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-B

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

Examiner Marshall L. Gratz having, on March 6, 1978, issued his Findings of Fact, Conclusions of Law and Order in the above-entitled matter wherein he found that the above-named Respondents had violated the provisions of a collective bargaining agreement and committed a prohibited practice within the meaning of Section 111.70(3)(a)5 and 1 of the Municipal Employment Relations Act, MERA, by failing to comply with the Civil Service Procedures contained in Section 63.10, Stats., in discharging Complainant Pariza and wherein he ordered that the Respondents cease and desist from such conduct and take certain affirmative action to remedy said violation; and the Respondents having on March 27, 1978, filed a timely 1/ petition for review of said decision; and the parties having waived further argument in the matter; and the Commission having reviewed the entire record, including the petition for review, and being satisifed that the Examiner's Findings of Fact, Conclusions of Law and Order be affirmed;

NOW, THEREFORE, it is

ORDERED

The Examiner's Findings of Fact, Conclusions of Law and Order in the above-entitled matter be, and the same hereby are, affirmed; and the Respondents are hereby directed to notify the Commission within twenty (20) days of the date of this order as to what steps they have taken to comply with the Examiner's order.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of August, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

1/ The petition for review was timely inasmuch as the twentieth day following the Examiner's decision fell on a Sunday, March 26, 1978. See Section 990.001(4)(b), Stats.

MILWAUKEE COUNTY (CIVIL SERVICE COMMISSION), LXXXIV, Decision No. 14962-B

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

In the amended complaint the Complainant Union alleges, inter alia, that the collective bargaining agreement existing between it and the Respondent County at all material times contained a provision which provides that the County's right to discharge employes covered by its terms is "subject to civil service procedures and the terms of this agreement related thereto"; and that:

> "2. Complainant James W. Pariza was, until his discharge on or about August 30, 1976, a member of Complainant Milwaukee District Council 48 and an employe of Respondent Milwaukee County. 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.
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> . . .
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> 10. 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 employment by Respondent Milwaukee County, that he, Pariza, was discharged from his employment effective immediately. Neither Respondent afforded Complainant Pariza an opportunity to be heard with or without representation by Complainant Milwaukee District Council 48 before or after said discharge on the merits therefor, despite Complainant Pariza's efforts to obtain a post-discharge hearing from Respondent Milwaukee Civil Service Commission and others.
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> 11. Ebert's phone conversation noted in paragraph 10, above, effected a termination of Complainant Pariza's employment. At all material times Complainant Pariza has claimed that said termination was without just cause and without sufficient reason."

These allegations were admitted in the Respondents' amended answer.

Section 1.05 of the collective bargaining agreement reads in relevant part as follows:

> "1.05 MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is. . . the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employes from duties because of lack of work or lack of funds. . ."

In his decision, the Examiner found that the Respondents had violated Section 1.05 of the collective bargaining agreement and concluded that the Respondent County violated Section 111.70(3)(a)5 and 1 of the MERA by discharging Pariza without following the procedures for discharge contained in Section 63.10, Stats., and Rule VII 2/ of the Respondent Commission. The Examiner also concluded that the Respondent Commission

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2/ The Examiner's Finding of Fact number 11 contains a typographical error and refers to "Rule IV (1-3) noted above" rather than Rule VII (1-3).

was a person within the meaning of Section 111.70(1)(f) of the MERA and violated Section 111.70(3)(c) of the MERA. He rejected the Union's claim that the Respondents had violated other provisions of the agreement or that they had violated any other provisions of the MERA. No petition for review was filed by the Complainants regarding these latter findings and conclusions and we agree with the Examiner's disposition of same.

In their petition for review, the Respondents indicate that they are dissatisfied with the Examiner's Findings of Fact, Conclusions of Law and Order and request the Commission to reverse and set them aside. Specifically, the Respondents argue:

1. That while it is true that the Respondents never requested that the Examiner decline to exercise the Commission's jurisidiction to determine the alleged violations of the agreement set forth in the amended complaint, they would now ask that the Commission decline to do so; and

2. That a substantial question of law and administrative policy is raised by the Examiner's legal conclusions.

Both the Complainants and Respondents waived their right to make additional arguments in support of or in opposition to the Respondents' petition for review and rely instead on their arguments before the Examiner.

DISCUSSION:

In our opinion, the Respondents are no longer in a position to object to the Commission's assertion of jurisdiction for the purpose of determining whether the Respondents have violated the terms of the collective bargaining agreement.

Where a collective bargaining agreement provides a grievance procedure culminating in binding arbitration, we will not ordinarily assert our jurisidiction under Section 111.70(3)(a)5 of the MERA for the purpose of determining whether there has been a violation of the terms of the agreement. Instead, we would defer to that forum selected by the parties, in this case the Umpire, for that purpose. However, where the parties agree to waive the arbitration provision of the agreement, or by their actions indicate their intent to waive such a provision, the Commission will assert its jurisdiction.

Here, the Respondents stipulated to the Examiner's determination of the allegation of contract violation contained in the amended complaint. 3/ We do not believe that the Respondents should be allowed at this stage of the proceeding to attempt to withdraw such agreement.

3/ In a letter to Counsel for the Complainants and Respondents, dated December 15, 1976, the Examiner summarized stipulations reached at prehearing conference and stated in relevant part: "Each party expressly stipulated that it has no objection to WERC determination of the violations of collective bargaining agreement alleged in the amended complaint. . . " This letter closed with a request that Counsel for both parties review the summary and promptly reply in writing as to whether they agreed with the summary. Although Counsel for the Respondents never replied in writing, he indicated by his subsequent inaction and filing of an amended answer consistent with the outline of stipulations, that he had no objection to the summary. Finally, on May 4, 1977, the Examiner notified the parties that, pursuant to Section 227.07(4)(b), Stats., the summary and amended complaint and answer would control the subsequent course of this proceeding.

With regard to the Examiner's legal conclusions, we agree that the County (and the Civil Service Commission acting on its behalf) violated the terms of the collective bargaining agreement by failing to follow the procedures set out in Section 63.10, Stats., and the rules of the Civil Service Commission implementing that section. The agreement expressly provides that the County's right to discharge employes is "subject to civil service procedures and the terms of this agreement related thereto." Unless the County's admitted failure to follow the procedures outlined in Section 63.10, Stats., and Rule VII of the Civil Service Commission in the case of discharging Pariza was justified because of his classification as a "temporary" employe, the County has violated its contractual commitment to the Union.

The wording of Section 63.10, Stats., is broad enough to cover the discharge of any employe in the classified service of the County. 4/ It makes no exception for temporary employes or probationary employes. The Wisconsin Supreme Court has upheld the validity of a rule of the Civil Service Commission which permits the termination of employes holding regular appointments during the period of their probation. 5/ However, there is no such rule covering temporary employes.

The County relies on an alleged practice or policy of not affording the protections of 63.10, Stats., and Rule VII to temporary employes. However, an examination of the evidence regarding that "practice" or "policy" fails to disclose any specific examples where temporary employes were expressly denied the protections of civil service procedures when discharged (as opposed to being separated by reason of the expiration of their temporary term). Furthermore, absent a rule to that effect, we seriously question whether such a practice would be upheld by the courts as a valid exercise of the Commission's authority under the statutes. Finally, we note that the County has not cited any formal ruling of the Commission applying such policy or interpretation of the statutes to which we could assign "great weight" as argued in their brief.

While the fact that Pariza was classified as a "temporary" employe for a period far in excess of that permitted by Section 63.07, Stats. is not controlling on the conclusion reached herein, such fact does raise an additional problem if the County's position were otherwise to be sustained in this case. The rule which permits the County to discharge an employe holding a regular appointment during the period of his or her probation only permits such discharge during the period of probation (six months). Here, Pariza, who was appointed from the eligible list, worked for nearly four years prior to his discharge. A rule which permitted his discharge during the six-months period provided for temporary appointments would not be dissimilar from the rule, already approved by the courts, which provides that employes appointed to fill regular appointments may be "separated" during the first six months of their appointment without complying with Section 63.10, Stats. However, in order to sustain the County's position in this case, it would be necessary to sustain a "policy" or "rule" which permits the discharge 6/

4/ It is undisputed that temporary employes, like employes holding regular appointments (whether on probation or not) are "in the classified service." Only employes holding emergency appointments, who are not appointed from the eligible list, are excluded from the classified service.

5/ State ex rel. Dela Hunt v. Ward 26 Wis. 2d 345, 132 N.W. 2d, 523 (1965).

6/ The pleadings clearly establish that Pariza was discharged and not separated as a result of the expiration of the basis for his temporary appointment. We do not mean to imply herein that the County may not separate a temporary employe at any time that the temporary vacancy ceases to exist, which practice is implicit in the concept of temporary employment.

of a temporary employe nearly four years after he was selected from the eligible list.

Remedy

We have reviewed the Examiner's remedial order and deem it appropriate under the circumstances. The record does not disclose the reasons for Pariza's discharge. It may be that the County had a valid basis for discharging him. If a complaint had been filed against him in a timely fashion as contemplated by Section 63.10, Stats., it would have been within the County's prerogative to immediately suspend him pending the decision of the Commission with regard to his proposed discharge. Any question of his reinstatement or entitlement to backpay would have been properly left to the discretion of the Commission.

However, a complaint was never filed with the Civil Service Commission. Therefore, there was no lawful basis for his suspension or discharge. If Pariza was entitled to the protections of Section 63.10, Stats., and Rule VII of the Civil Service Commission, and we have found that he was, the appropriate remedy for the violation of his rights under the agreement is to order his immediate reinstatement until such time as the County complies with the requirements of Section 63.10, Stats., and the rules of the Civil Service Commission.

Dated at Madison, Wisconsin this 16th day of August, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner