STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MADISON TEACHERS, INC. Requesting a Declaratory Ruling Pursuant to Sec. 227.41, Stats., Involving a Dispute Between Said Petitioner and MADISON METROPOLITAN SCHOOL DISTRICT	Case 228 No. 49952 DR(M)-531 Decision No. 28252

Appearances:

Cullen, Weston, Pines and Bach, Attorneys at Law, by Mr. Gordon E. McQuillen, 20 North Carroll Street, Madison, Wisconsin 53703, on behalf of Madison Teachers, Inc.

Lathrop and Clark, Attorneys at Law, by Ms. Malina Fischer, 122 West Washington Avenue, P.O. Box 1507, Madison, Wisconsin 53701-1507, on behalf of the Madison Metropolitan School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On October 13, 1993, Madison Teachers, Inc., 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 modified or remanded to the arbitrator under ERB 32.16 and 32.17. The parties thereafter stipulated to the record and filed written argument in support of and in opposition to the petition, the last of which was received July 25, 1994.

Having considered the matter and being fully advised of the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. At all times material herein, Madison Teachers, Inc., herein MTI, was a labor organization functioning as the collective bargaining representative for certain secretarial, clerical, technical and related employes of the Madison Metropolitan School District. MTI has its principal offices at 821 Williamson Street, Madison, Wisconsin, 53703.

2. The Madison Metropolitan School District, herein the District, is a municipal employer having its principal offices at 545 West Dayton Street, Madison, Wisconsin, 53703.

3. On November 2, 1992, MTI filed a petition with the Wisconsin Employment Relations Commission for final and binding interest arbitration pursuant to Sec. 111.70(4)(cm)6., Stats., as to the secretarial, clerical, technical and related employe unit. Pursuant to that petition, MTI and the District ultimately proceeded to interest arbitration before Arbitrator Richard Tyson. The parties agreed on all terms of a 1992-1994 agreement except for wages. The

District offered a base wage increase of 4% for 1992-1993 and 3% for 1993-1994. MTI offered wage increases of 4.35% for 1992-1993 and 4% for 1993-1994.

4. In its initial brief to Arbitrator Tyson, the District argued in part as follows:

. . .

VIII. THE PUBLIC INTEREST SUPPORTS THE DISTRICT'S POSITION IN THIS CASE

Exhibits #99 and #100 indicate that in April of 1993 the Board of Education of the Madison School District, based on pressure from the Governor and Legislature voted to freeze the local property tax rate. This would still mean that the District's school taxes would rise nearly 5% under a 4.9% budget increase. To achieve that goal the District had to cut $4,000,000 from its current services. (Tr. p. 245-246; Exhibit #99 and #100) Exhibit #101 is "The Citizens' Budget" which summarizes the 1993-94 proposed budget for the Madison Metropolitan School District. The Superintendent points out in the introductory letter to Exhibit #101 that the community is willing to invest in educational services, but they are also concerned about the rising taxes and the need to control costs. (Tr. p. 246, 247) The Superintendent also pointed out that there were difficult choices in that the District was faced with the necessity for planning for a state imposed freeze on property tax rates. (Tr. p. 247) The exhibit goes on to state that the Board had to cut $4,000,000 from its proposed budget and the proposed costs are contained in the document commencing at page 12. (Tr. p. 247; Exhibit #101) Exhibit #101 also indicates that the cuts that were made from the budget were made in an attempt to keep as many cuts as possible away from the students. However, the budget still contained increases for salary and benefits. (Tr. p. 247) The document also indicates that there were across-the-board cuts and that the budget considerations included trying to hold down some of the costs of salary and benefits. (Tr. p. 248)

The Union tries to argue that $98,000 is a small percentage of a large school district budget. However, the District is considering all of the units in dealing with its budget for the 1993-94 school year - i.e. trying to be fair and reasonable with the employees, while still holding to a reasonable budget increase.

This is the first time that this unit has been to arbitration since this unit was created in 1976. (Tr. pp. 21, 120, 250) During all of these years the District and MTI have been able to reach a voluntary settlement with this unit. This year the District is attempting to be fair and reasonable with the Union by attempting to pay them a salary that slightly exceeds the Consumer Price Index. However, the District is also balancing employer concerns with that of the students, parents and taxpayers.

. . .

In its initial brief to Arbitrator Tyson, MTI argued in part as follows:

. . .

A. The Interest and Welfare of the Public

There is no question that MTI's final offer is compatible with the interest and welfare of the public. The public overwhelmingly supported a budget which would maintain the level of service offered the previous year (Tr. 267; MMSD Exs. 99, 100, 101). This message was also delivered in the recent school board election in which two fiscally conservative challengers, who proposed to reduce services, were soundly defeated (Tr. 268; MMSD Ex. 100). The budget "dilemma" faced by the District was not created by the public, but was, according to District Superintendent Cheryl Wilhoyte, "thrust upon (Madison) by the state" (MMSD Ex. 101, page 1).

What is the appropriate response to proposed fiscal constraints "thrust" upon the school district by the state? The District submitted exhibits describing the school board's reaction to the governor's proposal to freeze the property tax rate (MMSD Ex. 99, 100, and 101, page 3). The Governor, however, has as of this date, dropped his tax rate freeze proposal in favor of an alternative. The bottom-line is that proposed legislation should have no probative value in this proceeding. Even assuming arguendo that legislation was enacted during the pendency of the arbitration proceedings herein (criteria i.), it would be unfair to expect the employees of the District to solely shoulder the consequences of that legislation. Besides, it should be remembered, the public has a substantial interest in attracting, retaining and motivating a highly qualified clerical/technical staff to carry out the District's business.

B. Financial Ability to Pay

Madison is a relatively affluent community. The District's "inability to pay" argument is based upon its, and only its, understanding of the proposed legislation as of the date of the hearing in the instant matter. That proposed legislation, as discussed above, has since bitten the dust. MTI's argument, on the other hand, is based upon the relative wealth of the community.

. . .

In its reply brief to Arbitrator Tyson, the District argued in part as follows:

. . .

> At page 5 of the Union's brief the Union argues that it would be "unfair to expect the employees of the District to solely shoulder the consequences of that legislation" (State legislation controlling the budget). The District is not expecting employees to solely shoulder the consequences of State legislation. It is clear from the testimony at the hearing and the exhibits that the wage and benefit increases are included in the budget and account for approximately $6.4 million out of the $9.4 million overall budget increases, 68% of the budget expenditures for 1993-94. (Tr. pp. 247-248) The District is not asking the employees to "solely shoulder the consequences of legislation" but has instead budgeted for reasonable wage and benefit increases and has also had to cut programs in order to achieve that goal. The evidence presented by the District listed a number of programs and services that would likely be reduced or eliminated, and fees that would have to be increased, all as a result of the tightening budget. (District Exhibit #101, pp. 6-12)
>
> MTI points out at page 5 of its brief that the Governor has dropped his tax rate freeze; however, the Legislature has not dropped its proposal to cap the per student cost allowed by school districts in the State of Wisconsin. Even with these caps, however, the District is prepared to offer the reasonable final offer in this case which continues to maintain these employees with top ranked wages.

. . .

5. On August 31, 1993, Arbitrator Tyson issued his Award wherein he selected the final offer of the District. The Award is attached to this decision as Appendix A. In his Award, at p. 21, Tyson stated:

. . .

> Lastly, the interest and welfare of the public may be better served by an award in favor of the District if it serves as a precedent for pending settlements and/or arbitration awards, given the legislation recently passed. However, these and other employees should not shoulder the burden of meeting the District's budget without reduction in services, particularly if, in the Arbitrator's opinion, unit employees are under the new challenges to which they have testified.

. . .

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

CONCLUSION OF LAW

The Award issued by Arbitrator Richard Tyson on August 31, 1993 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 32.17.

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

DECLARATORY RULING 1/

Because the Award issued by Arbitrator Richard Tyson on August 31, 1993 was lawfully made and does not require modification, there is no basis under Sec. 111.70(4)(cm)6. and 7., Stats., and ERB 32.16 or 32.17 for the Wisconsin Employment Relations Commission to modify same or remand the matter to Arbitrator Tyson.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.

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 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.

(footnote 1 continued on page 7)

(footnote 1 continued from page 6)

(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.

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

POSITIONS OF THE PARTIES

MTI

MTI initially argues that the Commission should modify the standard it has previously applied when reviewing interest arbitration awards. Contrary to the Commission holding in School District of Wausaukee, Dec. No. 17576 (WERC, 1/80) aff'd Ct. App. III (No.81-1869, 1/83 unpublished) and Nekoosa School District, Dec. No. 25876 (WERC, 2/89), MTI argues that the test enunciated in Scherrer Const. Co. v. Burlington Mem. Hospital, 64 Wis.2nd 720 (1974) and adopted by the Commission is not the appropriate standard to apply to interest arbitration awards. MTI asserts that the Scherrer standard is not applicable because it does not fit the needs of an interest arbitration review. MTI contends that in interest arbitration, an arbitrator is making a choice between the final offers of the parties. Unlike grievance or rights arbitration, which has a purpose of ensuring that the parties receive the benefit of their earlier bargain, MTI argues that interest arbitration is intended to create that initial bargain. Thus, MTI argues that in interest arbitration, the standard of review applicable when arbitrators are interpreting contracts need not be applicable to circumstances in which the arbitrator is creating the contract.

MTI contends that the Tyson Award was not lawfully made within the meaning of ERB 32.16(1)(d). MTI asserts that Tyson's authority comes from the language of Sec. 111.70(4)(cm), Stats., and that he was obligated to confine his Award to the language of the statute.

When Tyson cited "legislation recently passed" as the basis for his conclusion that the interest and welfare of the public may be better served by an award in favor of the District, MTI argues that he was referring to 1993 Wisconsin Act 16 which is not applicable to the parties' proceeding in any way. Thus, MTI asserts that the Arbitrator was taking it upon himself to make a decision not based on the evidence presented to him by the parties but upon his own personal assessment of public policy.

MTI contends there are sound reasons for the Commission to overturn Tyson's Award because he substituted his will for sound judgement. MTI alleges the parties were deprived of the opportunity to make arguments about Act 16 because they were not on notice that Tyson intended to consider Act 16 in his deliberations. Had it been placed on notice of Tyson's intentions, MTI argues that it would certainly have argued against the application of Act 16 to the proceedings.

MTI asserts there can be little doubt that Arbitrator Tyson relied inappropriately upon Act 16 when reaching his decision. MTI argues that based upon the Arbitrator's close call in deciding the issue before him, it is not possible to say how he would have decided the case had he not considered Act 16. MTI argues that in this case, rather than either of the parties having introduced a new question into the proceedings, Tyson did so on his own. MTI asserts that it is inherently wrong for Tyson to consider a new question that

he interjected into the process. MTI contends that the inclusion of Act 16 in the arbitral balance was sufficient in and of itself to tip the scales in favor of an award incorporating the District's final offer. Accordingly, MTI contends that removing consideration of Act 16 from the equation would tip the balance in favor of an award incorporating MTI's final offer. MTI believes the Commission should modify the Award to incorporate MTI's final offer.

In the alternative, MTI asserts the Commission may conclude that these scales are levelled once consideration of Act 16 is eliminated. In that case, MTI argues that Tyson's Award should be set aside and the case should be remanded to him for further consideration.

In its reply brief, MTI disputes the District's assertion that Tyson properly considered Act 16 in his deliberations. MTI contends that neither party could effectively argue about the content of Act 16 because it was not enacted until after the submission of briefs. Further, MTI contends that it cannot be determined whether Tyson actually saw the statute or explored its complexities in making his award. MTI notes that the argument and exhibits presented by the parties focussed only on the possible legislation. In such circumstances, MTI contends the Arbitrator's reliance on the ultimate acts of the legislature was wrong. MTI asserts arbitral guess work should not form the basis for proof in an interest arbitration case. MTI argues that if Tyson intended to use recently enacted legislation when reaching his award, he was obligated to provide the parties an opportunity to present evidence and to argue from that evidence about the real, rather than supposed, effect of that legislation on the arbitration proceedings.

MTI also urges the Commission to reject the District's argument that because Tyson found for the District on a majority of the criteria set for in Sec. 111.70(4)(cm)7., Stats., Tyson's consideration of Act 16 did not influence the result of his decision. MTI argues that there is no way from a review of the Award to determine the weight Tyson gave Act 16. Under such circumstances, MTI argues that it is at least appropriate for the Commission to remand the matter to the Arbitrator for him to reconsider the real impact of Act 16, after receiving evidence and argument from the parties.

The District

The District contends that Tyson's Award was lawfully made within the meaning of ERB 32.16(1)(d). The District asserts that both sides had argued extensively to Tyson over the impact of pending fiscal legislation upon the parties' respective offers. Under these circumstances, the District contends that it was appropriate for Tyson to consider the legislation ultimately passed when making his award.

The District contends that a review of the Tyson Award demonstrates that it was not based solely on Act 16 but rather a review of the entirety of the evidence presented. Thus, the District argues that Act 16 was not the determining factor in this case, contrary to MTI's arguments.

Should the Commission conclude that the Tyson Award was unlawfully made because of the consideration given to Act 16, the District contends that the only logical remedy is to strike references to Act 16 from the Award. The District argues that the Commission would be overreaching its authority to overturn the entire decision as advocated by MTI. This is so, in the District's view, because Tyson's Award did not rest solely on the existence of Act 16 but rather a consideration of all statutory criteria.

Given the foregoing, the District argues the Commission should conclude

that the Award of Tyson was lawfully made.

DISCUSSION

A declaratory ruling petition filed pursuant to Sec. 227.41, Stats., is the vehicle by which a labor organization can acquire Commission review of interest arbitration awards under the standards established by ERB 32.16 and ERB 32.17. Nekoosa School District, Dec. No. 25876 (WERC, 2/89); School District of Wausaukee, Dec. No. 17576 (WERC, 1/80), aff'd CtApp III (No. 81-1869, 1/83 unpublished).

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:
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> (a) Where the interest arbitration award was procured by corruption, fraud or undue means;
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> (b) Where there was evident partiality on the part of the neutral arbitrator or corruption on the part of an arbitrator;
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> (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:

> If, in a proceeding for enforcement, 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 where:
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> (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.

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 Scherrer Construction Co. v. Burlington Memorial Hospital, 64 Wis.2d 720 (1974) in Nekoosa and 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 Bd. School Directors v. Milwaukee Teachers' Ed. Asso., 93 Wis.2d 415, 422, 287 N.W.2d 131 (1979).
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> 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.
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> . . .
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> Therefore, 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.
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> . . .
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> The parties bargain for the judgement of the arbitrator-correct or incorrect-whether that judgment is one of fact or law.
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> . . .

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 "presumptively valid" so long as the parties receive what they are entitled to under Secs. 111.70(4)(cm)6. and 7., Stats.

Given the foregoing, we continue to be persuaded that our role in these matters is a supervisory one and we thus decline MTI's invitation to apply a different standard of review to the Tyson Award. While MTI is obviously correct that an interest arbitrator is creating a contract rather than interpreting an existing agreement, we think the applicable law and existing judicial interpretation thereof establish a clear and common policy favoring final and binding resolution of both grievance and interest arbitration disputes with only supervisory review. In grievance arbitration, that supervisory role seeks to insure that the parties receive what they bargained for. In interest arbitration, that supervisory role seeks to ensure that the parties receive what they are entitled to under Secs. 111.70(4)(cm)6. and 7., Stats.

Here, MTI argues that Tyson's Award was not lawfully made because of his reference to the "legislation recently passed" and that the Award must therefore be modified pursuant to ERB 32.16 or ERB 32.17. We disagree.

As is apparent from Finding of Fact 4, before Tyson the parties vigorously litigated the impact on their respective offers of pending fiscal constraint legislation. In such circumstances, it was entirely appropriate for Tyson to comment on the ultimate result of these legislative efforts. While it may have been more appropriate for Tyson to advise the parties of his intention to take notice of the "legislation recently passed" and to give the parties an opportunity to add one more chapter to their dialogue about legislatively imposed fiscal constraints, his failure to do so does not render his Award unlawful.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.