STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVID A. KATZ, Complainant, vs. CITY OF MADISON, Respondent.	:	Case LI No. 21916 MP-772 Decision No. 15725-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Complainant.
Mr. Henry A. Gempeler, City Attorney, City of Madison, by Mr. William A. Jansen, Assistant City Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission on July 28, 1977 in the above-entitled matter and the Commission, having on August 14, 1977 appointed Duane McCrary, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Madison, Wisconsin on November 11, 1977, December 12, 1977 and December 13, 1977 before the Examiner; and the parties having filed post-hearing briefs by June 15, 1978; and the Examiner having considered the evidence and arguments of counsel; and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Complainant is an employe of the Respondent in its Water Utility Department and is a member of Local 60, AFSCME, AFL-CIO, a labor organization with its offices in Madison, Wisconsin.

2. That the City of Madison, hereinafter referred to as Respondent, is a municipal employer having its principal office at the City-County Building, 210 Monona Avenue, Madison, Wisconsin; that the Respondent operates a Water Utility Department at which the following personnel are employed; Larry Russell-Manager, Robert R. Fuller - Assistant Manager, Laverne Nelson - Chief Operator, Frank Dvorak - Assistant Chief Operator, Luther Cook - Waterworks Operator III, George Holden - Waterworks Operator II and Chester Dolva - Waterworks Operator II.

3. That the Respondent and Local 60, AFSCME, AFL-CIO were parties to a collective bargaining agreement effective December 14, 1975 through December 25, 1976 covering wages, hours and conditions of employment of employes in the Water Utility Department exclusive of managerial, supervisory and confidential employes as well as certain employes in other departments of the Respondent. That said collective bargaining agreement contains the following pertinent provisions:

CONSIDERATION OF AGREEMENT

ARTICLE I

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1.02 NON-DISCRIMINATION:

The parties agree that their respective policies will not violate the rights or discriminate against any employees covered by this Agreement because of . . . Union . . . affiliation in the application or interpretation of the provisions of this Agreement.

. . .

MANAGEMENT RIGHTS

ARTICLE V

5.01 MANAGEMENT RIGHTS:

The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibility and the powers or authority which the City has not officially abridged, delegated, or modified by this Agreement and such powers or authority are retained by the City.

These Management Rights include, but are not limited to the following:

A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible; to manage and direct the employees of the City; to hire, schedule, promote, transfer, assign, train, or retain employees in positions within the City; to suspend, demote, discharge, or take other appropriate action against the employees for just cause.

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GRIEVANCE AND ARBITRATION PROCEDURE

ARTICLE VI

6.01 GRIEVANCE PROCEDURE:

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

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STEP ONE: If an employee has a grievance, he shall first present the grievance orally to his immediate supervisor or his designated replacement, and state that this is a grievance, either alone or accompanied by a Union representative within five (5) days of his knowledge of the occurrence of the event causing the grievance but not later than

thirty (30) calendar days from the time of the event. The supervisor shall be required to give an oral answer within five (5) days and state that this is in answer to that grievance.

STEP TWO: The grievance shall be considered settled in Step One unless within five (5) days after the immediate supervisor's (or his replacement's) answer is due, the grievance is reduced to writing and presented to said immediate supervisor on a form attached hereto and made a part thereof as Schedule B. Within five (5) days, the supervisor 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 City Negotiator.

STEP THREE: The grievance shall be considered settled in Step Two unless within five (5) days after the immediate supervisor's written answer is due, the grievance is again reduced to writing and presented to the department/division head and the immediate supervisor's response (or his designated representative) if any, is appealed to the department or division head. The department/division head may confer with the aggrieved and the Union and such other people he deems appropriate before making his determination. Such decision shall be reduced to writing and submitted to the aggrieved employee, the City Negotiator, and the Union within five (5) working days from his receipt of the grievance and/or appeal of the immediate supervisor's answer.

STEP FOUR: If a Union grievance is not settled at Step Three, or any grievance filed by the City cannot be satisfactorily resolved by conferences with appropriate representatives of the Union, either party may proceed to the next step as hereinafter provided.

6.02 FINAL AND BINDING ARBITRATION:

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

Any dispute which shall be determined by the arbitrator to be non-grievable, shall be appealable under the provisions of Chapter Three of the Madison General Ordinances.

For 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 date of this Agreement.

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

No item or issue may be the subject of arbitration, unless such arbitration is formally requested within thirty (30) days following the filing of a Written Response required by Step Three 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 the 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.

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.

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PROMOTION - TRIAL PERIOD - JOB POSTING

ARTICLE IX

9.01 PROMOTION:

Is advancement of an employee occupying a permanent position to a position in a classification having a higher salary range.

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9.03 TRIAL PERIOD:

In cases of promotion the employee shall serve a trial period of six (6) months following the date or promotion during which time the employee shall be entitled to return to his former position if either the employee or employer so decides. Upon successful completion of the trial period the employee shall be "permanent" in the new position.

9.04 JOB POSITION AND FILLING:

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B. Failure to report for work or the refusal of an offer of re-employment in any job in the same pay and classification to the last job held by the employee prior to the layoff shall terminate any obligation assumed by the City.

PAY POLICY

ARTICLE XII

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12.02 Any employee who by assignment performs the work of a classification that falls into a pay range

higher than the pay range of such employees classification, shall receive as additional compensation fifteen (15) cents per hour when such assignment is one (1) pay range higher, or if two (2) or more pay ranges higher ten (10) cents per hour for each pay range while so assigned.

4. That the Complainant was hired on June 5, 1973; that on July 8, 1975, the Complainant, then classified as a Public Works Maintenance Worker I requested training as a Waterworks Operator I; that subsequently Larry Russell approved Complainant's request for training; that the Complainant was assigned as a trainee to learn Waterworks Operator I duties from January 26, 1976 to May 2, 1976, and during said period Complainant was paid at the rate of a Public Works Maintenance Worker I while working under the immediate supervision of a Waterworks Operator I; that from May 3, 1976 to July 27, 1976 the Complainant continued to be trained to perform the duties of a Waterworks Operator I, but did not always work under the immediate supervision of a Waterworks Operator I; that on July 20, 1976 the Complainant filed a grievance alleging that he did not receive "acting out of class" pay in violation of Section 12.02 of the collective bargaining agreement between February 16, 1976 and May 3, 1976; that said grievance was resolved at Step III of the grievance procedure on July 26, 1976; that on July 22, 1976 the Complainant was given verbal instructions that his training assignment would be terminated effective July 27, 1976; that on July 27, 1976 the Complainant began working at the Main office of the Water Utility in the capacity of a Public works Maintenance Worker I and was paid at that corresponding pay rate; that on August 3, 1976 the Complainant filed a grievance with the Respondent which incorporated allegations of discrimination contained in the instant complaint as well as alleged violations of Articles I, V and IX of the collective bargaining agreement; that said grievance was denied at the second step by Laverne Nelson on August 9, 1976 and the third step by Robert Fuller on August 24, 1976; and that said grievance was withdrawn prior to arbitration.

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

CONCLUSION OF LAW

That the instant complaint is dismissed on the basis that the activity alleged to have constituted a prohibited practice occurred more than one year prior to the date upon which the complaint was filed.

Based on the above and foregoing Findings of Fact and Conclusion of Law the undersigned makes and enters the following

ORDER

That the instant complaint be and the same hereby is dismissed.

Dated at Madison, Wisconsin this 31st day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Duane McCrary, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSION OF LAW AND ORDER

The complaint essentially alleges that the Complainant's rights under the Municipal Employment Relations Act (MERA) were violated in that after the Complainant had filed a grievance, he was transferred from a higher paying position to one which did not pay as much. The transfer became effective on July 27, 1976. The instant complaint was filed on July 28, 1977. At hearing the Respondent moved to dismiss the complaint on the basis of an alleged failure of the Complainant to exhaust his contractual remedies and because the charges which arose out of the Respondent's action occurred more than one year prior to the filing of the complaint and are thus barred by Section 111.07(14), Wisconsin Statutes, which is incorporated by reference in Section 111.70 prohibited practice proceedings by Section 111.70 (4)(a) Wisconsin Statutes. Complainant's counsel replied by pointing out that paragraphs 7 and 8 of the complaint refer to events occurring after July 28, 1976 and that because paragraph 9 alleges that discriminatory conduct has continued through and including the present, the complaint should not be dismissed. The Examiner notes that Paragraph 7 and 8 of the complaint merely state that the Complainant filed grievances on August 3, 1976 and August 11, 1976. Further, an examination of the record does not disclose an allegation of continued discriminatory conduct. The record demonstrates that the Complainant was transferred on a date certain and that this transfer constitutes the single alleged discriminatory act complained of. Accordingly, the Examiner will utilize the date of Complainant's transfer July 27, 1976 as the date on which the alleged violation occurred in order to determine whether the complaint is barred by the statute of limitations.

At hearing Complainant's counsel asserted that the instant complaint was timely filed in that it was filed with the Commission less than one (1) year after the parties had attempted to resolve the dispute through the contractual grievance procedure. He further asserted that the statute of limitations should not have began to run until the parties had completed their attempts to resolve the disputed issue through the grievance procedure.

The Commission has previously held that where a collective bargaining agreement provides procedures for the voluntary settlement of disputes arising thereunder, it will not entertain a complaint that either party has violated said agreement before the parties have exhausted said voluntary procedures for resolving such disputes. In effectuating this policy the Commission has concluded that a cause of action does not arise until the grievance procedure has been exhausted and, the one-year period of limitation for the filing of a complaint in such cases is computed from the date when the grievance procedure was exhausted, provided the Complainant has not unduly delayed the grievance procedure. 1/ The rationale for the exhaustion policy is that the parties should be allowed to utilize the dispute resolution mechanism for which they bargained when recourse to that forum will also resolve the prohibited practice question before the Commission. The reason for the exhaustion requirement in Section 111.70(3)(a)5 cases is obvious

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1/ Prairie Farms Joint School District No. 5, (12740-A, B) 6/75; Plum City Joint School District (15626-A) 4/78.

- the substantial congruity of issues presented to the Arbitrator and the Commission.

Further, the Commission's policy is to defer to the arbitration process in all cases involving alleged violations of the terms of a collective bargaining agreement where said agreement provides for final and binding arbitration of alleged violations of its terms, unless the parties, by their conduct waive or forfeit their right to insist that alleged violations be submitted to arbitration. Such waiver or forfeiture then allows the Commission to rule on the alleged contractual violation. 2/

However, in complaint cases where a violation of a MERA protected right is alleged and the alleged prohibited activity is also covered under the parties' collective bargaining agreement the Commission will retain its exclusive jursidiction to determine whether such a prohibited practice has occurred. 3/ However, the Commission may in its discretion and if the parties are willing, hold the statutory proceedings in abeyance and defer resolution of the dispute to the arbitration process. Should the Commission do so jurisdiction is retained to insure that the arbitration award ultimately issued is not inconsistent with statutory policy under the Municipal Employment Relations Act. 4/

Here, the issues to be resolved are covered by both the collective bargaining agreement and the Municipal Employment Relations Act. Further, as Complainant avers that Respondent discriminated against him for engaging in union activity and that Respondent interfered with the exercise of rights guaranteed by MERA in violation of Sections 111.70(3)(a)3 and 111.70(3)(a)1 of the same Act, the exhaustion of remedies doctrine cannot appropriately be applied. The Complainant could have utilized the agreed-to grievance procedure to the fullest extent for the resolution of the issues presented in the instant complaint. Having failed to do so and having filed the instant complaint with the Commission, the Complainant must comply with the statutory procedural requirements under which the Commission operates. One of these procedural requirements which must be met before the Commission may exercise its jurisdiction is compliance with the one-year statute of limitations.

Here, the date of the alleged discriminatory transfer took place on July 27, 1976. The instant complaint was filed on July 28, 1977, and as the alleged unlawful transfer took place more than one year prior to the date the complaint was filed, the Commission is precluded from exercising its jurisdiction to determine whether

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2/ Chetek Joint School District No. 5, (12864-A, B) 6/75; Madison Joint School District (14866, 14867) 8/76.

3/ Section 111.70(4) Wisconsin Statutes.

4/ In Lisbon-Pewaukee Joint School District, (13404-B) 9/76 the Commission applied the criteria set forth in Spielberg Mfg. Co. 112 N.L.R.B. 1080 (1955) for deferring to arbitration awards in the disposition of unfair labor practice proceedings. These criteria require that the arbitration proceeding be fair and regular, that all parties agreed to be bound by the award, and that the result reached was not clearly repugnant to the Act.

such activity constituted a prohibited practice. 5/ Accordingly, the Examiner concludes that the instant complaint must be dismissed.

Dated at Madison, Wisconsin this 31st day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Duane McCrary, Examiner

5/ School District of Kettle Moraine, (15188-B) 3/77; CESA #4, (13100-E) 12/77.