

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondents. 1/:

Appearances:

No. 15191-A

collective bargaining representative of all full-time, non-supervisory law enforcement personnel employed in the LaCrosse County Traffic Police and Sheriff's Department.

3. LaCrosse County, referred to as Respondent County or the County, is a municipal employer. Respondent William Bush, referred to as Respondent Bush or Bush, is the Chairman of the LaCrosse County Board. Respondent William R. Black, referred to as Respondent Black or Sheriff Black, is the Sheriff of LaCrosse County and, as such, acted as Complainant's supervisor. At all times pertinent to this action, Respondents Bush and Black acted as agents of Respondent County.

4. At all times pertinent to this action, the Association and Respondent County were parties to a collective bargaining agreement effective from January 1, 1976 until December 31, 1976 covering wages, hours and conditions of employment of the bargaining unit described in Finding of Fact 2. Said agreement contained the following relevant provisions:

"ARTICLE II

ADMINISTRATION

2.01 Except as otherwise provided in this Agreement, the County retains the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer [,] demote or suspend or otherwise discharge or discipline for proper cause, the right to decide the work to be done and location of work; to determine the construction, maintenance or services to be rendered, the materials and equipment to be used, the size of the work-force, and the allocation and assignment of work or workers; to schedule when work shall be performed; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; and to adopt and enforce reasonable rules and regulations.

. . .

ARTICLE XII

GRIEVANCE PROCEDURE AND ARBITRATION

12.01 Any employee being discharged shall be so notified in writing stating therein the reasons for such action. A copy shall be submitted to the President of the Association.

12.02 In the event of any disagreement concerning the meaning or application of any provisions of this Agreement, such disagreement shall be resolved in the manner hereinafter set forth, however, no matter not involving the interpretation of the Agreement shall be subject to these procedures:

12.02.1 Any eligible employee(s) having a grievance shall withing [sic] five (5) work days of [the] alleged violation, [sic] present his/their grievance to his/their immediate supervisor to attempt to reach a settlement. This can

be done orally and the supervisor shall be as defined in the Municipal Employment Relations Act, Section[s] 111.70 and 111.71. [sic

- 12.02.2 If no satisfactory settlement is reached within three (3) work days after 12.02.1, then the matter shall be reduced to writing and presented to the Department Head. The Department Head and County Personnel Director along with the aggrieved employee and the Association President shall meet and attempt to resolve the dispute.
- 12.02.3 If no satisfactory settlement is reached within ten (10) work days after 12.02.2, then the matter shall be referred to the Law Enforcement Committee. The Law Enforcement Committee shall review the facts and may call for a meeting with the concerned parties and shall render its decision within fifteen (15) work days from date of meeting.
- 12.02.4 If no satisfactory settlement is reached at 12.02.3, then within five (5) working days, the matter shall be submitted to a Board of Arbitration constituted and empowered as follows:
 - 12.02.4.1 The Board of Arbitration shall be composed of three (3) members. One member to be chosen by the Law Enforcement Committee. One member to be chosen by the Association and those two members shall choose the third member who shall be the chairman of the committee. Each party shall bear his own expenses for witnesses and representatives, and both parties shall equally bear the expenses of the third party. In the event the Association and the County are unable to agree on the third party, then the third party shall be selected by the Judge of the Circuit Court, La Crosse County.
 - 12.02.4.2 Grievances subject to this arbitration clause shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and about alleged violations of the Agreement. The Board of Arbitration shall have no power to add to, or subtract from, or modify any of the terms of this Agreement, nor shall [it] substitute its discretion for that of the County or the Association where such discretion has been retained by the County or the Association, nor shall it exercise any responsibility or function of the County or the Association. No questions affecting the wage structure of the County shall be considered arbitrable.

12.02.4.3 It is further agreed that the findings of the Arbitration Board shall be final and binding upon both parties and that such findings shall be made in writing within twenty (20) work days after the dispute has been submitted to arbitration, unless an extension is approved jointly by the County and the Association."

5. Complainant ended his work week for the week of April 26 through May 1, 1976 at 7:00 a.m. on Saturday, May 1. During the evening of May 1, Complainant was arrested and charged with unlawful possession of a controlled substance with intent to deliver same. Shortly thereafter and on the same day, Complainant was orally discharged from his employment by Sheriff Black for possession of a drug with intent to deliver. Had Complainant not been discharged, his work schedule for the following week would have been to work the 11:00 p.m. to 7:00 a.m. shift six consecutive nights beginning Tuesday night, May 4.

6. Shortly after his discharge, Complainant retained an attorney. On Monday, May 3, Complainant's attorney, Burleigh Randolph, contacted the Sheriff's Department in regard to the criminal charges pending against Complainant.

7. On Tuesday, May 4, Complainant received a letter dated May 3 from Sheriff Black, confirming Complainant's discharge. The relevant portion of that letter states that: "This is to inform you officially that on May 1, 1976 at 11:00 P.M., upon your incarceration in the LaCrosse County Jail, your employment with LaCrosse County has been terminated." The President of the Association was not sent a copy of this letter.

8. On Tuesday, May 5 or Wednesday, May 6, Complainant received from the County a copy of a form entitled "Notice of Personnel Action" which stated "[d]ischarged for misconduct. Possession with [sic] a drug with an intent to deliver" The Association was not sent a copy of this notice.

9. On Tuesday, May 11, Complainant's attorney, Burleigh Randolph, sent a letter to Sheriff Black who received it on May 12, 1976 which reads in pertinent part as follows:

"This will advise that I represent Gregory Murphy in the matters to which this letter pertains, and that this letter is being forwarded to you on behalf of Mr. Murphy, with his consent.

Mr. Murphy regards his discharge from employment by you more than a week ago as being without any lawful authority or basis, and we regard any supposed resignation by Mr. Murphy as being under duress and constituting no more than a recognition of your illegal discharge of him from his position of jailer at the time of his discharge.

This will advise that we demand his immediate retroactive reinstatement, without loss of any pay, employment rights, time in grade, seniority, or other fringe benefits."

The Association was not sent a copy of this letter.

10. On Thursday, May 13, Sheriff Black sent the following letter to Attorney Randolph:

"I am writing to you at this time in response to your letter of May 11, 1976. I am sorry that you feel his leaving was illegal and some how his resignation obtained under duress. My facts substantially differ from your interpretation and I am only attempting to fulfill my duty as a law enforcement officer administrator."

11. On August 18, Complainant's attorney, Charles Norseng, sent to the Personnel Director of the County with a copy to the President of the Association a letter which reads in pertinent part as follows:

"I represent Mr. Greg Murphy in regard to a discharge from employment by the County Sheriff. Mr. Black sent Mr. Murphy a certified letter dated May 3, 1976. That certification was received and returned some day after the 3rd. I note that a copy of that letter was not submitted to the President of the Association as required by Article 12.01 of the Grievance Procedure of the working agreement between the La Crosse County Traffic Police and the Deputy Sheriff's Association.

Mr. Murphy voiced his disagreement to Sheriff Black, and on May 11, 1976, his counsel, Mr. Burleigh Randolph [,] sent a letter indicating that the discharge from employment by Sheriff Black was without lawful authority. This appears to me to be consistent with the Grievance Procedure in 12.02.1 and 12.02.2.

You are advised that no satisfactory agreement was reached and that on May 13, 1976, Sheriff Black wrote to Mr. Randolph saying he was sorry that Mr. Murphy felt his discharge was illegal and referred to the discharge as a 'resignation.' In examining the provisions of the contract, Article 12.02.2 says:

'The Department Head and County Personnel Director along with the aggrieved employee and the Association President shall meet and attempt to resolve the dispute.'

As far as I know, there has been no meeting, and by this letter we are formally requesting you to schedule the meeting as called for by the contract so that Mr. Murphy may be afforded his rights.

You should be advised that we do not consider the discharge valid and that, in fact, Mr. Murphy has been suspended pending the resolution of the problem in the Courts, and the issue is whether he is suspended with or without pay."

12. On August 20, the Personnel Director of the County sent a letter to Complainant's attorney which reads in pertinent part as follows:

This is in response to your letter of August 18, 1976

Your allegation that the La Crosse County Traffic Police and Deputy Sheriff's Association was not notified of Mr. Murphy's termination is in error. Officer Westlie, President of the Association, was aware of the situation and action taken within the prescribed time limits of Article XII of the Agreement.

Further, there was no processing of any grievance through the Association by either its officers, or Mr. Murphy, within the time frames as specified in the Contract.

Therefore, your request for access to the grievance procedure for redress of your clients [sic] claim is denied. Your client apparently has elected from the outset to seek redress through other channels than the procedure prescribed in the Contract.

Relative to your statement that Mr. Murphy had been suspended, we would point out that Sheriff Black's letter of May 3, 1976 leaves no doubt that Mr. Murphy was terminated. Mr. Murphy's involvement with the Courts is another matter, which, [sic] does not in itself relate to conduct the County can rightfully expect of its employees, more especially those who are involved in a law enforcement function.

13. Complainant alleges that his discharge was in violation of the collective bargaining agreement because Sheriff Black failed to send a copy of the discharge letter to the President of the Association pursuant to section 12.01 of the contract, because no grievance meeting was held pursuant to section 12.02.2 of the contract, because Sheriff Black failed to inform Complainant of his rights under the grievance procedure and because notice of the reasons for Complainant's discharge was not given as required by section 12.02.1 of the contract.

14. At the time of his discharge, Complainant was aware of the existence of the contractual grievance procedure, although he did not know the specifics of that procedure, and he knew that a member of the bargaining unit should contact the President of the Association if that member had a grievance. Complainant never requested the Association to file a grievance on his behalf or to assist him in filing a grievance to protest his discharge.

15. The grievance procedure set forth in Finding of Fact 4 constituted Complainant's exclusive remedy for violations of the collective bargaining agreement. Complainant's allegation that he was discharged in violation of the collective bargaining agreement constitutes a grievance within the meaning of the collective bargaining agreement. Complainant failed to file any such grievance, either orally or in writing, pursuant to sections 12.02.1 and 12.02.2 of the collective bargaining agreement and thus Complainant failed to attempt to exhaust the contractual grievance procedure.

16. Complainant has not filed a complaint of prohibited practices which names the Association as a respondent.

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

CONCLUSIONS OF LAW

1. The Examiner is without jurisdiction to determine whether the LaCrosse Traffic Police and Deputy Sheriff's Association has breached the terms of the collective bargaining agreement in violation of section 111.70(3)(b)4 of the Municipal Employment Relations Act.

2. Because Complainant's contention that his discharge violated the collective bargaining agreement is a grievance within the meaning of that agreement and because Complainant failed to present an oral grievance to his supervisor or to seek representation by the Association in order to file a written grievance, Complainant has failed to attempt to exhaust the grievance procedure in the collective bargaining agreement.

3. The LaCrosse County Traffic Police and Deputy Sheriff's Association did not violate its duty to fairly represent Complainant since Complainant never contacted the Association in a timely manner regarding his discharge.

4. Because the Association did not violate its duty to fairly represent Complainant, the Examiner will not assert the Commission's jurisdiction to determine whether Respondents breached the collective bargaining agreement in violation of section 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the complaint and the amended complaint filed herein be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 26th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner

MEMORANDUM ACCOMPANYING FINDINGS
OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In the complaint and amended complaint, Complainant alleges that the President of the Association, the Personnel Director of the County and Sheriff Black failed to schedule a meeting as required by section 12.02.2 of the collective bargaining agreement and thereby violated section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA). 4/ Complainant further alleges that the Association failed to process Complainant's grievance concerning his discharge and that this failure was arbitrary, discriminatory, in bad faith and in violation of the collective bargaining agreement. 5/

At the hearing in this matter, Complainant alleged that his discharge violated the collective bargaining agreement because Sheriff Black failed to mail a copy of the discharge notice to the President of the Association, pursuant to section 12.02.1 of the collective bargaining agreement, failed to inform Complainant of his rights under the grievance procedure of the contract and failed to give Complainant notice of the reasons for his discharge pursuant to section 12.02.1 of the contract and because no grievance meeting was held pursuant to section 12.02.2 of the contract. 6/

Respondents deny that they violated the terms of the collective bargaining agreement and thus deny that they violated section 111.70(3)(a)5 of MERA. Respondents affirmatively allege that Complainant failed to exhaust the contractual grievance procedure and, therefore, the complaint and amended complaint should be dismissed without any determination concerning the claim of a violation of contract.

DISCUSSION

As filed, the complaint and amended complaint were entitled Gregory J. Murphy v. William Bush, Chairman LaCrosse County Board and William R. Black, Sheriff LaCrosse County. LaCrosse County was not named as a Respondent. Respondents Bush and Black were named in their official capacities as agents of LaCrosse County. They were represented at the hearing by the Corporation Counsel of LaCrosse County who stated at the hearing that he was appearing "for the County and other Respondents" T. 2. Because it is LaCrosse County which is the municipal employer in this matter, the Examiner has amended the pleadings by adding LaCrosse County as a Respondent. No prejudice is caused LaCrosse County by the Examiner's actions as the County, by its Corporation Counsel, fully participated in the hearing.

4/ Section 111.70(3)(a)5 of MERA provides that it is a prohibited practice for a municipal employer to violate the terms of a collective bargaining agreement. Section 111.70(3)(b)4 of MERA provides that it is a prohibited practice for a municipal employee to violate the terms of a collective bargaining agreement. Section 111.70(3)(b) has been interpreted as applying to labor organizations. Racine Policemen's Professional and Benevolent Corporation (12637, 12637-A) 5/74. The Examiner will conform the pleadings so that the correct statutory violation is alleged against the Association.

5/ Complainant did not specifically allege any statutory violation based on this conduct.

6/ The Examiner will amend the complaint and amended complaint to conform to the proofs.

Complainant alleges in his complaint and amended complaint that the Association violated the collective bargaining agreement by failing to schedule a meeting as required by section 12.02.2 of the agreement, thereby violating section 111.70(3)(b)4 of MERA. 7/ The Examiner has dismissed this portion of the complaint and amended complaint because the Complainant did not name the Association as a party to the proceeding and, therefore, the Association did not participate in the hearing. The Examiner will not determine the merits concerning an alleged statutory violation when the person or organization which allegedly committed the violation is not a party to the proceedings.

The Complainant also alleges that the Association violated the collective bargaining agreement by failing to process Complainant's grievance. Complainant did not allege any statutory violation based on this conduct, however. Assuming that Complainant was alleging that the Association violated section 111.70(3)(b)4 of MERA, the Examiner has dismissed the portion of the complaint and amended complaint which alleges that the Association violated the collective bargaining agreement by failing to process Complainant's grievance for the same reason which was discussed above. This dismissal does not preclude the Complainant from litigating the issue of whether the Association's failure to process Complainant's grievance was arbitrary, discriminatory or in bad faith, thereby violating its duty to fairly represent Complainant.

The collective bargaining agreement involved herein contains a grievance procedure which culminates in final and binding arbitration to resolve disputes arising under that agreement. It is a well-established policy of the Commission not to assert its jurisdiction to determine an allegation that one party has violated the terms of that agreement where the parties to the agreement have agreed to submit to final and binding arbitration disputes which arise over alleged violations of that agreement. 8/ This policy is not limited to substantive issues but covers procedural issues as well. 9/ However, under certain circumstances, the Commission will determine the merits of a claim that a party has violated the terms of a collective bargaining agreement even if that agreement provides for final and binding arbitration. Such a circumstance occurs when the grievance procedure has not been exhausted by or on behalf of an aggrieved employee because the employee's bargaining representative has breached its duty to fairly represent that employee.

Before the Examiner will assert the Commission's jurisdiction to determine the merits of Complainant's allegation that Respondents breached the collective bargaining agreement in violation of section 111.70(3)(a)5 of MERA, Complainant must show that he attempted to exhaust the collective bargaining agreement's grievance procedure and that his failure to succeed in exhausting the grievance procedure was caused by the Association's breach of

7/ See Footnote 4 for an explanation of this allegation.

8/ Beloit Jt. School District (14702-B, C) 4/77; City of Wauwatosa (13385-A, B) 12/75; Lake Mills Jt. School District No. 1 (11529-A, B) 8/73; Milwaukee Board of School Directors (10663-B, C) 3/73; Oostburg Jt. School District No. 1 (11196-A, B) 12/72; River Falls Coop. Creamery (2311) 1/50; J.I. Case Co. (1593) 4/48.

9/ Oostburg Jt. School District No. 1, above.

its duty to fairly represent him. 10/ Complainant must sustain his burden of proof "by a clear and satisfactory preponderance of the evidence." 11/

The contract provides for a five step grievance procedure: oral grievance; written grievance; meeting of the Department Head, Personnel Director, aggrieved employee and the President of the Association; referral to the Law Enforcement Committee; and, finally, final and binding arbitration. Complainant, either by himself or through the Association, never presented to Sheriff Black, Complainant's immediate supervisor, an oral grievance concerning any of the alleged contractual violations as required by section 12.02.1 of the contract. Sheriff Black's dismissal letter did not foreclose Complainant from presenting an oral grievance, as contended by Complainant. It is unlikely that Sheriff Black would have changed his mind about the discharge. However, this does not mean that Complainant was prevented from presenting an oral grievance. If the County and the Association had wanted to exempt discharge cases from the requirement of presenting an oral grievance to the Sheriff, they could have provided, but did not, for such an exception.

Even assuming that the presentation of an oral grievance was not necessary under the circumstances, Complainant also never filed a written grievance pursuant to section 12.02.2 of the contract. Complainant contends that his attorney's letter of May 11, 1976 (see Finding of Fact 9) amounted to such a grievance. That letter does not amount to a grievance since it was not presented through the Association. As held in Milwaukee Board of School Directors (11280-A, B) 12/72, "[u]nless the collective bargaining agreement specifically provides that an individual employee, without union representation, can utilize all the steps of the grievance procedure, a grievance filed by an individual employee who does not seek union representation does not have access to the contractual grievance procedure." The contractual grievance procedure involved in the case before this Examiner permits the individual employee to file an oral grievance--which is the first step of the grievance procedure--without the representation of the Association. However, the contract does not specifically provide that an individual employee, without representation, can utilize all the steps of the grievance procedure and thus the remaining steps do not permit the individual employee to process a grievance without the Association's representation. Therefore, the letter of May 11, 1976 did not amount to a grievance.

Because Complainant failed to present an oral grievance to his supervisor and failed to seek representation by the Association in order to file a written grievance, Complainant failed to attempt to exhaust the contractual grievance procedure.

Assuming representatives of the Association knew of Complainant's discharge promptly after its occurrence, they did not have an

10/ Mahnke v. WERC, 66 Wis. 2d 524, 225 N.W. 2d 617 (1975). The burden rests with the Employer to raise and prove the defense of failure to exhaust the contractual grievance procedure. In this case, Respondents pleaded this defense and Complainant admitted his failure to exhaust. The burden then rests with Complainant to prove that, although failing to exhaust the grievance procedure, he at least attempted to exhaust it and that his attempt was frustrated by the Association's breach of the duty of fair representation.

11/ Section 111.07(3), Wis. Stats.

affirmative duty to seek out Complainant and inquire whether he wished to file a grievance absent some indication from him that he wished to contest his discharge. The record shows that the first time that Complainant indicated that he felt that his discharge was in any way improper was the May 11 letter and that letter was not sent to the Association. Complainant never contacted the Association in any manner concerning his discharge until August 18, three and one-half months after his discharge; that contact was in the form of a carbon copy of a letter sent to the County's Personnel Director (see Finding of Fact 11). Complainant was aware at the time of his discharge of the existence of the grievance procedure and also knew that one should contact the President of the Association in order to file a grievance. Although the events of May 1, including his discharge, were no doubt upsetting to Complainant, he nevertheless had the presence of mind to contact an attorney by May 3 and certainly could have contacted, had he wanted to, some representative of the Association. Therefore, because Complainant never contacted the Association in a timely manner regarding his discharge, the Association's inaction concerning Complainant's discharge does not amount to a breach of its duty to fairly represent Complainant.

Because Complainant did not attempt to exhaust the grievance procedure and because the Association did not breach the duty of fair representation, the Examiner will not assert the jurisdiction of the Commission to determine whether Respondents breached the collective bargaining agreement in violation of section 111.70(3)(a)5 of MERA.

Dated at Madison, Wisconsin this 26th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner