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-C

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 Milwaukee Teachers' Education Association.

Attorney Donald L. Schriefer, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of Milwaukee Board of School Directors.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 30, 2002, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondent Milwaukee Board of School Directors had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by failing to implement a grievance arbitration award. To remedy the prohibited practice, she ordered Respondent to cease and desist from implementing the award, to make affected employees whole, and to post a notice to employees.

On August 2, 2002, Respondent filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and opposition to the petition. The record was closed on September 30, 2002 when Respondent advised the Commission that it would not be filing a reply brief.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 24th day of October, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Milwaukee Public Schools

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background

Complainant Milwaukee Teachers' Education Association filed a complaint alleging that Respondent Milwaukee Board of School Directors had committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 7, Stats., by refusing to implement a grievance arbitration award issued by Peter Obermeyer.

Respondent then filed a motion to vacate the Obermeyer Award in Milwaukee County Circuit Court and Complainant filed a responsive motion to confirm the Award.

Citing its motion to vacate, Respondent filed a motion to dismiss the complaint with Examiner Burns. Complainant opposed the motion to dismiss. In response, the Examiner issued an order staying proceedings before her until the Milwaukee County Circuit Court (Judge Dominic S. Amato) determined whether he wished to proceed as to the motions pending before him.

Judge Amato then issued an order staying action on the motions before him pending disposition of the complaint before Examiner Burns.

The Examiner's Decision

In her decision, the Examiner first responded to Respondent's argument that its timely and good faith exercise of its Chapter 788 right to seek vacation of the Obermeyer Award is a valid defense to Complainant's Sec. 111.70(3)(a)5, Stats., claim. She reasoned as follows:

> 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.

Having concluded that Respondent's motion to vacate the Obermeyer Award did not insulate Respondent from potential liability under Sec. 111.70(3)(a)5, Stats., the Examiner then turned to the question of whether the Award was valid. She reasoned:

> 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.
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> 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:
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> > "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.
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> "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.

Positions of the Parties on Review

Respondent

Respondent urges the Commission to reverse the Examiner.

Respondent contends that the Examiner erred when she concluded that the pendency of the good faith motion to vacate did not insulate Respondent from potential liability under Sec. 111.70(3)(a)5, Stats., until the merits of that motion were resolved. Respondent asserts that to require implementation of an award before Chapter 788 review is completed is offensive to the interests of labor peace and to the Chapter 788 process itself. Respondent further alleges that the Examiner's reliance on the second sentence of Sec. 788.13, Stats., is not persuasive. Given the foregoing, Respondent asserts the complaint should have been dismissed as prematurely filed and the Examiner should not have proceeded to consider the validity of the Obermeyer Award.

Should the Commission conclude that it is appropriate to consider the validity of the Obermeyer Award, Respondent argues that the Award is invalid because it does not honor the contractual requirement that an arbitrator is bound by "the principles of law relating to the interpretation of contracts followed by Wisconsin courts." Respondent asserts that the Obermeyer Award's reliance on the doctrine of promissory estoppel was contrary to this contractual requirement because said doctrine comes into play only where there is no valid or enforceable contract to apply. Even if it is concluded that it was appropriate for Obermeyer to apply the doctrine of promissory estoppel, Respondent contends that he improperly applied that doctrine when awarding wages to employees who did not demonstrate any damage, detriment or inconvenience. Thus, Respondent argues that Obermeyer exceeded his authority under the contract and the Award is invalid.

Complainant

Complainant asks that the Examiner be affirmed.

Complainant argues that the Examiner properly rejected Respondent's claim that a Sec. 111.70(3)(a)5, Stats., claim is not ripe where a Chapter 788 action is being pursued. Complainant asserts that a contrary conclusion would not be in the interests of labor peace and has no support in the language of Chapter 788 or Sec. 111.70(3)(a)5, Stats.

Complainant contends the Examiner was correct when concluding that the Obermeyer Award was not rendered invalid by use of the doctrine of promissory estoppel or by the remedy granted. Complainant asserts it is clear that promissory estoppel is within the "precepts understood to be an element of contract law" and that the remedy awarded is within the range of remedial discretion under this estoppel doctrine.

DISCUSSION

Looking first at the question of whether Respondent should be insulated from potential liability under Sec. 111.70(3)(a)5, Stats., by the pendency of the Chapter 788 action, we affirm the Examiner's rejection of this Respondent argument.

As cited by the Examiner, DANE COUNTY V. DANE CTY. UNION LOCAL 65, 210 WIS.2D 267 (CT. APP. 1997) and MADISON METROPOLITAN SCHOOL DIST. V. WERC, 86 WIS.2D 249 (CT. APP. 1978) clearly establish that motions to a circuit court to vacate/confirm an award through use of Chapter 788 and complaints filed with the Wisconsin Employment Relations Commission alleging a violation of Sec. 111.70(3)(a)5, Stats., both invoke forums in which the validity of an arbitration award can be tested against the standards of Chapter 788. Where, as here, the Court has elected to honor our jurisdiction under Sec. 111.70(3)(a)5, Stats., rather than proceed with the motions to vacate/confirm the Obermeyer Award, we think it clear that it is appropriate to now determine the validity of the Obermeyer Award and thereby resolve the merits of the Sec. 111.70(3)(a)5, Stats., complaint.

As noted by Complainant, there is nothing in the statutory language of Sec. 111.70(3)(a)5, Stats., or Chapter 788 that supports Respondent's view that it is automatically insulated from liability under Sec. 111.70(3)(a)5, Stats., while a motion to vacate is pending. Thus, while the Legislature could have expressed such a choice in statutory language, it did not. Further, as noted by the Examiner, the existing statutory language found in Sec. 788.13, Stats., can be reasonably interpreted as contrary to Respondent's position. The second sentence of Sec. 788.13, Stats., grants the Court discretion to decide whether proceedings to enforce an award should be stayed during the pendency of a motion to vacate. Here, the Court did not choose to stay enforcement proceedings.

In addition, we reject Respondent's contentions that labor peace would be advanced if its position were to prevail. Section 111.70(6), Stats., makes it the public policy of the State of Wisconsin that procedures for the resolution of labor disputes be "speedy." It would be contrary to this statutory admonition to allow the losing party in a grievance arbitration proceeding to be insulated from liability until it has exhausted its rights under Chapter 788. Instead, we think it is clear that if a party elects not to implement an award, that party will immediately incur liability for that choice unless the award is found invalid.

While Respondent correctly notes that in a Sec. 111.70(3)(a)5, Stats., proceeding the validity of an award is raised only as a defense to a refusal to implement, we find any distinctions between our complaint forum and a Chapter 788 motion to vacate to be distinctions without a difference as to the question of whether a Sec. 111.70(3)(a)5, Stats., claim is premature. In both forums, the validity of the award is measured by the same standard – Chapter 788. In both forums, the award becomes unenforceable if the award is found to be at odds with Chapter 788. In both forums, the validity of the award can be raised as a defense -- i.e., when a motion to confirm is filed a responsive motion to vacate is the functional equivalent of the "invalid award" defense raised in the Sec. 111.70(3)(a)5, Stats., complaint proceeding.

Given all of the foregoing, we affirm the Examiner's conclusion that Complainant's Sec. 111.70(3)(a)5, Stats., claim is ripe for resolution on its merits.

We turn to Respondent's contention that the Examiner erred when she concluded that the Obermeyer Award was valid when measured against Chapter 788 and thus that Respondent's refusal to implement the Award did violate Sec. 111.70(3)(a)5, Stats.

Looking first at the question of whether Obermeyer's use of the promissory estoppel doctrine invalidates the Award, we affirm the Examiner's determination that the doctrine is sufficiently related to interpretations of contract so as to be consistent with the contractual requirement that "the impartial referee shall be bound by the principles of law relating to the interpretation of contracts followed by Wisconsin Courts." Because we adopt her rationale (which we quoted earlier herein) we make no further comment.

Lastly, we turn to the contention that the remedy granted in the Obermeyer Award is beyond the realm of the doctrine of promissory estoppel. Again, we affirm the Examiner and find her expressed and previously quoted rationale persuasive. As she concluded, the remedy awarded is within the broad range of remedial discretion afforded by the doctrine of promissory estoppel.

In closing, it is worth pointing out that even if Obermeyer had erred as to the role of promissory estoppel or the extent of a decision-maker's remedial discretion under that doctrine, the Award would still withstand scrutiny. This is so because so long as there is

reasonable or substantial authority to support what is ultimately determined to nonetheless be an erroneous legal judgment, the Wisconsin courts have made clear that such "errors of law" by an arbitrator do not warrant overturning an award. LUSKOWSKI V. DANKERT, 184 WIS.2D 142 (1994); OSHKOSH V. UNION LOCAL 796-A, 99 WIS.2D 95 (1980). Such reasonable or substantial support is present here.

Dated at Madison, Wisconsin, this 24th day of October, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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