

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME,
COUNCIL 24, AFL-CIO, LOCAL 82, Complainant,**

vs.

UNIVERSITY OF WISCONSIN – MILWAUKEE, Respondent.

Case 455
No. 56260
PP(S)-288

Decision No. 29428-A

Appearances:

Lawton & Cates, S.C., by **Attorney P. Scott Hassett**, 214 West Mifflin Street, P.O. Box 2965, Madison, WI 53701-2965, appearing on behalf of the Complainant.

Mr. David J. Vergeront, Chief Legal Counsel, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Respondent.

EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant filed a complaint on March 19, 1998, with the Wisconsin Employment Relations Commission alleging that the Respondent had committed an unfair labor practice within the meaning of the State Employment Labor Relations Act, Sec. 111.84(1)(e) by refusing to abide by the terms of an umpire's arbitration award. The Commission appointed Karen J. Mawhinney, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order. A hearing on the matter was held on February 16, 1999, in Madison, Wisconsin, and the parties completed filing briefs on May 24, 1999.

No. 29428-A

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

1. Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, Local 82, herein called the Union, is a labor organization with its offices at 8033 Excelsior Drive, Madison, Wisconsin 53717-1903.

2. The University of Wisconsin – Milwaukee, herein called the Employer or UWM, is the State Employer. The State’s Department of Employment Relations (DER) is statutorily designated to represent the interests of the State for purposes of conducting labor relations involving state employes. DER has offices at 345 West Washington Avenue, Madison, Wisconsin 53707-7855.

3. The Union and UWM are parties to a collective bargaining agreement that contains the following relevant clauses:

2/1/7 Employees excluded from these collective bargaining units are all office professional (except Professional Social Services unit employes), sessional, confidential, limited term, project, management, supervisory and building trades-craft employes. All employes are in the classified service of the State of Wisconsin as listed in the certifications by the Wisconsin Employment Relations Commission as set forth in this Section.

. . .

4/12/1 In the interest of achieving more efficient handling of routine grievances, including grievances concerning minor discipline, the parties agree to the following special arbitration procedures. These procedures are intended to replace the procedure in Subsection 4/3/1-7 for the resolution of non-precedential grievances as set forth below. If either of the parties believes that a particular case is precedential in nature and therefore not properly handled through these special procedures, that case will be processed through the full arbitration procedure in subsection 4/3/1-7. Cases decided by these methods of dispute resolution shall not be used as precedent in any other proceeding(s).

Arbitrators will be mutually agreed to by District Council 24, WSEU, and the State Division of Collective Bargaining for both of these procedures during the term of the contract.

A. Expedited Arbitration Procedure

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B. Umpire Arbitration Procedure

1. Whenever possible, each arbitrator will conduct hearings a minimum of two (2) days per month. District Council 24, Wisconsin State Employees Union and the State Division of Collective Bargaining will meet with the arbitrator at least once every six (6) months and select dates for hearings during the next six (6) month period.
2. The cases presented to the arbitrator will consist of campus, local institution or work site issues, short-term disciplinary actions (three (3) day or less suspensions without pay), overtime distribution, and other individual situations mutually agreed to.
3. Cases will be given an initial joint screening by representatives of the State Division of Collective Bargaining and the WSEU, Council 24. Either party will provide the other with an initial list of the cases which it wishes to be heard on a scheduled hearing date at least forty-five (45) calendar days prior to a hearing date. This list may be revised upon mutual agreement of the parties at any time up to fifteen (15) calendar days prior to the hearing date.
4. Statements of facts and the issue will be presented by the parties, in writing, to the arbitrator at least seven (7) calendar days prior to the hearing date unless the arbitrator agrees to fewer days for that particular hearing date. If contract language is to be interpreted, the appropriate language provisions of the contract will also be provided to the arbitrator prior to the hearing.
5. The arbitrator will normally hear at least eight (8) cases at each session, unless mutually agreed otherwise. Whenever possible, the cases will be grouped by campus, institution and/or geographic area and heard in that area. The hearing site may be moved to facilitate the expeditious handling of the day's cases.
6. The case in chief will be limited to five (5) minutes by each side with an opportunity for a one minute rebuttal and/or closing. No witnesses will be called. No objections will be allowed. No briefs or transcripts shall be made. The Grievant and his/her steward, plus a department representative and the supervisor, will be present at the hearing and available to answer questions from the arbitrator.

7. The arbitrator will render a final and binding decision on each case at the end of the day on the form provided. The arbitrator may deny, uphold or modify the action of the Employer.

...

5/1/1 Seniority for employes hired after the effective date of this Agreement shall be determined by the original date of employment with the State of Wisconsin. Seniority for existing bargaining unit employes shall be their seniority date as of the effective date of this Agreement. Seniority for employes who become members of this bargaining unit during the term of this Agreement shall be their adjusted continuous service date as of the time they became members of the unit. When the Employer becomes responsible for a function previously administered by another governmental agency, a quasi-public or a private enterprise, the seniority of employes who become bargaining unit members as a result of this change of responsibility shall be their date of accretion into state service unless the legislation or the Executive Order causing such accretion specifies differently. Such seniority will be changed only where the employe is separated from state service by discharge, resignation or layoff.

...

4. In October of 1994, two students were hired by UWM under a Cooperative Education Program, or CEP, as police officers (also called Cadets) at 50 percent time. The two students were Lisa Panas and Greg Rafferty. They were transferred into permanent classified police officer positions on May 26, 1996, upon completing their education. Their seniority date was determined by the Employer to be October 3, 1994.

5. Paul Sorrell is a police officer with the UWM Police Department and has a seniority date of April 17, 1995. In early 1997, Sorrell applied for and was denied a position on the second shift. That position was offered to one of the Cadets based on seniority.

6. On April 25, 1997, Sorrell filed a grievance regarding the denial of the position of the second shift. The basis of his grievance was that he had more seniority than the Cadets did, and that they had been given seniority dates of October 3, 1994, inappropriately.

7. Jana Weaver is the Union's field representative who handled Sorrell's grievance and appealed it to arbitration. Shannon Bradbury, the Labor Relations Manager for UWM, represented the Employer in the grievance. The parties agreed to use the umpire arbitration procedure of the collective bargaining agreement as provided in Article IV, Section 4/12/1/B. Weaver and Bradbury prepared a document with a statement of the issue, a statement of agreed-upon facts, and exhibits for the umpire. That document contains the following:

UMPIRE ARBITRATION PROCEDURE
UW-Milwaukee

NAME: Paul Sorrell (Group) DATE OF HEARING: 8/19/97

CASE NO. 015298

STATEMENT OF ISSUE: Did the Employer incorrectly calculate the seniority dates of the Police Officers who were formerly Police Cadets, thus making them eligible to be granted a requested shift assignment ahead of the grievant?

STATEMENT OF FACTS:

1. On October 3, 1994, the University Police Department hired two MATC Police Science students under a program called Cooperative Education Program (CEP).
2. The Cadets were appointed with dual appointments; they were given classified appointments at 50% time, and permanent classified appointments at 0% time. For the period of the Cadet appointments, they were considered "Project" appointees, and not part of the Law Enforcement (LE) bargaining unit. The now-former Cadets have seniority dates of October 3, 1994.
3. The grievant has a seniority date of April 17, 1995.
4. In March of 1997, the Department posted openings for Shift assignments on First and Second Shift. The grievant expressed his desire to be posted to the Second Shift duty opening. Shift assignments are made by the seniority of those indicating an interest. The Department awarded the Second Shift duty assignment to one of the now-former-Cadets.
5. The Employer argues that while there might have been alternative procedures for appointing the Cadets to their Police Officer-CEP appointments within State of Wisconsin civil service rules, all of them would have rendered a seniority date for the Cadets of October 3, 1994.

JOINT EXHIBITS:

1. Second Step Grievance, filed 4/25/97
2. Shift Vacancy Announcement, dated 3/29/97
3. Employer's announcement of shift assignments, dated 4/09/97
4. "Police Cadet" position description
5. S.230.27 *Wis.Stats.*, Project positions

6. Chapter 228, "Project Appointments", Wisconsin Human Resources Handbook
7. Art. V, Seniority, 1995-97 WSEU Master Agreement
8. Art. VII, Transfer Provisions, 1995-97 WSEU Master Agreement

EMPLOYER'S EXHIBITS:

1. ER-1, ER-34 *Wis. Adm. Code* (Definitions, Project Employment Provisions)
2. Memo and Fact Sheet from Department of Employment Relations (DER) explaining CEP Program
3. Program Description of CEP Program as applied to UWM University Police
4. DER form, "Certification Request/Report" (blank)

8. On August 19, 1997, the Umpire, Jay Grenig, heard the grievance and issued his decision. The Umpire upheld the grievance and ordered the Employer to assign the Grievant to the second shift and give the Cadets a seniority date of May 26, 1996. The Umpire's decision is on a form which only gives the disposition of the grievance and no rationale for his decision.

9. On October 6, 1997, DER notified the Union that it was going to implement part of the Umpire's award by assigning Sorrell to the second shift position. DER stated that it would not make any adjustments to the seniority dates of the two Cadets. Allen Cottrell, Acting Assistant Administrator in the Division of Collective Bargaining at DER, notified the Assistant Director of AFSCME Council 24, WSEU, Karl Hacker, in a letter on October 6, 1997, in a letter that states the DER's objections as follows:

...

As you know, we had objections to Arbitrator Grenig's decision and we believe a grievous error was made. However, to demonstrate our good faith we will implement the part of his award we believe most important to the grievant (Sorrell). That is, Officer Sorrell will be assigned to the second shift position he sought. We will not, however, make any adjustments to the seniority dates of the two Officers identified in the decision as "Cadets."

My personal investigation of this matter revealed that the "Cadets" in question were in fact "Permanent/Project" appointments entitling them to "continuous service" credits that, based on the language of Article V of the Agreement (5/1/1), means their seniority date is in fact 10/3/94, not 5/26/96 as stated by Arbitrator Grenig. I have consulted with a representative for DER's Division of Merit Recruitment and Selection, and DER's Office of Legal Counsel, in this matter.

I believe there was considerable confusion and a lack of understanding on the part of the Arbitrator as to the type of appointments under which the “Cadets” were hired. In fact, they were “permanent/project appointments” entitling them to the transfer of “continuous service” credits for the establishment of seniority dates. The statutory reference made by Ms. Weaver is not applicable to this situation, as I tried to explain during our telephone conference, and does not negate the “continuous service” credit for the two “Cadets.”

. . .

10. After being assigned to the second shift, Sorrell has had other problems because of the seniority dates of the two Cadets.

11. UWM used the same process to hire the Cadets that it uses for any permanent position. When the Cadets were first hired, UWM called them 50% permanent employees for a month or two, until the Union told Bradbury that it was receiving Union dues from them and it should not have been receiving such dues. The dues payments were stopped. If the Cadets were project employees, they would not be in the bargaining unit and not pay dues. If they were in fact permanent employees, they should have paid dues. UWM then called the Cadets 50% project appointment and 0% permanent appointment. After the Cadets were hired, UWM found its database insufficient to code a person as a “permanent/project appointment” and that is why it gave the Cadets the permanent appointment at 0% and the project appointment at 50%. UWM had not used this kind of personnel designation before.

12. UWM intended that the Cadets would have rights to permanent service. The Cadets were to be on probation for the entire time they were in school and continuing in the Cadet status. UWM considered the Cadets to have been transferred to a permanent position when they completed their permanent appointments to the project positions. The Police Department at UWM posted notices for the Cadet positions stating that when the Cadets completed the program, they would be eligible for promotion to full time permanent classified position of Police Officer I based upon vacancy availability within the Department. A program description for the Cadet position states that participants have full transfer and retirement rights within the Wisconsin Classified Civil Service system. It also states that upon completion of the program and with the recommendation of departmental supervisory personnel, the incumbent will be eligible for appointment to a permanent classified staff position of Police Officer I and would have to serve an additional probationary period of six months at that time. Bradbury testified that a permanent appointment to a project position can transfer into a permanent position, but project appointments to project positions cannot transfer. The Union did not challenge the Cadets’ transfer into permanent positions. The Union has no right to challenge original appointments.

13. Bradbury disagreed with the Umpire's result because she did not believe the Umpire had a clear understanding of the civil service regulations relating to the difference between a project and permanent appointment. She also thought that the Umpire did not understand the importance of removing two years of seniority from two employees.

14. Jesus Garza is the General Counsel of the Wisconsin Technical College System Board. He was a labor relations specialist with DER's Division of Collective Bargaining during 1997, and a policy adviser to the DER's Division of Merit Recruitment and Selection between 1992 and 1996. During his career as policy advisor, Garza was involved in litigation involving project appointments. He defined a project appointment as one whereby an individual does not attain or have the ability to attain permanent status and class in that particular project position. A permanent appointment to a project position is one whereby the individual would be able to attain permanent status of class in that particular job. A project position has to end within four years. To get a permanent appointment to a project position, a person has to go through a civil service testing procedure. Garza advised UWM to make the Cadets permanent appointments to project positions.

15. DER rules and regulations provide a definition of "continuous service," which Garza interpreted to mean that the Cadets in question would have a start date for continuous service as of the date they were appointed to their Cadet positions in October of 1994. He testified that if they were project appointments instead of permanent appointments to project positions, they would not get credit for their service as Cadets under the State's regulations and they would have to go through the civil service testing and certification process to be appointed to their new positions. Garza testified that the UWM's designation created a hybrid position. Garza did not testify before the Umpire.

CONCLUSION OF LAW

The Respondent's refusal to comply with the Umpire's award by refusing to adjust the seniority dates of Lisa Panas and Greg Rafferty violates Sec. 111.84(1)(e) of the State Employment Labor Relations Act.

ORDER

1. To remedy its violation of Sec. 111.84(1)(e), Stats., the State of Wisconsin, its officers and agents shall immediately:

a. cease and desist from refusing to implement the Umpire's award;

b. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the State Employment Labor Relations Act:

- (1) Change the seniority dates of Lisa Panas and Greg Rafferty to reflect that their seniority dates start on May 26, 1996, as ordered by the Umpire;
- (2) Make the Grievant Paul Sorrell whole for any loss of wages, benefits, or other conditions of employment that he may have suffered due to the State's violation of the Act;
- (3) Notify employes at the University of Wisconsin-Milwaukee Police Department by posting the attached APPENDIX A in places where notices to such employes are customarily posted and take reasonable steps to assure that the notice remains posted and unobstructed for a period of thirty (30) days;
- (4) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order as to what steps the State has taken to comply with this Order.

Dated at Elkhorn, Wisconsin, this 9th day of July, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/

Karen J. Mawhinney, Examiner

APPENDIX A

NOTICE TO EMPLOYEES OF
UNIVERSITY OF WISCONSIN-MILWAUKEE POLICE DEPARTMENT

As ordered by the Wisconsin Employment Relations Commission, and in order to remedy violations of the State Employment Labor Relations Act, the State of Wisconsin and the University of Wisconsin-Milwaukee Police Department notifies you of the following:

1. We will implement the award of Umpire Jay Grenig issued on August 19, 1997, regarding the seniority dates of Lisa Panas and Greg Rafferty and Paul Sorrell.
2. We will adjust the seniority dates of Lisa Panas and Greg Rafferty to be May 26, 1996.
3. We will make Paul Sorrell whole for any loss in wages, benefits or other conditions of employment he may have suffered due to our refusal to implement the award of Umpire Grenig in its entirety.

THE STATE OF WISCONSIN
UNIVERSITY OF WISCONSIN-MILWAUKEE POLICE DEPARTMENT

By _____
Name

Title

Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED.

UNIVERSITY OF WISCONSIN – MILWAUKEE

**MEMORANDUM ACCOMPANYING
EXAMINER’S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER**

Under the State Employment Labor Relations Act (SELRA), it is an unfair labor practice for an employer to refuse to accept the terms of an arbitration award where the parties have agreed to accept such award as final and binding upon them. Sec. 111.84(1)(e), Stats. The Employer in this case admits that it has refused to implement the award of an umpire but alleges that the Umpire’s award exceeded the remedial authority of a grievance arbitrator because it failed to draw its essence from the collective bargaining agreement.

THE PARTIES’ POSITIONS

The Union

The Union asserts that the Employer was not happy with the results of the arbitration and seeks to retry it in this proceeding with a more elaborate presentation. With narrow exceptions, arbitration decisions are final and binding by law and contract. The Employer failed to carry the burden of its affirmative defense.

The Union notes that few of the facts are in dispute. There is confusion and conflict in the record as to the status of the Cadets prior to May 26, 1996, the date when they became full-time permanent Police Officers after completing their education. Under ER-MRS 1.02(20) and (29), a distinction is made between “permanent” appointments and “project” appointments. A permanent appointment triggers the normal benefits of a permanent classified position, including seniority, and a project appointment does not.

The Union points out that the Employer’s witnesses acknowledged that the situation was unique and without precedent (TR-pp. 56-57, 88). Exhibit 13 is a packet put out by DER concerning the CEP training plan, and it indicates that placement in a permanent position is upon completion of the training program. It also indicates that there is permanent status after completion of the CEP segments and a probationary program. Exhibit 14, a CEP Program Description, indicates that participants have full transfer and retirement rights, but also states that the probationary period in the permanent position begins upon successful completion of the CEP.

The Union further notes that Exhibit 15 put out by the UWM Police Department indicates eligibility for promotion to a permanent position upon completion of the field training program. The Employer has denied that a promotion occurred and contends that the Cadets were transferred to their full-time permanent positions rather than promoted. The Union

asserts that in order to transfer into a permanent position, one must be a member of the bargaining unit. The Cadets were not members of the Union. While they initially paid Union dues, those deductions stopped when the Union protested that they were not in the bargaining unit because they were not permanent and were serving project appointments. The Employer agreed at that point, because dues were no longer taken out. In that case, the Cadets were not in the bargaining unit and could not accumulate seniority.

Another dispute and source of confusion concerns the 0% allocation of the Cadets as permanent classified appointments combined with 50% classified project appointments. The Employer's response in the grievance procedure indicates that the Cadets had 50% regular project appointments, but the Employer now denies that the appointments were regular project appointments. The Union believes that the 0% allocation is meaningless. As Weaver testified, "If I worked for someone zero percent, I don't work for them." The Employer stated that there was precedent for a 0% allocation, but only for people already in permanent positions. This was a unique situation, a creative hybrid, and all assumptions as to its legitimacy were based on a 0% allocation that had never been used in this context.

The Union contends that the Arbitrator heard these arguments, and much of it is set forth in the submission to the Arbitrator. The factual recitation indicates that there was confusion and dispute about the status of the Cadets prior to May 26, 1996, and this confusion was primarily the result of conflicting documents – generated by the Employer – and actions which can support either permanent or project classifications.

The Arbitrator had to choose one or the other, and the Employer did not like the result. The Union states that it was nonetheless a legitimate dispute, with factual interpretations that could go either way under the law and the contract, and a far cry from the burden required to set aside an arbitration decision. The labor agreement states that the arbitration will render a final and binding decision in an umpired arbitration.

Courts will overturn arbitration awards when there has been a perverse misconstruction or positive misconduct plainly established, or if the award is illegal or violates a strong public policy or if there is a manifest disregard of the law. MILW. BD. SCH. DIRS. VS. MILW. TEACHERS ASS'N. 93 WIS.2D AT 422, SCHOOL DIST. NO. 10 VS. JEFFERSON ED. ASS'N. 78 WIS.2D 94, 117-118, 253 N.W.2D 536 (1977). Section 788.10, Stats., provides for vacating an award under nearly the same circumstances as at common law.

The Union finds it apparent that the Employer is trying to undo the umpired decision and relitigate the arbitration. The Employer's reference in opening remarks on the record to JACKSON, ET AL VS. STATE OF WISCONSIN AND DOC, DEC. NO. 28379-B AND 28415-B is instructive as to when and how an arbitration award might be overturned. In that case, the issue was not properly before the Arbitrator in the first place, unlike the instant case.

The Union has established that the matter was properly before the Arbitrator, the merits were heard, a binding decision was issued, and the Employer failed to abide by the ruling. The arbitration award should be enforced.

The Employer

The Employer submits that the issue is whether the Umpire's award is void and unenforceable because it exceeded his remedial authority under the labor agreement since it failed to draw its essence from that agreement, and further submits that the issue must be answered in the affirmative. The Employer first notes that the labor agreement is a law passed by the legislature. Section 111.92, Wis. Stats., sets out the process to approve a collective bargaining agreement. Anyone, including the Arbitrator, must abide by the law, not disregard it.

The Employer further asserts that Sec. 111.93(3), Wis. Stats, requires that civil service laws and rules govern. The language of the collective bargaining agreement supercedes only when there is a potential conflict between the language of the agreement and the subject matter of the statutes, rules or polices. Where the contract's phrase "continuous service" is not defined and its interplay with "seniority" is not explained in the contract, there is nothing that supersedes the statutes and rules. Therefore, the definitions of the relevant statutes and administrative rules control.

The Employer argues that the lawful continuous seniority date of the two Cadets must be enforced, since employees' rights stay with employees during their career in State service. The labor contract provides for seniority from the original date of employment with the State of Wisconsin. The original date of employment and the continuous service date are not defined in the contract and one must look to the statutes and rules for those definitions.

The Employer claims that these are unusual circumstances. The Umpire did not understand the legal significance of a permanent appointment to a project position versus a project appointment to a project position, and the related rights or lack of rights of the appointees. The Umpire did not have a grasp of "continuous service" and its ramification.

Examiner Marshall Gratz set noted standards for setting aside an arbitrator's award in STATE OF WISCONSIN (DER), DEC. NO. 28379-B AND 28415-B. A fair reading of the record shows that the Umpire did not interpret and apply the collective bargaining agreement, but rather, revised it. Also, he did not issue an award which drew its essence from the collective bargaining agreement, and he issued an award in manifest disregard of the law. Therefore, his award must be found to be unenforceable.

The Employer asserts that there is a significant difference between a permanent appointment and a project appointment, because the type of appointment determines the rights

and privileges afforded to the appointee. The permanent appointment allows the appointee to attain permanent status, which the project appointment does not provide for the attainment of permanent status. A permanent appointment, even to a project position, requires traditional recruitment and selection procedures, including application, examination, certification, interview and appointment, all based on merit and fitness. The State intended to fill the vacancies with permanent appointments to project positions.

Two rights and privileges of permanent appointees to projects are (1) continuous service and (2) transfer. Continuous service is defined in ER 1.02(6), Wis. Adm. Code. Project appointees cannot transfer continuous service under the statutes. Transfer rights of permanent employees are regulated by Ch. ER-MRS 15, Wis. Adm. Code, or by labor agreement. In this case, the labor agreement allows for employees to transfer into the bargaining unit and bring with him/her the continuous service accumulated outside of the bargaining unit, which then becomes the employee's seniority date. Project appointees have no right of transfer.

The Employer asserts that the relevant statutes and rules grant to permanently appointed employees like Rafferty and Panas specific rights. They have a right to their continuous service date as determined by the law and the right to transfer as provided for by law. Both the agreement and the law permit transfers of non-bargaining unit members into the bargaining unit, contrary to the Union's statement in its brief. Further, the Employer notes, the Union never grieved the transfer transaction in this case. The Employer contends that no one, including an arbitrator, can take away the Cadets' rights which include a continuous service and seniority date of October 3, 1994.

The Umpire's award is contrary to the law and the essence of the contract, the Employer contends. The contract provides that seniority for employees who become members of the bargaining unit during the term of the Agreement shall be their adjusted continuous service date as of the time they became members of the unit. The contract contemplates employees with no seniority within the unit moving into the unit during the term of the agreement. The employee's continuous service date becomes the employee's seniority date once he/she moves into the unit. That is what the parties agreed to and what the Umpire was obligated to apply to the facts and the law.

The key is the continuous service date of the Cadets, which the law specifically addresses and defines as all time in continuous employment status as a permanent employee in the classified service. Under ER 18.01(3) and ER 18.02(2), the Cadets' continuous employment was from October 3, 1994, the first date they were in pay status as permanent employees. Under the law and the agreement, the adjusted continuous service date is October 3, 1994. The case law is clear – when an arbitrator's award is contrary to the law and the essence of the contract, it cannot stand and is not enforceable.

The Union's Reply

In reply, the Union states that the case is a disputed claim in fact and law, and the Employer was unhappy with the decision. The Union has a standing objection to relitigating the merits of the arbitration and states that the only issue is whether the Employer violated the arbitration award.

The parties agreed to stipulated facts, issues, and exhibits including the contract and applicable law, argued the fact and law, and a final decision was rendered in accordance with the provisions of the contract deal with umpired arbitrations. The Employer lost, and in retrospect, realized that it should have put more effort into developing the factual record in the original arbitration. The Union speculates that perhaps the Employer made a tactical error and should not have stipulated to an umpired arbitration in this case, because the second time around, the Employer sought to develop a more all-encompassing record. The Union asks – where was Garza the first time around? Imagine if this were a disciplinary case, and the Employer subsequently feels that it could have won the case if only it brought in some additional witnesses and documentary evidence.

The Union asks whether the Employer gets another kick at the cat simply by refusing to implement the award? This is a nonprecedential arbitration with a stipulated issue, and the Umpire issued a decision within the parameters of the stipulation. The Umpire did not rewrite the contract nor issue an order outside the scope of the stipulated issue.

The Employer seeks to add additional facts through testimony and documents and argues that the decision is wrong as a matter of law. The Union cites LUKOWSKI VS. DANKERT, 503 N.W.2D 15, 178 WIS.2D 110, AFF'D 515 N.W.2D 833, 184 WIS.2D 142 (APP.1983) as follows: “An arbitration will be upheld whether that award is correct or incorrect as a matter of fact or of law unless perverse misconstruction or positive misconduct is plainly established or there is a manifest disregard of the law or the award is illegal or violates strong public policy . . .” The Employer has merely alleged, based on a larger record which amounts to a supplemental hearing, that mistakes of fact or law were made in the first hearing. The arbitration is binding, and the order should not be disturbed.

Finally, the Union notes that a decision for the Employer in this case would open the door to subsequent litigation any time the Employer felt it could do a better job the second time around. The parties got what they bargained for and the inquiry should go no further.

DISCUSSION

The parties are well aware of the limited nature of reviewing an arbitrator's award, and the case law cited by both of them emphasizes the limits. A court will overturn an arbitrator's

award when there has been a perverse misconstruction or positive misconduct plainly established, or if the award is illegal or violates a strong public policy or if there is a manifest disregard of the law. See MILW. BD. SCH. DIRS. V. MILW. TEACHERS' ASS'N., 93 WIS.2D AT 422 (1980); JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASS'N., 78 WIS.2D 94, 253 N.W.2D 536 (1977). In this case, the Employer has argued that the Umpire did not interpret and apply the collective bargaining agreement but rather revised it, did not issue an award which draws its essence from the collective bargaining agreement, and issued an award in manifest disregard of the law.

The Employer does not show how the Umpire's award fails to draw its essence from the bargaining agreement. The Union is correct when it states that the instant proceeding has amounted to a supplemental hearing, with the Employer merely alleging that mistakes were made at the first hearing. Even though the Employer created a better and larger record in this case, the Umpire had all the relevant information and documents before him that were also introduced in this hearing. Significantly, as part of the stipulated facts, the parties gave the Umpire the following statement:

The Cadets were appointed with dual appointments; they were given classified project appointments at 50% time, and permanent classified appointments at 0% time. For the period of the Cadet appointments, they were considered "Project" appointees, and were not part of the Law Enforcement (LE) bargaining unit.

The Umpire was being asked whether the Employer correctly calculated the seniority dates of the Cadets. He had to determine their status in order to determine their seniority dates. The labor agreement excludes project employees in Section 2/1/7. It provides in Section 2/2/1 that the Employer will deduct dues for employees covered by the agreement. Certainly, the Umpire could have concluded – as a matter of accepting the stipulated facts – that the Cadets who were considered "project" appointees and not part of the bargaining unit – were in fact project appointees not part of the bargaining unit. The Employer is attempting now to clarify the factual issue of whether the Cadets were "permanent" appointees to project positions as opposed to "project" appointees to project positions. However, the Umpire also had before him Employer's exhibits and explanations regarding the permanent and project distinctions, as well as the rights such as transferring that are associated with those distinctions.

The Employer fails to show that the Umpire has revised the collective bargaining agreement. He interpreted it and applied it to the facts at hand. The award drew its essence from the agreement. It is drawn on several provisions that the parties submitted, including Articles 2, 5, 7. Moreover, the award was rendered within the authority given to the Umpire in Article 4.

The Employer contends that the award disregards the law. However, there is no indication that the Umpire disregarded the law. The Umpire concluded certain facts that did not favor the Employer's position. The Employer has taken strong exception to the Umpire's factual interpretation. Bradbury's testimony (TR-p.51) shows that UWM thought that the Umpire had reached the wrong result, that he did not understand the facts, and that he did not consider the seriousness of the decision. It was, after all, UWM's bookkeeping problems that caused much of the confusion in this case. The Employer's own witness - Garza - admitted that this was a hybrid situation, something a little creative, and not normally seen. Also, Cottrell's letter shows that DER believed that the Umpire made a mistake. That is not the same as an arbitrator exceeding his authority under the contract or disregarding the law.

The record does not show that the Umpire's award disregarded the law. He had the statutes and rules and regulations available to him. This case was not so much a dispute over the law regarding the impact of a permanent appointment to a project position versus a project appointment to a project position - as it was a dispute over whether or not the Cadets had permanent appointments in the first place. The evidence was conflicting, and the Umpire favored the Union's position. That was an interpretation of the facts, and not a disregard of the law. The facts included the Cadets not being bargaining unit members and not paying dues deductions, the Employer agreeing that they should not pay dues deductions because it stopped such deductions, and the parties' submission to the Umpire calling the Cadets "project" appointees who were not members of the bargaining unit. (Jt. Ex. #4) There was no perverse misconstruction or modification of the labor contract. The Respondent's failure to fully implement the Umpire's award is an unfair labor practice and violates Sec. 111.84(1)(3) of SELRA.

Both parties' requests for attorneys' fees, costs and disbursements incurred are denied.

Dated at Elkhorn, Wisconsin, this 9th day of July, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/

Karen J. Mawhinney, Examiner