STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DONALD TARKOWSKI, Complainant,

vs.

MILWAUKEE COUNTY and MILWAUKEE DISTRICT COUNCIL 48 AFSCME, AFL-CIO, LOCAL 882, Respondents.

Case 541
No. 63136
MP-4003

Decision No. 30848-A

Appearances:

James Allemang, 2947 North 121st Street, Wauwatosa, Wisconsin 53222, on behalf of Complainant Donald Tarkowski.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, Room 303, Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin 53233, on behalf of Respondent Milwaukee County.

Mark Sweet, Attorney, Law Offices of Mark A. Sweet, 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217, on behalf of Respondent Milwaukee District Council 48 AFSCME and Local 882.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 23, 2003, Donald Tarkowski filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against Milwaukee County and Milwaukee District Council 48 AFSCME and Local 882. The complaint alleged that the County committed prohibited practices under Secs. 111.70(3)(a)1 and 5 "by its threat to layoff" Tarkowski, forcing Tarkowski into a "premature" and "manipulated" retirement and laying off 102 Park Maintenance Worker I's on September 12, 2003. The complaint further alleges that the Union committed prohibited practices under Secs. 111.70(3)(b)1 and 4 and (c) by its "non-representation" and "failure of representation", and by its "refusal to submit" Tarkowski's grievance [to arbitration]. On March 11, 2004, the Commission appointed Raleigh Jones, a

member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a) Stats. On April 19, 2004, Tarkowski notified the Examiner, in writing, that Milwaukee County employee James Allemang would be attending the hearing as an Intervenor. On April 28, 2004, the Examiner wrote that Allemang could attend the upcoming May 10 hearing, but

> . . .it remains to be seen what Mr. Allemang's status will be in this matter. I do not intend to address that prior to the hearing. Instead, we will sort out Mr. Allemang's status at the hearing.

On May 3, 2004, the County and the Union filed Answers to the complaint. Hearing on the complaint was set for May 10, 2004, but no hearing was convened that day. Instead, settlement discussion ensued. One of the matters addressed that day was Allemang's status, and the Examiner declined to grant Allemang Intervenor status. At the parties' request, the case was placed in abeyance. On May 14, 2004, the Examiner confirmed, in writing, that "this case will be held in abeyance until Mr. Tarkowski notifies us to the contrary." On June 17, 2004, Tarkowski requested that his case be rescheduled for hearing. At that same time, he indicated that his representative at the hearing would be James Allemang. Pursuant to notice, hearing on the complaint was held on September 30 and October 22, 2004, at the Milwaukee County Courthouse in Milwaukee, Wisconsin. Following the hearing, the parties filed briefs by December 30, 2004. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Donald Tarkowski is an individual residing in Milwaukee, Wisconsin. James Allemang is an individual residing in Wauwatosa, Wisconsin. Tarkowski formerly worked for Milwaukee County in the Parks Department. He is now retired. Allemang currently works for Milwaukee County in the Parks Department. Tarkowski and Allemang were co-workers.

2. Respondent Milwaukee County (County) is a municipal employer with principal offices at 901 North Ninth Street, Milwaukee, Wisconsin 53233. It employs thousands of people in different capacities for public service work. At all material times, the County has operated, among others, a Parks Department.

3. Respondent Milwaukee District Council 48 AFSCME, AFL-CIO (Union) is a labor organization with offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208. It is the exclusive bargaining agent for approximately 6000 employees of Milwaukee County. AFSCME Local 882 is one of several locals affiliated with and served by the staff of District Council 48 that represent employees of Respondent County. Local 882's jurisdiction includes the Parks Department employees at issue in this case. At all material times, Christopher Pegelow and William Mollenhauer have been officers or agents of Respondent Union, as

follows: Pegelow as President of Local 882 and Mollenhauer as District Council 48 Staff Representative serving Local 882 and various other locals affiliated with District Council 48.

4. Milwaukee County has maintained a retirement system for its employees for many years. Members of District Council 48's bargaining unit are "members" of the Milwaukee County Employes' Retirement System, which is the only county-operated retirement system in Wisconsin.

5. Under that System, an employee becomes eligible for a full pension benefit based on a formula which considers a combination of "years of creditable service" and the individual's age. Different formulae apply to different classifications of employees.

6. At all material times, Respondents have been parties to a Memorandum of Agreement (herein Agreement) covering calendar years 2001 and 2002-04. The Agreement contains a multi-step grievance procedure ending in final and binding grievance arbitration. The Agreement defines grievances as "matters involving the interpretation, application or enforcement of the terms of this Agreement." The grievance procedure is outlined in Agreement Sec. 4.02, which also provides, "[t]he County recognizes the right of an employe to file a grievance, and will not discriminate against any employe for having exercised their rights under this section." This section permits individual employees to file grievances.

7. The Memorandum of Agreement referenced in Finding 6 provides in Sec. 1.05 (the Management Rights clause) that the County retains the right to determine: "the kinds and number of services to be performed;". . . "the number of positions and the classifications thereof to perform such service;" . . . "the right to release employees from duties because of lack of work or lack of funds;" and "the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted".

8. The Memorandum of Agreement referenced in Finding 6 provides in Sec. 2.37(1) (the Layoff and Recall provision) that employees who are laid off are placed on a "layoff/recall list for the classification from which the layoff occurred and shall have precedence for recall from the layoff/recall list for that classification in order of bargaining unit seniority for three years and one day from the date of the layoff."

9. The Memorandum of Agreement referenced in Finding 6 contains a procedure for administering layoffs. The procedure is found in Sec. 2.37(1) (the Layoff and Recall provision). In Sec. 2.37(1)(a), it provides that "layoffs shall be made within classification on a county-wide basis in the inverse order of total bargaining unit seniority per Section 2.25 of the Agreement." (Note: Section 2.25 is the Seniority Defined section).

10. The Memorandum of Agreement referenced in Finding 6 provides in Sec. 2.17(11) (the Retirement Benefits section) that "Members [of the bargaining unit represented by District Council 48] who retire on and after January 1, 1994 shall be eligible

for a normal pension when the age of the member when added to his/her years of service equals 75." This is commonly known as the "Rule of 75".

11. At all material times, Respondents have also been parties to an Agreement known as the Collateral Agreement. That Agreement was drafted and signed in 1991. That Agreement provides in the second paragraph that "It is not the intent of the Department of Parks, Recreation and Culture to Supplant Park Maintenance Workers with seasonal Park Worker III's while Park Maintenance Workers are on layoff status."

12. On August 12, 2003, County Executive Scott Walker sent a letter to all County employees informing them that the County was facing a "fiscal crisis", and that the County was trying to close a 7.8 million dollar deficit in the 2003 budget and a 90 million dollar deficit in the 2004 budget. The letter indicated that as a result of those deficits, the County was going to layoff represented and non-represented employees. The letter further indicated that layoff plans would be implemented by each department, "subject to appropriate Civil Service Rules and Memoranda of Agreement." The letter further indicated that "it is anticipated that the positions from which employees are laid off will not be filled in the 2004 county budget."

13. At a Friday meeting in August, 2003, County Executive Scott Walker told top officials in the Parks Department to cut one million dollars from their existing 2003 budget by the following Monday. Walker directed these officials to cut full-time staff – not seasonal employees. Department officials did as Walker directed and compiled a plan that cut about one million dollars from the existing 2003 budget. This reduction plan included cutting about 120 existing full-time jobs in the Parks Department. Most of the anticipated cuts were in the Park Maintenance Worker I classification. There are three classifications of Park Maintenance Worker: I's, II's and II's in charge. This reduction plan was subsequently approved by Sue Baldwin, who was then head of the Parks Department, and the County's Human Resources Department.

14. On or about August 25, 2003, agents of the County notified hundreds of employees of the bargaining unit represented by District Council 48, who are also members of the County Retirement System, by letter, that they were at risk of being laid off effective September 12, 2003.

15. Two of the employees who received the letter referenced in Finding 14 were Donald Tarkowski and James Allemang. Tarkowski was one of the more senior employees in the Parks Department who received this letter.

16. On August 27, 2003, the Parks Department Human Resources Manager, Greg McKinstry, told Parks Department employees, at a meeting at the Greenfield Pavilion, that those individuals who were scheduled for layoff on September 12, 2003 would not be eligible after that date to retire from the Milwaukee County Retirement System even if the individual had satisfied the "Rule of 75" described in Finding 10 before September 12, 2003, and that the

only way such employee could retire with any benefits at all would be to retire before September 12, 2003. In other words, the County was not permitting employees to retire based on the "Rule of 75" while they were on layoff.

17. The Union disagreed with the County's position that employees could not retire while on layoff. The Union's position was that if a member of the retirement system in the bargaining unit represented by it was placed on layoff, such layoff would have an impact on the earning of serviceable credits during the period of layoff, but that such member of the system does not lose his status as a member of the system until the requirements of Section 2.11 of Chapter 201 of the Milwaukee County Code of General Ordinances have been met. Thus, the Union's position was that a bargaining unit employee who was also a member of the retirement system could retire while on layoff if he/she otherwise met the criteria of Section 2.11 of Chapter 201 of the Milwaukee County Code of General Ordinances.

18. On September 4, 2003, the Union filed a lawsuit against the County concerning individuals being able to retire while on layoff. That lawsuit, which is Case No. 03-CV-007829, seeks a declaratory judgment pursuant to Sec. 781.02, Stats., on the proper application of the "Rule of 75". In that lawsuit, the Union alleges that the County violated the parties' Memorandum of Agreement, in conjunction with relevant ordinances, by its refusal to apply the "Rule of 75" to employees on layoff. That lawsuit is still being litigated before Judge Pekowsky in Milwaukee County Circuit Court.

19. As of September 12, 2003, Tarkowski had attained a combination of age and service equal to 75 years, but Allemang had not yet attained a combination of age and service equal to 75 years. Thus, under the "Rule of 75", Tarkowski was eligible for a pension as of that date, while Allemang was not.

20. On September 12, 2003, hundreds of County employees were laid off. The employees who were laid off were both represented and non-represented employees. About 120 of the employees who were laid off were in the Parks Department. Most of the employees who were laid off in the Parks Department were in one classification: the Park Maintenance Worker I classification. Specifically, 102 of the employees in the Parks Department who were laid off were Park Maintenance Worker I's. At that time, there were 108 Park Maintenance Worker I's in the Parks Department. Both Tarkowski and Allemang were Park Maintenance Worker I's. Allemang was one of the Park Maintenance Worker I's who was laid off. Tarkowski was not laid off for reasons that will be identified in Finding 21. The six Park Maintenance Worker I's who were not laid off on September 12, 2003 were the most senior Park Maintenance Worker I's. All of them had more seniority than Tarkowski.

21. On September 12, 2003, Tarkowski was similarly situated to hundreds of other County employees who were going to be laid off. Faced with a layoff of unknown duration starting September 12, 2003, and the likelihood that his position would not be filled in the 2004 budget, and the possibility of not being able to retire while on layoff, Tarkowski chose to retire rather than be laid off. His last day of work was September 12, 2003. His retirement

from the County became effective October 11, 2003. Tarkowski viewed his retirement as a forced retirement because he retired earlier than he wanted. He wanted to continue working for the County past September 12, 2003 (i.e. the date he was going to be laid off) but chose to retire for the reasons just listed.

22. Many grievances were subsequently filed over the layoffs in the Parks Department. One of them will be addressed in detail in Finding 23. Most of the grievances had to do with seasonal employees performing the job duties of the laid off Park Maintenance Worker I's. As of the hearing, most of those grievances were still pending because the County had taken the position that laid off employees did not have the right to file grievances, and that issue was being litigated.

23. On August 28, 2003, Allemang filed a grievance (which was later assigned the number 33237) which contended that the upcoming layoffs in the Parks Department (i.e. the layoffs scheduled to occur September 12, 2003) "discriminated against its Parks employees for the purpose of discrediting and weakening the Union as organized." An attachment to the grievance provided thus:

> This is a grievance against the Parks Department, who claimed they had no choice to carry out a proposal to layoff virtually an entire class of Park Maintenance Worker 1 positions. These are local 882 members who are still under contract with Milwaukee County until Dec. 31, 2004. This proposal was signed with Scott Walkers executive order, and carried out with the help of both the Human Resource Department at the parks and at the court house.
>
> I am contending that this was a move to discriminate against a specific class of employees with the soul purpose of discrediting and weakening the union. This would be a clear violation of managements own rights. They are supposed to only be able to lay people off because of lack of funds or lack of work. Lack of work does not apply, and if it was lack of funds, why would they bring back seasonals after they laid them off because of lack of funds. And why would virtually everyone else in the whole parks department be unaffected by this move. And also, why would they hire a new seasonal in the month of August, when in the same month we were told we were being laid off. I am also contending that the County did not bargain in good faith with our union. This all happened so fast with all these impromptu meetings, that it didn't seem like the County was interested in letting us know what was going on. Therefore, they would not be genuinely interested in maintaining full-time status for this selective group of employees. This would be another clear violation of their own rights. They are also discrediting us and all our years of service by saying that we only do odd jobs from September to April, therefore it wouldn't matter if we just hire a few more seasonals to pickup the slack in spring. It also states that Milwaukee County will make every reasonable effort to place a laid off person in a vacant position. Does making a reasonable effort mean freezing

> virtually every available opening or vacancy the day before we are supposed to go down to see about open and vacant positions. Not to mention the fact that employees are being intimidated or harassed into early retirement. This is happening at a time when there are still unresolved issues between our union and the County.

While Allemang was the only person who signed the grievance, it affected more than just himself. The grievance requested that all the laid off Park Maintenance Workers be recalled to work and made whole.

24. On September 30, 2003, the Parks Department Human Resources Manager, Greg McKinstry, scheduled a first step grievance meeting concerning Grievance No. 33237 for October 8, 2003. That meeting was held as scheduled.

25. On October 9, 2003, McKinstry denied the grievance in writing. In doing so, he treated the grievance as a group grievance rather than an individual grievance affecting only the named grievant (Allemang). His written response to the grievance follows:

> October 9, 2003
> James Allemang
> Park Maintenance Worker I
> South Region
> Grievance #33237
>
> Grievance was filed 08/28/03 by James Allemang contending a violation of Sections 1.03 and 1.05 of the Memorandum of Agreement, as well as the 1991 Collateral Agreement. Grievant is requesting the reinstatement of laid off Park Maintenance Workers and that all employees be made whole.
>
> Grievance was discussed in 1st step meeting held at Parks Administration on 10/08/03. Present for the union were James Allemang, Jeff Gollner and Dave Sikorski. The Department was represented by Nancy Gall, Tyler Van Ert and the undersigned.
>
> During the 1st step discussion, the aggrieved stated that the County of Milwaukee violated Section 1.03 whereas, the County and the Union shall not discriminate in any manner whatsoever against any employee for employment because of race, sex, age, nationality, handicap, political or religious affiliation or marital status. However, when questioned for the basis for his claim of this violation, the Grievant did not provide any justification for his claim. He also contends that Milwaukee County improperly laid off a large number of Park Maintenance Workers I on September 12, 2003, while at the same time, retaining Seasonal Park Maintenance Workers and Park Workers. The aggrieved indicated that the retention of seasonal employees violates the 1991

Collateral Agreement by supplanting the full-time workforce of Park Maintenance Workers. The Grievant contends that Seasonal Park Maintenance Workers and Regular Park Maintenance Workers are the same classification and management awarded Seasonal Park Maintenance Workers seniority rights over regular Park Maintenance Workers. The aggrieved stated that the retention of Seasonal Park Maintenance Workers provides the basis for his claim and violate both the labor agreement and the 1991 collateral. Grievant is also contending a violation of sections 1.05 of the MOA, in that the County of Milwaukee may only release (layoff) employees from duty because of lack of work or lack of funds. He indicated there is no lack of work and there is no lack of funds because management retained seasonal employees while permanent employees were laid off.

With regard to the aggrieved employee's contention that Park Maintenance Workers were improperly laid off, it must be noted that the 9-12-03 lay off of all bargaining unit personnel was completed consistent with the provisions contained in Sections 1.05 and 2.37 of current MOA. The instant layoffs occurred due to the obvious fiscal crisis, which Milwaukee County has been in for many months. The extent of the fiscal crisis was outlined in the County Executive's 06/06/03 memo to the County Board, providing the board with the June update on the 2003 budget. The scope of the fiscal crisis was again reiterated by the County Executive in his letter to all employees dated 08/12/03.

Moreover, there was no awarding of seniority to seasonal Park Maintenance Workers. Section 2.25 is clear in stating that seasonal employees have no seniority until such time as they ". . .achieve regular appointment to a full-time bargaining unit position. . .". Likewise, there has been no violation of the 1991 Collateral Agreement. The referenced agreement simply states that Park Workers III will not be used to Supplant Park Maintenance Workers while they are on layoff. The hearing officer rejects this contention and the aggrieved is unable to substantiate this claim.

The hearing officer also denies the aggrieved employee's contention that Seasonal Park Maintenance Workers and full time Park Maintenance Workers are the same classification. Consequently, the seasonal employees are performing the work of the laid off Park maintenance Workers. The fact of the matter is that the two classifications referenced are separate and distinct, with both separate titles and title codes. The recognition of the separation of the classifications in this manner is consistent with the ruling issued in umpires ruling in case #1278.

Inasmuch as there has been no violation of the Memorandum of Agreement or the 1991 Collateral agreement, the grievance is denied.

Greg McKinstry /s/
Greg McKinstry
Human Resources Manager (Parks)

26. The next to the last paragraph of McKinstry's response references an umpire decision in Case #1278. That particular grievance arbitration case involved the layoff of certain laborers in the Parks Department in 1990. The issue in that case was whether Milwaukee County violated the collective bargaining agreement by retaining seasonal laborers while laying off regular full-time laborers. Umpire Sherwood Malamud answered that question in the negative, meaning that the County had not violated the collective bargaining agreement by retaining seasonal laborers while laying off regular full-time laborers. Thus, the Union lost that case. (Note: Sometime after that decision was issued, the job title of Full-Time Laborer was changed to Park Maintenance Worker).

27. After McKinstry denied Grievance No. 33237 at Step 1, the President of Local 882, Chris Pegelow, consulted with other union officials, including District Council 48 Staff Representative William Mollenhauer, about the grievance. Collectively, they decided that the grievance lacked merit for the following reasons. First, the union officials knew, based on their knowledge of the Memorandum of Agreement, that the County had retained the management right to determine staffing levels, to lay off employees, and to determine which classification of employees is selected for layoff. They concluded that, in the context of this case, those rights allowed County officials to select the Park Maintenance Worker I classification as the classification to be affected by the layoff, and to layoff 102 employees in that classification. Second, the union officials knew that the Layoff and Recall provision in the contract specifies that layoffs are to be done by seniority. They concluded that had happened here because the 102 Park Maintenance Worker I's who were laid off were the least senior 102 employees in the Park Maintenance Worker I classification. The union officials also decided that if the grievance was appealed to arbitration, it would not prevail because of the arbitral precedent of Case No. 1278 (wherein the Umpire had found that the County can layoff full-time employees while retaining seasonal employees). After union officials concluded that the grievance lacked merit for the above-noted reasons and could not prevail if it was appealed to arbitration, Pegelow withdrew the grievance.

28. On March 29, 2004, the County's Director of Labor Relations, Troy Hamblin, sent a letter to District Council Staff Representative William Mollenhauer confirming that the Union had withdrawn Grievance 33237 (i.e. the grievance referenced in Finding 23 filed by James Allemang).

29. The Union's decision to withdraw Grievance No. 33237 and not appeal it to arbitration was made in good faith and was not arbitrary or discriminatory.

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

CONCLUSIONS OF LAW

1. The layoffs which Respondent County implemented in the Parks Department on September 12, 2003 did not violate Sec. 111.70(3)(a)1, Stats.

2. Respondent District Council 48, AFSCME did not violate its duty of fair representation towards Complainant Donald Tarkowski by not taking the Allemang grievance to arbitration and thus did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b)1, Stats.

3. Because Respondent District Council 48, AFSCME did not violate its duty to fairly represent Complainant Tarkowski by not taking the Allemang grievance to arbitration, the Commission will not exercise its jurisdiction to determine whether Respondent Milwaukee County violated a collective bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

4. Because Respondent District Council 48, AFSCME did not violate its duty to fairly represent Complainant Tarkowski by not taking the Allemang grievance to arbitration, the Commission will not exercise its jurisdiction to determine whether Respondent District Council 48, AFSCME violated a collective bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(b)4, Stats.

5. Since the issue of whether the County's refusal to apply the "Rule of 75" to employees on layoff is currently pending before a Milwaukee County Circuit Court, the Commission will not exercise its jurisdiction to determine whether Respondent County violated a collective bargaining agreement by that conduct and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

6. To the extent that union officials took the actions referenced in Finding 27 (namely, withdrawing the Allemang grievance after the second step and not appealing it to arbitration), it was in their capacity as officers and representatives of the Union and not in their individual capacity. Thus, they did not commit prohibited practices within the meaning of Sec. 111.70(3)(c), Stats.

7. Under MERA, the Commission lacks statutory authority to order Complainant to pay Respondents' defense costs and fees.

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

ORDER

1. The complaint is dismissed in all its respects.

2. The Respondents' requests that Complainant be ordered to pay Respondents' defense costs and attorneys fees are denied.

Dated at Madison, Wisconsin this 20th day of April, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint alleges that the County violated the collective bargaining agreement by its actions herein, and that the Union failed to fairly represent the Complainant. Both Respondents deny committing any prohibited practices by its conduct herein.

POSITIONS OF THE PARTIES

Complainant

It is the Complainant's position that the County violated the labor agreement when it laid off the Park Maintenance Worker I's on September 12, 2003. According to the Complainant, that layoff was arbitrary and discriminatory because the County singled out the Park Maintenance Worker I classification to bear the brunt of the layoffs in the Parks Department while leaving other areas and classifications in the department, such as aquatics and the golf course, untouched. As the Complainant sees it, this was unfair and should not pass muster. The Complainant maintains that the County did not show why that particular classification (i.e. the Park Maintenance Worker I classification) had to be hit so hard by the layoffs in the department. By cutting 102 positions in that one classification, the Complainant avers that the County circumvented his overall seniority rights because he had seniority over other employees in different classifications in the Parks Department who were not laid off. The Complainant speculates that the reason the Park Maintenance Worker I classification was chosen for the layoffs was so those laid off employees could be replaced with seasonal employees. The Complainant notes in that regard that after the layoffs of the Park Maintenance Worker I's occurred, the County continued to employ seasonal employees in the Parks Department. The Complainant contends that by its actions herein, the County violated the labor agreement and the Collateral Agreement.

Next, the Complainant maintains that the Union was aware of the County's contract violations relative to the layoffs of the Park Maintenance Worker I's because of the grievance Allemang filed, but it notes that the Union withdrew that grievance at the second step of the grievance procedure. As the Complainant sees it, that withdrawal of the grievance proves that the Union was more concerned with employees being allowed to retire while on layoff than it was in protecting employees' seniority and fighting the layoffs. The Complainant believes the Union should have done more than it did to fight the layoffs that occurred in the Parks Department, and in particular, his classification. The Complainant argues "that the Union should be held accountable for its non-action regarding those layoffs" and for what it calls "non-representation".

As a remedy, the Complainant asks that he be reinstated to his former position and made whole.

Respondent County

It is the County's position that the complaint should be dismissed. It elaborates as follows.

The County notes at the outset that as the complaining party, the Complainant has the burden of persuasion to show that the County violated Sec. 111.70. The County argues that the Complainant did not meet that burden in any respect.

Next, the County points out that under the MAHNKE decision, a complainant must first show that the Union somehow violated its duty of fair representation before the complainant can even attempt to pursue a claim against the Employer. As the County sees it, the Complainant did not meet that threshold requirement because he did not demonstrate any misconduct by the Union in this matter. Building on that premise, the County argues that the Complainant did not prove that the Union's conduct herein was arbitrary, discriminatory or in bad faith. While the Complainant was faced with what the County calls the Hobson's choice of accepting layoff or accepting retirement, the County contends the Complainant was treated the same as hundreds of other County employees. Said another way, the County asserts that the Complainant was not treated any differently than any other similarly situated employee.

Next, the County avers that the Complainant also demonstrated no self-help in the matter. What the County is referring to is that under the instant collective bargaining agreement, the Complainant could have initiated a grievance either alone or with a representative, but he did neither. In short, he did not use the grievance procedure in any fashion. The County notes that any dispute under the labor agreement is to be resolved via binding arbitration, and that did not happen here. Building on that point, the County submits that allowing this claim to advance would deny the County of the benefit of its bargain (i.e. that labor disputes are resolved via arbitration). It asserts that the Complainant "ought not be rewarded for his sloth and neglect."

Finally, with regard to the Complainant's allegations against the County, the County maintains that the Complainant did not show any threats, coercion or misconduct by any of the County's representatives. It also avers that the Complainant failed to prove that the County violated the collective bargaining agreement by its actions herein.

The County therefore asks that the complaint be dismissed.

Respondent Union

It is the Union's position that it did not violate its duty of fair representation to Tarkowski by its conduct herein. According to the Union, there is a lack of evidence that it acted arbitrarily, or in bad faith, or in a discriminatory fashion against Tarkowski. The Union therefore asks that the complaint against it be dismissed. It elaborates on this contention as follows.

First, the Union notes that in the complaint, the factual basis for the duty of fair representation claim is this: the Union's "refusal to submit Donald Tarkowski's grievance." In response, the Union points out that, in fact, Tarkowski never filed a grievance himself challenging either the layoff itself or the fact that the County would not let laid off employees retire on layoff status. The Union notes that he could have, because the collective bargaining agreement gives him the right to do so. Thus, the reference in the complaint to "Tarkowski's grievance" is just plain wrong, and really refers to Allemang's layoff grievance (which the Employer treated as a group grievance when it responded). That said, the Union acknowledges that it withdrew Allemang's grievance and did not appeal it to arbitration.

Second, the Union addresses why it did that (i.e. withdraw Allemang's layoff grievance and not appeal it to arbitration). It avers that the reason union officials withdrew the grievance can be simply stated: they concluded it lacked merit. As the Union sees it, that conclusion had a logical basis because under the collective bargaining agreement, the County has the right to layoff employees and to decide which classification of employees is selected for layoff. The Union maintains that those rights allowed County officials to select the Park Maintenance Worker I classification as the classification to be affected by the layoff and to layoff 102 employees in that classification. Once that decision was made, the County was contractually obligated to follow the layoff procedure found in Sec. 2.37(1) of the collective bargaining agreement. According to the Union, that is exactly what happened because the 102 Park Maintenance Worker I's who were laid off were the least senior 102 Park Maintenance Worker I's. Another reason union officials withdrew the grievance was because they concluded it could not prevail if it was appealed to arbitration. Once again, the Union believes that conclusion had a logical basis because of the arbitral precedent of Case 1278. The Union notes that in that decision, the Umpire found that the County can lay off full-time employees while retaining seasonal employees. Putting the foregoing points together, the Union argues that the conclusion of union officials that the Allemang grievance lacked merit and could not prevail in arbitration was well-reasoned and defensible.

Third, the Union notes that it took a different tactical strategy to the layoffs than the grievance approach taken by Allemang. It avers that the reason it took this different approach was because it knows it cannot prevent employee layoffs. What the Union is referring to is that it decided to file a lawsuit against the County, instead of a grievance, concerning individuals being able to retire while on layoff. The Union believes that by taking that legal action, it acted prudently. The Union characterizes that lawsuit as involving "much of the subject matter raised by the Complainant." In that lawsuit, the Union alleges that the County violated the labor agreement, in conjunction with relevant County ordinances, by its refusal to apply the "Rule of 75" to employees on layoff. While that lawsuit is still pending, the Union maintains that the judge hearing the case "will analyze the interplay between the collective bargaining agreement, the relevant ordinances, and arbitral decisions. . ."

Notwithstanding the fact that that case is still pending in Milwaukee County Circuit Court, the Union asks the Examiner to find that the County violated the collective bargaining agreement by making a unilateral change to what it calls the "proper application of the Rule of

75" by threatening employees, including Tarkowski, that they would be unable to retire while on layoff status. Elaborating further on that point, the Union asks the Examiner to find that by telling employees, including Tarkowski, that they could not retire while on layoff, the County violated a term of the collective bargaining agreement, namely Sec. 2.17(11), and therefore Sec. 111.70(3)(a)5, Stats. In the alternative, the Union asks the Examiner to reserve ruling on the contractual matter until after Judge Pekowsky decides the outcome of Case No. 03-CV-007829.

DISCUSSION

The complaint contends that the County violated Secs. 111.70(3)(a)1 and 5, Stats., and that the Union violated Secs. 111.70(3)(b)1 and 4, and (c), Stats. All these sections will be reviewed below. The discussion on each section is essentially divided into two parts: in the first part, I identify the applicable legal standards and in the second part, I apply those legal standards to the facts.

Alleged Violation of Sec. 111.70(3)(a)1

Under Sec. 111.70(3)(a)1, Stats., municipal employers may not "interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." Under Section 111.70(2), Stats., the rights protected by Sec. 111.70(3)(a)1, Stats., include, among others, "the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." In order for a complainant to prevail on its complaint of interference with employe rights it must demonstrate, by a clear and satisfactory preponderance of the evidence, that respondent's complained of conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with its employes in the exercise of their rights guaranteed by sub (2). Employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will generally not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason for its actions. E.G., BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); CEDAR GROVE-BELGIUM SCHOOLS, DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). Similarly, unilateral employer action within the scope of employer rights is not prohibited by Sec. 111.70(3)(a)1.

While the complaint pled an Employer violation of Sec. 111.70(3)(a)1, Stats., that is the only reference to same in the record. It was not mentioned at the hearing or in the Complainant's brief. As a result, it is unclear whether the Complainant is claiming an independent violation of Sec. 111.70(3)(a)1, Stats., or a derivative violation of same.

It can nonetheless be inferred that the Employer conduct at issue is the layoffs which occurred in the Parks Department on September 12, 2003. The record will not support a finding that the layoffs which the County implemented in the Parks Department on

September 12, 2003 constituted either independent or derivative violations of Sec. 111.70(3)(a)1, Stats. Here's why. First, as was noted above, unilateral employer conduct will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer has a valid business reason for its actions. Finding 12 indicates that in August, 2003, the County Executive sent a letter to all County employees informing them that the County was facing a "fiscal crisis" and multi-million dollar deficits. That letter indicated that as a result of those deficits, the County was going to layoff an unspecified number of employees. For the purpose of ruling on the claimed Sec. 111.70(3)(a)1, Stats. violation involved here, that letter establishes that the Employer had a valid business reason for the layoffs which it implemented in the Parks Department on September 12, 2003. Second, as was also noted above, unilateral employer action which is within the scope of employer rights is not prohibited by Sec. 111.70(3)(a)1, Stats. Finding 6 indicates that under its Memorandum of Agreement with District Council 48, the County has retained the right to layoff employees. Since the County has contractually retained the right to layoff bargaining unit employees, the layoffs which the County implemented in the Parks Department on September 12, 2003 did not violate Sec. 111.70(3)(a)1, Stats.

Alleged Violation of Sec. 111.70(3)(b)1

Section 111.70(3)(b)1, Stats. states that it is a prohibited practice for a municipal employee, individually or in concert with others "[t]o coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in sub. (2)." (The pertinent sub. (2) language is quoted above). The reference in Sec. 111.70(3)(b)1, Stats., to "a municipal employee. . .in concert with others" has historically been interpreted to extend the prohibitions in Sec. 111.70(3)(b)1, to labor organizations. RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 14308-D, 14389-D, 14390-D (WERC, 6/77). Section (3)(b)1 has also been held to incorporate a labor organization's duty to fairly represent those in the bargaining unit for which it serves as the exclusive collective bargaining representative. E.G., CITY OF JANESVILLE, DEC. NO. 15209-C at 6 (Henningsen, 3/78), AFF'D BY OPERATION OF LAW, -D (WERC, 4/78). In order to prove a violation of the duty of fair representation, it is necessary to show, by a clear and satisfactory preponderance of the evidence, that the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." MAHNKE V. WERC, 66 Wis. 2D 524, 531 (1975) (quoting VACA V. SIPES, 386 U.S. 171, 190 (1967)). This standard does not require the union to arbitrate all grievances because "a union has considerable latitude in deciding whether to pursue a grievance through arbitration." E.G., MAHNKE, SUPRA, 66 Wis. 2D at 531 (quoting HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964)).

Applying those principles here yields the following results.

The MAHNKE decision just cited requires that a union's exercise of its discretion be put on the record in sufficient detail so as to enable the Commission and reviewing courts to determine whether the union made a considered decision by review of relevant factors. The Union did that here. As noted in Finding 27, after the Allemang grievance was filed, Local

Union President Pegelow conducted an investigation of the facts and consulted with other union officials, including District Council 48 Staff Representative Mollenhauer, about it (i.e. the grievance). They ultimately decided that the grievance lacked merit. Their rationale for so finding was as follows. First, they knew, based on their knowledge of the Memorandum of Agreement, that the County had retained the management right to determine staffing levels, to lay off employees, and to determine which classification of employees is selected for layoff. They concluded that, as it related to this case, those management rights allowed County officials to select the Park Maintenance Worker I classification as the classification to be affected by the layoff, and to layoff 102 employees in that classification. Second, they also knew that the Layoff and Recall provision in the labor agreement specifies that layoffs are to be done by seniority. After investigating the matter, they concluded that had happened because the 102 Park Maintenance Worker I's who were laid off were the least senior 102 employees in the Park Maintenance Worker I classification. Aside from the foregoing, union officials also decided that if the grievance was appealed to arbitration, the Union would probably not prevail because of the arbitral precedent of Case No. 1278 (wherein the Umpire had found that the County can layoff full-time employees while retaining seasonal employees). Thus, it was their view that the grievance had little chance of success in arbitration.

The Examiner finds that the foregoing facts establish that the Union made a good faith decision about the merits of the grievance and the likelihood of success in arbitration (namely, that the grievance lacked merit and had little chance of success in arbitration). Those decisions had a sound labor relations basis given the County's right to layoff bargaining unit employees and the arbitral precedent of Case 1278.

The only real claim which the Complainant makes against the Union is that the Union should have done more than it did to fight the layoffs that occurred in the Parks Department, and in particular, his classification. However, "doing more than it did" is not one of the MAHNKE factors. Instead, as previously noted, the MAHNKE factors are simply whether the Union's conduct toward the employee was arbitrary, discriminatory, or in bad faith. In the context of this particular duty of fair representation case, the question to be answered is whether the Union acted in an arbitrary, discriminatory or bad faith manner when it withdrew the Allemang grievance after the second step and did not appeal it to arbitration. The Complainant had to show that the Union's decision to withdraw the Allemang grievance and not appeal it to arbitration was arbitrary, discriminatory or in bad faith. He did not do so. Even if the Union was wrong in its conclusion that the Allemang grievance lacked merit, a union does not breach its duty of fair representation by deciding not to arbitrate what might ultimately be a meritorious grievance. Where, as here, the union investigates the matter and concludes that the grievance lacks merit, it does not act in an arbitrary, discriminatory or bad faith manner even if its judgment as to the merits is incorrect. CITY OF MADISON, DEC. NO. 30789-B (WERC, 10/04).

Accordingly, it is concluded that the Complainant has not established that the Union violated its duty of fair representation under Sec. 111.70(3)(b)1, Stats., when it withdrew the Allemang grievance after the second step and did not appeal it to arbitration.

Alleged Violation of Secs. 111.70(3)(a)5 and 111.70(3)(b)4

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer "to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. . . ." This provision makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. The traditional mechanism for enforcing a collective bargaining agreement is grievance arbitration. Where a collective bargaining agreement contains a grievance arbitration procedure, it is presumed (absent an express provision to the contrary) to be the exclusive method of settling contractual disputes. MAHNKE, SUPRA. If the union has control over the contractual grievance arbitration procedure and elects not to take a grievance to arbitration, an employee may not pursue a claimed breach of the agreement under Sec. 111.70(3)(a)5, Stats., unless the union has violated its duty of fair representation when deciding not to take the grievance to arbitration. MAHNKE, SUPRA.

Section 111.70(3)(b)4, Stats., makes it a prohibited practice for a "municipal employee, individually or in concert with others" to violate a collective bargaining agreement. It mirrors Sec. 111.70(3)(a)5, Stats.

Both the Complainant and the Union ask the Examiner to interpret the collective bargaining agreement and decide different contract claims. I decline to do so. My rationale follows.

The Complainant contends that the County violated the labor agreement, specifically Sec. 2.37(1)(a), when it decided that most of the job cuts in the Parks Department would be in the Park Maintenance Worker I classification. The Complainant believes the job cuts, and corresponding layoffs, should have occurred elsewhere (i.e. in other classifications). If that had happened (i.e. the County had made the job cuts in other classifications, or made fewer job cuts in the Park Maintenance Worker I classification), he would not have been one of the employees to be laid off September 12, 2003 and thus would not have been forced to take early retirement to avoid a layoff.

There is a basic jurisdictional problem with my deciding the merits of the Complainant's contract claim and, to the extent that it raises different issues, the Allemang grievance. It is this. It has long been the Commission's policy not to exercise its collective bargaining agreement enforcement jurisdiction regarding a dispute that is subject to resolution under an agreed-upon and presumptively-exclusive grievance procedure like the one contained in the County's 2001, 2002-04 Agreement with the Union. E.G., MILWAUKEE COUNTY, DEC. NO. 28525-B (Burns, 5/98) at 12, aff'd –C (WERC, 8/98). This means that the Commission will only decide the merits of a grievance if it is shown that the complainant's access to the applicable grievance procedure is being prevented by a Union failure to fairly represent the employees' interests on the subject through the grievance procedure. E.G., MILWAUKEE COUNTY, SUPRA. In other words, in order for a contract claim to be addressed in this type of case, a complainant must first show that the union violated its duty of fair representation to the employee.

The Examiner has already concluded, above, that the Union's withdrawal of the Allemang grievance and failure to submit it to arbitration was not arbitrary, discriminatory or done in bad faith and that the Union did not violate its duty of fair representation to the Complainant by its actions herein. This finding, in turn, precludes the Examiner from addressing the Complainant's contract claim against both the County and the Union. Accordingly, the Examiner declines to exercise the Commission's MERA collective bargaining agreement enforcement jurisdiction to decide the merits of the Complainant's contract claim, and to the extent it might raise different issues, the Allemang grievance (a/k/a Grievance 33237).

The Examiner also declines, albeit for different reasons, to exercise the Commission's MERA collective bargaining agreement enforcement jurisdiction to decide the Union's claim that the County violated the labor agreement, specifically Sec. 2.17(11), by its refusal to apply the "Rule of 75" to employees on layoff. There are several jurisdictional problems with my addressing the merits of that contractual claim. First and foremost, Finding 18 indicates that the Union decided to litigate that very issue in a lawsuit which it filed against Milwaukee County in Milwaukee County Circuit Court. That litigation is currently ongoing. The Union certainly had the right to litigate that issue in that forum. However, having made the decision to litigate that issue in that forum, the Union cannot switch tracks, so to speak, and have this Examiner decide a claim which is currently pending before that court. Second, as was noted above, when there is an arbitration clause in the parties' collective bargaining agreement, as there is here, the Commission generally does not exercise its collective bargaining agreement enforcement jurisdiction. One exception to that rule is when both sides consent to the Commission exercising its collective bargaining agreement enforcement jurisdiction to decide a contract dispute. That did not happen here. Specifically, the County never agreed to have the Examiner decide that contract claim. Consequently, the Examiner declines to exercise the Commission's MERA collective bargaining agreement enforcement jurisdiction to decide whether the County's refusal to apply the "Rule of 75" to employees on layoff violates Sec. 2.17(11) of the parties' labor agreement.

Alleged Violation of Sec. 111.70(3)(c)

Section 111.70(3)(c), Stats., states that "[i]t is a prohibited practice for any person to do or cause to be done on behalf or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any action prohibited by par. (a) or (b)." This section recognizes that prohibited practices can also be committed by a person.

The Complainant failed to prove a violation of this section. To the extent that union officials took the actions referenced in Finding 27 (namely, withdrawing the Allemang grievance after the second step and not appealing it to arbitration), it was in their capacity as officers and representatives of the Union. Insofar as the record shows, those officials acted within the scope of their authority. No evidence was presented that any of them acted in an individual capacity for which they should be found individually liable. As a result, there is no

basis in the record for concluding that any union official violated this section by their conduct herein. Accordingly, no violation of Sec. 111.70(3)(c), Stats. has been found.

. . .

In summary then, it is concluded that the County did not violate Secs. 111.70(3)(a)1 or 5, Stats., by its conduct herein and that the Union did not violate Secs. 111.70(3)(b)1 or 4 or (c), Stats., by its conduct herein. The complaint has therefore been dismissed in its entirety.

Respondents' Requests for Defense Costs

In their original Answers, both Respondents' asked to be awarded their costs for defending themselves in this action. Their requests are denied because the Commission has held repeatedly in recent years that it is without statutory authority to grant the relief the Respondents are requesting in this case. E.G., MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 30254 (WERC, 1/4/02) at 4 ("We deny the Respondents' request for costs and attorneys' fees because we do not have the statutory authority to grant same in complaint proceedings to responding parties. STATE OF WISCONSIN, DEC. NO. 29177-C (WERC 5/99).")

Dated at Madison, Wisconsin this 20th day of April, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
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