STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED, Complainant, vs. MADISON METROPOLITAN SCHOOL DISTRICT and the BOARD OF EDUCATION OF THE MADISON METROPOLITAN SCHOOL DISTRICT, Respondents.	Case 205 No. 46046 MP-2508 Decision No. 27149-A

Appearances:

Mr. Robert C. Kelly, Kelly and Haus, Attorneys at Law, 121 East Wilson Street, Madison, Wisconsin 53703-3422, appearing on behalf of Madison Teachers Incorporated, referred to below as MTI.

Ms. Susan Hawley, Labor Contract Manager, and Ms. Beverly M. Massing, Assistant Labor Contract Manager, Madison Metropolitan School District, 545 West Dayton, Madison, Wisconsin 53703, appearing on behalf of Madison Metropolitan School District and the Board of Education of the Madison Metropolitan School District, referred to below as the District.

ORDER DENYING
MOTION TO DEFER

MTI filed a complaint with the Wisconsin Employment Relations Commission on July 25, 1991, alleging that the District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats. On August 29, 1991, the Commission informally assigned Richard B. McLaughlin, a member of its staff, to act as Examiner in the matter. On September 13, 1991, the District filed a Motion to Defer the complaint to Interest Arbitrator Frank P. Zeidler, who had, on March 9, 1991, issued an interest arbitration decision concerning Athletic Directors employed by the District. Included with the motion was an Affidavit In Support Of Motion To Defer. The parties disputed whether the Motion raised issues which would have to be addressed prior to a formal hearing on the merits of the complaint. The parties' informal attempts to resolve this dispute proved unsuccessful, as did attempts to jointly address the dispute during a conference call. The matter was addressed first in a phone conversation with counsel for MTI, then in a follow-up letter to counsel for the District. That letter was issued on November 4, 1991, and reads thus:

. . .

> I have advised Mr. Kelly that I believe your motion states a threshold issue which must be resolved before consideration of the merit of the allegations of the complaint . . .
>
> I noted to him that I was operating under the assumption that the pending motion to defer was the only threshold issue requiring resolution. More specifically, I indicated to him that the complaint alleges a violation of Sec. 111.70(3)(a)5, Stats., and

> that the Commission will not typically assert jurisdiction under that section if the parties have in force a collective bargaining agreement containing a provision for final and binding arbitration. Parties may, expressly or by conduct, waive the operation of this doctrine. I indicated to him, and now indicate to you, that before ruling on your motion to defer to the interest arbitrator, I need to know if there is any question regarding whether any aspect of this matter should be deferred to grievance arbitration. Mr. Kelly indicated to me that he believed the matter should be placed before the Commission, and that there is no aspect of the matter which should be deferred to grievance arbitration. If no such motion will be advanced by the District, the matter is ready to be briefed.
>
> Please advise me, as soon as possible, regarding the existence of any threshold issue beyond the pending motion to defer to the interest arbitrator . . .

A briefing schedule was set during a conference call on November 8, 1991, and the parties discussed whether further procedural issues needed to be addressed. In a letter to the parties dated November 12, 1991, I set forth the briefing schedule and noted that "(The District) will include in (their initial) brief the District's position on whether, if the motion to defer to the interest arbitrator is denied, the matter should be heard by the Commission or by a grievance arbitrator."

On November 12, 1991, MTI filed an amended complaint which alleged the District had violated Sec. 111.70(3)(a)7, Stats.

The parties filed their initial briefs by November 26, 1991, and their reply briefs by December 16, 1991.

ORDER

The District's Motion to Defer, filed originally on September 12, 1991, is denied.

Dated at Madison, Wisconsin this 6th day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DEFER

BACKGROUND

The affidavit filed with the District's Motion to Defer states the background to the issues posed here. The affidavit states:

. . .

3. That Arbitrator Zeidler chose the Union's final offer in the arbitration Award and that part of the Union's final offer included the reduction of the teaching load for Athletic Directors from three (3) classes to two (2) classes per day; that the Award was retroactive for the 1990-91 school year; and that Arbitrator Zeidler's Award did not specify how much additional compensation, if any, the Athletic Directors were entitled to for the 1990-91 school year as a result of the Award.

4. That following the issuance of the Award, the parties had extensive correspondence on the issue of the compensation for Athletic Directors but were unable to reach agreement on the amount of retroactive compensation, if any, to be paid the Athletic Directors for the 1990-91 school year.

5. That it is the District's position that this matter should be referred back to Arbitrator Zeidler for a determination as to how much compensation, if any, the Athletic Directors are entitled to under his Award, and that the Wisconsin Employment Relations Commission should retain jurisdiction over this matter until it is satisfactorily resolved.

. . .

THE PARTIES' POSITIONS

MTI's Initial Brief

After a review of the background to this matter, MTI argues that Arbitrator Zeidler is without authority to determine whether the District has or has not violated Sec. 111.70(3)(a)7, Stats., or how much, if any, additional compensation should be paid to Athletic Directors for the 1990-91 school year as a result of his March 9, 1991, award. MTI initially contends that "(t)here is a longstanding . . . rule **in common law arbitration** that when arbitrators have executed their awards and declared their decision they are functus officio and have no power to proceed further without the consent of both parties". While noting a certain erosion of this general rule as a matter of federal law, MTI concludes that as a matter of common law arbitration, the District's motion is without merit.

Since the enforcement of arbitration awards is statutory, MTI urges that the present motion poses no basis for vacation or modification recognized by Secs. 788.10 or 788.11, Stats. This point is essential to the motion, MTI

contends, since "(t)he power to vacate rests in the court not in the arbitrator." The same principle governs the power to modify or correct an award, according to MTI. Beyond this, MTI contends that since "the District's deferral motion comes in excess of six months . . . after the award herein was filed", the motion "is clearly untimely and . . . should be dismissed on that ground alone."

MTI argues that these considerations form background to the statute governing this matter -- Sec. 111.70(4)(cm)(6), Stats. MTI then contends that under that provision, an arbitrator has the authority to "adopt without further modification the final offer of one of the parties, specifically MTI, on all disputed issues." From this it follows, according to MTI, that "(h)aving made a final and binding award, the arbitrator has no authority to clarify, interpret, or otherwise modify his award upon application by one of the parties." Any modification of an award must, MTI contends, be made only by the Commission under the standards noted at Sec. ERB 31.17 Wis. Adm. Code. Such modification can arise, according to MTI, only "as a defense in the pending enforcement proceeding."

MTI argues that the District's motion does not seek to attack the Zeidler award, but instead seeks a determination of a matter which was neither brought nor which can be brought to an interest arbitrator. The District's "defense" thus seeks a result which can not be granted, according to MTI. The MTI complaint seeks determination of an alleged violation of Sec. 111.70(3)(a)7, Stats., and MTI asserts that "(j)urisdiction to hear and determine an alleged violation of Sec. 111.70(3)(a)7 rests solely and exclusively with the Commission." Since Zeidler decided MTI's offer regarding course load of Athletic Directors should be adopted, it necessarily follows, according to MTI, that the sole issue to be decided is whether or not the District has implemented the Zeidler award. MTI puts the point thus:

> The 1990-91 pay of Athletic Directors under the contract as amended by MTI's final offer was not an issue before the arbitrator at the time he rendered his decision and award and it is not an issue over which he should as the result of a deferral have jurisdiction today absent the mutual agreement of the parties.

MTI concludes that the motion to defer should be dismissed.

The District's Initial Brief

After a review of the background to this matter, the District urges that the motion seeks to determine whether "the Award issued by Arbitrator Zeidler contemplated any compensation for the Athletic Directors . . . (and) if any compensation is due, the amount of such compensation".

The District argues initially that a remand to the interest arbitrator is appropriate and supported by law. The general common law rule of "functus officio" has, the District contends, been "modified by state statutes and court decisions." More specifically, the District argues that Papermakers, Local 675 v. Westvaco Corp., establishes the three criteria which will support a "remand of a dispute back to the original arbitrator":

> 1. Where the issues submitted to arbitration are only partially resolved;

2. Where the award is considered to be clear and final but has generated a collateral dispute concerning the meaning of the essential terms of the award;

3. Where the award contains a glaring or patent ambiguity. 1/

Each of these criteria has been met here, according to the District. The first is met, the District contends, "to the extent that this issue involving the Athletic Directors is only partially resolved by the Award in its current state". The District contends that the second criterion has been met since the issue of compensation "flows directly out of the Award which reduces the teaching load of the Athletic Directors." The final criterion has been met, the District contends, since "each party has an arguably reasonable yet totally divergent interpretation of the Award".

The District's next major line of argument is that a remand will most closely effectuate the intent of the parties since a remand will submit the dispute to the process chosen by the parties; will afford the parties the complete resolution they originally sought; and will submit the dispute to the decision maker jointly chosen by the parties.

Beyond this, the District contends that a remand is the most efficient way to resolve this dispute. More specifically, the District contends that Zeidler can completely resolve the dispute, and can do so at a fraction of the cost of further litigation in any other forum since Zeidler "is intimately familiar with the issue and the evidence." That "the employer is committed to complying with whatever clarification the arbitrator makes" underscores the practical sense a remand makes, according to the District.

The District notes that if its motion to defer is denied, "the matter (should) proceed through grievance arbitration." Citing Sauk Co. v. WERC, 158 Wis. 2d 35 (Ct. App., 1990), the District asserts that "whether a prohibited practice complaint is the proper procedure for interpreting an interest arbitration award is currently unresolved in Wisconsin." Given the uncertainty of the law and the presence of a consensually defined means of dispute resolution, the District argues that "sound policy would dictate that the consensual procedure be used." Beyond this, the District questions whether the matter could be fully resolved by a hearing examiner under Sec. 111.70(3)(a)7, Stats., since the matter poses not just whether the Award has been complied with, but how that Award should be implemented. Such a dispute may pose issues of contract interpretation and bargaining history which, the District asserts, are "clearly within the province of the grievance arbitrator" but not so clearly within the province of a hearing examiner.

The District concludes that its motion to defer to the interest arbitrator should be granted, or that the matter be deferred to grievance arbitration.

MTI's Reply Brief

MTI argues initially that even if Westvaco was governing law, the present motion falls within none of its three criteria. More specifically, MTI contends that the interest arbitrator's role is to adopt, without modification, the final offer of either party. Since Zeidler has done that, MTI concludes

1/ 105 LRRM 2360, 2361-2362 (D.W.Va., 1978).

that the issues have been fully resolved. MTI then asserts that the second criterion is inapplicable since the Award "was not self-executing (but) required retroactive implementation." Thus, according to MTI, any issue raised would not be a collateral dispute, but one of first impression. Beyond this, MTI asserts that the Award "contains no patent ambiguity".

Beyond this, MTI argues that a remand could not effectuate the intent of the parties since "MTI, for one, never intended that Arbitrator Zeidler would pass on issues concerning the implementation of his award".

MTI's next major line of argument is that a remand neither makes sense nor is the most efficient means to resolve the dispute. Since the dispute posed by the complaint concerns not "the interpretation of an award" but "the application . . . of an award", it follows, according to MTI, that the issue is posed not for arbitral but for legal review.

MTI's final major line of argument is that the matter should not be remanded to a grievance arbitrator. Noting that Sauk County establishes that "(d)isputes regarding retroactive implementation of mediation/arbitration awards are properly adjudicated in prohibited practice proceedings under Sec. 111.70(3)(a)7, Stats.," MTI concludes that any remand to a grievance arbitrator would be inappropriate. Beyond this, MTI asserts that proceeding before the Commission would not adversely impact the District's case, but would deny MTI "its ability to assert any claims it may have for interest and attorney fees."

The District's Reply Brief

The District asserts initially that MTI's citation of Chapter 788 is misleading and irrelevant. Since that chapter "does not apply to arbitration proceedings under Section 111.70 Wis. Stats.", the District concludes that any assertion that the District has not filed its motion in a timely fashion must be rejected. The District contends that the applicable provisions of Chapter 111 and of Section 31 of the Wis. Adm. Code state no time bar relevant to this matter.

The District then challenges the MTI assertion that Zeidler lacks any authority to modify or clarify his Award. The District contends that Sec. ERB 31.17 Wis. Adm. Code "envisions modification or correction of an award" in certain circumstances. The criteria stated there do not, however, "address the concern raised by the District" in its motion. It should not follow from this, the District argues, that no means should exist to address the problem here, which is "that the Arbitrator has adopted a final offer which does not address how to amend the Collective Bargaining Agreement as it affects Athletic Directors other than to reduce the number of classes taught." That MTI has chosen to give "the Award its own monetary interpretation and consequences" is what poses the need for the remand, according to the District, which summarizes the point thus:

> (T)he District is not raising the issue of pay of Athletic Directors. Pay was not an issue before the Arbitrator per se. However, the Union brought the issue of compensation into the implementation of the Award by insisting that Athletic Directors were entitled to overload pay. The resolution of this type of issue is not contemplated by ERB 31.19 . . .

The District concludes that a remand to the interest arbitrator is both legally and practically appropriate.

DISCUSSION

The motion questions whether Arbitrator Zeidler or the Commission should address whether the compensation sought by MTI is required as a function of the retroactivity of his March 9, 1991, award.

Addressing the parties' dispute regarding the application of the doctrine of functus officio affords no guidance here. That doctrine seeks to assure the finality of arbitration awards. The policy of assuring the finality of arbitration awards has also served to justify the erosion of the doctrine as noted, among other places, in the Westvaco case discussed by each party. Against this background, a direct examination of the motion is preferable to a rote application of the common law doctrine.

Discussion of the District's motion must start with the fact that neither Sec. 111.70(3)(a)7, nor Sec. 111.70(4)(cm), Stats., specifically addresses the deferral sought by the District.

The Commission's rules are, at best, silent on the point. Sec. ERB 32.16, Wis. Adm. Code governs the enforcement of arbitration awards, and seeks to flesh out the reference, in Sec. 111.70(3)(a)7, Stats., to "an arbitration decision lawfully made". It specifies four sets of circumstances in which "the commission shall find . . . (an) award was not lawfully made". There is no dispute that none of those circumstances is posed here. Sec. ERB 32.17, Wis. Adm. Code draws on Section 32.16, by governing those situations where "in a proceeding for enforcement, it appears that an interest arbitration award is

lawfully made", but that the award "requires modification or correction". The section poses four sets of circumstances in which a modification or correction can be ordered. Each circumstance focuses on facts in which there can be no plausible dispute between the parties on the merits of the award, thus permitting the Commission to ministerially amend the award without entering into its merits. Such circumstances are not posed here.

In sum, the Commission's rules are unhelpful in addressing this dispute. 2/ At this point in the pleadings, the parties' dispute poses a good faith disagreement on how contract provisions not in dispute before Zeidler affect the retroactive implementation of his award.

Sauk County 3/ establishes that the Commission has jurisdiction under Sec. 111.70(3)(a)7, Stats., to determine disputes regarding the retroactive implementation of interest awards in a proceeding brought to enforce the award.

If, then, the deferral sought by the District is to be granted, it must be rooted in the Commission's jurisdiction under Sec. 111.70(3)(a)7, Stats., and must be based on a policy decision that the interest arbitrator is a superior, or at least an available, forum.

While there may be cases in which a deferral to an interest arbitrator could be appropriate, the present record affords no persuasive basis to do so. Presumably, the policy basis for the deferral sought here is similar to that which has prompted the Commission to defer issues of contract interpretation to grievance arbitrators, 4/ or to remand issues raised regarding the enforcement of a grievance arbitration award to the original arbitrator. 5/

2/ The dissenting opinion in Sauk County v. WERC, No. 89-2059, (filed 12/09/91), Slip Opinion at Footnote 8/, page 6, underscores the problematic impact of the Commission's rules on the general point of retroactivity of interest awards, noting that Section ERB 32.16 "appears to interpret sec. 111.70(3)(a)7 as referring only to the employer's failing to incorporate the award in a written collective bargaining agreement."

3/ Ibid.

4/ The deferral of contract interpretation issues arises for the WERC because of Secs. 111.70(3)(a)5, and (3)(b)4, Stats., which confer the authority to interpret collective bargaining agreements. The underlying basis for deferral is examined by the Commission in Waupun School District, Dec. No. 22409 (WERC, 3/85); and Monona Grove School District, Dec. No. 22414 (WERC, 3/85).

5/ See, for example, School District of Chetek, Dec. No. 15210-A (Henningsen, 1/78), aff'd by operation of law, Dec. No. 15210-D (WERC, 9/78); and Madison Metropolitan School District et. al., Dec. No. 16493-A (Schoenfeld, 6/79). The Commission has itself remanded an award to a grievance arbitrator for clarification, School District of West Allis-West Milwaukee et. al., Dec. No. 15504-B (WERC, 8/78). That decision includes three separate opinions, none of which questioned the general propriety of a remand to an arbitrator.

The policies surrounding deferrals and remands, although not necessarily synonymous, are closely related. The Commission has articulated the reasons to defer issues of contract interpretation to grievance arbitrators thus:

> By . . . (deferring), the Commission respects the parties' agreement and enhances the prospects that such disputes will be resolved through the statutorily preferred means of bilateral collective bargaining without need for third party intervention. See, Secs. 111.70(1)(a)(g) and 111.70(6), Stats. 6/

The Commission has also noted the significance of "the presumed exclusivity of the contractual procedure". 7/ Presumably, reasons of administrative convenience to the parties and to the Commission also enter into consideration. Even without regard to the Commission's case load at a given point in time, grievance arbitration is typically quicker for the parties, given the appellate procedures built into Sec. 111.70(3)(a)5, Stats. From the Commission's perspective, grievance arbitration assures a means to resolve disputes with a minimum of expenditure of limited agency resources.

Similar policy considerations support a remand of a grievance arbitration award to the original arbitrator. Briefly put, the purpose, apart from reasons of administrative convenience, is to encourage the use of consensual dispute resolution techniques to foster voluntary agreements, thus promoting labor peace.

The policies supporting the deferral of contract interpretation disputes to grievance arbitration are not significantly implicated here. In issues of contract interpretation, the forum choice is between Secs. 111.70(3)(a)5, and (3)(b)4, Stats., and the parties' bargained grievance procedure. While acting from different sources of authority, both a hearing examiner and a grievance arbitrator share a common jurisdiction rooted in the collective bargaining agreement itself. In this case, there is no common underlying jurisdiction. Zeidler's jurisdiction, under Sec. 111.70(4)(cm)6d, Stats., is to "adopt without further modification the final offer of one of the parties on all disputed issues". The Commission's jurisdiction under Sec. 111.70(3)(a)7, Stats., is to enforce the award, if "lawfully made under sub.(4)(cm)". This is not without significance to the policy considerations noted above. The parties, in creating grievance procedures, establish a consensual process typically extending from the filing of a grievance to the selection of a third party decision-maker. No such mutuality is apparent in Sec. 111.70(4)(cm)6, Stats., in which the State established a dispute resolution scheme for those parties who could not agree on an alternative. 8/ Thus, a deferral here can not "enhance . . . the prospects that such disputes will be resolved . . . without need for third party intervention." The choice here is which third party will intervene. Nor can a deferral here recognize "the presumed exclusivity" of the dispute resolution scheme.

The District does persuasively note that reasons of administrative

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6/ Waupun School District, Dec. No. 22409 (WERC, 3/85), at 10.

7/ Ibid., at 9-10.

8/ It should be stressed that the present matter does not concern a voluntary impasse procedure created under Sec. 111.70(4)(cm)5, Stats.

practicality can support the deferral. Such reasons are not, however, compelling on the present record. As with the remand of a grievance arbitration award to the original arbitrator, there may arguably exist reason to believe the arbitrator's familiarity with the record may assist in swiftly and economically resolving the dispute. In this case, however, it is apparent that the parties did not litigate the point to be resolved here. From the pleadings, it appears that "Section III(G)(21) of the 1989-91 Collective Bargaining Agreement" 9/ is the provision which is the focus of the parties' dispute. That provision does not appear to have had any role in the litigation of the interest dispute.

That Sec. 111.70(7m)(e), Stats., provides remedies not necessarily available before an interest arbitrator also undercuts the administrative practicality of deferring the matter. Any remand would have to include a retention of jurisdiction to assure that if a violation was found, it would be fully remedied. This undercuts some of the practical basis for a remand.

In sum, due primarily to the fact that interest arbitration under Sec. 111.70(4)(cm)6d, Stats., is not a consensually created dispute resolution procedure, there is no strong policy basis to warrant the requested deferral to the interest arbitrator. That the issue posed here was not placed before Zeidler undercuts whatever basis in administrative convenience such a deferral might have.

Beyond this, there are policy reasons not to defer the matter to the interest arbitrator. Issues of retroactivity in implementing interest arbitration awards are novel. The retroactivity issue posed here appears at this point in the pleadings to present a question of law. 10/ Interest arbitrators are understandably reluctant to rule on issues of law. For example, in the interest arbitration award at issue here, Zeidler expressly declined to rule on the merits of a District contention that "adding new positions into a Bargaining Agreement is a permissive subject of bargaining and not a mandatory one." 11/ Thus, there is a significant probability any legal issues posed to the interest arbitrator will not be fully addressed. Even if any such issues were to be considered by the interest arbitrator, the Commission has yet to devote significant analysis to issues surrounding the retroactivity of interest awards, and there is little case law guidance available. Apart from an arbitrator's reluctance to consider issues of law, these considerations support keeping the matter before the Commission.

In sum, the District's motion to defer is, on the pleadings posed here, unpersuasive.

A closer question may arise regarding the relationship of the present matter to grievance arbitration. The difficulty of defining that relationship prompted the dissent in Sauk County, and appears more starkly posed here. In Sauk County, the parties' dispute focused on the retroactive effect of a provision governing fair share and union dues. The parties did not have a collateral dispute on how that clause should be interpreted, as a matter of contract. In the present case, the parties may or may not dispute the appropriate construction of the contractual clause affording overload compensation. Such a dispute can not, however, be presumed. Thus, it is at

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9/ See Paragraph 14 of the amended complaint filed on November 12, 1991.

10/ See Sauk County, cited at footnote 2/ above.

11/ Decision No. 26392-A at 6-7.

best premature, and at worst inappropriate, to defer this matter to grievance arbitration.

Whatever the difficulty of defining the relationship between grievance arbitration and Sec. 111.70(3)(a)7, Stats., it is apparent that the Court has determined "if the dispute relates to the retroactive effect of economic items in the arbitration decision and leads to a failure to implement the arbitration decision, the dispute may properly be the subject of a sec. 111.70(3)(a)7, prohibited practice complaint." 12/ MTI argues this is precisely what is at issue in this case. Whether MTI's view is accurate or whether the dispute is more accurately characterized as being "over construction of terms of an arbitration decision or resultant collective bargaining agreement after implementation of the agreement" 13/ is not yet clear. However, further clarity can come only through addressing the merits of the complaint.

In sum, the District's motion to defer the complaint to the interest arbitrator is not persuasive. Until or unless it is made clear that the present dispute involves the construction of the agreement after implementation of the award, no deferral to grievance arbitration can be considered.

Dated at Madison, Wisconsin, this 6th day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner

12/ Sauk County at 14.

13/ Ibid.