STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, and JAMES W. PARIZA, Complainants, vs. MILWAUKEE COUNTY and MILWAUKEE COUNTY CIVIL SERVICE COMMISSION, Respondents.	Case LXXXIV No. 20878 MP-669 Decision No. 14962-A

Appearances:
Podell & Ugent, Attorneys at Law, by Mr. Alvin R. Ugent, appearing on behalf of the Complainants.
Mr. Robert P. Russell, Corporation Counsel for Milwaukee County, by Mr. Patrick J. Foster, Principal Assistant Corporation Counsel, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 6, 1976, the abovenamed Complainants filed a complaint alleging that the abovenamed Respondents, among others, had committed prohibited practices within the meaning of the Municipal Employment Relations Act. By order dated October 11, 1976, the WERC appointed the undersigned Marshall L. Gratz, a member of its staff, to act as examiner and to make and issue findings of fact, conclusions of law and order in the matter. Pursuant to notice, counsel for all parties met with the examiner for a prehearing conference pursuant to Sec. 227.07(4), Stats., at which time the pleadings were substantially amended, the record was stipulated, and further hearing was waived. By letter dated December 15, 1976 the examiner summarized the results of said prehearing conference. Briefing was completed on November 14, 1977 when Respondents submitted their reply brief. The examiner thereafter reopened the hearing on his own motion, conducting a further prehearing conference on December 7, 1976 and a hearing on February 1, 1978. Counsel argued the matter orally at the conclusion of that hearing and chose not to file additional briefs.

The examiner has considered the evidence and the briefs and arguments of counsel, and, being fully advised in the premises, makes and issues the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Complainant Milwaukee District Council 48, AFSCME, AFL-CIO, is a labor organization and has its principal office located at 3427

West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. Complainant James W. Pariza is an individual who resides at 5902 Dale Lane, Greendale, Wisconsin 53129. Until his discharge on or about August 30, 1976, Complainant Pariza was a member of Complainant Milwaukee District Council 48, an employe of Respondent Milwaukee County and a municipal employe. Complainant Pariza received a temporary appointment to the position of Ambulance Driver I in the classified service of Respondent Milwaukee County on September 24, 1972, and he held said position continuously until on or about August 30, 1976.

3. Respondent Milwaukee County is a municipal employer within the meaning of Section 111.70(1)(a) and has its principal offices located at the Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin 53233.

4. Respondent Milwaukee County Civil Service Commission is a commission established under Chapter 63, Stats., and at all material times it has consisted of a group of individuals. Its principal offices are at 901 North 9th Street, Milwaukee, Wisconsin 53233. In all respects material herein, Respondent Commission has acted on behalf of Respondent County and purportedly within the scope of its (Respondent Commission's) authority under Secs. 63.01-63.16, Stats.

5. Complainant Milwaukee District Council 48 is and has been at all material times the certified representative of a bargaining unit including the position held by Complainant Pariza noted in finding 2, above.

6. At all material times, Respondent Milwaukee County and Complainant District Council and its appropriate affiliated locals have been parties to a collective bargaining agreement covering the bargaining unit referred to in finding 5, above. Said agreement is binding upon Respondent Milwaukee County Civil Service Commission.

7. Neither Subsec. 4.06(1) nor 4.06(2) of said agreement requires either respondent to provide a hearing in connection with the discharge of any employe, and Complainants have failed to prove a violation of either of said subsections by Respondents.

8. Section 1.05 of said agreement provides that Respondent County's right to discharge employes is "subject to Civil Service procedures and the terms of this Agreement related thereto. . . ." The "Civil Service procedures" referred to therein include Secs. 63.01-63.16, Stats., and rules promulgated and published by Respondent Commission pursuant thereto. Section 63.02(1), Stats., authorizes and mandates Respondent Commission's preparation and adoption of ". . .

such rules and regulations to carry out the provisions of ss. 63.01 to 63.16, inclusive, as in their judgment shall be adapted to secure the best service for the county in each department affected by said sections, and as shall tend to promote expedition and speed the elimination of all unnecessary formalities in making appointments." That section further provides that "[s]uch rules shall be printed and distributed in such manner as reasonably to inform the public of the county as to their purpose, and shall take effect ten days after they are published." Section 63.04, Stats., provides in pertinent part that "no person shall be . . . reduced in . . . or removed from the classified service . . . except in accordance with [Secs. 63.01-63.16, Stats.]." Section 63.10, Stats., and published Civil Service Rule VII(1-3) both provide that the procedure for discharge of ". . . an . . . employe in the classified service . . ." shall involve, inter alia, the filing of charges by supervision, a possible suspension pending determination of charges, notice to the employe of such filing, and a hearing before Respondent Commission to determine whether such charges are well founded and if they are what action is deemed requisite and proper. The rules published by Respondent Commission refer to three types of appointment to the classified service: regular, temporary and emergency. Civil Service Rule IV(6) provides that the Sec. 63.10 procedures noted above shall not apply to discharges of persons holding an emergency appointment to a position in the classified service and Rule IV(4) implies that said Sec. 63.10 procedures shall not apply to the separation of an employe from a position during the required probationary period. No similar written or published rule excludes discharges of temporary appointment personnel from application of those Sec. 63.10 procedures, however. Respondents have failed to prove by a clear and satisfactory preponderance of the evidence that the history of bargaining and administration of Agreement Sec. 1.05 reflects a mutual understanding that discharges of temporary appointment personnel shall not be subject to said Sec. 63.10 procedures.

9. On or about August 27, 1976, Complainant Pariza was informed by telephone by Orville Ebert, Chief of Protective Services of the Milwaukee County Institutions, acting within the scope of his authority as a supervisor and agent of Respondent Milwaukee County, that he (Pariza) was discharged from his employment effective immediately. Ebert did so without filing charges against or providing written notice thereof to Pariza.

10. On or about September 1, 1976 Pariza submitted and Respondent Commission denied a written request for a hearing concerning Pariza's discharge.

11. Thus, Respondents discharged Complainant Pariza and removed him from the classified service effective August 27, 1976, without

following the procedures for discharge contained in Sec. 63.10, Stats., and Rule IV(1-3) noted above, (e.g., filing of charges, notice of filing, and hearing), and without waiver of such procedures by Complainant Pariza.

12. By doing so, Respondents violated Sec. 1.05 of the collective bargaining agreement referred to above. However, Complainants have failed to prove that either Respondent has violated either Subsec. 4.06(1) or 4.06(2) of said agreement.

13. Neither party has requested that the examiner or WERC decline to exercise jurisdiction to determine the violation of collective bargaining agreement allegations set forth in the amended complaint herein.

Based on the above and foregoing findings of fact, the examiner makes and issues the following

CONCLUSIONS OF LAW

1. Respondent Commission is a person within the meaning of Sec. 111.70(1)(f), Stats.

2. As noted in finding 12, above, Respondents violated a collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes. By doing so, Respondent County committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats. By doing so on behalf of a municipal employer (Respondent County), Respondent Commission committed a prohibited practice within the meaning of Sec. 111.70(c), Stats.

3. Neither Respondent, by the conduct noted in the findings above, violated rights of either Complainant in a manner constituting either an independent violation of Sec. 111.70(3)(a)1, Stats., or violations of Secs. 111.70(3)(a)3 or 4, Stats. Hence, neither Respondent committed any prohibited practices in those regards.

On the basis of the foregoing findings of fact and conclusions of law, the examiner makes and issues the following order.

ORDER

Respondents Milwaukee County and Milwaukee County Civil Service Commission, their officers and agents, shall immediately:

1. Cease and desist from failing to follow the Sec. 63.10, Stats., procedures for discharge in cases of discharge of employes holding positions in the classified service by temporary appoint-

ment, until such time as either the provisions of Sec. 1.05 of the collective bargaining agreement between Milwaukee District Council 48 (and its appropriate affiliated locals) and Milwaukee County or the "Civil Service procedures" referred to therein are changed so as not to require same.

2. Take the following affirmative action which the examiner finds will effectuate the purpose of the Municipal Employment Relations Act:

a. Offer to James W. Pariza immediate reinstatement to his former or a substantially equivalent position (without prejudice to his rights and privileges) but with his continued employment subject to the County's rights to file such charges as it may have against Pariza and to seek his discharge in the manner prescribed in Sec. 63.10, Stats., and Civil Service Rules promulgated and published with respect thereto.

b. In any event, make James W. Pariza whole for any loss of pay he may have suffered by reason of the collective bargaining agreement violation noted above by paying to him an amount of money equivalent to that which he would normally have earned as an employe from August 27, 1976 until the date of the offer or reinstatement noted above, less any earnings he may have received during said period and less the amount of unemployment compensation, if any, received by him during said period.

c. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of receipt of this order as to what steps have been taken to comply herewith.

Except as noted above, the Complaint filed in the above matter shall be, and hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 6th day of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner

MILWAUKEE COUNTY and MILWAUKEE COUNTY CIVIL SERVICE COMMISSION, LXXXIV, No. 14962-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint initiating this proceeding was filed on October 6, 1976. It originally named each Civil Service Commission member as additional respondents but was amended as in the caption above. As amended, the complaint contains allegations that Respondents violated Secs. 111.70(3)(a)1, 3, 4, 5 and (3)(c), Stats., by discharging Complainant Pariza without according him notice of charges, a hearing before Respondent Commission, and representation by Complainant District Council. In its amended answer, Respondents admit that Pariza was discharged without such procedural protections, but contend that Respondent Commission is not subject to WERC complaint jurisdiction and that as a temporary appointee Complainant Pariza was not entitled by contract or MERA to the procedural protections claimed.

The examiner has concluded that Respondent Commission, being at all times a group of individuals, is a "person" within the meaning of Sec. 111.70(1)(k), Stats. As such and because the Chapter 63, Stats., provisions creating it clearly empower Respondent Commission to act on behalf of a municipal employer, Respondent County, the examiner has found Respondent Commission subject to WERC complaint jurisdiction under Sec. 111.70(3)(c), Stats.[1/]

The central issue in this case is whether Complainant Pariza is entitled to the procedural protections claimed violated. While Respondents' admitted nonprovision of those protections may have resulted in frustration of Complainants' desires to be represented or to represent during those procedures, no specific request for representation was denied, and it cannot be anticipated from the record that Respondents would deny the representation rights claimed if a hearing before the Respondent Commission were held. Thus, Complainants' allegations of an independent violation of Sec. 111.70(3)(a)1, Stats., are rejected and their allegations of a violation of Secs. 111.70(3)(a)3 and 4, Stats., which were not supported by evidence or argument are also found to be without merit. Moreover, the alleged violations of Agreement Subsecs. 4.06(1) and (2) have also been rejected because

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1/ cf. Milwaukee County, Dec. No. 14834-A (5/77) (Milwaukee County Civil Service Commission held to be a municipal employer within the meaning of MERA).

those provisions do not constitute an independent source of a right to a hearing in the case of a discharge.[2/]

The examiner now turns to the remaining complaint allegation, that Respondents violated Agreement Sec. 1.05 which makes Respondent County's right to discharge ". . . subject to the Civil Service procedures and the terms of this Agreement related thereto. . . ." Since there is no objection to WERC exercise of jurisdiction to decide that matter, the examiner has done so.

2/ Those agreement provisions read as follows:

"4.06 REPRESENTATION AT DISCIPLINARY HEARINGS

(1) At meetings called for the purpose of considering the imposition of discipline upon employes, the employe shall be entitled to Union representation but only at the administrative level at which suspension may be imposed or effectively recommended, that is, at the level of the appointing authority or his designee for such purposes.

(2) It is understood and agreed that such right is conditioned upon the following:

(a) At the hearing before the appointing authority or his designee for disciplinary purposes, the employe may be represented by Union officials equal to the number of management officials present at such hearing.

(b) The meeting at which the Union official is permitted to be present shall not be an adversary proceeding. The Union official may bring to the attention of the appointing authority or his designee any facts which he considers relevant to the issues and may recommend to the appointing authority on behalf of the employe what he considers to be the appropriate disposition of the matter. The employe shall not be entitled to have witnesses appear on his behalf nor shall the supervisory personnel present at such hearing be subject to cross-examination or harassment. These restrictions recognize that the purpose of Union representation at such hearings is to provide the employe with a spokesman to enable him to put his case before the appointing authority and, further, to apprise the Union of the facts upon which the decision of the appointing authority or his designee is made. These restrictions are in recognition of the further fact that, in accordance with other terms and conditions of this Agreement, the employe has recourse from the decision of the appointing authority or his designee to the permanent umpire where the employe is entitled to a full measure of due process.

(c) Recognizing that discipline is most effectively imposed as contemporaneously as possible with the incident leading to discipline, it shall be the obligation of the employe to make arrangements to have his Union representative present at the time the meeting is set by the appointing authority or his designee to consider the imposition of discipline. In order to carry out the intent of this Agreement, written notice of the meeting shall be provided to the employe and the Union not less than 48 hours prior to such a meeting and such (continued)

It is undisputed that the Sec. 63.10, Stats., procedures for discharge[3/] constitute a limitation imposed by the terms of Agreement Sec. 1.05 on the Respondents' right to discharge. Respondents, contrary to Complainants, contend, however, that Respondent Commission has always treated the 63.10 protections as applicable only to those individuals in the classified service holding regular appointments and never to those holding temporary appointments or emergency appointments. Respondents urge that the WERC as contract enforcement forum should afford great weight to Respondent Commission's interpretations of the statute and rules it was created to administer and promulgate, respectively. Respondents further contend that the history of bargaining and of administration of Agreement Sec. 1.05 indicates a mutual understanding consistent with Respondent Commission's interpretation of the statute and rules.

Complainants argue, on the other hand, that the Sec. 63.10 and Rule VII(1-3) protections expressly apply to discharges (removals from the classified service) of all employed "in the classified service"; that, unlike discharges of emergency appointees and separations from position of probationary personnel, no written or published rule excludes discharges of temporary appointees from the application of those protections; that the evidence establishes that no binding past practice exists such as would support the additional exception to Sec. 63.10 proposed by the Respondents; and that, even if temporary appointments are somehow excepted from Sec. 63.10 protections, Pariza ought to be treated as a regular and not a temporary appointee when discharged because he was retained in his position for

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2/ (cont'd) notice shall be accompanied by a brief statement of the basis for the proposed discipline. The inability of the employe to secure the services of any particular Union representative shall not be justification for adjourning such hearings beyond the date and time originally set by the appointing authority.

(d) Nothing contained herein shall in any way limit the authority of supervisory staff to impose summary discipline where the circumstances warrant such action. If summary discipline is in the form of a suspension, it is understood that a review of the action of the supervisor will be made at the level of the appointing authority or his designee to review the action taken by the immediate supervisor. Hearings to review such summary suspensions shall be held as soon as practicable at the level of the appointing authority or his designee. At such hearing the employe shall be entitled to the rights set forth herein."

3/ Referred to hereinafter as "the 63.10 procedures."

longer than the 6 month maximum period of temporary appointment contemplated in Sec 63.07, Stats.

A review of the record supports Complainants' characterization of the evidence concerning history of bargaining and administration. In support of its bargaining history and past practice theory, Respondents presented undisputed evidence that: Agreement Sec. 1.05 was inserted into the County-48 agreement in 1971 as the parties' first management rights clause; at least one previous bilateral written agreement had been entered into theretofore; since 1971, no proposals or negotiations concerning modifications of the discharge portion of the management rights clause have been made or conducted; so far as the Chief Examiner of Respondent Commission could recall, Complainant Pariza's was the first request for a hearing before Respondent Commission concerning the discharge of a termporary appointment ever received by Respondent Commission, and Respondent Commission has not conducted a hearing concerning such a discharge in at least the past 22 years. Respondents urge the examiner to further find, based "on common sense," that at least some temporary appointees have been discharged for cause in the past (both with less than and more than 6 months' service in their temporary appointments) and that Respondents' practice of nonapplication of Sec. 63.10 protections in such cases must have come to the attention of one or more agents of Complainant District Council such that said Complainant can now be charged with that knowledge and with acquiescence in such practice.

Absent evidence in support of both of the latter arguments, the examiner cannot and does not conclude that Complainant District Council knew of or acquiesced in a practice of nonapplication of Sec. 63.10 procedures to discharges of temporary appointees. Hence, Complainant District Council cannot be said to be bound by past practice to accept Respondents' view that Pariza was not entitled to Sec. 63.10 procedures in connection with his discharge.

Respondents' defense therefore rests on its citation of the well established principle of administrative law that interpretations (especially those of longstanding nature) of statutes and rules by the agency responsible for administration and promulgation thereof are worthy of great weight. Here, however, the record raises serious doubts about the existence of a longstanding interpretation on the point in question, and other considerations relevant to the proper construction of Agreement Sec. 1.05 outweigh the weight to be accorded Respondent Commission's statutory and rules interpretation.

It is by no means clear from the record that Respondent Commission

ever squarely faced the question of whether Sec. 63.10 protections apply to discharges of temporary appointees prior to the instant case. Chief Examiner Romano testified that Respondent Commission receives the same form from supervision when a person on temporary appointment is discharged for perceived cause as it does in the far more common situation wherein a permanent appointee returns from a leave of absence and the temporary appointment of the individual selected to substitute during the leave is terminated. Since Sec. 63.10 expressly applies only to situations where supervision ". . . believes that an . . . employe has acted in such a manner as to show him to be incompetent to perform his duties or to have merited demotion or dismissal," it does not appear to apply to the termination of a temporary appointment brought on by the return of a permanent appointee from leave. However, since as Chief Examiner Romano testified, Respondent Commission receives the same formal communication from supervision in both situations and Respondent Commission never in memory received a request for a hearing from a discharged temporary appointee before Pariza's, it would seem that Respondent Commission has not had occasion to interpret the provisions of Sec. 63.10 in the temporary appointee discharge situation prior to the instant case. If that is true, the weight to be accorded to Respondent Commission's interpretation would be at least somewhat reduced from that to be accorded a longstanding interpretation by that agency of the statutes it administers.

More importantly, Respondent Commission's interpretation of the scope of application of Sec. 63.10 has not been shown to have been known to Complainant District Council. Thus, Respondents would have the examiner find in Agreement Sec. 1.05--and impose on Complainants as one of the "Civil Service procedures" shaping the Respondents' right to discharge--an unwritten exception to the scope of application of Sec. 63.10 expressly provided in that section and in Rule IV(1-3) of which exception Complainants have not been shown to have had a reason to know. Respondents would have the examiner so find despite the fact that Sec. 63.02 provides that rules promulgated by Respondent Commission "shall take effect ten days after they are published" and that they are to be published ". . . in such a manner as reasonably to inform the public of the county as to their purpose," and despite the fact the express and published exceptions to the application of Sec. 63.10 protections exist with respect to separation of probationary personnel from their positions (Rule IV[4]) and with respect to discharges of individuals holding emergency appointments (Rule IV[6]). No such exception of discharges of temporary appointment holders has

been published as a rule of Respondent Commission.[4/] Hence, the examiner concludes that, absent proof that they had reason to know otherwise, Complainants have a right to rely on the absence of such a published rule in concluding that no such exception is reflected in the term "Civil Service procedures" as used in Agreement Sec. 1.05.

On the foregoing analysis, the examiner has determined that Respondents' failure to follow the Sec. 63.10 procedures in connection with the discharge of Complainant Pariza constituted a violation of Agreement Sec. 1.05 and thus a violation of the terms of a collective bargaining agreement by Respondents.[5/]

In fashioning a remedy for those prohibited practices, the examiner rejects Complainants' contention that Pariza's continued employment upon his acceptance of offered reinstatement should not be subject to a hearing before Respondent Commission. Complainants apparently do not contend that consideration of the merits of any charges supervision may have against Pariza is no longer timely.[6/] Rather, Complainants seem to argue that Respondent Commission has already evidenced pre-judgment of the merits of the case by its denial of Pariza's request for a hearing. Assuming arguendo that the examiner had the authority to order that a hearing of the merits of such charges be conducted before some other tribunal as Complainants have requested, the instant

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4/ Respondent's citation of State ex rel Dela Hunt v. Ward, 26 Wis. 2d 345 (1965) (Rule IV[4] excepting separations from positions during probation from scope of Sec. 63.10 is valid interpretation of the statutes) is inapposite herein. The question here is not whether Respondent Commission could publish a valid rule creating an exception to Sec. 63.10 for discharges of temporary appointment personnel as it did for separations of probationary personnel. Rather the question here is whether the Respondents can in the instant circumstances cause such a rule to affect the meaning of Agreement Sec. 1.05 without first publishing same.

5/ Respondents' argument that this conclusion would produce the harsh and therefore presumably unintended result of preventing replacement of temporary appointees upon the return from leave of permanent appointees for whom they are temporarily working is without merit. The instant conclusion does not require that result. For the order issued herein relates only to discharges (removals from the classified service) of temporary appointees and not to the termination of their temporary appointment by reason of the return of the permanent appointee. Furthermore, if Respondent Commission is uncomfortable in drawing that distinction based on its current rules it would seem to have the authority to publish additional rules establishing such distinction and a related limited exception from Sec. 63.10 protections more clearly.

6/ See, State ex rel Irany v. Milwaukee County Civil Service Commission, 18 Wis. 2d 132, 136-7 (1962) (remand for hearing before commission ordered despite strong dissent by Wilkie, J.).

facts would not warrant such an order here. For, the record suggests that Respondent Commission has never been apprised of the basis for Ebert's August, 1976 discharge of Pariza. Instead, the denial of Pariza's request by Respondent Commission appears to have been based upon the view that Pariza was not entitled to the hearing because of his temporary appointment status. That being the case, no prejudgment of the merits of as yet unfiled charges can be attributed to Respondent Commission. Moreover, because back-pay is ordered, no retroactive monetary considerations will be operative in any determination of charges against Pariza that Respondent Commission may hereinafter undertake.

Dated at Milwaukee, Wisconsin, this 6th of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner