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 236 No. 50108 DR(M)-534 Decision No. 28254

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 November 22, 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 educational assistants employed by 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 October 29, 1992, MTI filed a petition with the Wisconsin Employment Relations Commission for final and binding interest arbitration regarding the educational assistants pursuant to Sec. 111.70(4)(cm)6., Stats. Pursuant to that petition, MTI and the District ultimately proceeded to interest arbitration before Arbitrator Frank P. Zeidler.

4. During a July 27, 1993 hearing before Arbitrator Zeidler, the District and MTI represented the following argument and testimony:

SUSAN HAWLEY, DISTRICT LABOR CONTRACT MANAGER

. . .

> Again, you'll find from the testimony, that our position here is consistent with our position in other units, and that -- so we are internally consistent, and also that there have been a series of very public debates as the Arbitrator well knows, in relation to budget constraints from the legislature. Those budget constraints impacts on all units, and all of our budgetary issues. There have been a series of programs that have been cut out of the budget, and the district attempted to balance program cuts while keeping wages and benefits at a reasonable level. Those constraints by the legislature are continuing, and there is a dollar, $190 dollar per cap per student constraints on our budget, that it is just in the process of being enacted. And that of course has had an impact on all of our negotiations this year, and as Mr. Matthews indicated correctly, we have proceeded to arbitration on all units. We have commenced food service negotiations and we are not sure exactly where that negotiations will be at the present time, but every other unit is in the process of either having had a hearing, or for interest arbitration, or proceeding to a hearing.
>
> We do believe, though, that this reflects not only what is happening in this district but what is happening state wide, and also reflects constraints on our budget. (Tr. 29-30)

. . .

CHRIS HANSON, DISTRICT COMPTROLLER

. . .

> A Yes, I am primarily responsible for coordinating the development of the District's annual budget.
>
> Q Could you state whether or not the Governor or the Legislature or the State of Wisconsin in any event has placed limitations on this year's budget?
>
> A The state legislature has passed a plan which limits school district expenditures and it is before the governor now for signature.

Q And does that have a per pupil cap in it?

A Yes, it does. It has a per pupil revenue cap, it limits the amount of money a district can raise through a combination of their general state aide and their local property taxes on a per pupil basis and establish a cap which they therefore cannot exceed beyond that level.

Q And has the district taken measures to at this point in time, to cut the things from the budget in order to be prepared for this kind of a cap situation?

A Yes, the tentative budget, which has been approved by the Board of Education and committee as of this time, took into consideration and enacted a number of expenditure reductions from what had been previously considered existing levels of expenditure for the school district.

Q What are some of the examples of some of the kinds of cuts that the Board has made?

A Well, the custodial staffing levels from 1992-93 have been reduced, the level of expenditures for the district extra curricular athletic program has been reduced, the staffing ratios for pupil teacher ratios that were in existence in 1992-93 have been increased, which reflects a greater ratio, more pupils per teacher as a cost reduction mechanism. Those are three.

Q Summer school affected?

A Thank you, the elementary summer school program, was effectively eliminated upon completion of the segment which concluded in early July this year and there is no provision for continuation of that program next summer.

Q Okay, and the finalization of the total impact of the budget has not yet been determined exactly for 93-94, is that right?

A That's correct. Board of Education adopted a budget tentatively in committee and chose to recess at that time, until further information was then made available by the state. That information now is starting to come forth ... (Tr. 208-209)

. . .

SUSAN HAWLEY, DISTRICT LABOR CONTRACT MANAGER

. . .

> The next exhibit, Exhibit 55 was a state budget, another article indicating the state budget and the situation with the legislature, and this indicates that just recently, as of the last few weeks, the legislature has placed a cap as Mr. Hanson indicated, has placed a cap on the district spending of $190.00 per pupil, and has also placed limits on teacher pay raises, as also indicated in this article. In Exhibit 56, the article indicates again, the recent legislative action, again the spending limit per pupil, and the constraints that the District will be under in terms of that particular legislation that is being I think at this time finally drafted and it is going on to be the board -- to the governor. (Tr. 278)

. . .

DOUG KELLOR, MTI ASSISTANT TO THE EXECUTIVE DIRECTOR

. . .

> Q And in your understanding of Senate Bill 44 which became the budget bill enacted by the State of Wisconsin, is it your understanding that there is a mechanism for the District to spend what it wants relative to the educational program in the district?
>
> A Yes, there is.
>
> Q And they are not limited by what mandates the legislature or the governor may plan on them?
>
> A No, the mechanism they can utilize would be a referendum among the electorate of the school district. (Tr. 288)

. . .

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

. . .

> The Board also offered 4% and 3% respectively for 1992-93 and the 1993-94 school years for the Clerical/Technical Unit. The arbitration decision in

that unit was recently received by the District and the District prevailed in that arbitration. A copy of the arbitration decision, Decision No. 27611, is attached to this brief. The Decision by Arbitrator Tyson indicates that the District's offer of 4% for the 1992-93 school year and 3% for the 1993-94 school years was accepted by the arbitrator and is, therefore, an internal comparable which relates directly to this arbitration.

. . .

IX. THE PUBLIC INTEREST SUPPORTS THE DISTRICT POSITION.

District's Exhibits #50 through #56 indicate the struggle that the Madison Metropolitan School District has had with the budget for the 1993-94 school year.

District Exhibit #50 is a document called "The Citizens' Budget" and was prepared to help citizens understand the budget process for the 1993-94 school year. (Tr. p. 275) The first page of Exhibit #50 includes a letter from the Superintendent of Schools which points out that there were public forums and hearings which indicated overwhelming support to continue the programs of the District but that there also were concerns over rising property taxes. There were also concerns at the time over the Governor's proposal to impose freezes on the property tax rate. (Tr. pp. 275-276) This document goes on to point out that the District made numerous cuts to the budget and that there was an attempt by the District to spread the cuts across the board to minimize their impact. (Tr. p. 276; District Exhibit #50) From page six through page twelve of District Exhibit #50 many of the programs totally valued at approximately $4 million that were cut are listed and explained. At page 16 District Exhibit #50 indicates that the budget did include significant amounts of money for salary and benefit increases - $6.4 million of the $9.2 million. (District Exhibit #50, p. 16; Tr. p. 276) Therefore, salary and benefit increases were included in the budget even though there were a number of other cuts to programs to try to arrive at a budget which fell within the constraints of the potential legislative constraints. (Tr. p. 277)

District Exhibit #51 is a set of Minutes of the Board of Education of June 14, 1993 in which the Board changed the number of the cuts but ended up with a proposed budget that was still holding the line on property taxes. (Tr. p. 277) Exhibit #52 is the press article indicating the results of the June 14, 1993 meeting and discusses the budget cuts that were still contained in the budget proposal. (See also District Exhibit #54)

District Exhibit #55 and #56 indicates the summary of the legislation that was finally established

> which will limit the District's spending to $190 per pupil over the District's last budget. It also indicates that it has placed limits on teacher pay raises of 2.1% for total salary and 3.8% for a total package. (See District Exhibits #55 and #56)
>
> . . .

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

> . . .
>
> B. Financial Ability to Pay
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> Madison is an affluent community. The District's "inability to pay" argument is based upon its, and only its, understanding of the legislation as of the date of the hearing in the instant matter. The Employer makes reference to a recently legislated $190 per student cap as a "constraint on (the MMSD's) budget" (Tr.29). Yet, the Employer failed to mention that the District could exceed the per student "cap" by holding a referendum among the electorate (Tr.288). Given the citizenry's overwhelming support in the District's most recent budget process, there is no indication that they would be less supportive of said referendum.
>
> . . .
>
> As previously mentioned, while the recent award involving the clerical/technical bargaining unit (SEE-MTI) included a 1993-94 increase of only 3%, the Arbitrator's decision was based on the fact that the SEE_MTI bargaining unit was highly paid when compared to the external comparables, and in effect is the "wage leader." The Educational Assistants, however, are not "wage leaders", so the same rationale does not apply. Those involved in the instant matter are behind their peers who are employed by the comparable districts.
>
> . . .

6. On October 20, 1993, Arbitrator Zeidler 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 pp. 23-25, Zeidler stated in part as follows:

> **XVI. ABILITY OF THE UNIT OF GOVERNMENT TO MEET THE COSTS AND THE INTEREST AND WELFARE OF THE PUBLIC.**
>
> . . .
>
> Discussion and Opinion. The evidence is that the District would have the ability to pay the costs of the MTI offer, though with new budget restraints by the legislature, it might have to cut services if the MTI

offer prevails. As to the interest and welfare of the public, the evidence is that although citizens of the District at a hearing supported the level of services of the District, they did not speak to whether they would support this level if it cost more. At the same time there was in operation other forces to curtail education expenditures in the form of a legislative cap on the increase per pupil for the total budget and on an increase for teachers and administrators.

In the presence of this effort to control and compress school budgets, it must be judged that the District offer, which is substantially higher in total compensation per employee than the Consumer Price Index changes, is more reasonable by responding to the changed conditions in legislation.

XVII. CHANGES DURING THE PENDENCY OF THE PROCEEDINGS. The Award of Arbitrator Tyson to the District in the contract between the Clerical/Technical employees in the District and the District must be considered as a factor weighing for the District offer because of the similarity of percentage increases for compensation offered.

. . .

XIX. SUMMARY OF FINDINGS AND CONCLUSIONS. The following is a summary of the findings and conclusion of the arbitrator:

1. There is no question here as to the lawful authority of the District to meet the cost of either offer.

2. All other matters have been stipulated to between the parties.

3. The arbitrator considers districts adjacent to Madison with unions to be the primary comparables. These districts are Middleton-Cross Plains, Sun Prairie, Verona, Monona Grove and McFarland. This is because they are part of the same market from which Education Assistants are likely to be drawn. The 10 largest districts offered by the MTI and adjacent districts offered by the District which are not organized but grouped with organized adjacent districts also have a secondary value.

4. The offer of the District when compared to the conditions in the primary comparables for wages is reasonable and the more comparable.

5. The 1990 data offered by the District on comparisons with wages paid to other governmental units in the Madison area for work similar to Educational Assistants the arbitrator regards as insufficient for making a conclusive judgment as to the comparability of either offer.

6. As to comparisons of percentage increases offered in the same unit of government for 1992-1993 wages, the MTI offer is the more comparable.

7. As for the offers on holidays, the District offer which increases the number of holidays each year by one is comparable and reasonable.

8. As for comparison of employment in the private sector, the District offer is competitive for persons seeking part-time work, but the higher turnover indicates that the positions are not comparable for persons seeking full-time employment.

9. The arbitrator considers the inclusion of an unsigned Memorandum of Agreement between the parties as not appropriately included, even though it constitutes a commitment by the District of pay for training.

10. As for the changes in the cost of living, the District offer for total compensation is closer to the changes than the MTI offer.

11. The District has the ability to meet the costs of either offer.

12. As to the interest and welfare of the public, the District offer, in light of the legislative effort to control educational costs and compress percentage increases of professional employees, is the more reasonable.

13. As to changes during the pendency of the proceedings, the decision of Arbitrator Tyson in an arbitration matter involving Clerical/Technical employees of the District is a factor weighing in favor of the District offer.

14. Though the District witnesses gave detailed testimony as to their complex duties, the arbitrator for lack of evidence was unable to make valid comparisons with whether these duties were superior in detail to those of comparable districts.

In light of the foregoing analysis, the factors of the wage and holiday offers, the cost of living changes, and the interest and welfare of the public specially weigh in favor of the District offer. Hence the following Award is made:

XX. AWARD. The offer of the Madison Metropolitan School District in the Educational Assistants' Collective Bargaining Agreement should be included in the 1992-1993 and 1993-1994 Agreement between the District and Madison Teachers, Inc.

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

CONCLUSION OF LAW

The Award issued by Arbitrator Frank P. Zeidler on October 20, 1993 in the above matter was lawfully made and does not require modification under the provisions of Secs. 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 Frank P. Zeidler on October 20, 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 Zeidler.

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.

(footnote 1 begins on page 11)

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.

(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 conyends that the Scherrer standard is not applicable because it does not fit the needs of an interest arbitration review. MTI argues 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 asserts 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 Zeidler Award was not lawfully made because it was premised in part upon the unlawful Tyson Award and upon Arbitrator Zeidler's view of Act 16, a matter as to which the parties did not have the opportunity to make argument. MTI asserts that the Zeidler Award should be overturned because he disregarded the law he was obligated to apply (Sec. 111.70(4)(cm)7., Stats.) and disregarded strong public policy in Act 16 which limited the Act's economic restrictions to professional employes, not employes included in the MTI educational assistant unit. MTI alleges that Zeidler made the problem worse by following Tyson's leadership when determining that the Tyson Award in the clerical/technical unit established an internal comparable.

Given Zeidler's error, MTI asserts that it is not possible to say how Zeidler would have decided the case had he not improperly considered Act 16 and Arbitrator Tyson's Award. MTI argues that the inclusion of Act 16 and Arbitrator Tyson's Award 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 and Arbitrator Tyson's Award from the equation would clearly tip the balance in favor of an award incorporating MTI's final offer. Thus, MTI asserts that this is the appropriate remedy for the Commission to award. In the alternative, MTI contends that the Commission should remand the case to Arbitrator Zeidler for further consideration.

In its reply brief, MTI contests the District's assertion that the impact of Act 16 was litigated by the parties before Zeidler. MTI contends that Act 16 had not reached its final form by the July 27, 1993 hearing date and thus that it is "untenable" for the parties to have been presumed by Arbitrator Zeidler to have known the intricacies of the Act. MTI alleges there is nothing in the exhibits of either side that purports to explain the impact of Act 16 on

their respective positions and notes that the Arbitrator's Award is devoid of any references to the actualities of Act 16 as it applies to educational assistants. Nonetheless, MTI argues that the Arbitrator erroneously assigned to educational assistants the burden of salary control that the legislature has laid upon professional employes.

MTI asserts that if the Commission affirms Arbitrator Zeidler's Award, there will be

> . . . a floodgate to disastrous award by renegade arbitrators. (The prospect of Arbitrator Zeidler being considered a 'renegade' is fraught with imagined consequences; yet, if so long-standing an arbitrator as he can boot-strap onto Arbitrator Tyson's award, what might other arbitrators do when faced with similar challenges?)

In conclusion, MTI acknowledges that Arbitrator Zeidler did not issue his Award based solely on either Tyson's Award or Zeidler's reliance upon recently enacted statutes. However, MTI contends that the issue is whether his reliance in either instance so tainted his Award as to make it reversible. In the absence of the opportunity to provide evidence about the Act and its impact and to argue from that evidence, and in the absence of any explanation from the Arbitrator as to the impact of Act 16 on his decision-making process, MTI asserts the Commission should grant the relief it seeks.

The District

The District argues that Arbitrator Zeidler's Award was lawfully made within the meaning of ERB 32.16(1)(d). The District contends that Zeidler properly considered the Tyson Award as to the matter of internal comparability and that Tyson, in turn, had properly considered the impact of state budget constraints upon the proceeding before him. Therefore, the District argues that Zeidler appropriately applied the statutory criteria and gave weight to the Tyson Award. In this regard, the District notes that MTI itself referenced the Tyson Award in its brief to Arbitrator Zeidler.

The District further asserts it was appropriate for Zeidler himself to consider the impact of Act 16 upon the proceeding before him. The District notes that the parties placed evidence and argument before the Arbitrator as to the budget constraints imposed by the legislature. Thus, the District argues it was clearly appropriate for Zeidler to consider Act 16 when rendering his Award. The District further notes that the Tyson Award and Act 16 played only a partial role in the Zeidler Award and that the Award in question was reached after the Arbitrator had properly considered all of the criteria which the statute establishes.

Given the foregoing, the District asserts the Commission should conclude the Zeidler Award was lawfully made and that no modification is appropriate.

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 unplublished).

ERB 32.16(1) provides in pertinent part:

. . .

> In determining whether an interest arbitration award was lawfully made, the commission shall find that said award was not lawfully made under the following circumstances:
>
> (a) Where the interest arbitration award was procured by corruption, fraud or undue means;
>
> (b) Where there was evident partiality on the part of the neutral arbitrator or corruption on the part of an arbitrator;
>
> (c) Where the arbitrator was guilty of misconduct in refusing to conduct an arbitration hearing upon request or refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear supporting arguments or evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
>
> (d) Where the arbitrator exceeded his or her powers, or so imperfectly executed them that a mutual, final and definite interest arbitration award was not made.

. . .

ERB 32.17 provides:

> 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:
>
> (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).
>
> 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.
>
> . . .
>
> 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.
>
> . . .
>
> The parties bargain for the judgement of the arbitrator-correct or incorrect-whether that judgment is one of fact or law.
>
> . . .

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

MTI argues the Zeidler Award was unlawfully made because it was premised in part upon the unlawful Tyson Award and Act 16. We disagree.

As is apparent from Findings of Fact 4 and 5, before Zeidler the parties vigorously litigated the impact on their respective offers of the fiscal constraint legislation enacted by the legislature. As reflected in Finding of Fact 5, the Tyson Award was also presented to Zeidler for his consideration. In such circumstances, it was entirely appropriate for Zeidler to comment in his Award on the impact of legislative fiscal constraints and Tyson's Award. To the extent MTI's theory herein hinges on the allegedly unlawful nature of the Tyson Award, we reject same in light of our decision in Madison Metropolitan School District, Dec. No. 28252 (WERC, 12/94) in which we found the Tyson Award to be lawful.

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.