STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant,

vs.

MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.

Case 393
No. 60217
MP-3756

Decision No. 30201-B

Appearances:

Perry, Shapiro, Quindel, Saks, Charlton & Lerner, S.C., by **Attorney Barbara Zack Quindel**, 823 North Cass Street, P. O. Box 514005, Milwaukee, Wisconsin 53203-3405, appearing on behalf of Complainant.

Office of City Attorney, City of Milwaukee, by **Attorney Donald L. Schriefer**, 200 East Wells Street, Suite 800, Milwaukee, Wisconsin 53202-3551, appearing on behalf of Respondent.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

On August 13, 2001, Milwaukee Teachers' Education Association (Complainant) filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that Milwaukee Board of School Directors (Respondent) was violating Sec. 111.70(3)(a)5 and 7, Stats., by refusing to implement the June 15, 2001 Award of Arbitrator Peter E. Obermeyer. On August 14, 2001, the Respondent filed an action in Milwaukee County Circuit Court (Case No. 01-CV-007544) seeking vacation of the June 15, 2001 Arbitration Award of Arbitrator Peter E. Obermeyer. On August 24, 2001, Respondent requested the WERC to dismiss the complaint, without prejudice. On August 29, 2001, the WERC appointed Coleen A. Burns, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. On September 7,

2001, the Examiner issued a Notice of Hearing on Complaint, scheduling a hearing for September 21, 2001. On September 10, 2001, Complainant filed its Opposition to Respondent's Motion to Vacate and Alternative Motion to Confirm the June 15, 2001 Arbitration Award of Arbitrator Peter E. Obermeyer in Milwaukee County Circuit Court. On September 13, 2001, Complainant filed a Memorandum of the MTEA in Opposition to the MBSD's Request to Dismiss Complaint. On September 17, 2001, the Examiner issued an Order Indefinitely Staying Proceedings In This Matter And Indefinitely Postponing Hearing pending conclusion of the judicial proceedings before the Milwaukee County Circuit Court. On September 26, 2001, Judge Dominic S. Amato declined to assert jurisdiction over Respondent's Motion to Vacate Arbitration Award and issued an Order Dismissing Petitioner's Motion to Vacate Arbitration Award. Following the Respondent's Motion to Reconsider, Judge Amato, on November 8, 2001, rescinded the Court's prior Order and stayed the action pending resolution of the parallel proceeding involving the same parties presently before the WERC. Thereafter, the parties agreed to have the Complaint before the Examiner decided on the basis of a Stipulation of Facts and written briefs. The record was closed on January 19, 2002.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Milwaukee Board of School Directors, hereafter Respondent, directs and controls the operations of the Milwaukee Public Schools (MPS), which is a public school system in Milwaukee, Wisconsin, with a principle office at 5225 West Vliet Street, Milwaukee, Wisconsin 53201.

2. The Milwaukee Teachers' Education Association, hereafter Complainant or MTEA, is the recognized collective bargaining agent of certain employees of the Respondent and maintains its principle office at 5130 West Vliet Street, Milwaukee, Wisconsin.

3. On June 15, 2001, Arbitrator Peter E. Obermeyer issued an Award on Grievance No. 98-150. The decision of Arbitrator Obermeyer includes the following:

ISSUES:

1. Did the District violate the Contract, Part II, Section C and Part IV, Section I (In-Service) and the arbitration awards of Arbitrator Richard J. Miller (dated December 5, 1986) and Morris Slavney (dated March 5, 1987) when it failed to notify the MTEA that it intended to offer an in-service seminar titled MPS Efficacy Training on August 3, 4, 6 and 7, 1998 and when it failed to notify the MTEA that it intended to cancel the in-service seminar?

2. Did the District violate Part II, Section C and Part IV, Section 1 of the Contract when it unilaterally canceled the August 3, 4, 6 and 7, 1998, in-service titled MPS Efficacy Training without notice to the MTEA or the individual participants who were registered for the seminar and who showed up to attend the seminar or were called on Monday morning August 3rd and informed of the cancellation just prior to the scheduled start of the seminar and when it refused to compensate them at their individual hourly rate for the time scheduled for the in-service?

3. Does the Arbitrator have jurisdictional authority to award any relief to employees concerning the cancellation of the in-service training?

If so, what is the remedy?

BACKGROUND OF THE CASE:

For a number of years, the District has sponsored a four day in-service Efficacy Training program. Historically the in-service program has been sponsored both during the regular school year and in the summer, outside of the teachers' regular school year. Teachers attending the in-service program during the summer are compensated based on their regular daily rate of pay.

Several four-day Efficacy Training in-service programs had been scheduled for the summer of 1998, including one that was to begin on August 3, 1998, and continue on August 4, 6 and 7. . .Notwithstanding the administration's efforts to notify teachers registered for the in-service program, several teachers were not notified of the cancellation and reported to the District's Professional Development Center on August 3, 1998. The Association filed a timely grievance on behalf of teachers who were not notified of the in-service training cancellation or who were notified of the cancellation in the morning, prior to the start of the training.

DISCUSSION:

. . .

3. Merits of the Case. At the center of this grievance is what obligations, if any, did the District incur when it cancelled the August 3, 1998 in-service training? The District has the right to schedule "necessary" and "voluntary" in-service training consistent with the conditions of Part IV, Section 1, 1, of the Contract. During the 1997-1998 school year the District implemented this right by sponsoring a series of Efficacy Training in-service programs during the summer of 1998./15 District teachers were encouraged to attend what was considered to be an important and highly effective in-service program. By May of 1998 only a few openings remained for the three Efficacy Training in-service programs scheduled for August, 1998./16 Following the completion of the 1997-1998 school year District administrators notified teachers enrolled in the summer Efficacy Training in-service that their attendance was confirmed. /17 Enrolled teachers made arrangements which allowed them to attend the August 3, 4, 6 and 7, 1998, in-service training.

Following the confirmation of attendance by District administration the School Board, on July 29, 1998, referred to committee the request to approve the sole-source contract with Efficacy Institute, Inc. to conduct approximately 12 workshops./18 The action was consistent with the School Board's authority, was not arbitrary and capricious, and ended the funding for Efficacy Training in-service programs scheduled for the rest of the summer of 1998.

Because of the School Board's referral, the District administration took action to cancel the three Efficacy Training in-service programs scheduled during August 1998, by telephone and letter. 19/ (cites omitted)

4. Establishing an Obligation. The following pattern of actions by the District regarding the in-service training:

- sponsoring and scheduling the in-service training program
- recruiting teachers to attend the training, and
- confirming enrollment and compensation for participation in the program;

resulted in an acceptance by enrolled teachers to make necessary arrangements for their participation in the in-service program. This pattern of actions established an "agreement" between the District and the enrolled teachers.

The parties have a responsibility to deal with each other in a manner which is reflective of "good faith and fair dealing." This responsibility requires the District to give some minimal notice to enrolled teachers when it determines to cancel a scheduled in-service training program. Given the circumstances of this case, a District representative was obligated to notify enrolled teachers in the Efficacy Training in-service program, no later than the calendar day (August 2, 1998) prior to the start of the in-service training (August 3, 1998).

An effort to notify enrolled teachers was initiated by the District Administration. Approximately one-half of the enrolled teachers, however, did not receive notice of the in-service cancellation by August 2, 1998. To these teachers the District is obligated for compensation in the amount of four days pay.

The parties have recognized their joint duty to deal in good faith and fair dealing. Resolution of grievances and arbitration decisions have confirmed this obligation.

In 1991 the District resolved the Gerrity grievance when Raymond Williams, Executive Director, determined that "…administration has an obligation based upon written contract and promise."/20 Numerous arbitrators have also held that teachers should not be penalized financially for reliance on District commitments. Particularly note Rice where he decided that the grievant "… had a right to assume that the Employer was making a proper determination with respect to her placement on the salary schedule and that it would inform her if there was some question.../21 And Bellman's conclusion, that in the Lelinski grievance "…she naively assumed that her Employer was doing its best to realize its agreements with her and the Union. /22 He then found, that the case required the consideration of equity and sustained the grievance. 23 (footnotes omitted)

CONCLUSION:

The District, in implementing Part IV, Section I, 1, rights to schedule and cancel in-service training, is obligated to carry out those rights in good faith and with fair dealing. Its actions in establishing, recruiting, and confirming enrollment with teachers created a promissory estoppel relationship.

Cancellation of the in-service training without adequate notice to enrolled teachers requires a remedy. The Arbitrator has the authority to craft such a remedy under the terms of the Contract.

FINDINGS:

1. The District has the right to sponsor and schedule "necessary" and "voluntary" in-service training, consistent with the obligations of Part IV, Section I, 1, of the Contract.

2. The District violated the Contract when it did not notify the Association 10 workdays prior to the August 3, 4, 6 and 7, 1998, in-service training.

3. The District has the right to cancel in-service training, which it sponsors and schedules without notice to the Association.

4. The District has the right to cancel in-service training, which it sponsors and schedules, with notification to enrolled teachers no later than the calendar day prior to the start of the training.

5. The School Board did not act in an arbitrary or capricious manner when it referred the payment of Efficacy Institute, Inc. to the Finance and Personnel Committee.

6. The District established a "promissory estoppel" relationship with teachers enrolled in the August 3, 4, 6, and 7, 1998, in-service program.

7. The Arbitrator has the authority to determine a remedy for teachers who were not notified of the in-service training cancellation before August 3, 1998.

8. The District is obligated to compensate the teachers listed in Appendix A with four days pay at their regular daily rate.

9. A cease and desist order is not an appropriate remedy.

DECISION:

1. The District shall compensate all teachers enrolled in the Efficacy Training in-service training who were not notified by the District before August 3, 1998, and who reported to the scheduled training site with four days pay at their regular daily rate.

2. This Decision shall include teachers who were:

A. Not notified and who reported to the training site on the morning of August 3, 1998; and

B. Notified on the morning of August 3, 1998, who did not report to the training site, but documented their intention to do so.

3. The Arbitrator shall maintain jurisdiction over this Decision to resolve any disputes concerning the implementation of the remedy for 60 calendar days.

4. The parties' July 1, 1997 to June 30, 1999 collective bargaining agreement contains the following:

PART IV
TEACHING CONDITIONS AND EDUCATIONAL IMPROVEMENTS

I. INSERVICE AND TUITION REIMBURSEMENT

1. INSERVICE

a. The Board and the MTEA agree that annual inservice needs exist for the professional staff. As part of developing an annual inservice training program, teachers once every other year shall be surveyed as to suggestions for courses for inservice training. Where teachers are hired to teach the courses, they will be paid their individual hourly rate.

. . .

PART VII
GRIEVANCE AND COMPLAINT PROCEDURE

A. PURPOSE

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 contract, 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 a teacher with some aspect of employment.

. . .

D. STEPS OF GRIEVANCE OR COMPLAINT PROCEDURE

. . .

FOURTH STEP. If the grievance is not adjusted in a manner satisfactory to the MTEA within twenty (20) workdays of the written disposition of the superintendent, it may be presented to final binding arbitration in accordance with the following procedures.

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

1. **JURISDICTIONAL AUTHORITY.** Jurisdictional authority is limited to consideration of grievances 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 the certification of a grievance.

b. The certifying party shall forward to the impartial referee a copy of the grievance and the other party's answer and send a copy of such communication to the other party.

c. Upon receipt of such documents, the impartial referee shall fix the time and place for a formal hearing of the issues raised in the grievance not later than thirty (30) days after receipt of such documents unless a longer time is agreed to by the parties.

d. Upon the fixing of a referee hearing date, the parties may arrange mutually agreeable terms for a prehearing conference to consider the means of expediting the hearing by, for example, reducing the issues to writing, stipulating fact, outlining intended offers of proof, and authenticating proposed exhibits.

e. In those cases where either party deems it necessary, it may be arranged that a transcript of the hearing be made by a qualified court reporter. The party making such arrangements shall bear the full cost thereof. The other party may purchase a copy. If the impartial referee requests that he/she be furnished with a copy, the expense of the original copy and the reporter's attendance charge shall be borne equally by the parties.

f. The goal of the arbitration procedure is to provide prompt but judicious consideration of grievances. In most grievances, the time span between hearing and decision should not exceed eight (8) weeks. If briefs are to be filed, a period of up to three (3) weeks should be allowed for the filing of briefs after receipt of transcripts. Thereafter, the arbitrator may extend the filing date for an additional two (2) weeks, upon request for extenuating circumstances. If, after the initial three (3) weeks for filing briefs, either party fails to request a two (2)-week extension, of if after requesting a two (2)-week extension the party fails to file their brief, it shall be considered a waiver of the right to brief the case and the arbitrator shall proceed to prepare and issue the award.

g. The arbitrator's award shall be transmitted within three (3) weeks after the receipt of briefs, except in very lengthy and/or complex cases.

h. The impartial referee shall lay down the rules for orderly conduct of the hearing.

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.

j. The expenses of the impartial referee shall be borne equally by the parties, except that the party requesting reconsideration or rehearing shall bear the full expenses of the impartial referee incurred in such reconsideration or rehearing.

. . .

5. On August 14, 2001, the Respondent filed an action in Milwaukee County Circuit Court (Case No. 01-CV-007544) seeking vacation of the June 15, 2001 Arbitration Award of Arbitrator Peter E. Obermeyer. On September 26, 2001, Judge Dominic S. Amato declined to assert jurisdiction over Respondent's Motion to Vacate Arbitration Award and issued an Order Dismissing Petitioner's Motion to Vacate Arbitration Award, without prejudice. Following the Respondent's Motion to Reconsider, Judge Amato, on November 8, 2001, issued an Order stating, inter alia:

> 1. The Court's October 29, 2001 order dismissing the present action without prejudice is hereby rescinded; and
>
> 2. This action is stayed pending resolution of the parallel proceeding involving the same parties presently pending before the Wisconsin Employment Relations Commission (Case 393 No. 60217 MP-3756).

6. Respondent has refused to accept and implement the June 15, 2001 Arbitration Award of Arbitrator Obermeyer.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Complainant Milwaukee Teachers' Education Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent Milwaukee Board of School Directors is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. The Complaint states a claim upon which relief can be granted under the Municipal Employment Relations Act.

4. The Complaint involves an issue that is ripe for a determination.

5. The Wisconsin Employment Relations has jurisdiction to hear and decide the prohibited practices alleged in the Complaint.

6. Promissory estoppel is a principle of law relating to the interpretation of contracts followed by Wisconsin courts.

7. The June 15, 2001 award of Arbitrator Peter E. Obermeyer was made within the scope of his jurisdictional authority.

8. The June 15, 2001 award of Arbitrator Peter E. Obermeyer is valid and final and binding upon Respondent Milwaukee Board of School Directors and Complainant Milwaukee Teachers' Education Association.

9. By refusing to accept and implement the terms of the June 15, 2001 award of Arbitrator Peter E. Obermeyer, Respondent Milwaukee Board of School Directors has violated Sec. 111.70(3)(a)5, Stats.

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

ORDER

1. **IT IS ORDERED THAT** the Respondent Milwaukee Board of School Directors, its officers and agents shall immediately:

a. Cease and desist from refusing to accept and implement the June 15, 2001 Award of Arbitrator Peter E. Obermeyer.

b. Take the following affirmative action which will effectuate the purposes and policies of the Municipal Employment Relations Act:

(1) Make whole all teachers that are entitled to receive compensation under the Obermeyer Award for all wages and benefits lost as a result of Respondent's failure to accept and implement the June 15, 2001 Award of Arbitrator Peter E. Obermeyer, together with interest at the statutory rate of 12% per annum established by Sec. 814.04(04), Stats. The interest calculation begins on June 15, 2001, the date on which the Award was issued.

(2) Notify all teachers represented by the Milwaukee Teachers' Association, by posting in conspicuous places in Respondent's offices and buildings where such teachers are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by an authorized representative of the Milwaukee Board of School Directors and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of sixty days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

(3) Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Madison, Wisconsin, this 30th day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

APPENDIX "A"

NOTICE TO ALL TEACHERS REPRESENTED BY THE MTEA

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

1. We will accept and implement the terms of the June 15, 2001 award of Arbitrator Peter E. Obermeyer.

2. We will immediately make whole all teachers that are entitled to receive compensation under the award of Arbitrator Peter E. Obermeyer for all wages and benefits lost as a result of our failure to accept and implement this Award, together with the applicable statutory interest.

Milwaukee Board of School Directors

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO TEACHERS REPRESENTED BY MTEA FOR A PERIOD OF SIXTY(60) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY

MILWAUKEE BOARD OF SCHOOL DIRECTORS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant, on August 13, 2001, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that the District has committed prohibited practices in violation of Sec. 111.70(3)(a)5 and 7, Stats., by refusing to implement the June 15, 2001 Award of Arbitrator Peter E. Obermeyer. On October 4, 2001, the Respondent filed its Answer to this Complaint in which Respondent denied that it has violated the Municipal Employment Relations Act as alleged by the Complainant and raised certain defenses.

Complainant

Under the terms of the parties' collective bargaining agreement, the June 15, 2001 Award of Arbitrator Obermeyer is final and binding upon the parties. Thus, by refusing to accept and implement this Award, Respondent has violated Sec. 111.70(3)(a)5, Stats.

Chapter 788 permits Respondent to seek a vacation of the Obermeyer Award. However, the filing of a Chapter 788 Motion to Vacate does not, as Respondent argues, compel the conclusion that Respondent has not refused to accept this Award.

Acceptance of Respondent's argument that it has not "refused" to accept the Award would make Complainant's MERA right to enforce an arbitration award subservient to Respondent's Chapter 788 rights. Such a result is unsupported by law; undermines MERA; ignores, generally, the well-established law recognizing that the WERC and the courts are each competent to resolve the legal issues involved; and ignores, specifically, the fact that the Milwaukee County Circuit court has deferred to the Commission in this matter.

Where, as here, the collective bargaining agreement makes arbitration awards final and binding on the parties, the Supreme Court and this Commission have made clear that review of a labor arbitrator's decision is deferential and limited in scope. The merits of the arbitration award are not within the province of courts on review and the role of the reviewing court or agency is strictly supervisory.

An arbitrator's award is presumptively valid and must be left undisturbed, even where there may be "errors of judgment as to law or fact." MILWAUKEE BD. OF SCH. DIRS. V. MILWAUKEE TEACHERS' ED. ASSO., 93 WIS.2D 415 (1980). The review of the arbitrator's assessment of the factual and legal merits of a particular labor dispute is extremely limited precisely because the "parties bargained for the judgment of the arbitrator. . .correct or

incorrect, whether or not that judgment is one of fact or law." OSHKOSH V. UNION LOCAL 796-A, 99 WIS.2D 95, 299 N.W.2D 210 (1980) An arbitration award may not be vacated unless "there has been a perverse misconstruction (of the contract) or a positive misconduct plainly established, or if the award is illegal or violates a strong public policy, or if there is a manifest disregard of the law." CITY OF MILWAUKEE V. MILWAUKEE POLICE ASSOCIATION, 97 Wis.2d 15, 292 N.W.2d 841 (1980)

Respondent argues that Arbitrator Obermeyer exceeded his authority because he relied upon the principles of "promissory estoppel." HOFFMAN V. RED OWL STORES, INC., 26 WIS.2D 683, relied upon by Respondent, is, in fact, the case that specifically adopted Sec. 90 of Restatement, 1 Contracts, holding that promissory estoppel supplies a needed tool that Wisconsin "courts may apply in a proper case to prevent injustice." In finding that the elements of promissory estoppel are not identical to those of breach of contract, the Court was explaining the need for promissory estoppel doctrine and not removing this doctrine from the body of contract law as the Respondent argues.

Notwithstanding Respondent's arguments to the contrary, promissory estoppel is clearly a doctrine within contract law. Thus, the language of parties' collective bargaining agreement does not restrict the Arbitrator from applying principles of promissory estoppel.

A long history of unchallenged arbitration awards utilizing promissory estoppel to support remedial relief clearly illustrates that such remedial relief is well within the authority of the arbitrator under the MTEA/MBSD labor agreement. Arbitrator Obermeyer was presented with this precedent, as well as a grievance disposition that was premised upon promissory estoppel, and appropriately considered these matters. The Award of Arbitrator Malamud did not exclude the use of the doctrine of promissory estoppel as a basis for arbitral rulings and remedies under this contract, and his decision cannot be used to support such a proposition.

Wisconsin arbitrators routinely apply the doctrine of promissory estoppel in grievances brought under a collective bargaining agreement, as do arbitrators in other jurisdictions. The Respondent's assertion that Arbitrator Obermeyer exceeded his jurisdiction by utilizing promissory estoppel theory in awarding remedial relief is without merit.

Respondent's argument that there was insufficient proof underlying the arbitrator's back pay award and its reliance on SILBERMAN V. ROETHE, 64 WIS.2D 131, 218 N.W.2D 723 (1974) is not only unpersuasive, but also, is unavailable as a basis on which to invalidate the award under the deferential standard afforded arbitration awards and the nature of Section 788.10 inquiry. As noted in OSHKOSH above, an award cannot be found to exceed the arbitrator's authority based upon a parties' disagreement with an arbitrator's judgment regarding remedy. The Commission's decision in ROCK COUNTY, DEC. NO. 25610-C (3/90) is illustrative of this principle.

Respondent's arguments regarding the application of estoppel principles were clearly espoused in its brief to the arbitrator. The arbitrator rejected such arguments and used the authority afforded him under the contract to fashion an appropriate remedy.

The Examiner should find that the Respondent has committed a prohibited practice under Section 111.70(a)(5), Stats. The Examiner should order Respondent to comply with the Award.

Respondent

The prohibited practices complaint raises an issue of first impression that involves interplay of rights and remedies under MERA and Chapter 788. The prior cases before the WERC involved categorical refusals to accept or implement awards. In the present case, the Respondent never communicated any categorical refusal to accept or implement the Obermeyer award. Rather, the Complainant was given to understand, only after having been told at least twice that the Respondent was considering a Chapter 788 action, that the Respondent was, in fact, filing such a motion and, therefore, that it would not presently comply with the Award.

Complainant does not allege that Respondent's act of considering a Chapter 788 motion, of advising Complainant in advance that it had decided to file such motion, or the filing of the motion itself, were undertaken in bad faith. Nor has it alleged any categorical refusal by the Respondent not to implement the award should its Chapter 788 motion be denied.

The issue presented in the complaint, i.e., does an employer's failure to implement an arbitration award while considering in good faith whether to exercise its Chapter 788 right to review, and during the pendency of a good faith and timely action for Chapter 788 review, constitute a prohibited refusal to "accept" or to "implement" an arbitration award under Section 111.70(3)(a)5? There are compelling and persuasive reasons for answering this question in the negative.

To require an employer to implement a remedy that upon subsequent judicial review would be undone, would make the affected employees suffer a second round of hardship. Thus, such a requirement would trigger employee grievances and dissatisfaction and undermine the fundamental policy of labor peace that imbues MERA. In a group grievance situation such as is involved herein, the employer would be forced to track down and institute legal action to recoup the remedy.

To comply with an award and then undo such compliance is awkward and disruptive and unquestionably tends to aggravate labor/management relations. Thus, where as here, an employer has a good faith basis for filing a motion for Chapter 788 review, it would be

impractical, inimical to MERA, and bad public policy to require implementation of an award before such review occurred.

When confronted with a first impression issue of statutory construction, it is fundamental that the construction should be consistent and harmonious with the statute's purpose and leading idea. STATE V. HENSLEY, 245 Wis.2d 607, 616, 629 N.W. 2d 686 (Wis. 2001); STATE V. WILLIAMS, 198 Wis.2d, 516, 527, 544 N.W. 2d 406 (Wis. 1996). Acceptance of the Complainant's argument with respect to the duty to accept and implement arbitration awards would require a construction of MERA that places that act in direct conflict with Chapter 788 and would be inconsistent with the policies underlying MERA.

To conclude that an employer's merely provisory and contingent failure to immediately comply with an award while it pursues its Chapter 788 remedies constitutes a prohibited practice would be to conclude that the exercise of an unqualified right under one statute constitutes a *per se* violation of another statute. The Wisconsin courts disfavor such statutory conflicts, and when such conflicts arise, the statutes are to be harmonized if a reasonable construction of the statutes permits. PRITCHARD V. MADISON METROPOLITAN SCHOOL DISTRICT, 242 Wis. 301, 314, 625 N.W. 2d. 613 (Ct. of Appeals, 2001).

The Commission has previously stated that "engaging in activity whereby a party seeks to exercise a statutory right is not bad faith bargaining." RACINE EDUCATION ASSOCIATION, DEC. NO. 27982-B (6/94). The same principle should apply here, i.e., exercise of the employer's unqualified right to file a Chapter 788 motion to vacate should not be deemed to implicate a prohibited practice refusal to accept or implement an award.

Harmonization is easily accomplished in the present case. The delay associated with a Chapter 788 motion by an employer to vacate an arbitration award should not be deemed to constitute a refusal to accept or implement the award under MERA because it doe not evince any categorical refusal to accept or implement an award. Rather, it is merely a provisory, contingent and eminently pragmatic disinclination to implement an award that is believed defective and that may well be vacated. Under this harmonization, a prohibited practices action filed under such circumstances should be deemed premature and dismissed.

Such a result would eliminate forum shopping, multiple filings involving the same facts before both the Commission and Circuit Court, and the need by parties in both forums to address deferral issues as occurred here. It would also spare employers from being penalized with prohibited practice filings and findings merely because they exercised the unqualified review rights created under Chapter 788.

The Chapter 788 action was stayed by the Court based upon its recognition that the Commission could decide the present case upon the narrow ground advocated here by the

Respondent, without reaching the merits of the arbitration award. Under the present, unique facts, there is no need for the Commission to reach the merits of Arbitrator Obermeyer's award. This case is ripe for dismissal, as a matter of law, on the grounds that it's premature. Upon dismissal on this ground, the parties' respective motions to vacate and confirm can be taken up by the Circuit Court.

Should the merits of the arbitration award be reached, the back pay remedy granted by the Arbitrator should be vacated. The grievance procedure in the bargaining agreement between the Respondent and the MTEA specifically limits an arbitrator's authority as follows:

> 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.

This unambiguous language requires arbitrators to apply Wisconsin contract law in determining any disputes before them. In HOFFMAN V. RED OWL STORES, INC., 26 Wis.2d 683, 698, 133 N.W. 2d, 267, 275 (Wis. 1965), the Wisconsin Supreme Court specifically held that a promissory estoppel theory of recovery is an equitable action, implicating policy decisions and discretion by a court, and most assuredly is not, in the Court's words, the equivalent of a "breach of contract action." Arbitrator Malamud recognized this in dismissing a grievance determined nearly eleven years before the presently considered arbitration decision.

Inasmuch as this Award is premised upon equitable principles, not Wisconsin contract law, it does not derive its essence form the parties' agreement because it grants relief under a theory that is expressly off limits to the Arbitrator under those provisions of the Agreement that confer and limit arbitral authority. The arbitrator plainly exceeded his authority and this aspect of the award must be vacated. It is well established that, if an arbitrator undertakes to amend the contract or acts to dispense his own brand of justice, the award will be vacated.

If promissory estoppel theory were somehow viewed to involve an application of Wisconsin contract law, the award is still defective. Recovery is not permitted under a promissory estoppel theory unless injustice can be avoided only by enforcing a promise. The requisite degree of injustice cannot be found absent a showing of detrimental reliance of both "a definite and substantial character" - "speculative losses or suffering will not suffice." SILBERMAN V. ROETHE, 64 Wis.2d. 131, 143-44, 146-47, 218 N.W. 2d. 723 (Wis. 1974). The only evidence presented by the Complainant on these issues consisted of ambiguous, highly non-particularized, and vague, abstract assertions about the scheduling of summer vacations, lost work opportunities, day care for children, and the like. Complainant's evidence in the arbitration suffers from a significant failure of proof regarding both the definiteness of the detriment claimed by the teacher/grievant and as to how substantial their claimed detriment was.

Secondly and even more significantly, under a promissory estoppel theory, an automatic award to each affected teacher of four days pay is totally inappropriate. Promissory estoppel recovery requires individualized damage considerations. Damages are available under the theory only to the extent they "are necessary to prevent injustice." "Mechanical or rule of thumb approaches" are to be avoided. Redress under the promissory estoppel theory is not deprivation of a promised reward, but the change in a plaintiff's position – given this fact, damages should "never exceed the loss caused by the change in position" and "would never be more in amount, but might be less, than the promised award." (cites omitted) Ambiguous, speculative and unproven damages are not compensable under a promissory estoppel theory.

The arbitrator, in effect, created an entirely new basis for determining damages under a promissory estoppel theory, one which adopts a *per se* approach with no consideration whatsoever of whether any cognizable loss was actually sustained or proved. If application of a promissory estoppel theory of recovery is deemed consistent with the contractual mandate that the arbitrator "be bound by the principles of law relating to the interpretation contracts followed by Wisconsin courts," the award of damages at issue must be vacated.

The Complainant argues that the Award must be upheld under general principles of deference. In making this argument, the Complainant completely disregards the contractual mandate to adhere to Wisconsin contract law "as followed by Wisconsin courts." Where, as here, the arbitrator ignores this law or applies it in a manner plainly at odds with Wisconsin law as applied by the Courts, he has exceeded his contractual authority and the award is entitled to be vacated. Under Section 788.10(c) and the cited cases, the Award should be vacated and the complaint should be dismissed.

DISCUSSION

Jurisdiction

In a prior decision involving these parties, this Examiner concluded that the Commission has jurisdiction to hear and decide the Sec. 111.70(3)(a)5 and Sec. 111.70(3)(a)7 claims raised in the Complaint. DEC. NO. 30201-A (9/01) However, recognizing that MERA and Chapter 788 provide alternative forums in which to raise issues regarding Respondent's duty to accept grievance arbitration awards; that a resolution of the issues submitted to the Circuit Court in Respondent's pending Chapter 788 action to vacate the arbitration award may resolve the issues raised in the Complaint; and that, under such circumstances, it is for the court to decide whether to honor the Commission's jurisdiction, this Examiner issued an Order that indefinitely stayed the proceedings before the Examiner pending the conclusion of the judicial proceedings.

For the purposes of this decision, the judicial proceedings were concluded when Milwaukee County Circuit Court Judge Dominic S. Amato issued his Order of November 8, 2001, staying the court proceeding pending resolution of this "parallel" proceeding. By this Order, Judge Amato "honored" the Commission's jurisdiction to hear and decide Complainant's Sec. 111.70(3)(a)5 and 7 claims. Thus, it is appropriate for the Examiner to exercise the Commission's jurisdiction to hear and decide the allegations raised in the Complaint.

Merits

The Complaint alleges that Respondent has violated Sec. 111.70(3)(a)5 and 7, Stats., by refusing to implement the June 15, 2001 Arbitration Award of Arbitrator Peter E. Obermeyer. Complainant, it its written argument, limits its discussion to the alleged violation of Sec. 111.70(3)(a)5, Stats. Accordingly, the Examiner considers Complainant to have abandoned it allegation that Respondent also has violated Sec. 111.70(3)(a)7, Stats.

Sec. 111.70(3)(a)5, Stats., provides as follows:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

The Obermeyer Award is a grievance arbitration award. Under the terms of the parties' collective bargaining agreement, a grievance arbitration award that is made within the scope of the arbitrator's jurisdictional authority is final and binding upon the parties. Sec. 111.70(3)(a)5, Stats., imposes upon the Respondent a duty to accept the terms of such arbitration awards.

As Examiner Gratz stated in STATE OF WISCONSIN, DEC. NO. 28379-B, 28415-B (3/98); AFF'D BY OPERATION OF LAW, DEC. NO. 28379-C, 28415-C (WERC, 3/98):

> The Wisconsin Supreme Court discussed the standards for review of an arbitrator's remedies in CITY OF MILWAUKEE V. MILWAUKEE POLICE ASSOCIATION, 97 Wis.2d 15 (1980), as follows:
>
> Judicial review of an arbitrator's decision is quite limited. The merits of the arbitration award are not within the province of courts on review. "The refusal of courts to review the merits of an arbitration award is the proper

approach to arbitration under collective bargaining agreements." UNITED STEELWORKERS OF AMERICA v. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 596 (1960). . . . The decision of the arbitrator will not be disturbed for an error of law or fact. JOINT SCHOOL DISTRICT NO. 10 v. JEFFERSON ED. ASSO., 78 Wis.2d 94, 117-118, 253 N.W.2d 536 (1977).

The arbitrator's power to make an award is not unlimited. The power of the arbitrator is derived from the contract and is limited by the terms of the contract:

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." UNITED STEELWORKERS OF AMERICA v. ENTERPRISE WHEEL & CAR CO., 363 U.S. at 597; see also, ALEXANDER v. GARDNER-DENVER CO., 415 U.S. 36, 53-54 (1974).

When a grievance is properly before the arbitrator for his decision, the court will overturn the award made when there has been a perverse misconstruction or positive misconduct plainly established, or if the award is illegal or violates a strong public policy or if there is a manifest disregard of the law. MILW. BD. SCH. DIRS. v. MILW. TEACHERS' ASSO., 93 Wis.2d at 422; JT. SCHOOL DIST. NO. 10 v. JEFFERSON ED. ASSO., 78 Wis.2d 94, 117-118, 253 N.W.2d 536 (1977). . . . Sec. 298.10, Stats. (1973) provided for the vacation of an arbitrator's award under approximately the same circumstances allowed at common law. . . . [reciting the contents of 298.10 which parallel the current 788.10]

We must look to whether the arbitrator exceeded the limits of his power under the contract. If the arbitrator in effect undertook to amend the contract, to substitute his own discretion for that vested in one or another of the parties or if the arbitrator acted to dispense his own brand of justice the award will be vacated. TIMKIN CO. v. LOCAL UNION NO. 1123, UNITED STEELWORKERS OF AMERICA, AFL-CIO, 482 F.2d 1012, 1014-1015 (6th Cir. 1974); DETROIT COIL CO. v. INTERN. ASS'N. OF M. & A., WORKERS, LODGE #82, 594 F.2d 575 (6th Cir.),

cert. denied 444 U.S. 840 (1979). The arbitrator is free to give his own construction to ambiguous language in the collective bargaining agreement but he is without authority to disregard or modify plain and unambiguous provisions. MONONGAHELA POWER CO. V. LOCAL NO. 2332 INTERNATIONAL BRO. OF EL. WORKERS, 566 F.2d 1196, 1199 (4th Cir. 1975). The award must "draw its essence" from the collective bargaining agreement.

WASHINGTON-BALTIMORE NEWSPAPER GUILD V. BUREAU OF NATIONAL AFFAIRS, 97 L.R.R.M. 3068, 3069 (D.D.C. 1978).

With these principles in mind we must analyze the relevant contract provisions to determine whether the arbitrator exceeded the outer bounds of his power.

Following issuance of the CITY OF MILWAUKEE case cited by Examiner Gratz, the Supreme Court of Wisconsin decided NICOLET HS DIST. V. NICOLET ED. ASS'N., 118 WIS.2D 707 (1984) and LUKOWSKI V. DANKERT, 184 WIS.2D 142 (1994). In NICOLET, the Court discussed the scope of review of an arbitrator's award and stated:

This Court has developed several well-settled rules governing review of arbitrators' decisions. An arbitrator's award is presumptively valid, and it will be disturbed only when its invalidity is demonstrated by clear and convincing evidence. MILWAUKEE BOARD OF SCHOOL DIRECTORS V. MILWAUKEE TEACHERS' EDUCATION ASSO., 93 WIS.2D 415, 422, 287 N.W.2D 131(1980). Furthermore, our review is quite limited in scope. As we noted in OSHKOSH V. UNION LOCAL 796-A, 99 WIS.2D 95, 299 N.W.2D 210 (1980):

"This court's acceptance of the STEELWORKER'S TRILOGY in the case of DEHNART 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. A final and binding arbitration clause signifies that the parties to a labor contract desire to have certain contractual disputes determined on the merits by an impartial decision-maker whose determination the parties agree to accept as final and binding. Great deference is paid to the arbitrator's award as the product of the initial bargain of the parties. 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. MILWAUKEE PRO. FIREFIGHTERS LOCAL 215 V. MILWAUKEE, 78 WIS.2D 1, 22, 253 N.W.2D 481 (1977).

"The parties bargain for the judgment of the arbitrator – correct or incorrect – whether that judgment is one of fact or law. *Id.* At 103 (footnotes omitted) (emphasis in the original)

"... We therefore must uphold the arbitrators' decision as long as it is within the bounds of the contract language, regardless of whether we might have reached a different result under that language, and does not violate the law." ARBITRATION BETWEEN WEST SALEM & FORTNEY, 108 WIS.2D 167, 179, 321 N.W.3D 225 (1982).

However, the arbitrator's decision-making authority is not unlimited. If the arbitrator exceeded his authority by, in effect, undertaking to amend the contract, to substitute his own discretion for that vested in one or another of the parties, or if the arbitrator acted to dispense his own brand of justice, the award must be vacated. MILWAUKEE V. MILWAUKEE POLICE ASSO., 97 WIS.2D, 15, 26, 292 N.W.2D 841 (1980) (citations omitted) Further, the power of the arbitrator is derived solely from the contract, and that authority is, therefore, limited by the terms of the contract. *See id.*, at 25.

In LUKOWSKI, at page 149, the Court stated:

The standard of review for arbitration awards is generally very limited. SEE, MILW. PRO. FIREFIGHTERS LOCAL 215 V. MILWAUKEE, 78 WIS.2D 1, 21, 253 N.W.2D 481 (1977) When reviewing an arbitration award the function of the courts is essentially supervisory, ensuring that the parties received the arbitration for which they bargained. *Id*, at 22. Courts will overturn an arbitration award only if there is a "perverse misconstruction or if there is positive misconduct plainly established or if there is a manifest disregard of the law, or if the award is illegal or violates strong public policy." JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., 78 WIS.2D 94, 117-118, 253 N.W.2D 536 (1977); SCHERRER CONSTR. CO., 64 WIS.2D AT 729.

In reviewing an arbitration the courts are guided by the general statutory standards, listed in secs. 788.10 and 788.11, Stats./3 . . . and by the standards developed at common law. GLENDALE PROF. POLICEMEN'S ASSO., 83 WIS.2D AT 100. If these general standards are not violated, the arbitrator's award should be confirmed by the trial court. SEE, JT. SCHOOL DIST. NO. 10, 78 WIS.2D AT 117-118.

The LUKOWSKI Court, beginning at page 151, also stated:

. . . arbitration awards are ultimately subject to the governing law. The rule that a court will not overturn an arbitration panel for "mere errors of judgment as to law or fact" does not mean that all errors will be tolerated. Arbitration awards will be vacated when the award is illegal . . .; arbitration awards will be vacated when they conflict with governing law in the constitution or statute, . . . and arbitration awards will be vacated if they violate a strong public policy. . .

. . . arbitration awards will be vacated when they exceed what is permissible in the contract providing for arbitration. An arbitrator obtains authority only from the contract of the parties and therefore is confined to the interpretation of that contract and cannot ignore that contract when making an award. SEE, MILW. BD. SCH. DIRS., 93 WIS.2D AT 430-431; JT. SCHOOL DIST. NO. 10, 78 WIS.2D AT 101; SCHERRER CONSTR. CO., 64 WIS.2D. AT 729; MILW. PRO. FIREFIGHTERS LOCAL 215, 78 WIS.2D. AT 21. In this case the parties specifically contracted in the arbitration clause of General Casualty's insurance policy that, "[l]ocal rules of law as to procedures and evidence will apply." Thus, the parties had a legitimate expectation that governing law would be followed and applied properly. 4/ (footnote omitted)

. . .

. . . In OSHKOSH V. UNION LOCAL 796-A, 99 WIS.2D AT 107, this court held that an arbitrator's award should be upheld if there is some reasonable foundation for the interpretation of the contract offered in the decision. Likewise, in MADISON POLICE ASS'N., 144 WIS.2D AT 588, CITIING WITH APPROVAL FROM THE COURT OF APPEALS, CITY OF MADISON V. FIREFIGHTERS, 133 WIS.2D 186, 191, 394 N.W.2D 766 (CT. APP. 1986) this court made clear that an arbitrator cannot be said to have manifestly disregarded the law if substantial authority sustains the arbitrator's assumption as to the law.

. . .

Sec. 788.10, Stats., states as follows:

788.10 Vacation of award, rehearing by arbitrators.

(1) In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:
(a) Where the award was procured by corruption, fraud or undue means;
(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear any 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 arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(2) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

Respondent argues that it "never communicated any categorical refusal to accept or implement the Obermeyer Award," but rather, only indicated that Respondent would not presently comply with Award, pending resolution of Respondent's Chapter 788 action. According to Respondent, such conduct cannot be deemed a prohibited refusal to accept or implement the Obermeyer Award.

To accept Respondent's argument that a timely and good-faith exercise of its Chapter 788 right to seek vacation of an arbitration award is a valid defense to Complainant's Sec. 111.70(3)(a)5 claim, would be to conclude that Respondent has no Sec. 111.70(3)(a)5 duty to accept the Obermeyer Award until Respondent has fully litigated its Chapter 788 claim. As Complainant argues, such a conclusion is inconsistent with well-established law that recognizes that MERA and Chapter 788 provide alternative forums in which to review arbitration awards. DANE COUNTY V. DANE CTY. UNION LOCAL 65, 210 WIS.2D 267, 565 NW.2D. 540 (CT. APP.1997); MADISON METROPOLITAN SCHOOL DIST. V. WERC, 86 WIS.2D 249, 271 N.W.2D 314 (CT. APP.1978)

A conclusion that Respondent does not have a Sec. 111.70(3)(a)5 duty to accept the Obermeyer Award until Respondent has fully litigated its Chapter 788 claim is also inconsistent with the language of Section 788.13, Stats., which states as follows:

788.13 Notice of motion to change award. Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or attorney within 3 months after the award is filed or delivered, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

As a review of the above language reveals, the filing of a Chapter 788.13 Motion to Vacate an award is not sufficient, in and of itself, to stay a proceeding by an adverse party to enforce the award. Rather, it is for the Court, in the exercise of its discretion, to order that such proceedings be stayed. In this case, not only has the Court not issued a stay in the enforcement proceedings before the Commission, but also it has specifically stayed the Motion to Vacate action pending the resolution of the Commission's "parallel" enforcement proceedings.

Respondent is incorrect when it argues that, to conclude that Respondent has refused to accept the Award of Arbitrator Obermeyer is to conclude that the exercise of an unqualified right under Chapter 788 constitutes a per se violation of MERA. First, Respondent does not have an unqualified Chapter 788 right. Rather, as discussed above, it is for the court to decide whether or not Respondent's Chapter 788 right to Move to Vacate the Obermeyer Award takes precedence over Complainant's Sec. 111.70(3)(a)5 claim. Secondly, the conclusion that Respondent has refused to accept the Award of Arbitrator Obermeyer is not sufficient, in and of itself, to give rise to a statutory violation. Rather, as set forth above, MERA provides Respondent with the right to have the validity of this Award reviewed under the same standards that are applied by the court in a Chapter 788 Motion to Vacate proceeding. ROCK COUNTY, DEC. NO. 25610-C (WERC, 3/90); SHEBOYGAN COUNTY, DEC. NO. 23277-B (4/87).

The conflicts that Respondent perceives to exist between Chapter 788 and MERA have been "harmonized." This harmonization occurred when the Courts recognized that MERA and Chapter 788 provide alternative forums for the review of arbitration awards and this Commission recognized that it is for the court to decide whether to honor the Commission's jurisdiction to make such a review. BURNETT COUNTY, DEC. NO. 28262-A (MCLAUGHLIN, 5/95); PIERCE COUNTY, DEC. NO. 16067 (WERC, 1/78)

In the present case, the court has honored the Commission's jurisdiction to review the Award of Arbitrator Obermeyer. Thus, contrary to the argument of the Respondent, this case is not ripe for dismissal, but rather, is ripe for a determination of the merits of Complainant's Sec. 111.70(3)(a)5 claim.

Notwithstanding Respondent's numerous arguments to the contrary, Respondent has refused to accept the Award of Arbitrator Obermeyer. This conclusion of the Examiner is not impractical, contrary to statute, or inconsistent with public policy.

Having concluded that Respondent has refused to accept the Award of Arbitrator Obermeyer, the issue to be decided is whether or not this refusal violates Sec. 111.70(3)(a)5, Stats. Respondent argues that it does not because the Award was not within the scope of the arbitrator's jurisdictional authority.

As set forth above, one of the grounds for vacating an Arbitration Award under Chapter 788 is that the Arbitrator exceeded his powers. Thus, if Respondent is correct in its assertion that the Award of Arbitrator Obermeyer was outside the scope of this Arbitrator's jurisdictional authority, then, under the well-established law discussed above, Respondent does not have a Sec. 111.70(3)(a)(5), Stats., duty to accept the Obermeyer Award.

Part VII, Grievance and Complaint Procedure, of the parties' collective bargaining agreement contains the following:

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

Respondent argues that the Obermeyer Award and the remedy ordered therein are premised upon the equitable principle of promissory estoppel; that this principle is not one of Wisconsin contract law; and, therefore, the Obermeyer Award and the remedy ordered therein are outside the scope of Arbitrator Obermeyer's jurisdictional authority.

The Award of Arbitrator Obermeyer includes following:

> **CONCLUSION**
>
> The District, in implementing Part IV, Section I, 1, rights to schedule and cancel in-service training, is obligated to carry out those rights in good faith and with fair dealing. Its actions in establishing, recruiting, and confirming enrollment with teachers created a promissory estoppel relationship. Cancellation of the in-service training without adequate notice to enrolled teachers requires a remedy. The Arbitrator has the authority to craft such a remedy under the terms of the Contract.
>
> . . .
>
> 10. The District established a "promissory estoppel" relationship with teachers enrolled in the August 3, 4, 6, and 7, 1998, in-service program.

11. The Arbitrator has the authority to determine a remedy for teachers who were not notified of the in-service training cancellation before August 3, 1998.

12. The District is obligated to compensate the teachers listed in Appendix A with four days pay at their regular daily rate.

13. A cease and desist order is not an appropriate remedy.

DECISION:

3. The District shall compensate all teachers enrolled in the Efficacy Training in-service training who were not notified by the District before August 3, 1998, and who reported to the scheduled training site with four days pay at their regular daily rate.

4. This Decision shall include teachers who were:

   A. Not notified and who reported to the training site on the morning of August 3, 1998; and

   B. Notified on the morning of August 3, 1998, who did not report to the training site, but documented their intention to do so.

5. The Arbitrator shall maintain jurisdiction over this Decision to resolve any disputes concerning the implementation of the remedy for 60 calendar days.

In arguing that promissory estoppel is not a principle of law relating to the interpretation of contracts followed by Wisconsin Courts, Respondent relies upon HOFFMAN V. RED OWL STORES, INC. 26 WIS.2D 683 (1965). As Complainant argues, however, the Court expressly recognized that promissory estoppel is a principle of law relating to the interpretation of contracts under Wisconsin law when the Court, at page 696, stated

> Because we deem the doctrine of promissory estoppel, as stated in sec. 90 of Restatement, 1 Contracts, is one which supplies a needed tool which courts may employ in a proper case to prevent injustice, we endorse and adopt it.

As Complainant further argues, in finding that the elements of promissory estoppel are not identical to those of breach of contract, the Court in RED OWL, was explaining the need for promissory estoppel doctrine and not removing this doctrine from the body of contract law.

As set forth in Arbitrator Obermeyer's Award, Arbitrator Obermeyer found the existence of a promissory estoppel relationship and relied upon this relationship when he fashioned his remedy. Inasmuch as promissory estoppel is a principle of law relating to the interpretation of contracts followed by Wisconsin Courts, Arbitrator Obermeyer did not exceed the scope of his jurisdictional authority when he found the existence of a promissory estoppel relationship and relied upon promissory estoppel in fashioning his remedy.

Relying upon RED OWL and SILBERMAN V. ROETHE, 64 WIS.2D. 131, 218 N.W.2D 723 (1974) Respondent argues that, if the Examiner were to deem the principle of promissory estoppel to constitute an application of Wisconsin contract law, then the Obermeyer Award would still be defective. Respondent further argues that, under promissory estoppel theory, recovery is not permitted unless injustice can only be avoided by enforcing a promise; that the requisite degree of injustice cannot be found absent a showing of detrimental reliance of both a "definite and substantial character;" and that speculative losses or suffering will not suffice. Respondent maintains that the evidence at the arbitration hearing suffers from a significant failure of proof as concerns both the definiteness of the detriment claimed by the teacher/grievants and the substance of their claimed detriment.

Additionally, Respondent argues that promissory estoppel recovery requires individualized damage considerations. Respondent concludes, therefore, that in awarding every teacher/grievant a full four days of pay without any consideration or regard to substantive proof of reliance, Arbitrator Obermeyer totally ignored Wisconsin case law governing damages under promissory estoppel.

The remedy ordered by Arbitrator Obermeyer was to compensate certain teachers who had enrolled in the inservice and had not received timely notification of the cancellation of the inservice. The compensation was four days pay at their regular daily rate, which was the pay that each would have received had they attended the cancelled inservice.

In RED OWL, at page 698, the Court recognized that there are three requirements of promissory estoppel:

(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?

(2) Did the promise induce such action or forbearance?

(3) Can injustice be avoided only by enforcement of the promise?

It is evident from the Discussion, Section 4, that Arbitrator Obermeyer found that the Respondent's pattern of conduct in sponsoring, recruiting, and confirming enrollment and compensation for participation in the four day inservice program was a promise that induced the enrolled teachers to make arrangements to participate in this program for four days. One may reasonably conclude that this conduct of Respondent involved a promise, i.e., four days of pay for attending the inservice, that the promisors should reasonably expect to induce action or forbearance, i.e., the teachers making themselves available for the four days of inservice.

It is evident from the discussion that Arbitrator Obermeyer found that the teachers had enrolled in the four day in-service program. Thus, one may reasonably conclude that the "promise" did induce the action or forbearance that the promissory should have reasonably expected.

It is evident from the "Background of the Case" that Arbitrator Obermeyer found that the inservice was scheduled to be held for four days outside of the teachers' regular school year. One may reasonably conclude that the induced action or forbearance was of a definite and substantial character.

The Court in RED OWL went on to state:

> . . . While the first two of the above-listed three requirements of promissory estoppel present issues of fact which ordinarily will be resolved by a jury, the third requirement, that the remedy can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court. Such a policy decision necessarily embraces an element of discretion.

The remedy ordered by Arbitrator Obermeyer was limited to the teachers that were found to have not received notice of the cancellation of the inservice by August 2, 1998, which was one day before the start of the inservice. Given the discretion permitted in invoking a remedy premised upon promissory estoppel, one may reasonably conclude that injustice would result here if these teachers were not granted some relief because the failure of Respondent to timely notify the teachers that it did not intend to keep its promise deprived these teachers of a reasonable opportunity to use these four days in whatever manner they chose.

The Court in RED OWL states that:

> Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should only be such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule-of-

thumb approaches to the damage problem should be avoided. In discussing remedies to be applied by courts in promissory estoppel we quote the following views of writers on the subject:

> "Enforcement of a promise does not necessarily mean Specific Performance. It does not necessarily mean Damages for breach. Moreover, the amount allowed as Damages may be determined by the plaintiff's expenditures or change of position in reliance as well as by the value to him of the promised performance. Restitution is also an 'enforcing' remedy, although it is often said to be based upon some kind of a rescission. In determining what justice requires, the court must remember all of its powers, derived from equity, law merchant, and other sources, as well as the common law. Its decree should be molded accordingly. 1A Corbin, Contracts, p. 221, sec. 200.
>
> "The wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment. It would follow that the damages should not exceed the loss caused by the change of position, which would never be more in amount, but might be less, than the promised reward." Seavey, Reliance on Gratuitous Promises or Other Conduct, 64 Harvard Law Review (1951), 913, 926.
>
> "There likewise seems to be no positive legal requirements, and certainly no legal policy, which dictates the allowance of contract damages in every case where the defendant's duty is consensual." Shattuck, Gratuitous Promises-A New Writ?, 35 Michigan Law Review (1936), 908, 912. (footnotes omitted)

As reflected in the above, the Court, and thus in this instance Arbitrator Obermeyer, has great discretion in formulating a remedy premised upon promissory estoppel.

The Court in SILBERMAN, recognized that "Neither the RED OWL case nor the handful of cases following it which concern the doctrines of promissory estoppel have discussed in detail any factors which can be useful in determining whether injustice will result from nonenforcement of the alleged promise," but made no finding that would overrule, in any way, the RED OWL case.

In OSHKOSH, the Court held that an arbitrator's award should be upheld if there is some reasonable foundation for the interpretation of the contract offered in the decision. Construing the Award of Arbitrator Obermeyer as a whole, it is reasonable to conclude that the "wrong" remedied by the Award was Respondent's causing an affected employee to change a position to his/her detriment, i.e., to make himself/herself available for four days of employment at a time in which the employee had no duty to make himself/herself available for employment. One may reasonably conclude that the "damage" resulting from this wrong was the loss of opportunity to use the four days in whatever manner the affected employee chose. One may reasonably conclude that the remedy of four days pay at the employee's regular rate did not exceed the loss caused by the change in position, but rather, was what was necessary to prevent injustice. Given the fact that each affected employee suffered the same "wrong" and the same "damage", one may reasonably conclude that each affected employee should receive the same remedy. Arbitrator Obermeyer did not exceed the bounds of the principles of law relating to the interpretation of contracts followed by Wisconsin courts when this Arbitrator ordered that the affected teachers be compensated with four days pay at their regular daily rate.

Conclusion

As the Respondent argues, under the terms of the parties' collective bargaining agreement, Arbitrator Obermeyer is "bound by the principles of law relating to the interpretation of contracts followed by Wisconsin courts." Construing the Obermeyer Award, as a whole, one may reasonably conclude that the Award of Arbitrator Obermeyer, including the remedy fashioned by Arbitrator Obermeyer, was based upon principles of law relating to the interpretation of contracts followed by Wisconsin Courts. Thus, the Award of Arbitrator Obermeyer is made within the scope of his jurisdictional authority.

Under Wisconsin law, an arbitrator's award is presumptively valid and will be disturbed only when its invalidity is demonstrated by clear and convincing evidence. An arbitrator's award is invalid if it involves a perverse misconstruction, a positive misconduct plainly established, a manifest disregard of the law, is illegal or violates a strong public policy. Given the absence of clear and convincing evidence that the June 15, 2001 Award of Arbitrator Peter E. Obermeyer involves a perverse misconstruction, a positive misconduct plainly established, a manifest disregard of the law, is illegal or violates a strong public policy, this Examiner must conclude that the Obermeyer Award is valid.

The June 15, 2001 Award of Arbitrator Obermeyer is final and binding upon the parties. By failing to accept and implement the Award of Arbitrator Obermeyer, Respondent has violated Sec. 111.70(3)(a)5, Stats. The appropriate remedy for this statutory violation is to order Respondent to cease and desist from refusing to accept and implement the terms of the June 15, 2001 Arbitration Award of Arbitrator Obermeyer; to immediately make whole all the

teachers that were entitled to receive four days pay under the remedy ordered by Arbitrator Obermeyer with the applicable statutory interest rate calculated from the date that the Award was issued; 1/ and to order Respondent to post the appropriate notice.

1/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the Commission.

Dated at Madison, Wisconsin, this 30th day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

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