BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SURING EDUCATION ASSOCIATION

and

BOARD OF EDUCATION, SURING PUBLIC SCHOOL DISTRICT

Case 14
No. 55176
MA-9916

Appearances:

Mr. James A. Blank, Executive Director, and Ms. Suzanne Dishaw Britz, Research Consultant, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303, for the Suring Education Association, referred to below as the Association.

Mr. William G. Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn, S.C., 219 Washington Avenue, P. O. Box 1278, Oshkosh, Wisconsin 54902-1278, for the Board of Education, Suring Public School District, referred to below as the Board, or as the District.

ARBITRATION AWARD

The Board and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of the Suring Education Association. The Commission appointed Richard B. McLaughlin, a member of its staff. The parties submitted a stipulation of facts with ten joint exhibits on May 14, 1997, and agreed to argue the grievance based on the stipulated record. As a result of this agreement, no evidentiary hearing was conducted. The parties filed briefs and reply briefs by June 30, 1997.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

> Is the November 4, 1996 grievance arbitrable within the meaning of Article VII of the collective bargaining agreement?

If so, was the November 4, 1996 grievance timely filed within the meaning of Article VII, Level One a) of the collective bargaining agreement?

If so, did the Board's implementation of a salary schedule for the 1996-97 school year built on a BA base of $24,583 violate Appendix I of the collective bargaining agreement?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

I. Introduction

. . .

B. The intent of this Agreement is to set forth and record herein the basic and full agreement between the parties on those matters pertaining to wages, hours, and conditions of employment for teaching personnel.

. . .

V. Board of Education Functions

. . .

B. Without limiting the generality of the foregoing (paragraph A), it is expressly recognized that the Board's operational and managerial responsibility includes:

. . .

2. The determination of the financial policies of the District, including the general accounting procedures, inventory of supplies and equipment procedures and public relations.

. . .

VI. Teacher Rights

. . .

F. Nothing contained herein shall be construed to deny or to restrict for any teacher such rights as he has under the laws of Wisconsin and the United States or other applicable laws, decisions and regulations. The rights granted to teachers hereunder shall be considered to be in addition to those provided elsewhere.

VII. Grievance Procedure

A grievance shall be defined as any disagreement affecting the wages, hours and conditions of employment of a teacher or a group of teachers as it relates to the interpretation or application of this agreement or teacher evaluation.

. . .

1. Level One

a) A person must submit his grievance directly to the school principal in writing and/or orally within fifteen (15) school days following the date that such grievance occurred.

. . .

4. Level Four

. . .

e) Said arbitrator shall have no power to add to or subtract from the terms of this agreement. The arbitrator shall have no power to advise on salary adjustments except improper application thereof.

. . .

XX. General Provisions

A. This Agreement may be altered, changed, added to, deleted from or modified only through the voluntary, mutual consent of the parties in written and signed amendment to this Agreement.

. . .

APPENDIX I
1995-1997

SURING PUBLIC SCHOOL DISTRICT

. . .

The parties agree to prepare a total package increase of 3.8% in 1996-97 using the WERC costing methodology and rules based on the same staff that was used to build the 1995-96 salary schedule. The parties shall build the salary schedule after all other costs are known with certainty.

. . .

BACKGROUND

The parties submitted the following stipulation of fact:

1. The parties agree to costing for 1995-96. During 1995-96, teachers paid their own share of the increase in retirement (.3%). In 1996-97, the parties have a dispute concerning how the .1% decrease in retirement will be handled.

2. The Union's costing of retirement in 1996-97 results in a BA base of $24,593. The District's BA base amounts to $10 less ($24,583) because of the way it calculates retirement.

3. The dispute centers around the appropriate way to calculate the .1% decrease in retirement during 1996-97 school year.

4. The Board also has raised a timeliness issue on this

grievance.

5. The District has implemented its version of the 1996-97 salary schedule.

6. By reference, the parties acknowledge WERC administrative rules in (ERC) 33.

7. During negotiations for 1995-96, the District's position was to cost the WRS increase effective 1/1/96 as if it had been (in) effect for the entire school year. The Association's position was to cost the increase as of the effective date.

8. The parties agree to costing of the 1995-96 total package. The District's share of WRS was costed at the higher rate for the entire school year. The teachers paid their own share of the increase in retirement (0.3%) from 1/1/96 through 6/30/96. Effective 7/1/96, the District pays the full employee contribution to WRS.

The parties also submitted ten exhibits with their stipulation of fact. Among those exhibits is a letter dated July 3, 1996, from Bridget M. Amraen, Research Paralegal for Godfrey & Kahn S.C., to William W. Kean, the Board's District Administrator. That letter sets forth the costing methodology underlying the Board's calculation of the BA Base for the 1996-97 school year thus:

> Since the teachers have agreed upon a 1996-97 3.80% total package increase, our firm recommends the following procedure in costing the decrease:
>
> Employer: The percentage will decrease by .1% for 1996-97, resulting in 6.4% costed for the entire year.
>
> Employee: This share is somewhat different in that the 1995-96 employees share was calculated at the *actual* rate of 6.2%. To be consistent, the employee 1996-97 contribution will assume the *actual* cost of the impact effective January 1, 1996 or .05%. This results in a WRS rate of 6.45% (6.2% + .3% + .05%).
>
> The decrease in rates results in a base of $24,583.

This view was not agreed to by the Association and prompted discussions in July concerning the parties' conflicting assumptions regarding costing methodology and concerning expeditious means to resolve any potential dispute. Presumably, those discussions did not result in any agreement.

The Board implemented a salary schedule for the 1996-97 school year which included a BA Base of $24,583. This ultimately provoked a grievance dated November 4, 1996, filed by Robert Nelson, the Association's Grievance Chair. The grievance form includes a "Statement of Grievance" which states:

> **Violation of Appendix I, 1995-97 Master Agreement**
>
> 1) With respect to preparation of the 1996-97 Salary Schedule, the contract states: *The parties agree to prepare a total package increase of 3.8% in 1996-97 using the WERC costing methodology and rules based on the same staff that was used to build the 1995-96 salary schedule. The parties shall build the salary schedule after all other costs are known with certainty*. The District failed to provide a 3.8% total package increase for 1996-97 by miscalculating the costs of WRS contributions. The District further violated Appendix I by implementing its 1996-97 salary schedule without Association approval on August 22, 1996.

The grievance states the "Remedy Requested" thus:

> 1) The Association's 3.8% total package cost and salary schedule for 1996-97 be accepted with full back pay to 7/l/96 for all Education Association members.

In a letter dated November 14, 1996, William O. Bartz, Jr. the Board's President responded to the grievance thus:

> The School Board has carefully reviewed the grievance that the Union has filed regarding the pay schedule. The School Board notes that the grievance has not been timely filed. The salary schedule was implemented on August 20, 1996. The grievance procedure between the parties clearly states that all grievances must be filed "within 15 school days following the date that such

grievance occurred", Article VII, Grievance Procedure No. 1,

> Page 6, of the 1995-97 contract. Because the Union filed this grievance on November 4, 1996, the Union has missed the timeline for filing the grievance.
>
> In addition, the School Board fails to see how the master agreement was violated. Therefore based on all of the above information, the School Board finds that the contract was not violated and there is no merit to the grievance as filed.
>
> . . .

Nelson responded to Bartz in a letter dated November 25, which states:

> I have received your response to the grievance filed with Dr. Kean and I am somewhat confused that Dr. Kean did not respond to our grievance as required by the Grievance Procedure.
>
> When I spoke to Dr. Kean, he agreed that we would initiate this grievance at his level of the grievance procedure. Therefore, we expected a response from Dr. Kean within ten (10) school days following that meeting. Then, as outlined in Level 3, page 7, the Association may meet with the Administrator and the Board of Education within ten (10) school days to resolve the grievance. Since Dr. Kean did not respond and you as Board President did, are we to assume that there will be no hearing with the Board of Education?
>
> While the Board has every right to assert that the grievance was not timely filed, it is the Association's position that a new grievance concerning payroll occurs every time a payroll is cut and the checks are distributed.
>
> The Suring Education Association would appreciate knowing whether or not this is the Board's final decision and whether or not, as indicated in Level 4, a) and b), the parties should seek to select an impartial arbitrator.
>
> We would appreciate hearing from you as soon as possible relative to the Board's position but no later than December 2, 1996. . . .

Kean responded to Nelson in a letter dated November 25, which states:

> With regard to the confusion over the handling of the grievance, on or about November 6, 1996 I told you that I was handing the grievance over to the School Board.
>
> I will consult with the Board regarding their position . . .

Bartz responded to Nelson's November 25 letter in a letter dated December 2, which states:

> . . .
>
> The Association is correct in assuming that there will be no hearing with the Board of Education. Since the grievance was not filed within the 15 days of the Board's decision not to replace the reduction in the state retirement plan premium it assumed this decision was acceptable by the Association. However, this decision or "occurrence" does not repeat itself with each pay period.
>
> Consequently, it was the Board's final decision not to move forward any further in the grievance procedures regarding this matter.
>
> The Board looks forward to negotiating the Association's upcoming contract and making whatever adjustments are necessary to the base salaries at that time.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Association's Initial Brief

The Association states the issues for decision thus:

> Did the District violate the Collective Bargaining Agreement when it implemented its 1996-97 salary schedule, inconsistent with the parties' agreement to calculate total package increases at 3.8%, contrary to Appendix I of the contract?

If so, what is the appropriate remedy?

After a review of the evidence, the Association argues that the grievance "is timely and, therefore, procedurally arbitrable." The Association notes that ETF notified the parties of the decrease in retirement contributions in June of 1996, and that the Board did not implement its salary schedule for the 1996-97 school year until August 20, 1996. Because "(e)ach pay period represents a potential grievance as the salary payment has a recurring effect," the Association urges that the grievance need not have been filed when the Board issued its first pay check under its implemented salary schedule. Arbitral precedent, according to the Association, supports this assertion.

The Association then contends that its costing of the .1% decrease is consistent with Chapter 33 of the Commission's rules. Even though the Board is not bound to Commission costing rules since the settlement underlying the 1995-97 labor agreement was voluntary, the Association argues that the parties "had expressly agreed to use those WERC costing guidelines to determine total package increases for 1995-96 and 1996-97." In the first school year of this agreement, "the total package costing used an *assumed* employer contribution rate for the entire year and the *actual* employee rate for the entire year." In the second year, the parties agree on how to cost the Board contribution to the WRS, but differ on whether the employe share should be based on actual costs.

The Board's position is, according to the Association, "wrong for two reasons." The first is that WERC costing rules "clearly state that 'actual costs' are not used." Second, the Board's position is internally inconsistent. It is, the Association argues, inaccurate for the Board to contend that an actual costs approach was taken to the employe share of the WRS for the 1995-96 school year. That the Board's contribution did not increase in that school year is coincidental, and the change in "the basis for costing the employee share in the second year" makes the costing of the prior year an inappropriate model. Unlike the Board's, "the Association's total package costing treats both portions of the WRS contributions in the same manner," pegging each a 6.4% for the entire year.

As the remedy appropriate to the Board's conduct, the Association requests that "its grievance be sustained, (its) salary schedule be implemented, and back pay issued in accordance with said schedule."

The Board's Initial Brief

After a review of the evidence, the Board states the issues for decision thus:

> Is the grievance timely filed?
> Does the Arbitrator have jurisdiction to interpret state law and administrative rules?
> Did the District violate the Master Agreement when it costed the employee's share of retirement in 1996-97 on an actual basis?

Ample arbitral precedent establishes that processing of grievances must be prompt. Article VII, Section 1 requires a grievance to be submitted within fifteen school days of "the date that such grievance occurred." That date was August 22, 1996, and the filing of the grievance on November 4, 1996, must, under the contract and arbitral precedent, be considered untimely. Any other conclusions renders the express provisions of Article VII meaningless.

Beyond this, the Board contends that the grievance is not substantively arbitrable. Sec. 111.70(4)(cm)8s and ERC 33 govern the issues posed by the grievance on its merits. Those provisions have not yet been interpreted either by the WERC or the courts. Either would be an appropriate forum for the determination of the legal issue posed by the grievance. Grievance arbitration would not. Articles I and VII expressly underscore this conclusion.

If the merits of the grievance can be considered posed for arbitral determination, then the grievance lacks merit. ERC 33 and Sec. 111.70(4)(cm)8s, Stats., require the "annualization" of increases in costs, not of decreases. To imply that those provisions extend to decreases would be, at best, an inappropriate attempt to reach an equitable result in spite of the governing authority.

The "unique facts in Suring" also underscore the lack of merit in the grievance. In the 1995-96 school year, the Board annualized its cost increase, but used an actual costs approach to the employe contribution. It acted consistent with this in the 1996-97 school year. To adopt the Association's position would mean that "the employees would be unjustly enriched by the amount of .05 percent." The compounding effect this has on future salary schedules "will amount to thousands of dollars to the taxpayers of the Suring School District."

Whether on its merits or for reasons of procedural or substantive arbitrability, the Board concludes that the grievance must be dismissed.

The Association's Reply Brief

The Association contends, after an extensive review of arbitral precedent, that the purpose of grievance arbitration is frustrated if inconsequential procedural violations are taken as a bar to the determination of the merits of a grievance. Noting that the nature of the violation alleged is a continuing one and that there is no evidence that the Association has improperly delayed processing the matter, the Association concludes that the grievance should be found procedurally arbitrable.

Beyond this, the Association contends the grievance must be found substantively arbitrable. The labor agreement "incorporates by reference the WERC rules for costing a minimum QEO, thereby giving the Arbitrator authority to interpret those rules to decide" the grievance. That the Board waited to make this argument until the filing of a brief is, the Association urges, "outrageous." Article VI, Section F, further underscores the parties' mutual agreement to place issues like that posed here before a grievance arbitrator, and Article XX adds emphasis to the contractual dimensions of the grievance.

The Board's contention that the grievance seeks an equitable result not founded on the agreement is belied by the Board's own costing. Its annualization of the decrease in its contribution in the 1996-97 school year is "highly contradictory" to its protestations concerning the Association's position. A review of the evidence will establish, according to the Association, that its position "is based on common sense and is the fair and sensible manner in which to handle costing of the decreased WRS benefit during the 1996-97 contract year."

If the Board is correct that employes would be unjustly enriched if the grievance is sustained, then it must follow that "employees were unjustly penalized in the first year of this contract when it insisted on costing a mid-year benefit increase for the entire school year." A more apt characterization is, the Association urges, that its costing does not penalize the Board. The annualization of the mid-year increase in the WRS contribution attributed a "benefit cost to the unit's total package that was not incurred by the District," and the "Association's decision to pay its own .3% increase for six months was an attempt to defray the impact of the exaggerated benefit cost." The consistency of its costing is the source of its reasonableness and the basis on which the grievance should be granted.

The Board's Reply Brief

The Board underscores that its view of the grievance requires two threshold issues to be resolved before the merits of the grievance can be considered. If the Association's view of a continuing grievance is upheld, the Board urges that it can face a grievance indefinitely in spite of contract provisions requiring the prompt processing of a grievance.

The Association's contention that WERC rules are directed only to a minimum QEO "and not higher, voluntary settlements" is, the Board urges, "nonsense." The Association's view lacks support in both the statute and the administrative code, and is, "really not relevant for determining the outcome of this grievance."

Nor is the Association's method of costing the WRS decrease consistent with ERC 33. Its assertion that those rules preclude the use of "actual costs" is inaccurate. The references pointed to by the Association concern not the actual cost of a fringe benefit, but "a prohibition from using actual cost that would include staff turnover." Whatever may be said of the "logic" of consistently treating cost increases and cost decreases, "it is not what the rules say," and it is beyond arbitral authority to imply such "logic." The Board adds that it "strongly objects" to an "alleged 'informal opinion' attributed to WERC General Counsel . . . that was introduced through an exhibit attached to the Union's brief." Beyond this, the inconsistency alleged by the Association regarding Board costing in the 1996-97 school year is actually proof of the consistency of Board costing throughout the 1995-96 and the 1996-97 school years.

Concluding that "the Union has fallen short of proving its case" the District requests that the grievance be denied.

DISCUSSION

The District's arguments pose two threshold issues which must be addressed before the merits of the grievance can be considered. The first is that the labor agreement affords no contractual authority over the legal issue posed by the grievance. The second is that even if the agreement governs the grievance, the Association's failure to timely challenge the District's implementation of the salary schedule precludes arbitral consideration of the grievance.

The District's assertion of an issue of substantive arbitrability should not be considered to have been waived by its failure to raise the issue until the filing of its initial brief. That the issue should be raised as early in the grievance procedure as possible can be accepted, but does not address whether a delay in raising the issue forfeits the right to do so.

"Waiver" has been defined as "(t)he intentional or voluntary relinquishment of a known right." BLACK'S LAW DICTIONARY, (REVISED FOURTH EDITION, WEST, 1968) The challenge of the substantive arbitrability of a grievance poses a jurisdictional issue. The enforceability of a contract rests on the law, but the source of an arbitrator's authority is contractual, thus demanding the agreement of bargaining parties. The difficulty with applying waiver concepts to jurisdictional issues is that a focus on the action of one party to an agreement does not necessarily create the mutual agreement which is the source of arbitral authority. That the District belatedly challenged the scope of Appendix I does not grant that provision any greater scope than it may have without the challenge. It may be that the conduct of one party could be sufficiently egregious to justify waiver of a jurisdictional argument. Such facts, however, are not posed here. The District's belated challenge is not traceable to bad faith, and the issue of jurisdiction is fundamental. It is, then, necessary to address the issue of substantive arbitrability.

The standards governing the enforcement of an agreement to arbitrate date back to the Steelworkers' Trilogy. UNITED STEELWORKERS V. AMERICAN MFG. CO., 363 US 564 (1960); UNITED STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 US 574 (1960); UNITED STEELWORKERS V. ENTERPRISE WHEEL & CAR CORP., 363 US 593 (1960). The Wisconsin Supreme Court incorporated, from the Trilogy, the teaching of the limited function served by a reviewing authority in addressing arbitrability issues. DEHNART V. WAUKESHA BREWING CO., INC., 17 WIS.2D 44 (1962) The Court, in JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., stated this "limited function" thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 78 WIS.2D 94, 111 (1977)

The JEFFERSON Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be

considered arbitrable. IBID., AT 113

Article VII defines "grievance" broadly as "any disagreement affecting the wages . . . of a group of teachers," but narrows the scope of such a disagreement to a matter which "relates to the interpretation or application of this agreement." Level Four e) of Article VII further restricts the scope of this definition by noting an "arbitrator shall have no power to advise on salary adjustments except improper application thereof."

The grievance alleges a violation of the terms of Appendix I which mandate "a total package increase of 3.8% in 1996-97 using WERC costing methodology and rules . . . " Whether the Association's or the District's costing methodology provides a 3.8% total package increase establishes a "disagreement" requiring the "interpretation" of Appendix I. The arbitration clause thus covers the grievance on its face and the first element of the JEFFERSON analysis has been met.

The second element of the JEFFERSON analysis requires a determination whether any provision of the agreement specifically excludes arbitration of the grievance. The admonition of Article VII, Level Four e) is not applicable. The grievance does not seek arbitral advice on any salary adjustment. That adjustment has already been agreed to in Appendix I, and is underscored by the parties' stipulation that their difference turns on a $10 adjustment to the BA base. Thus, the grievance questions the "improper application" of Appendix I through the District's implementation of its own costing methodology. Level Four e) does not specifically exclude arbitration of the grievance.

The District urges that arbitral consideration of a legal issue is inappropriate. That it may be undesirable can be accepted. The issue posed by the second element of JEFFERSON, however, is whether the labor agreement expressly bars contractual consideration of a costing dispute traceable to the statutes and the Administrative Code. It does not. The express incorporation of "WERC costing methodology and rules" into Appendix I, given the contractual definition of a grievance, affords the potential of a contractual forum for the resolution of statutory issues. Although not directly on point, the provisions of Article VI, Section F underscore this conclusion. That section makes the potential applicability of statutory protections a relevant consideration, not a bar, to arbitral interpretation of the labor agreement.

This does not make an arbitral foray into WERC rules the most desirable means of addressing a statutory issue. The parties' stipulation of the record, including a request for a prompt decision supports, however, a conclusion that the foray can afford a resolution of the contractual issue. Under JEFFERSON, the issue is not whether arbitration is the best forum. Rather, the issue is whether arbitration is an available forum. In this case, both elements of the JEFFERSON analysis have been met, and the grievance is substantively arbitrable.

The next threshold issue is whether the grievance can be considered timely filed under Level One a) of Article VII. That provision requires a grievance to be filed within fifteen days "following the date that such grievance occurred." The grievance acknowledges that the District implemented its version of a salary schedule in August of 1996.

The District's contention that the grievance is untimely has implications on the merits of

the grievance and has potential remedial ramifications. The contention that consideration of the

merits of the grievance should be barred due to the untimeliness of its filing has considerable persuasive force, but cannot be accepted. The fifteen day time limit, as any agreement provision, must be given effect. Grievance timelines foster the stability which follows the prompt resolution of disputes. They also serve to discourage litigation of claims on stale evidence. Level One a) dates the initial filing of a grievance from "the date such grievance occurred." The District's contention that the salary schedule was implemented, as a one time occurrence, in August of 1996, has support in the singular reference to "date" in Level One a).

While the force of the District's contention must be acknowledged, the uncertain factual background posed by this record precludes its acceptance. The parties' agreement does not state a sanction for the filing of an untimely grievance, and the waiver sought by the District is a harsh sanction. While the creation of a salary schedule is arguably a one-time occurrence, its implementation is spread, paycheck by paycheck, throughout a school year. Even if taken as a one-time occurrence, there is no evidence that the District notified the Association that it intended to, or had implemented its view of the salary schedule. Even if such evidence had been submitted, it is not clear that such an implementation was intended to resolve the underlying dispute. The evidence indicates the parties were still discussing potential avenues to resolve their dispute in July of 1996. On the record posed here, the August implementation could plausibly be viewed as no more than a means to implement a provisional solution until a final agreement on costing methodology or on how to resolve the costing dispute had been reached.

That the parties' difference is $10 on a BA base which, for the 1995-96 school year, was $24,148 reflects that the difference between the parties was less than stark on a paycheck-by-paycheck basis. Against this background, there is no clear notice from the District to the Association that their position on the salary schedule had been fully and finally rejected. Viewed as a whole, the evidence makes a forfeiture of the grievance unpersuasive. The language of Level One a) should be interpreted to encourage the prompt, open discussion of differences. In the absence of evidence of notice to the Association regarding the significance of the Board's August actions, it is difficult to see how the District's view furthers those purposes. Against this background, it is impossible to date the fifteen day time limit from a single event in August. Rather, the asserted violation appears, as the Association asserts, to turn on the continuing, paycheck-by-paycheck implementation of the District's unilateral implementation of its costing methodology. This does not mean the fifteen day time limit has no meaning. Rather, the time limit cannot be dated from August of 1996.

It is now necessary to address the merits of the grievance. The issue adopted above focuses on the language of Appendix I. This highlights that the issue posed is contractual. The governing language, however, calls into question statutes and Commission rules by its reference to "WERC costing methodology and rules." The narrow issue posed by the parties is whether a BA base of $24,583 or of $24,593 generates the "total package increase of 3.8%" required by Appendix I.

The parties' arguments highlight that there is no clear case-law guidance on their dispute. The Association attached to its brief an internal memorandum which asserts the Commission may

have issued an informal opinion on the point. The memo was not included in the parties' stipulation of fact and thus can play no role in an examination of the grievance.

My own assessment of the parties' arguments is that the Association's view is a more persuasive application of "WERC costing methodology and rules" than is the District's. The Association's view is simpler, and can be consistently applied across bargaining units. It is thus more reconcilable to the purpose of the underlying statutes and rules than is the Board's view, which turns on circumstances unique to the Suring School District.

The purpose of the statutory changes implemented through ERC 33 is one of cost containment, applied on a state-wide basis. Sec. 111.70(1)(nc)1, Stats., read in conjunction with Secs. 111.70(1)(dm), 111.70(4)(cm)5s, and 111.70(4)(cm)8s, Stats., establish an arguably unprecedented level of legislative interest in the cost of collectively bargained agreements. The cost limits contained in those provisions are given uniform, state-wide implementation through the provisions of ERC 33, read in conjunction with Forms A, B and C which are stated as an Appendix to ERC 33.

The depth of the legislative interest is underscored by the requirement stated in Sec. 111.70(4)(cm)8s, Stats., that:

> (A)ny cost increase that is incurred on any day other than the beginning of the 12-month period commencing with the effective date of the agreement or any succeeding 12-month period commencing on the anniversary of that effective date shall be calculated as if the cost increase were incurred as of the beginning of the 12-month period beginning on the effective date or anniversary of the effective date in which the cost increase is incurred.

The interest thus underscored is two-fold. The first is that the legislature sought, by precluding the deferral of benefit costs, to close any means of undercutting its cost caps. The second is that costing rules were intended to be uniform and consistent across bargaining units.

In this case, the District forcefully points to factors within the parties' bargaining history to underscore the consistency of its costing approach. The difficulty with this argument is not with the consistency of the District's approach. Rather, it is with the focus of that approach on bargaining history unique to this school district. This approach is inconsistent with the legislative purposes noted above. The Association's view, in my opinion, is simpler and more capable of being applied across bargaining units. This is, in my opinion, more consistent with the statutory and administrative background to "WERC costing methodology."

Before closing, it is appropriate to tie this conclusion more tightly to the parties' arguments. The District accurately and forcefully points out that where the statutes and rules specify costing methodology, they refer to "increases" not "decreases" in benefit costs. Under this view, because there is no clear statutory guidance, there is no contractual basis to warrant the

annualization of cost decreases. The statutes and rules do govern cost decreases implicitly by permitting money not spent on maintaining fringe benefits to be spent on salary, and do cover

salary decreases when benefit increases exceed express statutory cost caps (Sec. 111.70(1)(nc)2, Stats.). This does not, as the District points out, govern the issue posed here. It does, however, underscore that the background legislation is comprehensive in nature. It is unlikely the statutes contemplate, or the Commission would tolerate, a gap in coverage. In my opinion, the gap pointed to by the District should be filled by applying as simple a rule as possible, which is readily capable of application across bargaining units. As noted above, this favors the Association's view.

The District persuasively contends that the "WERC costing methodology" cannot be restricted to a minimum QEO as the Association asserts. The District's reading of Sec. 111.70(4)(cm)8s, Stats., and of the relevant Commission forms is persuasive on this point. More significantly, however, Appendix I presumes, as a matter of contract, that "WERC costing methodology" applies to this dispute. There would be no reason to include that reference in Appendix I if "WERC costing methodology" did not apply to a voluntary settlement which reflected something greater than a minimum QEO.

That WERC costing forms and the underlying statutes employ costing methodology other than actual year-to-year expenditures is not, as the District asserts, irrelevant to this dispute. The cast forward costing system and Form A reflect, in my opinion, legislative intent to promote uniformity of costing to effect the fundamental interest in cost containment. The interest in uniformity is, as noted above, of some significance in evaluating the grievance. The Association's view is more readily applicable to other salary schedules than is the Board's.

Both parties have speculated on the equity of their respective views. The Board asserts its view is more equitable to taxpayers while the Association asserts its view is more equitable to teachers. Neither view is inherently inequitable. More significantly, the agreement does not call on an arbitrator to dispense equity, however defined. As noted above, however, the predominating legislative purpose underlying the statute revolves on cost containment. Unless the statute is viewed as a punitive measure toward employes, it is difficult to understand why cost decreases would be handled in a fashion different than cost increases. The statute states a defined cap on costs, not an unspecified diminution of employe benefits under that cap.

The analysis undertaken above does not turn on evidence of legislative intent, but on a reading of the statute and relevant rules. This reflects my understanding that the parties are more concerned with a prompt answer to a salary dispute than a treatise on legislative history.

Before closing, it is necessary to address the issue of remedy. The Association accurately notes that I have accepted, in a past case, the "continuing violation" theory of timeliness, see SCHOOL DISTRICT OF AUGUSTA, MA-3437 (MCLAUGHLIN, 6/85). In that case, I also noted (at page 11):

> Having determined Mayer's grievance is of a continuing nature does not, however, render the substantive time limits of the grievance procedure meaningless. The evidence does not establish what pay

period the check which prompted the filing of Mayer's

> grievance would have covered. Thus, Mayer's grievance can be considered valid for remedial purposes only from the time of its filing on September 5, 1984. The Association urges this creates a windfall for the District. However, to afford the Association the remedy it seeks would render the substantive time lines of the grievance procedure meaningless, since Mayer was admittedly less than diligent in pursuing his grievance, and there is no persuasive evidence that the District in any way hid its acts toward Mayer from Mayer or the Association. There is, in addition, no persuasive evidence of bad faith on the District's part . . .

These considerations underlie and dictate the remedy stated below. The remedy only states the point from which back pay can be compelled. Nothing stated in the award should be read to preclude a calculation of back pay from an earlier date if the parties agree it is more convenient to do so.

AWARD

The November 4, 1996 grievance is arbitrable within the meaning of Article VII of the collective bargaining agreement.

The November 4, 1996 grievance was timely filed within the meaning of Article VII, Level One a) of the collective bargaining agreement.

The Board's implementation of a salary schedule for the 1996-97 school year built on a BA base of $24,583 violated Appendix I of the collective bargaining agreement.

As the remedy appropriate to the Board's violation of Appendix I, the Board shall implement a salary schedule for the 1996-97 school year built on a BA base of $24,593. The Board shall also make each affected teacher whole by paying them the difference between the wages and benefits it paid based on its implementation of a salary schedule built on a BA base of $24,583 and the wages and benefits it would have paid had it implemented a salary schedule built on a BA base of $24,593. The Board's liability, in the absence of mutual agreement otherwise by the parties, shall date from November 4, 1996.

Dated at Madison, Wisconsin, this 11th day of September, 1997.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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