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-B

Appearances:

Donald Tarkowski, 3427 South 24th Street, Milwaukee, Wisconsin 53215, appearing on his own behalf.

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

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On April 20, 2005, Examiner Raleigh E. Jones issued Findings of Fact, Conclusions of Law, and Order concluding that the Respondent Milwaukee District Council 48, AFSCME and Local 882 (Union) had not breached its duty of fair representation toward the Complainant Donald Tarkowski (Tarkowski), that the Commission would not assert jurisdiction over any of the contract violations Mr. Tarkowski alleged in his complaint, and that the Respondent Milwaukee County (County) had not violated Sec. 111.70(3)(a)1, Stats. The Examiner dismissed all prohibited practice allegations in the complaint.

On May 9, 2005, Mr. Tarkowski filed a timely petition seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. and on May 11,

2005, the Union also filed a petition for review joining with Mr. Tarkowski on his claim that the County had violated the collective bargaining agreement in one respect. The Union's petition was not timely, although the Union was permitted to advance written argument on the issues raised by Mr. Tarkowski's petition. The County opposed the petition for review and sought to have the Examiner's decision affirmed. All parties filed written argument in support of their respective positions, the last of which were received on June 30, 2005. On August 8, 2005, the County submitted a copy of a Circuit Court decision relevant to the issues in the instant case and on or before August 29, 2005, the Union and Mr. Tarkowski filed additional argument addressing the effect of that decision on the this case.

We affirm the Examiner's dismissal of all allegations in the complaint, although we have modified his Conclusions of Law in certain respects for reasons explained in the accompanying Memorandum.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following:

ORDER

1. The Examiner's Findings of Fact 1 through 29 are affirmed.

2. The Examiner's Conclusions of Law 1 through 3 are affirmed.

3. The Examiner's Conclusion of Law 4 is set aside and the following Conclusion of Law is made:

> 4. The Respondent Union did not breach its duty of fair representation nor otherwise commit prohibited practices within the meaning of Secs. 111.70(3)(b)4 or 5, Stats., by the manner in which the Union responded to the layoff situation in October 2003.

4. The Examiner's Conclusion of Law 5 is set aside and the following Conclusion of Law is made:

> 5. Because the grievance procedure in the collective bargaining agreement has not been exhausted regarding the Respondent County's threatened refusal to apply the "Rule of 75" to employees on layoff, the Commission will not exercise its jurisdiction to determine whether the 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.

5. The Examiner's Conclusions of Law 6 and 7 are affirmed.

6. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of September, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

Summary of the Facts

As noted in the Order above, the Commission has affirmed the Examiner's Findings of Fact, which we summarize as follows.

The County employed three ranks of Park Maintenance Workers, i.e., I, II, and II-in-charge. To progress within the Park Maintenance ranks, an employee must acquire and/or demonstrate additional skills and training. Both Mr. Tarkowski and his colleague, James Allemang, held the position of Park Maintenance Worker I at times relevant to this proceeding. The County also employs Seasonal Park Maintenance Workers, which both Union and County agree comprise a separate classification from that of Park Maintenance Worker.

Section 2.37(1)(a) of the applicable collective bargaining agreement provides that "layoffs shall be made within classification on a county-wide basis in the inverse order of total bargaining unit seniority ... ." Section 1.05 of the agreement, *inter alia*, retained for the County the right to determine "the number of positions and the classifications thereof to perform such service," and "the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted." Section 2.37 (1)(b) allows laid off employees to "bump" less senior employees in "the next lower class series." That provision explains that "class series" means a set of classes of positions performing similar work but at varying ranks that are designated by roman numerals I, II, and so forth. The subsection also provides that classifications having "different title code descriptions ... shall not be included within the same class series."

In late summer 2003, Milwaukee County experienced a significant fiscal crisis causing the County to order its various department directors to plan substantial cuts in their existing 2003 budgets. The Parks Department, which employed Mr. Tarkowski, was directed to prepare a plan to cut approximately $1 million and to lay off full-time rather than seasonal staff in order to implement such reduction. The Parks Department ultimately decided to lay off about 120 full-time workers, including 102 of the existing 108 Park Maintenance Worker I's. Mr. Tarkowski and a colleague, James Allemang, were among the full-time Park Maintenance Worker I's who received a notice from the County that they were at risk of layoff. Both individuals, and especially Mr. Tarkowski, held County-wide seniority substantially exceeding that of many Park Maintenance Worker II's and II's-in-charge, who were not given such notice and were not subsequently laid off. The County also retained (and re-employed) a number of Seasonal Park Maintenance Workers.

The collective bargaining agreement contains a provision known as the "Rule of 75," which allows bargaining unit members to retire when his/her age plus his/her years of service

equals 75. At the time Mr. Tarkowski received the notice of possible layoff in August 2003, he was eligible to retire under the Rule of 75. Although thus eligible, Mr. Tarkowski had not intended to retire at that point in time. However, at a meeting on August 27, 2003, the County advised Parks Department employees that they would not be able to retire while they were on layoff status. The County also advised employees not to expect recall within the next fiscal year, and perhaps not at all. The Union challenged the County's position regarding eligibility to retire while on layoff status and filed a lawsuit on September 4, 2003, seeking a preliminary injunction to protect the rights of laid off retirement-eligible employees. The Union was not successful in obtaining a preliminary injunction. Accordingly, Mr. Tarkowski and other retirement-eligible employees whose layoffs were imminent, had to decide whether to retire at once or whether instead to accept layoff and take the risk of losing, for some period of time at least, their right to retirement benefits. Mr. Tarkowski decided to retire effective September 12, 2003, the date on which he otherwise would have been laid off. As it happened, most of the laid off Park Maintenance Worker I's were recalled to their jobs within a few months, in part because the Union successfully persuaded the County to allocate 2004 budget funds for full-time workers rather than seasonals as initially proposed by certain County officials.[1]

The Union, along with individual employees, filed several grievances as a result of the Parks Department layoffs, which challenged situations where the Union believed that seasonal workers were assigned work previously performed by the laid off full-time workers. At times relevant to this proceeding, the Union was continuing to pursue some of those grievances. Mr. Tarkowski himself did not sign or file any grievances nor was he named in any grievances. However, his colleague, Mr. Allemang, filed a grievance on August 28, 2003 complaining that the County's decision to lay off almost the entire classification of Park Maintenance Worker I was designed to discredit and weaken the Union and was not genuinely motivated by a lack of funds since the County continued to employ and re-employ seasonals. The Allemang grievance also asserted that the County was discriminating against the Park Maintenance Worker I classification by freezing vacancies that might otherwise be available to them, and contained the statement, "Not to mention the fact that employees are being intimidated or harassed into early retirement."

---

[1] Mr. Tarkowski asserts in his August 25, 2005 submission to the Commission that, at a meeting on August 30, 2003, he asked the Union to seek "contract interpretations" regarding (1) the County's alleged misapplication of the classification language in the contractual layoff procedure and (2) "the ability to retire while on layoff." He further asserts that these requests were "rejected and denied by the Union." The record supports the first portion of this assertion, in that Mr. Tarkowski and others sought to challenge the County's application of the seniority provisions in the contract, and the Union responded that the County had applied the seniority provisions correctly. A detailed review of the evidentiary record in this matter does not support Mr. Tarkowski's assertion that he asked the Union to grieve or otherwise seek a contract interpretation at that meeting regarding the retirement-on-layoff issue. To the extent the record contains evidence regarding this issue, which it does only tangentially, it appears that Mr. Tarkowski was in agreement with the Union's decision to seek injunctive relief establishing his right to retire while on layoff status. There is no evidence that, after the injunction was denied, Mr. Tarkowski asked the Union to file a grievance regarding his right to retire while on layoff. Mr. Tarkowski's concern, with which both the Union and the Commission sympathize, is the Hobson's choice thus created for him, since he had to decide whether or not to retire without knowing what his rights would be if he accepted layoff instead. Mr. Tarkowski's claim in his August 25, 2005 submission that the Allemang grievance addressed the retirement-on-layoff issue is discussed in more detail in Part 4 of the Discussion section, below.

Since Mr. Allemang's grievance requested that all laid off Park Maintenance Worker I's be recalled, the County appears to have treated the grievance as a group grievance. Mr. Allemang, accompanied by Union representatives, met with the County's representative at Step 1 of the grievance procedure on October 9, 2003 to discuss the Allemang grievance. Mr. Tarkowski was not present. During that discussion, Mr. Allemang argued, among other things, that the County was using seasonals to replace full-time park workers, in violation of a 1991 Collateral Agreement that had accompanied a departmental reorganization. That Agreement provided, in part, 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." As part of that reorganization, Laborers were reclassified as Park Maintenance Worker I's and Seasonal Laborers were reclassified as Seasonal Park Maintenance Workers. Seasonal workers had always been in a separate "class series" in the understanding of both the County and the Union.

The County denied the Allemang grievance in writing on October 9, 2003. The County's written decision relied in part upon an arbitration award dealing with layoffs in the Parks Department in 1990. In that award, the arbitrator held that the County did not violate the collective bargaining agreement by retaining seasonal laborers while laying off full-time laborers. The upshot of that award, combined with the 1991 Collateral Agreement, is that the County may retain seasonals while laying off full-time maintenance workers, but may not use the seasonals to perform the work the laid off workers had performed. The award was premised upon the fact that seasonals were in a different class series from full-time employees.

After receiving the County's grievance denial, Union officials conferred and decided not to pursue the Allemang grievance based upon lack of merit. The Union concluded that the County had a contractual right to reduce the size of its staff and to decide which classifications of employees to retain or lay off, including a right to lay off nearly all the Park Maintenance Worker I's. Since the County had laid off by seniority within the Park Maintenance Worker I classification, and since the 1990 arbitration award clearly permitted the County to lay off full-time workers as long as the seasonals were not given the laid off workers' duties, the Union concluded that the grievance would not be successful and withdrew it.

The Union's lawsuit to establish that employees otherwise eligible to retire may do so while on layoff status remained pending in court throughout the litigation of the instant prohibited practice case. On July 19, 2005, while the instant petition for review was pending before the Commission, the Circuit Court issued its decision, dismissing the Union's complaint on the ground that the right to retire under the Rule of 75 while on layoff was a matter involving interpretation of the collective bargaining agreement, which was another "adequate remedy available at law," thus precluding equitable relief. The Court's memorandum stated, "the relief that could have been provided under the collective bargaining agreement was never pursued as was the contractual obligation of the plaintiff."

The Examiner's Decision and the Issues Raised in the Petition for Review

The Examiner concluded that the County had not interfered with, restrained, or coerced bargaining unit employees by choosing to lay off nearly all its Park Maintenance Worker I's, while sparing other employees holding similar positions, and accordingly dismissed Mr. Tarkowski's allegation that the County had violated Sec. 111.70 (3)(a)1, Stats. No party has sought review of this conclusion and it is affirmed without further discussion for the reasons articulated by the Examiner.

The Examiner also concluded that the Union had not violated its duty to fairly represent Mr. Tarkowski by withdrawing the Allemang grievance after Step 1. The Examiner viewed the Union as having "made a good faith decision about the merits of the grievance and the likelihood of success in arbitration ... decisions [that] had a sound labor relations basis given the County's right to lay off bargaining unit employees and the arbitral precedent ... ." Examiner's Decision at 17. The Examiner accordingly dismissed Mr. Tarkowski's claim that the Union violated Sec. 111.70 (3)(b)1, Stats. Mr. Tarkowski has sought review of this conclusion. The Commission affirms the Examiner, for the reasons set forth under "DISCUSSION" below.

Having held that the Union had not violated its duty of fair representation, the Examiner then dismissed Mr. Tarkowski's claim that the layoffs violated the collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5. The Examiner relied upon the following longstanding "exhaustion" rule: the Commission will not decide whether an employer has violated the collective bargaining agreement unless a complainant first establishes that he tried to use ("exhaust") the contractual arbitration process but was unable to do so because the union unlawfully failed to represent him. MAHNKE V. WERC, 66 WIS. 2D 524, 531 (1975). Mr. Tarkowski also seeks review of this determination. As the Commission ultimately agrees with the Examiner that the Union acted lawfully regarding the grievance, the Commission also agrees that the exhaustion rule prevents the Commission from reaching the merits of Mr. Tarkowski's breach of contract claims. This aspect of the Examiner's decision is affirmed without further discussion, for the reasons articulated by the Examiner at pages 18-19 of his decision.

The Examiner next dismissed Mr. Tarkowski's claim that the Union had violated the collective bargaining agreement, within the meaning of Sec. 111.70(3)(b)4, Stats. The Examiner relied on the above-described exhaustion rule. According to the Examiner, the Commission would not reach Mr. Tarkowski's breach of contract claim against the Union on the same ground that the Commission would not reach his claim against the County, i.e., Mr. Tarkowski was unable to show that the Union had failed to fairly represent him in pursuing the contractual grievance procedure. Mr. Tarkowski does not directly challenge this conclusion, although he continues to argue in his petition for review that the Union failed to enforce what he sees as the proper interpretation of the contract. As indicated in paragraph 3 of its Order, above, and as discussed below, the Commission approaches this issue somewhat more broadly than did the Examiner, in an effort to address Mr. Tarkowski's articulated

concerns. Ultimately, however, the Commission agrees with the Examiner that the Union has not violated the contract by the way the Union responded to the layoff situation.

Mr. Tarkowski also contends that the County violated the contract by threatening to refuse to allow employees on layoff status to retire under the rule of 75. Although a Respondent in this matter, the Union has endorsed with some vigor this aspect of Mr. Tarkowski's complaint. The Examiner refused to exercise jurisdiction over this claim, on the ground that the issue was "currently pending before a Milwaukee County Circuit Court." Examiner's Decision at 10. Both Mr. Tarkowski and the Union seek review of the Examiner's conclusion. The Commission affirms the Examiner's dismissal of this allegation but on a different ground, as indicated in paragraph 4 of its Order, above, and discussed more fully below.

Finally, the Examiner dismissed Mr. Tarkowski's claim that individual Union officials committed prohibited practices within the meaning of Sec. 111.70(3)(c), Stats., and also rejected the Respondents' request for defense costs and fees. No party has sought review of these conclusions and they are hereby affirmed without further discussion for the reasons articulated by the Examiner at pages 19-20 of his decision and because Mr. Tarkowski's claims are not "frivolous" within the meaning of Sec. 227.483, Stats.

DISCUSSION

It is apparent from the foregoing that three issues remain for discussion in reviewing the Examiner's decision: first, did the Union make a lawful decision not to pursue the merits of the Allemang grievance; second, was the Union's response to the 2003 layoff situation consistent with its duty of fair representation and the collective bargaining agreement; and third, should the Commission decide the merits of the County's alleged violation of the collective bargaining agreement as to the right to retire while laid off, and, if so, did the County breach the agreement in that regard?

We also address a fourth issue, not raised directly in response to the Examiner's decision. After the record regarding the petition for review had been closed, the County submitted to the Commission the decision of the Circuit Court regarding the Union's civil complaint alleging violations of various rights of bargaining unit employees in connection with 2003 layoffs. In response to the County's submission of the court decision, Mr. Tarkowski claimed for the first time in the present case that he had asked the Union to grieve the coerced retirement issue and that the Union had failed to do so. This issue is addressed in part 4, below.

1. Withdrawing the Allemang grievance.

Mr. Tarkowski's argues on review [2] that the Union did not make a good faith decision to drop the Allemang group grievance, because, in Mr. Tarkowski's view, that grievance was clearly meritorious. Mr. Tarkowski principally asserts that the Examiner misunderstood his (Tarkowski's) argument that the contractual layoff and recall language, in particular Sec. 2.37 (1) (b), either does not or lawfully should not have allowed him to be laid off when he had more bargaining unit seniority than many other employees in Park Maintenance Worker positions. As we understand his argument, Mr. Tarkowski believes that Park Maintenance Worker I's, II's, and II's-in-charge are all members of the same "class series," i.e., that of Park Maintenance Worker. Mr. Tarkowski believes that the County treated the Park Maintenance Worker I's as a separate classification for layoff purposes by improperly relying on the last clause in Sec. 2.37(1)(b), which states, "where classifications have different title code descriptions, they shall not be included within the same class series." To Mr. Tarkowski, the ranks of I, II, or II-in-charge may be separate "job titles" but are not separate classifications or separate class series. He notes that seniority is contractually defined as years of service, not service within a particular rank. He also notes that these ranks are not segregated for seniority purposes for access to other contractual benefits, such as shift bidding or overtime. Accordingly, Mr. Tarkowski argues that Worker I's, II's, and II's-in-charge must be combined for seniority-based layoff, in order to be consistent with the rest of the contract. He also contends that segregating the Park Maintenance Worker I's for layoff also offends the contractual language forbidding the County from using its management rights to discriminate against employees or undermine the Union. In short, Mr. Tarkowski believes that less senior Park Maintenance Workers of whatever rank should have been laid off before he was, and thus his contractual seniority rights were "circumvented." [3]

---

[2] Before the Examiner Mr. Tarkowski advanced additional arguments in support of the grievance, principally an assertion that seasonal workers were being allowed to supplant full-time workers in alleged violation of the 1991 Collateral Agreement. The County and the Union argued that the arbitration award arising out of the 1990 layoffs explicitly permitted the County to retain seasonals while laying off full-time workers, although the Union does not concede that any such retained or re-employed seasonals may do the work previously preformed by the full-time workers. The Examiner concluded that the Union made a good faith determination about the merits of the grievance, including the foregoing argument, which we affirm, and Mr. Tarkowski does not raise this issue on review.

[3] The County has argued that Mr. Tarkowski has no standing to advance his contractual claims because he neither filed, signed, nor otherwise was identified as a grievant in any grievance. Mr. Tarkowski asserts that his situation was encompassed within the Allemang grievance, which sought relief for all similarly situated Park Maintenance Worker I's. The Union concurs with Mr. Tarkowski on this point, claiming that the Union understood the Allemang grievance and the County's Step 1 response to encompass similarly situated employees such as Mr. Tarkowski. The Examiner found that the County treated the Allemang grievance as a group grievance covering Mr. Tarkowski. Since the Union claims that its "Allemang" grievance included Mr. Tarkowski and nothing in the record would indicate otherwise, the Commission agrees with the Examiner's finding. To the extent the County's argument implies that the Union cannot pursue a grievance without individual signatures, the record does not support such an interpretation of the grievance procedure. In any event, this issue does not change the outcome of the case, as the Commission also agrees with the Examiner that the Union satisfied its duty of representation in handling the grievance, whether or not it properly pertained to Mr.

In essence, Mr. Tarkowski believes that the Union's (and the County's) mutual interpretation of the contractual layoff/recall language was wrong. The County and the Union agree that they intended to permit layoff by classification groups and that each rank of Park Maintenance Worker is a separate classification for this purpose. The County and the Union agree that, even if the County had laid off by seniority among all Park Maintenance Workers of all ranks, they (the County and the Union) intended to permit a higher-ranked worker (e.g., a Worker II) with less seniority to bump a lower-ranked worker (e.g., a Worker I) with more seniority. They support this interpretation by noting that workers of a higher rank can handle all the duties of the lower rank, but the reverse is not true. Hence the County's managerial right to determine and further its own operational needs is served by permitting rank-based layoff groups. Section 2.37 (1) is not without ambiguity as to the meaning of the terms "classification," "class series," or "title code descriptions." However, the interpretation adopted by the Union is certainly within the "wide range of reasonableness" that a Union is permitted. MAHNKE, 66 WIS. 2D at 531, quoting HUMPHREY V. MOORE, 375 U. S. 335, 349 (1964). Nothing in the record supports Mr. Tarkowski's suggestion that this interpretation was adopted out of hostility toward the lower-ranked Park Maintenance Workers or for any bad faith motive. Accordingly, we affirm the Examiner's conclusion that the Union did not violate its duty of fair representation in choosing to withdraw the Allemang group grievance.

2. The Union's Response to the Layoffs.

The second question on review is whether the Union violated either the contract or the Union's duty of fair representation by the manner in which it responded to the 2003 fiscal crisis and resulting layoffs. In this regard, Mr. Tarkowski's central claim in his petition for review is that the Union should have pursued the County's alleged offer to impose a shorter work week throughout the bargaining unit in exchange for not laying off any employees and/or should have allowed the bargaining unit to vote on that proposal before rejecting it. As the County notes, however, the evidentiary record does not support Mr. Tarkowski's contention that such an offer in fact was either made or refused. In fact, the Union president twice testified that such an offer had not been made. See Transcript at 163 and 164. Even assuming an evidentiary basis for this argument, a Union retains considerable discretion in deciding how to advance the sometimes competing interests of its bargaining unit members and what compromises it must make. "So long as a union considers the interests of all the employees it represents when making those determinations, it does not breach its duty of fair representation by failing to acquire benefits for some but not all employees." ROCK COUNTY, DEC. NO. 30805-A (WERC, 9/04), at 8, and cases cited therein. In short, absent some evidence of improper motive or bad faith, the Union could choose its strategy in responding to the County's fiscal crisis without violating the duty of fair representation.

Mr. Tarkowski also claims in this connection that the Union violated the collective bargaining agreement by concluding that Mr. Tarkowski's layoff was permitted by the contract or by its other actions in response to the layoffs. The Commission has previously held that it

---

Tarkowski.

will not find that a Union has bound itself in a collective bargaining agreement to undertake certain duties toward individual employees, so as to potentially violate Sec. 111.70(3)(b)4,

Stats., without clear and specific contract language to that effect. CITY OF MEDFORD AND IBEW LOCAL 953, DEC. NO. 30537-C (WERC, 8/04), and cases cited therein. As the Commission stated in MEDFORD, "This is and ought to be a difficult standard." Mr. Tarkowski has not pointed to any language in the agreement that would meet this difficult standard. Accordingly, there is no basis for holding that the Union violated a contractual commitment to Mr. Tarkowski within the meaning of Sec. 111.70(3)(b)4, Stats. [4]

3. The Coerced Retirement Issue as a Breach of the Collective Bargaining Agreement.

The third issue raised on review of the Examiner's decision involves Mr. Tarkowski's and the Union's claim that the County violated the collective bargaining agreement when the County told employees otherwise eligible to retire under the Rule of 75, such as Mr. Tarkowski, that they would not be permitted to retire while on layoff status. As the Circuit Court has stated in its recent decision, the Rule of 75 benefit is incorporated into the collective bargaining agreement. [5] The Union joins Mr. Tarkowski in asking the Commission to rule that the County's threat to withhold rule of 75 retirement benefits from Mr. Tarkowski violated the collective bargaining agreement and constitutes an prohibited practice under Sec. 111.70(3)(a)5, Stats.

As the Examiner properly noted, unless the contract expressly provides otherwise, the contractual grievance arbitration procedure is presumed to be the exclusive method of settling contractual disputes. MAHNKE, at 529. As discussed in footnote 1, above, the record does not indicate that the contractual grievance procedure has been invoked regarding the coerced retirement issue. Nonetheless, the Union contends that the MAHNKE "exhaustion" rule should not apply because this is one of those rare situations in which the contract itself shows that the grievance procedure was not intended to be the exclusive enforcement mechanism. The Union points to Sec. 4.02 (1) of the agreement, which provides in pertinent part as follows:

> The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under existing procedures.

---

[4] The Examiner had also dismissed the alleged breach of contract claim against the Union, but did so by applying an exhaustion rule like the one that applies to alleged breaches of contract by an employer. In doing so, the Examiner assumed that, if such a commitment existed, an individual unit member could use the contractual grievance and arbitration procedure to enforce it. As we have found no contractual commitment, we need not address the Examiner's assumption in this regard.

[5] As discussed below, we conclude that we cannot exercise our jurisdiction over this alleged breach of contract claim. We note, however, that no party has developed a record either in support of or in response to such alleged breach.

As we understand the Union's argument, it contends that the County has taken the position that Tarkowski is trying to change his "existing fringe benefits" by arguing that he was coerced into retirement, an issue that is subject to processing under other "existing

procedures." Hence, according to the Union, the County itself has taken the position that the grievance procedure should not be available to test Tarkowski's claim. It follows, according to the Union that it would be "futile" to exhaust the grievance procedure and thus the Commission should address the breach of contract claim *ab initio*.

We cannot accept the Union's argument. First, it is not clear on this record that the County has actually taken the position the Union attributes to the County. Second, the foregoing contract language is ambiguous on its face as to whether it applies to contractual Rule of 75 retirement rights, (i.e., whether those rights are "processed under existing procedures") and thus whether the parties intended to preclude arbitration of those rights. Absent clear agreement between the County and the Union that the language in question was intended to preclude arbitrating Rule of 75 retirement rights, a party advancing that interpretation would have to develop an evidentiary record to support it. It is obvious in this case that no such record has been developed. Hence, we cannot conclude on this record that the grievance procedure is unavailable to address the coerced retirement issue. It follows that, pursuant to the normal rule of exhaustion, this issue is not ripe for Commission consideration and the Examiner properly dismissed it. [6]

4. Mr. Tarkowski's Claim that the Union Failed to Grieve the Coerced Retirement Issue

In his August 25, 2005 submission in response to the Circuit Court decision Mr. Tarkowski asserts for the first time on this record that the Allemang group grievance raised the issue that the County had violated the collective bargaining agreement when it "threatened employees with the inability to retire while on layoff," and that the Union violated its duty of fair representation by withdrawing this aspect of the Allemang grievance. As noted in footnote 1, above, it is true that the written attachment to the Allemang grievance referred very briefly to this issue, with the passing comment, "Not to mention the fact that employees have been intimidated or harassed into early retirement." This brief and undeveloped comment is inserted into a multi-paragraph exposition that otherwise focuses exclusively upon the classification, seniority, and discrimination allegations. The record (including the County's written denial of the Allemang grievance and the testimony at the hearing in the instant case) reflects that all parties dealing with the Allemang grievance focused exclusively on those issues, and that the coerced retirement issue was not treated as a substantively separate violation of the contract. After the Union withdrew the grievance, there is no evidence that Mr. Allemang, Mr. Tarkowski, or any other employee sought to pursue the coerced retirement issue as a separate violation. While Mr. Tarkowski's complaint in this case alleges that his

---

[6] While in his accompanying memorandum the Examiner referred to the exhaustion rule as a basis for dismissing the coerced retirement breach of contract claim (Examiner's Decision at 19), in his Conclusions of Law he relied upon a different ground, i.e., that the Commission should withhold jurisdiction over this issue because it was also pending in court. We do not endorse the latter rationale and as indicated in Paragraph 4 of our Order, above, we have set aside the Examiner's conclusion of law to that effect.

coerced retirement violates the contract, the complaint does not allege that the Union refused to grieve that issue or that the Allemang grievance included that issue. Nor does the record or any of Mr. Tarkowski's subsequent submissions, until August 25, 2005, contain that claim.

Thus, we cannot conclude that the retirement rights of laid off employees and/or the coerced retirement issue constituted a separate or substantial element in the Allemang grievance or that the Union unlawfully failed to pursue it as such.

It is understandable, especially with the benefit of hindsight following the Circuit Court's decision, that Mr. Tarkowski would conclude that the Union should have pursued a grievance regarding the County's claim that laid off employees could not retire on the Rule of 75. However, the fact is that Mr. Tarkowski's primary concern at the time of his layoff notice and throughout the litigation of this prohibited practice case was that his seniority should have protected him from being laid off. The Union tried to prevent Mr. Tarkowski and others in his situation from facing the "Hobson's choice" of accepting the layoff and risking their retirement rights by asking a court for injunctive relief. This strategy has been unsuccessful, but nothing on this record indicates that it was unlawful. Mr. Tarkowski acknowledges that he chose to challenge his allegedly coerced retirement (among other issues) by filing the instant prohibited practice complaint. The Union has supported his claim that the County violated the collective bargaining agreement by the allegedly coerced retirement. Until a couple weeks ago, long after the evidentiary record had been closed, no one has claimed that the Union was asked to file a grievance on that issue, and we have found no basis for such a claim anyway. As discussed above, longstanding case law requires the grievance arbitration procedure to be used to pursue breach of contract claims. We have found nothing in this case to warrant an exception to that rule. As the grievance procedure has not been exhausted, we must decline to decide whether the County violated the collective bargaining agreement by telling Mr. Tarkowski he could not retire if he accepted layoff status.

For the foregoing reasons, the Examiner correctly dismissed all allegations in the Complaint.

Dated at Madison, Wisconsin, this 8th day of September, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

gjc
30848-B