STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. THE MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 216 No. 41574 MP-2181 Decision No. 25928-A

Appearances:

Perry, Lerner & Quindel, S.C., Attorneys at Law, 823 North Cass Street, Milwaukee, Wisconsin 53202-3908, by Ms. Barbara Zack Quindel, on behalf of the Milwaukee Teachers' Education Association.

Ms. Deborah A. Ford, Division of Human Services, Administration Building, 5225 West Vliet Street, P.O. Drawer 10K, Milwaukee, Wisconsin 53201, on behalf of the Milwaukee Public School System.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Milwaukee Teachers Education Association, herein the Association, filed a prohibited practices complaint on January 12, 1989 with the Wisconsin Employment Relations Commission wherein it alleged that the Milwaukee Board of School Directors, herein the Board, had committed a prohibited practice within the meaning of Section 111.70(3)(a)5, Wis. Stats., by refusing to complete the arbitration process when it refused to submit a certain back pay issue to the arbitrator who had retained jurisdiction over a grievance previously submitted by the Association and decided by the arbitrator. The Board filed an Answer on February 13, 1989 wherein it alleged that the instant dispute falls outside the scope of the arbitrator's award and that, accordingly, his retention of jurisdiction does not cover such a matter. The parties thereafter agreed to waive hearing and to have the instant matter decided upon the basis of a stipulated record. Briefs and reply briefs were received by June 9, 1989.

The Examiner, having considered the pleadings and the arguments of the parties, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Association, a labor organization, maintains its principal offices at 5130 West Vliet Street, Milwaukee, Wisconsin and represents for collective bargaining purposes certain certificated teaching employes employed by the District.

2. The District, a municipal employer, maintains its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin and operates a school system in Milwaukee, Wisconsin.

3. At all times material herein, the Association and the District have been privy to a contract providing for a grievance procedure and for final and binding arbitration. Pursuant thereto, the Association on December 15, 1986 filed a grievance which stated inter alia: "Guidance counselors who performed guidance duties after the work day should be compensated at their individual hourly rate."

4. The parties thereafter selected Milo Flaten to hear the matter and hearing was held before him on November 5, 1987. There, Association attorney Ms. Barbara Zack Quindel informed Arbitrator Flaten in her opening statement that:

> We believe we have the starting date of the practice, and we believe we have records adequate - we do not intend to introduce that, the particular records of particular employees at this time, but in general we are. These type of grievances have occurred, and where the remedy has been ordered, we have been able to work with the administration with that.

5. On February 5, 1988, Arbitrator Flaten issued his decision sustaining

the grievance, finding that "guidance counselors performing such extra duty are entitled to compensation for such related work at their individual hourly rate". In doing so, he noted:

> At the beginning of the 1985-1986 school year and continuing into the following year, the employer began assigning guidance counselors on a rotating basis to remain in their offices approximately 30 minutes after the end of the school day. The practice was instituted at all 15 high schools in the system.

The award also provided:

> Nevertheless, with the exception of Vincent and South Division High Schools, the record is not clear as to which guidance counselors have actually performed extra guidance duties beyond their contractual work day. For this reason, it will be necessary for the arbitrator to retain jurisdiction over the matter should questions arise concerning the award.

The Award paragraph of said decision provided:

AWARD

> That the Milwaukee Board of School Directors cease and desist in the assignment of Guidance Counselors on a regular rotating basis to work beyond the school day; that the Guidance Counselors who have performed guidance duties after the work day specified in the Contract be compensated for such work at their regular hourly rate of pay; that the Arbitrator specifically retain jurisdiction until this Award has been completed.

6. The parties thereafter developed a dispute over the period of retroactivity covered by said Award, with the Association asserting that it covered certain Guidance Counselors who were required from the 1981-1982 school year onward to work outside the regular school day. The Board took the position that retroactivity under said Award could only go as far back as the 1985-1986 school year.

7. By letter dated November 17, 1988, Association Executive Director Barry Gilbert informed Labor Relations Specialist Ms. Deborah A. Ford:

. . .

> We met on November 10, 1988, to discuss the implementation of Grievance #86/132. You had determined the number of hours of retroactive pay each guidance counselor was eligible to receive but you limited payment back to September, 1985. Records transmitted to you from the guidance counselors in my June 17, 1988 letter indicate, however, that some employes at Rufus King High School and South Division High School had been directed to perform after-school guidance duties prior to the 1985-86 school year. You stated that you limited retroactivity back to the 1985-86 school year because you believed that the record in the case established that the district did not institute the practice until the 1985-86 school year. I indicated I would review the record.
>
> Having reviewed the record, I believe that retroactivity should not be limited back to only the 1985-86 school year. It is true that those teachers who testified at the hearing believed that they were not directed to perform these duties before the 1985-86 school year, but it was also made clear in Ms. Quindel's opening statement that the parties would have to establish the schools involved and the times involved after the award was issued.
>
> This grievance was filed within the time limits set forth in the contract, and there is, therefore, no limitation as to retroactivity. Please review the arbitration awards of Arlen Christenson in #75/47, dated November 23, 1976; Zel Rice in #79/100, dated May 27, 1980; and Morris Slavney in #87/158, dated March 16, 1988 which establish that there is only a limit on retroactivity where a continuing grievance is involved.
>
> I, therefore, request that you include all school years where guidance counselors were directed to perform after-school guidance duties in implementing the Flaten award.
>
> If we cannot agree to include years prior to 1985-86,

please notify me so that the arbitrator can be called back to resolve this dispute.

Your attention to this matter is appreciated.

. . .

8. By letter dated November 30, 1988, Ms. Ford replied:

. . .

Enclosed, please find a listing of the remaining counselors eligible for backpay under the Flaten award and the number of hours for which they should be paid.

With respect to the MTEA's claim for hours prior to the 1985-86 school year, it is the Board's position that no formal policy existed prior to 1985-86 and thus, no liability accrued. Moreover, it is the Board's position, that at this stage, the MTEA has waived its right to grieve or recover any pre-1985 claims.

Based on the foregoing, the Board opposes any attempt to recall Arbitrator Flaten on an issue that we believe to be outside the scope of his jurisdiction. We would also take the position that any new grievance filed on such claims is not procedurally arbitrable.

. . .

9. Association Assistant Executive Director Robert P. Anderson by letter dated December 6, 1988 advised Arbitrator Flaten:

. . .

The parties have met in an attempt to implement your award in the above captioned matter. A disagreement over the interpretation of your award has arisen, therefore we are jointly requesting that you return to provide further clarification.

> Based upon the dates you provided, the parties have mutually selected the following date to hold the hearing:
>
> Tuesday, December 20, 1988
>
> The scheduled hearing will be held at the Milwaukee Board of School Directors Central Administration Building located at 5225 West Vliet Street beginning at 10:00 a.m. in Room 127.
>
> The parties will arrange to have a court reporter present for the hearing.
>
> Thank you for your assistance in this matter.

. . .

10. By letter dated December 16, 1988, Ms. Ford informed Arbitrator Flaten:

. . .

> Please be advised that the above-captioned case was scheduled in error. It is the Board's position that the current dispute between the parties with respect to the guidance counselors is not properly before you as a rehearing to clarify your award. Rather, the Board views the MTEA's request as an attempt to reopen the record in order to consider matters beyond the scope of those established at hearing and in post-hearing briefs.
>
> Based on the foregoing, the Board's position at this time is that it will not be present or participate in the hearing scheduled for December 20, 1988.

. . .

11. By letter dated December 19, 1988, Ms. Ford informed Arbitrator Flaten:

. . .

> This letter is a follow-up to my letter of December 15, 1988. I wish to make it clear that my reference to the matter having been scheduled in error simply referred to a misunderstanding which arose as a result of a breakdown in communications between the parties. It was not intended to place any blame with Mr. Anderson or suggest he acted inappropriately.
>
> Again, inasmuch as the Board continues to believe a rehearing in this case would be inappropriate, it has no choice but to decline to participate in the December 20 hearing.

. . .

12. Thereafter, and at all times material herein, the Board has refused to submit the foregoing dispute to Arbitrator Flaten.

Based upon the foregoing, the Examiner makes and issues the following

CONCLUSION OF LAW

The Milwaukee Board of School Directors has violated, and is violating, Sec. 111.70(3)(a)5, Wis. Stats., by refusing to submit to Arbitrator Milo Flaten the dispute involving which Guidance Counselors are to receive any back pay pursuant to the terms of Arbitrator Flaten's February 5, 1988 Award, including the question of whether they are entitled to any back pay for work performed before 1985.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 1/

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

IT IS ORDERED that the Milwaukee Board of School Directors shall immediately

1. Cease and desist from refusing to submit to Arbitrator Milo Flaten the dispute over which Guidance Counselors are to receive back pay under the terms of Arbitrator Flaten's February 5, 1988 Award, including the question of whether they are entitled to any back pay for work performed before 1985.

2. Take the following affirmative action which will fulfill the policies of the Municipal Employment Relations Act:

(a) Submit to Arbitrator Milo Flaten the question of which Guidance Counselors are to receive back pay under the terms of Arbitrator Flaten's February 5, 1988 Award, including the question of whether they are entitled to any back pay for work performed before 1985.

(b) Post in conspicuous places on its premises, where notices to its employes are usually posted, a copy of the notice attached to this Order and marked "Appendix A". This copy shall be signed by an authorized representative of the Board; shall be posted as soon as possible after receipt of a copy of this Order; and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to insure that this notice is not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of service of this Order as to what steps have been taken to comply with this Order.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Amedeo Greco, Examiner

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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.

APPENDIX A

NOTICE TO ALL EMPLOYES

As ordered by the Wisconsin Employment Relations Commission, and in order to fulfill the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL immediately cease and desist from refusing to submit to Arbitrator Milo Flaten the dispute over which Guidance Counselors are to receive back pay under the terms of Arbitrator Milo Flaten's February 5, 1988 Award, including the question of whether they are entitled to any back pay for work performed before 1985.

2. WE WILL immediately submit to Arbitrator Milo Flaten the dispute over which Guidance Counselors are to receive back pay under the terms of Arbitrator Milo Flaten's February 5, 1988 Award, including the question of whether they are entitled to any back pay for work performed before 1985.

Dated at Milwaukee, Wisconsin this _____ day of _____, 1989.

By _____
On behalf of the Milwaukee Board of School Directors

THIS NOTICE MUST REMAIN POSTED FOR THIRTY DAYS FROM THE DATE HEREIN AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Association primarily contends that Arbitrator Flaten retained jurisdiction over implementation of his Award because he recognized that there might be questions between the parties relating to the back pay remedy he ordered; that the dispute over whether back pay should be ordered for work performed before 1985 is "precisely the type of dispute" which should be submitted to him; that the District's refusal to do so is violative of Sec. 111.70(3)(a)5 of MERA; and that, as a result, the Commission should order the District to submit the matter to Arbitrator Flaten. In support of its position, the Association notes that there is a strong national policy favoring arbitration dating back to the trilogy cases, 2/ a policy which the Wisconsin Supreme Court in Joint School District No. 10 v. Jefferson Education Association, 78 Wis.2d. 94 (1977) adopted when it declared: "Our adherence to the trilogy is in keeping with the strong legislative policy in Wisconsin favoring arbitration in the municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes.".

The District, on the other hand, asserts that Arbitrator's Flaten's Award "only covers work performed during the 1985-86 school year and thereafter"; that "the arbitrator made a factual finding that the practice did not begin until the 1985-86 school year"; and that this dispute does not simply involve the implementation of the award, but rather, "involves reopening the hearing to take additional evidence on the circumstances surrounding the reasons Guidance Counselors at various schools stayed after school prior to 1985-86". The District thus argues that it is not required to submit this particular dispute to Arbitrator Flaten because his "retention of jurisdiction only applies to the period beginning with the implementation of the practice" and because it would be unfair to burden the District with a pre-1985 back pay liability when the District never presented any facts on that issue. The District also argues that the question of arbitrability is different from questions relating to the scope of jurisdiction retained by the arbitrator.

The problem with the District's argument is that it in effect seeks to have the Commission decide the merits of the back pay controversy which turns upon an interpretation of the parties' collective bargaining agreement, when in fact that is an issue which can only be resolved through the arbitration process agreed to by the parties.

Here, the Association's grievance before Arbitrator Flaten centered on whether the District violated the contract by making Guidance Counselors work after school without any additional compensation and Arbitrator Flaten found that they were, at least from 1985 forward. Arbitrator Flaten thus is in the best position to determine whether, consistent with his retention of jurisdiction, any pre-1985 back pay is also warranted.

If he decides that more evidence is necessary on that question, as the District asserts, he is empowered to make that determination because the District mutually agreed to have him resolve all aspects of the grievance submitted to him, including questions relating to remedy. Furthermore, he may find that no such backpay is warranted for the very reasons noted by the District here. But that is his call, and his call alone, to make.

To do otherwise, is in effect to declare that the Association must file yet another grievance over this issue; that the parties then again must run it up the arbitration flagpole; and that they again must expend time and resources in resolving that issue. Such duplication and wasted time and effort are unnecessary when, as here, an arbitrator has retained jurisdiction to ensure that all aspects of the dispute are totally and finally resolved before him. That is what arbitration is all about and that is what the strong policy favoring arbitration requires in cases such as this.

By failing to submit this particular matter to him, the District thus has violated Sec. 111.70(3)(a)5 of MERA. It therefore shall take the remedial action noted above.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____

2/ Steel Workers v. American Manufacturing Co., 363 U.S. 564, 46 LRRM 2414 (1960); Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960) and Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

Amedeo Greco, Arbitrator