STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED AND LAURAMAE ANDERSON,	:	
Complainants,	:	Case LXXXIII No. 23286 MP-874 Decision No. 16471-A
vs.	:	
MADISON METROPOLITAN SCHOOL DISTRICT, BOARD OF EDUCATION, MADISON METROPOLITAN SCHOOL DISTRICT,	:	
Respondent.	:	

Appearances:
Kelly and Haus, Attorneys at Law, by Mr. Robert C. Kelly, appearing on behalf of the Complainants.
Isaksen, Lathrop, Esch, Hart and Clark, Attorneys at Law, by Mr. Gerald C. Kops, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Madison Teachers Incorporated and Lauramae Anderson, having filed a complaint on July 18, 1978 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 Thomas L. Yaeger, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusion 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 August 23, 1978, before the Examiner; and briefs having been filed by both parties with the Examiner by October 11, 1978; 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, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Madison Teachers Incorporated, hereinafter Complainant or Union, is a labor organization and the collective bargaining agent of certain secretarial, clerical and technical employes employed by the Madison Metropolitan School District; and that Lauramae Anderson, hereinafter Anderson, was at all times material herein employed by the Madison Metropolitan School District in the bargaining unit represented by Complainant.

2. That the Madison Metropolitan School District, hereinafter District or Respondent, is a City School District operating under Chapter 120, Laws of Wisconsin and is a municipal employer; and that Gene Sturdevant was at all times material hereto employed by the District as Lake View Elementary School Principal and functioned as its agent.

3. That the Board of Education of the District is an agent of the District and is charged with the possession, care, control and management of the property and affairs of the District.

4. That at all times pertinent hereto the Complainant and District were parties to a labor agreement for the period December 26, 1976 through May 26, 1978, which among its provisions contained an arbitration procedure that provided for the selection of an impartial arbitrator whose decision was to be final and binding upon the parties; and that said labor agreement also contained a procedure for the filling of vacancies.

5. That on or about August 17, 1977, the District filled the Lake View Elementary School Administrative Clerk vacancy with Blaska; that thereafter a grievance was filed by Heinz and Anderson, District employes employed in the bargaining unit governed by the abovementioned collective bargaining agreement; and that said grievance was processed through the parties' contractual grievance procedure and ultimately submitted to Arbitrator Hutchison on November 17 and 23, 1977, for her decision.

6. That on March 22, 1978, Arbitrator Hutchison issued her award; that in said award she determined inter alia that the District breached the aforesaid collective bargaining agreement in bypassing qualified unit employes Heinz and Anderson when filling the Lake View vacancy; and that she ordered the District to vacate the position, interview Anderson and Heinz for the vacancy and select between them.

7. That on or about March 31, 1978, Lake View Principal, Gene Sturdevant interviewed Heinz and Anderson pursuant to the aforesaid arbitration award; that Sturdevant interviewed Anderson first and found her unqualified; that Sturdevant then interviewed Heinz and offered her the Administrative Clerk vacancy; that Heinz rejected the offer and chose instead to stay in her present position; and that after Heinz rejected the vacancy the District involuntarily transferred Blaska to the position, the same position she had held from on or about August 17, 1977, until said position was vacated by Arbitrator Hutchison's award.

8. That the District acted in bad faith and contrary to Hutchison's award when its agent, Sturdevant determined on or about March 31, 1978, not to consider Anderson for the vacant Administrative Clerk position because he deemed she was not qualified; and that by the aforesaid conduct the District has not complied with Arbitrator Hutchison's award.

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

CONCLUSION OF LAW

That the District by its refusal to comply with the award of Arbitrator Hutchison, has committed and is committing a prohibited practice within the meaning of Section 111.70(3)(a)5, Stats.

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

ORDER

IT IS ORDERED that Madison Metropolitan School District, Board of Education, Madison Metropolitan School Districts its officers and agents shall immediately:

1. Cease and desist from refusing to comply with the Award of Arbitrator Kay B. Hutchison dated March 22, 1978.

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

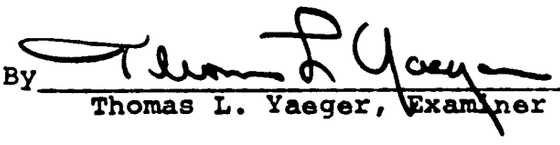
   a. Comply with Arbitrator Kay B. Hutchison's award dated March 22, 1978, by 1) immediately declaring the Lake View Elementary School Administrative Clerk position vacant and immediately awarding said position to Lauramae Anderson; 2) making Lauramae Anderson whole for wages and fringe benefits lost since April 7, 1978, because of the District's refusal to comply with Arbitrator Hutchison's award including 7% interest on said monies; 3) reimbursing the Complainants for attorney fee's incurred in prosecuting the District's refusal to comply with Hutchison's award.

   b. Notify all employes by posting in conspicuous places in District offices where secretarial, clerical and technical employes work, copies of the notice attached hereto and marked "Appendix A" which notice shall be signed by Director, Employee Services Division, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the District to insure 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 following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 19th day of December, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

APPENDIX "A"

Notice to All Employees

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 the award of Arbitrator Kay B. Hutchison dated March 22, 1978.

2. WE WILL immediately declare the Lake View Elementary Administrative Clerk position vacant and award the position to Lauramae Anderson, and we will make Lauramae Anderson whole for all lost wages and fringe benefits since April 7, 1978, including 7% interest on said monies, and we will reimburse Madison Teachers Incorporated and Lauramae Anderson for attorney fees incurred in prosecuting our refusal to comply with Arbitrator Hutchison's award.

By _____
Director, Employee Services Division

Dated this _____ day of _____, 197_.

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The instant complaint was filed by the Union and Anderson with the Commission on July 18, 1978, and therein Complainants allege the District refused to comply with Arbitrator Hutchison's award issued on March 22, 1978, in violation of Section 111.70(3)(a)5 of MERA. 1/ At hearing, the District moved to strike Complainant Hinze from the complaint and Complainants counsel concurred. Also, at hearing, Complainants moved to have the Examiner remand the dispute to Arbitrator Hutchison. The undersigned reserved ruling on said motion and it has been disposed of herein as part of the decision on the merits. After conclusion of the hearing and receipt of the transcript, the parties filed briefs and reply briefs that were received by the Examiner by October 11, 1978.

PARTIES' POSITIONS:

Complainants argue that the District willfully failed and refused to comply with the clear and unambiguous intent of Arbitrator Hutchison's award. It maintains the award requires the District to select one of the grievants to fill the position of Elementary School Administrative Clerk and remove the incumbent Blaska whose appointment the Arbitrator found breached the parties' labor agreement. However, by refusing to award the position to Anderson after the Arbitrator's decision the District was clearly attempting to avoid its contractual and statutory obligations. Furthermore, that the District's actions evidences lack of good faith in not attempting to comply with the award and, therefore, Complainants request that attorney's fees be awarded.

The District, on the other hand, contends that the Union has not established by a clear and satisfactory preponderance of the evidence that the District is not in compliance with the arbitration award. It avers that in good faith if offered the job to Hinze, she refused the position, and it thereby complied with the Arbitrator's decision. While it admits both Hinze and Anderson were originally certified as being minimally qualified, the Principal, after the award, determined Anderson was not qualified on the basis of "evidence later discovered". Further, it argues that the award did not require that it vacate the disputed position prior to finding a replacement for Blaska. Once Hinz rejected the position and Anderson was found unqualified the District was free to appoint Blaska to continue in the position and did so in good faith.

The District also claims the Commission lacks authority to remand the dispute to the Arbitrator for clarification of the award inasmuch as the Arbitrator is functus officio absent rehearing ordered by the court or a mutual request for clarification, in addition to public policy considerations against doing so. Lastly, it insists granting attorney fees would be inappropriate in this case, because the parties have no prior arrangement for same and, further, because there is no showing the District acted in bad faith.

1/ Municipal Employment Relations Act.

Failure to Comply with Award:

The material facts underlying the complaint are not disputed. Arbitrator Hutchison determined that the District breached the parties' labor agreement by selecting Blaska to fill the Lake View Elementary School Administrative Clerk position pursuant to contractual procedures to wit she was not the beneficiary, and thereby, wrongfully denied at least one grievant a promotion to which they were otherwise entitled.

> "Based on the foregoing, this Arbitrator concludes that the District has violated Article IV-E with respect to filling the Lake View vacancy on or about August 12, 1977.
>
> The findings, in summary, are that: (1) Ms. Blaska was not an 'employe' within the bargaining unit or covered by the agreement at the time the Lake View vacancy was filled and therefore was not entitled to the position unless it was not practical to fill the vacancy through the promotion or transfer of unit employe applicants; (2) the District has failed to substantiate that it was not 'practical,' i.e., efficient or workable, to promote either of the grievants herein to the Lake View position pursuant to the contract; and further that (3) the failure of the Employer to interview Sheryl Hinze was arbitrary and constituted unequal treatment."

Consistent with the broad remedial powers enjoyed by arbitrators 2/ Hutchison directed the District to "vacate" the disputed position and select one of the grievants to fill the position.

> "The undersigned directs the position of Administrative Clerk, Lake View Elementary School be vacated and that the Employer interview Lauramae Anderson and Sheryl Hinze for the vacancy and select between them pursuant to the agreement."

Upon receipt of the Arbitrator's decision the District, set about interviewing the grievants. 3/ It first interviewed Anderson and determined she was not a "qualified candidate". It then interviewed Heinz and during the interview offered her the position which she declined. At that point the District determined to continue Blaska in the position. These actions prompted the instant complaint.

A careful review of the record herein reveals a clear and satisfactory preponderance of evidence that the District has not complied with Arbitrator Hutchison's award. Said award directed the District to interview Heinz and Anderson and select between them on the basis of their relative abilities. The Arbitrator could not have made her point more clear, that both grievants were eligible to fill the position and only the decision as to which of the two was preferred was left to the District.

> "It is not the Arbitrator's function, under the contract, to determine the relative qualifications of the two

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2/ United Steelworkers of America v. Enterprise Wheel and Car Corp., 80 S. Ct. 1358 (1960).

3/ The interviews were conducted by the Lake View School Principal, Sturdevant.

applicants for the Lake View vacancy. Thereby, the undersigned will not substitute her judgment for that of the Employer in deciding whether Ms. Anderson or Ms. Hinze should be awarded the job."

In the proceeding before the Arbitrator the District even argued that:

> "MTI [union] has failed to establish that the promotion of either of the grievants would have been 'useful' to the Employer or that either of them was qualified for the position by 'practice' or 'practical training.'"

but the Arbitrator found otherwise.

> "In the opinion of the undersigned, the District must demonstrate that it is not 'practical' to promote or transfer a unit 'employe' in order to fill the vacancy from outside the bargaining unit.
>
> . . .
>
> This Arbitrator finds that the District has failed to demonstrate that the promotion of either of the grievants to the Lake View vacancy would be neither efficient nor workable."

Thus, it was clearly not for the District to decide on or about March 31, 1978, that Anderson was not a "qualified candidate". Further, the Examiner, contrary to District assertions does not believe this decision was based on "evidence later discovered". Even Sturdevant's letter of March 31st states:

> "she has regularly experienced problems with personal relations in at least 3 of the positions she had held." (Emphasis added.)

Surely the District would not expect the undersigned to believe that this information concerning her qualifications was not known prior to August 12, 1977, and was not obtainable in the normal course of reviewing the applicants under consideration at that time.

Even if the District had discovered new evidence that Anderson should not have been entitled to the vacancy on August 12, 1977, it cannot now be used to unilaterally alter the award. The Arbitrator's decision was based upon the record made by the parties. While arbitrators have been known to reopen cases prior to issuance of the award for the purpose of allowing a party to adduce new evidence 4/ they cannot be required to do so. 5/ In any event, here the evidence

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4/ Local Lodge 1746 v. United Aircraft Corp., 329 I. Supp. 283, 77 LRRM 2596 (D.C. Conn. 1971); George A. Hormel Co., 63-2 ARB Page 8462 (1963); Gateway Products Corp., 61-3 ARB Page 8639 (1961), Madison Institute, 18 LA 72 (1952).

5/ Newspaper Guild Local 35 v. Washington Post Co., 442 F. Supp. 1234, 76 LRRM 2274 (D.C. Civ. 1971).

was allegedly discovered after the award had been issued. Further, the District has never challenged the award's validity. Consequently the decision as to whether Anderson was qualified to fill the vacancy was not open to question by the District after receipt of Hutchison's decision. 6/ To permit the contrary result being urged by the District would nullify the often enunciated public policy encouraging arbitation as the preferred method of resolving disputes with employers. 7/

Thus, the District in order to be in compliance with Hutchison's award would have had to fill the vacancy with Anderson after Heinz had rejected the position. Clearly, the District was initially left with a choice only because both grievants were qualified and both wanted the position. However, once one grievant disclaimed an interest there was no longer a choice and Anderson should have filled the vacancy. Therefore, by failing to comply with a valid binding and enforceable arbitration award it has committed a prohibited practice in violation of Section 111.70(3)(a)5, Stats.

In view of the foregoing findings, it is unnecessary to deal with Complainants motion to remand the award to Hutchison for clarification, as well as the Complainants alternative positions relative to what other District action would have been appropriate, and the District's arguments regarding same.

Interest and Attorney Fees:

In order to correct the unlawful action of the District, it is necessary to order that the District abide by Hutchison's award and immediately vacate the Lake View Elementary School Administrative Clerk position and fill the position with Anderson. Had the District complied with Hutchison's award, Anderson would have been in said position by at least April 7, 1978, the effective date of Blaska's reappointment to the position after Heinz' rejection of the position. 8/ Consequently, in undoing what has been done, Anderson is entitled to be made whole for any and all losses of wages and fringe benefits with 7% interest, 9/ occasioned by the District's failure to appoint her to said position effective April 7, 1978.

6/ The only determination left unanswered by the award was which grievant was preferred by the District to fill the vacancy, inasmuch as both were qualified.

7/ United Steelworkers of America v. American Manufacturing Co., 80 S. Ct. 1343 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 80 S. Ct. 1347 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 80 S. Ct. 1358 (1960); Section 111.70(6), Stats.

8/ City of Franklin (11296) 9/72; Superior Jt. School District No. 1 (12174-A, B) 5/75, Madison Metropolitan School District (15007-A) 6/77.

9/ Florida Steel Corp. 231 NLRB No. 117, 96 LRRM 1070 (1977).

It is clear from the record that the defense presented by the District herein that Anderson was not "qualified" was spurious and thus had no chance of success. Hence, by adopting such a position the inescapable conclusion is that the District acted in bad faith. Consequently, Anderson is entitled to be paid interest upon her losses that would not have resulted, but for the District's bad faith. 10/

The Complainants herein believe the District willfully refused to abide by Hutchison's decisions without justification and that attorney fees should therefore be ordered. The District argues against granting attorney's fees because the parties have never before agreed to their being awarded and there has been no showing that they are warranted herein.

Although the Commission has to date chosen not to grant attorney's fees, it clearly is not because it lacks the authority. Indeed, in those municipal cases where such requests have been made, they have been denied, because the conditions precedent did not exist. In Madison Metropolitan School District (14038-B) 4/77 the Commission set forth the standards to be applied in determining whether to grant attorney fees.

> "Because the commission is satisfied on the record in this case that the respondent's refusal to abide by the award in question is not taken in bad faith or based upon legal arguments which are insubstantial and without justification, that it would be inappropriate to order respondent be directed to pay the complainant's attorney's fees and other costs of litigation incurred in this matter." (Citations omitted.)

Thus, the Commission has manifested its determination that said fees are appropriate in the aforesaid circumstances.

Herein the District's conduct meets the foregoing criterion. As noted earlier, the reason given for not appointing Anderson after being ordered to select between her and Heinz, and Heinz rejected the position, was because Anderson was not qualified. However, the Arbitrator had already ruled she was qualified and the District thereafter was without authority to disregard that determination. Thus, their disregard for that decision cannot be excused as a reasonable misreading of the award, but rather evidences a clear and unmistakeable bad faith attempt to circumvent a decision which they bargained for and are contractually bound to accept as final and binding. The situation is excerbated in that there was no challenge to the validity of said award.

While the District would like to obfuscate the issue with reference to Heinz' rejection of the position, the fact is that the District acted in bad faith prior to Heinz' rejection when it previously interviewed Anderson and found her to be unqualified. Thus, the District's argument that new facts were presented that were not contemplated by Hutchison's award is absurd. The District was ordered to select between the two grievants and if one was no longer interested in the position their compliance with the award was made all the

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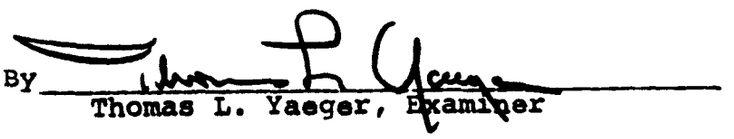
10/ Sawyer County Highway Department (13978-A, B) 1/76; Madison Metropolitan School District (14038-B) 4/77; Madison Metropolitan School District.

easier. The only reason they were given a choice is because both grievants who were interested were qualified. Thus, by basing its refusal to comply upon a spurious and insubstantial legal theory the District acted in bad faith. Hence, attorney fees are mandated by the District's egregious conduct.

Dated at Madison, Wisconsin this 19th day of December, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner