STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROCK COUNTY COURTHOUSE AND RELATED EMPLOYEES UNION, LOCAL 2489, AFSCME, AFL-CIO,	
Complainant,	Case 235 No. 40824 MP-2114
vs.	Decision No. 25610-A
ROCK COUNTY,	
Respondent.	

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council #40, AFSCME, AFL-CIO, 1722 St. Lawrence Avenue, Beloit, Wisconsin 53511, appearing on behalf of the Complainant.

Mr. Thomas A. Shroeder, Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Rock County Courthouse and Related Employees Union, Local 2489, AFSCME, AFL-CIO, having on July 1, 1988, filed a complaint with the Wisconsin Employment Relations Commission alleging that Rock County had violated Secs. 111.70(3)(a)4 and 5, Stats., by failing and refusing to accept and implement the terms of an arbitration award; and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law, and Order in this matter as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held on August 31, 1988, in Janesville, Wisconsin; and the parties having completed their briefing schedule on October 24, 1988; 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 Complainant, Rock County Courthouse and Related Employees Union, Local 2489, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization and the exclusive bargaining representative for certain of the County's employes in a unit consisting of all regular full-time and regular part-time clerical employes in the Rock County Courthouse (Janesville), Rock County Airport, the Rock County Administrative Building (Beloit), the Rock County Youth Shelter facility, the Rock County Department of Social Services (Public Welfare), the Rock County Highway Department, the Rock County Sheriff's Department, BETA Building, and all full-time and regular part-time matrons, cook-matrons, food service supervisors, non-deputized corrections officers and non-deputized dispatchers of the Rock County Sheriff's Department; that the Union's principal office is 5 Odana Court, Madison, Wisconsin 53719; and that the Union's principle representative and agent is Thomas Larsen, Staff Representative of Council 40, AFSCME, AFL-CIO.

2. That Respondent Rock County, hereinafter referred to as the County, is a municipal employer with its offices located at 51 South Main Street, Janesville, Wisconsin 53545; and that the County's principle representatives and agents at all times material hereto, are James Bryant, III, - Personnel Director, Craig Knutson - County Administrator, and Esther Gage - Register of Deeds.

3. That at all times material hereto the Union and the County have been parties to a series of collective bargaining agreements, the most recent effective January 1, 1986, through December 31, 1987, which have governed the wages, hours, and conditions of employment of the employes set forth in the bargaining unit described above in Finding of Fact 1.

4. That said agreement, which is referred to in Finding of Fact 3, provided for the final and binding arbitration of grievances, and contained the following provisions:

ARTICLE I - MANAGEMENT RIGHTS

1.01 The management of Rock County and the direction of the workforce is vested exclusively in the Employer to be exercised through the Department Head, including, but not limited to the right to hire, promote, demote, suspend, discipline and discharge for proper cause; the right to decide job qualifications for hiring; the right to transfer or lay-off because of lack of work or other legitimate reasons; to subconstract for economic reasons; to determine any type, kind and quality of service to be rendered to patients and citizenry; to determine the location, operation, and type of physical structures, facilities or equipment of the departments; to plan and schedule service and work; to plan and schedule any training programs; to create; promulgate and enforce reasonable work rules; to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects with its responsibilities.

. . .

ARTICLE IX - GRIEVANCE PROCEDURE

9.01 Any dispute which may arise from an employee or Union complaint with respect to the interpretation of the terms and conditions of this Agreement shall be subject to the following grievance procedure, unless expressly excluded from such procedure by the terms of this Agreement. Time limits set forth herein may be extended upon mutual agreement of the parties. The Union shall have the right to be notified and be present at all steps of the Grievance Procedure.

9.02 Step 1. The employee, Union steward or officer and/or the Union representative shall present the grievance to the most immediate supervisor who has the authority to make adjustments in the matter within fourteen days of the alleged grievance or knowledge thereof.

9.03 Step 2. If a satisfactory settlement is not reached in Step 1 within three days following its copletion, the employee, the Union and/or the Union representative may present the grievance to the department head. Upon the request of said department head, the grievance shall be in writing and shall state the grievant(s) names(s).

9.04 Step 3. If a satisfactory settlment is not reached in Step 2 within five days of the date of submission of the written grievance to the Department Head, the employee, the Union Committee and/or the Unon representative may present the grievance to the Personnel Director. The Director or his/her designeee shall schedule a meeting to be held within fourteen days of the receipt of the grievance by the Personnel Director with the Union Committee and/or Union Representative for the purpose of attempting to resolve the grievance. The Personnel Director or his/her designee shall respond in writing within seven days of the date of the meeting. Time frames may be extended in writing by mutual agreement of the parties.

9.05 Step 4. If the grievance is not resolved at Step 3 the Union may within fourteen days after the Personnel Director's written response is due, serve written notice upon the County that they desire to arbitrate the grievance. The parties may jointly request the Wisconsin Employment Relations Commission (WERC) to appoint an arbitrator or absent the jont request, the Union may request the WERC to furnish a panel of five arbitrators. Within ten days of the receipt of the panel of arbitrators the parties shall select an arbitrator. The Union shall make the first and third strike and the County the second and fourth strike of names. The remaining individual shall serve as arbitrator and hear the dispute. The decision of the arbitrator shall be final and binding upon the parties. The cost of the arbitration shall be borne equally by the parties, except that each party shall be responsible for the cost of any witnesses tetifying (sic) on its behalf. Upon the mutual consent of the parties more than one grievance may be heard before one arbitrator.

9.06 Limit on Arbitrators. The Arbitrator shall have jurisdiction and authority to interpret the provisions of the Agreement and shall not amend, delete or modify any of the provisions or terms of this Agreement.

5. That on or about September 1, 1987, Beverly Thomas, a Deputy Register of Deeds and bargaining unit employe represented by the Union, filed a grievance in accordance with the terms of the collective bargaining agreement over her placement in Pay Range 3; that Thompson's position was historically classified in Pay Range 3 along with those of Deputy County Clerk and Deputy Treasurer; that in 1981, the County's Board of Supervisors changed the title, job specification and pay range of the Deputy Treasurer to Pay Range 1 while the other two positions remained unchanged; that Thompson shortly after said change in 1981 had filed a prior grievance alleging that she was working out of classification and that her position was still identical in duties, skill and experience to that of Deputy Treasurer, which grievance was denied by an arbitrator; and that Thompson's most recent 1987 grievance alleging unilateral changes in pay parity was processed through the first three (3) steps of the grievance procedure and ultimately appealed to arbitration.

6. That at the second step, Thompson's supervisor and department head, The Register of Deeds Esther Gage, granted her grievance; that Gage had previously submitted budget requests for Thompson's reclassification to Pay Range 1 for three previous budgets which requests were denied by the County's administrator and the County Board each time that they were submitted; and that, notwithstanding Gage's granting of the grievance, it was appealed to the third step and beyond.

7. That in accordance with the provisions of the collective bargaining agreement, the grievance was submitted to final and binding arbitration; that Arbitrator Donald G. Chatman was selected to hear the dispute; that hearing was held on or about February 9, 1988, in which both parties were given full opportunity to present their evidence, testimony and argument, to present witnesses and engage in their examination and cross-examination; and that the witnesses were sworn, and that said hearing was conducted pursuant to Chapter 788, Stats.

8. That on or about March 18, 1988, Arbitrator Chatman issued his Award in which he held in pertinent part, as follows:

> "The Employer has argued and presented evidence that the County Administrator had determined that the pay schedule of the Deputy Register of Deeds was a matter of negotiation within the labor agreement. The Employer presents evidence that the Register of Deeds has recommended a position schedule increase for the Deputy Register of Deeds for every budget and the issue has been on the table for negotiation more than once (County Exhibits 3,4,5). On all these occasions the Union has negotiated a satisfactory labor agreement without impasse, and

without including the upgrade of the Deputy Register of Deeds. The Employer's argument that the Union should not prevail in an arbitration proceeding to acquire benefits it chose not to pursue in negotiation is given great merit. In fact, this arbitrator would consider this argument to be the determining factor of this case if the Employer had not unilaterally intervened at an earlier stage of the dispute.

The Labor Agreement between the parties ARTICLE I - MANAGEMENT RIGHTS; Section 1.01:

> The management of Rock County and the direction of the workforce is vested exclusively in the Employer to be exercised through the Department Head, . . .

The Register of Deeds is an official department head and an agent of Rock County. In this capacity, the Register of Deeds duly heard Step 1 of the Grievance, and agreed with the grievant (Union Exhibit 5). This Arbitrator's reading of the labor agreement does not show any point where a department head's decision on a grievance is subject to review by other department heads, administrators, or legislators, particularly if the department head agrees with the grievant. Thus, the County Personnel Director reversed a department head's decision with the consent of the County Administrator. This arbitrator could find no Labor Agreement provision permitting this action, nor was any evidence or testimony presented that would demonstrate that the Employer had this unilateral right. The grievance apparently was settled at Step 1.

The Employer raised one other issue before this proceeding. No Employer representaive (sic) was alleged to be present at steps 1, 2, or 3, of the Grievance. The Employer maintained that the department heads at these stages were acting in the capacity of hearing officers without an employer interest. This allegation is unsupportable. The County Personnel Manager, in direct testimony, stated he reversed the Register of Deeds' decision upon conference with the County Administrator, whereby they determined that the position upgrade was a collective bargaining matter. This testimony indicates the Employer had representation prior to the arbitration hearing. The grievance of Beverly Thompson is sustained."

that as a remedy, he ordered Thompson's placement "in the Pay Range Classification 1 commencing on the first work day of the County's next annual budget period after September 4, 1987"; that he also ordered that the grievant "shall be placed on the alphabetical step in which her years of service to the Employer would qualify her to normally hold" and that she "receive all the benefits of Pay Range Classification 1, upon her continued satisfactory performance of present position duties or until the Labor Agreement between the parties determines some some other pay status".

9. That on or about April 8, 1988, Larsen contacted Bryant by telephone and inquired as to what action the County was taking to implement Chatman's award; and that Bryant responded that he would get back to the Union with an answer.

10. That on or about April 11, 1988, Bryant sent Larson a response to his inquiry in which he informed Larsen that the County did not intend to implement the Chatman award.

12. That the County has taken no steps to either implement the award or to seek to have said award modified or vacated; and that at all times material herein, the Respondent has failed and continues to refuse to comply with the terms of the March 18, 1988 arbitration award.

CONCLUSIONS OF LAW

1. That the March 18, 1988 award of Arbitrator Donald G. Chatman draws its essence from the parties' collective bargaining agreement, was not in excess of his authority, and was not in violation of the law, and therefore Respondent Rock County, by its refusal to accept and implement the terms of the Chatman award, has committed and continues to commit prohibited practices within the meaning of Section 111.70(3)(a)1 and 5, Stats.

2. That Respondent Rock County, by its refusal to accept and implement the Chatman award, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)1 and 4, Stats.

3. That Respondent Rock County, by its refusal to accept the second step grievance determination of its Department Head Esther Gage, did not commit a violation of Sec. 111.70(3)(a)1 and 4, Stats.

4. That the Examiner will not exercise the Commission's jurisdiction over the Sec. 111.70(3)(a)5 breach of contract allegation with respect to the County's refusal to accept the second step determination of Department Head Gage because the agreement between the Union and Respondent Rock County contains an exclusive mechanism for resolution of such disputes, the grievance and arbitration procedure; that the Union pursued a grievance in this regard to a final and binding arbitration award on this very issue; and that there is no allegation of circumstances which would warrant assertion of jurisdiction.

ORDER 1/

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

1/ Pursuant to Sec. 227.48(2), Stats., the Examiner hereby notifies the parties that a petition for rehearing may be filed with the Examiner by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after

(Footnote one continued on page six)

a) Cease and desist from failing to implement or refusing to comply with the terms of the March 18, 1988 Chatman Arbitration Award.

b) Immediately make whole Beverly Thomas pursuant to said award for all lost wages and benefits with interest 2/ calculated from either the date the County received the award or from the first work day of the County's next annual budget period after September 4, 1987 whichever is the most recent date.

c) Notify all employes by posting in conspicuous places in the County's courthouse, copies of the notice attached hereto and marked "Appendix A" which notice shall be signed by the County Personnel Director, and shall be posted for sixty (60) days thereafter. The County shall take reasonable steps to insure that said notices are not altered, defaced, or covered by other material.

(Footnote one continued from page five)

the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing Anderson v. LIRC 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.d 623 (CtApp IV, 10/83). The instant complaint was filed on July 1, 1988 at a time when the Sec. 814.04(4), Stats., rate is effect was "12% per year."

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 other violations of the Municipal Employment Relations Act alleged but not found herein.

Dated at Madison, Wisconsin this 1st day of December, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

APPENDIX A

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 Chatman Arbitration Award dated March 18, 1988.

2. We will immediately make whole Beverly Thomas pursuant to said award for all lost wages and benefits including interest in accordance with said Order.

By _____
County Personnel Director

Dated this _____ day of _____, 1988.

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, CONCLUSIONS OF LAW AND ORDER

The Pleadings

In its complaint initiating the instant proceedings, the Union alleged that the County committed certain prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 5, Stats., by refusing to accept and implement an arbitration award rendered on March 18, 1988, by Arbitrator Donald G. Chatman. Respondent County answered the complaint by admitting all factual matters alleged, i.e., that it intentionally refuses to implement said award. However, as affirmative defenses, the County argues that implementation of said award would cause the County to commit a prohibited practice pursuant to Secs. 111.70(3)(a)4 and 5, Stats.; that implementation would violate the terms of the agreement as well as the collective bargaining process set forth under the Municipal Employment Relations Act (MERA); that implementation would violate the statutory budgetary procedures for counties as set forth in Secs. 59.033 and 65.90, Stats.; that implementation of said award violates Article IV, Sec. 22 of the Wisconsin Constitution; and that the Commission lacks jurisdiction because the Union, upon receiving notice that the County did not intend to implement the award, failed to seek an order from the Circuit Court confirming said Award, pursuant to Sec. 788.09, Stats. The County, based on the above affirmative defenses, filed a motion to dismiss the complaint.

POSITION OF THE PARTIES:

The Union maintains that, inasmuch as the County has admitted that it will not implement the arbitration award, the County has committed a per se violation of 111.70(3)(a)5 because the collective bargaining agreement provides for final and binding arbitration. It points out that Respondent County has taken no action to seek either vacation or modification of the disputed award as provided in Secs. 788.10 and 788.11, Stats., and argues that the Commission is without authority to consider the County's affirmative defenses pursuant to Sec. 788.10, Stats. Noting that the County has failed to meet the statutory time periods as set forth in Sec. 788.13, Stats., for filing its motion to vacate, modify, or correct an award, the Union stresses that the County is really attempting to reassert its right to seek vacation of the award in the instant proceeding.

The County makes numerous arguments that implementing said award would result in the commission of numerous prohibited practices under MERA. It also argues that other statutory provisions, namely Sec. 65.90(5), Stats. which require the County Board to adopt a budget and provide authority for the County administrator to formulate and submit a budget to the County Board, would be violated by the implementation of the award because it permits a department head to unilaterally amend the budget already adopted by the County Board. It maintains that the arbitrator, or the department head with the arbitrator's blessing, is legislating wage revisions in contravention of Sec. 59.15(2)(c), Stats., and Article 4, Sec. 22 of the Wisconsin Constitution.

The County avers that permitting a department head to grant wage increases to individual employes may encourage voluntary settlements but not through the statutorily-mandated collective bargaining process. Therefore, for valid public policy reasons, it stresses, the County cannot implement such an award.

The County complains that Arbitrator Chatman exceeded his authority. It stresses that Sec. 9.06 of the parties' agreement provides that "the Arbitrator shall have jurisdiction and authority to interpret the provisions of the Agreement and shall not amend, delete or modify any of the provisions or terms of this Agreement". Noting that Chatman did not find any violation of the contract, it claims that he merely affirmed the wage increase granted by the department head. This, it asserts, was not an interpretation of the contract, but rather an explicit modification not authorized under Sec. 9.06.

Finally the County's response to Union claims that the County is foreclosed from asserting these affirmative defenses is that it may assert these reasons in arguing against enforcement of an award. It submits that the Commission must

allow the County the same defensive weapons that it would have enjoyed had the Union proceeded under Sec. 788.09, Stats.

DISCUSSION

It is well-settled that the Commission will leave the interpretation of a collective bargaining agreement to the arbitrator and will not overrule the arbitrator because its interpretation might be different from his. 3/ Rather the question before the Commission is whether the arbitrator exceeded his authority or rendered an award which contravenes the law or strong public policy. 4/ Thus, the Commission's review of an arbitration award is supervisory in nature and the arbitrator's decision will be upheld as long as it comports with Sec. 788.10, Stats., 5/ regardless of whether the Commission might have reached a different result. 6/ The standards for review by the Commission are the same as if the review is made by the Courts. 7/ Moreover, the Wisconsin Supreme Court, in interpreting Sec. 788.10, Stats., 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 a manifest disregard of the law; or (4) if the award itself is illegal or violates strong public policy. 8/

The material facts in the instant case are undisputed. The County, however, seeks to assert certain of the above-listed grounds set forth in Sec. 788.10,

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3/ City of Neenah, Dec. No. 10716-C (WERC, 1973); Sheboygan County, Dec. Nos. 23277-A, B (Bielarczyk, affirmed by WERC, 1987).

4/ Sheboygan County, supra at 9; Fortney v. School District of West Salem, 108 Wis.2d 167 (1982).

5/ "788.09 Court confirmation award, time limit

At any time within one year after the award is made any party to the arbitration may apply to the court in and for the county within which such award was made for an order confirming the award, and thereupon the court must grant such an order unless the award is vacted, modified or corrected as presecribed in the nest two secionts. Notice writing of the application shall be served upon the averse party or his attorney 5 days before the hearing thereof.

788.10 Vacation of award, rehearing by arbitrators

(1) In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the abitration:

(a) Where the award was precured by corruption, fraud or undue means;

(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) 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.

(2) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

6/ Sheboygan County, Dec. No. 23277-B (WERC, 4/87); Arbitration Between West Salem & Fortney, 108 Wis.2d 167, 179 (1982).

7/ Sheboygan County, Dec. No. 23277-A at p. 11 (Bielarczyk, 10/86) aff'd Dec No. 23277-B (WERC, 4/87); and Jefferson Jt. School Dist. No. 10, Dec. No. 13698-A (Yaeger, 1976).

8/ Scherrer Construction Co. v. Burlington Memorial Hospital, 64 Wis.2d 720 (1974).

Stats., as affirmative defenses to its refusal to comply with the award. The Union, pointing out that the County has failed to meet the three-month statutory time period in which to file its motion to vacate, modify, or correct the award in the courts, argues that the County's action in raising these Sec. 788.10 affirmative defenses at this time in this proceeding is an attempt to reassert before the Commission its right to vacate the award. It argues that the County should be precluded from doing so and that the Commission is without authority to consider said affirmative defenses on their merits under these circumstances.

At first blush, the Union's argument that the County should not be entitled to two bites at the apple where the time period for moving to vacate the award has expired is appealing. The Wisconsin Supreme Court has, however, permitted the assertion of these defenses in response to applications for confirmation of the award where the three-month time period for vacation of the award had run. 9/ The Court looked to comparable federal law and the express language of the state arbitration statute (Sec. 298.09) to conclude that such language as the phrase "unless the award is vacated, modified or correct . . . " would be superfluous unless these statutory grounds were permitted to be raised at the time the application for confirmation is made. 10/ Thus, the legal reasoning set forth above is directly applicable to the instant dispute and requires consideration by the Commission of the affirmative defenses advanced by the County.

Because jurisdiction goes to the Commission's ultimate authority to hear and render a determination in the instant dispute, it is appropriate to consider first the County's last asserted defense, namely that the Commission lacks jurisdiction because the Union did not seek an order from Circuit Court confirming said award pursuant to Sec. 788.09, Stats., upon receiving notice that the County did not intend to implement the award. The Wisconsin Supreme Court has unequivocally ruled that the Commission does have the statutory authority to enforce the terms of a labor arbitration award where one party to the agreement to arbitrate has refused to abide by an award 11/ and that there are different avenues of review available to parties to arbitration of municipal grievances, 12/ one alternative is the filing of a complaint with the Commission if one of the parties refuses to comply with the award. 13/ The courts do not require the prevailing party to seek court confirmation of the arbitration award prior to allowing the Commission jurisdiction over the dispute. On the contrary, as the Union points out, the courts expressly recognize the different arenas in which the parties may litigate their claims. In the instant dispute, the Union has filed a complaint because the County has refused to comply with the Chatman award. The County's argument that the Commission is without authority to entertain said complaint is erroneous and fails to comport with the established case law.

As grounds for refusal to implement said award, the County's remaining arguments focus on its contention that the grievant's department head did not possess the authority to resolve the grievance at the second step and that she acted entirely outside of the scope of her authority in granting the grievance. The County advanced this very same argument to Arbitrator Chatman, who rejected it. He found, as a matter of fact, based upon Section 1.01 and Section 9.03, that in this case, Department Head Gage did possess the authority to settle the grievance. Although this examiner may not have arrived at the same conclusion, it is clear from the award itself that the Arbitrator's ultimate conclusion is premised squarely upon his interpretation of the applicable contract language.

Contending that neither the department head nor the grievant were authorized bargaining representatives of the parties, the County argues that it would be

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9/ Milwaukee Police Association v. City of Milwaukee, 92 Wis.2d 145 (1979).

10/ supra, at 165.

11/ WERC v. Teamsters Local No. 563, 75 Wis.2d 602, 609 (1977).

12/ supra; Madison Metropolitan School District v. WERC, 86 Wis.2d 249, 256-57 (1978).

13/ Madison Metropolitan School District v. WERC, supra.

forced to commit a prohibited practice in violation of Secs. 111.70(3)(a)2, 4, and 5, Stats. were it forced to comply with said award. Characterizing said award as requiring the implementation of "private wage negotiations", it argues that ordering enforcement is forcing the County to operate outside fo the statutorily-mandated bargaining procedure. By advancing said argument, the County misunderstands the grievance process when it assumes that the department head as a representative of the County would be operating on a unilateral basis. Section 9.03 of the agreement expressly authorizes the department head to act on behalf of the County. Moreover, the individual grievant was participating in the contractually-mandated grievance process with the concurrence and support of the Union. Contrary to the assertions of the County, neither the grievant nor the department head was acting outside of the collective bargaining process but rather they were operating within the framework established by the collective bargaining process, the grievance procedure. Where, as here, the Union has been a party throughout the grievance procedure as well as the arbitration process and it is the Union which seeks enforcement of the award, the County cannot successfully argue that acceptance of such an award under the circumstances will result in a violation of Secs. 111.70(3)(a)2, 4, or 5; thus, said argument is rejected.

The County is correct in asserting that there is strong public policy of encouraging the statutorily-mandated process set forth in Sec. 111.70(4)(cm)6, Stats., in the event that the parties cannot resolve their disputes voluntarily. Enforcement of the award, however, under the instant circumstances, does not contravene such a policy. Furthermore, there is an equally "strong legislative policy favoring arbitration in the municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes". 14/ Accordingly, the County cannot prevail with this defense either.

The County also argues that the Chatman Arbitration Award violates Sec. 65.90(5), Stats., which vests the authority to approve a budget in the County Board. According to the County, the arbitrator or the department head with the arbitrator's blessing, is violating Sec. 59.15(2)(c), Stats., and Article 4, Sec. 22 of the Wisconsin Constitution. The cohesive thread behind these arguments is the contention that Department Head Gage had no authority, delegated or otherwise, to commit the County's financial resources. Although the arbitrator did not expressly consider the potential conflict with each of the above statutes and the Wisconsin Constitution inasmuch as these arguments were never presented to him during the arbitration proceedings, he did address the County's delegation of authority to Department Head Gage.

As Finding of Fact No. 8 set forth above makes abundantly clear, he factually determined that the County, through the contractual language set forth in Article I, Section 1.01, delegated to the department head its authority to resolve said grievance. While a municipal employer cannot collectively bargain a contractual provision that violates a specific statute, it can, however, relinguish discretion given it by statute through collective bargaining. 15/ Neither Sec. 65.90(5) nor 59.15(2)(c), Stats. or Article 4, Sec. 22, of the Wisconsin Constitution expressly prohibit the County Board from delegating its authority. 16/

14/ Joint School District No. 10, City of Jefferson v. Jefferson Education Association, 78 Wis.2d 94 (1977); see also, Milwaukee Professional Firefighters Local 215, I.A.F.F., AFL-CIO v. City of Milwaukee, 78 Wis.2d 1 (1977); and City of Oshkosh v. Oshkosh Public Library Clerical and Maintenance Employee Union Local 796-A, 99 Wis.2d 95 (1980).

15/ Sheboygan County, Dec. No. 23277-B (WERC, 4/87); see also Madison v. AFSCME, AFL-CIO, Local 60, 124 Wis.2d 298 (Ct. App. 1985).

16/ In Milwaukee County v. Milwaukee District Council 48 - American Federation of State, County and Municipal Employees, AFL-CIO, 109 Wis.2d 14 (1980), the Wisconsin Court of Appeals concluded that Article 4, Section 22 of the Wisconsin Constitution and Section 59.15(2)(C), Stats., did not conflict with the mediation-arbitration provisions of MERA, Section 111.70, Stats. The court said that even if there were a conflict, MERA modified pre-existing statutes.

In the instant case, Arbitrator Chatman found that the County Board bargained a wage and classification system with the Union which system is not barred by the Constitution and statutes referred to above. He further concluded that the County agreed to a grievance and arbitration procedure set forth in the collective bargaining agreement and delegated its authority to adjust grievances arising under the contractual wage and classification system to department heads pursuant to Section 1.01 of the agreement. In this instance, Chatman held Department Head Gage to have duly exercised her delegated authority at the second step of the grievance procedure. His award, the culmination of the arbitral process as a natural extension of the collective bargaining process set forth under MERA, does not expressly violate any of the above provisions. Therefore, the Examiner finds no merit in the County's argument that the Chatman award violates Secs. 59.15(2)(c), 65.90(5), Stats. or Article 4, Sec. 22 of the Wisconsin Constitution.

The County's final argument is that Arbitrator Chatman exceeded his authority. It maintains that he was obligated to interpret but not to amend, delete, or modify any of the provisions or terms of the agreement. Chatman's confirmation of the wage increase granted by Gage, it asserts, was an explicit modification of the agreement not authorized under Sec. 9.06. The case law is well-settled that decisions of arbitrators cannot be interfered with for mere errors of judgment as to law or fact. 17/ Only if there is a perverse misconstruction of the parties' bargaining agreement will courts overturn an arbitrator's award. 18/

While Chatman's conclusions that Gage did possess the authority to resolve Thompson's grievance and that the labor agreement does not permit the County's personnel director to reverse the department head's decision with respect to the grievance on review may or may not be judgment errors of either fact or law, these conclusions are directly tied to his interpretation of Section 1.01, the management rights section, of the agreement. The root of Chatman's award is that the County violated the agreement by failing to accept its second step representative's disposition of the grievance. This finding is based upon his reading of Secs. 9.03 and 1.01 of the collective bargaining agreement. The arbitrator's conclusions are insufficient to establish that his award is a perverse misconstruction of the agreement. The undersigned, accordingly, finds that Arbitrator Chatman's award draws it essence from the agreement and that he acted within his authority. The County is therefore found to be in violation of Sec. 111.70(3)(a)5 and 1, Stats. and directed to immediately implement said award and to comply with the attached Order. The Order provides interest at the rate set forth in Sec. 814.04(4), Stats.

The Union further alleges that the County's failure to implement the arbitration award also constitutes a violation of Sec. 111.70(3)(a)4, Stats. because such an action is a failure to complete the bargaining process. The Commission has not yet directly addressed this issue of whether an employer's refusal to accept an arbitration award is a refusal-to-bargain pursuant to Sec. 111.70(3)(a)4, Stats. The NLRB has, however, considered the issue. It will not find a Sec. 8(a)(5) refusal to bargain for a single instance of noncompliance in implementing an arbitration award because it finds such evidence insufficient to support a finding that the employer has repudiated its statutory duty to bargain collectively with the Union. 19/ The rationale advanced by the National Labor Relations Board is sound. In the absence of additional evidence suggesting that the municipal employer is repudiating its statutory bargaining obligation, a single instance of failure to implement an arbitration award is not or should not be sufficient to warrant the finding of an additional Sec. 111.70(3)(a)4 violation. As no such evidence has been introduced, no violation has been found in the instant case.

17/ City of Oshkosh v. Oshkosh Public Library Clerical and Maintenance Employees Union Local 796-S, 229 Wis.2d 210 (1980); see also, Putterman v. Schmidt, 209 Wis. 442 (1932).

18/ Joint School District No. 10, City of Jefferson v. Jefferson Education Association, 78 Wis.2d 94 (1977).

19/ Danny's Foods, Inc., 260 NLRB No. 197, 1981-82 CCH NLRB #18, 884 (1982).

The Union also argues that the County's refusal to abide by its department head's decision violated Secs. 111.70(3)(a)4 and 5, Stats. as well. The County's actions in this regard are insufficient to warrant the finding of a violation of Sec. 111.70(3)(a)4 because the County did not refuse to process the grievance nor did it refuse to submit said grievance to arbitration. With respect to the Section 111.70(3)(a)5 allegation, it is well established that the Commission will refuse to exercise its jurisdiction over Sec. 111.70(3)(a)5 allegations where grievance arbitration procedures exist providing for final and binding arbitration. In the instant dispute not only do such procedures exist but it is apparent that the Union pursued the grievance to final and binding arbitration receiving a disposition from the arbitrator on this very basis. Because such procedures are available to the parties, resulting in an award clearly dispositive of the allegation, and there is no evidence in existence which suggests that the County has repudiated the agreement, it is inappropriate to consider the Union's additional Sec. 111.70(3)(a)5 allegation. This Examiner therefore declines to assert the Commission's jurisdiction under the circumstances.

Dated at Madison, Wisconsin this 1st day of December, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner