

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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 CHARLES J. NEUENS, :  
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 Complainant, :  
 :  
 vs. : Case 225  
 : No. 37499 MP-1884  
 : Decision No. 24195-B  
 MILWAUKEE COUNTY, :  
 :  
 Respondent. :  
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Appearances:

Mr. Charles J. Neuens, 504 North 106th Street, Wauwatosa, Wisconsin 53226, on his own behalf.  
Mr. Robert G. Ott, Deputy Corporation Counsel, Milwaukee, County Courthouse, Room 303, Milwaukee, Wisconsin 53233, on behalf of Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent has committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Wis. Stats.; and a hearing on said complaint having been held in Milwaukee, Wisconsin, on April 1, 1987, before the Examiner; and the parties having completed their briefing schedule by May 19, 1987; and the transcript of said proceedings having been received on July 20, 1987; and the Examiner, having considered the evidence and arguments 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 Charles J. Neuens, hereinafter referred to as the Complainant or Neuens, is an individual who resides at 504 North 106th Street, Wauwatosa, Wisconsin 53226.
2. That Milwaukee County, hereinafter referred to as the County, is a municipal employer employing various employes in the performance of its various functions; that certain classifications of its employes are included in various collective bargaining units and represented by various labor organizations for purposes of collective bargaining; and that in performance of its bargaining function, the County is represented by corporation counsel, whose offices are in Room 303, Courthouse, Milwaukee, Wisconsin 53233.
3. That at all times material herein, the County has recognized the Milwaukee Building Construction Trades Council, AFL-CIO, hereinafter referred to as the Trades Council, as the exclusive bargaining representative for certain employes employed by the County.
4. That the County and the Trades Council have been and are, parties to the collective bargaining agreements covering wages, hours and conditions of employment of employes in a craft bargaining unit which represents employes within Complainant's job classification, i.e., Electrical Mechanic; that the most recent agreement was in effect from 1983 to 1986; and that said agreement contained, among its provisions, a grievance procedure applicable to all alleged violations of said agreement, culminating in final and binding arbitration of unresolved grievances; and that the grievance procedures contained the following language material herein:

## 2.24 GRIEVANCE PROCEDURE

(1) APPLICATION: EXCEPTIONS. A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust to a claim or dispute by an employe or group of employes concerning the application of wage schedules or provisions relating to hours of work and working conditions. No written grievance shall be processed unless approved by the Council which approval will be evidenced by the signature of the appropriate business representative on the Grievance Initiation Form. The Grievance Procedure shall not be used to change existing rate schedules, hours of work, working conditions, fringe benefits and position classifications established by Ordinances and rules which are matters processed under other existing procedures.

(2) REPRESENTATIVES. An employe may choose to be represented at any step in the procedure by representatives of his choice, not to exceed three, except that, as to the first step, a choice shall be limited to employe representatives. At all other steps, representation must include the appropriate business representative.

(3) TIME OF HANDLING. Whenever possible, grievances will be handled during the regularly scheduled working hours of the parties involved.

(4) TIME LIMITATIONS. If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing. If one of the parties requests an extension not mutually acceptable, the request with the reason therefore may be submitted to the Personnel Review Board. After consideration and within eight working hours after receipt of the request, they will notify both parties in writing of their decision to grant or deny the extension. If an extension is not requested within the time limits herein provided, or a reply to the grievance is not received within time limits provided herein, the grievance may be appealed directly to the next step of the procedure.

. . .

(8) No grievance shall be initiated after the expiration of 90 calendar days from the date of the grievable event, or the date on which the employe becomes aware, or should have become aware, that a grievable event occurred, whichever is later. This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

(9) Representation at hearings on group grievances shall be limited to 3 employes from among the group, except in those cases where the Union and the department involved agree that the circumstances of the grievance are such as would justify participation by a large number. One employe of the group shall be designated as the grievant to whom the grievance disposition forms shall be forwarded.

(10) At each successive step of the grievance procedure, the subject matter treated and the grievance disposition shall be limited to those issues arising out of the original grievance as filed.

(11) In those cases in which a (sic) employe elects not to be represented by Union spokesmen, the grievance shall not be resolved in a manner inconsistent with the existing collective bargaining agreement.

(12) A copy of all grievance dispositions shall be promptly forwarded to the appropriate Union representative.

. . .

(3) INTERPRETATION OF MEMORANDUM OF AGREEMENT. Any dispute arising between the parties out of the interpretation of the provisions of the Memorandum of Agreement shall be discussed by the Council with the Department of Labor Relations. If such dispute cannot be resolved between the parties in this manner, either party shall have the right to refer the dispute to arbitration in the manner prescribed in par. (2)(a), except as hereinafter provided. The parties may stipulate to the issues submitted to the arbitrator and shall present to such arbitrator either orally or in writing, their respective positions with regard to the issues in dispute. The arbitrator shall be limited in his deliberations and decision to the issues so defined. The decision of the arbitrator shall be filed with the Department of Labor Relations.

(4) ARBITRATOR'S AUTHORITY. The arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this Memorandum of Agreement. The arbitrator shall confine himself to the precise issue submitted.

(5) FINAL AND BINDING. The decision of the arbitrator when filed with the parties shall be binding on both parties.

5. That in August of 1985, Neuens, who was and still remains employed by the County asked the Milwaukee County Employees' Retirement System for an estimated early retirement allowance; that on August 23, 1985, he received said estimate which was premised upon a lifetime reduction of approximately twenty-three per cent in the normal retirement allowance; that said estimate stated "a member is eligible for a normal pension, without such reduction, if he retires at age 60"; and that Neuens disagreed with said estimate and wrote a letter to then County Supervisor Richard Bussler arguing about the proper method upon which to calculate early retirement benefits.

6. That prior to contacting Bussler or the Pension Board, Neuens consulted with James Elliot, President of the Trades Council, by telephone; that, in the course of discussing another unrelated grievance, Neuens mentioned his early retirement problem; that Elliot, after reading the agreement, informed Neuens that he did not believe Neuens' early retirement problem was grievable pursuant to Sec. 2.24 of the grievance procedure; that Elliot informed Neuens that filing a grievance was not proper with respect to this matter; that Neuens agreed with Elliot and did not attempt to file a written grievance with respect to interpretation of the early retirement provision at issue either then or at any time thereafter; that Elliot did arrange a meeting with one of the Union attorneys who listened to Neuens's contentions with respect to the proper interpretation of the early retirement formula; that, as a result of the meeting with the Union attorney, Elliot advised Neuens that the possibility of prevailing in a legal action on this issue was so remote that the Union would not subsidize or underwrite any legal expenses which might be utilized to pursue this matter further; and that Neuens at no time has sought legal redress against the Trades Council for breaching its duty to represent him fairly with respect to this issue.

7. That after his inquiry to Elliot, Neuens wrote to Bussler and received a letter from Gary J. Doebert, the County's Deputy Director of Human Resources in response, on November 27, 1985; that Doebert acknowledged that the issue raised by

Neuens had previously been discussed and considered in opinions from A.S. Hansen, Inc., an actuarial company in 1967, Robert Russell, the Corporation Counsel in 1974, and Howard L. Janco in 1975; that Doebert informed Neuens the formula for calculation would not be changed; and that Bussler eventually informed Neuens it was beyond the scope of his authority to address Neuens's problem and suggested Neuens arrange a meeting before the Pension Board.

8. That Neuens contacted J.C. Dudenhoeffer, Director of the County Employees' Retirement System, and received a March 21, 1986 appointment to appear before the Pension Board; and that Neuens submitted a detailed written argument to the Board on February 16, 1986; and that the Board referred Neuens' complaint, i.e. that it was erroneously calculating early retirement benefits, to George Rice, the County's then Corporation Counsel, for a legal opinion with respect to the merits of Neuens' claim.

9. That on May 12, 1986, Rice issued a three page legal opinion whereby he acknowledged the persuasiveness of Neuens' arguments but, nevertheless, affirmed the Pension Board's current method of calculation.

10. That, thereafter, on August 27, 1986, Neuens filed the instant complaint.

#### CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission does not possess subject matter jurisdiction to decide matters which are not alleged to be violative of the Municipal Employment Relations Act.

2. That the Examiner will not assert the Commission's jurisdiction over an implied allegation that Milwaukee County violated the collective bargaining agreement between it and the Milwaukee Building and Construction Trades Council, AFL-CIO, by refusing to modify its early retirement calculation of benefits because there exists a collective bargaining agreement which contains a grievance procedure culminating in final and binding arbitration which the parties have agreed is the appropriate mechanism for resolution of such disputes, and there is no allegation of circumstances that would warrant assertion of the Commission's jurisdiction.

#### ORDER 1/

IT IS ORDERED that the complaint filed in the above-entitled matter, be and hereby is, dismissed.

Dated at Madison, Wisconsin this 16th day of September, 1987.

By Mary Jo Schiavoni  
Mary Jo Schiavoni, Examiner

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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

(Footnote one continued on page 5)

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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.

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Introduction:

Neuens in his complaint fails to allege a violation of any specific section of Chapter 111 of the Statutes. Rather, his complaint alleges that Milwaukee County (Employees Retirement System) has engaged in and is engaging in unfair labor practices contrary to the provisions of Chapter 111, specifically that the Employee Retirement System is improperly and erroneously interpreting and applying Sec. 5.2 of Chapter 201.24 of the Statutes. He requests that the Commission order the Employee Retirement System to cease and desist from misapplying Sec. 5.2 in a nonuniform contractual way.

At hearing on this matter, the County moved to dismiss the instant complaint on the basis of lack of jurisdiction by the Commission, and, in the alternative, answered the complaint denying the allegations. The undersigned examiner informed the parties that she would limit her consideration to the issue of jurisdiction initially and set an additional date for hearing the County's contentions with respect to the merits should jurisdiction be established.

Positions of the Parties:

The County's position is that the complaint must be dismissed on either of two grounds, namely that the Commission lacks jurisdiction to hear a complaint of this type or that the Complainant does not enjoy standing to raise such an issue assuming jurisdiction exists.

The County points to Secs. 7(1) and (6), Stats., which establish an Annuity and Pension Board to administer and oversee the Employee Retirement System and permit said Board to make rules and regulations for the administration of the funds created by the Act. These provisions, it asserts, make it clear that the Legislature intended that the decision-making authority regarding the Milwaukee County Employee Retirement System to vest in the Pension Board. The Commission, it argues, should not and cannot entertain this type of complaint.

According to the County, Neuens must receive a decision from the Pension Board and litigate said decision by bringing a writ of certiorari action in the Circuit Court of Milwaukee County. It maintains that Neuens is attempting to compel the Commission to render an advisory decision, which under the circumstances is improper.

Although not directly tied to a jurisdictional argument, the County also claims that Neuens lacks standing to pursue a claim of prohibited practice against the County. It stresses that Neuens has not attempted to retire nor has he submitted a request for benefits under the retirement system. These facts, it avers, demonstrate that there is no issue ripe for determination even if the Commission were to decide it had jurisdiction.

The Complainant, to the contrary, argues that jurisdiction does exist for the Commission to entertain his complaint and that he, as an individual, has standing to bring the instant action before the Commission. He urges the Commission to find that jurisdiction exists and to ultimately find in his favor on the merits.

Decision:

In his complaint, Neuens does not specifically set forth any statutory sections of Chapter 111 which the County is alleged to have violated or to be currently violating. Moreover, at hearing on this matter, Complainant did not adduce evidence to establish a potential violation of any provision of Chapter 111. Rather his entire case is premised upon an alleged violation of another statute, Chapter 201.24, expressly Sec. 5.2, which deals with retirement rights as administered by the County's Employee Retirement System.

At least one Examiner has already concluded that the Legislature did not create the Wisconsin Employment Relations Commission for the purpose of protecting all the legal rights of persons who happen to be employes within the meaning of

the three acts, i.e., WEPA, MERA, and SELRA, which it is empowered to administer. 2/ He concluded that the Legislature did not intend to protect the exercise of legal rights other than those specifically set out in the rights sections of the three statutes unless it can be said that the legal rights sought to be protected are rights established by other provisions of each of the statutes. 3/ It is clear that Neuens seeks a determination from the Commission on some alleged violation of his pension rights. Unless such a right is covered by a collective bargaining agreement and incorporated into an express or implied allegation of a violation of Sec. 111.70(3)(a)5, Stats., the dispute is not within the subject matter jurisdiction of the Commission. While the Examiner is unsure of the appropriate forum for Complainant Neuens to gain legal redress, it is clear that his contentions are unrelated to the exercise of employe rights as provided by MERA.

Even if Neuens's complaint were to be construed broadly as alleging a violation of Sec. 111.70(3)(a)5, Stats., based upon a breach of contract theory, the Commission would, nevertheless, refuse to assert jurisdiction. Where an exclusive collective bargaining representative of the employes has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over any breach of contract claims covered by the contractual procedure 4/ because of presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. 5/

The collective bargaining agreement in effect at the time of the controversy contained a final and binding grievance arbitration procedure which was available or potentially available to the Complainant and/or his bargaining representative for resolution of the instant dispute. Neuens admitted at hearing that he has not attempted to sue his union for failing to fairly represent him. Moreover, there is no evidence that the County and Union have waived or will waive the arbitration provision of said agreement or that the County ignores and/or rejects the arbitration provisions of the agreement. Because the agreed-upon dispute process is or was potentially available to Complainant, the Commission will not assert jurisdiction over any implied contractual claim by Neuens under Sec. 111.70(3)(a)5, Stats. Accordingly, the complaint is, dismissed.

Dated at Madison, Wisconsin this 16th day of September, 1987.

By Mary Jo Schiavoni  
Mary Jo Schiavoni, Examiner

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- 2/ Racine Policeman's Professional and Benevolent Corporation, Dec. No. 12637 (Fleischli, 4/74), aff'd by operation of law, Dec. No. 12637-A (WERC, 5/74).
- 3/ Ibid.
- 4/ Exceptions to this policy include but are not necessarily limited to instances where (1) the employe alleges denial of fair representation, Wonder Rest Corp., 275 Wis.2d 273 (1957); (2) the parties have waived the arbitration provision, Allis Chalmers Mfg. Co.; Dec. No. 8227 (WERB, 10/67); and (3) the party who allegedly violated the contract ignores and rejects the arbitration provisions in the contract, Mews Ready-Mix Corp., 29 Wis.2d 44 (1965).
- 5/ Mahnke v. WERC, 66 Wis.2d 524, 529-30 (1974); United States Motor Corp., Dec. No. 2067-A (WERB, 5/49); Harnischfeger Corp., Dec. No. 3899-B (WERB, 5/55); Melrose-Mindoro Joint School District No. 2, Dec. No. 11627 (WERC, 2/73); City of Menasha, Dec. No. 13283-A (WERC, 2/77); University of Wisconsin-Milwaukee, Dec. No. 11457-E (12/75), rev'd on other grounds, Dec. No. 11457-H (WERC, 5/84); State of Wisconsin (Department of Health and Social Services), Dec. No. 20830-B (WERC, 8/85).