STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED and ROGER HUJIK, ART MANN, PAUL DuVAIR, ET AL., Complainants, vs. MADISON METROPOLITAN SCHOOL DISTRICT, BOARD OF EDUCATION, MADISON METROPOLITAN SCHOOL DISTRICT, Respondents.	Case LIX No. 20923 MP-676 Decision No. 15007-A

Appearances:

Kelly and Haus, Attorneys at Law, by Mr. Robert C. Kelly, appearing on behalf of the Complainants.

Mr. Gerald C. Kops, Deputy City Attorney, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Teachers Incorporated and Roger Hujik, Art Mann, Paul DuVair, et al., having filed a complaint on October 20, 1976 with the Wisconsin Employment Relations Commission alleging that Madison Metropolitan School District, Board of Education, Madison Metropolitan School District, had committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act; and the Commission having appointed Stephen Schoenfeld, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Madison, Wisconsin on November 18, 1976, before the Examiner, and briefs having been filed by both parties with the Examiner; and the Examiner having considered the arguments, evidence and briefs and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Madison Teachers Incorporated, hereinafter referred to as Complainant, is a labor organization and the collective bargaining representative of certain teachers employed by Madison Metropolitan School District; and that Roger Hujik, Art Mann and Paul DuVair at all times material herein were employed as teachers by the Madison Metropolitan School District.

2. That Madison Metropolitan School District, hereinafter referred to as Respondent, is a public school district organized under the laws of the State of Wisconsin and is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act.

3. That the Board of Education of Madison Metropolitan School District is a public body and agent of Respondent and is charged under the laws of the State of Wisconsin with the possession, care, control and management of the property and affairs of Respondent.

4. That at all times material hereto Complainant and Respondent were parties to a collective bargaining agreement which, among its provisions, contained the following which are material herein. 1/

"II - Procedure - B

B. GRIEVANCE PROCEDURE

. . .

3. Definition:

a. A 'Grievance' is defined to be a dispute concerning the interpretation or application of any of the terms of any 'written' agreement establishing salaries, hours or other conditions of employment for the employees of the Board of Education for whom Madison Teachers is the collective bargaining representative. Aggrieved parties may be Madison Teachers or any such employees.

. . .

6. The procedural steps for Madison Teachers shall commence at Level 3. Organizational (Class) Grievance: Madison Teachers must submit the alleged grievance within sixty (60) days after Madison Teachers knew of the act or condition on which the grievance is based, or the grievance will be deemed waived. If the act or condition reoccurs the time limit will be renewed.

. . .

LEVEL 5:

a. To the extent the grievance remains unresolved at the conclusion of Level 3 or 4, Madison Teachers may call for compulsory, final, and binding arbitration. Said call must be within fifteen (15) school days after the receipt of the answer at Level 3 or 4.

. . .

d. The decision of the arbitration panel shall be final and binding on all parties except as forbidden by law and shall be rendered within thirty (30) days following the final day of hearings or receipt of briefs, whichever is later.

. . .

1/ The relevant collective bargaining agreement is dated January 1, 1975 - December 31, 1975. The Complainant, contrary to the Respondent, alleges that said agreement expired on December 31, 1975. A determination of this issue is not necessary to the resolution of the issue involved herein.

VI - Factors - Personal - A

A. ABSENCE ALLOWANCE

1. No deducation of salary is made for absence for the following reasons:

   a. Death in the immediate family not to exceed five school days per year for each death in the immediate family; immediate family interpretation for this subsection shall be limited to the following relatives of the employee or his spouse:

      1) Father or Mother
      2) Husband or Wife
      3) Child (including foster and step child)
      4) Son or Daughter-in-law
      5) Brother or Sister
      6) Brother or Sister-in-law
      7) Grandfather or Grandmother
      8) Grandfather or Grandmother-in-law
      9) Aunt or Uncle
      10) Aunt or Uncle-in-law
      11) First Cousin

   Any other absence for funeral leave must be approved by the Superintendent of Schools. In the absence of such approval, pay will be deducted.

   b. Attendance required by an officer of a court (and/or summoning of a governmental agency such as Internal Revenue or the draft board). Teachers who are required to serve on jury duty shall receive full pay from the MPS during the period of such service. Such teacher shall, however, remit to the Board of Education an amount equal to the compensation received for jury duty upon receipt of same.

   c. Severe illness in the immediate family requiring the presence of the teacher not to exceed five days in any school year; immediate family interpretation of this subsection shall be limited to the following relatives of the employee:

      1) Husband or Wife
      2) Child (including foster and step child)
      3) Son or Daughter-in-law
      4) Father or Mother of employee or spouse
      5) Brother or Sister
      6) Brother or Sister-in-law
      7) Grandmother or Grandfather

   d. Personal illness leave not to exceed ten days in any school year, except as provided in (2) below.

   e. Absences not covered in items a. through d. may be approved by the Board of Education on recommendation of the Superintendent of Schools.

f. Two days personal leave shall be permissible as follows: Teaching personnel will be permitted to be absent from school responsibilities for certain purposes without loss of compensation. The purposes will be defined basically as legal reasons i.e., adoption proceedings, settlement of wills, certain court actions, real estate closings. The teacher will be expected to notify the school principal at least three days prior to such absence. The teacher will be expected to be absent only as long as necessary and the school principal will provide class covering or substitute as determined by the principal."

5. That on December 10, 1975, various officers and members of Madison Teachers Incorporated began to initiate, organize, and implement a "sick-in" for Friday, December 12, 1975; that on December 11, 1975, based on the actions of the officers and members of Madison Teachers Incorporated, the President of the Board of Education ordered the schools closed for December 12, 1975; that in addition to the "sick-in", ten additional days were missed in January, 1976, due to a teacher strike; and that through negotiations, the parties ultimately agreed to make up eight days.

6. That shortly after December 12, 1975, Respondent deducted 1/190 from the salary of each member of the teachers' bargaining unit and an organizational grievance was initiated on March 16, 1976 on behalf of a class of grievants who allegedly qualified for paid absences on December 12, 1975, seeking payment of the deducted 1/190 and other fringe benefits lost; that said grievance was not resolved by the parties and accordingly was submitted to final and binding arbitration pursuant to the collective bargaining agreement of the parties.

7. That on August 16, 1976, Arbitrator June Weisberger entered an award on said grievance, which in pertinent part provided:

"The issue of law presented by this grievance is clear-cut. The class of grievants is entitled to pay for December 12, 1975 unless MTI's 'sick-in' provides a complete defense for the School District. Although MTI in its arguments and through some witnesses raised the question as to whether the School District acted reasonably in closing school on December 12, 1975, this line of speculation cannot be seriously pursued. In view of the information available to the School District, both from school principals and MTI spokespersons on the evening of December 11, 1975, the decision to close school was clearly reasonable and directly related to MTI's successful 'sick-in' campaign. In addition, the arbitrator does not believe that the subsequent negotiations between the parties concerning make-up days is relevant to this proceeding because payment to grievants for their absences on December 12, 1975 will not result in a windfall to them (i.e., an amount in excess of their negotiated school year salary).

The only serious legal issue involves the School District's argument that since MTI violated the contract by initiating the 'sick-in,' the School District is then justified in abrogating an express contractual obligation by deducting 1/190th from each grievants' pay for December 12, 1975. Under the facts of this case, the arbitrator rejects the conclusion that MTI's sick-in justifies the failure to pay these grievants. With one exception,

there has been no evidence that any of the grievants were involved in any aspect of the 'sick-in.' In fact, 36 grievants had completed all the requirements to qualify for paid leave absences on December 12 before the decision was made to close school. There is no contractual or equitable justification to withhold their salaries because of the actions of other members of the bargaining unit or because of MTI's admitted sponsorship of the 'sick-in.' The case of grievant John Chvala must be considered separately. As noted above, this grievant was involved in the planning of the 'sick-in.' Although no evidence was presented to dispute the fact that, but for the 'sick-in,' Chvala would have been entitled to a paid absence on December 12, 1975, the facts indicate that his situation was significantly different from that of all other grievants.

If the School Board has suffered damages as a result of the 'sick-in,' the School District may choose to pursue its legal remedies. However, this grievance proceeding is not the appropriate forum for the School District to seek such relief.

AWARD

Based upon a careful consideration of the evidence, arguments and briefs submitted by the parties, the undersigned makes the following award:

> The School District is directed to make grievants whole for the deduction of salary and other fringe benefits lost for their absences on December 12, 1975. Grievants covered by this award shall be those already stipulated to by the parties but shall exclude grievant John Chvala."

8. That the Respondent has refused and continues to refuse to implement the aforesaid award of Arbitrator Weisberger.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and renders the following

CONCLUSIONS OF LAW

1. That the award of Arbitrator Weisberger, entered on August 16, 1976, was not imperfectly executed and was based upon her interpretation and application of the terms of the collective bargaining agreement existing between the parties and that accordingly, said award was within Arbitrator Weisberger's authority.

2. That Respondent, by its refusal to comply with the award of Arbitrator Weisberger, has committed and is committing a prohibited practice within the meaning of Sec. 111.70(3)(a)(5) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER

IT IS ORDERED that Madison Metropolitan School District; the Board of Education of said school district, its officers and agents shall immediately:

1. Cease and desist from refusing to comply with the award of Arbitrator Weisberger dated August 16, 1976.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act.

a. Comply with the award of Arbitrator Weisberger dated August 16, 1976 by making the grievants covered by said award whole for the deduction of salary and other fringe benefits lost for their absences on December 12, 1975.

b. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 2nd day of June 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 20, 1976, Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent had committed a prohibited practice within the meaning of the Municipal Employment Relations Act, sec. 111.70, Stats., by refusing to accept and implement an arbitration award issued on August 16, 1976, pursuant to final and binding arbitration provisions of a collective bargaining agreement between the parties. On November 17, 1976, Respondent filed an answer in which it admitted refusal to fully comply with the arbitration award, but alleged, as an affirmative defense, that the Arbitrator exceeded the powers conferred upon her by the collective bargaining agreement and so imperfectly executed them that a mutual final and definite award upon the subject matter of the grievance was not met. Hearing in the matter was held on November 18, 1976 at Madison, Wisconsin. Both parties filed briefs.

POSITIONS OF THE PARTIES:

The collective bargaining agreement pertinent herein provides for the arbitration of grievances which are defined in Article II B. 3.a. as ". . . a dispute concerning the interpretation or application of any of the terms of any 'written' agreement establishing salaries, hours, or other conditions of employment . . ." Respondent avers that an arbitrator can only interpret and apply the existing terms of the labor agreement and may not add to or in any way modify the written agreement. Specifically, Respondent contends that the paid absence provision in the collective bargaining agreement constitutes an indemnity to make an employe whole whenever he is absent from work and when his absence prevents him from working; and that said benefits do not accrue where there is no work opportunity but only apply when, if it were not for the incidence of absence, the employe would be working and receiving pay. Respondent argues that inasmuch as there was a forced cessation of school on December 12, 1975, due to the decision of the majority of teachers to call in sick, there was no work opportunity on this date, and consequently, teachers are not entitled to wages and benefits for said date. Therefore, according to Respondent, the Arbitrator, by awarding leave benefits to the grievants for December 12, 1975, has imposed an "implicit guaranteed wage" provision into the contract and that this resulted in the arbitrator improperly amending the labor agreement. According to Respondent, it was, therefore, free to refuse to implement the award. Furthermore, Respondent maintains that the ten strike days and one "sick-in" day are considered non-school days, that wages and benefits are lost for said days unless these days are made up, and since the parties agreed to make up only eight days, the Arbitrator, in awarding paid absences to the grievants for worked missed on December 12, 1975, modified the make-up day negotiation and settlement agreement reached by the parties and the grievants were therefore awarded pay for one more day than the other teachers in the district. Consequently, it is the position of the Respondent that the Arbitrator awarded said grievants an amount in excess of the school year salary negotiated by their exclusive bargaining representative, and because the Arbitrator disregarded the material negotiations and agreement reached by the parties regarding the strike make-up days, said award does not draw its essence from the collective bargaining agreement and Respondent is not obligated to honor it.

Complainant argues that the mere fact that the schools were closed on December 12, 1975 does not justify the deduction taken from the grievants in that said grievants had a valid pre-existing "immunity" for being absent on the day in question and the labor agreement simply does not provide that a decision by the Respondent to close school defeats that immunity. Complainant avers that the Arbitrator found that the contractual leave of absence with pay provision required payment to the grievants for December 12, 1975 regardless of the "sick-in." Complainant contends that the Arbitrator rejected the position advanced by the Respondent herein by specifically finding that the negotiations between the parties concerning make-up days was irrelevant inasmuch as payment to the grievants for their absences on December 12, 1975 did not result in a windfall to them, i.e., an amount in excess of their negotiated school year salary. Complainant alleges that the Arbitrator's award was based on her interpretation of the labor agreement and draws its essence therefrom. According to Complainant, attorneys'fees should be awarded because Respondent, without justification, has refused to accept the terms of the arbitration award.

DISCUSSION:

The instant case is governed by sec. 111.70(3)(a)(5) of the Municipal Employment Relations Act:

> "111.70 Municipal employment.
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> . . .
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> (3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:
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> . . .
>
> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them."

When determining the enforceability of an arbitration award under the Wisconsin Employment Peace Act and the Municipal Employment Relations Act, the Commission has applied the standards set forth in sec. 298.10(1), Stats. 2/ The statutory standards that justify the vacation of an arbitration award are as follows:

2/ Harker Heating and Sheet Metal, Inc., et al, (6704) 4/64; H. Froebel and Sons (7804) 11/66; Research Products Corp. (10223-A), Examiner decision - 12/71, aff'd WERC (10223-B) 1/72; City of Neenah (10716-C) 10/73, reversed on other grounds, WERC v. Teamsters Local No. 563, 75 Wis. 2d 602, 250 N.W. 2d 696 (1977); Madison Metropolitan School District, City of Madison, et al, (14038-B) 4/77.

"(a) Where the award was procured by corruption, fraud, or undue means;

(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

Respondent does not allege by way of affirmative defense that the arbitration award is tainted by undue means, fraud, corruption, partiality or misconduct on the Arbitrator's part. Rather, Respondent contends that the Arbitrator exceeded her powers or imperfectly executed them, which, if proven, could be grounds under sec. 298.10(1)(d), Stats. for vacating the Arbitrator's award.

The role of the Commission in prohibited practice proceedings to enforce arbitration awards does not include a de novo determination of the issues that were before the Arbitrator. The thrust of the arguments advanced by Respondent herein were also made to the Arbitrator, and assuming arguendo that the undersigned finds Respondent's contentions to be meritorious, it is improper for the Examiner to review the correctness of the Arbitrator's findings of fact and contract interpretation and to refuse enforcement of the award if the Examiner should disagree with the Arbitrator on these points. Such a review would make a mockery of the contractual provision that the Arbitrator's award is to be final and binding and would in contradistinction to both state 3/ and federal 4/ labor policy. Therefore, the Examiner will not engage in a review of the merits of Arbitrator Weisberger's interpretation of the parties' collective bargaining agreement. The only issue for the Examiner's consideration is whether the Arbitrator's award can reasonably be construed as an interpretation of the collective bargaining agreement.

Arbitrator Weisberger found that under the contractual language the grievants qualify for pay on December 12, 1975, and that the contract fails to provide any authority for the Respondent's action in deducting pay from the grievants' salaries for December 12, 1975. The Examiner is convinced that Arbitrator Weisberger's interpretation of the contract draws it essence from the agreement. Arbitrator Weisberger found that the "36 grievances had completed all the requirements to qualify for paid leave absences on December 12 before the decision was made to close school." Arbitrator Weisberger also found that "there is no contractual or equitable justification to withhold their salaries . . ." (emphasis own) It is apparent to the Examiner that Arbitrator Weisberger was interpreting and enforcing the collective bargaining agreement when making her findings and award in which she directs Respondent to make the grievants whole for the deduction of salary and other fringe benefits lost for their absences on December 12, 1975.

3/ Ibid.

4/ Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960), 46 LRRM 2423.

As indicated previously, even if the Examiner should disagree with the interpretation of the contract reached by Arbitrator Weisberger, he will not substitute his judgment for that of the Arbitrator. The parties contracted for the Arbitrator's interpretation of the contract and resolution of the grievance and that is what they received. Because the Examiner concludes that Arbitrator Weisberger's award draws its essence from the collective bargaining agreement and is based upon the Arbitrator's interpretation of said agreement, the award is enforceable. Consequently, it is found that Respondent has violated Sec. 111.70(3)(a)(5) of the Municipal Employment Relations Act by refusing to comply with the award. Therefore, in order to effectuate the policies of the Municipal Employment Relations Act, the Examiner has ordered Respondent to comply with Arbitrator Weisberger's award.

Counsel for Complainant has made a request that the attorneys' fees, costs and disbursement associated with this litigation be paid by Respondent. While the Examiner is satisfied that Respondent's affirmative defense, that Arbitrator Weisberger exceeded her powers conferred upon her by the collective bargaining agreement and imperfectly executed them so that a mutual, final and definite award upon the grievance involved herein was not made, is without merit, the Examiner is not convinced that Respondent's claim is frivolous. Respondent's positions in support of its refusal to comply with Arbitrator Weisberger's award (see positions of the parties) are not taken in bad faith or based upon legal arguments which are insubstantial or without justification. 5/ Consequently the request for attorneys'fees and costs is denied.

Dated at Madison, Wisconsin this 2nd day of June 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner

5/ See Madison Metropolitan School District, City of Madison, et al, supra.