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-B

Appearances:

Lawton & Cates, S.C., Attorneys at Law, Tenney Building, 110 East Main Street, Madison, Wisconsin 53703-3354, by Mr. Bruce F. Ehlke, appearing on behalf of Local 2698, AFSCME, AFL-CIO.
Mr. James R. Meier, Columbia County Corporation Counsel, P.O. Box 256, Portage, Wisconsin 53901, appearing on behalf of Columbia County.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Lionel L. Crowley, having on October 21, 1985, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein he concluded that the Respondent had not committed any prohibited practices within the meaning of Sec. 111.70(3)(a)1, 2, or 4 Stats., and that he would not assert the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., to review the County's alleged breach of the parties' collective bargaining agreement; and the Complainant having, on November 7, 1985, timely filed a petition for Commission review of said decision; and the Complainant having filed a brief in the matter on March 10, 1986, and the Respondent having not filed any written argument by the expiration of the briefing schedule on March 24, 1986; and thereafter Respondent having submitted a brief to the Commission on May 22, 1986; and Complainant having objected to Commission consideration of said brief; and the Commission having reviewed the record in the matter including the Examiner's decision, the petition for review and the brief filed in support thereof, and being satisfied that the Respondent's brief to the Commission should be considered and that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified in certain respects;

NOW, THEREFORE, it is

ORDERED 1/

1. That the Commission affirms and adopts as its own the Examiner's Findings of Fact 1-4.

2. That the Examiner's Findings of Fact 5 and 6 are modified to read as follows, and as modified, are adopted as the Commission's Findings of Fact:

> 5. That in February, 1985, the County posted a vacancy in a full-time Cook/Aide position; that prior to the posting of this position, a question regarding the Union's policy on the appropriate procedure for filling the vacancy arose; that the question was discussed at a Union meeting conducted prior to the posting of the position; that the minutes of that Union meeting read thus: "The problem in the Dietary Department was discussed. The supervisor wanted to add two more days to a three day position. Everyone felt a full-time position should be posted, and the most senior person that signs the posting should have the 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.

1/ See Footnote 1 on Page Two.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

6. That Farrell thereafter grieved her nonselection; 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 without a Union representative present; that it cannot reasonably be inferred from the foregoing that Wendt knew of the Step 3 meeting or that Wendt acquiesced in having that meeting conducted in the absence of a Union representative; 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.

3. That the Examiner's Finding of Fact 7 is modified to read as follows, and as modified, is adopted as the Commission's Finding of Fact 7:

7. That Ahrens sent the following letter dated March 13, 1985, 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.;

and 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-
>
> 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 interpreta-

4. That the Examiner's Conclusions of Law are modified to read as follows, and as modified are adopted as the Commission's Conclusions of Law:

> 1. That the Commission will exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction to determine the merits of Complainant's contention that the County violated the parties' collective bargaining agreement by failing to afford the Union an opportunity to be present at the Step 3 meeting referred to in Modified Finding of Fact 6, inasmuch as both parties have advanced arguments which call for an interpretation and application of the parties' collective bargaining agreement in that regard and neither party has objected to the Commission's assertion of its Sec. 111.70(3)(a)5, Stats., jurisdiction over that issue.
>
> 2. That the County's processing of the Farrell grievance, including the meeting between Baldowin and Farrell at Step 3 of that procedure, does not constitute violation of Sec. 111.70(3)(a)2, Stats.
>
> 3. That by his conduct noted in Modified Finding of Fact 6, Baldowin conferred with a municipal employe about a grievance without affording Complainant, the exclusive representative, an opportunity to be present; and that by Baldowin's conduct in that regard, Respondent Columbia County engaged in unlawful individual bargaining with a municipal employe in violation of Sec. 111.70(3)(a)4 and 1, Stats., and violated the terms of the grievance procedure contained in its collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats.

5. That the Commission modifies the Examiner's Order to read as follows, and as modified, said Order is adopted by the Commission:

> 1. IT IS FURTHER ORDERED that the County of Columbia, its agents, officers and officials, shall immediately:
>
> > a. Cease and desist from discussing grievances with employes represented by Local 2698, AFSCME, AFL-CIO, at Step 3 of the grievance procedure without affording Local 2698 an opportunity to be present.
> >
> > b. Notify its employes by conspicuously posting the attached Appendix "A" in places where notices to its employes represented by Complainant Local 2698, AFSCME, AFL-CIO are customarily posted, and take reasonable steps to assure that said notice remains posted and unobstructed for a period of 30 days.
> >
> > c. Notify the Wisconsin Employment Relations Commission within 20 days of the date of this Order as to what steps it has taken to comply herewith.

2. IT IS FURTHER ORDERED that the Complaint allegations alleging a County violation of Sec. 111.70(3)(a)2, Stats., and the Complainant's requests for relief in addition to that contained in Modified Order Paragraph 1 a.-c., above, shall be, and hereby are, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

APPENDIX "A"

NOTICE TO COLUMBIA COUNTY EMPLOYEES REPRESENTED BY LOCAL 2698, AFSCME, AFL-CIO

Pursuant to an Order of the Wisconsin Employment Relations Commission, you are hereby notified as follows:

1. In the future, COLUMBIA COUNTY WILL NOT discuss grievances with employes at Step 3 of the grievance procedure without affording Local 2698 an opportunity to be present.

COLUMBIA COUNTY

By _____ _____
Name Title

_____
Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED.

COLUMBIA COUNTY

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S 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 a Union representative, by sustaining the grievance contrary to the consistent policy of the Union and by thereafter refusing to reverse its decision on the grievance. The County answered that the Union had agreed to contractual grievance language which waived its right to complain of interference, or in the alternative, that the County had complied with the contractual grievance language, and by doing so could not have interfered with the Union.

THE EXAMINER'S DECISION

The Examiner started his discussion of his decision by noting that although the Union's complaint alleged only a violaton of Secs. 111.70(3)(a)1 and 2, Stats., the Union's brief alleged violation of Secs. 111.70(3)(a)1, 2, 4, and 5 Stats., as well as of Sec. 111.70(4)(d)1, Stats.

The Examiner centered his decision on the provisions of Sec. 111.70(4)(d)1, Stats., and assumed that the allegations regarding Secs. 111.70(3)(a)1, 2 and 4 Stats., all hinged on the Union's ability to prove the County's processing of the Farrell grievance did not comply with the mandates of Sec. 111.70(4)(d)1, Stats.

The Examiner initiated his examination of Sec. 111.70(4)(d)1, Stats., by focusing on the County's assertion that the Union "waived its right to be present at the third step of the grievance procedure pursuant to the terms of the contractual grievance procedure." The Examiner rejected the County's assertion because the language of the third step is ambiguous, and waivers of statutory rights must be clear and unambiguous. Determining that the ambiguity involved represented a question for arbitral determination, the Examiner concluded his examination of the point thus: ". . . for the purpose 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 reached this conclusion, the Examiner turned to the provision of Sec. 111.70(4)(d)1, Stats., that a majority representative must be "afforded the opportunity to be present at the conferences." Positing that the Union had the burden of proof on this point, the Examiner concluded that the Union had failed to meet its burden. The Examiner based his conclusion on a review of the relevant evidence, which demonstrated that "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", and that the Union had failed to establish that it ever made the County aware that Wendt was not authorized to process grievances.

Turning to the provision of Sec. 111.70(4)(d)1, Stats., that "(a)ny adjustment resulting from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the

did not, according to the Examiner, present an appropriate basis to exercise the Commission's jurisdiction to determine violations of Sec. 111.70(3)(a)5, Stats., he dismissed the complaint in its entirety.

THE PETITION FOR REVIEW AND POSITIONS OF THE PARTIES

The Petition for Review filed by the Union focused on the Examiner's Conclusions of Law and Order. The Union requested Commission review of these aspects of the Examiner's decision because, "they raise a substantial question of law and administrative policy, in that they effectively strip AFSCME, Local 2698 of control over its own grievance procedure and, thereby, of its ability to enforce the collective bargaining agreement it negotiated with Columbia County and to represent the employees of the . . . County . . ."

The Union's initial general line of argument is that "the County violated Sec. 111.70(4)(d)(1), Wis. Stats. (1983-84), when it granted Farrell's grievance." According to the Union, the Examiner correctly reasoned that the Union did not waive the provisions of that statute by agreeing to the language of the third step of the grievance procedure, since that contractual language "refers only to the filing of a written grievance (emphasis from text). . . ." In addition, the Union contends that the provision does not constitute a clear and unambiguous waiver of a statutory right.

The Union contends that the Examiner erred in concluding that the County's conduct does not violate "at least one, if not both, of the conditions set forth in Sec. 111.70(4)(d)1 . . ." Specifically, the Union asserts that the County "failed to afford the Union an opportunity to be present at the grievance conference." According to the Union, Baldowin wrongfully heard the grievance, knowing that Wendt did not represent the Union's position on "additional hours" types of issues, and further complicated his wrongful conduct by meeting with Farrell at Step 3, without the presence of any Union official.

In addition, the Union urges that "the County's settlement of Farrell's grievance was inconsistent with the conditions of employment established by the Employer and Union and should, therefore, be reversed." The Union asserts that the Examiner failed to analyze the relevant collective bargaining agreement provisions and ignored that "the language of the collective bargaining agreement does not, in and of itself, comprise the conditions of employment established by the majority representative and the municipal employer." A review of the evidence relevant to these points establishes, according to the Union, that "the County's actions in awarding the grievance are inconsistent" with the conditions of employment established by the Union and the County, contrary to the provisions of Sec. 111.70(4)(d)1, Stats.

In addition, the Union urges that the Commission does have jurisdiction over the Unon's allegations of County violations of Sec. 111.70(3)(a)5, Stats., since the Union attempted to have the County "reappoint Marlene Jones" to the disputed position, but was "flatly rejected", thus making recourse to the grievance procedure a futile exercise.

The Union's final general line of argument is that "the County violated Sec. 111.70(3)(a)1, 2, 4 and 5, Stats., when it granted a grievance which contravened the bargaining ageement and which conflicted with the Union majority's interests." According to the Union "it is vital to the union's right and duty to protect employees that the County not be permitted to award a grievance to an employee which directly contravenes the Union's position and where the County has little or no evidence that the Union supports the grievance." Because Farrell's grievance was not supported by the Union's membership, it follows, according to

acquiesced authoritatively in light of her Chief Steward's position. The County argues that Ahrens' nine-month old letter on a separate subject did not put the Administrator on notice that he was to treat Wendt as if she were without the inherent authority associated with being the Union's Chief Steward.

The County argues the delay in its submission of a brief was due to misplacement in County Counsel's office of the Complainants' brief and of communications regarding the briefing deadlines. The County argues that it is doubtful that the delay in submission of the County's brief has significantly contributed to delaying the Commission's issuance of its decision in the matter, such that the Commission should consider the County's brief in its deliberations regarding the Complainant's Petititon for Review.

DISCUSSION

As noted by the Examiner, the complaint alleges violations of Secs. 111.70(3)(a)1 and 2, Stats., while the Union's brief before the Examiner addresses violations of Secs. 111.70(3)(a)1, 2, 4 and 5, Stats., as well as of Sec. 111.70(4)(d)1, Stats. The Examiner dealt with each of the alleged violations, which continue to be asserted by the Union in its brief in support of the Petition for Review. The County did not contend at the Examiner level that the Union should not be permitted to rely on statutory provisions in addition to those contained in its complaint or referred to at the hearing. We therefore consider alleged violations of each of the above-noted portions of MERA to be fairly at issue herein, and we address each of them below. An additional issue is whether to consider the County's brief which was submitted after the briefing deadline had run.

Dispute Regarding Propriety of Commission Consideration of County's Brief

Over Union objections, the Commission has considered the County's Brief in this matter. While that brief was submitted well after the briefing dealine had passed, our consideration of it has not contributed to delaying our decision issuance, and the Union has not shown that it would be prejudiced by our post facto extension of the briefing schedule in this manner.

Examiner's Refusal to Exercise Contract Enforcement Jurisdiction

The Examiner refused to exercise the Commission's Sec. 111.70(3)(a)5, Stats., jurisdiction to decide the Union's claim that County violated that statutory provision by failing to afford the Union an opportunity to be present at the Step 3 discussion of the grievance with grievant Farrell. While the Examiner's reasoning is sound -- the parties have an agreed-upon contractual procedure for resolving disputes about interpretation and application of their agreement -- there are good reasons, in our opinion, for the Commission to address the merits of the above-noted contract issue herein.

Both parties have at least implicitly sought a Commission interpretation and application of the agreement as regards that issue. The County argued for its interpretation of the Step 3 language at the hearing and in its brief to the Examiner. Moreover, the County does not have a facially obvious right to grieve under contractual procedure so as to be able to obtain an arbitral determination of the Agreement's meaning on this point on its own motion. Similarly, the Union's brief to the Examiner asserted a Sec. 111.70(3))a)5, Stats., claim (it was not advanced in the complaint or at the hearing) and thereby asked that the Commission interpret and apply the language of the agreement without deferring to parties' agreed-upon grievance procedure. The County did not object to Union's reliance on (3)(a)5 or to the Union's request that the Commission interpret and apply the language of the agreement in resolving it, and, indeed, the County filed no reply brief at all to the Examiner within the specified time for doing same.

For those reasons, we consider it appropriate to address the contract interpretation issues in an effort to more fully and satisfactorily resolve all of the issues bearing on this dispute.

Alleged Failure to Provide Exclusive Representative with an Opportunity to be Present at the Step 3 Grievance Meeting

Step 4 of the parties' Agreement grievance procedure expressly requires that a conference to be held and that "the Union representative shall be afforded the

opportunity to be present at this conference." In contrast, Step 3 of that procedure does not expressly require the Administrator to discuss the grievance with the employe involved before issuing a Step 3 disposition regarding the grievance, and it contains no statement regarding the Union representative's rights to be present in the event that the Administrator meets with the grievant to discuss the grievance at Step 3. The County would have us interpret that silence as reflective of a mutual understanding that the Administrator is free to discuss the grievance with the grievant without affording an opportunity to the Union representative to be present at such discussion. We disagree. The absence of a Step 3 provision paralleling the Step 4 language quoted above appears to us to be explained by the fact that the language of Step 3 does not require a discussion with the grievant at that step. In our opinion, the Administrator is not required to discuss the grievance with the grievant before rendering a Step 3 disposition. However, where, as here, the Administrator chooses to discuss the matter with the grievant, the overall logic of the Agreement would require the Administrator to afford the Union representative an opportunity to be present at that discussion, as well.

The foregoing interpretation parallels the provisions of Sec. 111.70(4)(d)1, Stats., to the effect that if the municipal employer confers with an employe in relation to a grievance, the majority representative must be "afforded the opportunity to be present at the conferences." That provision does not impose an affirmative obligation that the Employer meet and confer with employes and their representatives about grievances; rather it is intended "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 Sec. 111.70(3)(a)4, Stats., duty to bargain only with the exclusive bargaining representative." Greenfield Schools, Dec. No. 14026-B (WERC, 11/77), citing, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 61 n. 12 (1975).

The parties' silence in Step 3 appears to us to reflect an intent to adopt the arrangements expressly authorized by Sec. 111.70(4)(d)1, Stats., rather than an intent to opt out of those arrangements.

In light of the foregoing, the contractual and statutory duty to bargain issues turn on the same factual issue, to wit: has the Union sustained its burden of proving by a clear and satisfactory preponderance of the evidence that the County failed to fulfill its parallel Sec. 111.70(3)(a)4 and 5, Stats., duties to afford the Union an opportunity to be present at the Step 3 discussion that Administrator Baldowin had with grievant Farrell in this matter.

In essence, the Examiner concluded that the Union failed to sustain that burden because it is clear Wendt knew of the initiation of the grievance, because it is undisputed that Wendt's father's death caused Wendt to be away from work on the day of the Step 3 meeting, because of what was said between Farrell and Baldowin at the outset of the Step 3 meeting, and because of the failure of the Union to present either Wendt's testimony or any other evidence to the effect that Wendt did not know of the meeting. Examiner's Memorandum at 8.

The related portion of the Examiner's Finding of Fact 6 read as follows:

> . . . that on February 27, 1985, Farrell filed a written grievance at Step 3 of the grievance procedure; 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 13, 1985, responded to the grievance by upholding Farrell's claim and awarding her the position.

The testimony on that point came from Baldowin and Farrell. Farrell testified (at tr. 57-58, 60) as follows about why Wendt was not at the Step 3 meeting:

> Q: What did you do then?
>
> A: I went to Mr. Baldowin on Step 3.

Q: (by Counsel for the County) Did you file the written grievance?

A: Yes.

Q: After the oral grievance?

A: Yes.

Q: Did Darlene (Wendt) go with you?

A: No, she did not.

Q: Why not?

A: Because her father passed away, and I did not want to contact her, and the time limit was getting close.

Q: And do I understand that the -- was, for instance, the date that you talked to Mr. Baldowin was -- was Darlene at work or not that day?

A: No she was not.

Q: Because of the death of her father?

A: Right.

. . .

Q: (when you went and talked to Mr. Baldowin,) . . . did he ask you where the Union representative was?

A: Yes.

Q: What did you tell him?

A: I told him that Darlene's father passed away, and she could not be with me.

On the same subject, Baldowin testified (at tr. 70, 73-74) as follows:

Q: (by Counsel for the County) Between -- you heard the testimony of Phyllis Farrell. You heard the testimony of Phyllis Farrell in this matter. Did you have such a meeting with her?

A: I did.

Q: Did you ask her where the -- where the Union representative was?

A: I did.

Q: What was her response?

A: That she -- she generally would have Darlene with her, but Darlene's father had passed away

Q: So, you have -- so, you had no reason to be suspicious, did you?

A: No.

. . .

Q: (by Union Counsel) . . . do you think that the Union would have concurred with that (Farrell) grievance?

A: No.

. . .

Q: (by County Counsel): did you think then back in March that the Union objected to the Phyllis Farrell grievance?

A: No.

. . .

Q: Has the Union ever informed you before that it objected to a grievance?

A: No. I know through collective bargaining that they would prefer to have -- to have personnel advanced totally on seniority, and we have not permitted it in our contract as the wording says, but I mean the grievance was filed without objection from anyone, and I answered it.

In light of the above-noted testimony, we do not share the Examiner's inference that in the circumstances of this case, "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." (Examiner's Memorandum at 8). Rather, it appears to us more reasonable to conclude, absent evidence to the contrary, that Wendt did not have advance notice of the third step meeting. In our view, neither the absence of a showing that Wendt ever subsequently contacted Baldowin about the grievance nor the Union's failure to call Wendt warrants drawing an inference contrary to that flowing from the testimony of Farrell and Baldowin set forth above.

Farrell's above-quoted testimony reveals that Wendt was not at the Step 3 meeting because Farrell chose not to inform Wendt of the meeting, and that Farrell so chose because of the death of Wendt's father and the press of grievance procedure time limits. Farrell's testimony also clearly implies that Farrell has been and remains under the impression that Wendt had no advance notice of the Step 3 meeting.

Baldowin's above-quoted testimony does not contradict Farrell's in any of those respects. Baldowin does not claim either that Farrell told him that Farrell had notified Wendt of the meeting or that he (Baldowin) notified Wendt of the meeting himself. Baldowin states only that, when he asked "where the Union representative was," Farrell stated that Wendt would not be attending due to Wendt's father's death, a death which Baldowin independently knew had occurred.

Thus, the Union has shown through the above-noted testimony that the County's authorized agent discussed a grievance with an employe at Step 3 of the grievance procedure; that the Union was not represented at the meeting; and that although

a time at which he knew Wendt would be available and of which he knew Wendt was aware, or he could have notified some other available Union representative of the fact that the meeting was about to take place and that the Union was welcome to have a representative present. In this instance, however, he failed to do so.

For the foregoing reasons, then, we have concluded that the County violated the agreement and its statutory duty to bargain with the exclusive representative rather than with individual employes, by failing to afford the Union the opportunity to be present at the Step 3 meeting that Baldowin had with Farrell to discuss the latter's grievance.

Alleged Violation of Sec. 111.70(3)(a)2, Stats.

The Union's assertion that the County's conduct violated Sec. 111.70(3)(a)2, Stats., is not persuasive, however. That section assumes interference of a magnitude which threatens the independence of a labor organization as the representative of employe interests. 2/ Baldowin's decision to award the position to Farrell is a conclusion Baldowin could have reached whether he afforded Wendt or another Union official a chance to be present at the Step 3 conference. That conclusion, standing alone, represents nothing more than the County's determination of the most qualified employe for the position, and is a conclusion the County could have reached at any step of the grievance procedure. The level of interference involved in the present matter is fully addressed in the Sec. 111.70(3)(a)4 and 1, Stats., violations found above, and does not rise to the level of interference required to establish a violation of Sec. 111.70(3)(a)2, Stats.

Appropriate Remedy

By way of remedy for the contract breach and individual bargaining violations of MERA noted above, we have ordered cease-and-desist and notice-posting relief and we have further ordered that the County inform the Commission as to the steps it has taken to comply with our remedial Order. In our view, no additional relief is necessary or appropriate in the circumstances. 3/ An order awarding the disputed position to Jones is not warranted as a remedy for the above-noted violations. If Jones' contractual rights to the position were denied, the forum in which relief was properly to have been pursued was the contract grievance procedure. The parties cannot fairly be said to have agreed that the Commission

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2/ Winnebago County (Department of Social Services, Dec. No. 16930-A (Davis, 8/79), aff'd by operation of law, Dec. No. 16930-B (WERC, 9/70).

3/ This case involves an isolated incident, County reliance on a plausible (albeit unpersuasive) interpretation of the contract grievance procedure, and the Administrator's apparent reliance on the notion (albeit mistaken) that the Union's Chief Steward was willing to have the Step 3 meeting go forward without a Union representative present. Were we dealing, instead, with a repeated, knowing violation of the Union's right to be present at a Step 3 meeting, a more stringent remedy might well be warranted.

should determine the merits of that grievance herein, 4/ and the record does not support the Union's claim that it would have been futile to have pursued such claim through to final and binding grievance arbitration under the contractual procedure.

Dated at Madison, Wisconsin this 5th day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner