

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant,

vs.

MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.

Case 406
No. 62216
MP-3915

Decision No. 30590-A

Appearances:

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

Office of the Milwaukee City Attorney, 200 East Wells Street, Room 800, Milwaukee, Wisconsin 53202, by **Assistant City Attorney Donald L. Schriefer**, appearing on behalf of the Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On March 17, 2003, Milwaukee Teachers' Education Association filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that the Milwaukee Board of School Directors had committed prohibited practices in violation of Sec. 111.70(3)(a)1 and 5, Stats., by refusing to complete the remedy portion of a grievance arbitration hearing. On April 17, 2003, the Commission 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. A hearing on the complaint was held in Milwaukee, Wisconsin on May 5, 2003. The record was closed on

No. 30590-A

July 24, 2003, upon receipt of post-hearing written argument. Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Milwaukee Teachers' Education Association, hereafter MTEA or Complainant, is the recognized collective bargaining agent of certain employees of the Milwaukee Public Schools (MPS), including a teacher bargaining unit, and has its principal office located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

2. Milwaukee Board of School Directors, hereafter Board or Respondent, directs and controls the operations of the MPS, which is a public school system, and maintains its principal office at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

3. At all times material hereto, the Complainant and the Respondent have been parties to a collective bargaining agreement that contains a grievance procedure that culminates in final and binding arbitration. On or about November 15, 2000, the Complainant filed Grievance No. 00/228 on behalf of the teacher bargaining unit, which asserted that the Respondent had violated Part V, Section Q(9) of the parties' collective bargaining agreement by failing to adhere to the contractual procedures for incompatibility evaluations. On or about February 14, 2001, the Respondent issued a grievance disposition denying the grievance. Thereafter, the Complainant invoked final and binding arbitration and, pursuant to the contractual grievance and arbitration procedure, the parties selected Barbara Doering as the arbitrator of Grievance No. 00/228. Arbitrator Doering conducted three days of hearing on this grievance, the last of which was on March 5, 2002. On the first day of hearing, each party provided Arbitrator Doering with its statement of the issues. Counsel for the Respondent stated the issues as follows:

Is the Teacher who is not assigned to an expanded interview school under the contract, Part V(Q) able to utilize Part V(Q)(9), incompatibility evaluation procedures?

If not, what is the appropriate remedy?

Did the Board violate Part V(Q)(9) in refusing to grant the Grievants' request for an incompatibility assignment?

If not, what is the remedy?

Counsel for the Complainant provided its statement of the issues in written form, which statement is as follows:

Did the administration violate Part V, Section Q(9) of the MBSD/MTEA teacher contract by refusing to write an incompatibility evaluation form and reassigning all teachers who requested such evaluations because they believed that they were incompatible with their school?

Did the administration violate Part V, Section Q(9) of the teacher contract by refusing to reassign teachers to other MPS schools or place them on day-to-day assignment after they informed their school principals that they believed they were incompatible with the school and wished to be reassigned from that school to another MPS school or placed on day-to-day assignments at the earliest opportunity?

If so, what would the remedy be?

During opening statements before Arbitrator Doering, Counsel for the Complainant asked the Arbitrator to retain jurisdiction for a period of sixty days to resolve any questions that may arise in complying with the Arbitrator's Award, without objection from Counsel for the Respondent. On September 10, 2002, Arbitrator Doering issued her Award on Grievance No. 00/228, which states as follows:

AWARD

The administration violated Part V, Section Q(9) of the MBSD/MTEA teacher contract by refusing to write an incompatibility evaluation form and by not reassigning, at the earliest opportunity, the grievant and other similarly situated teachers assigned to qualified schools—regardless of how they came to be assigned there—who believed themselves to be incompatible with their school and conferred with their evaluator(s) as is required by Section Q(9). The remedy shall be as is stated in the conclusions above and the arbitrator will retain jurisdiction to resolve remedy questions, which, if not invoked by one side or the other, shall expire after sixty (60) days.

In a letter dated November 15, 2002, Donald Ernest, the Complainant's Assistant Executive Director, confirmed a telephone conversation with Arbitrator Doering regarding "the request of the parties for you to resolve a dispute that has arisen regarding your arbitration award dated September 10, 2002. We agreed that you would return to resolve the dispute on: Thursday, February 6, 2003." This letter was cc'd to Deborah Ford, MPS Labor Relations Director, and Don Schrieffer, Respondent's Counsel. At the time of this letter, Ford had had

discussions with another Complainant Representative, Sid Hatch. From these discussions, Ford understood that Complainant had issues regarding the form that had been developed by MPS in response to the Doering Award and that Complainant would be requesting that Arbitrator Doering return. Ford had not authorized the Complainant to make this request and had not given the Complainant express consent to make this request. By letter dated November 27, 2002 and addressed to Ford and Ernest, Arbitrator Doering stated the following:

This confirms that a hearing is scheduled on Thursday, February 6, 2003 at 10 a.m. in the Rm 116, Admin. Bldg, 5225 W. Vliet St. to deal with any unresolved remedy questions arising out of my September 10, 2002 award in the above-referenced case.

. . .

Unless I hear from you to the contrary, I will expect to be in Milwaukee on February 6, 2003.

Arbitrator Doering convened a hearing on February 6, 2003. Representatives of the MTEA and the Board appeared at this hearing. At the start of this hearing, Arbitrator Doering stated, *inter alia*, "this is a case under retained jurisdiction with respect to an award that was issued the 10th of September, 2002." In preparation for this hearing, Complainant prepared an exhibit packet that included the following:

MTEA STATEMENT OF ISSUE

1. Did the MPS Administration violate Part V, Section Q (9) of the contract and the Award of Arbitrator Barbara Doering dated September 10, 2002, when it unilaterally developed and implemented the "Incompatibility Transfer" transmittal forms dated November 7 and 12, 2002 and substituted it for the negotiated form?
2. Did the MPS Administration violate Part V, Section Q (9) of the contract and the Award of Arbitrator Barbara Doering dated September 10, 2002, when it unilaterally adapted transmittal forms calling for the teacher to sign the written transmittal form rather than simply "confer" with the principal as set forth in Section Q (9) of the contract?
3. Did the MPS Administration fail to destroy the incompatibility evaluation form and remove all documentation of the reassignment from the permanent file of teachers requesting such transfers?

4. Did the MPS Administration violate Part V, Section Q (9) of the contract and the Award of Arbitrator Barbara Doering dated September 10, 2002 when it used unsatisfactory evaluation forms to reassign teachers who have requested incompatibility transfers pursuant to Part V, Section Q (9) of the contract?

If so, what should be the remedy?

MTEA STATEMENT OF REMEDY

It is requested that the arbitrator:

1. Order the MPS Administration to cease and desist from using its unilaterally promulgated Incompatibility Transfer form.
2. Order the Administration to cease and desist from using unsatisfactory evaluations in connection with incompatibility transfers.
3. Order the Administration to destroy all Incompatibility Transfer evaluation forms and remove all documentation relating to such transfers from the permanent files of teachers.
4. Retain jurisdiction for a period of sixty (60) days to resolve any questions which may arise in complying with the arbitrator's award.

This exhibit packet was presented to Arbitrator Doering and representatives of the Board. At the beginning of the February 6, 2003 hearing, Respondent's Counsel stated, *inter alia*:

-- the Board doesn't believe any of the issues that are raised by the Union in the discussions we have had and in the issue statements in their exhibit packet are arbitrable or are within the scope of the Arbitrator's authority given the issues and the arguments and the briefs and the award itself in the underlying arbitration.

The rule in Wisconsin, as I understand it, from case law and WERC decisions is that in a situation where there's a dispute as to arbitrability, the parties can stipulate if they want that the Arbitrator can decide that dispute.

Alternatively, one party can simply refuse to proceed in which case the opposing party can bring a WERC action, Wisconsin Employment Relations Commission action, or a Circuit Court action I think under the Municipal Employment Relations Act to compel the other person to arbitrate. That case would involve independent assessment on the arbitrability issue.

So the Board in the present case declines to go forward with arbitration and I should probably just put on the record alternatively the Union in this case if they chose could presumably file a separate grievance raising the same points that they seem to be raising in the present arbitration proceedings.

Complainant's Counsel responded that where an employer timely raises an issue as to substantive, as opposed to procedural, jurisdiction and the parties cannot stipulate that the Arbitrator can decide, then a party could seek to compel arbitration in circuit court or through a prohibited practice proceeding. Complainant's Counsel then stated:

Here, however, we have a very different situation. The Employer has submitted to the jurisdiction of the Arbitrator. Indeed we had several days of proceedings with attempts to settle and a hearing and so forth and in accordance with our long standing policy we requested the Arbitrator to retain jurisdiction and without objection from the Employer.

In the award the Arbitrator did retain jurisdiction and we are here today again having submitted to the authority of the Arbitrator and, lo and behold, the Employer says, well we don't agree that these flow from the Arbitrator's award. And they would like us to file new grievances and start over again and go on for several years.

Well, the Arbitrator has jurisdiction to determine whether or not these issues flow from the Award. If they don't, then of course it would require probably a separate grievance, it wouldn't even be a question for the WERC or Circuit Court.

. . .

. . . There can be no question on the prevailing law as I understand it that when you have submitted to the Arbitrator you cannot later retroactively revoke that.

. . .

-- we cannot force them to stay, physically wrestle them to the ground—but we believe you do have the jurisdiction to hear the case and we would hope the Employer would reconsider since we come together and make the record, get it complete today if we can and if we can't, we reschedule it.

Arbitrator Doering then made a response that included the following:

Let me say two things. One is that in terms of retained jurisdiction, as I understand it when an Arbitrator retains jurisdiction with respect to remedy issues, the parties are not free to reargue the case and the Arbitrator is not free to rewrite the decision. So that what that has to do with is how the decision applies to some specific thing.

. . .

Secondly, what I would say to you is I can't really tell, you know, it's one thing when we are talking informally but I can't really tell whether what the Association would like to raise with me comes, would come under what I would see as retained jurisdiction unless they tell me what it is and you tell me why you think it doesn't.

Respondent's Counsel then responded to the Arbitrator. This response included the following:

But having looked at the Union's four issues as stated today, I do not see any way that the Arbitrator has jurisdiction, continuing jurisdiction given the issues that were raised and given the issues that were actually decided by the Arbitrator and, therefore, I cannot consent, I am not agreeable to consent to have you determine your jurisdiction. I want to test it via the WERC process. Now if the WERC says you have jurisdiction over one or more of those issues, then we come back and we submit those issues to you but if the WERC agrees with us, then the Union's recourse would be to, to file grievances over the stuff.

Complainant's Counsel made a response that included the following:

We would just state that Wisconsin law is absolutely clear as we understand it that once you have submitted the matter to the authority and the jurisdiction of the Arbitrator, you cannot revoke it retroactively. And the Employer is doing that. They're saying we have decided that this is not a compliance or retention matter, we'll unilaterally decide that and we won't let the Arbitrator.

There followed further discussion between the Arbitrator and Counsel for the parties. At one point, the Arbitrator stated the following:

Now, I was asked to retain jurisdiction. I don't recall there being an objection at that time but I would have to check the transcript on that. But what I retained, what I said I was retaining jurisdiction with respect to was the remedy stated in the conclusions above and the conclusions start on Page 24 with respect to what the remedy was.

Now, is it the Board's contention that I was without authority to retain the jurisdiction and, therefore, you don't have to submit this?

Counsel for the Respondent responded:

No, I'm not contending you weren't without authority. That happens from time to time in arbitrations involving the Board. Last Tuesday I think an Arbitrator ruled that he wouldn't retain any jurisdiction for the Functus Officio Doctrine.

We don't dispute that arbitrators sometimes do that and you would have authority to do that. We do dispute the fact that the issues that are being raised by the MTEA here have anything to do with remedy and we would like the WERC to address that issue and the WERC can address the issue. Maybe we are wrong, I think we are right.

In subsequent discussions, the Arbitrator offered the parties the opportunity to make a record with respect to the issues in dispute and to reserve ruling on these issues until the Respondent's claims had been resolved in either Circuit Court or the WERC. When Counsel for Respondent confirmed that he was not willing to go forward and Counsel for the Complainant confirmed that he was not willing to proceed in the absence of the Respondent, the Arbitrator continued the hearing indefinitely. By letter dated February 24, 2003, Complainant Counsel Barbara Zack Quindel advised Respondent's Counsel of the following:

Dear Mr. Schriefer:

I am writing regarding the Board's refusal to complete the above-entitled arbitration. Arbitrator Doering issued her award on September 10, 2002, finding a violation of the contract. The award provided that "the arbitrator will retain jurisdiction to resolve remedy questions, which if not invoked by one side or the other, shall expire after 60 days."

The MTEA invoked the retention provision and a hearing was scheduled for February 6, 2003. However, at that hearing the Board refused to go forward based upon the statement of issues presented by the MTEA. The Board then asserted it would not continue with the arbitration proceedings without a WERC/Court ruling on arbitrability. As there is no legal support for the position the Board asserted, I write to request that you reconsider and conclude this arbitration proceeding.

The Board asserts that arbitrability can be raised by a party to arbitration and taken to Court/WERC at any time during the arbitration process. Wisconsin law is contrary. In *Jt. School District #10 v. Jefferson Education Assn.*, 78 Wis. 2d 94, 106, 253 N.W. 2d, 536, 542 (1977, (sic) the Court found that parties can agree, by their contracts or through their conduct, to have the arbitrator determine substantive arbitrability. While a party has a right to challenge substantive arbitrability in court, once parties submit a matter to the arbitrator, they have conferred jurisdiction on the arbitrator and cannot challenge arbitrability in Court or the WERC absent a reservation.

If the parties submitted the merits to the arbitrators and at the same time challenged the arbitrability of the question and *reserved the right to challenge in court an adverse ruling on arbitrability*, the court would decide the issue of arbitrability *de novo*.

78 Wis. 2d at 106 (emphasis added).

Pilgrim Investment Corp. v. Richard Reed, 156 Wis. 2d 677, 457 N.W. 2d 544 (Ct. App. 1990) is consistent with *Jt. School District*. There, the court found that a party's conduct in selecting an arbitrator and seeking dismissal of a motion to compel arbitration estopped that party from any challenge to arbitrability.

We conclude that, absent a reservation of rights, "partial participation" in the arbitration process can serve to estop a party from challenging the arbitration agreement.

457 N.W. 2d at 548.

It is also well-established under Federal labor law that arbitrability challenges cannot be raised after submission to the arbitrator unless explicitly reserved. *Dreis & Krump Mfg. V. International Assn. of Machinists*, 802 F.2d

247, 250 (7th Cir. 1986); *Day Constr. Co. v. Carpenters Local 354*, 722 F.2d 1471, 1475-76 (9th Cir. 1984); *United Industrial Workers v. Gov't of Virgin Islands*, 987 F.2d 162, 168 (3rd Cir. 1993); *TriStar Pictures v. Directors Guild*, 160 F.3d 537 (9th Cir. 1998).

In this case, the Board did not make any challenge to arbitrability when this matter was presented to Arbitrator Doering. The Board's statement of the issue included a question of appropriate remedy, should the arbitrator find a violation. Nor did the Board object to the arbitrator's retention of jurisdiction, a well-established and appropriate course of action for an arbitrator. See *Dean Foods Co. v. USWA Local 5840*, 911 F. Supp. 1116 (D.C.N. Ind. 1995). It was not until the hearing on remedy issues that the Board refused to continue the arbitration and asserted a right to have the WERC or Court determine arbitrability as to the remedy. Under the clear case law, the Board had already submitted to the arbitrator's jurisdiction and cannot withdraw midstream, without any prior reservation of the issues.

In fact, the Board's objection to proceeding does not appear to arise from the arbitrator's authority under her retained jurisdiction, but rather over the issues the MTEA sought to submit to the arbitrator in the remedy hearing. Your statements at this hearing make clear that the Board believes those issues go beyond the bounds of her jurisdiction. Certainly, the Board can raise this argument and even take the position that there are no issues in dispute regarding the remedy Arbitrator Doering ordered. However, in submitting the grievance to the arbitration forum, the issue is part of what the parties have bargained to have the arbitrator decide. By aborting the hearing and refusing to continue, the board has not even given the arbitrator an opportunity to hear its arguments and rules on whether the issues being raised by the MTEA are beyond the scope of her retained jurisdiction. If Arbitrator Doering went forward and ruled on issues the Board maintains are outside her jurisdiction, the Board's remedy under the law is to seek vacation of that portion of the award it claims exceeded the arbitrator's jurisdiction.

Thus, the law provides two ways in which a party may challenge the jurisdiction of the arbitrator: prior to submitting the dispute to the arbitrator in a challenge to arbitrability (or through proceeding with the arbitration and reserving its arbitrability objection), or at the conclusion of the arbitration through a motion to vacate, alleging the arbitrator exceeded jurisdiction. There is no support in the law for challenging arbitrability during the process of an arbitration following a joint submission of the dispute.

The MTEA requests that the Board continue the pending arbitration to completion. In light of the well-established law in this area and the absence of any law supporting the Board's actions, forcing the MTEA to file a complaint with the court or WERC at this point in the arbitration process would objectively constitute bad faith. See *Dreis & Krump, supra* (court awarded attorneys fees in a case where employer, who having submitted to arbitration without any reservations, sought to litigate arbitrability.) It undermines the parties' agreement to arbitrate and is a waste of resources for the MTEA to be placed in the position of having to force compliance with our arbitration agreement in a case such as this where a submission has already been made. The MTEA urges the Board to reconsider its position and return to the arbitrator to conclude this case.

Please notify me of your position by March 5, 2003.

The Respondent did not respond to Quindel's request that the Board reconsider its position and return to the arbitrator to conclude the arbitration case. Thereafter, Complainant filed the instant complaint of prohibited practices.

4. The Complainant and Respondent are parties to a collective bargaining agreement that contains a grievance procedure that culminates in final and binding arbitration. Pursuant to this contractual procedure, the Complainant and Respondent submitted Grievance No. 00/228 to Arbitrator Doering's jurisdiction to determine whether or not there has been a violation of the parties' collective bargaining agreement and, if so, to determine the appropriate remedy. Arbitrator Doering has determined that there has been a violation of the parties' collective bargaining agreement. By agreement of the Respondent and Complainant, Arbitrator Doering retains jurisdiction to resolve remedy questions. By refusing to proceed with the hearing of February 6, 2003, Respondent has refused to submit to Arbitrator Doering's jurisdiction to resolve questions of remedy. Respondent continues to refuse to submit to Arbitrator Doering's jurisdiction to resolve questions of remedy. By refusing to submit to Arbitrator Doering's jurisdiction to resolve questions of remedy, Respondent has refused to complete the arbitration of Grievance No. 00/228 and, thus, has violated its agreement with Complainant to arbitrate Grievance No. 00/228.

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 Section 111.70(1)(h), Stats.

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

3. Arbitrator Doering retains jurisdiction to resolve questions of remedy in Grievance No. 00/228.

4. By refusing to proceed with the February 6, 2003 remedy hearing before Arbitrator Doering, the Respondent Milwaukee Board of School Directors has refused, and continues to refuse, to complete the arbitration of Grievance No. 00/228 and, therefore, has violated Respondent Milwaukee Board of School Directors' agreement with Complainant Milwaukee Teachers Education Association to arbitrate Grievance No. 00/228.

5. By violating Respondent Milwaukee Board of School Directors agreement with Complainant Milwaukee Teachers Education Association to arbitrate Grievance No. 00/228, Respondent Milwaukee Board of School Directors has violated Sec. 111.70(3)(a)5, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The Respondent Milwaukee Board of School Directors, its officers and agents, shall immediately:

- (1) Cease and desist from violating its agreement with Milwaukee Teachers' Education Association to arbitrate Grievance No. 00/228.
- (2) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:
 - (a) Complete the arbitration of Grievance No. 00/228.
 - (b) Post the Notice attached hereto as Appendix "A" in conspicuous places in MPS buildings where notices to employees are posted. The Notice shall be signed by a representative of the Milwaukee Board of School Directors and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

- (c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to the action the Milwaukee Board of School Directors has taken to comply with this Order.

Dated at Madison, Wisconsin, this 12th day of December, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES REPRESENTED BY
THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION

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:

WE WILL NOT violate an agreement to arbitrate in violation of Sections 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act by refusing to complete the arbitration of Grievance No. 00/228.

WE WILL participate with the Milwaukee Teachers' Education Association in the completion of the arbitration of Grievance No. 00/228.

Dated this _____ day of December, 2003.

MILWAUKEE BOARD OF SCHOOL DIRECTORS

By

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

MILWAUKEE BOARD OF SCHOOL DIRECTORS

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On March 17, 2003, the Complainant Milwaukee Teachers' Education Association filed a complaint alleging that the Respondent Milwaukee Board of School Directors had violated Section 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act by refusing to proceed with the remedy portion of the grievance arbitration hearing that was scheduled for February 6, 2003. On April 23, 2003, the Respondent filed an answer in which it denied that it had violated the Municipal Employment Relations Act as asserted by the Complainant. The Respondent asserts, as an affirmative defense, that the issues raised by the Complainant at the February 6, 2003 "remedy" hearing are new issues that were not raised in the grievance, the parties' statements of the issues at the arbitration, the parties' briefs, or the arbitrator's decision and Award; that the arbitrator's limited reservation of jurisdiction over the remedial portion of an Award does not give the Complainant *carte blanche* to introduce, as "remedy" questions, these new issues; that the parties must both agree to submit these new issues to the arbitrator; and that, absent such an agreement, the arbitrator does not have authority to decide whether or not she has jurisdiction over these new issues. The Respondent further asserts that the Union is required under MERA and the MBSD/MTEA collective bargaining agreement to utilize the grievance procedure of the contract to process the "new" issues raised by the Complainant at the February 6, 2003 "remedy" hearing and the Complainant's failure to do so constitutes a prohibited refusal to utilize the contractual dispute resolution process.

POSITIONS OF THE PARTIES

Complainant

This prohibited practice case arises from a grievance regarding the operation of what is known as "incompatibility transfers" in schools that are staffed by an interview procedure. At the first day of the arbitration hearing in this matter, the parties gave their statement of the issue to the arbitrator. The Board's statement of the issue contained no challenge to the arbitrator's authority or jurisdiction to hear this matter. The Complainant requested that the arbitrator retain jurisdiction to resolve any questions that might arise in complying with the arbitrator's award and the Respondent made no objection to the retention of this jurisdiction by the arbitrator.

Arbitrator Doering issued an Award, retaining jurisdiction for sixty (60) days to resolve remedy questions. Thereafter, the Board developed a new form and procedure that is not in compliance with the Doering Award. When, on February 6, 2003, Arbitrator Doering convened a remedial hearing, the Respondent stated that it was unwilling to go forward based upon the issues framed by the Complainant.

On February 24, 2003, Complainant sent a letter to the Respondent that put the Respondent on notice that its conduct was not fairly debatable under the law and, therefore, the Board's failure to participate in the remedial hearing objectively constituted bad faith. This letter concluded by urging "the Board to reconsider its position and return to the arbitrator to conclude this case." When the Board failed to respond, the Complainant filed its prohibited practice claim.

Under Wisconsin law, a party may challenge substantive arbitrability in the courts or at the Wisconsin Employment Relations Commission. In *JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSOC.*, 78 Wis. 2D 94, 106, 253 N.W. 2D 536, 542 (1977), the Court found that parties can agree, by contract or conduct, to have the arbitrator determine substantive arbitrability. The Court also set forth the manner in which a party may exercise its right to challenge substantive arbitrability in court, *i.e.*, either by going directly to court or by reserving its right to challenge subsequent to the arbitrator's ruling. Thus, unless a party has reserved the question of arbitrability, a party has submitted to the jurisdiction of the arbitrator and cannot challenge arbitrability in the court or before the Wisconsin Employment Relations Commission. Respondent's assertion that it can interpose a challenge to arbitrability at any time during the arbitration proceedings and then come to the Wisconsin Employment Relations Commission for a ruling is also contrary to *PILGRIM INVESTMENT CORP. V. RICHARD REED*, 156 WIS. 2D. 677, 457, N.W. 2D. 544 (CT. APP., 1990).

Federal labor law further supports the principle that arbitrability challenges cannot be raised after submission to the arbitrator unless expressly reserved. *DREIS & KRUMP MFG. V. INTERN. ASS'N. OF MACHINISTS*, 802 F.2D 247, 250 (7TH CIR. 1986); *GEORGE DAY CONST. V. UNITED BROTH. OF CARPENTERS*, 722 F.2D 1471, 1475-76 (9TH CIR. 1984); *UNITED INDUS. WORKERS V. GOVERNMENT OF V.I.*, 987 F.2D 162, 168 (3RD CIR. 1993); *TRISTAR PICTURES V. DIRECTOR'S GUILD OF AMERICA*, 160 F.3D 537 (9TH CIR. 1998).

It is undisputed that the Respondent did not challenge the arbitrability of this grievance, nor reserve its right to challenge arbitrability. Nor does the Board contend that the arbitrator was without authority to retain jurisdiction in this case. Based upon clear, well-defined arbitration jurisprudence, the Respondent is required to submit the remedial issues to arbitrator Doering. Apart from the Board's failure to reserve the substantive arbitrability determination at the beginning of these proceedings, the Board's arbitrability argument in this case is procedural, not substantive.

The Board's argument that this case is not controlled by jurisprudence on arbitrability because the Complainant's statement of the issues goes beyond the scope of what the Respondent initially agreed to arbitrate reflects a misunderstanding as to the source of the parties' arbitration agreement. What defines the scope of the arbitrator's authority is not the way in which the parties framed the issue, but whether the subject matter of the grievance is

covered under the contractual arbitration agreement and is not explicitly excluded. In this case, a grievance concerning Q(9) is covered under the collective bargaining agreement and does not become non-arbitrable during the course of the proceeding based upon submissions or arguments of one of the parties.

Once it has been determined that the subject matter of the grievance is covered by the arbitration clause, all other questions are for the arbitrator. JOHN WILEY & SONS V. LIVINGSTON, 376 U.S. 543, 557 (1964); S & M ROTOGRAVURE SERVICE, INC., DEC. NO. 29419-A (Nielsen, 4/99); AFF'D BY OPERATION OF LAW, DEC. NO. 29419-B (WERC, 5/99).

The remedial power of the arbitrator flows from the original substantive arbitrability of the grievance itself. No new issue of substantive arbitrability arises at the remedy phase of a case. Whether the Complainant is raising remedial issues that go beyond the scope of Arbitrator Doering's award is her call, and hers alone to make. Even if the Respondent received another opportunity to raise arbitrability prior to the final award, there is no basis for a claim that the grievance is no longer substantively arbitrable.

The Commission in a case involving these same parties previously resolved this very issue. In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 25928-A (Greco, 9/89); AFF'D BY OPERATION OF LAW, DEC. NO. 25928-B (WERC, 9/89), the MTEA filed a prohibited practice when the Board refused to proceed to hearing on a remedial issue. In rejecting the Board's position, the WERC examiner noted that it was the arbitrator to whom the parties had submitted the dispute. In response to the Board's concern that the arbitrator would re-open and broaden his initial award, the examiner stated if the arbitrator

“...decides that more evidence is necessary on the question, as the District asserts, he is empowered to make that determination because the District mutually agreed to have him resolve all aspects of the grievance submitted to him, including questions relating to remedy. Furthermore, he may find that no such back pay is warranted for the very reasons noted by the District here. But that is his call, and his call alone, to make.

To do otherwise, is in effect to declare that the Association must file yet another grievance over this issue; that the parties then again must run it up the arbitration flagpole; and that they must expend time and resources in resolving that issue. Such duplication and wasted time and effort are unnecessary when, as here, an arbitrator has retained jurisdiction to assure that all aspects of this dispute are totally and finally resolved before him. That is what arbitration is all about, and that is what the strong policy favoring arbitration requires in cases such as this.”

The Examiner as affirmed by the Commission, found that the Board violated Section 111.70(3)(a)5, Stats., by failing to proceed with the remedial hearing in that matter.

The only distinction between the prior case and this case is that in the former, the Board did not actually attend the remedial hearing and then abort it, but rather, simply refused to schedule the remedial hearing. The arguments the Board makes in the instant case are indistinguishable from those made in the case of resisting return to arbitrator Flaten.

The Board is seeking to pre-empt the arbitrator by having the Commission rule on the merits of its claim that the Complainant's statement of the issue is outside the scope of the submission to the arbitrator. As definitively determined in *JEFFERSON* and applied in *MTEA v. MBSD supra*, the law does not permit the WERC or court to rule on the merits of disputes submitted to an arbitrator. The District's only recourse is to allow Arbitrator Doering to conclude this case. If the Board then believes that Arbitrator Doering has exceeded her jurisdiction, it can assert such an argument under Section 788.10, Wis. Stats. However, such an action cannot occur until Arbitrator Doering has completed ruling in this case.

The Board fails to cite any legal support for its refusal to continue arbitration, wrongfully characterizing this as an undetermined issue to explain the lack of support for its position. Nothing in *DAY CONSTRUCTION CO., SUPRA*, implies that a party has a right to retract its submission agreement, or restrict the arbitrator's jurisdiction, once it assents to the arbitrator's jurisdiction and the proceeding is underway. Rather, the case stands for the opposite. The Board's reliance on cases that involve motions to vacate an arbitration award provides no support for the claim that a court may entertain a challenge to substantive arbitrability at the remedial stage of an ongoing case.

The Board is not seeking a reasonable extension of current law. The current law is overwhelmingly and completely contrary to the notion that a party is entitled to a continuing option of going to court (or the WERC) once it has submitted a dispute to arbitration. There is no basis in any of the existing case law for the proposition articulated by the Board. An award of attorney's fees should be made.

The WERC has recognized that in extraordinary cases, an award of attorney's fees is justified. In *WISCONSIN DELLS, DEC. NO. 25997-C (WERC, 8/90)*, the Commission set the standard for such award in cases where the defenses raised by Respondent are frivolous, as opposed to debatable. This standard was previously approved by the Court in *MADISON TEACHERS INC. v WERC*, 115 Wis. 2d 623, 340 N.W. 2d 571 (Wis. App. 1983).

In the instant case, there are no factual issues in dispute. Rather, Respondent's position is based solely on a legal claim without support in law. This is not a case of a respondent attempting to fit certain unsubstantiated facts to a recognized legal defense. Rather,

Respondent's position, *i.e.*, that a party can stop an arbitration at any point and seek a ruling from the court/WERC, is so far outside well-established principles of law as to be frivolous.

The MTEA has made the Board aware that the legal position on which it was relying to abort the arbitration proceeding has no basis in law. Moreover, the Board should have known of the frivolous nature of its position based on the prior ruling of the Commission. The WERC cannot permit a party knowledgeable in the law to proceed in defiance of that law, particularly where the Commission has ruled specifically against it on the same issue. To allow a party to do so undermines the policy of ensuring industrial peace through collective bargaining and arbitration.

In *DREIS & KRUMP, SUPRA*, the Court found that the failure to have a legally debatable position constitutes objective bad faith. The Rule 11 standard relied upon by the court in *DREIS & KRUMP* is the same standard articulated by the Commission. Under the Federal Rules of Civil Procedure, Rule 11(b)(2), a party or attorney can be sanctioned if the attorney cannot certify that the claims, defenses and other legal contentions in their pleadings are warranted by existing law or a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law. The same standard is used to determine whether a party must pay attorney's fees under Wisconsin's frivolous claims statute, Wis. Stats. 814.025(3)(b).

It is more important than ever that agency resources be used to resolve expeditiously the actual disputes that exist between labor and management. To allow a party, without any legal grounds, to force the Commission and parties to expend its resources in a case where the law is clear beyond doubt, would be a disservice to all litigants.

The Complainant respectfully requests that the Examiner find that the Respondent has committed a prohibited practice by violating Section 111.70(3)(a)1 and 5, Stats, by refusing to continue the remedial hearing before Arbitrator Doering. The Board should be ordered to cease and desist from its statutory violation and to complete the remedial hearing related to Grievance 00/228. Insofar as the Board's defense to this action is not clearly debatable, but rather is frivolous, the Examiner should award the Complainant reasonable attorney's fees and costs associated with having to bring this action.

Respondent

The MTEA's claim that the Respondent committed a prohibited practice in this case is based upon mistaken premises. The Respondent properly consented to arbitral jurisdiction over an issue and the Respondent fully complied with the award from Arbitrator Doering regarding that issue. The Complainant erroneously believes that, having consented to arbitrate one issue, the Respondent also is required to arbitrate anything else the MTEA might want to throw into the pot under the guise of "remedy."

The grievance underlying the Doering Award is that the Board violated the contract by refusing to re-assign Diane Freeman and similarly situated teachers who requested incompatibility reassignments. At the arbitration hearing, and in briefs, both parties similarly described the relevant issue as whether the Board violated the contract by failing to write incompatibility evaluation forms to effectuate the transfers of those teachers who had requested Q(9) transfers. This is the issue addressed by Arbitrator Doering both in the “conclusions” to her decision and in her “Award”.

All teachers who had requested Q(9) transfers as of the first day of the arbitration hearing had received their transfers by the date of the Award. Thus, the specific remedy ordered by the arbitrator has been implemented and nothing remains to be litigated with respect to the Award remedy hearing.

The first MTEA issue raised at the remedy hearing involved the Board’s development of a new transfer form for use in Q(9) transfers that was developed approximately one month after the Doering Award. The second issue is that this same new transfer form calls for a signature from the teacher.

The old form required a signature by the teacher requesting a transfer. The new transfer form is substantially the same as the form used before her Award; was developed over a month after the Award; and was not used in connection with the transfer of any of the nine teachers at issue in the Award. The Doering decision does not state or imply that the Board is forever precluded from slightly modifying the incompatibility transfer form.

The third issue the MTEA sought to raise at the remedy hearing was the Board’s alleged failure to destroy incompatibility evaluation forms and to remove documentation of reassignment from the personnel files of teachers requesting Q(9) transfers. Arbitrator Doering’s conclusions and Award do not address this issue.

The fourth issue the MTEA sought to raise at the remedy hearing was the Board’s use of an unsatisfactory evaluation form in conjunction with the transfer form noted above when reassigning teachers who request Q(9) transfers. Traditionally, an “incompatibility transfer” was accomplished at the District by using a transfer form plus an evaluation form. “Incompatibility transfers” under contract provisions predating Section Q(9) were not permitted in circumstances where a teacher had problems involving unsatisfactory performance. Accordingly, the overall status of a teacher requesting an incompatibility transfer under such provisions could never be marked as “unsatisfactory”. This evaluation form issue is not addressed in Arbitrator Doering’s conclusions or Award.

Case law addressing an arbitrator’s reservation of jurisdiction to address remedy issues, establishes, assuming this authority is found to be implied in the original grant of jurisdiction

to the arbitrator, that remedial jurisdiction is limited in precisely the manner one would expect, *i.e.*, to questions germane to the remedy and not to newly-arisen, or already-decided, substantive issues. DREIS & KRUMP, SUPRA; ENGIS CORP. V. ENGIS LTD., 800 F.SUPP. 627, 632 (N.D.Ill. 1992); ROBERT E. DERECKTOR OF RHODE ISLAND, INC. V. UNITED STEELWORKERS OF AMERICA, 1990 WL 82813 (D.R.I.); McCORD V. FLYNN, 86 N.W. 668, 672, (Wis. 1901).

The issues raised by the MTEA at the remedy hearing, unilaterally requested by the MTEA, involve matters that took place after the award issued; were never raised and processed through the parties' collective bargaining grievance procedure, as required under the contract; were not addressed by the parties at the arbitration hearing; and have nothing to do with the specific remedy ordered by the arbitrator, which remedy was fully implemented by the Board. Thus, the four issues raised by MTEA are "new" issues.

At the remedy hearing, the Board conceded it would not dispute that Arbitrator Doering had authority to reserve jurisdiction to determine issues relating to the remedy ordered. However, as the Board made clear at the remedy hearing, the four "new" issues are beyond the scope of the reserved remedial jurisdiction.

In its primary brief, the MTEA sidesteps any discussion of the four issues it sought to raise before Arbitrator Doering. This is so because these issues are outside the scope of the issues litigated at the arbitration and the remedy for which the arbitrator reserved jurisdiction.

An arbitrator's jurisdiction is rooted in the agreement of the parties. DAY CONSTRUCTION, SUPRA. The Board's initial consent to submit to arbitration an issue that had been properly processed through the contractual grievance procedure could not possibly imply consent to also submit, at a remedy hearing, the "new" issues raised by the MTEA. Indeed, such consent would have been impossible because the issues raised by the MTEA involved employees other than the nine original Grievants and matters that occurred well after issuance of the Award.

The appropriate forum for the MTEA to raise its "new" issues is through the contractual grievance arbitration procedure, or a separate prohibited practice hearings if the MTEA's claim is that the Board refused to bargain over implementation of new form. MTEA's claim that to resort to such procedures is too time consuming or inefficient is irrelevant.

A refusal by the employer to submit the "new" issues to arbitration under these circumstances could hardly constitute a prohibited practice. Any insistence by the MTEA that it does not have an obligation to process new grievances through the contractual grievance procedure would clearly constitute a violation of Section 111.70(3)(b)4, Stats. A decision in

favor of the MTEA in this case would undermine and be in derogation of the parties' contractual grievance procedure.

An arbitrator's initial jurisdiction in a case involves a question of law for the courts and an arbitrator is entitled to determine whether he or she has jurisdiction over an issue only if both parties agree to submit the issue to him or her. *JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSOC.* 78 WIS. 2D. 94, 101-102, 253 N.W. 2D. 536 (Wis. 1977). Although the Board has not found this question to be addressed by the WERC or the courts, by analogy, a dispute as to whether or not an issue falls within the arbitrator's limited remedial jurisdiction should similarly be a question of law to be decided by the Courts or the WERC.

In *MILWAUKEE BOARD OF SCHOOL DIRECTORS*, DEC. NO. 25928-A (Greco, 9/89); *AFF'D BY OPERATION OF LAW*, DEC. NO. 25928-B (WERC, 9/89), the arbitrator broadly retained jurisdiction "until this Award has been completed." In ordering the Board to submit the question of back pay to the arbitrator in a remedy hearing, the WERC Examiner noted the arbitrator's broad retention of jurisdiction; the Board's agreement to allow the arbitrator to resolve all aspects of the grievance; and the Board's agreement to the arbitrator's retention of jurisdiction. This back pay dispute unequivocally and squarely raised an issue relating to the specific remedy ordered and easily fit within the broad scope of the arbitrator's reserved jurisdiction. Therefore, the WERC ordered the Board to submit the dispute to the arbitrator.

The present case can be distinguished on its facts. The four issues raised by the MTEA were not raised in the initial grievance; were not raised in the parties' issue statements at arbitration; were not the subject of any substantive testimony at the arbitration hearing; were not addressed in any of the parties' arguments; and were not, even arguably, within the scope of the arbitrator's reserved jurisdiction. The four issues involved new personnel actions arising after the arbitration award; were never consented to by the Board as proper subjects for arbitration; and do not involve issues of award implementation.

In refusing to consent to have MTEA's new issues addressed by Arbitrator Doering in a "remedy" hearing, the Board has done no more than assert its right not to arbitrate issues that have not properly been raised and processed through the grievance arbitration procedure of the contract. The MTEA's claim that it is somehow entitled to attorney's fees under the present facts is strained. The Examiner should dismiss the complaint.

DISCUSSION

At all times material hereto, the parties have been signatories to a collective bargaining agreement that provides for a grievance procedure that culminates in final and binding arbitration. Pursuant to this contractual procedure, Grievance No. 00/228 was appealed to arbitration and Barbara Doering was selected as Arbitrator.

At the arbitration hearing before Arbitrator Doering, each party framed a statement of issues, which included a request that the Arbitrator determine the remedy. Additionally, during opening statements before Arbitrator Doering, Counsel for the Complainant asked the Arbitrator to retain jurisdiction for a period of sixty days to resolve any questions that may arise in complying with the Arbitrator's Award, without objection from Counsel for the Respondent. (Jt. Ex. 4, p. 20)

On September 10, 2002, Arbitrator Doering issued her Award on Grievance No. 00/228, which states as follows:

AWARD

The administration violated Part V, Section Q(9) of the MBSD/MTEA teacher contract by refusing to write an incompatibility evaluation form and by not reassigning, at the earliest opportunity, the grievant and other similarly situated teachers assigned to qualified schools—regardless of how they came to be assigned there—who believed themselves to be incompatible with their school and conferred with their evaluator(s) as is required by Section Q(9). The remedy shall be as is stated in the conclusions above and the arbitrator will retain jurisdiction to resolve remedy questions, which, if not invoked by one side or the other, shall expire after sixty (60) days.

By a letter to Arbitrator Doering dated November 15, 2002, Complainant Representative Donald Ernest confirmed a telephone conversation with Arbitrator Doering regarding “the request of the parties for you to resolve a dispute that has arisen regarding your arbitration award dated September 10, 2002. We agreed that you would return to resolve the dispute on: Thursday, February 6, 2003.” This letter was cc'd to Deborah Ford, MPS Labor Relations Director, and Don Schriefer, Respondent's Counsel.

In a letter dated November 27, 2002 and addressed to Ford and Ernest, Arbitrator Doering stated the following:

This confirms that a hearing is scheduled on Thursday, February 6, 2003 at 10 a.m. in the Rm 116, Admin. Bldg, 5225 W. Vliet St. to deal with any unresolved remedy questions arising out of my September 10, 2002 award in the above-referenced case.

. . .

Unless I hear from you to the contrary, I will expect to be in Milwaukee on February 6, 2003.

Representatives of the MTEA and the Board appeared at the February 6, 2003 hearing before Arbitrator Doering. At the start of this hearing, the MTEA presented certain written materials to Arbitrator Doering and representatives of the Board, which included the following statements:

MTEA STATEMENT OF ISSUE

Did the MPS Administration violate Part V, Section Q (9) of the contract and the Award of Arbitrator Barbara Doering dated September 10, 2002, when it unilaterally developed and implemented the "Incompatibility Transfer" transmittal forms dated November 7 and 12, 2002 and substituted it for the negotiated form?

Did the MPS Administration violate Part V, Section Q (9) of the contract and the Award of Arbitrator Barbara Doering dated September 10, 2002, when it unilaterally adapted transmittal forms calling for the teacher to sign the written transmittal form rather than simply "confer" with the principal as set forth in Section Q (9) of the contract?

Did the MPS Administration fail to destroy the incompatibility evaluation form and remove all documentation of the reassignment from the permanent file of teachers requesting such transfers?

Did the MPS Administration violate Part V, Section Q (9) of the contract and the Award of Arbitrator Barbara Doering dated September 10, 2002 when it used unsatisfactory evaluation forms to reassign teachers who have requested incompatibility transfers pursuant to Part V, Section Q (9) of the contract?

If so, what should be the remedy?

MTEA STATEMENT OF REMEDY

It is requested that the arbitrator:

1. Order the MPS Administration to cease and desist from using its unilaterally promulgated Incompatibility Transfer form.
2. Order the Administration to cease and desist from using unsatisfactory evaluations in connection with incompatibility transfers.

3. Order the Administration to destroy all Incompatibility Transfer evaluation forms and remove all documentation relating to such transfers from the permanent files of teachers.
4. Retain jurisdiction for a period of sixty (60) days to resolve any questions which may arise in complying with the arbitrator's award.

Following the presentation of these issues by the MTEA, Counsel for the Board advised the MTEA and Arbitrator Doering that it would not participate further in the proceedings before Arbitrator Doering.

The MTEA alleges that the Board has violated Sec. 111.70(3)(a)1 and 5, Stats., by refusing to proceed with the February 6, 2003 hearing before Arbitrator Doering. Sec. 111.70(3)(a)5, Stats. provides, in relevant part, that it is a prohibited practice for a municipal employer:

To violate any collective bargaining agreement previously agreed upon by the parties. . . , 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.

A violation of Sec. 111.70(3)(a)5 is a derivative violation of Sec. 111.70(3)(a)1, Stats.

The Board does not argue that the issues presented by the MTEA are not substantively arbitrable under the terms of the parties' collective bargaining agreement. Rather, the Board argues that these issues are not arbitrable before Arbitrator Doering because they raise new grievances that must be filed and processed through the contractual grievance procedure and these issues are outside the scope of the jurisdiction granted to Arbitrator Doering by the parties when they submitted Grievance No. 00/228 to Arbitrator Doering. Thus, the Board raises mixed claims of procedural and substantive arbitrability.

When confronted with questions of arbitrability, the Wisconsin Employment Relations Commission has relied upon the principles enunciated in the *Steelworkers Trilogy* as adopted by the Wisconsin Supreme Court in *DENHART V. WAUKESHA BREWING COMPANY, INC.*, 17 Wis. 2d 44 (1962) and applied to the Municipal Employment Relations Act by the Wisconsin Supreme Court in *JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSOC.*, 78 Wis. 2d 94 (1977). *CITY OF MADISON, DEC. NO. 28920-B (WERC, 4/98)*; *MARINETTE COUNTY (COURTHOUSE), DEC. NO. 28675-B (Jones, 2/97)*; *AFF'D BY OPERATION OF LAW, DEC.*

No. 28675-C (WERC, 3/97); HURLEY SCHOOL DISTRICT, DEC. No. 28804-A (Shaw, 1/97); AFF'D BY OPERATION OF LAW, DEC. No. 28804-B (WERC, 2/97).

In JEFFERSON, the Court states:

. . . the question of substantive arbitrability--whether the parties agreed to submit an issue to arbitration-- is a question of law for the courts to decide.^{4/} The arbitrator cannot, except by agreement of the parties, be the judge of the scope of his authority under the contract.^{5/} . . . (101-102) (cites omitted)

In JEFFERSON, the Court also states:

When the Court determines arbitrability it must exercise great caution. The court has no business weighing the merits of the grievance. It is the arbitrators' decision for which the parties have bargained. . . . (111)

. . .

Our adherence to the *Trilogy* is in keeping with the strong legislative policy in Wisconsin favoring arbitration in the municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes. . . . (112) (cites omitted)

The parties' conduct at hearing evidences an agreement to submit questions of remedy to the jurisdiction of Arbitrator Doering and to have Arbitrator Doering retain jurisdiction to resolve questions of remedy. In her Award, Arbitrator Doering retained jurisdiction to resolve questions of remedy.

Ford recalls that, prior to November 27, 2002, she and MTEA Representative Sid Hatch discussed issues over the Board's use of a form that the Board had developed in response to the Doering Award; that there was concern about the sixty days running out; and that she understood that the MTEA was going to request that Arbitrator Doering return. (T. at 27) Ford denies, however, that she authorized the MTEA to request Arbitrator Doering's return, or that she gave MTEA express consent to make this request. (T. at 28)

Ford does not deny receiving Ernest's letter of November 15, 2002, or Arbitrator Doering's letter of November 27, 2002. It is not evident that Ford, or any other Board Representative, advised MTEA or Arbitrator Doering, that the Board did not agree with Ernest's assertion that the parties had agreed to have Arbitrator Doering return to resolve a dispute regarding her Award. Nor is it evident that Ford, or any other Board Representative, made any response to Arbitrator Doering's letter of November 27, 2002 other than to appear before Arbitrator Doering on February 6, 2003.

At the time of this appearance, there was discussion between the Board's Counsel, MTEA's Counsel, and Arbitrator Doering. During this discussion, Arbitrator Doering stated as follows:

Now, I was asked to retain jurisdiction. I don't recall there being an objection at that time but I would have to check the transcript on that. But what I retained, what I said I was retaining jurisdiction with respect to was the remedy stated in the conclusions above and the conclusions start on Page 24 with respect to what the remedy was.

Now, is it the Board's contention that I was without authority to retain the jurisdiction and, therefore, you don't have to submit this? (T. at 18)

Counsel for the Board responded:

No, I'm not contending you weren't without authority. That happens from time to time in arbitrations involving the Board. Last Tuesday I think an Arbitrator ruled that he wouldn't retain any jurisdiction for the *Functus Officio* Doctrine.

We don't dispute that arbitrators sometimes do that and you would have authority to do that. We do dispute the fact that the issues that are being raised by the MTEA here have anything to do with remedy and we would like the WERC to address that issue and the WERC can address the issue. Maybe we are wrong, I think we are right. (T. at 18-19)

As evidenced by the conduct of the Board's representatives, the Board acquiesced to Arbitrator Doering's scheduling of a remedy hearing on February 6, 2003 and, on that date, agreed that Arbitrator Doering continued to retain jurisdiction with respect to remedy.

In summary, the parties agreed to arbitrate Grievance No. 00/228 before Arbitrator Doering. Under this agreement to arbitrate, Arbitrator Doering was given jurisdiction to determine whether or not there has been a violation of the parties' collective bargaining agreement; to determine the appropriate remedy for any such violation found by Arbitrator Doering; and to resolve remedy questions.

In *JEFFERSON*, the Court recognized that an issue is substantively arbitrable when the parties have agreed to submit that issue to arbitration. Inasmuch as the parties have agreed that Arbitrator Doering retains jurisdiction to resolve questions of remedy, remedy issues are substantively arbitrable before Arbitrator Doering. With respect to the procedural arbitrability issues raised by the Board, it is well established that questions of procedural arbitrability are a

matter for the arbitrator, not for the Courts or the Commission. S & M ROTOGRAVURE SERVICE, INC., DEC. NO. 29419-A (Nielsen, 4/99); AFF'D BY OPERATION OF LAW, DEC. NO. 29419-B (WERC, 5/99); MILWAUKEE COUNTY, DEC. NO. 28944-A (Levitan, 6/97); AFF'D IN RELEVANT PART, DEC. NO. 28944-B (WERC, 10/97).

In a prior proceeding involving these parties, Examiner Greco was confronted with a Board argument that the remedy sought by the MTEA was outside the scope of an arbitrator's retained jurisdiction. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 25928-A (9/89); AFF'D BY OPERATION OF LAW, DEC. NO. 25928-B (WERC, 9/89). As Examiner Greco concluded in that case, the "problem" with such an argument is that it, in effect, seeks to have the Commission determine whether or not MTEA is making a meritorious remedy claim; that the merits of the MTEA's remedy claim is an issue that can only be resolved through the arbitration process agreed to by the parties; and, that under the arbitration process agreed to by the parties, it is for the arbitrator, and the arbitrator alone, to determine the merits of MTEA's remedy claim.

In conclusion, by refusing to proceed with the hearing of February 6, 2003, the Board has refused to submit to Arbitrator Doering's jurisdiction to resolve questions of remedy and, thus, has violated the parties' agreement to arbitrate Grievance No. 00/228. By violating the parties' agreement to arbitrate Grievance No. 00/228, the Board has violated Sec. 111.70(3)(a)5, Stats., and, derivatively, has violated Sec. 111.70(3)(a)1, Stats.

The cases relied upon by the Board, *i.e.*, GEORGE DAY CONST. V. UNITED BROTH. OF CARPENTERS, 722 F.2D 1471 (9TH CIR. 1984); DREIS & KRUMP MFG. V. INTERN. ASS'N. OF MACHINISTS, 802 F.2D 247 (7TH CIR. 1986); ENGIS CORP. V. ENGIS LTD., 800 F.SUPP. 627 (N.D.Ill. 1992); ROBERT E. DERECKTOR OF RHODE ISLAND, INC. V. UNITED STEELWORKERS OF AMERICA, 1990 WL 82813 (D.R.I.) and McCORD V. FLYNN, 86 N.W. 668 (Wis. 1901) do not warrant a contrary conclusion. Rather, these cases support the conclusions reached by the Examiner. In DAY and McCORD, the Courts recognized the authority of the arbitrator to decide the issues that the parties have agreed to submit to the arbitrator. In ENGIS, DERECKTOR and DREIS & KRUMP, the Courts, expressly or tacitly, approved of arbitrators' retaining jurisdiction to ensure compliance with their awards and recognized that a court acts properly in deferring to, or refusing to substitute its judgment for that of, the arbitrator.

As a remedy for the Board's MERA violations, the MTEA requests reasonable attorney's fees and costs. In CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), the Commission has stated:

Regarding attorney's fees, the Commission has long construed this remedy to be limited to certain duty of fair representation cases and to cases where an extraordinary remedy is appropriate. SEE MADISON METROPOLITAN

SCHOOL DISTRICT, DEC. NO. 16471-D (WERC, 5/81), AFF'D IN PERTINENT PART, MTI v. WERC, 115 Wis.2d 623 (Ct. App. 1983); UNIVERSITY OF WISCONSIN-MILWAUKEE (GUTHRIE), DEC. NO. 11457-F (WERC, 12/77); DEPARTMENT OF EMPLOYMENT RELATIONS (UW HOSPITAL AND CLINICS), DEC. NO. 29093-B (WERC, 11/98). We see no reason to reconsider the Commission's view of its remedial authority regarding attorney's fees in the context of this case and conclude that an extraordinary remedy is not needed . . .

In this case, an extraordinary remedy is not appropriate. Thus, the Examiner has not granted Complainant's request for reasonable attorney's fees and costs. The appropriate remedy for the Board's MERA violations is to order the Board to cease and desist from violating its agreement to arbitrate; to complete the arbitration before Arbitrator Doering and to post an appropriate notice.

Dated at Madison, Wisconsin, this 12th day of December, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CAB/gjc
30590-A