STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AND ITS AFFILIATED LOCAL 1053,	:	
Complainant,	:	Case XXXVI No. 15096 MP-100 Decision No. 10663-A
vs.	:	
MILWAUKEE BOARD OF SCHOOL DIRECTORS AND STEPHEN A. VRSATA,	:	
Respondents.	:	

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., appearing on behalf of the Complainant.

Mr. Harry G. Slater, City Attorney, by Mr. Nicholas M. Sigel, appearing on behalf of the Milwaukee Board of School Directors.

Michael, Best & Friedrich, Attorneys at Law, by Mr. Marshall R. Berkoff, appearing on behalf of Respondent Stephen A. Vrsata.

ORDER DENYING MOTION TO DISMISS AND DEFERRING FURTHER PROCEEDINGS

On November 24, 1971, Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 1053, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the Milwaukee Board of School Directors and Stephen A. Vrsata, a supervisory employe of the Milwaukee Board of School Directors, had committed prohibited practices within the meaning of Section 111.70, Wisconsin Statutes. On December 2, 1971, the Commission appointed Marvin L. Schurke, a member of the Commission's staff, to act as Examiner as provided in Section 111.07(5) of the Wisconsin Employment Peace Act. On January 20, 1972, Respondent Milwaukee Board of School Directors filed its Answer wherein it denied any violation of Section 111.70, Wisconsin Statutes, and pleaded, by way of affirmative defense, that the matters alleged in the complaint filed in this matter are also the subject matter of a grievance, designated as Grievance No. 20, filed under and presently in the course of processing through a grievance procedure contained in a collective bargaining agreement between the Complainant and the Respondent, and that such grievance procedure provides for final disposition of grievances through binding arbitration. On January 20, 1972, Respondent Vrsata filed a separate Answer wherein he denied violation of Section 111.70, Wisconsin Statutes, and also filed a Motion to Dismiss and accompanying Memorandum and affidavit, alleging substantially the same facts alleged by the Milwaukee Board of School Directors in its affirmative defense, and urging that the Commission should not assert jurisdiction to determine a matter which

is subject to a grievance and arbitration procedure embodied in a collective bargaining agreement. Pursuant to notice issued by the Examiner, a hearing, limited in scope to facts and arguments of issues raised by the affirmative defense and Motion to Dismiss of the respective Respondents, was held before the Examiner at Milwaukee, Wisconsin, on January 27, 1972, and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following

ORDER

IT IS ORDERED:

1. That the Motion to Dismiss filed by Respondent Vrsata be, and the same hereby is, denied.

2. That the Milwaukee Board of School Directors furnish the Examiner with a copy of any Answer, appeal, notice, decision, settlement agreement or arbitration award issued or entered into in connection with Grievance No. 20 now pending under the grievance procedure contained in the collective bargaining agreement between the Milwaukee Board of School Directors and District Council 48, AFSCME, AFL-CIO and its affiliated Local 1053.

3. That the allegations of the Complainant in this proceeding that Milwaukee Board of School Directors and Stephen A. Vrsata have violated Section 111.70(3)(a)1 of the Wisconsin Statutes be, and hereby are, deferred, and held in abeyance without any determination until the Examiner has the opportunity to review the final resolution of said Grievance No. 20, in order to determine whether such allegations should be dismissed or a determination should be made on the merits thereof.

Dated at Madison, Wisconsin, this 27th day of March, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AND ITS AFFILIATED LOCAL 1053,	
Complainant,	Case XXXVI
vs.	No. 15096 MP-108
	Decision No. 10663-A
MILWAUKEE BOARD OF SCHOOL DIRECTORS AND STEPHEN A. VRSATA,	
Respondents.	

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS
AND DEFERRING FURTHER PROCEEDINGS

PLEADINGS AND PROCEDURE

The Union filed its complaint in the instant matter on November 24, 1971. The Commission appointed the undersigned as Examiner on December 2, 1971. On December 6, 1971 notice of hearing was issued setting hearing for December 29, 1971 and setting December 21, 1971 as the date for answer. On December 21, 1971, pursuant to a request from the Chief Negotiator of the Milwaukee Board of School Directors, the Examiner issued notice postponing hearing in the matter until January 13, 1972 and setting January 6, 1972 as the date for answer. On January 4, 1972 the Examiner was advised that Respondent Vrsata had retained separate counsel and on January 6, 1972, pursuant to a request from counsel for Respondent Vrsata, the Examiner issued notice postponing hearing in the matter until January 27, 1972 and setting January 20, 1972 as the date for answer. Both Respondents answered on January 20, 1972. The Milwaukee Board of School Directors pleaded an affirmative defense and Vrsata filed a Motion to Dismiss and accompanying memorandum. The main issue raised in the affirmative defense and Motion to Dismiss filed by the Respondents, and the issue before the Examiner at this time, concerns the Union's effort to litigate substantially the same allegations in two separate forums at the same time. Following receipt of the Respondents' pleadings, the Examiner notified all parties that the January 27, 1972, hearing date previously established would be preserved, but that the scope of the hearing on that date would be limited to the taking of facts and arguments on the issues raised by the Respondents' affirmative defense and Motion to Dismiss. During the course of the hearing all of the parties stipulated to the facts alleged in the affirmative defense and Motion to Dismiss. Oral arguments were received during the hearing and briefs were filed by all parties, the last of which was received on February 24, 1972. On March 2, 1972, the Examiner was advised that all of the parties waived the filing of answering briefs.

THE FACTS

The stipulations and exhibits admitted into evidence at the hearing held on January 27, 1972 and the admissions of the Respondents in their respective Answers indicate, at a minimum, the following facts: The Milwaukee Board of School Directors operates the public schools in the City of Milwaukee, Wisconsin and is a municipal employer within the meaning of Section 111.70, Wisconsin Statutes. Stephen A. Vrsata is a supervisory employe of the Milwaukee Board of School Directors and is the principal of John Burroughs Junior High School. The Complainant Union is the certified collective bargaining representative of certain employes of the Milwaukee Board of School Directors in a collective bargaining unit which includes secretaries and other clerical employes. The Union and the Milwaukee Board of School Directors are parties to a collective bargaining agreement, parts of which are set forth below:

> "THIS AGREEMENT, made and entered into at Milwaukee, Wisconsin, pursuant to the provisions of Section 111.70, Wisconsin Statutes, by and between the Milwaukee Board of School Directors, a municipal employer (hereinafter referred to as the "Board"), and Local #1053, chartered by the American Federation of State, County, and Municipal Employes, AFL-CIO, and affiliated with Milwaukee District Council #48 (hereinafter referred to as the "Union"), as representative of the employes (hereinafter referred to as "employes") employed by the Milwaukee Board of School Directors and included in the bargaining unit certified by the Wisconsin Employment Relations Commission, WITNESSETH:
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> . . .
>
> "WHEREAS, it is intended that the following agreement shall be an implementation of the provisions of Section 111.70, Wisconsin Statutes, consistent with the legislative authority which devolves upon the Board and the administrative authority and responsibility of the Superintendent and the Secretary-Business Manager, and the Statutes of the State of Wisconsin and amendments thereto and insofar as applicable, the administrative rules of the Department of Public Instruction and amendements thereto; and
>
> . . .
>
> "E. NEGOTIATIONS
>
> "Either party to this agreement may select for itself such negotiator or negotiators for the purposes of carrying on conferences and negotiations under the provisions of Section 111.70, Wisconsin Statutes, as such party may determine. No consent from either party shall be required in order to name such negotiator or negotiators, except as limited by Part II, Section B.

"G. SUBORDINATE STATUTES, ETC.

"This agreement shall in all respects, wherever the same may be applicable herein, be subject and subordinate to the provisions of the Wisconsin Statutes as amended, City Service rules as amended, and shall also be subject to the Rules of the Board as amended, provided, however, that if any amendment to the Rules is in conflict with any specific provision of this agreement, the agreement shall govern.

"C. UNION SECURITY

"6. Union Activity. There shall be no discrimination against any employe because of union activity.

"PART VII

"GRIEVANCE AND COMPLAINT PROCEDURE

"A. PURPOSE

"The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of an employe with some aspect of employment.

"B. DEFINITIONS

"1. A grievance is defined to be an issue concerning the interpretation or application of provisions of this agreement or compliance therewith, provided, however, that it shall not be deemed to apply to any order, action, or directive of the Superintendent or the Secretary-Business Manager or of anyone acting on their behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the provisions of the state statutes.

"2. A complaint is any matter of dissatisfaction of an employe with any aspect of his employment which does not involve any grievance as above defined. It may be processed through the application of the first two steps of the grievance procedure.

"C. RESOLUTION OF GRIEVANCE OR COMPLAINT

"If the grievance or complaint is not processed within the time limit at any step of the grievance or complaint

procedure, it shall be considered to have been resolved by previous disposition. Any time limit in the procedure may be extended by mutual consent.

"D. STEPS OF GRIEVANCE PROCEDURE

"Grievances or complaints shall be processed as follows:

First Step - An employe shall, within five working days, submit his grievance or complaint directly to his next higher authority, but he may request next higher authority to send for (a) a representative of the Union, or (b) a fellow employe of his own choosing, for the purpose of joint oral presentation and discussion of the grievance or complaint at a mutually convenient time. In the event a representative is brought in by the employe, a Union representative shall also be present. If the grievance or complaint is not resolved satisfactorily, it shall be reduced to writing and presented to the employe's next higher authority within five working days of the oral presentation. The next higher authority shall give a written answer within five working days of receipt of the written grievance or complaint.

The next higher authority shall advise the Superintendent or the Secretary-Business Manager in writing of his disposition of any grievance or complaint presented without the presence of a Union representative, with copies for the department head and the Union. All written grievances shall be set forth on a form provided by the Superintendent or Secretary-Business Manager.

Second Step - If the grievance or complaint is not adjusted in a manner satisfactory to the employe or the Union within five working days after receipt of the written answer, then the grievance or complaint may be set forth in writing within five working days by a representative of the Union. The grievant shall sign the grievance or complaint. Thereafter, the Union representative shall transmit the written grievance or complaint to the department head. The department head shall, at the Union's request, set a mutually convenient time for discussion of the grievance or complaint, with a copy for the Superintendent, the Secretary-Business Manager or their designee.

Third Step - If the written grievance is not adjusted in a manner satisfactory to the employe or the Union within five working days after the discussion with the department head, it may be presented within five working days by the Union to the Superintendent, the Secretary-Business Manager, or their designee for discussion. Such discussion shall be held within ten working days at a mutually convenient time fixed by the Superintendent, the Secretary-Business Manager or their designee.

Fourth Step - If the grievance is not satisfactorily adjusted within ten working days after discussion with the Superintendent, Secretary-Business Manager, or their

designee, it may be presented within ten working days by the Union to the Rules and Complaints Committee for prompt hearing. The Committee shall forward its recommendations in writing for action by the Board.

Fifth Step - The Board shall promptly pass upon the grievance and notify the Union in writing of its decision. If the grievance is not certified to the Impartial Referee in accordance with the Impartial Referee procedure within twenty working days after notification of the Board's decision, the decision of the Board shall become final.

Sixth Step - The decision of the Board upon a grievance shall be subject to hearing by the Impartial Referee upon certification to him by the Union.

The final decision of the Impartial Referee, made within the scope of his jurisdictional authority, shall be binding upon the parties and the employes covered by this agreement.

1. "Jurisdictional authority" is limited to consideration of grievance or complaints as herein above defined.

The Impartial Referee Procedure shall be subject to the following:

a. The certifying party shall notify the other party in writing of the certification of a grievance.

b. The certifying party shall forward to the Impartial Referee a copy of the grievance and the other party's answer, and also send a copy of such communication to the other party.

c. Upon receipt of such documents, the Impartial Referee shall fix the time and place for a formal hearing of the issues raised in the grievance not later than thirty days after receipt of such documents unless a longer time is agreed to by the parties.

d. Upon the fixing of a Referee hearing date, the parties may arrange mutually agreeable terms for a pre-hearing conference to consider means of expediting the hearing, by for example, reducing the issues to writing, stipulating facts, outlining intended offers of proof, and authenticating proposed exhibits.

e. In those cases where either party deems it necessary, it may be arranged that a transcript of the hearing be made by a qualified court reporter. The party making such arrangements shall bear the full cost thereof. The other party may purchase a copy. If the

Impartial Referee requests that he be furnished with a copy, the expense of the original copy and the reporter's attendance charge shall be borne equally by the parties.

f. At the close of the hearing, the Impartial Referee shall afford the parties reasonable opportunity to submit briefs, if requested by either party.

g. The Impartial Referee shall render his decision as soon as possible, preferably within twenty working days.

h. The Impartial Referee shall lay down the rules for orderly conduct of the hearing.

i. In making his decision, the Impartial Referee shall be bound by the principles of law relating to the interpretation of contracts followed by Wisconsin courts.

j. The expenses of the Impartial Referee shall be borne equally by the parties, except that the party requesting reconsideration or rehearing shall bear the full expenses of the Impartial Referee incurred in such reconsideration or rehearing.

2. Appointment of Impartial Referee. Impartial Referee shall be selected as follows:

a. If the parties are unable to agree upon the selection of an Impartial Referee within one week after desired certification of a grievance, they shall, by joint letter, request the Wisconsin Employment Relations Commission to submit to them a list of names of five persons suitable for selection as Impartial Referee.

b. If the parties cannot agree upon one of the persons named on the list, the parties shall strike a name alternately until one name remains. Such remaining person shall act as Impartial Referee.

On September 13, 1971, a vacancy occurred in a full-time clerical position under the supervision of Mr. Vrsata. The vacancy was not filled immediately with a regular full-time employe, and remained unfilled on November 4, 1971 when the Union, by its Local President, filed a grievance with Mr. Vrsata on behalf of five employes under the supervision of Mr. Vrsata. That grievance, designated by the parties as Grievance No. 19, alleged violation of several provisions of the collective bargaining agreement by the failure to fill the vacancy with a full-time employe and requested, as relief, that the vacancy should be filled immediately by a regular appointed full-time employe. After the Local Union President left the building following

the presentation of Grievance No. 19, Mr. Vrsata called and conducted a meeting with the secretaries under his supervision. A second meeting with the secretaries was held on November 5, 1971. The exact nature of the discussions which were had during those meetings is not a part of the record at this point in this proceeding, but it is clear that the discussion centered on Grievance No. 19. November 5, 1971, was a Friday. On the following Monday, November 8, 1971, the Union filed a grievance on behalf of three employes alleging violation of the collective bargaining agreement by harassment and discrimination against employes for union activities and refusal to permit union representation, all arising out of the meetings concerning Grievance No. 19 held by Mr. Vrsata with the secretaries. The grievance filed on November 8, 1971 was designated by the parties as Grievance No. 20, and was filed with the Chief Negotiator of the Milwaukee Board of School Directors as the designee of the Superintendent of Schools in the third step of the grievance procedure. For reasons which are not fully developed in the record, Grievance No. 20 was referred back to the second step of the grievance procedure. On November 12, 1971 the Union filed an appeal form concerning Grievance No. 19, but indicated on that form that the grievance should be held in abeyance to permit Mr. Vrsata time to act on the appointment of a full-time employe to fill the vacant position. On November 18, 1971 the Union filed an appeal form concerning Grievance No. 20 to again bring that grievance into the third step of the grievance procedure. On January 3, 1972 a regular full-time employe was appointed and started work in the position which was in dispute in Grievance No. 19. The Union apparently was not advised that the remedy it had requested in the grievance had been granted, and on the same date the Union requested further action on Grievance No. 19. Also on January 3, 1972, the Union requested further action on Grievance No. 20. On January 7, 1972, the Chief Negotiator answered Grievance No. 20 in the third step of the grievance procedure, and on January 11, 1972 the Union appealed Grievance No. 20 to the fourth step of the grievance procedure. On January 14, 1972, the Chief Negotiator answered Grievance No. 19, advising the Union of the appointment of the employe who had started work in the disputed job on January 3, 1972, and that grievance is now regarded as settled. Grievance No. 20 was scheduled for hearing before the Rules and Complaints Committee of the Milwaukee Board of School Directors on February 14, 1972.

THE POSITIONS OF THE PARTIES

The Union asserts several arguments against the affirmative defense and the Motion to Dismiss and urges the Examiner to proceed with full hearing and determination on the allegations of the complaint. Looking mainly to decisions of the National Labor Relations Board as precedent for its position, the Union urges that the instant case is not the type of case in which the NLRB has deferred to arbitration in the past. The Union contends that it is not seeking an interpretation of the collective bargaining agreement in the proceedings before the Commission, while it is seeking such a contract interpretation under the grievance procedure. Recognizing that the situation has the potential for simultaneous proceedings in two separate forums, the Union contends that the factual issues before the arbitrator will be different from those before the Examiner, that the arbitrator will be called upon to

interpret the contract while the Examiner will be called upon to interpret the statute, and that the remedies available to the arbitrator are different in kind and effect from those available to the Examiner. In some portions of its argument, the Union asserts that the Respondents' alleged interferences with the grievance machinery of the collective bargaining agreement should be treated in this case in much the same manner as the Commission has treated interference with contractual grievance procedures (i.e. refusal to proceed to arbitration) by employers in the private sector, and that the Commission has asserted jurisdiction and ordered compliance with the grievance procedure in such cases. Finally, the Union has filed its complaint alleging conduct which occurred prior to the enactment of the Municipal Employment Relations Act 1/ and has charged Mr. Vrsata as a respondent, pursuant to the provisions of the then-existing Section 111.70, Wisconsin Statutes. The Union urges that it has a right to proceedings against Mr. Vrsata for his prohibited practices independent of any rights it has or may have against the municipal employer which Mr. Vrsata represented, according to the allegations of the complaint, at the time the conduct complained of occurred. Since Mr. Vrsata is not personally a party to a collective bargaining agreement and arbitration clause, the Union asserts that deferral to arbitration between two other parties cannot vindicate the Union's rights against Mr. Vrsata.

On somewhat different grounds, each of the Respondents argue that the complaint filed in the instant matter should be dismissed and that the Commission should find it has no jurisdiction to hear and determine the allegations of the complaint. Respondent Milwaukee Board of School Directors asserts the grievance and arbitration procedure available under its collective bargaining agreement with the Union as a bar to the instant proceedings, but it also urges that the allegations of the complaint and the oral argument of counsel for the Union indicate that the Union is pursuing a complaint of prohibited practices in this matter against Mr. Vrsata personally rather than against the Milwaukee Board of School Directors. Consistent with its contention that this case should be determined under the provisions of the Municipal Employment Relations Act, the Milwaukee Board of School Directors contends that, in addition to and apart from its affirmative defense based on the availability of arbitration, the complaint should be dismissed because it does not state a claim that the municipal employer has violated any of the six subsections of Section 111.70(3)(a), Wisconsin Statutes. Citing several previous Commission decisions, Respondent Vrsata contends that the complaint should be dismissed because the Union has failed to exhaust its remedies under its collective bargaining agreement with the Milwaukee Board of School Directors. Vrsata directs the attention of the Examiner to certain sections of that collective bargaining agreement and argues on the basis of those provisions that the agreement incorporates the statute by reference, giving an arbitrator jurisdiction to make any finding which the Examiner could make, as well as jurisdiction to make

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1/ Section 111.70, Wisconsin Statutes, effective November 11, 1971.

findings of violations of the agreement. Vrsata cites recent decisions of the National Labor Relations Board in which that agency has adopted a mandatory deferral policy in certain types of cases where contractual settlement procedures exist, and urges that the instant case involves the type of allegations which the NLRB would defer to arbitration. As a policy matter, it is urged that assertion of jurisdiction in cases of this nature would lead to a flood of cases in which the Commission would be called upon to determine colorable or actual allegations of violation of the statute in cases which primarily concern violations of contracts and are subject to resolution through arbitration proceedings. Answering the Union's assertion that an arbitrator would be unable to give the Union a sufficient remedy against Vrsata, that Respondent argues that, as an agent of the Milwaukee Board of School Directors, he would be bound by any "cease and desist" type order which might be issued by an arbitrator and that, as an employe of the Milwaukee Board of School Directors, he is under its control and subject to its orders with respect to any affirmative action which might be ordered by an arbitrator. Vrsata argues that the vast majority of all grievances submitted to arbitration arise out of the actions of individual agents or supervisors who are not parties to the contracts under which those grievances are arbitrated, and that sufficient remedy is available through an order directed to the employer, so that the Union's argument in this regard is unrealistic. Both of the Respondents urge that the Union should not be allowed "two bites at the apple" through simultaneous proceedings in two separate forums where, as they allege to be the situation in this case, the facts and issues in dispute in both forums are substantially identical.

EXHAUSTION OF CONTRACT REMEDIES

A distinction must be drawn between two lines of cases which are cited by the parties in these proceedings. The first line of cases includes those cited by Respondent Vrsata in his Memorandum in support of his Motion to Dismiss, and they stand for the principle that exhaustion of contract remedies is a prerequisite to proceeding before the Commission. 2/ Those cases have developed out of the Commission's jurisdiction under Section 111.06(1)f of the Wisconsin Employment Peace Act, making violation of a collective bargaining agreement an unfair labor practice, and they parallel decisions of the federal courts under Section 301 of the Labor-Management Relations Act of 1947, as amended. The Commission has been affirmed in its holdings that its jurisdiction to determine violations of collective bargaining agreements in the private sector as unfair labor practices under state law is concurrent with the jurisdiction of the federal courts in civil actions commenced under Section 301 of the L.M.R.A. American Motors Corp., (7079) 3/65; affirmed 32 Wis. 2d 237 (1966). The Examiner agrees that, in cases alleging violation of Section 111.06(1)f, Wisconsin Statutes, the Commission normally will not assert jurisdiction where the complainant has not proceeded in accordance with collective bargaining agreement provisions for final and binding arbitration. However, for the reasons set forth below, the Examiner finds that this first line of cited authority is not controlling in the instant case.

2/ Amity Nursing Home (8425) 2/68; River Falls Co-Op Creamery (2311) 2/50; F. Hurlburt Co. (4121) 12/55; Pierce Auto Body Works (6635) 2/64

The second line of cases cited by the parties deals with the policies of the Commission and the National Labor Relations Board regarding deferral of proceedings before the administrative agency where a conventional unfair labor practice, e.g. interference, restraint, coercion, discrimination or refusal to bargain, is subject to arbitration under the provisions of a collective bargaining agreement. Since Spielberg Mfg. Co., 112 NLRB No. 139, 36 LRRM 1152 (1955), where it deferred to a previously rendered arbitration award, the NLRB has exercised its discretion to withhold proceedings in some cases where dual remedies are available. Dubo Manufacturing Corp., 142 NLRB No. 47, 53 LRRM 1070 (1963) represents an extension of NLRB policy regarding deferral to arbitration, by withholding action on a case in which arbitration was available to the parties and the employer had been ordered by a federal court to proceed to arbitration. No arbitration award had been issued covering the matters alleged in the complaint before the NLRB as of the time of the Board's Dubo decision. A further extension of NLRB policy is found in Collyer Insulated Wire, 192 NLRB 150, 77 LRRM 1931 (1971), wherein the NLRB deferred to a contract grievance and arbitration procedure even though no grievance had been filed under that procedure. The Wisconsin Employment Relations Commission deferred action on allegations of conventional unfair labor practices in Milwaukee Elks 3/ while enforcing a collective bargaining agreement under Section 111.06(1)f by ordering the employer to arbitrate grievances which incorporated the allegations of the complaint filed in that case. In the Milwaukee Elks case, as in the instant case, the Commission had jurisdiction to enforce the collective bargaining agreement as well as jurisdiction over the interference, restraint and coercion, discrimination and refusal to bargain allegations of the complaint. The role of the WERC is clearly distinguished from the role of the NLRB by the Commission's authority to enforce collective bargaining agreements. The NLRB has sought to make an accomodation between rights enforceable under a contract and rights enforceable under the statute, and recognized in Collyer:

> "Admittedly neither section 203 nor section 301 applies specifically to the Board. However labor law as administered by the Board does not operate in a vacuum isolated from other parts of the Act, or, indeed, from other acts of Congress." 77 LRRM 1931 at 1935.

The federal cases cited by the parties and those cited here are clearly not controlling in this case. They point out, however, the necessity of harmonizing two lines of labor law which have developed out of separate provisions of the statutes. In view of the Commission's dual jurisdiction in municipal employment under the Municipal Employment Relations Act, the lack of harmonization could quickly lead to multiciplicy of proceedings before the Commission.

The complaint filed in the instant matter states facts which, if proved, would constitute the basis for a finding that the

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3/ Milwaukee Lodge No. 46 of the Benevolent and Protective Order of Elks of the United States of America (7753) 10/66.

Respondents had committed prohibited practices within the meaning of Section 111.70(3)(a)1. The complaint is properly before the Wisconsin Employment Relations Commission and there can be no doubt that the Commission has the authority to make determinations and order relief on the allegations of this complaint that the Respondents have interferred with, restained and coerced municipal employes in the exercise of their rights under Section 111.70(2), Wisconsin Statutes. The complaint does not ask the Commission to exercise its authority to enforce the collective bargaining agreement. However, if the Union's contractual and statutory remedies are to be harmonized in this case, such a harmonization is clearly of the type made by the Commission in the Elks case, and it is to that case that the Examiner must look for guidance in this case. The doctrine of exhaustion of contract remedies does not apply.

AVAILABILITY OF REMEDY THROUGH ARBITRATION

The allegations of the complaint filed in the instant matter concern the same meetings that are alleged in Grievance No. 20. Any determination of the allegations of either the complaint or the grievance will necessarily require a full hearing and determination of the factual issues framed by the pleadings with regard to what was said during those meetings. Only following such a determination of the factual issues would either the Examiner or an arbitrator be in a position to determine whether the provisions of Section 111.70(3)(a)(1), Wisconsin Statutes, or the provisions of the collective bargaining agreement or the provisions of both have been violated. There is no issue of arbitrability before the Examiner in these proceedings. The collective bargaining agreement contains a number of references to Section 111.70, Wisconsin Statutes, and has provisions elsewhere in its text which will be subject to interpretation on the issues raised by Grievance No. 20. The Union has filed a grievance and has actively prosecuted that grievance through the grievance procedure, implying by its actions that it regards the subject matter of the grievance as an issue within the scope of the collective bargaining agreement. The Milwaukee Board of School Directors had indicated its willingness to regard the issues raised by the complaint herein as being covered by the contract and has also indicated its desire to proceed under the grievance procedure towards final resolution of Grievance No. 20.

In its Milwaukee Elks case, supra, the Commission was presented with an issue similar to that before the Examiner in the instant case. In ruling on that issue, the Commission said:

> "It is not unusual for contracts providing for arbitration to also forbid conduct which is likewise proscribed by "unfair labor practice" statutes. In fact, discrimination based upon union activity and unilateral employer action are two types of conduct often so doubly prohibited.
>
> "There can be no doubt that this Board [Commission] has the authority to make determinations and order relief in cases involving noncontractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters. The possibility of full relief through arbitration does not preclude this Board [Commission] from fully adjudicating alleged noncontractual violations of the statutes which it enforces.

"However, this Board [Commission] may also exercise its discretion and decline to determine alleged violations which can be submitted to, and materially resolved and remedied in an arbitration procedure. Such an exercise of discretion is in recognition of and consistent with the policies of this Board [Commission], the federal courts 7/ and the National Labor Relations Board 8/ which favor the settlement of disputes arising out of subsisting collective bargaining agreements by procedures voluntarily predetermined by the parties.

"7/ Acme Industrial Company v. NLRB (CA7, 1965) 60 LRRM 2220." [The Circuit Court in Acme had ruled that the NLRB was required to defer to arbitration. The Supreme Court of the United States reversed the Circuit Court decision, 64 LRRM 2069, 1967, stating that the National Labor Relations Board does have jurisdiction to order an employer to furnish a union with information needed for determining if a collective bargaining agreement has been violated, even if the dispute has not been decided by an arbitrator under the agreement's compulsory arbitration clause. The Union herein apparently cites the Supreme Court decisions in Acme in an effort to cast doubt on the Commission's policy in the Elks case. The Supreme Court did not rule that the NLRB was prevented from deferring to arbitration, but rather re-affirmed the policy stated by the Commission in the Elks case that the administrative agency had discretion to proceed or to decline to proceed where an arbitration procedure was an existing alternative.]

"8/ Dubo Manufacturing Corp. 142 NLRB 47, 53 LRRM 1070; See speech by Arnold Ordman, General Counsel, NLRB, 6/6/64, 56 LRRM 57,59."

The Union has cited a number of federal precedents stating the policy considerations used by the NLRB in its decisions whether it will defer to arbitration or take jurisdiction over allegations of violation of the National Labor Relations Act. These federal precedents are not controlling and miss the point. Because of the Commission's broader authority in the field, its decisions regarding deferral to arbitration must be based on policy considerations which may differ from those used by the NLRB. For example, the Commission might be called upon to enforce the grievance and arbitration provisions of a contract at the same time that the Commission is taking jurisdiction over the parties on allegations of "conventional" prohibited practices. The possibility exists wherever separate but concurrent proceedings occur that diverse results could be reached, and the Commission could therefore be asked to exercise its authority to enforce an arbitration award in one proceeding while that arbitration award was contrary to the decision of the Commission or its Examiner in another proceeding involving the same parties and facts. Further, arbitrators are appointed from the Commission's staff, presenting the possibility that two members of the staff, one sitting as arbitrator and the other sitting as Examiner, might be called upon to make independent but simultaneous determinations on similar issues.

The possibility of parallel proceedings in two separate forums on the same facts is particularly repugnant to the statutory purpose stated in Section 111.70(6) of the Municipal Employment Relations,

Act, of providing peaceful settlement through the processes of collective bargaining agreements. The Examiner finds that it would be appropriate in this case to defer to the settlement procedures contained in the contract, to permit the union those remedies without the need to make an election of the remedies available to it. The Examiner has ordered the Employer to submit a copy of any arbitration award or other document which concludes the processing of Grievance No. 20 under the grievance procedure. If the grievance is finally resolved by an arbitration award and that award, with respect to the allegations of the complaint herein, is in no way inconsistent with the policy of Section 111.70, Wisconsin Statutes and is not repugnant to any of its provisions, the Examiner will dismiss those allegations being held in abeyance. If on the other hand an arbitration award issued on Grievance No. 20 does not conform to said requirements, the Examiner will proceed with a determination on the allegations which have been held in abeyance.

SUFFICIENCY OF ARBITRATION AS REMEDY AGAINST VRSATA

Assuming for the purposes of the present decision that all of the allegations of the complaint are true, it is clear that an arbitrator acting as impartial referee pursuant to the procedures set forth in the collective bargaining agreement could find conduct on the part of Mr. Vrsata which was improper, and could fashion a remedy. The Union has filed its complaint against the Milwaukee Board of School Directors and Stephen A. Vrsata as co-Respondents and urges that, while the Commission could defer to arbitration in connection with the proceedings against the Milwaukee Board of School Directors, it should not defer to arbitration in the proceedings against Mr. Vrsata because proceedings under the arbitration provisions of the collective bargaining agreement would not provide it with a sufficient remedy against Mr. Vrsata. The Union has not shown anything which would so limit the authority of the arbitrator. The complaint filed in the instant matter seeks an order directing the Respondents to cease and desist from interferring with, restraining and coercing employes in connection with the processing of their grievances. Grievance No. 20 requests as a remedy that employes should not be harassed or discriminated against for union activity and should be granted the right to union representation, all of which amounts to a "cease and desist" type order. The complaint in this case is filed under Section 111.70, Wisconsin Statutes, as the statute was worded prior to the enactment of the Municipal Employment Relations Act. The provisions of Section 111.70(3)(a)1 of the present statute are substantially the same as the previous statute, but the first line of Section 111.70(3)(a) has been changed from "Municipal employers, their officers and agents are prohibited from:" to "It is a prohibited practice for a municipal employer individually or in concert with others:", with an accompanying change in the definition of municipal employer so as to include any person acting on behalf of the municipal employer within the scope of his authority, expressed or implied. Numerous cases were decided under the old statutes in which individuals were named as joint respondents and were found guilty of committing prohibited practices in violation of Section 111.70(3)(a)1, Wisconsin Statutes. However, it is difficult to conceive of even a hypothetical situation in which a supervisory employe could commit a prohibited practice under Section 111.70(3)(a)1 independent of any prohibited practice attributable to his employer. No cases are cited to the Examiner in which an individual

respondent has been found guilty of prohibited practices which were not also chargable to his employer. It is clear that any attempt to litigate the conduct of Vrsata would also determine the liability of the Milwaukee Board of School Directors on the prohibited practice charges. All of the conduct alleged in the complaint took place while Vrsata was acting as an agent of the Board. Since all of the conduct complained of occurred prior to the enactment of the Municipal Employment Relations Act it is procedurally correct to name Vrsata as a co-Respondent, but the Examiner does not find that the ability to charge Vrsata individually as a Respondent in this proceeding requires the adjudication of the case in separate but simultaneous forums. The Examiner is satisfied that the issues raised in the grievance are substantially identical to the issues raised in the complaint filed in this proceeding, and that all such issues can be materially resolved and remedied through an arbitration procedure.

DENIAL OF MOTION TO DISMISS

Respondent Vrsata has moved for dismissal of the complaint and has cited the NLRB Collyer case wherein that agency dismissed the complaint while retaining limited jurisdiction. The Examiner has not embraced the Collyer rule in this decision and, without attempting to compare the procedural practices of the NLRB and the Commission, the Examiner finds precedent in the Milwaukee Elks case, supra, for the form of order which has been issued. It should be clear that it is not the intent of the Order to require the filing of a new complaint should further proceedings be warranted in this case. Such a new filing would involve unnecessary pleadings, where the issues before the Commission are already framed in the present record, and would also involve a risk that rights would be cut off by the statutory time limitation set forth in Section 111.07 (14), Wisconsin Statutes.

Dated at Madison, Wisconsin, this 24th day of March, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner