STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO and LOCAL 1616, Complainants, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS Respondent.	Case 278 No. 48930 MP-2706 Decision No. 27653-A

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, 611 North Broadway, Milwaukee, WI 53202 by Mr. Alvin Ugent, appearing on behalf of the Complainant, Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 1616.

Mr. Grant Langley, City Attorney, City of Milwaukee, by Ms. Mary Kuhnmuench, Assistant City, Attorney, Room 800, City Hall, 200 East Wells Street, Milwaukee, WI 53202-3551, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: District Council 48, AFSCME, AFL-CIO and its affiliated Local 1616 (hereinafter referred to as the Complainant or the Union) filed a complaint of prohibited practices on March 11, 1993 with the Wisconsin Employment Relations Commission (hereinafter referred to as the Commission) alleging that the Milwaukee Metropolitan School District (hereinafter referred to as the Respondent or the District) had violated Sections 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA) by refusing to proceed to arbitration on a grievance filed by Neal Klinkert. The Commission appointed Daniel Nielsen, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07, Wis. Stats. The District denied committing prohibited practices, asserting that the grievance was not substantively arbitrable. A hearings was held on August 16, 1993 at the District's Administrative offices in Milwaukee, Wisconsin at which time the parties were afforded full opportunity to present such evidence and arguments as were relevant. A transcript was made, and was received on August 22, 1993. The parties submitted post-hearing briefs, which were

exchanged through the Examiner. There was no provision for reply briefs, and the record was closed on November 8, 1993. The Examiner, having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliated Local 1616, hereinafter collectively referred to as either the Complainant or the Union, is a labor organization, maintaining its principal offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. The Milwaukee Board of School Directors, hereinafter referred to as either the Respondent or the District, are elected officials overseeing the Milwaukee Public Schools, which is municipal employer providing general educational services to the people of the Milwaukee metropolitan area in southeastern Wisconsin, and maintaining its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin 53201-8210.

3. The District and the Union were parties to a collective bargaining agreement for the period from July 1, 1989 through June 30, 1992. Among the provisions of the agreement is PART VI, GRIEVANCE AND COMPLAINT PROCEDURE, which provides, in part, as follows:

> **A. PURPOSE**
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> The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of an employe with some aspect of employment.
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> **B. DEFINITIONS**
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> 1. A grievance is defined to be an issue concerning the interpretation or application of provisions of this agreement or compliance therewith provided, however, that it shall not be deemed to apply to any order, action, or directive of the superintendent, secretary-business manager, or of anyone acting on their behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the state statutes.
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> 2. A complaint is any matter of dissatisfaction of an employe with any aspect of his/her employment which relates primarily to wages, hours, and working

conditions and which does not involve a grievance as defined above. It may be processed through the application of the second step of the grievance procedure.
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D. STEPS OF THE GRIEVANCE PROCEDURE

Grievances or complaints shall be processed as follows:

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FOURTH STEP - The decision of the superintendent, secretary-business manager, or designee upon a grievance shall be subject to hearing by the impartial referee upon certification to him/her by the Union.

The final decision of the impartial referee, made within the scope of his/her jurisdictional authority, shall be binding upon the parties and the employes covered by this agreement.

1. **JURISDICTIONAL AUTHORITY**. Jurisdictional authority is limited to consideration of grievances or complaints as herein above defined.

The impartial referee procedure shall be subject to the following:

a. The certifying party shall notify the other party in writing of a grievance.

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i. In making his/her decision, the impartial referee shall be bound by the principles of law relating to the interpretation of contracts followed by Wisconsin courts.

4. Among the classifications represented by the Union are Material Handler I, Material Handler II and Material Handler III. Vacancies in the Material Handler III classification are filled by District choice from among those unit employees who have passed competitive examinations.

5. In 1991, a vacancy occurred in the Material Handler III classification. Among the employees seeking the vacancy were Richard Luczkowski and Neal Klinkert, both Material Handler II's who placed in the top three on the examination. On January 21, 1991, the District selected Klinkert for the vacancy. Luczkowski filed a grievance challenging that selection. The grievance was processed through to arbitration before Arbitrator Raymond McAlpin. In an Award dated June 1, 1992, Arbitrator McAlpin found that Luczkowski possessed the minimum qualifications for the vacancy and determined that the District had not proven that its choice of Klinkert was not arbitrary and capricious. On this basis, he sustained the grievance, concluding

with the following:

> We come now, to the remedy. The Arbitrator has reviewed all of the circumstances in this case and, notwithstanding Mr. Cowan's error in judgment regarding access to the grievance procedure, the Arbitrator finds that, while mistaken, the Board acted in good faith in this matter and, therefore, the Arbitrator will deny the Union's claim for back pay. The Grievant deserves an opportunity to demonstrate whether or not he can perform these responsibilities on a permanent basis. The Arbitrator will order that the Board offer the Grievant a promotion to material handler III within 15 calendar days of the receipt of this award.

6. After receipt of Arbitrator McAlpin's Award, the District promoted Luczkowski to Material Handler III. On August 28, 1992, Klinkert was demoted to his former classification as a Material Handler II. On September 5th, the Union filed a grievance on behalf of Klinkert, alleging that he had been reduced in status without just cause. The grievance cited past practice, as well as PART VI, Section H of the contract:

> Any regularly appointed employe who is reduced in status, suspended, removed, or discharged may, within five (5) workdays after receipt of such action, file a grievance as to the just cause of the discharge, suspension, or discipline imposed upon him/her.

7. The District denied the grievance, asserting that the reduction of Klinkert was the result of the Union's successful challenge before McAlpin and that compliance with the Award was not a grievable or arbitrable issue. After the grievance was denied at the third step, the Union requested a panel of arbitrators from the WERC. When Union Staff Representative Anthony, Molter contacted Director of Labor Relations Deborah Ford to strike arbitrators, Ford refused to participate in the striking process, and informed Molter that the grievance was not substantively arbitrable. The District refused and continues to refuse to proceed to arbitration on Klinkert's grievance.

8. The grievance filed by Klinkert alleges a violation of the collective bargaining agreement, and is a grievance as defined by PART VI, B(1) of the contract.

9. The collective bargaining agreement, in PART VI, D, provides for final and binding arbitration of grievances. This provision is, on its face, susceptible to an interpretation which would cover Klinkert's grievance.

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

CONCLUSIONS OF LAW

1. The collective bargaining agreement between the parties is susceptible to an interpretation which would allow the submission of Klinkert's grievance to final and binding arbitration.

2. The Milwaukee Board of School Directors violated Section 111.70(3)(a)5, MERA by refusing to proceed to final and binding arbitration on Klinkert's grievance.

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

ORDER

IT IS ORDERED that the Milwaukee Board of School Directors participate in the striking of arbitrators for the Klinkert grievance, proceed to arbitration on the grievance in accordance with the collective bargaining agreement, and notify the Examiner in writing within twenty (20) days of the date of this Order what steps have been taken to comply with the Order. 1/

1/ Any party may file a petition for review with the Commission by following the procedures set forth in section 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 orders of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification in 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 new 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 an exceptional delay in receipt of a copy of any findings or order it may extend the time for another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

Dated at Racine, Wisconsin this 10th day of January, 1994:

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel Nielsen /s/
Daniel Nielsen, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

BACKGROUND

There is no dispute over the facts of this case. The District returned Klinkert to his former position after Arbitrator McAlpin upheld Luczkowski's claim to the Material Handler III job. Klinkert grieved the decision to remove him from the Material Handler III classification, and the District now, refuses to proceed to arbitration on Klinkert's grievance. The District bases its refusal on its belief that the reduction of Klinkert was part and parcel of the McAlpin Award. The Union believes that it has the right to proceed, since McAlpin did not direct the reduction of Klinkert, only the promotion of Luczkowski.

ARGUMENTS OF THE PARTIES

The Arguments of the Complainant Union

The Union takes the position that the grievance is clearly arbitrable. Klinkert was promoted to the position of Material Handler III and successfully completed his probationary period. He performed well in the position, and neither his work performance nor his personal conduct provided just cause for a demotion. The District's claim that McAlpin Award dictated the demotion is completely misplaced. McAlpin ruled that Luczkowski should be promoted, but said nothing about Klinkert being displaced from his job.

If the District has some valid argument that it has not violated the contract, the Union asserts that the argument must be made to an arbitrator, not to the WERC. The contract clearly allows any regularly appointed employee who is reduced in status to file a grievance challenging that action. Klinkert falls under the scope of the contract's protections and the arbitration clause, and the District's refusal to proceed to arbitration is a prohibited practice.

The Arguments of the Respondent District

The return of Klinkert to his former position was the inevitable consequence of the Union's successful challenge to his promotion over the more senior applicant, Richard Luczkowski. In order to comply with McAlpin's Award of the Material Handler III job to Luczkowski, Klinkert had to be removed from the job. There was only position available, and compliance with the Award dictated that Luczkowski get the job.

The Union has the burden to prove by a clear and satisfactory preponderance of the evidence that this dispute is the type that the parties had in mind when the negotiated the evidence that this dispute is the type that the parties had in mind when they negotiated the arbitration clause

of the contract. The legal standard in Wisconsin is whether the claim is, on its face, covered by the collective bargaining agreement, giving the fullest meaning to the arbitration provisions. The District argues that the Union has failed to carry this burden. No Union witness could point to anything in the collective bargaining agreement supporting their theory of this grievance, nor was there any evidence that this type of case had even been grieved, much less arbitrated, in the past.

If the Union truly believes that the District has misapplied the McAlpin Award, it should proceed in court for enforcement of the Award, advancing the argument that McAlpin's remedy did not include displacing Klinkert. The instant dispute is more a question of compliance with the Award already issued than a separate grievance, and the Union should avail itself of the legal avenues open for compliance questions.

DISCUSSION

The issue in this case involves substantive arbitrability. As the District correctly notes, the standard in such cases is as enunciated by the U. S. Supreme Court in the Steelworkers Trilogy of 1960 2/ and adopted by the Wisconsin Supreme Court in Dehnart v. Waukesha Brewing Co., 17 Wis.2d 44 (1962):

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving, party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. 3/

There is a strong presumption of arbitrability, and arbitration must be compelled where the claim is, on its face, covered by the contract, even though the claim may be baseless or even frivolous. The burden of proof on the Complainant is simply to show that a grievance has been asserted, and that the parties have a contract which provides for the arbitration of grievances, not as claimed by the District, that there is support in the contract for the Union's theory of the case. Unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation which allows arbitration of the dispute, the courts or, in this case, the reviewing

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2/ United Steelworkers v. American Manufacturing Company, 363 U.S. 564 (1960); United Steelworkers vs. Warrior and Gulf Navigation Company, 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corporation, 363 U.S. 593 (1960).

3/ Dehnart v. Waukesha Brewing Co., 17 Wis.(2d) 44, 51 (1961) citing United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 567 (1960).

agency, must leave the disposition of the grievance to the arbitrator. 4/

Here the grievance cites "Reduced in status, without just cause" as the action grieved, and "Part VI, Section H" of the contract, "past practice" and "any other sections of this contract, or other sources as amended" as the portions of the agreement violated. The grievance and arbitration provisions of the collective bargaining agreement provide, inter alia:

> 1. *A grievance is defined to be an issue concerning the interpretation or application of provisions of this agreement or compliance therewith* provided, however, that it shall not be deemed to apply to any order, action, or directive of the superintendent, secretary-business manager, or of anyone acting on their behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the state statutes.
>
> 2. A complaint is any matter of dissatisfaction of an employe with any aspect of his/her employment which relates primarily to wages, hours, and working conditions and which does not involve a grievance as defined above. It may be processed through the application of the second step of the grievance procedure.
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> **D. STEPS OF THE GRIEVANCE PROCEDURE**
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> Grievances or complaints shall be processed as follows:
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> **FOURTH STEP** - The decision of the superintendent, secretary-business manager, or designee upon a grievance *shall be subject to hearing by the impartial referee upon certification to him/her by the Union*.
>
> The final decision of the impartial referee, made within the scope of his/her jurisdictional authority, shall be binding upon the parties and the employes covered by this agreement.
>
> 1. **JURISDICTIONAL AUTHORITY**. *Jurisdictional authority is limited to consideration of grievances or complaints as herein above defined.*
>
> The impartial referee procedure shall be subject to the following:

4/ Racine Unified School District, Dec. No. 27064-C (WERC, 12/30/92).

> a. The certifying party shall notify the other party in writing of the certification of a grievance.
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> i. In making his/her decision, the impartial referee shall be bound by the principles of law relating to the interpretation of contracts followed by Wisconsin courts.
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> Joint Exhibit No. I (emphasis added)

The grievance claims that Klinkert was reduced in status without just cause. PART VI, Section H of the contract speaks to such actions:

> 2. Any regularly appointed employe who is reduced in status, suspended, removed, or discharged may, within five (5) workdays after receipt of such action, file a grievance as to the just cause of the discharge, suspension, or discipline imposed upon him/her.

On its face, the contract addresses reductions in status and removals. The grievance procedure defines a grievance as "an issue concerning the interpretation or application of provisions of this agreement or compliance therewith" and provides for the submission of grievances to binding arbitration. Given this, it cannot be said with positive assurance that the arbitration provision of the contract is not susceptible to an interpretation covering the dispute.

It may be, as claimed by the District, that the McAlpin Award provides just cause for the removal of Klinkert in favor of Luczkowski, or estops the Union from obtaining relief for Klinkert. Those arguments go to the merits of Klinkert's grievance, and under the well settled law of Wisconsin, they are reserved for the arbitrator. For this reason, I have concluded that the District violated Section 111.70(3)(a)5 by violating "an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement". The District is accordingly ordered to process Klinkert's grievance to arbitration and to participate in the arbitration process as dictated by the contract. 5/

Dated at Racine, Wisconsin this 10th day of January, 1994:

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

5/ Given the peculiar and narrow dispute that led the District to refuse arbitration of this grievance, and the isolated nature of the refusal, I do not find that the posting of a notice to employees is required in order to effectuate the policies of the Act, and have accordingly declined to order any such posting.

By Daniel Nielsen /s/
Daniel Nielsen, Examiner