STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHEBOYGAN COUNTY INSTITUTION EMPLOYEES, LOCAL 2427, AFSCME, AFL-CIO, Complainant, vs. COUNTY OF SHEBOYGAN, Respondent.	Case 89 No. 36316 MP-1809 Decision No. 23277-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of the Complainant.

Mr. Alexander Kopp, Corporation Counsel, Sheboygan County, 601 North Street, P.O. Box 128, Sheboygan, Wisconsin 53801, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Sheboygan County Institution Employees, Local 2427, AFSCME, AFL-CIO, having, on January 6, 1986, filed a Complaint with the Wisconsin Employment Relations Commission alleging therein that Sheboygan County had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, 4 and 5, Stats., by failing and refusing to implement an arbitration award and had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., by creating and implementing changes in its Table of Organization without bargaining its decision and impact of its decision; and the Commission, having, on February 10, 1986, appointed Edmond J. Bielarczyk, Jr., 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 Secs. 111.70(4)(a) and 111.07, Stats.; and a hearing in the matter having been scheduled for March 11, 1986, and rescheduled and held on May 12, 1986, in Sheboygan, Wisconsin; and a stenographic transcript of the proceedings having been prepared and received by the Examiner on June 25, 1986; and the parties having filed briefs and reply briefs by July 30, 1986; and the Examiner having considered the evidence and arguments of the parties; and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Sheboygan County Institution Employees, Local 2427, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization which has its offices located as 2323 North 29th Street, Sheboygan, Wisconsin 53081.

2. That Sheboygan County, hereinafter referred to as the Respondent, is a municipal employer which has its offices located at 601 North Fifth Street, P.O. Box 128, Sheboygan, Wisconsin 53081.

3. That the Complainant and Respondent are parties to a collective bargaining agreement, effective January 1, 1983 through December 31, 1984; that said agreement provides for final and binding arbitration of grievances; that said agreement applies to employes represented by the Complainant and employed at Respondent's Comprehensive Health Center, Rocky Knoll Health Care Facility and Sunny Ridge Home; and, that said agreement contains the following pertinent provisions:

. . .

III

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not be (sic) be justified, the employee shall receive all wages and benefits due him/her for such period of time involved in the matter.

Sheboygan County shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this Agreement and the Wisconsin Statutes. But in the event the Employer desires to subcontract any work which will result in the layoff of any county employees, said matter shall first be reviewed with the Union.

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its institutions. The Union agrees at all times as far as it has within its powers to preserve and maintain the best care and all humanitarian consideration of the patients at said institutions and otherwise further the public interest of Sheboygan County.

In keeping with the above, the Employer may adopt reasonable rules and amend the same from time to time, and the Employer and the Union will cooperate in the enforcement thereof.

. . .

XXVI
SENIORITY

. . .

2. Promotions. Whenever any vacancy occurs due to a retirement, quit, new position or for whatever reason, the job vacancy shall be posted. The vacancy shall be posted on one (1) bulletin board designated for that purpose at each institution for a minimum of five (5) work days. The job requirements and the qualifications shall be a part of the posting and sufficient space provided for interested parties to sign said posting. Opportunity for promotion or transfer shall be first for employees working at the institution where the vacancy exists. If no qualified employee with seniority applies at the institution where the vacancy exists, applications of employees at the other two (2) institutions shall be accepted with the most senior employee qualifying receiving the job. If no regular employee makes application for this job by signing the posting, it shall be given to the temporary employee applying (signing) who has the most seniority, subject to the right of the employer to determine whether the employee applying for said position has the proper qualifications to perform the job.

. . .

APPENDIX "A"

SHEBOYGAN COUNTY INSTITUTIONS CLASSIFICATIONS/WAGES

JOB TITLES	WAGE RATES		
	1-1-83	7-01-83	1-01-84
Licensed Practical Nurse	7.01	7.11	7.41
Attendant	6.12	6.22	6.52
Nurses Aide	5.95	6.05	6.35
X-Ray Technician	6.36	6.46	6.76

. . .

4. That at the commencement of said agreement and for approximately sixteen (16) years prior to, the Respondent employed attendants at the Comprehensive Health Center and Nurses Aides at Rocky Knoll Health Care Facility and Sunny Ridge Home; that Appendix A of said agreement provides for the following pertinent classifications/wages:

	1-1-83	7-01-83	1-01-84
Attendant	6.12	6.22	6.52
Nurses Aide	5.95	6.05	6.35

that on October 25, 1983, the Respondent adopted Ordinances #19 (1983-84) which provided in pertinent part the following:

> WHEREAS, it is recommended that the Table of Organization for Sheboygan County Comprehensive Health Center be amended as follows:
>
> . . .
>
> | NURSING SERVICES | Present | | Proposed | |
> |---|---|---|---|---|
> | | Full Time | Part Time | Full Time | Part Time |
> | Attendant* | 45 | 47 | 0 | 0 |
> | Aides | 0 | 0 | 45 | 47 |
>
> . . .
>
> * These are temporary positions which will be filled by Nurses Aides, Food Service Worker I, and Housekeeper I through attrition and termination.
>
> NOW, THEREFORE, THE COUNTY BOARD OF SUPERVISORS DO ORDAIN AS FOLLOWS:
>
> Section 1. Amending T/O. The provisions of Section 40.02(c) of the Sheboygan County Code of General Ordinances be amended to read as follows:
>
> "(c) COMPREHENSIVE HEALTH CENTER
> (County Hospital)
>
> . . .
>
> | Nursing Services | Full Time | Part Time |
> |---|---|---|
> | Aides | 45 | 47 |
>
> . . .
>
> Section 2. Effective Date. The herein ordinance shall take effect on the first day of the month after its adoption.

that following the adoption of said ordinance the Respondent began posting vacant attendant positions as aide positions; that on March 23, 1984 the Complainant grieved Respondent's action of filling vacant attendant positions at the Resondent's Comprehensive Health Center and requested Respondent cease said action and requested employes hired as aides be made whole for wages and benefits; and, that said grievance was processed to final and binding arbitration inaccordance with said collective bargaining agreement.

5. That on September 26, 1986, an Arbitrator issued an Arbitration Award on said grievance; that therein said Arbitrator determined that although aides and attendant's performed the same duties, attendants work under more severe and dangerous conditions by being assigned to Respondent's Comprehensive Health Center; that the Respondent violated said collective bargaining agreement when it assigned aides to the Comprehensive Health Center, that an ordinance in violation of a collective bargaining agreement was void, and that an ordinance enacted in violation of a collective bargaining agreement has no more validity than any other employer violation; and, that said award contains the following Remedy and Award:

Remedy

The Employer has violated Appendix A, by regularly assigning employees in the classification of nurse's aide to perform the higher paid duties of attendant. The evidence indicates that all of the nurse's aides assigned to the Comprehensive Health Center since January 1, 1984, regularly performed the duties of the higher classification of attendant as long as they were assigned to, and working at the Comprehensive Health Center. Pursuant to Article III the Employer is, therefore, ordered to make all such affected employees whole for all lost wages and benefits. The Employer necessarily violated XXVI, Sec. 2 of the agreement when it posted positions of nurses aides at the Comprehensive Health Center when, in fact, the positions were regularly assigned to perform the duties of attendant. The Employer is also ordered to cease and desist from violating the agreement by assigning a lower classification to positions when, in fact, it intends to regularly assign them to higher rated duties.

AWARD

1. That the Employer violated Appendix A and Article XXVI of the current collective bargaining agreement when it posted positions of nurse's aide at the Comprehensive Health Center on and after January 1, 1984, when, in fact, these positions were regularly assigned the duties of the position of attendant.

2. That the Employer make each person employed on or after January 1, 1984, in the position of nurse's aide at the Comprehensive Health Center whole for all lost wages and benefits.

3. That the Undersigned reserves jurisdiction over the determination of which employees are in the affected class and the calculation of back pay, if either party requests in writing, copy of opposing party, that such a determination shall be made within 60 days of the date of this award. If no such request is made, this award shall become final.

4. The Employer shall cease and desist from violating Appendix A and, or Article XXVI, by regularly asssigning (sic) a lower rated position to the duties of a higher rated position, or otherwise violating said provisions.

5. The parties may, by mutual agreement, amend this award to provide that persons already appointed as nurse's aides at Comprehensive may be direcly (sic) appointed to the positions of attendant.

Dated at Milwaukee, Wisconsin, this 26th day of September, 1985.

6. That on January 6, 1986, the Complainant filed the instant complaint wherein it alleged Respondent, by its refusal to implement said Arbitration Award, vioalted Article 111.70(3)(a)1, 4 and 5, Stats., and that Respondent, by enactment of said ordinance, failed to bargain its decision to change it's organization structure and the impact of said change in violation of Section 111.70(3)(a)1, 2, 3, 4 and 5, Stats.; that Complainant in its arguments asserts both State and Federal Law favor arbitration as a method of peaceful dispute resolution, that an arbitration award cannot be set aside on the grounds of erroneous findings of fact or law, that the arbitration award should be confirmed as there is no showing of a preverse misconstruction of positive misconduct, that the Arbitrator acted within his authority when he determined the Respondent failed to comply with Article XXVI, Sec. 2 of said collective bargaining agreement; that said Arbitrator did not issue an arbitration award which is contrary to state law or usurps the power of the County in an unlawful manner; and, Respondent requests appropriate remedial orders.

7. That Respondent acknowledges it has failed and that it continues to refuse to implement said Arbitration Award; that Respondent in its arguments asserts the Arbitrator exceeded his authority under said collective bargaining agreement and that said award is a preverse misconstruction and violates the law, that the Respondent has the statutory authority to determine staffing patterns in Respondent's Nursing Homes, that the Respondent by legislative capacity determines the number and types of employes to be hired, that this authority cannot be delegated, and that by approving the agreement the Respondent determined the salaries to be paid; that the agreement is silent concerning the number of staffing positions or employe structure and is silent concerning the number of attendants to be hired; that the Arbitrator ignored said agreement and wrote his own contract and thereby exceeded his authority; that the arbitrator's actions violate the law and to carry out his Award would likewise violate the law; that Complainant's allegation that Respondent did not bargain the change in the table of organization is not supported by the record, assumed to be waived and should be dismissed for failure of proof; that the Respondent acknowledges it agreed to arbitrate issues arising out of said agreement but that it did not bargain to have an arbitrator write a new agreement or to rewrite parts of the old agreement; that there is no provision in said agreement which requires the Respondent to hire attendants; and, that said agreement does not require the Respondent to replace position for position, that it cannot be forced to hire a minimum number of attendants, and that when the Arbitrator required otherwise he exceeded his authority.

8. That there is no evidence which would demonstrate that Respondent's decision to change the organizational structure of said Comprehensive Health Center by elimination of all attendant positions and replacing said positions with aides and implementation of said decision interfered with, restrained or coerced municipal employes in the exercise of their guaranteed rights, or initiated, created, dominated or interfered with the formation or administration of any labor organization, or encouraged or discouraged membership in any labor organization, or refused to bargain with the Complainant in good faith.

9. That there is no evidence which would demonstrate that Respondent's refusal to implement said Arbitration Award interfeared with, restrained, or coerced municipal employes in the exercise of their guaranteed rights, or refused to bargaining collectively with the Complainant in good faith.

10. That the Complainant and Respondent have agreed to resolve disputes concerning the effect, interpretation, application, claim of breech or violation of said collective bargaining agreement through a grievance procedure which culminates in final and binding arbitration; that pursuant to said grievance procedure the Complainant grieved the Respondent's hiring of aides at said Comprehensive Health Center and said grievance culminated in a final and binding Arbitration Award; and, that the Respondent refuses, and continues to refuse, to implement said Award.

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

CONCLUSIONS OF LAW

1. That Sheboygan County Institution Employees, Local 2427, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. That Sheboygan County is a Municipal Employer within the meaning of Sec. 111.70(1)(h), Stats.

3. That the Respondent by its enactment of an ordinance to change the organization organization at Respondent's Comprehensive Health Center did not violate Sec. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., when it did not bargain its decision and the implementation of its decisions.

4. That the Respondent by its refusal to comply with the September 26, 1985 Arbitration Award did not violate Sec. 111.70(3)(a)1 and 4, Stats.

5. That the Respondent by it refusal to comply with the September 26, 1985 Arbitration Award, has committed and is committing a prohibited practice within the meaning of Sec. 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 1/

1. It is ordered that to remedy Respondent's violation of Sec. 111.70(3)(a)5, Stats., Respondent, its officers and agents, shall immediately take the following affirmative action:

a. Cease and desist from failing or refusing to comply with the terms of the September 26, 1985 Arbitration Award.

b. Make all employes employed on or after January 1, 1984 in the positions of nurse's aide at Respondent's Comprehensive Health Center whole for all lost wages and benefits including interest at a rate of 12 percent per year on the monetary amounts due, with interest to be calculated from September 26, 1985, the date of said Arbitration Award.

c. Notify all employes by posting in conspicious places in Respondent's offices where nurse's aides and attendants work, copies of the notice attached hereto and marked "Appendix A" which notice shall be signed by the County Personnel Director, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for sixty (60) days thereafter. Respondent shall take reasonable steps to insure that said notices are not altered, defaced or covered by other material.

d. 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.

2. It is ordered that the complaint be dismissed as to all violations of the Municipal Employment Relations Act alleged, but not found herein.

Dated at Madison, Wisconsin this 16th day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr.
Edmond J. Bielarczyk, Jr., Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or (Footnote 1 Continued on Page 7)

1/ Continued.

order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX A

Notice to All Employes

Pursuant to an Order of the Wisconsin Employment Relations Act, 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 Arbitration Award dated September 26, 1985.

2. We will immediately make all employes employed on or after January 1, 1985 as nurse's aides at the Comprehensive Health Center whole for all lost wages and benefits including 12 percent interest on said monies from September 26, 1985.

By _____
County Personnel Director

Dated this _____ day of _____, 198__.

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

SHEBOYGAN COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint filed on January 6, 1986, the Complainant pleads two (2) counts. No. 1, that the Respondent has refused and continues to refuse to implement an Arbitration Award issued on September 26, 1985 in violation of Sec. 111.70(3)(a)1, 4 and 5, Stats. No. 2, that the Respondent by its actions of deleting attendant positions at Respondent's Comprehensive Health Center and using nurse's aides to fill attendant positions and by unilaterally creating and changing Respondent's Table of Organization without first bargaining its decision to do so as well as the impact of the decision, that the Respondent has violated Sec. 111.70(3)(a)1, 2, 3, 4 and 5. Complainant submitted its initial brief prior to the hearing. At the hearing the only evidence adduced were the collective bargaining agreement, a copy of the September 26, 1985 Arbitration Award, a copy of County Ordinance #19, and a statement by Respondent's counsel that the Respondent had not and did not intend to comply with said Arbitration Award. In its initial brief the Respondent moved that pleading No. 2 be dismissed for failure of proof. Therefore, contrary to the assertions raised by the Complainant in pleading No. 2, the Examiner finds no basis for finding the Respondent violated the Municipal Employment Relations Act (MERA). Also, contrary to the assertions raised by the Complainant in pleading No. 1, the Examiner finds no basis for concluding the Respondent has violated Sec. 111.70(3)(a)1 or 4 of MERA.

POSITIONS OF THE PARTIES

In its initial brief the Complainant asserts it is seeking an order confirming the Arbitration Award issued on September 26, 1985. The Complainant contends said Award was issued per the provisions of the collective bargaining agreement then in effect between the parties. The Complainant argues that both the State and Federal Courts favor arbitration as a method of peaceful dispute resolution. In support of its position the Complainant points to several cases which hold that the courts will not relitigate issues submitted to arbitration, that the parties contracted for an arbitrator's decision and that the decision of an arbitrator cannot be interferred with for mere errors of judgment as to law or fact.

Herein, the Complainant points out the following: (1) the parties have a collective bargaining agreement which provides for the filing of grievances given a dispute over contractual language; (2) a dispute over Article XXVI and Appendix A occurred; (3) a grievance was filed; (4) the collective bargaining agreement provides for final and binding arbitration if the grievance was not satisfactorily resolved by and between the parties; (5) the Respondent specifically agreed to have the arbitrator resolve the question of contract breech and to formulate a remedy; and (6) the arbitrator resolved the question. The Complainant argues that the Respondent cannot, at this time, complain of conduct when it stipulated to the issue to be resolved by the Arbitrator. In support of its position that the Respondent waived by such stipulation any legally significant objections and or challenges to the Award the Respondent points to Manitowoc v. Manitowoc Police Dept., 70 Wis.2d 1006 (1975). The Complainant therefore contends the Arbitration Award must be confirmed.

In its reply brief the Complainant argues that it is a well established rule in Wisconsin that arbitration awards should not be disturbed for mere errors in judgement as to law or fact. The Complainant also points out that the Wisconsin Supreme Court, in Oshkosh v. Union Local 796-A, 99 Wis.2d 94 N.W. 2nd 210 (1980) held that an arbitrator's award should be sustained if the arbitrator interprets the labor contract, correctly or incorrectly. The Complainant asserts the Arbitrator correctly (or incorrectly) interpreted the parties collective bargaining agreement by holding that the Respondent violated Article XXVI, Sec. 2 of the agreement by failing to post job openings for the position of attendant at the Comprehensive Health Center. The Complainant also asserts that the Respondent mistakenly believes the collective bargaining agreement is contrary to State Law.

The Complainant also argues that Respondent's reliance on Milwaukee Bd. of School Directors v. Milwaukee Teachers Ed. Asso., 93 Wis.2d 415, 287 N.W. 2nd 131 (1980) in support of its position that the Arbitrator exceeded his authority

is not on point. Herein the Arbitrator clearly acted within his authority under the collective bargaining agreement. Further, the Respondent's reliance on Sec. 59.07 and Sec. 46.19(4), Stats., and Wis. Adm. Code Sec. HSS132.62(3) do not support a conclusion that the Arbitrator's Award is contrary to state law or usurps the power of the Respondent in an unlawful manner.

The Complainant acknowledges that the Respondent has the traditional management prerogatives of running and staffing the Comprehensive Health Center. However, the Complainant argues the Respondent, because it has entered into a collective bargaining agreement, is bound by the terms of that agreement. The Complainant argues that at bar the Respondent entered into a collective bargaining agreement which provided that job vacancies be posted. The Complaiant asserts this provision does not conflict with any state statute. The Complainant concludes that the Respondent is bound by the collective bargaining agreement and the Arbitrator's Award.

The Complainant requests that the Award be confirmed and requests appropriate remedial orders including interest, attorney's fees, and costs.

In its initial brief the Respondent acknowldges that arbitrators obtain their authority from the collective bargaining agreement, that the function of an arbitrator is to interpret and apply the agreement, and that when the parties agree to binding arbitration they in effect bargain for the judgment of the arbitrator. The Respondent also acknowledges that the reviewing authority does not weigh the merits of the dispute but rather acts in a supervisory role to determine and insure the parties receive the arbitration function they bargained for. While reviewing authorities start with the presumption that an award is valid and will only be disturbed where the invalidity is shown by clear and convincing evidence, the Respondent points out that Sec. 788.10(d), Stats., clearly provides for the vacating of an arbitrator's award where the arbitrator exceeded their authority. The Respondent also points out that the Wisconsin Supreme Court in Scherrer Construction Co. v. Burlington Men. Hospital, 64 Wis.2d 720, 211 N.W. 2d 855 (1974) determined the criteria whereby an award should be overturned.

The Respondent acknowledges that it has refused to enforce the Arbitration Award. However, the Respondent asserts that it has done so in a good faith belief that the Arbitrator exceeded his authority, preversely misconstrued the agreement, and that the Award violates the law. The Respondent argues the collective bargaining agreement retains for the Respondent the right to manage it's work force unless that right is specifically limited somewhere in the agreement. The Respondent asserts that the Arbitrator concluded this right was limited in Appendix A which sets the wages for employes. The Respondent argues no reading of the collective bargaining agreement which exercises a measure of rational judgment can lead to a conclusion that the schedule of wages to be paid establishes the number and classification of employes which may be hired.

The Respondent also asserts that staffing is by law the responsibility of the employer and points to Sec. 59.07 and Sec. 46.19(4), Stats., and Wis. Adm. Code HSS132.62(3) in support of its position. The Respondent argues that delegation of this authority cannot be accomplished because of the legislative nature of the staffing decision.

The Respondent argues the collective bargaining agreement is devoid of any provision that sets forth the number of staff positions. Here, the Respondent claims, it has the authority to staff its facility with all employes in the highest category set forth in Appendix A. The Respondent asserts if it can do so on the up side, clearly it can do so on the down side. The Respondent argues that when the parties agreed to Appendix A of the agreement, they agreed that when an employe was appointed to a certain position, the employe would be paid the wage assigned to such position. The Respondent claims that for the Arbitrator to use Appendix A for the basis of constructing a table of organization, the Arbitrator preversely misconstrued the parties collective bargaining agreement.

The Respondent contends that the Arbitrator, in effect, imposed his own brand of justice on the parties without construing the intent of the parties. The Respondent asserts the impact of the Arbitrator's deicison is that if at the time of signing the agreement there were forty-five (45) attendants and six (6) nurses, such number must be maintained during the life of the agreement. The Respondent points out that there is no contract langauge which provides how many, if any,

attendants should be hired. Thus, the Respondent argues the Arbitrator has therefore ignored the agreement and written his own contract thereby exceeding his authority.

The Respondent argues that the instant matter is substantially similar to Milwaukee Bd. of School Directors v. Milwaukee Teachers Ed. Asso., supra, where an arbitrator failed to recognize that only the school board had the authority to appoint teachers and ignored the provisions of the collective bargaining agreement placing that power in the school board. The Respondent contends that in its power to appoint employes it has directed that no further attendants be hired, and thus, the Arbitrator's actions violate the law and to carry out the Arbitrator's Award would likewise violate the law.

The Respondent, in its reply brief, asserts the Complainant misstates the Respondent's case when it fails to recognize that the Respondent's position is that the Arbitrator's actions are contary to state law. The Respondent argues that the legal issue herein is who has the right to determine staff and how, if at all, can this right to delegate staff be delegated. The Respondent believes when the Arbitrator determined staffing patterns he violated state law. The Respondent concludes that although the Arbitrator has broad powers, these powers are not absolute. This power is limited to the collective bargaining agreement. The Respondent asserts the Arbitrator did not limit himself to the collective bargaining agreement and therefore the award must be set aside.

DISCUSSION

The Commission has held that the question of the interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's constuction which was bargained for and the Commission will not overrule the arbitrator because their interpretation might be different from his. 2/ The question before the Commission is whether the Arbitrator in the instant matter exceeded his authority. The material facts are not in dispute. The Arbitrator ruled that the Respondent breeched the parties' collective bargaining agreement when it posted a nurses aide position and then regularly assigned the position the duties of an attendant. The standards for review of an arbitrator's award are the same as if the review is made by the Courts. 3/ Sec. 788.10 Stats. 4/ identifies those instances wherein an arbitrator's award will be disturbed. Herein the Respondent has argued the Arbitrator's Award is a preverse misconstruction of the parties collective bargaining agreement and that it violates the law. The Complainant asserts the Respondent's refusal to implement the Arbitration Award is without merit.

2/ City of Neenah, Dec. No. 10716-C (WERC, 1973).

3/ Jefferson Jt. School District No. 10, Dec. No. 13698-A (Yaeger, 1976).

4/

> "778.10 Vacation of award . . . (1) . . . the court . . . must make an order vacating the award upon the applicaton of any party to the arbitration:
>
> . . . (d) Where the arbitrators exceeded their powers, ..."

In Scherrer Construction Co. v. Burlington Mem. Hospital, Wis.2d 720.211 N.W. 2d 855 (1974), the Wisconsin Supreme Court indicated that the courts should overturn an award:

> (1) If there is perverse misconstruction;
> (2) If there is positive misconduct plainly established;
> (3) If there is manifest disregard of the law; or,
> (4) If the award itself is illegal or violates strong public policy.

A careful review of the Arbitrator's Award demonstrates that the Arbitrator confined himself to the interpretation and application of the collective bargaining agreement. Therein the Arbitrator reasoned that when the parties agreed to their wage classification appendix they agreed on the compensation levels to be paid for the duties the position performed. The arbitrator reasoned that the County ordinance did not supercede the collective bargaining agreement. The Respondent's reliances on WERC v. Teamsters Local No. 563 (City of Neenah), 75 Wis.2d 602 (1976) was not persuasive to the Arbitrator. Nor is it persuasive in the instant matter. Therein the Court held a discharge for violation of a residency ordinance was not arbitrable because there was no need for the municipal employer to accomodate the ordinance with the resolution that adopted the collective bargaining agreement. The Court also noted that at the time of the discharge there was no statutory language which mandated that a labor agreement superceded other provisions or statutes. However, with the enactment of Sec. 111.70(3)(a)5, it is now a prohibited practice for an employer to violate a collective bargaining agreement. As such, generally a municipal employer cannot enact an ordinance which would violate the provisions of a collective bargaining agreement.

The Respondent also argues the Arbitrator's Award violated the authority granted it under Sec. 59.07 5/ and Sec 46.19(4) 6/ Stats., and Wis. Adm. Code HSS132.62(3). 7/ These arguments were raised before the Arbitrator. In his decision the Arbitrator noted that the Wisconsin Supreme Court, in City of Glendale, 83 Wis.2d 90 (1978) harmonized Sec. 62.13, Stats. with Sec. 111.70, Stats. The Arbitrator correctly concluded that the same analogy applies to the instant matter whereby the Respondent has bargained a wage and classification system, this system is not barred by said statutes and administrative code, and the Respondent is therefore bound by that bargain. Therefore the Examiner finds no merit in the Respondent's argument that the Arbitrator's Award violates Sec. 59.07 and Sec. 46.19(4), Stats. or Wis. Adm. Code HSS132.62(3).

The Respondent's argument that the instant matter is similar to Milwaukee Bd. of School Directors v. Milwaukee Teachers' Ed. Asso., supra, is also without merit. Therein the Court held that when an arbitrator ordered the municipal employer to appoint substitute teachers as regular teachers the arbitrator exceeded his authority because a state statute detailed how regular teachers were to be appointed. Herein the Arbitrator has not directed the Respondent to appoint the nurses aides at the Comprehensive Health Center as attendants. The Arbitrator has, in essence, directed the Respondent to post attendant positions if the corresponding duties of that type of position are regularly to be performed. The Arbitrator has reasoned that this is what the parties bargained for when they agreed to Article XXVI and Appendix A. Nor does the arbitrator's make whole remedy exceed his authority as the arbitrator concluded that as the Respondent as assigned the nurses aides the regular duties of attendants the Respondent in effect has not paid the nurses aides the wages the parties have bargained will be paid for the performance of attendant's duties.

Therefore, based upon the above and foregoing, the Examiner concludes the Arbitrator's decision is not a preverse misconstruction of the parties' collective bargaining agreement, nor does it violate the law. The Respondent is therefore

---

5/ Sec. 59.07 Stats.

> (5) GENERAL AUTHORITY. Represent the county, have the management of the business and concerns of the county in all cases where no other provision is made, apportion and levy taxes and appropriate money to carry into effect any of its powers and duties.

6/ Sec. 46.19(4) Stats.

> The salaries of the Superintendent, visiting physician and all necessary additional officers and employees shall be fixed by the county board.

7/ HSS132.62(3): Mandates the number of hours of nursing care a day that a patient receives.

found to be in violation of Sec. 111.7)(3)(a)5, and directed to immediately implement said Award.

The Complainant's request for appropriate relief, including costs, disbursements, expenses and attorneys' fees and interest are issues governed by prior cases. In Madison Metropolitan School District 8/ the Commission set forth its policy concerning attorney's fees, costs and interest. Regarding attorney's fees and costs the Commission set forth: "No attorney's fees nor costs will be granted unless the parties have agreed otherwise or unless the Commission is required to do so by specific statutory language." 9/ Since neither MERA nor the parties agreement contains any provision for the award of attorneys' fees and costs, no award of such costs has been made. The Commission also held in Madison Metropolitan School District, supra, that in complaint cases seeking enforcement of arbitraiton awards, it would grant interest on the sum of money due and owing from an arbitration award. 10/ The Order provides interest at the rate set forth in Sec. 814.04(4), Stats.

Dated at Madison, Wisconsin this 16th day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr.
Edmond J. Bielarczyk, Jr., Examiner

8/ Dec. No. 16571-D, 5/81.

9/ Ibid. at 10.

10/ Ibid. at 11.