

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**MILWAUKEE TEACHERS' EDUCATION ASSOCIATION**, Complainant,

vs.

**MILWAUKEE BOARD OF SCHOOL DIRECTORS**, Respondent.

Case 406  
No. 62216  
MP-3915

**Decision No. 30590-B**

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**Appearances:**

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

**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 ON REVIEW OF EXAMINER'S DECISION**

On December 12, 2003, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she determined that Respondent Milwaukee Board of School Directors had committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1, Stats., by refusing to complete a grievance arbitration proceeding with the Complainant Milwaukee Teachers' Education Association. To remedy the prohibited practices, the Examiner ordered the Board to complete the arbitration proceeding and to post a notice. She denied Complainant's request for attorney's fees.

Both Complainant and Respondent timely filed petitions 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 filed written argument and the record was closed on March 1, 2004.

Dec. No. 30590-B

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

**ORDER**

- A. The Examiner's Findings of Fact 1 - 3 are affirmed.
- B. The Examiner's Finding of Fact 4 is modified by changing the second sentence to state, "By agreement of the Respondent and Complainant, Arbitrator Doering retains jurisdiction to resolve remedy questions." In all other respects the Finding is affirmed.
- C. The Examiner's Conclusions of Law 1 - 2 are affirmed.
- D. The Examiner's Conclusion of Law 3 is modified and affirmed as follows:
  - 3. Arbitrator Doering retains jurisdiction to resolve questions of remedy in Grievance No. 00/228, subject to the Respondent's right to challenge the substantive arbitrability of remedial issues placed before the arbitrator and by such challenge to reserve the right to *de novo* review of any such issues after Doering issues her supplemental award.
- E. The Examiner's Conclusions of Law 4 - 5 are affirmed.
- F. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of May, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/  
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Judith Neumann, Chair

Paul Gordon /s/  
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Paul Gordon, Commissioner

Susan J. M. Bauman /s/  
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Susan J. M. Bauman, Commissioner

**Milwaukee Board of School Directors**

**MEMORANDUM ACCOMPANYING ORDER**

**SUMMARY OF FACTS**

Respondent School District and Complainant Association agreed to have an arbitrator decide whether certain conduct by the District violated a collective bargaining agreement and, if so, to determine an appropriate remedy. At the outset of the arbitration, the Association requested the arbitrator to retain jurisdiction over the remedy and the District did not object. The District did not challenge the substantive arbitrability of the matters before the arbitrator.

After a hearing, the arbitrator determined that the District had violated the agreement and directed certain remedial action. The arbitrator retained jurisdiction over the matter “to resolve remedy questions.” The District took certain steps to implement the arbitrator’s award, but the Association did not believe those steps were sufficient. The Association asked the arbitrator to exercise her retained jurisdiction and to convene an additional hearing to resolve the parties’ dispute over what her award required of the District. The District appeared at the reconvened hearing and asserted that the Association was seeking to use the remedial phase of the arbitration proceeding to have new matters decided that were beyond the scope of what the District had agreed to arbitrate and beyond the scope of the award. In such circumstances, Respondent contended that an issue of substantive arbitrability had newly arisen and that it was entitled to have the WERC or a court determine the substantive arbitrability of the Association’s remedial issues before proceeding further. Consistent with its belief, the District thereafter refused to participate in the proceedings and the arbitrator suspended the hearing.

**DISCUSSION**

The central issue in this case is whether the Respondent School District is entitled to interrupt an ongoing arbitration proceeding by challenging the substantive arbitrability of the Association’s remedial issues, where the Respondent had not earlier objected to the arbitrator’s jurisdiction over the grievance or its remedy. We agree with the Examiner that it is not. The secondary issue in this case is whether the Complainant Association should receive attorney’s fees as part of the remedy for the District’s illegal conduct. We agree with the Examiner that it should not.

## 1. Refusal to Arbitrate

We see this case as a question of substantive arbitrability that is largely controlled by the Supreme Court's reasoning in *JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSOC.*, 78 WIS.2D 94 (1977). 1/ As the JEFFERSON court stated at pp. 101-102 "Thus, 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. The arbitrator cannot, except by agreement of the parties, be the judge of the scope of his authority under the contract." In that case the Court held that, where substantive arbitrability issues arise before the arbitration proceedings begin, there are three options for the challenging party: (1) the party may refrain from participating in the arbitration proceeding until the issue of substantive arbitrability has been decided by the court or the WERC; (2) the party may agree to participate in the arbitration, but reserve the right to a *de novo* judicial determination of the arbitrability issue once the arbitration is complete; or (3) the party may submit the substantive arbitrability issue to the arbitrator for a final and binding determination.

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*1/ The Examiner viewed the District's challenge as raising "mixed claims of procedural and substantive arbitrability," (Examiner's Decision at 25). It appears that the Examiner perceived elements of procedural arbitrability in the District's claim that the Association's remedial issues were actually new grievances that had not been properly taken through the preliminary steps of the grievance procedure. While there is some technical truth in that perception, we think this case falls more comfortably within the traditional notion of substantive arbitrability, i.e., the District claims that the Association's remedial issues are not within the boundaries of the remedial jurisdiction the District agreed that the arbitrator could retain.*

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Here, however, unlike the scenarios envisioned by the JEFFERSON court, the substantive arbitrability issue did not arise until after the proceedings had begun – indeed, not until the remedy phase of the proceedings. Nonetheless, we believe JEFFERSON supplies substantial guidance for resolving the issue before us.

Where, as here, the District had no reason at the outset of the arbitration to anticipate that an issue of substantive arbitrability would arise, it would be impractical and unfair to assume that, by agreeing to the arbitrator's jurisdiction over the grievance and the remedy, the District had thereby exercised the third option under JEFFERSON, i.e., agreed to allow the arbitrator to resolve any substantive issue the Association may assert during the course of the proceedings without retaining the right to obtain *de novo* judicial review. Such a conclusion could inject confusion into the grievance arbitration process, as employers may then feel

compelled to assert blanket substantive arbitrability objections at the outset of every arbitration (a variation on the first option under JEFFERSON) simply as a prophylactic measure. This could promote unnecessary or even hypothetical disputes as the parties and the arbitrator try to ascertain the actual scope of the arbitrator's jurisdiction. On the other hand, we, like the Examiner and the Association, are concerned about the delay and expense that necessarily accompany an employer's resort to the court or the Commission to resolve substantive arbitrability disputes.

In balancing these legitimate interests, we conclude that where, as here, the parties have generally agreed to an arbitrator's jurisdiction, but where unforeseeable substantive arbitrability issues arise after arbitration proceedings are underway, the challenging party is limited to the second option set forth in JEFFERSON. That is, the party will be deemed to have agreed to proceed through the arbitration process and have the arbitrator resolve the newly arisen issues of substantive arbitrability, but the party may protect its right to have a court or the Commission review the arbitrator's determinations on the newly-arisen issues by interposing a timely objection to the arbitrator's jurisdiction. This construction best accommodates the dispute resolution purposes of Sec. 111.70, Stats., which are founded upon the parties' agreement to arbitrate but are also designed to be expeditious and efficient. As the JEFFERSON court noted in discussing this option, allowing the arbitrator to make the initial determination of arbitrability is consistent with the policies of the Sec. 111.70, Stats., since it avoids delay and economizes effort, 2/ and because evaluation of arbitrability will likely involve some consideration of evidence relevant to the merits and thus call upon the same expertise and experience required for a decision on the merits. 3/

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2/ *One economy is the reality that if the arbitrator resolves the arbitrability issue in a manner that is acceptable to both parties, there is no need for judicial intervention.*

3/ *We note that even without the protection of de novo judicial consideration of the substantive arbitrability issue, Respondent would have the right to seek to vacate the award if the arbitrator exercises remedial authority in a manner that exceeds the scope of her authority. MILW. PRO. FIREFIGHTERS LOCAL 215 v. MILWAUKEE, 78 WIS.2D 1, (1977); MILW BD SCH. DIRS v. MILW. TEACHERS' EDUCATION ASSO., 93 WIS.2D 415 (1980).*

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Accordingly, we have affirmed the Examiner's conclusion that by refusing to complete the ongoing arbitration proceedings, the District violated an agreement to arbitrate questions arising under the parties' contract and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., and derivatively within the meaning of Sec. 111.70(3)(a)1, Stats.

**2. Attorney's Fees**

As to the issue of attorney's fees raised by the Association, it is evident from the foregoing that we have found the merits of this dispute to present a difficult question of first impression. 4/ Thus, it is also clear that this is not a case in which the extraordinary remedy of attorney's fees is appropriate, CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), and we have affirmed the Examiner's denial of this remedial request.

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*4/ In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 15928-A (GRECO, 9/89), AFF'D BY OPERATION OF LAW, DEC. NO. 25928-B (WERC, 9/89), the Examiner considered a somewhat similar situation, where the employer had objected to the arbitrator's jurisdiction to consider the union's remedial request. In ruling against the employer, the Examiner stated, ". . . that is [the arbitrator's] call, and his call alone, to make." We do not endorse the Examiner's assertion in this regard, as it implies that an arbitrator's substantive arbitrability decision regarding remedial issues cannot be subject to de novo judicial review.*

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Dated at Madison, Wisconsin, this 7th day of May, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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