STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED, Complainant, vs. MADISON METROPOLITAN SCHOOL DISTRICT and its agent THE BOARD OF EDUCATION OF MADISON METROPOLITAN SCHOOL DISTRICT, Respondents.	Case LXXXIV No. 23351 MP-880 Decision No. 16493-A

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM ORDER REMANDING AND HOLDING PROCEEDING IN ABEYANCE

Madison Teachers Incorporated having filed a complaint on August 2, 1978, with the Wisconsin Employment Relations Commission alleging that Madison Metropolitan School District and its agent the Board of Education of Madison Metropolitan School District had committed certain prohibited practices within the meaning of Section 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Stephen Schoenfeld, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) Stats.; and hearing on said complaint having been held in Madison, Wisconsin on September 5 1/ and December 19, 1978 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, (also referred to as Complainant), is a labor organization having its principal office at 121 South Hancock Street, Madison, Wisconsin 53703.

2. That at all times pertinent hereto Complainant was the certified exclusive collective bargaining representative of all regular full-time and regular part-time teaching and other related professional personnel who are employed in a professional capacity to work with students and teachers, employed by Madison Metropolitan School District, including psychologists, psychometrists, social workers, attendants and visitation

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1/ During the course of the hearing on September 5, 1978, Complainant's counsel asked that the hearing be adjourned and that the parties be afforded an opportunity to submit briefs concerning whether Arbitrator Weisberger could be subpoenaed or voluntarily called as a witness at the prohibited practice hearing. Subsequently, Complainant's counsel withdrew his request for a subpoena to compel Weisberger to appear and testify for the purpose of clarifying her award. The hearing was then scheduled for November 9, 1978; however, pursuant to Respondent's request, the hearing was rescheduled for December 19, 1978.

workers, work experience coordinator, remedial reading teacher, University Hospital teachers, trainable group teachers, librarians, cataloger, educational reference librarian, text librarian, Title I coordinator, guidance counselors, teaching assistant principals (except at Sunnyside School) teachers on leave of absence, and teachers under temporary contract, but excluding supervisor-cataloging and processing, on call substitute teachers, interns and all other employes, principals, supervisors and administrators.

3. That, Madison Metropolitan School District (also referred to as Respondent), is a city school district operating under the laws of the State of Wisconsin and is a municipal employer as defined in Section 111.70(1)(a), Stats., with its principal office at 545 West Dayton Street, Madison, Wisconsin 53703.

4. 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.

5. That Respondent and Complainant, at all times pertinent hereto, were signatory to and bound by the terms of the 1976 collective bargaining agreement setting forth the wages, hours and conditions of employment of those employes of Respondent who were represented by Complainant.

6. That the material provision of said collective bargaining agreement provided as follows:

I. RECOGNITION

. . .

B. Collective Bargaining Representative

. . .

2. Hereinafter the term "teacher" refers to anyone in the collective bargaining unit.

3. The parties recognizing the value of a qualified teaching staff as it relates to the instructional process hereby agree that instructional duties where the Wisconsin Department of Public Instruction requires that such be performed by a certified teacher, shall be performed only by "teachers."

Substitutes are excepted and may take the place of absent "teachers" pusuant [sic] to Section IV-B. In an emergency and/or when a substitute is not available, certificated administrators may serve as substitutes.

Administrators, may under the terms of this agreement, perform work under Section III I.

IV. Individual Contract

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B. SUBSTITUTES, NEW HIRES (TEACHERS AND REPLACEMENT TEACHERS)

1. Per Diem Substitutes

Substitutes shall be retained by the Madison Public Schools for teachers absent up to the equivalent of one semester. Such substitutes shall be paid at the rate specified for per

diem substitutes as established by the Board of Education or in collective bargaining.

2. Replacement Teachers

Such individual shall be hired by the Board of Education, under a temporary contract as per the specifications of the Agreement, to replace teachers whose position becomes temporarily vacant for more than one semester.

3. New Hires

Permanent positions vacated for one semester or more due to the resignation, dismissal, death or other permanent action of a contracted teacher shall be filled by the Board of Education by hiring a teacher under a regular contract granting them all the rights, privileges and obligations of the Agreement.

Permanent positions permanently vacated for less than one semester shall be filled by the Board of Education by hiring teachers on a temporary contract, and such teacher will be considered replacement teachers, and said teacher will have no reemployment rights under the Agreement.

7. That said collective bargaining agreement also contained therein a provision entitled "Grievance Procedure" providing for the processing of dispute(s) concerning the interpretation or application of any of the terms of any written agreement establishing salaries, hours, or other conditions of employment for the employes of Respondent for whom Complainant is the collective bargaining representative through the steps of a contractually established grievance machinery and ultimately to final and binding arbitration before an arbitrator mutually selected by the parties from a panel furnished them by the Wisconsin Employment Relations Commission.

8. That during the course of the 1976-1977 school year, Madison Teachers, Inc. filed a grievance protesting the District's policy of hiring per diem substitutes to replace certain kinds of teachers. The grievance alleged that in hiring per diem substitutes for said teachers, 2/ the District violated Sections I(B) and IV(B) of the labor contract. The parties were unable to resolve the dispute and pursuant to the procedures agreed upon by Respondent and Complainant, on June 6, 1977, June Weisberger arbitrated the grievance relative to the following issues:

1) Is the School District violating the collective bargaining agreement between the parties when it hires per diem substitute teachers to replace bargaining unit teachers when the latter are assigned by the School District to other duties on a regular part-time basis for a school year and fails to hire part time replacement teachers under a temporary contract?

2/ Per diem substitutes had been hired to replace unit leaders, reading resource teachers, and teachers under "joint appointments." A unit leader coordinates a team of teachers in developing an instructional program based upon the individual needs of students in the unit. A reading resource teacher coordinates the reading program in his or her assigned school. Teachers under "joint appointments" remain regular School District employes and the University of Wisconsin reimburses the District for the time spent by these teachers doing University teaching or supervising student teachers on behalf of the University.

2) If there is a contract violation, what shall the remedy be?

9. That on November 1, 1977, the arbitrator issued her decision and Award. The Award provided as follows:

AWARD

Based upon a thorough consideration of all the testimony, exhibits and arguments, the arbitrator concludes that:

1. The School District violated Sections I (B) and IV (B) of the collective bargaining agreement between the parties when it hired per diem substitute teachers to replace bargaining unit teachers when the latter are assigned to other duties on a regular part time basis for more than a semester and the assignments amount to at least 10% of a full time teacher contract.

2. Effective at the end of the first semester of the 1977-78 school year, whenever a bargaining unit teacher is assigned for more than a semester to other duties on a regular part time basis which amounts to at least 10% of a full time teacher contract, that teacher shall be replaced by a regular part time teacher on a temporary contract.

3. The arbitrator shall retain jurisdiction for a period of 45 days following the date of this award to resolve disputes which might arise in the implementation of the award.

10. That Arbitrator Weisberger had the authority to render an Award, including a remedy, which was final and binding on the parties; that Weisberger did not issue a final and definite Award inasmuch as said Award is unclear concerning the date the Award was to take effect; that there are two plausible interpretations of her Award with respect to the time she intended the remedy to take effect in that it can reasonably be inferred from the Award that it is to take effect at the end of the first semester of the 1977-1978 school year and it can also be reasonably inferred that it is not to take effect until the commencement of the second semester of said school year; that be failing to clearly specify whether teachers who were replacing bargaining unit teachers at the end of the first semester of the 1977-1978 school year and who continued in those position for the entire second semester held those positions for more than a semester during said school year, Arbitrator Weisberger did not fully resolve the remedy issue which was before her and, consequently, the Arbitration Award is not definite and final.

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

CONCLUSIONS OF LAW

1. That the November 1, 1977, Arbitration Award of June Weisberger is not a final and definite Award within the meaning of Section 298.10(1)(d), Stats., and therefore the Award is not one which the Wisconsin Employment Relations Commission will enforce pursuant to Section 111.70 (3)(a)5 of the Municipal Employment Relations Act.

2. That it is premature for the Wisconsin Employment Relations Commission to determine whether Respondent has violated the terms of the parties' collective bargaining agreement, including the agreement to accept as binding and enforceable Arbitration Award issued by June Weisberger on November 1, 1977.

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

INTERIM ORDER

That the subject matter of this dispute be, and the same hereby is, remanded to Arbitrator June Weisberger for the purpose of obtaining a final and definite Award with respect to ascertaining the time she intended the Award to take effect; that Arbitrator Weisberger should specifically address the question concerning whether teachers who were replacing bargaining unit teachers at the end of the first semester of the 1977-1978 school year, because the bargaining unit teachers were assigned to other duties on a regular part-time basis which amounted to at least 10% of a full-time teachers' contract, and who continued in those positions for the entire second semester of the 1977-1978 school year, held those positions for more than a semester during said school year and are therefore affected by the award.

That Complainant and Respondent contact Arbitrator Weisberger within twenty (20) days from the date of this Order so that a time for hearing can be established for Arbitrator Weisberger to address the issue remanded to her.

IT IS FURTHER ORDERED that the instant proceeding be, and the same hereby is, held in abeyance until the Commission is notified that Arbitrator June Weisberger issues a final and definite Award in the matter as contemplated in Section 298.10, Stats.

Dated at Madison, Wisconsin this 25th day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

At the outset of the hearing on September 5, 1978, Respondent made a motion that the subject matter of this litigation be deferred to the jurisdiction of the Circuit Court of Dane County Branch 2, The Honorable Michael B. Torphy, presiding. The basis of the motion was that in March, 1978, a hearing under Section 298.09, Stats., had been held before Judge Torphy pursuant to Complainant's petition for an order confirming Arbitrator Weisberger's November 1, 1977 Award and that Judge Torphy confirmed the Award in its entirety. The Examiner denied Respondent's motion on the basis that the issue concerning whether Respondent had complied with Weisberger's Award had not been submitted to Judge Torphy and that issue, consequently, was not pending before the Circuit Court. Since Judge Torphy had made no factual determination with respect to that issue, the question concerning whether Respondent has or hasn't complied with Weisberger's November 1, 1977 Arbitration Award is an issue of the first impression and is properly before the Commission. Because the general issue of compliance wasn't before the Court, and inasmuch as the specific question concerning what date Weisberger intended the Award to take effect wasn't adjudicated by the Court, the Court's affirmation of the Award doesn't constitute a binding precedent in this proceeding.

The Complainant in this proceeding contends that the Respondent has violated Section 111.70(3)(a)5 of the MERA when it failed and refused to accept the terms of June Weisberger's November 1, 1977 Arbitration Award as final and binding upon it. According to Complainant, the District violated said Award when it failed and refused to award temporary part-time contracts to per diem substitute teachers who were at the end of the first semester of the 1977-1978 school year filling vacancies of at least ten percent of a full-time teacher's contract, in cases where such vacancies continued and would extend through the second semester of the 1977-1978 school year. On the other hand, the District avers that it has complied with Wiesberger's Award inasmuch as the Award, according to the District, is only to be awarded prospective application. During the course of the hearing on December 19, 1978, both parties agreed that the issue to be resolved by the Examiner concerned a determination of the date that Arbitrator Weisberger intended her Award to take effect.

Although the Commission has the jurisdiction pursuant to Sections 111.70(3)(a)5 and 111.70(3)(b)4 of MERA to enforce a binding Arbitration Award issued by Arbitrator Weisberger, in order to enforce such an Award, the Commission must find said Award to be "final and definite" as prescribed in Section 298.10, Stats. 3/ Although neither Complainant nor Respondent contended that the standards set forth in Section 298.10, Stats., are applicable herein, the Examiner believes that the standards set forth in said statute are apposite in this proceeding.

Arbitrator Weisberger set forth two criteria which had to be satisfied before the District was obligated to replace unit leaders, reading resource teachers, and teachers under joint appointments with regular

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3/ See Harker Heating and Sheet Metal, Decision No. 6704 (6/64) and City of Neenah, Decision No. 10716 (10/72) where the Commission held that it will not enforce arbitration awards which are contrary to the standards for court review set forth in Section 298.10, Stats., which provides, in material part, the following ground as being sufficient to justify the vacation of an arbitration award by a court:

> "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."

part-time teachers on a temporary contract. The bargaining unit teacher had to be assigned to other duties on a regular basis which amounted to at least 10% of a full-time teacher contract. Secondly, the bargaining unit teacher had to be assigned to said duties for more than a semester. It isn't clear from the Award whether the Arbitrator intended that teachers who were replacing bargaining unit teachers at the end of the first semester of the 1977-1978 school year and who continued in those positions for the entire second semester should or should not be credited for the time spent in the employ of the District in said positions for the first semester when determining whether the replacement teachers satisfied the second criteria, namely, whether said assignment was for more than a semester.

Arguably, there are two plausible interpretations of her Award with respect to the time she intended the remedy to take effect. On the one hand, it can reasonably be inferred that any teacher who was replacing a unit leader, a reading resource teacher, or a "joint appointment" teacher at the end of the first semester and who continued in that position for the entire second semester of the school year, held the position for more than a semester. Weisberger's language "effective at the end of the first semester", is certainly not synonymous with the term effective at the beginning of the second semester. It is therefore reasonable to conclude from Weisberger's language that a teacher who was "in" an above-mentioned position at the end of the first semester and who continued in that position throughout the second semester, held that position for more than a semester.

Weisberger indicated that ". . . unit leaders are to be assigned to their special duties for 10% of their full time duties for a school year." (emphasis added) If Arbitrator Weisberger intended that her award was not to be effective with respect to said unit leaders until the commencement of the 1978-79 school year, it is reasonable to assume that she would have retained jurisdiction to resolve disputes concerning implementation of the award as of the commencement of the 1978-79 school year. Rather, she retained jurisdiction for a 45-day period. It is therefore reasonable to conclude that she intended the award to impact upon assignments made during the 1977-78 school year and that the award was to take effect at the end of the first semester of said school year.

On the other hand, a reasonable argument can also be made that Weisberger did not intend that teachers who replaced unit leaders, reading resource teachers and "joint appointment" teachers during the first semester of the 1977-1978 school year be given credit for time spent in said positions during the first semester when ascertaining whether they filled said positions for more than a semester. If credit were given for time spent in said positions for the first semester, then the Award would have retroactive application and would be in contradiction to Weisberger's stated intent that the Award be prospective.

Arbitrator Weisberger acknowledges that at the time she executed the Award the 1977-1978 school year had begun and it was impossible for her to ascertain the full array of problems which might arise in implementing the Award without interfering with the continuity of classroom instruction. She also pointed out that contractual rights of present and former members of the bargaining unit as well as substitute teachers may be involved. Consequently, she made the Award prospective.

Since Weisberger didn't make the Award effective from the commencement of the first semester of the 1977-1978 school year, it is reasonable to conclude that she may have intended that effective with the beginning of the second semester, rather than at some time at the end of the first semester, whenever a bargaining unit teacher is assigned for more than a semester to other duties on a regular part-time basis which amounts to at least 10% of a full-time teacher contract, the District is then obligated to replace that teacher with a regular part-time teacher on a temporary contract. If Arbitrator Weisberger intended the Award to impact on assignments made during the first semester of the 1977-1978 school

year, it is reasonable to assume that she would have either made the remedy effective with the date of the Award or utilized language that the Award was to take effect "during" the first semester; however, she did neither. In fashioning her Award, Arbitrator Weisberger said:

> In addition to the qualifications just noted, determining the appropriate remedy for this contract violation is not a simple matter. On the one hand, the School District has proceeded in good faith and there are direct budgetary implications to consider. On the other hand, the Union did not specifically call the matter to the School District's attention, particularly in regard to unit leaders and reading resource teachers until well after the commencement of the 1976-77 school year although many members of the teachers' bargaining unit, including some members of the MTI Board of Directors, knew about the Board's practices and apparently failed to press for prompt action by the Union. Indeed, this problem of Union delay in pursuing this matter was implicity [sic] recognized by the Union during the arbitration hearing when counsel suggested that the Union sought relief "at least" back to the date of the filing of the grievance. It was also emphasized by the Employer when it argued that the effective date for any remedy should be no sooner than the date of the award. Under these circumstances, the arbitrator agrees that prospective relief only appears appropriate.
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> The 1977-78 school year has already commenced and it is impossible for the arbitrator at this time to ascertain the full array of problems which might arise in implementing this award without interfering with the continuity of classroom instruction. Contractual rights, of members (or former members) of the teacher bargaining unit may be involved. Contractual rights of substitute teachers may also be involved. Therefore, this award shall be prospective only and shall be effective at the end of the first semester of the 1977-78 school year. In addition, the arbitrator shall retain jurisdiction for a reasonable period of time to resolve disputes which may arise in the implementation of this decision.

Therefore, it is reasonable to infer from Weisberger's utilization of the aforesaid language that she intended the first semester of the 1977-78 school year to conclude before the District was obligated to tender temporary contracts to regular part-time teachers who replace bargaining unit teachers who are assigned to other duties on a regular part-time basis which amounts to at least 10% of a full-time teacher contract.

Because Arbitrator Weisberger failed to fully resolve the remedy issue in that she did not clearly specify whether or not teachers who were replacing bargaining unit teachers at the end of the first semester of the 1977-1978 school year and who continued in those positions for the entire second semester should or should not be credited for the time spent in said positions during the first semester of the 1977-1978 school year in determining whether their assignments were for more than a semester, and inasmuch as there are two plausible interpretations of her Award that can be gleaned as to the time she intended the Award to take effect, the Examiner has concluded that the Arbitrator has not issued a definite Award upon the subject matter submitted to her within the meaning of Section 298.10)1)(d), Stats. The Examiner is therefore unable to reach any decision regarding whether Respondent has failed to fully implement the Arbitration Award and thereby violated Section 111.70 (3)(a)(5) of MERA. Consequently, the Examiner has remanded the arbitration proceeding to the Arbitrator to resolve the ambiguity concerning what date the Arbitrator intended the Award to take effect. Specifically, the Arbitrator should address whether she intended that a teacher who was replacing a bargaining unit teacher at the end of the first semester of the 1977-1978 school year, because the bargaining unit teacher was assigned

to other duties on a regular part-time basis which amounted to at least 10% of a full-time teacher contract, and who continued in that position for the entire second semester of the 1977-1978 school year, held that position for more than a semester during said school year and is therefore affected by the Award. A decision on Complainant's allegation that Respondent has violated MERA can only be made after the Arbitrator has answered said question and thereby issued a final and definite award.

In considering the aforesaid conflicting contentions, the Examiner concludes that the interpretation of Weisberger's Award advanced by either party may be correct, as neither contention is without plausible merit. Accordingly, and because the Award is susceptible to varying interpretations, it must be concluded that it is indefinite. Consequently, the Examiner has remanded the remedy issue in this dispute to Arbitrator Weisberger for a definite Award. Until such an Award has been rendered through the procedures set forth in the parties' labor contract, it would be premature for the Commission to determine whether there has been a violation of Section 111.70(3)(a)5 of the MERA. Because the Examiner cannot ascertain the date Arbitrator Weisberger intended the Award to take effect, and inasmuch as it would be inappropriate for the Examiner to guess at same, the Examiner will hold this proceeding in abeyance until an enforceable binding Award had been rendered pursuant to the parties' agreement.

Dated at Madison, Wisconsin this 25th day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner