STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRANK REITH and the STANLEY-BOYD EDUCATION ASSOCIATION, Complainants, vs. STANLEY-BOYD AREA SCHOOLS and the BOARD OF EDUCATION OF STANLEY-BOYD AREA SCHOOLS, Respondents.	Case IV No. 19653 MP-330 Decision No. 12504-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Complainants.

Gay & Nafzger, Attorneys at Law, by Mr. Ernest C. Gay, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and the Respondents having filed a motion to dismiss said complaint on April 11, 1974, and hearing on said motion having been held at Chippewa Falls, Wisconsin, on April 24, 1974, before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Frank Reith, hereinafter referred to as Complainant Reith or Reith, is an individual who was employed as a classroom teacher by Stanley-Boyd Area Schools, Jt. District No. 4, at all times relevant herein, until his employment was terminated at the end of his individual employment contract for the 1972-1973 school year.

2. That Stanley-Boyd Education Association, hereinafter referred to as the Complainant Association or Association, is a labor organization within the meaning of Section 111.70(1)(j) of the Municipal Employment Relations Act and the voluntarily recognized representative of certain teachers employed by Stanley-Boyd Area Schools, Jt. District No. 4, including Complainant Reith, for purposes of collective bargaining on questions concerning wages, hours and conditions of employment.

3. That Stanley-Boyd Area Schools, Jt. District No. 4, hereinafter referred to as the Respondent District or District, is a public school district organized under the laws of the State of Wisconsin, and a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act; that the Board of Education of Stanley-Boyd Area Schools, Jt. School District No. 4, hereinafter referred to as the Respondent Board or Board, is a public body charged under the laws of the State of Wisconsin with the management, direction and control of said District and its affairs.

4. That at all times relevant herein, the Complainant Association and Respondent Board were parties to a collective bargaining agreement which contained a grievance procedure reading as follows:

"ARTICLE V

GRIEVANCE PROCEDURE

A. Definition

Rule 1. A 'grievance' shall mean a complaint by a teacher in the bargaining unit that (1) there has been, as to him, a violation, misinterpretation, or inequitable application of any of the provisions of this Agreement or that (2) he believes he has been treated unfairly or inequitably by reason of any act or condition which is contrary to established policy or practice governing or affecting teachers, except that the term 'grievance' shall not apply to any matter for which (1) a method of review is prescribed by law, or (2) where a rule or regulation of the State Department of Public Instruction has the force and effect of law, or (3) where any by-law of the Employer is in effect, or (4) in any area where the Employer is without authority to act.

B. Individual grievances shall be handled as follows:

Rule 1. Any teacher within the bargaining unit may file a written grievance with a representative of the Grievance Committee of the collective bargaining agent and the Building Principal, within ten(10) school days, following the act or condition of his complaint.

Rule 2. The primary purpose of the procedure set forth in this section is to secure, at the lowest level possible, equitable solutions to the problem of the parties. Both parties agree that these proceedings shall be kept as confidential as may be appropriate at any level of such procedure. Nothing contained herein shall be construed as limiting the right of any teacher having a grievance to discuss the matter informally with any appropriate member of the administration. For the purpose of this agreement a day shall be defined as a teachers [sic] working day.

C. Formal grievances shall be handled in the following manner:

Rule 1. Any teacher within the bargaining unit may file a written grievance with a member of the Grievance committee of the collective bargaining agent to explain and/or ask for assistance with said grievance.

Rule 2. The teacher and a member of the grievance committee may be represented at subsequent hearings.

Rule 3. The channeling of grievances shall be from the aggrieved to:

(1) Building Principal, (2) Superintendent of Schools, (3) Teacher Committee of the Board of Education, (4) Board of Education. The Elementary Coordinator is the next step above the building principal in the elementary grievance procedure. Grievances not processed to the next step within the prescribed time of ten days by the aggrieved party, shall be considered dropped.

D. Grievances shall, if not resolved, be acted upon by the Board of Education at the next Board meeting from the onset of the grievance. The grievance shall be presented to the board not less than ten (10) working days prior to the regular stated meeting of the Board of Education.

E. The Teacher Committee or the Board of Education shall within ten (10) days after the regular stated meeting of the Board of Education send written notice to the teacher and the Grievenace [sic] Committee of the Association of the action taken to resolve the grievance.

F. In a case where the grievance cannot be resolved by the Board of Education, the Board and the Association shall enter into mediation or fact finding upon request by either party named above.

G. If the Board of Education is the aggrieved party, the Board shall submit its grievance in writing to the president of the Association. The Association shall give its answer in writing to the Board of Education within fifteen (15) days. If the grievance remains unresolved, the Board of Education and the Association shall enter into mediation or fact finding upon request of the Association or the Board of Education."

5. That, on February 26, 1973, Marlyn Mohr, President of the Respondent Board, sent Complainant Keith a letter, which read in relevant part, as follows:

"This is to inform you that the Board of Education of the Stanley-Boyd Area Schools is considering the non-renewal of your teaching contract for the 1973-74 school year.

May we inform you that under Wisconsin Statutes 118.22, sub-sections 2 & 3, you may appeal for a conference with the Board within five days.

Your appeal must be in writing sent to Mr. Roy Samplawski, R. 2, Stanley, Wisconsin."

6. Sometime after receiving Mohr's letter dated February 26, 1973, Keith asked for a conference with the Respondent Board and a conference was held on Tuesday, March 13, 1973, that, thereafter, by letter dated Wednesday, March 14, 1973, Mohr advised Keith of the Respondent Board's decision on the proposed non-renewal of his teaching contract, which read as follows:

"At a meeting of the Board of Education of the Stanley-Boyd Area Schools, on March 14, 1973, the Board voted not to renew your teaching contract for the 1973-74 school year."

7. That, on Wednesday, March 28, 1973, Keith's wife called Bruce Neuenfeldt, Chairman of the Professional Rights and Responsibilities Committee, which is the Grievance Committee for the Complainant Association, and asked him to hand-deliver a grievance which Keith had drafted to Mohr, because Keith was sick and unable to deliver the grievance himself; that, Neuenfeldt and another teacher went to Mohr's house and hand-delivered said grievance which read as follows:

"Grievance against the Board of Education

In the matter of my contract the Board of Education has violated the following sections of the master contract between the Board of Education and the Stanley-Boyd Education Association:

Article III Sections B & D
Article IV Section B-1
Article VI Section A-3

I hereby waive the preliminary steps of the grievance procedure and wish this matter to go directly to the Board of Education."

8. That, the provisions of the collective bargaining agreement alleged to have been violated and referred to in Keith's "grievance" read as follows:

"ARTICLE III

RECOGNITION

. . .

B. The Employer agrees not to negotiate with any teachers' organization other than the Association for the duration of this agreement. Nothing contained herein shall be construed to prevent an individual teacher from presenting a grievance and having the grievance adjusted without intervention of the Association, if the adjustment is not inconsistent with the terms of this Agreement, provided that the Association has been given opportunity to be present at such adjustment.

. . .

D. Nothing contained herein shall be construed to deny or restrict to any teacher rights he may have under Wisconsin laws or applicable civil service laws and regulations. The rights granted to teacners hereunder shall be deemed to be in addition to those provided elsewhere.

. . .

ARTICLE IV

RESPONSIBILITIES

. . .

B. In addition to the responsibilities that may be provided for elsewhere in this Agreement the following shall be observed:

1. The Employer shall not interfere with the rights of teachers to become members of teacher organizations; there shall be no discrimination, interference, restraint, or coercion by the Employer, its officers or representatives, against any teacher because of membership in teacher organizations.

. . .

ARTICLE VI

PRINCIPLES OF PERSONNEL RELATIONS

A. Principles of personnel relations to govern all Stanley-Boyd teachers.

. . .

3. Any complaints by a parent or guardian of a student directed toward a teacher shall promptly be called to the teacher's attention."

9. That when Neuenfelat delivered Keith's grievance Mohr went into anotner room to get a copy of the collective bargaining agreement and looked at some of the provisions contained therein, but he did not refuse to accept the grievance or make any statement about the contents of the grievance or any provisions of the collective bargaining agreement; that sometime thereafter, Mohr gave the grievance to Kermit Miller, Superintendent for the Respondent District, but did not give him any instructions as to what he should do with it particularly, as to whether he should give it to William Granos, High School Principal and Keith's Building Principal, or return it to Keith.

10. That thereafter on April 6, 1973, Mohr sent Keith a letter with copies to Neuenfelat and others, responding to the "grievance" which Keith had filed which read as follows:

> "The Board of Education received your letter of March 28, 1973 wherein you indicated that you have a grievance against the Board of Education of the Stanley-Boyd Area Schools, and therein you referred to the following sections of the master contract:
>
> Article III, Sections B and D
> Article IV, Sections B-1
> Article VI, Section A-3
>
> We can understand your desires to have the preliminary steps of the grievance procedure waived, however, the Board of Education feels that Article V, Rule 2, of the grievance procedure should be followed because as it is indicated therein, the primary purpose of the procedures set out under the grievance procedure article is to secure a solution at the lowest possible level. We feel that the steps as outlined, should be followed, not only so that we may be appraised of what your grievance consists of, but so that the teacher committee of the Board of Education can review the same without having to call the entire Board together for that purpose. In addition, the regular scheduled Board of Education meeting will be on April 10th, 1973 at 8:00 p.m., however, because we did not receive the grievance claim within the ten day working period as required by Article V, Rule 3-d [sic], we will be unable to schedule this matter at that meeting, as we have our agenda prepared for that evening.
>
> Trusting that we will hear from you in order to process your complaint and to hear what you consider is a grievance as soon as possible, we remain,"

11. That, after receiving Mohr's letter, Keith did not thereafter submit any grievance to Granos, or any other agent of the Respondent District; that, thereafter, sometime during May, 1973, an agreement was reached on a date for a non-renewal hearing before the Respondent Board, which was held on May 31, 1973; that Keith and his representative attended said hearing on May 31, 1973; that, thereafter, on June 26, 1973, Mohr sent Keith a letter which was received by Keith on June 27, 1973 and read as follows:

> "This is to inform you that a special meeting of the Board of Education was held on June 25, 1973, at 8:00 P.M. in the high school library for the purpose of reaching a decision on your 1973-74 teaching contract Non-Renewal hearing which was held on May 31, 1973. By an unaminous [sic] ballet [sic]--12 to 0--, the Stanley-Boyd Board of Education voted not to renew your 1973-74 teaching contract with the Stanley-Boyd Area Schools.

The decision reached was based on the following reasons which were presented at the hearing:

I. Not maintaining an acceptive learning atmosphere conducive to student enrollment in the elective class of physics
II. Breaks down administrative policy
III. Insubordination
IV. Accuses the administration of non-ethical practices
V. Failure to apply for teacher certification
VI. Miscellaneous complaints"

12. That, thereafter, Reith, who was presumably familiar with the terms of the collective bargaining agreement because he was the Association's President and Chief Negotiator, did not file any grievance or otherwise communicate in any way relevant herein, with any agent of the Respondent District until the complaint herein was filed on February 11, 1974; that the First Count of the complaint herein alleges that the Respondents have violated various provisions of the collective bargaining agreement, including the following which are in addition to those referred to in Reith's grievance of March 28, 1973:

"ARTICLE VI

PRINCIPLES OF PERSONNEL RELATIONS

A. Principles of personnel relations to govern all Stanley-Boyd teachers.

. . .

2. Personnel problems involving pupil, parent, or staff member are best resolved by channeling through teacher-principal-superintendent-Board of Education lines of communication.

. . .

ARTICLE VII

TEACHING CONDITIONS

. . .

I. The provisions of the Agreement and the wages, hours, terms, and conditions of employment shall be applied without regard to race, creed, religion, color, national origin, age, sex, marital status, or membership in an association with the activities of any employee organization. The Board and the Association pledge themselves to seek to extend the advantages of public education to every student without regard to race, creed, religion, sex, color, or national origin and to seek to achieve full equality of educational opportunity to all pupils.

. . .

K. Teacher evaluation procedure

. . .

b. Any written evaluation will be made in duplicate and the teacher is to receive one copy within five days.

. . .

L. Non-Renewal

a. No teacher shall be discharged, non-renewed, suspended, reduced in rank or compensation, or deprived of any professional advantage without being given a written statement of all the evidence as to why the action is being taken.

b. The teacher shall be given adequate notice of a right to a hearing, (within fifteen days) at which the teacher may respond to the stated evidence.

c. The hearing must be held if the teacher appears at the appointed time and place, and the right to be represented by counsel of the teacher's choice must be afforded.

d. The teacher and the board must be given the opportunity to call witnesses and submit evidence.

e. The right to cross-examine witnesses must be afforded to the teacher and the board."

13. That, after receiving the complaint herein on February 23, 1974, the Respondents filed a motion with the Examiner on April 1, 1974, asking that the complaint be dismissed because Complainant Keith had failed to exhaust the grievance procedure set out above before filing the complaint herein; that, by agreement between the parties, the hearing on the complaint which had previously been scheduled for April 24, 1974, was limited to taking evidence relevant to the disposition of the Respondents' motion before any further hearing is held on the complaint herein.

14. That the reason that Complainant Keith did not properly file a grievance in accordance with the established grievance procedure or exhaust that procedure with regard to any of the alleged violations of the collective bargaining agreement set out in Count One of the complaint herein, was his personal belief that it would be "futile" to do so and not because he was in any way prevented from doing so by the Respondent District or any of its agents.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. That Complainant Keith failed to exhaust the established grievance procedure and failed to comply with the provisions of Article V, Section B, Rule 3 of the collective bargaining agreement for reasons which are not excusable as a matter of law and therefore the Respondents' motion to dismiss with regard to the allegations contained in the First Count of the complaint herein ought to be granted.

2. That to the extent that the Second Count of the complaint herein alleges that the Respondents have engaged in conduct which, if proven, would constitute interference with Complainant Keith's rights under Section 111.70(2) of the Municipal Employment Relations Act even in the absence of a collective bargaining agreement, Count Two of the complaint herein ought not be dismissed.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDER

1. That the First Count of the complaint herein be, and the same hereby is, dismissed.

2. That to the extent that the Second Count of the complaint herein alleges conduct which, if proven, would constitute interference with Complainant Reith's rights under Section 111.70(2) of the Municipal Employment Relations Act even in the absence of a collective bargaining agreement, the motion to dismiss the Second Count of the complaint herein is denied.

Dated at Madison, Wisconsin, this 7th day of November, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint in this case is stated in two counts. The First Count alleges that Complainant Reith was non-renewed in a manner that violated a number of provisions of the collective bargaining agreement contained in Articles III, IV, VI and VII and set out in the Findings of Fact above. Included among those allegations was the allegation that the reasons for Reith's non-renewal "were based, totally or in part, upon his activities and actions as a member of the SBEA, its President at various times material hereto, or as its Chief Negotiator," in violation of the provisions of said agreement, and Section 111.70(3)(a)5 of the Municipal Employment Relations Act. The Second Count of the complaint incorporates by reference the allegations contained in the First Count and alleges that the conduct described therein constituted interference with Reith's Section 111.70(2) rights in violation of Section 111.70 (3)(a)1 of the Municipal Employment Relations Act. The Respondents' motion to dismiss does not differentiate between the allegations contained in the First Count and Second Count of the complaint and asks that the complaint be dismissed in its entirety.

RESPONDENTS' ARGUMENTS:

The Respondents contend that the complaint ought to be dismissed because Reith failed to avail himself of the established grievance procedure. The grievance presented by Neuenfeldt to Mohr on Reith's behalf on March 28, 1973, was presented less than ten working days prior to the next scheduled Board meeting. Mohr advised Reith by letter that this was so, and that the District objected to his failure to follow the established grievance procedure. The Respondents point out that Reith was advised that the Board expected to hear from him with regard to his grievance after filing it through the proper channels and contend that he has given no adequate reason to explain why he failed to do so. According to the Respondents, Reith made no effort to process his grievance through the established grievance procedure at any time thereafter until the complaint herein was filed.

According to the Respondents, the complaint ought to be dismissed because of the policy of the law which encourages voluntary settlement of disputes over the interpretation and application of the collective bargaining agreement, as reflected in Section 111.70(6) of the Municipal Employment Relations Act and applied in a number of Commission and court cases which hold that an employe must exhaust any available grievance procedure before bringing on action to enforce the terms of a collective bargaining agreement. In this regard, the Employer argues that even if Reith is found to have complied with the initial steps of the grievance procedure, he failed to exhaust that procedure by pursuing the grievance through the last step of the procedure which provides for mediation or fact finding.

COMPLAINANTS' ARGUMENTS:

The Complainants argue that Reith made a sufficient attempt to exhaust the contractual grievance procedure, when he submitted his grievance to Mohr on March 28, 1973. The Complainants point out that, among the agents of the District, only the Respondent Board had the power to grant the relief sought in his grievance and argue that it would have been "futile" for Reith to refile the grievance with Granos after receiving Mohr's letter of March 28, 1973.

The Complainants make the following specific arguments as to why the doctrine of exhaustion ought not be applied in this case:

1. The Board waived its right to raise the question of exhaustion by the language contained in Article III, Section D.

2. The language of Article V, Section A, Rule 1, excludes allegations of violations of Section 111.70 from the definition of a grievance.

3. Mediation and fact finding only apply if the Board "cannot resolve the grievance" and the Board has the power to resolve the grievance herein.

4. The fact that the collective bargaining agreement has no provision for binding arbitration ought to preclude the application of the doctrine of exhaustion.

5. The authorities relied on by the Respondents are distinguishable because:

(a) In the cases cited the Commission found that the grievant had failed to request reemployment or even file a grievance.

(b) Those cases occurred in the private sector where the right to strike is legal.

6. The doctrine of exhaustion ought not be applied where the allegation is based, in part, on a claim of interference.

DISCUSSION:

The Commission has consistently held that it will not consider the merits of a claim that an employer has violated the terms of the collective bargaining agreement which contains a procedure for attempting to resolve grievances alleging a violation of the agreement unless the party making the claim is first able to show that he has exhausted that procedure. 1/ In addition, if the agreement provides for binding arbitration of grievances which are not resolved in the grievance procedure, the Commission will not ordinarily assert its jurisdiction to entertain the merits of the claim. 2/ If the Complainant is able to show that he was frustrated in his effort to exhaust the grievance procedure, such as is the case where the union fails or refuses to represent him fairly, his failure to exhaust the grievance procedure is no bar to consideration of the merits of his claim. 3/

On the facts presented in this case, there is no question that Reith did attempt to file a grievance with regard to some of the alleged violations set out in the complaint herein. That grievance was apparently intended to be an "individual grievance" rather than a "formal grievance" processed by the Association. This difference is significant in two respects. First of all, the Complainant Association did not have the power to prevent Reith from pursuing his grievance since it was an "individual grievance." (There is no claim that the Association failed to fairly represent Reith in this case.) Secondly, any claim by Reith that he was frustrated in his effort to exhaust the grievance procedure must inevitably be premised on a claim that the Respondents prevented him from doing so.

1/ American Motors Corporation (7758) 11/66; Lake Mills Joint School District No. 1 (11529-A, B) 7/73, 8/73. See also Republic Steel Corp. v. Maddox, 379 US 650, 58 LRRM 2193 (1965).

2/ River Falls Co-op Creamery (2311) 1/50; Oostburg Joint School District No. 1 (11196-A, B) 11/72, 12/72, aff. Sheboygan Co. Cir. Ct. 6/6/74.

3/ American Motors Corporation (7488) 2/66; Northwest General Hospital (10599-B & 10600-B) 1/73. This is the same policy applied by the Federal courts. VACA vs. Sipes, 386 US 171, 64 LRRM 2369 (1967).

Although Keith's grievance was not filed at the proper step of the established grievance procedure, it is clear that it was filed within ten days. Even if there were no intervening holidays or vacation days between his receipt of Mohr's letter of March 14, 1973 and the delivery of his grievance by Neuenfeldt on March 28, 1973, the grievance was filed "within ten school days following the act or condition giving rise to the complaint". In fact, the apparent urgency reflected in the manner of its transmittal indicates that Keith, who had reason to be knowledgeable in such matters, was aware that the ten-day period was about to expire.

At the time that he accepted the grievance from Neuenfeldt, Mohr gave no indication that the grievance had not been properly filed. Because of the wording of the grievance itself, it is reasonable to assume that when Mohr went to get a copy of the collective bargaining agreement, he was doing so for the purpose of reading the provisions which were alleged to be violated, and not necessarily for the purpose of seeing if the grievance had been filed in compliance with the established procedure, which was evident since the grievance itself offered to "waive the preliminary steps of the procedure." 4/ Mohr's acceptance of the grievance and failure to return it immediately to Neuenfeldt or Keith, might be taken as an acceptance of Keith's offer to "waive the preliminary steps of the grievance procedure" if it were not for Mohr's letter of April 6, 1973.

While it is understandable from Keith's point of view why he wanted to waive the preliminary steps of the grievance procedure, it is also understandable why the Respondent Board refused to agree to do so. In his letter of April 6, 1973, Mohr indicated that the Board was unwilling to waive the preliminary steps of the grievance procedure which would deprive it of the benefit of the information that might be developed as a result of processing the grievance through the established procedure as well as the additional time that it would have for considering the merits of the grievance. Under the provisions of the first sentence of Section D and Section E of the grievance procedure, the Board was obligated to consider the grievance at its next meeting which was scheduled for April 10, 1973, and answer the grievance ten days later. Under the circumstances, the Board's insistence that Keith follow the established procedure and its reliance on its right to the benefit of information developed in the grievance procedure, as well as "not less than ten working days" notice that the grievance was going to be presented to the Board was understandable.

The Complainants would have the Examiner find that Mohr intentionally held on to Keith's grievance until it was "too late" to file it with Granos, and thereby frustrate Keith in his effort to exhaust the grievance procedure. The facts simply do not support this argument. First of all, it is not reasonable to expect that Mohr would have acted on the requested waiver without first consulting with other members of the Board or Administration. The record also discloses that the Board sought the advice of its attorney throughout the processing of the non-renewal action against Keith. Mohr's letter clearly indicated that the Board's objection was to Keith's attempted waiver of its rights and gave no indication that it intended to claim that Keith had exceeded the ten-day limit. On the contrary, the letter invited Keith to file his grievance in accordance with the established procedure and he never did so. If Keith had filed

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4/ Although the letter was written as if the preliminary steps of the grievance procedure could be waived unilaterally by the Grievant, it is obvious for reasons alluded to in Mohr's subsequent letter that the provisions created rights for the Board which could not be waived unilaterally.

his grievance with Granos as suggested, and the District had raised the question of Keith's compliance with the ten-day time limit, that question, which is one of procedural arbitrability, could have been resolved as part of Keith's grievance. Because Mohr accepted the grievance, and because the Board held onto Keith's grievance for seven school days before advising him that it was unwilling to waive the preliminary steps of the grievance procedure, the Board would obviously be in a poor position to argue that those seven days should be counted against Keith for purposes of the ten-day requirement.

Keith testified that his reason for not filing his grievance with Granos after receiving Mohr's letter was because it would be "futile" to do so, since neither Granos nor Miller was in a position to grant the relief sought. 5/ This was the same reason Keith gave for attempting to waive the preliminary steps of the grievance procedure in the first place, and did not, in any way, relate to the ten-day time limit. In view of the fact that Keith was specifically advised by Mohr that he should process his grievance through the established grievance procedure if he wanted the Board to consider his grievance, his failure to do so at any time thereafter gave the Respondents every reason to believe that he had dropped his grievance in accordance with the provisions of Article V, C, Rule 3.

When the Board later held a hearing on the question of Keith's non-renewal, he failed to file any grievance alleging that the hearing in that case was not in accordance with the agreement. The Complainants' attempt to justify Keith's failure to file a grievance with regard to that alleged violation on the same basis, that is, that it would have been "futile" to do so, since the Respondent Board had already voted not to renew his contract on two separate occasions. That argument assumes that Keith would not have been able to persuade the Board that it had violated his rights under the agreement as alleged (without regard to the merits of reasons for the non-renewal) and also assumes that the agreed-to final step of mediation or fact finding by an outside neutral would be useless because the mediator or fact finder's recommendations would not be binding on the Board. This premise is not only contrary to the apparent intent of the parties by agreeing to the grievance procedure, but flies in the face of the statutory language contained in Section 111.70(6) of the Municipal Employment Relations Act which is reflected in the Commission's exhaustion and deferral policies and reads as follows:

> "(6) DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter."

5/ The Transcript at page 36 reads:

> "Q And at the bottom of that particular letter there is a request to you indicating that they would like to hear from you further. Why didn't you respond?
>
> A Well, I felt that there wasn't much use to respond to this letter because first of all Mr. Granos is not in a position to alter the non-renewal of my contract and neither was Mr. Miller. They were simply agents of the Board and they cannot act to change the non-renewal so I felt that was futile to go back to the first two steps of the grievance procedure and I had already stated in the grievance that I waived those preliminary steps of the grievance procedure because there wasn't any use to go through them anyway." (Emphasis added)

Whether Keith's failure to pursue his grievance with regard to the Respondents' alleged violations of those provisions of the collective bargaining agreement set out in his letter of March 26, 1973, and his failure to file a grievance with regard to the Board's alleged violation of the provisions of Article VI and Article VII set out in the complaint herein is viewed as a failure to exhaust the established grievance procedure or evidence of lack of procedural viability under the terms of the agreement itself, the result is the same. Keith sat on his rights under the collective bargaining agreement from the time of his non-renewal in the Spring of 1973 until February 11, 1974, when the complaint herein was filed. On the evidence presented, it is clear that Keith made an inadequate effort to avail himself of the established grievance procedure and that his reason for failing to avail himself of that procedure was his own assessment of the value of those procedures rather than any misconduct on the part of the Respondents. In addition, on the question of procedural viability, it is clear that the alleged violations contained in the complaint herein are untimely under Article V, Section C, Rule 3.

With regard to the Complainants' claim that all the allegations contained in Count One of the complaint herein are excluded from the definition of a grievance, it should be observed that such a construction of the provision in question would totally negate that portion of the definition which states that a grievance includes a complaint "that there has been . . . a violation, misinterpretation or inequitable application of any of the provisions of this agreement." A more plausible interpretation of the exclusion in question would be that it refers to actions of the Board, which are reviewable by administrative agencies or the courts even in the absence of a collective bargaining agreement, such as those discussed below.

The argument that the final step of the grievance procedure, i.e., mediation or fact finding, does not apply to this situation since the Respondent Board has the power to resolve the grievance, likewise involves an interpretation of the provision in question, which would render it meaningless. Such an interpretation would mean that only those grievances which were beyond the power of the Respondent Board to remedy would be appropriate for that step of the grievance procedure.

The claim that the doctrine of exhaustion is inapplicable to this case because the collective bargaining agreement contains no provision for binding arbitration is without merit since the Commission has never made such a distinction, and has expressly held to the contrary. 6/ Similarly, the Complainants' arguments which attempt to distinguish this case from prior Commission cases is without merit. Although Keith did attempt to secure reemployment, his failure to properly follow the established grievance procedure not only constituted a failure to exhaust the grievance procedure, but also affected the procedural viability of his claims. The fact that public employes do not have the legal right to strike is no basis for distinguishing this case from prior Commission cases since the right sought to be asserted in the private sector cases is the same right that is sought to be asserted herein, and that is the peaceful adjudication of the question of compliance with the terms of a collective bargaining agreement without regard to the legality or illegality of strikes. The statuory intent was to provide a peaceful means for enforcing the terms of a collective bargaining agreement including the provisions establishing a procedure for enforcing its terms.

6/ See the Commission cases cited in Footnote 1, supra.

CLAIM OF INTERFERENCE:

To the extent that Count Two of the complaint alleges that the violations of the collective bargaining agreement alleged in Count One also violate rights that Keith enjoys under the provisions of Section 111.70(2) of the Municipal Employment Relations Act even in the absence of a collective bargaining agreement, Count Two ought not be dismissed. For example, it is alleged in paragraph 10 of the complaint that the reasons for the non-renewal "were based, totally or in part, upon his activities and actions as a member of the SBEA, its President at various times material hereto, or as its Chief Negotiator." Such conduct on the part of the Respondents, if proven, would not only constitute a prohibited practice within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act as alleged, but would constitute a violation of Section 111.70(3)(a)3 as well. There is nothing in the collective bargaining agreement indicating that the parties attempted to waive the Complainants' right to file a prohibited practice complaint in exchange for his right to grieve such conduct, and the provisions of Article III, Section D and Article V, Section A, Rule 1 lead to the opposite conclusion.

The legislature has established a one-year time limit for the filing of complaints in Section 111.07(14) of the Wisconsin Statutes and the complaint herein alleges conduct occurring within one year prior to the filing of the complaint. The Commission has never held that a complainant is precluded from filing a complaint of unfair labor practices or prohibited practices merely because the complainant also had the right to pursue his allegation under the provisions of a collective bargaining agreement when the acts complained of would constitute unfair labor practices or prohibited practices, even in the absence of a collective bargaining agreement. The law is clearly to the contrary. 7/

For the foregoing reasons, the Examiner has concluded that the motion to dismiss ought to be granted except as to so much of the Second Count as alleges that the Respondents have engaged in conduct which, if proven, would constitute interference with Complainant Keith's rights under Section 111.70(2) even in the absence of a collective bargaining agreement.

Dated at Madison, Wisconsin, this 7th day of November, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By /George R. Fleischli
George R. Fleischli, Examiner

7/ See City of Milwaukee (13093) 10/74 and cases cited therein. See also Merrimack Mfg. Co., 31 NLRB 900, 8 LRRM 170 (1941) and subsequent NLRB cases cited in Morris, The Developing Labor Law (BNA 1971) at page 495.

Under the NLRB Collyer policy which is intended to encourage deferral of such unfair labor practices charges to the arbitration process where possible, the NLRB requires that the party seeking deferral must be willing to waive any arguments concerning procedural arbitrability. See Collyer Insulated Wire, 192 NLRB 150, 77 LRRM 1931 (1971) and "Revised Guidelines Issued by the General Counsel of the NLRB for use of Board Regional Offices in Cases Involving Deferral to Arbitration" 83 LRRM 42 (1973).