STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT L. ALBRIGHT, CARL E. AUSTIN, LLOYD W. BRIGGS, MARVIN J. KAMMER, HAROLD P. KLEIN, ELLINGTON H. LANDSOWNE, KEITH F. LAWLER, RAYMOND A. MARTINSON, AND JAMES C. OLSON, Complainants, vs. CITY OF MADISON, LOCAL 311 OF THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS AFL-CIO, BOARD OF TRUSTEES OF THE FIRE PENSION FUND OF THE CITY OF MADISON, PAUL SOGLIN, HOWARD GALLAGHER, PAUL REILLY, ELDON MAGINNIS, PAUL G. McCALLUM, DARRELL FLEMING AND RICHARD HAACK, INDIVIDUALLY AND IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF TRUSTEES OF THE FIRE PENSION FUND OF THE CITY OF MADISON, AND CHARLES R. MERKLE, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 311 OF THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, Respondents.	Case XLVII No. 21058 MP-685 Decision No. 15079-D
OSCAR PETRY, Complainant, vs. CITY OF MADISON, and LOCAL 311 OF THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, Respondents.	Case XLIX No. 21185 MP-694 Decision No. 15171-C

Appearances:

Axley, Brynelson, Herrick & Gehl, Attorneys at Law, by Mr. Frank Bucaida and Mr. Ronald M. Trachtenberg, for Complainants Albright et al.

Jenswold, Studt, Hanson, Clark & Kaufmann, Attorneys at Law, by Mr. Bruce Kaufman and Mr. Gerald C. Opgenorth, for Complainant Petry.

Mr. William Jansen, Deputy City Attorney, for Respondent City of Madison.

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, for Respondent Union.

Boardman, Suhr, Curry & Field, Attorneys at Law, by Mr. Richard L. Olson and Ms. Rebecca A. Erhardt, for Respondent Pension Board.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Robert L. Albright, et al., having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on

November 30, 1976; and the Commission having appointed Thomas L. Yaeger to act as Examiner therein; and Oscar Petry having filed a complaint of prohibited practices with the Commission on December 30, 1976; and the Commission also having appointed the undersigned to act as Examiner therein; and the Examiner having on January 31, 1977 ordered both matters consolidated for hearing; and hearing on said complaints having been held at Madison, Wisconsin on January 5, 6 and February 7, 8 and 9, 1977, before the Examiner; and the parties having filed briefs by June 14, 1977; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainants Robert L. Albright, Carl E. Austin, Marvin J. Kammer, Harold P. Klein, Ellington H. Landsowne, Raymond A. Martinson and Keith F. Lawler, herein Albright et al., were at all times material hereto employed as firefighters by the City of Madison; that, said employes were included in the voluntarily recognized collective bargaining unit of all City of Madison Fire Department employes classified as firefighters, Fire Mechanic, Lieutenant and Captain; that said individuals were over the age of 55 years on or about December 30, 1976; that said individuals are participants in Section 62.13, Stats. pension fund; and that Complainants Lloyd W. Briggs and James C. Olson were at all times material hereto employed in positions classified above the rank of Captain and were not members of the aforementioned bargaining unit.

2. That Complainant Oscar Petry at all times material hereto was employed as a firefighter by the City of Madison; that Petry was over age 55 on December 30, 1976; and that he is a participant in Chapter 41, Stats., Wisconsin Retirement Fund.

3. That Respondent City of Madison, herein City is a municipal corporation with its offices at the City-County Building in Madison, Wisconsin and that Paul R. Soglin was Mayor of said City at all times material hereto.

4. That Local No. 311, International Association of Firefighters, herein Union, is the voluntarily recognized exclusive bargaining agent for Firefighters, Fire Mechancis, Lieutenants and Captains employed in the City's Fire Department; and that Charles R. Merkle was at all times material hereto President of said Union.

5. That the City of Madison has created a pension fund pursuant to the provisions of Section 62.13(10), Stats.; that said pension fund is managed by a Board of Trustees, herein Pension Board, who inter alia has exclusive control of the fund, hears and decides all applications for pensions and, has the power to assign former employes to perform work in the City's Fire Department; that Paul R. Soglin (Mayor), Howard Gallagher (City Treasurer), Paul Reilly (City Comptroller), Eldon E. Maginnis (City Fire Chief), Paul R. McCallum (Firefighter), Darrell Fleming (Firefighter), and Richard Haack (Firefighter) are Pension Board Trustees; and that on or about September 1975, Gale Duschak, Deputy City Comptroller, was a Pension Board Trustee; and that said Board of Trustees is an agency of the City and at all times material hereto was acting within the scope of its authority, express or implied.

6. That at all times material hereto the City and Union were parties to a collective bargaining agreement governing wages, hours and conditions of employment for employes employed in the previously described firefighter bargaining unit and containing the following provisions pertinent to the instant complaints:

"ARTICLE IX

GRIEVANCE AND ARBITRATION PROCEDURE:

A. Only matters involving interpretation, application, or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth herein.

B. The City agrees to allow an executive Board Member and members of the grievance committee sufficient time off for the proper processing of grievances at the appropriate steps as outlined in this Agreement. The aggrieved party shall also be given sufficient time off for the processing of his grievance.

C. General Grievances: Union grievances involving the general interpretation, application, or enforcement of this Agreement may be initiated with Step Two of this procedure.

D. Grievances related to the education incentive program shall be initiated at Step Two of the Grievance Procedure.

STEP ONE: If an employee has a grievance, he shall first present the grievance orally to the District Chief or Division Head within three (3) days of his knowledge of the occurrence of the event causing the grievance but not later than thirty (30 days from the time of the event. The District Chief or Division Head shall be required to give an oral answer within three (3) days.

STEP TWO: The grievance shall be considered settled in Step One unless within five (5) days after the District Chief or Division Head's answer is due, the grievance is reduced to writing and presented to the Chief of the Department. Within five (5) days, the Chief of the Department shall furnish the employee with a written answer to the grievance, a copy of which shall be forwarded to the designated Union Representative and to the Labor Negotiator.

STEP THREE: The grievance shall be considered settled at Step Two of the Grievance Procedure unless within five (5) days from the date of the Chief's written answer or the last date due the grievance is presented in writing to the Grievance Arbitrator, with a copy to the Chief and Labor Negotiator. (The Grievance Arbitrator shall be a person mutually agreed to by the Labor Negotiator or the Chief of the Fire Department and the Union. His function is to hear grievances appealed to the first step of the Arbitration Procedure.)

The Grievance Arbitrator may confer with the Chief, the Union, and, such other persons he deems appropriate before making his determination. Such decision shall be reduced to writing and submitted to the aggrieved employee, the City and the Union, within ten (10) working days from his receipt of the written grievance and shall:

1. Deny the grievance, or

2. Grant the grievant satisfaction.

The time limits requiring a written answer may be extended upon mutual agreement of the parties. The Grievance Arbitrator's fees shall be shared equally by the City and the Union.

Arbitration may be resorted to only when issues arise between the parties hereto with reference to the interpretation, application, or enforcement of the provisions of this Agreement.

No item or issue may be subject to arbitration, unless such arbitration is formally requested within thirty (30) days following the filing of the written response required by Step One of the Arbitration procedure or the due date therefor. This provision is one of limitation, and no award of any arbitrator, may be retroactive for a period greater than thirty (30) days prior to presentation of the grievance in Step One as herein provided or the date of occurrence whichever is later, but in no event shall it be retroactive for any period prior to the execution of this Agreement.

STEP FOUR: Final and binding arbitration may be initiated by either party serving upon the other party a notice in writing of the intent to proceed to arbitration. Said notice shall identify the agreement provision, the grievance or grievances, the department, and the employees involved. Unless the parties can, within five (5) working days following the receipt of such written notice, agree upon the selection of an arbitrator, either party may, in writing, request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators to both parties. The toss of a coin shall determine who shall eliminate first. By alternate elimination the remaining named person shall then become the arbitrator. The arbitrator shall neither add to nor detract from nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for arbitration within the limitations expressed herein. The arbitrator shall have no authority to change wage rates or salaries. The arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion, which are not directly essential in reaching the determination.

Whenever one of the parties deems the issue to be arbitrated, to be of such significance to warrant a panel of three (3) arbitrators, each party shall, within five (5) working days of the notification of the request to proceed to arbitration, appoint one arbitrator, and the two arbitrators so appointed shall attempt to agree on a neutral person to serve as the third arbitrator and chairman of the panel. If no mutual agreement is reached within five (5) working days on the selection of the third arbitrator, said arbitrator and chairman shall be selected in the manner and within the time limit specified for the selection of a single arbitrator.

All expenses which may be involved in the arbitration proceedings shall be borne by the parties equally. However, expenses relating to the calling of witnesses or the obtaining of depositions or any other similar expenses associated with such proceeding, shall be borne by the party at whose request such witness or depositions are required.

The arbitrator so selected shall hold a hearing at Madison, Wisconsin, at a time and place convenient to the parties at the earliest possible date following

notification of a selection. The arbitrator shall take such evidence as in his judgment is appropriate for the disposition of the dispute. Statements of position may be made by the parties and witnesses may be called. The arbitrator shall have initial authority to determine whether or not the dispute is arbitrable under the express terms of this Agreement. Once it is determined that the dispute is arbitrable, the arbitrator shall proceed in accordance with this article to determine the merits of the dispute submitted to arbitration.

Proceeding shall be as provided in Arbitration Chapter 298, Wisconsin Statutes.

LIMITATIONS ON GRIEVANCE ARBITRATORS:

1. Arbitration shall be limited to:

   a. An interpretation of the articles of this Agreement, and,

   b. A grievance as defined herein arising out of the express terms of this Agreement.

2. Arbitration shall not apply where Section 62.13 of the Wisconsin Statutes are applicable and in Article V, where Management has reserved rights relating to arbitration.

For the purposes of brevity, the term "arbitrator" as used hereinafter shall refer either to a single arbitrator or a panel of arbitrators, as the case may be.

No issue whatsoever shall be arbitrated or subject to arbitration unless such issue results from an action or occurrence which takes place following the execution of this Agreement, and no arbitration, determination, or award shall be made by an arbitrator, which grants any right or relief for any period of time whatsoever prior to the execution date of this Agreement or following the termination of this Agreement.

In the event that this agreement is terminated for any reason, rights to arbitration thereupon cease. This provision, however, shall not affect any arbitration proceedings which were properly commenced prior to arbitration or termination of this Agreement.

It is contemplated by the provisions of this Agreement that any arbitration award shall be issued by the Arbitration at the earliest date after completion of the hearing."

7. That on April 24, 1974, at a regular Union membership meeting a resolution was adopted that called upon the Union to request the Madison Common Council to adopt a policy of mandatory retirement at age 55 for Fire Department personnel governed by the Chapter 41, Stats. retirement fund; that at a regular membership meeting held on June 21, 1974, the Union resolved to go on record at the Professional Firefighters of Wisconsin (PFFW) convention supporting mandatory retirement at age 55 for all Wisconsin firefighters; and that at said PFFW convention held June 24, 25, 26, 1974, the convention delegates endorsed mandatory retirement at age 55 for all firefighters.

8. That the Pension Board Trustees held a special meeting on September 30, 1975; that during said meeting mandatory retirement, inter alia, was discussed by the Trustees, that at the conclusion of said discussion Trustee Fleming suggested the Board make a policy

decision in the matter and, thereafter, moved that the Board adopt a retirement policy that is identical to whatever the City Council adopts for employes in the protective services whose pensions are governed by Chapter 41, Stats.; and that Flemings motion carried and said policy was adopted.

9. That at a Council meeting on October 7, 1975, the City Council adopted Ordinance Section 3.39(13) governing mandatory retirement for "protective occupational employees" governed by Chapter 41, Stats. and that said ordinance was finalized by the Council on October 31, 1975, and provided:

> "Retirement Date for Protective Occupational Employees. All protective occupational employees who are participants of the Wisconsin Retirement Fund under Chapter 41 of the Wisconsin State Statutes shall be retired no later than December 31 in the year in which age fifty-five (55) is attained. (Cr. by Ord. 5206, 10-31-75)"

10. That, thereafter, on November 11, 1975, the Pension Board held a special meeting where, inter alia, it discussed its policy on mandatory retirement and formally adopted the policy that employes governed by Chapter 62.13, Stats., must retire no later than December 31st in the year in which said employe reaches age 55; that this action preceded by more than one year the filing of the instant complaints which were filed on November 30, 1976, by Albright et al., and December 30, 1976, by Petry; that at the same November 11, 1976, meeting the Board decided to exempt employes from the December 31, 1975, deadline and extended the date for retirement of employes reaching age 55 in 1975, until February 26, 1976; and that, however, no firefighters who were at least age 55 were involuntarily retired between January 1, 1976, and July 21, 1976.

11. That at a special meeting of the Pension Board on July 21, 1976 the following resolution was adopted:

> "WHEREAS, the legality of mandatory retirement has been upheld by the United States Supreme Court, and
>
> "WHEREAS, the City of Madison has by Ordinance and the Board of Trustees, Firemen's Pension Fund, has by Resolution adopted the provision requiring mandatory retirement for all protective occupational employees at the end of the calendar year in which age 55 is reached,
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> "NOW THEREFORE BE IT RESOLVED that implementation of this provision take effect and be in force from and after December 31, 1976.";

that at a special meeting on September 7, 1976, the Pension Board determined to take up the matter of mandatory retirement of nine (9) Fire Department employes at a meeting of the Board on October 5, 1976; that thereafter on September 30, 1976, Fire Department members Austin, Kammer, Klein, Briggs, Landsowne, Lawler, Martinson, Olson and Albright were served with amended notice of a hearing to be held on October 5, 1976, to take up the matter of their involuntary retirement; that at the October 5, 1976, Board meeting no action was taken on the retirement of the aforesaid individuals, rather, such action was postponed until December 7, 1976; and, that no action was taken in December 1976, to involuntarily retire the aforesaid individuals and that none of them have been involuntarily retired to date.

12. That on October 27, 1976, Complainant Robert L. Albright voluntarily retired from employment as a firefighter with the City.

13. That the Union and City engaged in collective bargaining at various times from 1974, through the present; that these negotiations resulted in collective bargaining agreements governing the wages, hours and conditions of employment of bargaining unit employes during the calendar years 1974, 1975 and 1976; and that at no time during these negotiations nor at any other time during said period did the Union demand to bargain or in fact bargain with the City on the subject of mandatory retirement for bargaining unit members.

14. That at no time did Complainants ever file grievances with the City or Union or request the Union to file grievances on their behalf to contest the mandatory retirement policy established by the City; that Complainants did not grieve either because they believed such efforts would prove fruitless in light of the position adopted by the Union on mandatory retirement or because they were not aware they themselves could file grievances; and that all of Complainants, were provided with copies of the applicable collective bargaining agreements.

15. That on October 23, 1975 at a Union general membership meeting the Union took the position that firefighters governed by the Chapter 62.13, Stats., retirement fund be mandatorily retired at the end of the calendar year in which they reach age 55; that at the same October 23, 1975, Union meeting the membership voted to finance legal action taken by any member to challenge the Pension Board ruling of September 30, 1975, resolution on compulsory retirement if the Union's legal counsel advised that they should finance such litigation; that on October 28, 1975, the Union sought a legal opinion on the legality of the Pension Board resolution inter alia and was advised on November 5, 1975, that said action was legal; that at a Union Executive Board meeting on November 13, 1975, said Board agreed not to finance any litigation by a Section 62.13, Stats. firefighter seeking to reverse said Pension Board action; that at the November 17, 1975, general membership meeting, the members were advised of the November 5, 1975, legal opinion and then voted not to finance any litigation by a member seeking to reverse the Pension Board action; that on August 5, 1976, and September 8, 1976, Counsel for Complainants requested the Union to provide Complainants with legal representation to enforce their alleged right to continued employment; and that said request was denied on September 23, 1976, upon the advice of the Union's legal counsel because the Union supported mandatory retirement and the belief that there was nothing invidious in such a requirement.

16. That the Union did not act arbitrarily, capriciously, or in bad faith in adopting its position favoring mandatory retirement of all City firefighters upon reaching age 55.

Upon the basis of the foregoing Findings of Fact the Examiner makes the following

CONCLUSIONS OF LAW

1. That Complainants Robert L. Albright, Carl E. Austin, Marvin J. Kammer, Harold P. Klein, Keith F. Lawler and Oscar Petry are employes within the meaning of Section 111.70(1)(b), Stats.

2. That Complainants Lloyd W. Briggs and James C. Olson are supervisors within the meaning of Section 111.70(1)(0), Stats., and, therefore, said individuals lack standing to bring the instant action.

3. That the Respondent City of Madison is a municipal employer within the meaning of Section 111.70(1)(a), Stats.

4. That the Respondent Pension Board is a person within the meaning of Section 111.70(1)(k) and was at all times material herein acting

on behalf of the City of Madison and, therefore, is a municipal employer within the meaning of Section 111.70(1)(a), Stats.

5. That the Respondent Union is a labor organization within the meaning of Section 111.70(1)(j), Stats.

6. That the Pension Board's enactment of a mandatory retirement policy effective October 31, 1975, and Charles Merkle's lobbying for passage of City Council Ordinance 3.39(13) and its ultimate enactment occurred more than one year prior to the filing of the instant complaints and, therefore, the Commission is precluded by Section 111.07(14), Stats., from finding said actions to be prohibited practices within the meaning of Section 111.70, Stats.

7. That Complainants Albright et al. and Petry are not parties in interest within the meaning of Section 111.07(3)(a), Stats., or ERB Sec. 12.02(1), Wis. Adm. Code with respect to their allegation that the City committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

8. That Respondent Union Local 311 of the International Association of Firefighters, did not breach its duty of fair representation owed Complainants by advocating mandatory retirement at age 55 and by refusing Albright et al.'s request for legal representation to challenge the Pension Board's action.

9. That Respondent Local 311, International Association of Firefighters and McCallum, Fleming and Haack did not coerce or intimidate any of Complainants in the enjoyment of their legal rights nor induce any officer or agent of the City of Madison to interfere with the enjoyment of any of Complainants legal rights and, therefore, have not committed and are not committing a prohibited practice within the meaning of Section 111.70(3)(b)1 and 2, Stats.

10. That the Commission will not exercise its jurisdiction to review the merits of the Respondent City of Madison's alleged breach of the collective bargaining agreement in violation of Section 111.70(3)(a)5, Stats.

Upon the basis of the above, and foregoing Findings of Fact, and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the Albright et al. and Petry complaints be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 6th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
Thomas L. Yaeger, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF THE PARTIES:

Complainant Petry:

Petry contends that the City of Madison attempted to involuntarily retire him in violation of various provisions of the Municipal Employment Relations Act. Specifically, Chapter 41, Stats., provided for mandatory retirement at age 55 and; the City upon petition allowed employes to extend their employment beyond said mandatory retirement date. However, through the adoption of Ordinance 3.39(13) such extensions are no longer available inasmuch as said ordinance provides for uniform retirement at the end of the calendar year in which the employe reaches age 55. Furthermore, compulsory retirement is a mandatory subject of bargaining as previously determined by the Commission (City of Appleton, Police Department), (14615-A) 1/77.

Herein, no bargaining took place between the City and the Union concerning the subject of mandatory retirement. Therefore, there can be no finding that the enactment of Ordinance of 3.39(13) was enacted after an impasse in negotiations on the subject of mandatory retirement had been reached. Furthermore, no waiver of the duty to bargain with the Respondent Union on said issue can be established merely by the fact that no bargaining took place; but, rather there must be clear and unmistakable language requiring the finding that a waiver took place. The subject collective bargaining agreements in issue herein do not support such a finding. Thus, Petry claims that by enacting ordinance 3.39(13) the City unilaterally changed working conditions in violation of Section 111.70(3)(a)4, Stats.

Petry also argues that enactment and implementation of Ordinance 3.39(13) breached several provisions of the parties' collective bargaining agreement and, thereby violated the provisions of Section 111.70(3)(a)5, Stats. Specifically, Article XXII(B) of the parties agreement imposes a contractual duty to bargain the establishment of new work rules. This, the City did not do. Furthermore, Section D of the Preamble to the parties' collective bargaining agreement requires the maintenance of the existing benefits then enjoyed by employes. However, by no longer requiring individual consideration of each employe's circumstances, in determining whether to extend said employe's employment beyond the end of the calendar year in which said employe reaches age 55, terminates an existing benefit in violation of said provision of the agreement. Also, Section C of said Preamble, dealing with ordinances and resolutions which conflict with a specific provision of said agreement, requires a finding that Section D of said Preamble supercedes Ordinance 3.39(13) inasmuch as said Section D preceded enactment of said ordinance. Thus, by giving effect to Ordinance 3.39(13) the City violated Section C of the Preamble to the parties' collective bargaining agreement.

Petry also claims that the reason for enactment of Ordinance 3.39(13) was to effectuate a reduction in force (layoff) and that by so doing violated Section 62.13(5m), Stats. setting forth a mandatory system for reduction in force and municipal firefighting departments. Thus, by attempting to dismiss Complainant Petry and continue in the City's employ those with less service than him, the City violated Section 62.13(5m), Stats. Furthermore by not following said statute the City has deprived Complainants of an "existing benefit" in violation of Section D of the Preamble to the parties' agreement. This contractual violation also constitutes a prohibited practice in violation of Section 111.70(3)(a)5, Stats.

Petry also contends that the prohibited practices committed by the City, specifically violations of Section 111.70(3)(a)4, and 5, Stats., establish a derivative inference violation pursuant to the provisions of Section 111.70(3)(a)1, Stats. Lastly, Petry claims the Union intimidated and coerced him in the enjoyment of his legal rights as well as coerced, intimidated and induced certain municipal employes, officers and agents of the City to interfere with his rights.

Petry requests that the Commission grant the appropriate relief in light of the prohibited practices committed by Respondents and, further, that it issue a declaratory ruling pertaining to the bargainability of the establishment of mandatory retirement age.

Complainants Albright et al.:

In its brief, Complainant's Counsel concedes that Complainants Briggs and Olson are supervisors as defined in Section 111.70(0)(2), Stats., and that Complainant Martinson voluntarily petitioned to be retired on February 10, 1977, and was so retired. Martinson's retirement was voluntary and not based upon the Pension Board's retirement policy in issue herein. Concerning the status of Complainant Albright, Complainant's Counsel contends that although Albright petitioned the Board for retirement and was retired, said retirement was involuntary. Complainants allege that Albright's retirement resulted from being under duress as a result of the Pension Board's decision to retire him pursuant to its policy of mandatory retirement. Indeed, if the Examiner were to void the Pension Board policy of mandatory retirement Complainant Albright would seek reappointment with the City Fire Department.

Complainant's first prohibited practice alleges that the City and Board violated the provisions of the 1975-76 collective bargaining agreement between the City and the Union by adopting and implementing a policy of mandatory retirement. Furthermore, inasmuch as the provisions of said collective bargaining agreement that were violated benefit Complainants they have standing to bring this action to enforce said contract. Also, the City had a long standing policy of only voluntarily retiring firemen at age 55 and permitting their continued employment beyond said age unless they were incapacitated and unable to perform their duties. Thus, by enacting a mandatory retirement policy (work rule) the Pension Board acting on behalf of the City, violated Article XXII(A) of the collective bargaining agreement. Finally, inasmuch as the Pension Board nor the City bargained this mandatory retirement policy (work rule), said action constituted a breach of Article XXII(B) of the parties' collective bargaining agreement requiring the parties to bargain changes in existing work rules.

In their second prohibited practice allegation Complainants contend the Board and City violated the collective bargaining agreement by unilaterally changing a condition of employment and by refusing to bargain same as required by the contract. Section 62.13(5m), Stats., establishes a mandatory layoff procedure for firefighters and, this procedure was therefore necessarily an established work rule of the City. Complainants contend that the adoption of the mandatory retirement policy was in fact a substitute for a layoff thereby violative of Section 62.13(5m), Stats.

In the third and fourth prohibited practices, Complainants allege the City, Pension Board and its members agreed with certain Union members and officers outside of collective bargaining to seek the adoption and implementation of the Pension Board resolution on mandatory retirement thereby interfering with Complainant's right to bargain collectively. Furthermore, Complainants allege that the

conduct of the Pension Board, the City and the Pension Board members individually constituted domination and interference with the administration of the labor organization in violation of Section 111.70(3)(a)1 and 2, Stats.

The fifth prohibited practice alleged by Complainants is that the City by unilaterally adopting and applying the resolution of the Pension Board on mandatory retirement without submitting the issue to collective bargaining with the Union committed a statutory refusal to bargain prohibited practice violation of Section 111.70(3)(a)4, Stats. In support of its position in this regard Complainants' point to Respondents' concession that the Pension Board policy was never submitted to bargaining and conclude that the only question therefore concerns the standing of Complainants to bring this action against the City. Complainants argue in reference to the recent Commission decision in City of Menasha, (13283-A) 2/77, that the Commission erred in that decision and, in any event, there was no Union antagonism toward Complainants as exists in the instant case.

The sixth prohibited practice alleges that the Pension Board's adoption and later implementation of the mandatory retirement resolution was the result of coercion and intimidation on the part of Respondent Union and its agents who are members of said Pension Board. These acts constitute coercion and intimidation of the municipal employer to interfere with the legal rights of Complainant all in violation of Section 111.70(3)(b)2, Stats.

Complainants' seventh and eighth prohibited practices charge that the Union breached its duty of fair representation owed Complainants by its conduct in the matter of the adoption of the mandatory retirement policy by the Pension Board. Complainant's contend that the Union was hostile and antagonistic toward the economic interest of pensioners under Section 62.13 Stats., who constituted a minority in the Union. Furthermore, the Union refused to assist Complainants in their efforts to fight the City and Pension Board concerning its adoption of the mandatory retirement policy and, thereby, breached its duty of fair representation in violation of 111.70(3)(b)1, Stats.

Respondent City: 1/

The City contends the Commission lacks jurisdiction to grant relief to Complainants Albright, Olson and Briggs inasmuch as they are not municipal employes within the meaning of Section 111.70(1)(b), Stats. In Albright's case, he voluntarily retired prior to the filing of the instant complaint and, therefore, was not a municipal employe at said time. With respect to Briggs and Olson, they are supervisors within the meaning of Section 111.70(1)(o), Stats., and are not proper Complainants herein inasmuch as Section 111.70, Stats., only extends protection to municipal employes and, further, that as supervisors they are not covered by the collective bargaining agreement.

Secondly, the City contends that the age of retirement is not a mandatory subject of bargaining and only the Pension Board has the power to deal with the issue of retirement as set forth in Section 62.13, Stats. Furthermore, the effect or impact of its decisions cannot thereafter be modified by collective bargaining between the City and Union.

1/ Unless indicated otherwise herein, the Respondent City's defenses to the instant complaints are applicable to both actions, Albright et al. and Petry.

Concerning Complainants' pleadings alleging breach of contract, the City contends they should be dismissed inasmuch as Complainants failed to exhaust their contractual remedies and did not even attempt to exhaust same, i.e., the contractual grievance procedure. Furthermore, the City denies it laid off Complainants as alleged herein and contends there is no evidence in the record to support such a finding.

As to the Complainants' charge that the City interfered with their rights to bargain collectively, Respondent notes that any duty to bargain on the part of the City runs to the majority representative of its employes and not to Complainants individually. Furthermore, there is no record evidence herein that the City dominated or interfered with the administration of the Union as charged. The City argues alternatively that it was powerless to bargain with the Union concerning action taken by the Pension Board in the exercise of its statutory authority under Section 62.13, Stats., and even if it could both City and Union have waived any rights or obligations they had in that regard.

Lastly, the City contends no evidence was adduced to establish that the Pension Board resolution was adopted as a result of coercion, intimidation or inducement by the City and, therefore, said allegation should be dismissed.

Respondent Pension Board: 2/

The Pension Board claims the Albright et al. complaint is jurisdictionally defective for several reasons. First, it contends the Commission lacks jurisdiction over it or its members inasmuch as they are not a municipal employer nor were they acting on behalf of same. Rather, the Pension Board is a independent agency created by statute and is not subject to the control of the City. As further evidence of its independence from the City, Respondents assert that the Board's action was in fact contrary to the best interest of the City. Finally, the Pension Board argues that the mere use of the City facilities to conduct this business does not establish it or its members as agents of the City. Second, Complainants are barred from pursuing the breach of contract allegations contained in their complaint in that they did not grieve said alleged violations pursuant to the contractual procedure. Last, the complaints as they relate to the Pension Board action are barred by the statute of limitations in that the action complained of herein occurred more than one year from the filing of the Albright et al. complaint.

In response to Complainants' charge that the Board's adoption or implementation of the mandatory retirement age policy breaches a contractual duty to bargain, Respondents contend that the established policy is and was not discriminatory and did not constitute a violation of the labor agreement. Furthermore, said allegation should be dismissed as a matter of law because the Commission could not impose a duty to bargain upon the Board inasmuch as the Board lacked the authority to bargain with the Union. Lastly, the charge must be dismissed because no change in conditions of employment ever occurred as a result of adoption of the policy.

2/ It and its members are named Respondents only in the Albright et al. complaint and, therefore, the defenses are not applicable to the matters raised by the Petry complaint. Thus, all references of the summary of the Board's statement of position necessarily refers only to the Albright et al. matter.

With respect to the fifth prohibited practice outlined in the complaint, the Board contends there is no evidence in the record to support the charge that the Board or its members dominated or interfered with the administration of the Union. Further, even though the Board believes evidence of Board members' motivation for how they voted is inadmissible in such a proceeding as herein, and, although, inquiry was permitted by the Examiner, no evidence was adduced to establish the existence of improper motivation. Finally, there also is no record evidence that said members voted as a result of coercion by agents of the Union.

Respondent Union: 3/

The Union raises several defenses to the complaint allegations in issue herein. First, the Union asserts that Albright retired voluntarily in 1976, and that Briggs and Olson are supervisors within the meaning of the Section 111.70, Stats. Therefore, the Union concludes that none of the three has standing to bring this action. Furthermore, none of the Complainants have standing to pursue a complaint of refusal to bargain against the City and Union inasmuch as no such duty is owed Complainants individually. Complainants here are trying to assert "associational" rights and only the City and/or Union have standing to enforce the duty to bargain owed one to the other.

The Union also relies upon the extensive Federal and Commission authority to preclude individuals from pursuing a theory of breach of contract where said Complainants have failed or attempted to exhaust their exclusive remedies under the collective bargaining agreement. As for the charge of breach of duty of fair representation on the part of the Union, it contends that no such charge can be prosecuted where the Complainants fail to grieve or attempt to grieve.

Respecting Complainant's allegations that the Union acted inappropriately in its dealings with the City Counsel the Union points out that the Union President Merkle's remarks to the City Counsel were made as President of the Local and, therefore, were protected under the provisions of MERA and the First Amendment to the U.S. Constitution. The Union asserts that Merkle was doing nothing other than advocating the position taken by a majority of the Union's members and his activity in all respects was appropriate.

The Union also contends that while the age of retirement is a mandatory subject of bargaining the City and Union have both expressly and unequivocally waived their right and/or duty to bargain on the subject. The Union does not wish to bargain concerning the matter and this position has been made known to the City. Thus, there can be no breach where, as here, the Union has waived any right it may have to insist that the employer bargain with it concerning a change in policy or whatever.

Lastly, the Union contends that the lobbying efforts of Merkle and others on behalf of the adoption of Ordinance 3.39(13) occurred some thirteen and one-half months prior to the filing of the Albright et al. and Petry complaints and, therefore, all aspects of the complaint dealing with the adoption of said Ordinance should be dismissed as barred by the statute of limitations provided for in Section

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3/ Unless indicated otherwise the Respondent Union's defenses outlined hereinafter are applicable to both actions, Albright et al. and Petry.

111.70, Stats. Respecting the Petry complaint, inasmuch as it is premised upon the enactment of said ordinance it should be dismissed in its entirety as being barred by the statute of limitations.

DISCUSSION:

Several threshold questions were presented pertaining to the status of several Complainants in the instant proceedings. Respondents contend that Complainants Briggs and Olson are not proper parties to this action inasmuch as they are not employes as defined in Section 111.70 Stats., but, rather, are supervisors as that term is used therein. Complainants concede that Briggs and Olson are in fact and were in fact supervisors at the time that this action was commenced. Inasmuch as supervisors are not entitled to the protections afforded municipal employes pursuant to the provisions of Section 111.70(2), Stats., it is not a prohibited practice for a municipal employer and/or Union to engage in the conduct alleged herein vis-a-vis supervisors. Therefore, Briggs and Olson lack standing to proceed against Respondents in the instant matter.

Also, Complainants acknowledge in their brief that Complainant Martinson petitioned to be retired and was retired on February 10, 1977, and that said retirement was not based upon passage of the Board retirement policy. However, inasmuch as there is no evidence of said retirement in the factual record of these proceedings there is no basis upon which to dismiss the complaint with respect to Martinson.

Respondents also argue that because Albright allegedly voluntarily retired on November 16, 1976, he lacks standing to bring the subject action before the Commission. Standing

> "concerns . . . the question whether the interest sought to be protected by the Complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 4/

Section 111.70(2)(c), Stats. provides:

> "Upon the filing with the Commission by any party in interest of a complaint in writing, . . ." (Emphasis added.)

Surely, an employe complaining of acts of interference 5/ with his protected rights, as herein, is a party in interest within the meaning of Section 111.07, Stats. While Albright retired in November 1976, he was an employe at the time of the occurrence of the actions complained of as well as at the time his complaint was filed with the Commission. 6/ He does not, thereafter, lose standing by retiring from the City's employ. 7/ Thus, Albright has standing to proceed on the instant complaint.

4/ Association of Data Processing Service Organizations, Inc. v. Camp, 397 US 150, 153 (1970).

5/ The Commission held in City of Menasha, (13283-A) 2/77, an employe was not a "party in interest" within the meaning of Section 111.07 (2)(a), Stats. in a proceeding against an employer for refusing to bargain.

6/ These determinations are based upon the record made at the time both Complainants concluded the presentation of their case-in-chief.

7/ Rosen v. Public Service Electric Co., 477 F2d 90 (CA3-1973), 5 FEP 711.

PENSION BOARD AS A MUNICIPAL EMPLOYER:

The Pension Board and its members as named Respondents herein claim that the Commission lacks jurisdiction over it and its members because it is not a municipal employer as defined in Section 111.70, Stats., nor was it acting on behalf of same in adopting its resolution pertaining to the mandatory retirement at age 55 of City firefighters governed by the provisions of Chapter 62.13, Stats. The Board is a named Respondent in only the Albright et al. complaint inasmuch as Complainants therein are covered by the provisions of Chapter 62.13, Stats. whereas Complainant Petry's pension is governed by Chapter 41, Stats. 8/

Section 111.70(1)(a), Stats., defines municipal employer as

> "any city, county, village, town, metropolitan sewage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied."

There is no record evidence that the Pension Board itself employs anyone and, therefore, it cannot be a municipal employer in the sense of one who engages the services of employes. However, "any person acting on behalf of the municipal employer within the scope of his authority, expressed or implied" is a municipal employer for purposes of the act.

The first question therefore is whether or not the Pension Board is a "person" within the meaning of Section 111.70(1)(a), Stats. Section 111.70(1)(k) Stats. defines "person" to mean "one or more individuals, labor organizations, associations, corporations or legal representatives." A "legal representative" has been variously defined to include a trustee and Black defines it in its broadest sense to "mean one who stands in place of an represents the interests of, another." Wisconsin courts have placed various constructions on the term. In Moyer v. Oskusk, (1913), 151 Wis. 586, 139 NW 328 the court said:

> "These words [legal representatives] when used in their strictly technical sense mean executors or administrators. In the present case there is, in this strictly technical sense, but one legal representative, and yet the claim is for damages suffered by the 'legal representatives.'
>
> "The books are full of cases where these words have been given other and broader meanings. The rule seems to be that they will ordinarily be given their accurate primary meaning where nothing appears to indicate a different intention; but that this rule will readily yield, and where it appears from a survey of the context, the subject matter, and the purpose of the writing that the words were used as indicating heirs, next of kin, descendants, widow, and sometimes even assignees, grantees, or successors in interest, the intention will be carried into effect and the words given the meaning so intended."

Furthermore, in a Wisconsin Attorney General's opinion 64 OAG 18 (1975), it was concluded that the "various agencies of the

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8/ The controlling factor in determining whether an employe's pension comes under Chapter 62.13 or Chapter 41 Stats. is the date of employment with the municipal employer. Any municipal firefighter hired on or before December 31, 1947, is governed by the provisions of Chapter 62.13 whereas any municipal firefighter hired on or after January 1, 1948 is a participating employe under subchapter 1, XXXXI, Wisconsin Retirement Fund.

state function as 'an' employer in differing circumstances and are 'persons' subject to SELRA" and that these persons are capable of committing unfair labor practices notwithstanding that the State is the ultimate employer. Therein, the issue was whether the Group Insurance Board would commit an unfair labor practice if it unilaterally increased benefits and cost to State employes and collective bargaining units. That situation is somewhat akin to what is presented herein. The City is clearly the "ultimate" employer, nonetheless, the Pension Board of Trustees clearly has it within its power to affect the conditions of employment of some City firefighters.

Section 62.13(10), Stats., provides "each City of the second and third class having a paid fire department shall have a firemens' pension fund". Subdivision (e) thereof provides that the provisions of subdivision (b) to (d) of subsection 9 [Police Pension Fund] shall apply to the firemens' pension fund. Subdivision 9 (b)1 provides "the mayor, treasurer, comptroller, and the chief and three active subordinates of the department, shall be the Board of Trustees of the pension fund." Subdivision 9(b)3 provides "the Board shall have exclusive control and management of the funds." Subdivision 4 thereof provides "the Board shall hear and decide all applications for pensions, . . .". Lastly, subdivision 9(c)3 provides: "Service. A member of the department who has served 22 years or more may apply to be retired or may be retired on motion of the Board, . . .". It is also interesting to note that subdivision 9(c)4 "Light duty," allows the Board on recommendation of the Chief to assign any former employes, now pensioners, to perform work in the department. While said individuals may not be "employees" as that term is used in the collective bargaining agreement and, are rather retirees, nonetheless pursuant to the provisions of Section 111.70(1)(b) would be municipal employes.

While the Pension Board was created pursuant to Section 62.13, Stats. said statute mandates the City to have a pension fund. Thus, the firemens' pension fund is a City fund and is administered by a Board of trustees which as noted earlier herein is comprised of several City officials in addition to three employes of the fire department. 9/ Consequently, while it may act on behalf of employes it also acts on behalf of the City.

For these reasons the Pension Board is a municipal employer within the meaning of Section 111.70(1)(a), Stats.

Statute of Limitations

Respondents affirmatively defend against Complainants' prohibited practice allegations realtive to the passage of the Pension Board resolution of September 30, 1975, and the enactment of Ordinance 3.39(13) on the ground that all occurred more than one year prior to filing of the instant complaint.

The Pension Board resolution was adopted on September 30, 1975, whereas Ordinance 3.39(13) was not enacted until October 31, 1975. However, the Pension Board policy adopting mandatory retirement did not in fact occur until October 31, 1975, when the Ordinance was effective because

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9/ Chapter 62.13 does not require that the three active subordinants of the department be participants of the 62.13 fund. In this sense it seems clear that the pension fund is an agency of the City as well as employes which the City is required to maintain pursuant to the provisions of Chapter 62.13.

the Board Resolution merely said it would adopt what ever policy was adopted by the City. Section 111.70(4)(a), Stats. provides:

> "(a) Prevention of prohibited practices. Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term 'unfair labor practices' appears in s. 111.07 the term 'prohibited practices' shall be substituted."

and Section 111.07(14), Stats. provides

> "(14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged."

Complainants Albright et al. filed their complaint with the Commission on November 30, 1976, whereas Petry did not file his complaint until December 30, 1976. Pursuant to the aforequoted Section 111.07(14), Stats., Complainants herein cannot as a matter of right prosecute a complaint of prohibited practices where the alleged prohibited practices occurred more than one year prior to the filing of their complaint.

Complainants Albright et al. allege Respondent City, Union, Pension Board and its members individually interfered with and restrained Complainants in the enjoyment of protected rights through conduct associated with the adoption and implementation of the mandatory retirement age resolution and that said conduct also constituted domination and interference with the administration of the Union. As to whether Respondents' alleged conduct associated with adoption of said resolution was prohibited by Section 111.70(3), Stats. is immaterial inasmuch as said actions occurred more than one year prior to filing of the instant complaint and, therefore, is beyond the reach of this proceeding. Thus, those prohibited practice allegations that relate to adoption of the Pension Board resolution have been dismissed. The allegations related to implementation of said resolution are discussed elsewhere herein because the alleged implementation occurred less than one year prior to filing of the instant complaints.

The same rationale applies to Complainants Albright et al. charges that Charles Merkle both individually and as President of the Union committed prohibited practices in lobbying for passage of Ordinance 3.39(13). Inasmuch as conduct associated with any lobbying efforts in support of passage of said Ordinance must necessarily have occurred prior to its adoption on October 31, 1975, the allegations arising out of said conduct are beyond the one year period preceding the filing of said complaints. Consequently, these changes have been dismissed.

Complainant Petry also alleges that the City and Union committed prohibited practices in connection with enactment and implementation of City Ordinance 3.39(13). As noted earlier herein said enactment precedes by more than one year the filing of Petry's complaint. Therefore, the Commission lacks authority to proceed to review the merits of those changes footed in said enactment and they necessarily have been dismissed.

Statutory Refusal to Bargain 10/

Both complaints allege that the City has unilaterally altered working conditions without first bargaining said changes to impasse.

10/ Both complaints allege not only violations of the statutorily imposed duty to bargain but, breach of a contractual duty to bargain as well. The latter subject is dealt with elsewhere herein under the hearing - Breach of Contract.

Petry's complaint argues that compulsory retirement at age 55 is a mandatory subject for bargaining and by adopting Ordinance 3.39(13) without first bargaining with the Union on the subject, the City has refused to bargain in violation of Section 111.70(3)(a)4, Stats. Complainants Albright et al., however, allege that the City, by adopting and implementing the Pension Board resolution on compulsory retirement without first bargaining that subject with the Union, committed a refusal to bargain prohibited practice.

Section 111.70(3)(a)4, Stats., makes it a prohibited practice for a municipal employer to refuse to collectively bargain, as defined in Section 111.70(1)(d), Stats., with a representative of a majority of its employes concerning wages, hours and conditions of employment. As interpreted by this Commission, a municipal employer must bargain to impasse on mandatory subjects of bargaining prior to making any changes therein or be found to have refused to bargain in good faith. 11/ A unilateral change in a mandatory subject of bargaining is a per se refusal to bargain in good faith. 12/ This duty pertains not only to contract negotiations but, also, survives thereafter and continues during the term of said agreement 13/ with respect to those subjects that were not discussed or provided for in the collective bargaining agreement, i.e., where the duty has not been extinguished as a result of the bargaining agent waiving its statutory right to insist on bargaining. 14/

Complainants herein contend the duty to bargain applies to the subject of compulsory retirement. In City of Appleton, (14615-A) 1/77, 15/ the Examiner was confronted with whether, inter alia, the issue of retirement policy was a mandatory subject of bargaining he said:

> "Inasmuch as a retirement policy has a substantial effect upon the wages, hours, and conditions of employment of bargaining unit employes, the Examiner concludes that both the content of such a policy and its impact upon employes are currently mandatory subjects of bargaining under MERA. 16/
>
> . . .
>
> Thus, the Respondent violates Section 111.70(3)(a)4 of MERA if it fails to bargain in good faith before establishing or implementing a new retirement policy unless the Complainant has in some manner waived its right to bargain over said subject."

The undersigned agrees with the Appleton decision insofar as it concludes that retirement policy is a mandatory subject of bargaining.

11/ Madison Jt. School District, (12610) 4/74, Racine Unified School District, (11315-B) 1/74, modified Comm. (11315-D) 4/74; City of Wisconsin Dells, (11646) 2/73.

12/ Fennimore Jt. School District (11865-A) 6/74, aff'd Comm. (11865-B) 7/74.

13/ Village of Shorewood, (13024) 9/74; Madison Jt. School Dist. (12610) 4/74; Fennimore Jt. School Dist., (11865-A) 6/74, aff'd Comm. (11815-B) 7/74; City of Brookfield, (11489-A) 10/73, modified Comm. (11489-B) 4/75; City of Brookfield, (11406-A) 7/73, aff'd Comm. (11406-B) 9/73, aff'd Waukesha County Cir. Ct. 6/74.

14/ City of Brookfield (11406-A) 7/73, supra. Village of Greendale (13830-A, B) and (13888-A, B) 4/77.

15/ This decision has yet to be affirmed by the Commission.

16/ Inland Steel Co., 77 NLRB 1, 21 LRRM 1310, enforced 170 F.2d 247, 22 LRRM 2505 (CA7 1448) certs. denied 338 4596, 24 LRRM 2014 (1449).

Thus, the City has a general duty to bargain on the subject of retirement policy upon demand by the Union to do so. What is in issue herein is the duty to bargain an alleged change in retirement policy for employes governed by the provisions of either Section 62.13 or 41, Stats. A threshold issue presented by both complaints is whether Complainants have standing to commence an action for enforcement of the City's statutory duty to bargain on changes in conditions of employment. The Commission ruled in City of Menasha (13283-A) 2/77, that

> ". . . . 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." 17/

Complainants herein would have the Examiner distinguish the instant case from City of Menasha on the ground that there was no evidence present therein of Union antagonism toward Complainants as alleged to exist herein. The undersigned does not agree that the presence of alleged antagonism or hostility harbored by the Union toward Complainants is a basis for distinguishing the case, inasmuch as these elements are not considerations to the question of standing. As noted earlier herein, the question in determining standing is whether the Complainant is a "party in interest" and the Union's feeling toward Complainants is not relevant to that determination. Thus, the undersigned finds City of Menasha controlling and concludes that Complainants herein lack standing to complain of the City's alleged refusal to bargain with the Union concerning establishment and implementation of a compulsory retirement policy for City firefighters.

Notwithstanding the foregoing, as noted earlier, a Union can waive its right to insist upon bargaining changes in wages, hours and conditions of employment. Waiver can be established by contract language or conduct. 18/ The Commission, in instances too numerous to cite, has repeatedly held that it must be clear and unmistakable from the evidence that the Union waived its right to bargain concerning changes in wages, hours and conditions of employment during the term of the collective bargaining agreement. Herein, the evidence establishes the Union had knowledge of the passage of the Pension Board Resolution in 1975, as well as its implementation in 1976. Yet it never demanded that the City bargain about said compulsory retirement. 19/ Indeed, the testimony is that the Union had no interest in bargaining concerning same inasmuch as it was in favor of the policy. Therefore, the inescapable conclusion is that, in any event, the Union waived any rights it had in this regard.

In light of the preceding discussion there is no need to address the question of whether the adoption and implementation of Ordinance 3.39(13) and the Pension Board resolution constituted a unilateral change in a condition of employment.

17/ 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 .

18/ See note 8 supra.

19/ Milwaukee County (11306) 9/72; Kenosha County (14937-A, 14943-A) 6/77; New Richmond Jt. School District (15172-A) 7/77; City of Jefferson (15482-A) 8/77.

Breach of Duty of Fair Representation

Complainants Albright et al. contend the Union discriminated against them in the interest of the majority in advocating mandatory retirement at age 55 for fire fighters. Also, that by refusing to represent Complainants before the Pension Board and in otherwise fighting the mandatory retirement policy, the Union's conduct amounts to a breach of its duty of fair representation. Petry argues the alleged breach of duty as a defense to Respondents' charge that he failed to exhaust or even attempt to exhaust the contract remedies available to him before bringing this action to enforce the collective bargaining agreement.

The Union as exclusive bargaining agent of City fire fighters has a duty to represent all fire fighters in the bargaining unit fairly. 20/ This duty is breached only when said Union's conduct toward a unit member is arbitrary, discriminatory or in bad faith. 21/ Said duty also includes a "full and honest disclosure of the facts to all those whom it represents no matter how unpalatable those facts might be." Debales v. Trans World Airlines, 90 LRRM 3064, 3072 (1975).

In Humphrey v. Moore 375 U.S. 338; 55 LRRM 2031 (1964), the Court said "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

Both Humphrey and Ford Motor Co. v. Huffman 34 U.S. 330, 31 LRRM 2548 (1953), involved matters surrounding employes' seniority and, in both instances, the Court found that more favorable seniority for some employes was the result of relevant and reasonable considerations. Consequently, no breach of duty was found.

Although the Union has a wide range of reasonableness within which to make decisions affecting employe rights, said "decisions cannot be made soley" for the benefit of a stronger, more politically favored group over a minority. To allow such arbitrary decision making is contrary to the Union's duty of fair representation . . ." (Emphasis added) Barton Brands, LTD v. NLRB, 91 LRRM 2244, 2245 (1976).

In the instant case the Union was on record with its own members as early as April 24, 1974, of its support for mandatory retirement of fire fighters at age 55. The rationale behind the subject Union's position in favor of compulsory retirement was outlined in the minutes of the 1974 Professional Fire Fighters of Wisconsin convention. At said convention retirements under Chapter 62.13 and the Wisconsin Retirement Fund were discussed vis-a-vis the Association's backing of pension legislation in the State legislature. Several reasons were given including the prospect that if employes were allowed to continue employment beyond the normal retirement age of 55 the legislature might alter the existing benefit schedules. The conclusion reached by the Association was that it would support mandatory retirement for all fire fighters irrespective of which retirement fund they are participants of. This position was assumed by this Union in its dealings with the City and Pension Board.

20/ Syres v. Oil Workers 350 U.S. 892, 37 LRRM 2068 (1955).

21/ Vaca v. Sipes 386 U.S. 171, 64 LRRM 2369 (1967); Manke (11017-B) 8/74.

A review of the pertinent evidence concerning the Union's advocacy of compulsory retirement for City fire fighters leads to the conclusion that it was not a decision made arbitrarily or in bad faith. Furthermore, inasmuch as the position advocated by the Union would require all City fire fighters to retire at age 55 it did not discriminate between participants in the Chapter 62.13 pension fund and Chapter 41 participants. Further evidence of this is the fact that Complainants herein who are challenging compulsory retirement for City fire fighters are representative of both Section 62.13 and 41, Stats. retirement funds.

In addition to advocating mandatory retirement for City fire fighters the Union also refused to aid Complainants Albright et al. before the Pension Board that deliberated their retirements. Initially the Union general membership voted to finance any litigation undertaken by a member to reverse the Pension Board resolution if the Union's legal counsel thought it advisable. However, on November 13, 1975, after having received a legal opinion on the Pension Board's resolution the Union's Executive Board went on record against financing any legal action instituted by Chapter 62.13, Stats., participants to reverse Pension Board action on compulsory retirement. This position was adopted by the general membership on November 17, 1975. Thereafter, on August 5, 1976, and September 8, 1976, Counsel for Complainants Albright et al. requested the Union to provide them with legal representation to enforce their right to continue employment. This request was denied on September 23, 1976. As can best be determined from this record, the request was denied at least in part because it presented a conflict of interest with the Union's position favoring compulsory retirement at age 55 and the further belief that there was nothing invidious about such a requirement.

To say the least, the Union was confronted with a difficult decision when presented with Complainant's request to provide them with legal representation to challenge the policy they had been advocating. Complainants upon the advice of counsel and consistent with earlier decisions of the Union membership denied the request. However, in light of that which preceded the Union's decision it can hardly be said that the Union's action was arbitrary, discriminatory or taken in bad faith. Rather it was reasoned and within the wide latitude afforded the Union in carrying out its fuduciary duty of fair representation.

BREACH OF CONTRACT

Both complaints contain several breach of contract allegations. The Respondents, however, raise as an affirmative defense to said complaints Complainants' failure to grieve said alleged breaches. The Commission has held, in cases too numerous to cite, that a prerequisite to asserting jurisdiction over alleged breach of contract complaints where the contract allegedly violated contains a grievance and arbitration procedure is Complainant's exhaustion of contractual remedies. 22/ The Commission has, however, again in cases too numerous to cite, excused said exhaustion requirement where the Union has breached its duty to fairly represent said Complainant and said breach precluded his exhaustion of contractual remedies. 23/

The exhaustion theory applied to suits to enforce collective bargaining agreements can be traced to Republic Steel Corp. v. Maddox 379 U.S. 650, 58 LRRM 2193 (1965), and was reaffirmed in Vaca, supra. In Maddox the Court said

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22/ Manke, supra.

23/ Manke, supra.

". . . federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." (Emphasis in court's decision.)
". . . And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."

However in Vaca the court recognized the need for exceptions to the general proposition.

". . . However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures."

Thereafter, the Court in Vaca gave two examples of exceptions to the general rule.

"An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. Drake Bakeries Inc. v. Bakery Workers, 370 U.S. 254, 260-263, 50 LRRM 2440 . . .

We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance."

Also, two years later, the Court in Glover v. St. Louis-San Francisco Ry, 70 LRRM 2097 (1969) enunciated another exception.

". . . The circumstances of the present case call into play another of the most obvious exceptions to the exhaustion requirement--the situation where the effort to proceed formally with contractual or administrative remedies would be wholly futile."

The Courts have also held that where a Union-Employer conspiracy is alleged it would be futile to present the grievance to the Union and filing of the grievance as well as exhaustion have been excused. 24/ It is this latter exception, in addition to the fact that they don't have access to arbitration, that Complainants rely upon to excuse their failure to grieve the alleged breaches of contract.

24/ Desrosiers v. American Cynanamid Corp., 377 F. 2d 864 (2d Cir. 1967), 65 LRRM 2557.

A careful reading of Vaca and subsequent cases 25/ shows that a prerequisite to an employe being able to sue his employer for breach of contract where there is a contractual grievance and arbitration procedure for resolving disputes under said contract, is proof that the Union breached its duty of fair representation. This rule of law has also been adopted by the Commission and Wisconsin Courts where employes have sued the employer pursuant to Section 111.60(1)(f), Stats., and Section 111.70(3)(a)5, Stats. 26/ Thus, the courts have excused the filing of grievances or exhausting the procedure in instances where the Union refused to proceed with the advanced stages of the grievance-arbitration procedure or where the filing of a grievance would be futile. 27/ However, a fair reading of the Courts analysis of Vaca, Maddox and others in Desrosiers, supra, leads to the inescapable conclusion that any showing that resort to the contractual remedial procedures would be futile or useless must be footed in the Union's breach of its duty of fair representation. In other words, there must be sufficient evidence of Union conduct establishing said breach to justify the employe's conclusion that resort to the grievance procedure would be futile.

Herein, the futility argument is based upon the fact that the Union urged adoption of mandatory retirement at age 55 and, consequently, with the Union in control of the advanced stages of the grievance and arbitration machinery it would be futile to invoke said procedures. However, as noted earlier, the Union's position on mandatory retirement was not taken arbitrarily or in bad faith so as to breach its duty of fair representation. Thus, the futility argued by Complainants herein will not excuse their failure to grieve the alleged breaches of contract inasmuch as the futility is not based upon a breach of duty of fair representation.

Also, Complainants' claim that they were unaware of their individual right to grieve under the applicable collective bargaining agreements is not controlling. All Complainants were given copies of said contracts and, therefore, must necessarily be held accountable for knowing the contents thereof. The language of Step 1 of said procedure could not be more clear.

> "If an employee has a grievance, he shall first present the grievance orally to the District Chief or Division Head . . .". (Emphasis added).

This procedure was not followed by Complainants and their lack of knowledge does not excuse this omission on their part.

For these reasons the Examiner will not assert the Commission's jurisdiction to review the merits of Complainants' breach of contract allegations. Also, the Examiner has not dealt with Complainants' contention that the City violated Section 62.13(5m), Stats., because said allegation was raised only to establish a breach of contract prohibited practice. Since the Examiner is not undertaking a review of the merits of said breach of contract allegations it's not necessary to decide if the City violated Section 62.13(5m), Stats.

25/ Ibid.

26/ Manke.

27/ Maddox, supra, Vaca, supra, Desrosiers, supra.

Coercion, Intimidation and Inducement of the City

Complainants Albright et al. allege that the Union, through its agents on the Pension Board, coerced and intimidated the City into adopting and implementing the Pension Board resolution. Whereas, Petry alleges that the Union coerced and intimidated agents and employes of the City to interfere with his legal rights. Both allege the Union otherwise coerced and intimidated them in the enjoyment of their legal rights.

Complainants Albright's et al. allegations of coercion and intimidation are based in part upon actions which the undersigned has already found to be outside the reach of this proceeding as beyond the statute of limitations. Therefore, even assuming, arguendo, that said allegations could be substantiated, they cannot support a finding herein that the Union committed a prohibited practice in violation of Section 111.70(3)(b)2.

Respecting Complainants' other allegations that the Union coerced and intimidated City officers and agents into adopting and implementing the Pension Board resolution and adopting and implementing City Ordinance 3.39(13) thereby interfering with Complainants' rights, there is no evidence to support these claims. As noted elsewhere herein, the City and its agents, by the conduct complained of, did not refuse to bargain with Complainants' authorized exclusive bargaining agent or thereby commit any other prohibited practice in violation of Section 111.70(3)(a), Stats. Neither did the conduct complained of interfere with any of Complainants' other legal rights. The Commission has interpreted the phrase "legal rights" to pertain only to those rights established by Section 111.70, Stats., and other rights interfered with because of the employe's assertion of rights guaranteed by said section.

> "For these reasons, the Examiner concludes that the legislature did not intend to protect the exercise of legal rights other than those specifically set out in the rights section of the three statutes unless it can be said that the legal rights sought to be protected are rights established by other provisions of the statute or the employe or employes who are allegedly interfering with the employe's other legal rights (such as the right of free speech) are motivated by the employe's exercise of his rights under the statute." 28/

Establishing the requirement that Complainants retire at age 55 without the capability of being extended beyond said age does not, standing alone, interfere with any of their Section 111.70(2), Stats., rights. Furthermore, Complainants do not allege that the Union's conduct and actions were motivated by Complainants' exercise of any of their rights protected by Section 111.70, Stats. Consequently, there is no basis for finding Respondent Union committed a prohibited practice within the meaning of Section 111.70(3)(b)2, Stats.

Coercion and Intimidation of Complainants

Section 111.70(3)(b)1, makes it a prohibited practice for a municipal employer acting alone or in concert with others to "coerce or intimidate a municipal employe in the employment of his legal rights, including those guaranteed in sub. (2)." Section 111.70(2), Stats., provides in pertinent part:

28/ Racine Policemen's Professional and Benevolent Corporation (12637) 4/74; aff'd (12637-A) 5/74.

"(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement . . . ."

Also, as noted elsewhere herein, coercion and intimidation of employes' legal rights has been interpreted by the Commission to only pertain to those rights protected by Section 111.70, Stats. or where the coercive and intimidating conduct relates to legal rights protected elsewhere in the act when such conduct was motivated by the employes' exercise of rights protected thereby.

Herein we are dealing with alleged independent 29/ as well as derivative violations. 30/ Complainants contend that they were coerced and intimidated by the Union and McCallum, Fleming, Haack and Merkle in the enjoyment of their right to collectively bargain and their right to fair Union representation. As noted in Section 111.70(2), Stats., municipal employes have a right to "bargain through representatives of their own choosing" but, have no right to demand that the municipal employer bargain directly with them and, in fact, the municipal employer is barred by law from doing so. 31/ Consequently, because they have no right as individuals to demand to bargain, said allegation, even if true, could not constitute coercion and intimidation in the enjoyment of a legal right. Also, as noted elsewhere herein, the undersigned has concluded the Union did not breach its duty of fair representation owed Complainants. Consequently, the Union did not, as contended by Complainants, commit a prohibited practice within the meaning of Section 111.70(3)(b)1, Stats.

Dated at Madison, Wisconsin this 6th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger, Examiner

29/ Milwaukee Board of School Directors (6695-A) 1/66; Rev. 24 Wis. 2d 637, 6/69; American Fed. of Teacher, Local Union 1714 (12707-B) 1/76; AFSCME, (District Council 40, Local 990) (14608-A) 11/76.

30/ Racine Policemen's Professional Benevolent Corporations, see note - Supra.

31/ Madison Jt. School Dist. No. 8 v. WERC, 69 Wis. 2d 200, 231 NW 2d 206 (1975), Rev. 97 S. Ct. 421 (1976).