STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO and its affiliated LOCAL 366, Complainants, vs. MILWAUKEE SEWERAGE COMMISSION, Respondent.	Case LXIII No. 21961 MP-777 Decision No. 15755-A

Appearances:
Podell & Ugent, Attorneys at Law, by Ms. Nola J. Hitchcock Cross, for the Complainants.
Mr. William Smith Malloy, Assistant Labor Negotiator, Milwaukee Sewerage Commission, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Milwaukee District Council 48, American Federation of State, County & Municipal Employees, AFL-CIO and its affiliated Local 366, having filed a prohibited practice complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that the Milwaukee Sewerage Commission has committed certain prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission having appointed Byron Yaffe, a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5), Statutes; and questions of law being raised by Respondent's answer; and the Examiner having requested and considered the briefs of the parties with respect to said question of law, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Milwaukee District Council 48, American Federation of State, County & Municipal Employees, AFL-CIO, and its affiliated Local 366, hereinafter referred to as Complainant Unions, are labor organizations having offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. The Milwaukee Sewerage Commission, hereinafter referred to as Respondent, is a Municipal Employer having its principle office at Jones Island in the city and county of Milwaukee and its named address is Post Office Box 2079, Milwaukee, Wisconsin 53201.

3. Respondent Employer has recognized Complainant Unions as the exclusive collective bargaining representative of certain employes employed by the Respondent; Respondent and Complainant Unions were parties to a collective bargaining agreement for the period of January 1, 1975 through December 31, 1976 which was subsequently extended by agreement of the parties; which agreement included the following provision of Part II, Section E, 6:

> "BARGAINING UNIT WORK. Nonbargaining unit individuals, such as supervisors or management personnel, shall not perform any work which is regularly assigned to members of the

bargaining unit, except in cases of emergency instruction, testing of new or remodeled equipment, and experimentation."

4. On September 29, 1976, Complainants filed a grievance alleging that Respondent Employer had utilized cooperative students to perform bargaining unit work which action allegedly violated the above provision of the collective bargaining agreement.

5. Thereafter the grievance was processed to arbitration and on June 21, 1977, arbitrator Amedeo Greco decided that the grievance had not been timely filed and thus was not arbitrable under the collective bargaining agreement.

6. On August 16, 1977, Complainant Unions filed a prohibited practice complaint before the Wisconsin Employment Relations Commission alleging that the Respondent was utilizing cooperative students to perform bargaining unit work which violated the collective bargaining agreement and thus violated Section 111.70(3)(a)5 of MERA.

Upon the above and foregoing Findings of Fact, the Examiner makes the following Conclusion of Law

CONCLUSION OF LAW

That the Examiner will not assert the Commission's jurisdiction to determine the merits of the alleged 111.70(3)(a)5 violation in a prohibited practice proceeding since said contractual issue was submitted to final and binding arbitration pursuant to the parties' collective bargaining agreement and since a final and binding arbitration award was issued on said matter which is not repugnant to the rights of the parties under MERA and which does not violate the standards set forth in 298.10, Stats. for the vacation of such awards. Accordingly, the Examiner deems the decision of arbitrator Amedeo Greco, which was issued on June 21, 1977 to be dispositive of the merits of all contractual issues raised herein.

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

ORDER

That the complaint be, and hereby is, dismissed.

Dated at Madison, Wisconsin this 20th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITION OF THE PARTIES

Complainants have filed a prohibited practice complaint alleging that the Respondent's action in utilizing cooperative students to perform bargaining unit work in violation of Part II, Section E, paragraph 6 of the collective bargaining agreement is a violation of Section 111.70(3)(a)5 of MERA. Complainant Unions agree that an arbitrator's award dismissing the grievance involving the same subject matter was entered on June 21, 1977. The Complainants allege however that the Commission still has the authority to assert its jurisdiction to determine this question of an alleged statutory violation.

Respondent alleges that the present proceeding is res judicata by way of the arbitration award and that the prohibited practice complaint constitutes a collateral attack on the arbitration award in violation of Chapter 298.10, Wisconsin Statutes.

PROPRIETY OF THIS PROCEEDING

Respondent's answer and brief raises serious questions regarding the propriety of this proceeding. Respondent contends that the arbitrator's award makes this matter res judicata. The concept of res judicata involves, as Respondent notes in its brief, a decision on the merits disposing of the questions raised. 1/

Since arbitrator Greco's award resolved the dispute on procedural grounds and made no determination as to whether the Respondent's action, contested herein, violated the parties' agreement, said award is not res judicata with respect to the issues raised herein.

Respondent next contends that the filing of this complaint constitutes a collateral attack on the arbitration award. The question here presented is whether the Commission should decline to exercise its jurisdiction to determine the alleged 111.70(3)(a)5 prohibited practice raised herein or whether it should instead defer to arbitrator Greco's award which disposed of the same contractual issue.

It is a well established policy of the Commission not to assert its jurisdiction to entertain complaints which allege that one party has violated the terms of the collective bargaining agreement where the parties have agreed to arbitrate disputes over alleged contractual violations. 2/ The oft-expressed rationale for the deferral policy is that the parties should be allowed to utilize the dispute resolution mechanism for which they bargained when recourse to that forum will also resolve the prohibited practice question before the Commission. Thus, generally, the Commission will defer Section 111.70(3)(a)5 questions to the arbitration forum where the collective bargaining agreement provides the machinery to resolve disputes over alleged contractual violations. The reason for deferral in Section 111.70(3)(a)5 cases is apparent - the substantial congruity of issues presented to the arbitrator and the Commission for resolution.

1/ See Lisbon-Pewaukee Joint District No. 2 (13269-A, B) 8/75, which held where a previous arbitration award concerned itself with procedural defenses only, such an award was not deemed res judicata of the merits of the grievance.

2/ J. I. Case Company, (1593) 4/48; River Falls Cooperative Creamery, (2311) 1/50; Tecumceh Products Company, 23 Wis. 2d 118 (1964); Oostburg Jt. School Dist. No. 1 (11196-A, B) 12/72.

Thus, the interests of both judicial economy and the parties' choice of a dispute resolution mechanism are served.

In this case, Complainants filed a demand on behalf of its member employes for arbitration to grieve the fact that non-bargaining unit personnel had performed and were continuing to perform bargaining unit work in violation of the collective bargaining agreement. The arbitrator ruled that although the grievance was a continuing violation of the collective bargaining agreement, it had not been timely filed and thus was not arbitrable. Complainants then filed a prohibited practices complaint alleging that non-bargaining unit personnel were performing bargaining unit work in violation of the contract, thereby violating Section 111.70(3)(a)5 of MERA.

There is no question that the proceedings before the arbitrator were fair and regular and that the parties agreed that the award was to be final and binding. However, Complainant argues that as this complaint involves an alleged continuing contract violation and because the arbitrator's award disposed of the issue on procedural grounds the Commission should not defer to the arbitration award in determining the contractual issues raised in this prohibited practice proceeding. However, the proper test is whether the award is repugnant to the purposes of the Act. 3/ Absent such a showing, the Commission will defer to the arbitrator's award.

In the instance, although the examiner or Commission might disagree with the arbitrator's ruling, not deferring on the basis of such a disagreement would amount to the Commission allowing an unwarranted collateral attack on the award, unless the award infringed upon the statutory rights of the Complainants or the represented employes. In the examiner's opinion the award in question does not violate the statutory rights of either the Complainants or the employes they represent, and accordingly the award is deemed not to be repugnant to the purposes of the Act.

Similarly, assuming arguendo that the criteria for vacating arbitration awards as set forth in 298.10, Stats. are applicable to the instant proceeding, the record does not indicate that any of said criteria have been violated by the arbitration award in question. Accordingly, not to defer to said award and to allow relitigation of the issue raised herein would grant the Complainants who were obviously dissatisfied with the arbitrator's award, an unreasonable second bite at the apple which would seriously undermine the strong Commission policy favoring the finality of arbitration awards.

Dated at Madison, Wisconsin this 24th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

3/ In Lisbon-Pewaukee Jt. School Dist. (13404-B) 9/76 the Commission stated that the criteria set forth in Spielberg Mfg. Co., 112 NLRB 1080, 26 LRRM 1152 for deferring to arbitration awards in the disposition of unfair labor practice proceedings were applicable to similar proceedings before the Commission. Those criteria require that the arbitration proceeding be fair and regular, that all parties agreed to be bound by the award, and that the result reached was not clearly repugnant to the purposes of the Act.