STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL #48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Complainant, vs. MILWAUKEE COUNTY, Respondent.	Case CV No. 23192 MP-869 Decision No. 16446-A

Appearances:
Podell & Ugent, Attorneys at Law, by Mr. Alvin R. Ugent, appearing on behalf of the Complainant.
Mr. Robert G. Ott, Principal Assistant Corporation Counsel, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee District Council #48, American Federation of State, County and Municipal Employees, AFL-CIO having filed a complaint on June 20, 1978, with the Wisconsin Employment Relations Commission alleging that Milwaukee County had committed prohibited practices within the meaning of Sections 111.70(3)(a)1., 3., 4., and 5., of the Municipal Employment Relations Act; and the Commission having appointed Stephen Pieroni, 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 Milwaukee, Wisconsin, on July 24, 1978 before the Examiner, and a transcript of the hearing being distributed to the Union on October 19, 1978, and both parties declining to submit briefs; and the Examiner having considered the arguments and evidence 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 Complainant Milwaukee District Council #48, AFSCME, AFL-CIO is a labor organization with a mailing address of 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208. At all times material hereto, Council #48 has been the exclusive bargaining representative of certain laborers employed by Respondent in various county park districts of the Milwaukee County Park Commission.

2. That Reponsdent is a Municipal Employer and a municipal corporation organized and operated under the laws of the State of Wisconsin. Respondent maintains its principal offices at the Milwaukee County Courthouse, Milwaukee, Wisconsin; that Richard Swetalla is employed by Respondent as Personnel Officer II, Parks and functions as its agent.

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

"PART I

"1.01 RECOGNITION. The County of Milwaukee agrees to recognize and herewith does recognize Milwaukee District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, and its appropriate affiliated Locals, as the exclusive collective bargaining agent on behalf of the employes of Milwaukee County in accordance with the certification of the Wisconsin Employment Relations Commission, as amended, in respect to wages, hours and conditions of employment, pursuant to Subchapter IV, Chapter 111.70, Wis. Stats., as amended.

1.02 EMPLOYE DEFINED. Wherever the term 'employe' is used in this Memorandum of Agreement, it shall mean and include only those employes of Milwaukee County within the certified bargaining units represented by the Union.

. . .

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 to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this Agreement; 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; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agrement, [sic] now shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe or for the purpose of discrediting or weakening the Union.

. . .

4.02 GRIEVANCE PROCEDURE.

(1) APPLICATION: EXCEPTIONS. A grievance shall mean any controversy which exists as a result of an unsatis-

factory adjustment or failure to adjust a claim or dispute by an employe or group of employes concerning the application of wage schedules or provisions relating to hours of work and working conditions. . . .

. . .

(FOR EMPLOYES COVERED BY
THIS AGREEMENT ONLY.)

If the grievance is not resolved at the fourth step as provided, the Union (District Council 48 or its appropriate affiliated Local) or the County may refer such grievance to the umpire or may proceed directly to the fifth step if the other party does not seek such reference. Reference to the umpire must be taken within 60 days from the date of the fourth step decision. Such reference shall be in writing and shall be served upon the appropriate fifth step agency and the Department of Labor Relations.

. . .

(5) UMPIRE'S AUTHORITY

. . .

(6) FINAL AND BINDING. The decision of the umpire when filed with the appropriate fifth step agency shall be binding on both parties."

4. For approximately the last ten years Respondent-County has continuously carried out a program in which young adults are hired for about seven weeks during the summer months to do various kinds of work in the Milwaukee County park system; said young adults are referred to as Junior Public Service (J.P.S.) workers and funding for their positions at all times material herein was provided exclusively by the federal government under the auspices of the Comprehensive Employment Training Act.

5. That in July and August 1977 three different groups of regular appointed laborers employed in the Jackson Park District, Humboldt Park District and Grant Park District respectively, filed separate grievances, all of which concerned the invasion of bargaining unit work vis-a-vis the employment of Junior Public Service (J.P.S.) workers; on August 18, 1977 a group of laborers in the Jackson Park Street alleged in their grievance, in pertinent part, as follows:

"J.P.S. (Junior Public Service) workers are invading bargaining unit work while one or more laborer positions have been cut in the Jackson District."

"J.P.S. workers should be assigned work outside the bargaining unit assignments and regular civil service employees should be used in bargaining unit work. Work rules should be negotiated with the Union covering the J.P.S. program."

On July 7, 1977 a group of laborers employed in the Humboldt District initiated a grievance which read, in part, as follows:

"J.P.S. workers should be assigned work outside the bargaining unit assignments and regular Civil Service

employes should be used for bargaining unit work. Work rules should be negotiated with the Union covering the J.P.S. program. All injured parties should be made whole.";

and on July 8, 1978 a group of laborers employed at the Grant Park District filed a grievance which stated, in part, as follows:

"Junior Public Service (J.P.S.) workers invaded our bargaining unit on July 1st, 1977, and were used to complete a job erecting snow fence [sic]; a job always performed by bargaining unit employees. Seven J.P.S. workers were used to perform the assigned task.";

and that said grievances were substantially denied by Mr. Swetalla and others on behalf of the Respondent based, in part, upon the established past practice of allowing J.P.S. workers to assist regular appointed laborers in their daily chores.

6. That said grievances were not resolved by the parties and accordingly they were consolidated and submitted to final and binding arbitration pursuant to the parties collective bargaining agreement; that on January 7, 1978, Umpire Frank P. Zeidler issued an Arbitration Award wherein he found that a binding past practice was established whereby the Respondent had a certain level or complement of regular employes, after which the Union did not object to the presence of J.P.S. workers; but that "when J.P.S. workers are in districts where the complement of regular employees has been reduced from the 1976 complement, they are in effect displacing bargaining unit employees."; that on the basis of his findings, Umpire Zeidler sustained the grievances that J.P.S. workers in 1977 were doing bargaining unit work and therefore invading the bargaining unit.

7. That during the summer of 1978 the number of regular appointed laborers in the Grant and Jackson Park Districts were fewer than were employed in 1976; that the number of seasonal laborers in the Grant and Jackson Districts during 1978 was increased over the 1976 levels; and that during 1978 J.P.S. workers continued to perform bargaining unit work in the Grant and Jackson Park Districts; that the number of J.P.S. workers in Grant and Jackson Park Districts during 1978 was less than in 1977; that "seasonal" employes and "regular appointed" employes are in the same bargaining unit represented by the Union herein; that the total number of bargaining unit employes in both the Grant and Jackson Park Districts during 1978 was greater than in 1977 and 1976.

8. That J.P.S. employes are not part of the classified civil service; that a "seasonal" position is a part of the classified civil service and is defined in the civil service rules for the Milwaukee County government as a "temporary appointment", that is, a position authorized to be filled for a limited period of time; that a "regular appointment" is a part of the classified civil service and is an appointment to a permanent position; that by the terms of Umpire Zeidler's Award of January 7, 1978, the Respondent was not to use J.P.S. workers in park districts where the number of regular appointed laborers had declined from the 1976 levels or levels that had been accepted in past practice.

9. That even though the number of bargaining unit employes in the Grant and Jackson Park Districts during 1978 was greater than in 1977 and 1976, the Respondent has not fully complied with the Award of Umpire Zeidler because J.P.S. workers were employed during 1978 in Grant and Jackson Park District where the number of regular appointed laborers had declined from the 1976 levels.

10. That no regular appointment laborers were laid off during calendar years 1976, 1977 and 1978; that neither the Union nor any

employes suffered monetary loss as a result of the use of J.P.S. workers in the park districts during 1978; that during 1978 certain park district regular appointment laborer positions became vacant but the Respondent chose not to fill same.

11. That no evidence was adduced at hearing which would tend to support Complainant's allegations of a violation of Section 111.70(3)(a)1., 3., or 4.

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

CONCLUSIONS OF LAW

1. That Respondent's agents, by employing J.P.S. workers during 1978 in Grant and Jackson Park Districts where the number of regular appointment laborers had declined from the 1976 levels, failed to comply with Umpire Zeidler's January 7, 1978 award; that said conduct constitutes a prohibited practice within the meaning of Section 111.70(3)(a)5. of the MERA.

2. That Respondent by its conduct referred to in paragraph 1 hereof, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)1., 3. or 4. of the MERA.

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 Respondent, Milwaukee County, its officers and agents shall immediately:

(1) Cease and desist from failing to comply with Umpire Zeidler's January 7, 1978 Award.

(2) Take the following affirmative action which the undersigned finds will effectuate the purpose of the MERA.

(a) Comply with the terms of Umpire Zeidler's Award of January 7, 1978 in which he found that J.P.S. workers assigned to a park district should not do bargaining unit work unless the complement of regular employes in said park district is equal to the 1976 levels or levels accepted in past practice.

(b) Notify all employes, by posting in conspicuous places in its offices where the employes are employed, copies of the notice attached hereto and marked "Appendix A" which notice shall be signed by Respondent, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this order what action has been taken to comply herewith.

Dated at Madison, Wisconsin this 31st day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL comply with the terms of Umpire Zeidler's Award in which he found that J.P.S. assigned to a park district should not do bargaining unit work unless the complement of regular employes in said park district is equal to the 1976 levels or levels accepted in past practice.

2. WE WILL NOT refuse to comply with the terms of a valid Arbitration Award.

By_____
Chairman, Milwaukee County Board
of Supervisors

Dated this_____day of _____,19__.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Introduction and Positions of the Parties:

The Complainant in this case alleges that Respondent committed prohibited practices within the meaning of the Municipal Employment Relations Act, Sections 111.70(3)a., 1., 3., 4, and 5., by refusing to comply within an Arbitration Award issued on January 7, 1978, pursuant to the final and binding arbitration provisions of the collective bargaining agreement between the parties.

Three separate grievances were consolidated for decision by Umpire Zeidler, all of which raised the issue of whether J.P.S. workers were invading the bargaining unit by performing bargaining unit work in park districts where one or more regular laborer positions had been abolished. In sustaining the grievances, Umpire Zeidler stated as follows:

> "The Umpire therefore believes that when J.P.S. workers are in Districts where the complement of regular employees has been reduced from the 1976 complement, they are in effect displacing bargaining unit employees. Unless such levels are restored in a District to the 1976 levels or levels accepted in past practice, J.P.S. workers assigned in any District should not do bargaining unit work."

Respondent denies that it has refused to comply with Umpire Zeidler's Award and argues that it has in fact complied with said Award. Respondent contends that by using the phrase "bargaining unit employees" the Umpire tended to refer to the entire bargaining unit which includes seasonal employes as well as regular employes. Thus, Respondent argues that by employing more seasonal employes, the aggregate total number of bargaining unit employes has increased from the 1976 level; that no regular appointed laborers have been laid off, and therefore the J.P.S. workers cannot be said to have displaced bargaining unit employes within the meaning of the Umpire's Award.

Respondent argues, in the alternative, that the Umpire intended to establish a ratio for the park districts such that the ratio of J.P.S. workers to regular appointed laborers must be maintained at least at the 1976 level or levels accepted in past practice. Here the Respondent points out that due to a significant decline in hiring J.P.S. workers, the 1978 ratio of J.P.S. workers to regular appointed laborers has decreased and therefore Respondent has complied with the Union's Award.

Complainant contends that the Award prohibits the Respondent from using any J.P.S. workers to perform bargaining unit work in the park districts until the number of regular appointed laborers is restored to the 1976 level or levels accepted in past practice. (Emphasis added). According to the Complainant, Respondent has violated the terms of the Award by employing J.P.S. workers in park districts which have fewer regular laborers than existed in 1976.

The Complainant, contrary to the Respondent, argues that the Umpire used the terms "regular employees" and "bargaining unit employees" interchangeably throughout his Award and did not intend to include "seasonal employees" when referring to "regular employees" or "bargaining unit employees." The evidence of record reveals that the term "regular employees" has been used by the parties herein for many

years to mean "regular appointed" employes. Under Milwaukee County Civic Service rules "regular appointment" means an appointment to a permanent position and the parties clearly understand and distinguish same from the term "seasonal employees" which refers to a temporary civil service position. Hence, Complainant contends that it cannot be seriously argued that when the Umpire used the term "regular employees" he meant to include "seasonal employees". Also, Complainant argues that there is nothing in the Umpire's decision which indicates that he intended to have the Respondent reduce the number of J.P.S. workers on a ratio basis. Indeed, Respondent didn't reduce the number of J.P.S. workers because of the belief that a ratio was required, rather it was due to a decline in federal funding.

Lastly, Complainant argues that Respondent's steadfast refusal to return to the Umpire for clarification of the Award in question, reveals that Respondent's interpretation was not made in good faith and therefore broad remedial relief is required.

DISCUSSION:

Umpire Zeidler identified the general thrust of the grievances consolidated for decision by stating:

> "The general thrust of the grievance, however, is contained in the Lembach grievance, that J.P.S. workers were invading bargaining unit work while one or more laborer positions were cut in the district." Page 6.

Zeidler sustained the grievances by finding as follows:

> ". . . yet the presence of J.P.S. workers in a District, doing bargaining unit of work when the level of regular employees has been reduced from the previous year, constitutes a substitution of J.P.S. workers for bargaining unit employees. If the level is reestablished when J.P.S. workers are present, a past practice would be recognized and J.P.S. workers then could work at their accustomed assignments."

There is no dispute that the Respondent employed J.P.S. workers to perform bargaining unit work during the summer of 1978 in Grant and Jackson Park Districts. Nor is there a dispute that the number of regular appointed laborers employed in the Grant and Jackson Park Districts during 1978 were fewer than were employed in 1976.

The issue for the Examiner to decide is whether the Respondent complied with Umpire Zeidler's aforementioned Award by: (a) increasing the number of seasonal employes and thereby the total number of bargaining unit employes in Grant and Jackson Park Districts; or (b) reducing the ratio of J.P.S. workers compared to regular appointed laborers in the Grant and Jackson Park Districts. For the reasons discussed below the Examiner finds that the evidence requires a finding that Respondent has failed to comply with the Umpire's award.

It should be noted that Respondent, through its agent Mr. Swetalla, recognized that the grievances concerned the displacement of regular appointed laborers by J.P.S. workers who performed bargaining unit work. At page 4 and page 5 of his Award, Zeidler quotes Mr. Swatella's response to the two grievances as follows:

> "It is the opinion of the undersigned in the instant grievance that junior public service employes appropriately assisted and did not replace regular appointment employes. The hearing officer sees no correllation between the abolition of two laborer positions as a result of Finance Committee cuts in

1976 and junior public service employes, who work less than seven weeks annually in the Humboldt District. [page 4]

. . .The undersigned is not persuaded that junior public service workers are supplanting regular appointment employees. In the instant matter, the junior public service crew was assisting a crew of regular appointment laborers and equipment operator. The grievance, therefore, is denied."

It appears that Mr. Swatella unequivocally understood that the focus of the grievances concerned regular appointed laborer positions as opposed to seasonal laborer employes.

Umpire Zeidler also recognized the distinction between regular employes and seasonal employes when he summarized the testimony of a witness as follows:

"Robert Gloudeman, an Equipment Operator at the Grant District says that he saw J.P.S. workers repairing shoulders on the road, grooming traps, and replacing sod, all work done by regular employes. He said he saw seven J.P.S. workers, one project worker, one seasonal laborer putting up snow fence. He said they never did this kind of work before. Formerly this was done by a crew of four regular employees. He said that one equipment operator and regular employe dropped off the materials. The employe says that the repairing of tables which the J.P.S. workers do now was formerly winter work for the regular employes." (Emphasis added.) [page 9]

Therefore, it is evident to the Examiner that when Umpire Zeidler fashioned his Award, he contemplated that J.P.S. workers would not perform bargaining unit work in the Park Districts until the number of regular appointed labors was restored to the 1976 level or levels accepted in past practice. Based upon the record evidence, the Examiner concludes that the presence of seasonal employes was not a factor in determining the outcome of the grievances. Hence, the fact that Respondent increased the number of seasonal employes and thereby increased the number of bargaining unit employes does not bring Respondent into compliance with Zeidler's award in this instance.

Nor can the Examiner find any substantial evidence in the record which would support Respondent's contention that the Umpire intended to require Respondent to hold to a ratio of J.P.S. workers to regular appointed laborers. Rather, the undersigned finds that the Umpire's award clearly does not established a ratio as a basis for his decision. There can be little dispute that the Umpire did not intend to establish a ratio when he concludes as follows:

". . . yet the presence of J.P.S. workers in a District, doing bargaining unit work when the level of regular employes has been reduced from the previous year, constitutes a substitution of J.P.S. workers for bargaining unit employes. . . ." (page 15)

Therefore, since Respondent chose to employ J.P.S. workers to do bargaining unit work in the Jackson and Grant Park Districts, it was obliged by the Umpire's award to restore the number of regular appointed laborers to the 1976 levels. By failing to restore the number of regular appointed laborers to the 1976 levels or levels accepted in past practice, Respondent has not complied with Umpire Zeidler's award and is in violation of Section 111.70(3)(a)5. of the MERA.

Complainant also alleges in its complaint that by failing to comply with the Umpire's award, Respondent violated Sections 111.70(3)(a)1.,

3. and 4. However, Complainant did not submit any convincing evidence which would support these allegations. It is noted that Respondent did not lay off any regular appointed laborers during the time period in question. Rather, Respondent merely declined to fill regular laborer positions thereby creating a net loss in the complement of regular laborer positions. Thus, Respondent's failure to comply with the Umpire's award does not appear reasonably likely to have interfered with, restrained, coerced or discriminated against municipal employes in the exercise of protected MERA rights. Nor has Complainant cited any evidence of authority to support the proposition that Respondent's action was tantamount to a refusal to bargain collectively with Complainant. Therefore, the alleged independent violations of Sections 111.70(3)(a)1, 3. and 4. have not been found herein.

Finally, Complainant, in the pleadings, requested that Respondent be ordered to make whole any employes and the Union for all losses sustained. The record contains unrebutted testimony that no unit employes were laid off as a result of Respondent's failure to abide by the Umpire's award. Hence, to grant a make whole award in the instant matter would constitute a windfall to any employes and/or the Union; therefore the Examiner determines that make whole relief is inappropriate in this instance.

Dated at Madison, Wisconsin this 31st day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner