STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREGORY RESCH, Complainant,	:	Case XXV No. 18738 MP-432 Decision No. 13283-A
vs.	:	
CITY OF MENASHA, WISCONSIN (POLICE DEPARTMENT), Respondent.	:	

Appearances:
Krizenesky and Hill, Attorneys at Law, by Mr. James R. Hill, for the complainant.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Mark F. Vetter, for the respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named complainant having filed a complaint with the Wisconsin Employment Relations Commission on January 16, 1975, alleging that the above-named respondent has committed prohibited practices within the meaning of sec. 111.70(3)(a)1, 3, 4 and 5, Stats; hearing on said complaint having been held before an examiner of the commission on February 17, 1975; at said hearing the complaint orally having been amended to delete the allegation of a violation of sec. 111.70(3)(a)3, Stats., and to show that the alleged violation of sec. 111.70(3)(a)1, Stats., is wholly derivative of the violation of sec. 111.70(3)(a)4, Stats.; the commission on January 7, 1977, having ordered that this case be removed from said examiner and transferred to the commission; and the commission having reviewed the evidence and arguments and briefs of counsel, and being fully advised in the premises, makes and files the following

FINDINGS OF FACT

1. Complainant is an individual who was employed as a police officer for the respondent for the period 1948 through December 31, 1974, by which time he had obtained the rank of sergeant, and at all material times was a member of a collective bargaining unit exclusively represented by Menasha Professional Policemen's Association, hereafter referred to as "association".

2. Respondent is a municipal employer which operates a police department.

3. At all material times respondent participated in two different retirement programs affecting its police officers, one pursuant to the terms of ch. 41, Stats., and the other pursuant to the terms of sec. 62.13, Stats., and complainant was included within the plan under ch. 41, Stats.

4. On June 4, 1974, respondent's common council passed an ordinance providing that whereas persons covered by the retirement plan under ch. 41, Stats., must retire at age 55, persons covered by the retirement plan

under sec. 62.13, Stats., shall retire at age 62, with provision for extensions to age 65, and said ordinance was amended by the common council on June 18, 1974, to become effective as to the plan under sec. 62.13, Stats., at the end of the quarter in which the first eligible employe reached his 65th birthday.

5. On August 2, 1974, the association, through Attorney F. David Krizenesky, wrote the respondent a letter, addressed to the attention of its mayor, proposing that the then current collective bargaining agreement be amended to require police officers covered by the plan under ch. 41, Stats., to retire at age 55 without any right to an extension. Receiving no response to his letter, Mr. Krizenesky a few days later called the mayor to ask for the respondent's position, and the mayor replied by asking what the respondent would get in return for agreeing to the association's proposal. Mr. Krizenesky replied that such matters could be handled in negotiations. No negotiations in regard to the association's proposal occurred in the year 1974 between respondent and the association.

6. On September 17, 1974, the common council, on the basis of a recommendation of September 16, 1974, of its personnel committee, passed a motion that no extension of employment to protective occupation personnel, which included police officers, be granted at that time beyond the calendar quarter of attaining age 55.

7. On September 23, 1974, complainant by letter asked the respondent's chief of police to extend the age 55 retirement requirement in his case because of inflationary pressures, and further asked that if no exception be given to him no exception be given to others. On October 18, 1974, the personnel committee of the respondent directed that a letter be written to complainant indicating the common council's action on retirement of personnel at age 55. On October 23, 1974, respondent's city clerk wrote complainant a letter stating that the personnel committee had determined that the council's action of September 17, 1974, would prevail, i.e., that no extensions of employment would be granted at that time beyond the calendar quarter of attaining age 55.

8. The respondent and the association were parties to a collective bargaining agreement effective for the calendar years 1974 and 1975 which contained a grievance procedure culminating in final and binding arbitration; said grievance procedure constituted complainant's exclusive remedy for violations of the collective bargaining agreement; complainant's allegation, that respondent's imposition of a mandatory age 55 retirement violated Article III of the collective bargaining agreement, constituted a grievance within the meaning of the collective bargaining agreement; and complainant failed to file or otherwise make such a grievance in respect to said allegation.

9. The said collective bargaining agreement also contained the following provisions:

"Article II - Recognition

... the City recognizes the Kenosha Professional Policemen's

"B. 'All officers of the Bargaining Unit are entitled to receive the benefits of this Contract so that in each paragraph of the agreement making reference to policemen will be modified to include all officers of the Bargaining Unit.'"

"Article III - Management Rights

"The City possesses the sole right to operate the Menasha Police Department and all management rights repose in it, subject only to the provisions of this agreement and applicable law. These rights which are normally exercised by the Chief of Police, include but are not limited to the direction of all operations of the Menasha Police Department, the establishment of reasonable work rules, the discipline of employees pursuant to Section 62.13, Wisconsin Statutes, the assignment and transfer of employees within the department, and the determination of the number and classifications of employees needed to provide the services of the department. These rights shall be exercised in a reasonable manner and shall not be used to discriminate against any employees."

On the basis of the foregoing Findings of Fact, the commission makes and files the following

CONCLUSIONS OF LAW

1. Complainant is not a party in interest within the meaning of sec. 111.07(2)(a), Stats., or ERB sec. 12.02(1), Wis. Admn. Code, in respect to his allegation that the respondent, by unilaterally imposing a mandatory age 55 retirement, breached its duty to bargain in violation of sec. 111.70(3)(a)4 and 1, Stats.

2. Since complainant's contention that the respondent, by imposing a mandatory age 55 retirement discriminated against him in violation of Article III of the collective bargaining agreement, is a grievance within the meaning of the collective bargaining agreement, and since complainant failed to exhaust his exclusive remedies provided in said grievance-arbitration provisions of the collective bargaining agreement and has failed to show a legally cognizable excuse for said failure, complainant has shown no entitlement to a decision by the commission on the merits of his allegation that respondent so violated said provision of the collective bargaining agreement.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the commission makes and files the following

ORDER

The complaint herein shall be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of February, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Charles D. Hoornstra, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PLEADINGS

On January 16, 1975, the complainant Gregory Resch filed a complaint with this commission alleging that his employer, the respondent City of Menasha, had committed certain prohibited practices by requiring him to retire as a police officer on December 31, 1974, the end of the quarter in which he had attained the age of 55 years. The complaint alleges that, in adopting and enforcing its policy relative to the retirement ages of police officers, the respondent acted unilaterally and failed and refused to bargain collectively in violation of sec. 111.70 (3)(a)4, Stats.; that through individual bargaining 1/ and in treating other officers in the bargaining unit differently, i.e., in permitting them to work beyond the quarter in which they became 55, respondent violated sec. 111.70(3)(a)1, 3 and 4, Stats.; and that complainant's involuntary retirement violated the collective bargaining agreement, and, therefore, violated sec. 111.70(3)(a)5, Stats. He prays for reinstatement and to be made whole.

The complaint was orally amended at the hearing on February 17, 1975, to delete the allegation that the respondent violated sec. 111.70(3)(a)3, Stats. Further, at the hearing counsel for the complainant advised that the alleged violation of sec. 111.70(3)(a)1, Stats., is derivative of the alleged violation of sec. 111.70(3)(a)4, Stats.

Respondent filed its answer on February 10, 1975, and, with few exceptions, made a general denial. At hearing, respondent interposed the defense that this matter should be deferred to final and binding arbitration under the applicable collective bargaining agreement.

The association did not appear in these proceedings, although its attorney appeared as a witness for the complainant.

The final brief was received May 12, 1975. On January 7, 1977, the commission ordered that this case be removed from the originally appointed examiner and transferred to the commission to make and file findings, conclusions and an order.

DISCUSSION OF THE EVIDENCE

Complainant first was hired as a police officer in 1948, and worked continuously until his retirement as a sergeant on December 31, 1974. At all material times he was within the collective bargaining unit represented by Menasha Professional Policemen's Association, hereafter "association". The association and the respondent had executed a collective bargaining agreement effective for the years 1974 and 1975.

The collective bargaining agreement itself does not impose a mandatory retirement age. The agreement does provide, however, at Article IV, sec. J:

> "* * * 'The City agrees to pay the employee's contribution to the Wisconsin Retirement Fund as provided in Chapter 41 (formerly 66.90) of the Wisconsin Statutes in effect January 1, 1974.'"

1/ Complainant did not pursue this allegation, so it is not discussed.

During negotiations for this agreement there was no discussion relative to retirement, except to make the noted statutory numbering change at Article IV, sec. J.

Although the collective agreement does not impose a mandatory retirement age, the parties appear to agree that the respondent has discretion to impose a retirement age as to those of its officers covered by the plan provided for in sec. 62.13, Stats., hereafter referred to as the "62.13" plan. 2/ The parties disagree, however, as to whether officers covered by the retirement plan under ch. 41, Stats., hereafter referred to as the "ch. 41" plan, must retire at age 55 or whether it also is discretionary with the respondent. 3/ In any event, the "normal retirement date" under the ch. 41 plan changed, by the terms of the statute itself, from age 60 to 55. This change became effective June 30, 1974, 4/ by enactment of the legislature in ch. 214, Laws of 1971. Complainant was covered by the ch. 41 plan.

On June 4, 1974, the Menasha common council passed an ordinance effective June 4, 1975, pursuant to a May 15, 1974, recommendation of the joint police and fire pension board, 5/ stating that, whereas the

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2/ Section 62.13(9)(c)3, Stats., provides: "Service. A member of the department who has served 22 years or more may apply to be retired on motion of the board, except that a member joining the police department after January 1, 1940, must also have attained the age of 55 years. * * *"

3/ Section 41.11, Stats., provides: "Compulsory retirement; annuities. (1) Compulsory retirement. Any participating employe . . . who has reached his normal retirement date on the effective date for his employer shall be retired at the end of his first calendar quarter year as a participating employe and any participating employe . . . who reaches his normal retirement date shall be retired at the end of the calendar quarter year in which such date occurs, unless, in either case, his employment is continued by his employer or appointing authority.

"* * *."

4/ Section 41.02(23), Stats., provides: "'Normal retirement date' means the day on which a participant attains the age of a) 60 years if he is or was a protective occupation participant; * * * but after June 30, 1974, normal retirement date for each protective occupation participant means the day on which such participant attains the age of 55 years * * *."

5/ The pension board's minutes show:

"After a lengthy discussion, a motion was made by the Police Chief Rappert and seconded by Sergeant Porath that all protective occupation personnel under Wisconsin Statutes 62.13 (City Pension Fund) will retire at the end of the quarter in which age 62 is attained. Age may be extended on a year to year basis in which the employee reaches the end of the quarter of their 65th birthday, but only upon certification of his chief that he can dully [sic] perform the duties for which he is employed and can pass a rigid physical examination by the city physician and city nurse. The city physician, city nurse and chief must concur in order for extended employment to be granted and an ordinance be recommended to that affect [sic].

"It was therefore recommended that the proposed ordinance on the above decision take affect [sic] one year from date of passage."

ch. 41 plan mandates retirement of police officers at age 55, officers under the 62.13 plan shall retire at age 62, with provision for extensions to age 65. 6/ On June 18, 1975, the common council amended its June 4, 1974, ordinance to make the effective date "in the end of the quarter in which the first eligible employee reaches his 65th birthday."

On August 2, 1974, the association, through Attorney F. David Krizenesky, wrote the respondent a letter, drawn to the attention of its mayor, asking that the collective bargaining agreement be amended to require police officers under the ch. 41 plan to retire at age 55 without a right to an extension. The purpose of proposed amendment was to dispel any confusion

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6/ The ordinance provides:

> "* * *.
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> "WHEREAS, the City of Menasha is now operating under two separate pension funds and the City pension fund known as Chapter 62.13 fund is completely financed by the City of Menasha and not the State of Wisconsin and,
>
> "WHEREAS, the State Statute makes it mandatory for people in the Wisconsin Retirement Fund to retire at age 55 whether they are policemen or firemen. And,
>
> "WHEREAS, Menasha now has five people under the City pension fund and it is deemed in their best interest that they know in advance when their retirement commences,
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> "NOW, THEREFORE, The City of Menasha do [sic] ordain as follows:
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> "SECTION 1: All employees under Chapter 62.13 of the Wisconsin Statutes known as the City pension fund must retire at the end of the quarter in which they reach their 62nd birthday. In the event such employee desires to work beyond his 62nd year, he shall no less than 60 days prior to his birthday commencing with the age 62, submit a request to the Personnel Committee in writing. The Personnel Committee as expeditiously as possible will either grant or deny the applicant's desire to continue his employment, but only on the basic condition that the Chief of his department submits to the committee a recommendation in writing that he can adequately fulfill the duties normally assigned to him, plus recommendations from the City physician or a physician designated by the committee and the City Health Officer that such applicant is in a sound, robust, physical conditions. Said physical examination is to be paid by employee.
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> "SECTION 2: The applicant under Chapter 62.13 of the Wisconsin Statutes ~~and under the Wisconsin Retirement Fund~~* may have his employment extended on this basis year to year, but in no event may he continue his employment with the City of Menasha beyond the end of the quarter in which he reaches his 65th birthday.
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> "SECTION 3: This ordinance shall become effective one year from the date of its passage.
>
> "* * *."

*The record is silent as to who made this interlineation or when it was made.

in light of ambiguity in ch. 41, Stats., as to whether retirement at age 55 was mandatory. 7/ Receiving no response, Attorney Krizenesky called the mayor about the matter. The mayor asked what the respondent would get in return for acceding to the association's request. The matter was dropped with Krizenesky saying that these matters could be bargained.

On August 14, 1974, the personnel committee of the respondent met. The minutes show that the city attorney asked for an executive session to discuss the request by the police and fire unions for an age 55 retirement. The minutes do not expressly state whether that executive session occurred. 8/

On September 16, 1974, the personnel committee, which was principally responsible for discharging respondent's collective bargaining obligations, reviewed a letter of September 11, 1974, from a private law firm relative to the retirement of policemen and firefighters. The committee recommended that the common council give no extensions of employment "at this time" for those beyond the calendar quarter of attaining age 55. The common council adopted this recommendation on September 17, 1974.

On September 23, 1974, complainant, by letter, asked the police chief to extend the 55 retirement limit, citing his hardship from inflationary pressures. He further asked that if no exception was made in his case, that all future personnel be subject to the same ruling without exception. On October 18, 1974, the personnel committee resolved that a letter should be written to complainant "indicating recent Council action on retirement of executive personnel at age fifty-five." On October 23, 1974, the city clerk wrote complainant a letter saying that the personnel committee had determined that the council's action of September 17, 1974, would prevail, i.e., that no extensions of employment be granted at that time beyond the calendar quarter of attaining age 55. On December 17, 1974, the common council defeated a motion to delay the age 55 retirement rule for one year.

It was stipulated that there was at least one other police officer, age 59, under the 62.13 plan who is eligible for retirement but for whom there were no plans that he retire. 9/

7/ Attorney Krizenesky's letter states: "It is the unit's position that there is no requirement of retirement at age 55 even though Chapter 41 would lend credence to that position. In light of the ambiguity and so that there will be no confusion in the future the union would propose that all protected personnel covered by Chapter 41 of the Statutes be required to retire at age 55, with no exceptions, and with no provision for a year to year renewal. Otherwise stated, at age 55 retirement for Chapter 41 employees is required regardless of the employee's desire to continue on and/or the City's request that he continue on."

8/ The relevant portion of the minutes states: "Attorney Steffens requested an executive session of this committee following the Council Meeting on Tuesday evening to discuss the request by both Police and Fire Unions for an age 55 retirement for protective personnel."

9/ Complainant's attorney also proposed to stipulate that two firefighters were eligible for retirement under the 62.13 plan but still were employed. Respondent's counsel responded only that he did not see the materiality of such a stipulation, and he did not stipulate that it was true. Tr. 19-21.

THE ISSUES OF BREACH OF THE DUTY TO BARGAIN AND COMPLAINANT'S STANDING

Positions of the parties

Complainant argues that respondent never bargained about a mandatory retirement age, never responded to Attorney Krizenesky's letter on August 2, 1974, requesting such negotiations on behalf of the association, and instead unilaterally adopted a policy requiring retirement at age 55. Complainant points to the following evidence as showing respondent's knowing refusal to bargain: (1) On August 14, 1974, the personnel committee was asked by the city attorney to go into executive session "to discuss the request" by the association "for an age 55 retirement"; (2) On September 11, 1974, a private law firm by letter specifically advised respondent not to bargain at that time over mandatory retirement; and (3) on September 17, 1974, the common council adopted the September 16, 1974, recommendation of the personnel committee that no extensions beyond age 55 be given at that time. Complainant says there never was any bargaining on mandatory retirement, and the discussions during negotiations concerning only the change in statutory numbers further evidences this fact. Further, complainant argues that the association never waived its right to bargain, the zipper clause 10/ being too general and not sufficiently specific to constitute a waiver over a mandatory retirement age.

Respondent, on the other hand, argues that the association waived its right to bargain over a mandatory retirement age in two ways: (1) it had every opportunity to raise the issue during negotiations, and the change in statutory numbering relative to the ch. 41 plan evidences that opportunity; and (2) the zipper clause constitutes a waiver. The statutory change in the normal retirement date from age 60 to age 55, effective June 30, 1974, could not have surprised the association inasmuch as the legislature had enacted said provision years earlier. 11/ Respondent should not be blamed for the association's failure during negotiations to deal with the coming statutory change in the normal retirement date. By law, respondent argues, the normal retirement date is mandatory absent specific contrary action by respondent, and respondent's ordinance merely incorporated the statutory change.

Wholly apart from the association's waiver, respondent contends the commission cannot adjudicate the alleged refusal to bargain for two reasons: (1) the commission should defer to the final and binding arbitration provisions of the collective bargaining agreement because

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10/ Article XV of the agreement is headed "Entire Memorandum of Agreement" and provides:

> "This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supercede any of its provisions. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement."

11/ Ch. 214, Laws of 1971, was published March 30, 1972.

the management rights clause 12/ authorized respondent's action relative to a mandatory retirement; and (2) complainant has no standing to proceed against respondent for refusing to bargain with the association.

Complainant argues that deferral would be inappropriate because respondent's offer to arbitrate came at the hearing, and therefore was untimely, and respondent, by reserving the right to raise objections of procedural arbitrability before the arbitrator, has not shown the requisite willingness to arbitrate.

Complainant claims standing as a "party in interest" within the meaning of sec. 111.07(2)(a), Stats., 13/ and ERB sec. 12.02(1), Wis. Admn. Code., 14/ and relies on William E. Moes v. City of New Berlin (7293), 3/66. Respondent, on the other hand, says New Berlin is inapposite because it preceded a municipal employer's duty to bargain, and that to permit an employe to sue on a refusal to bargain theory would emasculate the nature of the collective bargaining relationship and, in particular, the exclusivity of the association as the bargaining agent.

Discussion

The commission agrees with respondent that complainant, as an employe within the collective bargaining unit, has no standing to complain of respondent's refusal to bargain with the association as the exclusive majority collective bargaining representative. Respondent's duty to bargain is owed to the association, not to the complainant. Indeed, as respondent correctly argues, respondent may not bargain with an individual employe. 15/

New Berlin, on which complainant relies, is inapposite. There, an individual employe alleged that the employer's refusal to bargain constituted an interference with his right to associate with a union. The commission rejected the argument. The employe had standing to proceed, however, not because he was alleging a refusal to bargain, but because he was alleging an unlawful interference. Moreover, at that time sec. 111.70(4)(h)1, Stats., provided that "any individual . . . is a proper party to proceedings" to prevent prohibited practices. That provision was repealed by the same legislative act 16/ which imposed on municipal employers the duty "to bargain collectively with a representative of a majority of its employes." Section 111.70(3)(a)4, Stats. (Emphasis added.) Significantly, the legislature made no change in the "party in interest" language in sec. 111.07(2)(a), Stats.

12/ Quoted in full in the Findings of Fact, paragraph 9.

13/ Section 111.07(2)(a), Stats., provides: "Upon the filing with the commission by any party in interest of a complaint in writing . . . charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employe, or their representative, shall be made a party upon application. * * *"

14/ ERB sec. 12.02(1) provides: "A complaint . . . may be filed by any party in interest. * * *"

15/ See Madison Joint School Dist. No. 8 v. WERC, 69 Wis. 2d 200, 211-212, 215, 231 N.W. 2d 206 (1975), reversed on other grounds, ___ U.S. ___, 97 S. Ct. 421, ___ L. Ed. 2d ___.

16/ Ch. 124, Laws of 1971.

Accordingly, the commission concludes that only a collective bargaining representative is a party in interest in a proceeding against an employer for refusing to bargain. Complainant suggests that if the association is deemed a necessary party either the commission or the respondent could add the association as a party. There is no reason, however, to expect the respondent to aid the complainant in winning this case. Furthermore, it would be inappropriate for the commission to do so, even if it had the power to compel the association to proceed against the respondent. If complainant believes the association, by failing to resist respondent's conduct, has breached its duty of fair representation to complainant, or otherwise interfered with his rights or discriminated against him wrongfully, allegations which complainant has avoided, the remedy for such wrongs does not lie in an action against the employer for refusing to bargain with the association. 17/

Because of this disposition, it is unnecessary to discuss the parties' arguments as to whether respondent breached its duty to bargain with the association, deferral to arbitration or the association's alleged waiver.

For these reasons the commission has dismissed the complaint in respect to the allegation that respondent breached its duty to bargain by unilaterally adopting and imposing a mandatory retirement age on complainant.

THE ISSUES OF BREACH OF CONTRACT AND DEFERRAL TO ARBITRATION

Positions of the parties

Respondent claims that the management rights clause of the collective bargaining agreement, quoted in full in paragraph 9 of the Findings, authorized its unilateral imposition of a mandatory age 55 retirement. Complainant, on the other hand, contends that such imposition is discriminatory because the employes under the 62.13 plan were not also required to retire at age 55, and that such discrimination violates the final sentence of the management rights clause, which provides:

> "These rights shall be exercised in a reasonable manner and shall not be used to discriminate against any employees."

Respondent counters that its age 55 requirement is not discriminatory since it applied to all persons under the ch. 41 plan, and that comparison to persons under the 62.13 plan is inappropriate since each plan is a separate bona fide retirement plan authorized by the legislature.

Respondent further contends that the commission should defer the question of breach of contract to the arbitration process included in the collective bargaining agreement. Complainant replies that the

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17/ Compare Metal Workers Union (Hughes Tool Co.), 147 NLRB No. 166, 56 LRRM 1289 (1964) where the federal board held an individual could proceed against his union for refusing to process his grievance because of the individual's race, such a refusal constituting unlawful interference, discrimination and a refusal to bargain on the part of the union. Although the board adopted the examiner's obiter that an employer's duty to bargain also is owed to employes, little weight is attached to that obiter because of the board's pro founa adoption and the well reasoned dissent of two board members. 56 LRRM at 1300-1301, esp. n. 43.

deferral is inappropriate since respondent waited until the hearing to raise the issue of deferral.

Discussion

The material provisions of the grievance-arbitration provisions of the agreement are as follows:

"Article VII - Grievance Procedure

"'A. Definition of Grievance: A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute of any employee or group employees or the City concerning this contract.

"* * *.

"D. Steps in Procedure:

"Step 1: The grievant, either alone or with one (1) Association representative, shall present his grievance in writing to the Captain within fifteen (15) calendar days after he knew the cause of such grievance or the grievance shall be deemed to have been waived. * * *.

"Step 2: If the grievance is not settled at the first step, the grievant with one (1) Association representative, within five (5) calendar days after the decision of the Captain, shall present his grievance to the Police Chief. * * *.

"Step 3: If the grievance is not settled in the second step, the grievant, with one (1) Association representative within five (5) calendar days after the decision of the Police Chief, may refer his written grievance to the Mayor. * * *.

"Step 4: If the grievance is not settled in the third step, any grievance which . . . relates only to the interpretation of this contract shall be submitted to the Personnel Committee. * * *.

"* * *.

"ARTICLE VIII - Arbitration

"'A. Time Limits: If a satisfactory settlement is not reached in Step 3 or Step 4 of the grievance procedure, depending upon the nature of the grievance, the employee and the Association must notify the City in writing within five (5) calendar days after the decision of either the Mayor or the Personnel Committee, whichever is applicable, that they intend to process the grievance to arbitration or the appeal shall be deemed to have been waived.

"B. Arbitration Board: Before the initial arbitration hearing, the City and Association shall each select one (1) member of the Arbitration Board, and the two members selected by the parties shall use their best efforts to select a mutually agreeable chairman of the Arbitration Board. If the City and Association are unable to agree on a chairman within ten (10) days, either party may request the Wisconsin Employment Relations Commission to prepare a list of five (5) impartial arbitrators. The Association and the City shall then alternately strike two (2) parties each

on the slate with the party filing the grievances exercising the first and third strikes. * * *.

"C. Arbitration Hearing: * * *. The Arbitration Board selected or appointed shall meet with the parties as soon as a mutually agreeable date can be set to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the Arbitration Board shall render a written decision as soon as possible to both the City and the Association which shall be final and binding upon both parties. (Emphasis added.)

"D. * * *.

"E. Decision of Arbitration Board: The decision of the Arbitration Board shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The Arbitration Board shall not modify, add to or delete from the express terms of the Agreement.

"* * *."

Complainant's contention here that respondent breached the management right's clause is a grievance within the meaning of Article VII, A. It involves a controversy concerning the contract. Said controversy is unadjusted within the meaning of that paragraph as evidenced by complainant's request of September 23, 1974, to the police chief to extend the 55 retirement and the respondent's refusal to do so through the action of the personnel committee of October 18, 1974, and the city clerk's letter to complainant of October 23, 1974. By the terms of Article VII, D, and Article VIII, complainant was required to process his unadjusted grievance through the steps and procedures of the grievance-arbitration process contained therein, culminating in an arbitration award which would be final and binding on the parties.

A grievance-arbitration procedure is presumed to constitute a grievant's exclusive remedy, and this presumption may be overcome only by express language. See Mahnke v. WERC, 66 Wis. 2d 524, 529, 225 N.W. 2d 617 (1975). There being no such express language here, grievant's sole remedy for the alleged contract violation lay in said grievance-arbitration procedure.

Respondent is not precluded from raising this defense because it raised it at the hearing rather than in its responsive pleading. In Mahnke the court said, 66 Wis. 2d at 533:

> "* * *We believe the employer is obligated in the first instance by way of an affirmative defense to allege that the contract grievance procedure has not been exhausted. If this fact has been established by proof, admission or stipulation, the employee cannot prosecute his claim unless he proves the union breached its duty of fair representation to him."

While ordinarily affirmative defenses are included in responsive pleadings, the supreme court's language does not mandate that practice, and its acceptance of establishing the facts by admission or stipulation evinces tolerance of relaxation from the ordinary practice. Further, generally speaking, the courts are without power to proscribe procedures for agency practice. See State ex rel. Thompson v. Nash, 27 Wis. 2d 183, 189-190. Complainant has shown no prejudice from the timing of presentation of this defense and did not ask for a continuance. Since the legislature has adopted a policy favoring voluntary methods of settling disputes through the collective bargaining process, see

sec. 111.70(6), Stats., it would be inappropriate to preclude respondent from making this defense.

Since the dialogue of record between counsel and the briefs here show that the grievance-arbitration procedures were not attempted to be exhausted, the burden switched to the complainant to prove that the association breached its duty of fair representation toward him. Mahnke, supra. There is no allegation that the union breached that duty nor proof which would support such a finding. 18/

Accordingly, because the complainant failed to exhaust or to attempt to exhaust his exclusive remedies under the collective bargaining agreement, and has failed to show any legally cognizable excuse therefor, the complaint must be dismissed in respect to its allegation that respondent breached the collective bargaining agreement.

Dated at Madison, Wisconsin this 16th day of February, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Charles D. Hoornstra, Commissioner

18/ The association's proposal that the agreement be amended to require persons like complainant under the ch. 41 plan to retire at age 55 does not, without more, establish the association's breach of its duty of fair representation, even though officers under the 62.13 plan were not so required. Cf. Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed. 2d 370 (1964). Moreover, the issue of the association's breach was not litigated here, and the commission is precluded by due process considerations from making a ruling thereon. See General Elec. Co. v. WERB, 3 Wis. 2d 227, 88 N.W. 2d 691 (1958).