STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2698, AFSCME, AFL-CIO, Complainant, vs. COLUMBIA COUNTY, Respondent.	Case 55 No. 34901 MP-1708 Decision No. 22683-A

Appearances:

Mr. David Ahrens, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Complainant.

Mr. James R. Meier, Corporation Counsel, Columbia County, P. O. Box 256, Portage, Wisconsin 53901, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 2698, AFSCME, AFL-CIO having, on April 25, 1985, filed a complaint with the Wisconsin Employment Relations Commission, alleging that Columbia County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 2 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on May 24, 1985, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held in Portage, Wisconsin on June 24, 1985; and the parties having filed briefs which were exchanged on September 16, 1985, and while the parties were given the opportunity to file reply briefs within fifteen (15) days after receipt of the opposing party's brief, neither party did so; and the Examiner having considered the evidence and arguments of Counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 2698, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization which functions as the exclusive bargaining representative of certain employes of Columbia County employed at the Columbia County Home; that David Ahrens is the Union's representative and has acted on its behalf; and that the Union maintains its offices at 5 Odana Court, Madison, Wisconsin 53719.

2. That Columbia County, hereinafter referred to as the County, is a municipal employer maintaining its offices at the Columbia County Courthouse, Portage, Wisconsin 53901; that Gerald Baldowin is employed by the County as the Administrator of the Columbia County Home; that Lila Smith is employed as the Dietary Supervisor at the Columbia County Home; and that they have functioned as agents for the County.

3. That the Union and the County at all times material herein were parties to successive collective bargaining agreements including a 1983-85 agreement which by its terms became effective as of January 1, 1983 and extended through July 1, 1985; and that said agreement provided in pertinent part as follows:

> ARTICLE IV - GRIEVANCE & ARBITRATION PROCEDURE
>
> 4.01 Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.
>
> 4.02 Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the

relief sought, the date the incident of violation took place, the specific section of the Agreement alleged to have been violated and the signature of the grievant and/or representative of the Union, and the date.

4.03 Time Limitations: If it is impossible to comply with the time limits specified in this procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent.

4.04 Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisified. Dissatisfaction is implied in recourse from one step to the next.

4.05 Steps in Procedure

Step 1: The employee, alone or with his representative, shall orally explain his grievance to his supervisor no later than ten (10) days after he knew or should have known, of the cause of such grievance. In the event of a grievance, the employee shall perform his assigned work task and grieve his complaint later. The supervisor shall, within four (4) days, orally inform the employee, and the representative, where applicable of his decision.

Step 2: If the grievance is not settled at the first step, the employee and/or his representative shall prepare a written grievance on forms supplied by the Union and present it to the supervisor within five (5) days. The supervisor will further investigate the grievance and submit his decision to the employee and his representatives in writing within five (5) days after receiving written notice of the grievance.

Step 3: If the grievance is not settled at the second step, the employee and/or his representative shall present a written grievance to the Administrator within five (5) days. The Administrator will further investigate the grievance and submit his decision to the employee and his representative in writing within five (5) days after receiving notice of the grievance.

Step 4: If the grievance is not settled at the third step, the employee or his representative may appeal the written grievance to the Home Committee within five (5) days after receipt of the written decision of the Administrator. The Personnel Committee shall discuss the grievance with the employee and the Union representative shall be afforded the opportunity to be present at this conference. Following said conference, the Home Committee shall respond within ten (10) calendar days in writing.

4.06 Arbitration:

1) Time Limit: If a satisfactory setlement is not reached in Step 4, the Union must notify the Home Committee in writing within ten (10) calendar days that they intend to process the grievance to arbitration.

. . .

ARTICLE V - SENIORITY RIGHTS

5.01 It shall be the policy of the Employer to recognize seniority.

5.02 Seniority shall be defined as the length of time that an employee has been employed, dating from his most

recent date of hire, and excluding any unpaid leaves of absence except as hereinafter provided.

5.03 Regular part-time employees shall attain seniority in relationship to time worked. For the purpose of computing seniority, 173.3 hours shall be considered one (1) month.

5.04 Seniority shall apply in promotions, transfers, layoffs, recall from layoff, and vacation selection, as hereinafter provided.

5.05 Job Posting: All vacancies or new positions shall be immediately posted on all bulletin boards for a period of five (5) work days, and employees may apply for positions during this period by signing the job posting. Such posting shall include: Job title, the job location, job shift, and the rate of pay. The Union agrees that employees who apply, waive their grievance rights under Section 5.07 and Article IV, as it applies to Sections 5.01 through 5.08 unless that employee also submits a written application on forms provided by the Employer at the Business Office for the position signed for. Any employee who successfully obtains a new job through the job posting mechanisms in another department may not post for another job in another department for twelve (12) months.

5.06 Selection of applicants to fill job vacancies or new positions shall be determined by the employee's skill, ability, as reflected in his personnel file, and seniority. Where all factors are equal, the employee with the greatest seniority shall be entitled to preference.

5.07 The Employer retains the right to establish necessary qualifications for all positions, and to determine whether a given employee meets the necessary qualifications. As may be applied to an individual employee, the question of that employee's qualifications shall be subject to the grievance procedure contained in Article IV of this Agreement if the employee has submitted a written application.

4. That prior to July, 1984, Maxine Harriman, nee Von Behren, was President of the Union; that Harriman and Darlene Wendt, a bargaining unit employe, met with Baldowin and the County Home's Director of Nursing in an attempt to reach agreement with respect to who would be called for additional hours; that in July, 1984, Diane Grueneberg became President of the Union replacing Harriman, and Wendt became Chief Steward of the Union; that in August, 1984, Grueneberg met with Baldowin about the assignment of additional hours and indicated that the Union's position was that call in be by seniority; that Baldowin indicated that this position was different from that previously expressed by the Union and that any agreement must be one way or the other; that by a letter dated August 22, 1984, to Baldowin, Ahrens stated as follows:

> It has come to my attention that certain members of Local 2698 have participated in discussion with you or members of your supervisory staff in regard to assignment of additional hours and other topics of concern. Be advised that no individual members (sic) speaks for the union organization other than the myself.

> potentially a highly charged adversary relationship has contributed to better living and working conditions for all concerned parties.
>
> If you have any questions about our position on this problem, please feel free to contact me.;

and that on August 24, 1984, a written agreement as to the procedure related to the assignment of additional hours was executed by Diane Grueneberg and the Director of Nursing.

5. That in February, 1985, the County posted a vacancy in a full time Cook/Aide position; that two employes, Marlene Jones and Phyllis Farrell, posted for the position; that Jones had greater seniority than Farrell; and that on February 19, 1985, Lila Smith selected Jones for the vacancy.

6. That Farrell thereafter grieved her non-selection; that Farrell and Chief Steward Wendt met with Smith at the first Step of the Grievance Procedure and thereafter Smith denied the grievance; that on February 27, 1985, Farrell filed a written grievance at Step 3 of the grievance procedure; that at Step 3 Baldowin met with Farrell who was not accompanied by any Union representative; that Baldowin asked where the representative was and Farrell replied that Wendt's father had died and she would not be present for that reason; that Baldowin and Farrell discussed the grievance; and that thereafter Baldowin investigated the grievance and on March 12, 1985, responded to the grievance by upholding Farrell's claim and awarding her the position.

7. That by a letter dated March 13, 1985, Ahrens sent the following letter to Baldowin on the Farrell grievance:

> Please be advised that Local 2698 disavows the above-cited grievance. Submittal of a grievances (sic) does not make it a bonafide statement of local policy.
>
> The statement of Farrell is contrary to the consistent policy of the Union.
>
> Please notify me of the date of your reinstatement of Ms. Marlene Jones to the position in question.;

that Baldowin by a letter dated March 14, 1985, responded to Ahrens as follows:

> This letter is to inform you that I cannot either disavow the above-cited grievance or reinstate Ms. Marlene Jones to the position in question.
>
> Please read Article IV - Grievance and Arbitration Procedure 4.04 Steps in Procedure-
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> Step 1: "The employee, alone or with his representative, etc."
> Step 2: "If the grievance is not settled at the first step, the employee and/or his representative, etc."
> Step 3: "If the grievance is not settled at the second step, the employee and/or his representative, etc."
>
> I believe Mrs. Phyllis Farrell has met all of the criteria for filing the grievance along with bringing it to a conclusion.
>
> Ms. Farrell had a dispute concerning the interpretation or application of the contract and as far as I am concerned, she received my interpretation and application of same.;

and that thereafter the Union filed the instant complaint.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Respondent, Columbia County, has not been shown to have committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, 2 or 4, Stats., by the conduct of the Respondent's agent, Baldowin, in meeting with Farrell and adjusting her grievance without the presence of a representative of the Union.

2. That the Union failed to prove that it has exhausted the contractual grievance procedure, and therefore, the Examiner will not assert the Commission's jurisdiction to review the County's alleged breach of the parties' collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 21st day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

COLUMBIA COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint, the Union alleged that the County committed prohibited practices in violation of Secs. 111.70(3)(a) 1 and 2, Stats. by meeting with an employe on a grievance without the presence of the Union representative, by sustaining the grievance contrary to the consistent policy of the Union and by thereafter refusing to reverse its decision on said grievance. The County answered that the Union agreed to contractual grievance language which waived its right to complain of interference and the County's following said grievance procedure did not interfere with the Union.

UNION'S POSITION

The Union contends that the County violated MERA when it sustained the grievance of an individual without notifying the Union of the grievance meeting so that the Union representative could be present. It alleges that the County had full knowledge that the grievance set forth a position which was contrary to the Union's consistent policy and the County's granting of the grievance may have violated the parties' agreement. The Union asserts that there can be no separate and contrary settlement of grievances with individuals. It argues that the Union, not an employe, is a party to the agreement and settlements without the Union's participation could result in undercutting the interests of the Union as well as a majority of the employes. The Union submits that the County's reliance on the grievance procedure is misplaced. It maintains that while the contract allows individual employes as well as the Union to file grievances, it does not provide that the employe has equal standing with the Union to resolve grievances. It insists that the agreement does not supersede Sec. 111.70(4)(d)1, Stats. in that the Union must be afforded the opportunity to be present at a grievance meeting. It points out that the County failed to notify a Union representative. It claims that the County's failure to afford the majority representative to be present when the grievance was resolved violated MERA. The Union further contends that permitting an "errant" employe to submit a grievance in opposition to the labor agreement without the Union's presence or subsequent disavowal of the grievance, as in this case, results in an inability of the Union to enforce the agreement through either the complaint procedure or grievance procedure, and even though it is a party to this agreement and had negotiated it, it would be unable to enforce the contract. The Union requests that Jones be reinstated to the position and made whole for her losses and that the County be required to post appropriate notices.

COUNTY'S POSITION

The County contends that it complied with the contractual grievance procedure on a grievance brought by a Union member with the assistance of the Union steward. It argues that if it had not done so, it could be subject to a prohibited practice charge for failure to abide by the grievance procedure. It further submits that the Union cannot inform the County after a grievance is processed that the grievance should have been ignored as this makes a farce and mockery of the grievance procedure. The County points out that the Union's reference to the August 22, 1984, letter to Baldowin from Ahrens does not reference any named individual, does not reference grievances and does not indicate that the Chief steward of the Union should be ignored in grievance handling. The County insists that the Union is seeking to be bound by the agreement when it suits it and not otherwise, and is attempting to change the language of the agreement without negotiating same in order to gain relief for Jones in this proceeding instead of in final and binding arbitration.

DISCUSSION

In its complaint, the Union alleged only a violation of Secs. 111.70(3)(a)1 and 2, Stats. In its brief, the Union alleged violations of Secs. 111.70(3)(a)1, 2, 4, 5 and 111.70(4)(d)1, Stats.

Section 111.70(4)(d)1., Stats., states in part, as follows:

> "Any individual employe, or any minority group of employes in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employe in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer."

The Commission has held that this subsection functions to excuse an employer from the charge of failing to bargain exclusively with the Union by dealing with employes individually over their grievances. 2/ The Commission has cited the United States Supreme Court 3/ which construed the parallel federal provision as follows:

> "Respondent clearly misapprehends the nature of the "right" conferred by this section. The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative. . . . The Act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation. . . ."

The statutory conditions which must be satisfied are that the Union must be afforded the opportunity to be present at the grievance meeting and that any grievance adjustment must be consistent with the terms of the parties' agreement. If these conditions are met, the County could entertain an individual's grievance and adjust it without violating any provision of MERA.

The County contends that the Union has waived its right to be present at the third step of the grievance procedure pursuant to the terms of the contractual grievance procedure. The Union, citing Waupun School District, 4/ argues that interpreting the grievance procedure to exclude the Union leaves the Union without the right to enforce the agreement, and therefore this interpretation is a permissive subject of bargaining. Even though a subject of bargaining is permissive, the parties may reach an agreement on the subject which is included in the parties' agreement and said agreement would be given effect. The issue then is whether the parties' agreement provides for a meeting with the grievant without the presence of the Union. Section 4.05 of the parties' agreement sets out the steps of the grievance procedure. Step 1. states that "the employee, alone or with his representative, shall orally explain his grievance to his supervisor. . . ." This step further provides that the supervisor shall "orally inform the employe, and the representative, where applicable of his decision." (Emphasis added) Step 2 and Step 3 provide that if the grievance has not been resolved at the prior step, "the employee and/or his representative shall prepare a written grievance and present it to the "supervisor or Administrator respectively. Step 4 provides that the employe or his representative may appeal after Step 3 to the Home Committee and "the Personnel Committee shall discuss the grievance with the employee and the Union representative shall be afforded the opportunity to be present at this conference." By expressly stating that the Union representative shall be afforded the opportunity to be present at the 4th Step, it may be inferred that this requirement is not applicable to Steps 2 and 3 in light of the equivocal "and/or" in the presentation of the grievance. However, Steps 2 and 3 can also be read to mean that either the employe or representative can submit the grievance but that any grievance meeting must comply with the

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2/ Greenfield School District No. 6, Dec. No. 14026-B (WERC, 11/77).

3/ Emporium Capwell Co. v. Western Addition Commun. Org., 420 U.S. 50, 61 (1975), n. 12.

4/ Decision No. 22409 (WERC, 3/85).

provisions of Sec. 111.70(4)(d)1, Stats. Waiver of a statutory right by a party must be clear and unambiguous. 5/ Here the language of Steps 2 and 3 is ambiguous in that the interpretation argued by the County might be correct, and yet the arguments by the Union as to its interpretation may also be correct. It is for an arbitrator to determine the meaning of the parties' contract and the undersigned cannot conclude, on the basis of the evidence presented in this case, that the Union has clearly and unmistakenably waived its right to be afforded the opportunity to be present during a grievance meeting at Step 2 and Step 3. Therefore, for the purposes of this proceeding, it is concluded that the County was obligated to afford the Union the opportunity to be present at the Step 3 grievance meeting.

Having concluded that the Union did not waive its right to an opportunity to be present at any grievance meeting by its agreement to the grievance procedure, it must be determined if the County denied the Union the opportunity to be present on Farrell's grievance. The Union has the burden of proving by a clear and satisfactory preponderance of the evidence 6/ that the County denied the Union its right under Sec. 111.70(4)(d)1 Stats. to have the opportunity to be present at the Step 3 grievance meeting. The Union argued that the County failed to notify the Union and proceeded with the grievance meeting and adjustment of the grievance without the presence of the Union. The evidence established that the grievant and Chief Steward Wendt met with Supervisor Smith at the first step of the grievance procedure. Therefore, this was not a case of an individual employe presenting a grievance to the County without the Union having any knowledge of it. The grievance was denied by Smith. There is no claim that Smith's conduct constituted a prohibited practice. The grievance was then appealed to Baldowin in accordance with the grievance procedure. The evidence established that Baldowin met with the grievant without Wendt who was absent due to her father's death. No evidence was presented when this meeting occurred, i.e. it may have occurred at the time the grievance was submitted to Baldowin or there may have been a grievance meeting scheduled at a later time. No evidence was presented as to who scheduled the meeting or with whom or when this was done. At the meeting, Baldowin asked the grievant where her union steward was and he was informed the steward would have attended but her father had passed away. The Union asserts Baldowin's conduct was improper because another representative should have been called, and additionally, Baldowin was put on notice that Wendt did not speak for the Union. Wendt, as the Chief Steward, was involved in the initiation of the grievance, and, absent evidence to the contrary, it can reasonably be concluded that Wendt knew of the meeting but did not attend due to her father's death. Wendt did not testify and there was no evidence presented that she was not given notice of the grievance meeting. Baldowin did not refuse to allow the Union to be present at the grievance meeting and had a reasonable basis for believing that the Chief Steward knew of the meeting. Under these circumstances, Baldowin would not be required to notify other officials of the Union besides the Chief Steward. 7/ Rather, it was the responsibility of the Chief Steward to inform other officials of the Union to attend in her absence. There was no evidence that the death of her father presented Wendt from notifying other Union officials about the meeting, asking for a postponement of the meeting; or other circumstances which demonstrated her failure to attend constituted a denial of the opportunity to attend the meeting. There was no showing that upon her return to work or later that Wendt ever contacted Baldowin about the grievance either before or after he answered it. Baldowin could have reasonably concluded that the Union was assisting the grievant and felt its presence at this particular step of the grievance procedure was unnecessary. It may have been more prudent on Baldowin's part to reschedule the meeting to a time when Wendt would have been at work, but his failure to do so in this particular case did not constitute a refusal to grant the Union the opportunity to be present at the grievance meeting.

5/ Faust v. Ladysmith-Hawkins School System, 88 Wis. 2d 525, 277 N.W. 2d 303 (1979); City of Menomonie, Dec. No. 12674-A (McGilligan, 8/74), aff'd by operation of law, Dec. No. 12074-B (WERC, 10/74).

6/ Section 111.07(3), Stats.

7/ Wedgewood Nursing Home, 118 LRRM 1253 (NLRB, 1985), n. 4.

The Union also contends that Baldowin should have known that Wendt did not speak on behalf of the Union in that Ahrens' letter to him of August 22, 1984, put him on notice of that fact. The letter of August 22, 1984, refers to discussions in regard to the assignment of additional hours. The evidence established that there were two schools of thought within the Union on such assignments and that Baldowin was involved in discussions with the past president of the Union and Wendt. After the Union election, the new president met with Baldowin with a different position on this subject and the letter clarified who spoke on behalf of the Union. The letter does not refer to grievances or stewards. The evidence established that Wendt had been elected Chief Steward in July, 1984, a postion she held at all times material thereafter. The Union never informed Baldowin that Wendt was not to handle grievances or was not to function as Chief Steward. Thus, the evidence failed to establish that Wendt was not authorized to handle grievances, and it cannot be concluded that Baldowin knew or should have known that Wendt did not have authority to speak for the Union in grievance matters.

Under the unique circumstances present in this case, namely Wendt's involvement from the initiation of the grievance, the lack of evidence establishing that Wendt was not aware of the Step 3 meeting, or unable to attend or notify others about it, or to ask for a postponement, and no clear disavowal of Wendt's authority to act as Chief Steward and to process grievances, it must be concluded that the County did not deny the Union the opportunity to be present at the Step 3 grievance meeting. Therefore, the Union has failed to prove by a clear and satisfactory preponderance of the evidence that the County violated Sec. 111.70(4)(d)1 of MERA by meeting with the grievant without Wendt's presence at Step 3 of the grievance procedure.

The second proviso of Sec. 111.70(4)(d)1 is that any settlement cannot be inconsistent with the terms of the agreement. The evidence failed to establish that the settlement was inconsistent with the agreement. The settlement may have been in opposition to the Union's policy of strict seniority but the contractual language is a modified seniority clause. While the relative skill and ability of the two applicants can be argued such that the junior employe's skill and ability are sufficiently greater to overcome the seniority factor, it is for an arbitrator to decide that issue. If the Union felt that Baldowin's granting the grievance violated the terms of the agreement, the appropriate recourse was to appeal the matter to the next step of the grievance procedure. Section 4.04 of the grievance procedure provides that a grievance shall be considered settled only if all parties concerned are mutually satisfied. The Union is a party to the agreement, and if it was not satisfied, the grievance would not be considered settled and the matter could be processed at the next step. Nothing in the agreement prevented the Union from appealing the Step 3 answer to the next Step and ultimately to arbitration. Additionally, Jones may grieve the selection of Farrell through the grievance procedure and to arbitration and the relative skill and ability of both employes would be determined in a final and binding decision. The decision of the County granting the grievant is not so clearly inconsistent with the parties' agreement so as to violate the proviso in Sec. 111.70(4)(d)1, Stats. Inasmuch as the evidence failed to establish that the County's conduct violated the requirements of Sec. 111.74(4)(d)1, Stats., it follows that the County has not violated either Sec. 111.70(3)(a)4 or 111.70(3)(a)1 and 2, Stats.

Although not pleaded in its complaint, the Union in its brief argued that the County violated Sec. 111.70(3)(a)5, Stats. The Commission's long-standing policy regarding breach of contract allegations has been not to assert its jurisdiction where the complainant has failed to exhaust the parties' contractual grievance and arbitration procedures. 8/ The exceptions to this policy are where the union has been frustrated in its efforts to utilize the grievance and arbitration procedures or where the parties have mutually waived the arbitration procedure. 9/ Since the evidence fails to demonstrate that the Union exhausted the parties' contractual grievance and arbitration procedures, and as none of the foregoing exceptions to the Commission's policy are present in this case, the Examiner will not assert the Commission's jurisdiction to determine whether the County has breached the

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8/ Waupun School District, Dec. No. 22409 (WERC, 3/85).

9/ Id. at n. 2.

bargaining agreement, and has dismissed this allegation. Consequently, it is concluded the County has not committed any prohibited practice and the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 21st day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner