STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES ALLEMANG, Complainant,

vs.

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

Case 564
No. 64613
MP-4141

Decision No. 31395-A

Appearances:

James Allemang, appearing pro se.

Mark Sweet, Attorney at Law, appearing on behalf of the Union Respondent.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, appearing on behalf of the County Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 16, 2005, Complainant James Allemang filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against Milwaukee County and Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO. The complaint alleged that the County violated Secs. 111.70(3)(a)1,3,5 & 7, and that the Union violated Secs. 111.70(3)(b)1,2,4 & 6, Wis. Stats. On April 12, 2005, the Commission appointed Karen J. Mawhinney, 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 July 7, 2005, the Examiner met with all the parties for a pre-hearing conference. The hearing was subsequently scheduled and held on January 20, 2006, in Milwaukee, Wisconsin. The County filed a brief on April 13, 2006 and the Union filed a brief on July 17, 2006. The Complainant was given as much time as he needed to file a brief or to respond to the County's brief and Union's brief. The Examiner's last contact with the Complainant was on September 24, 2006, when the Complainant notified the Examiner that he intended to file a brief and the Examiner told him to take all the time he wanted. On April 3, 2007 and August 14, 2007, the Examiner attempted to check with the Complainant about the status of his brief and whether he still planned on filing a brief. The Complainant did not respond to those communications. On September 18, 2007, the Examiner notified the Complainant in writing that she intended to work on the case and finish it in November or December of 2007, and that she would consider the Complainant's brief if it arrived while she was working on the case. There was no response to that communication.

Having considered the record evidence and arguments of the parties, the Examiner makes and files the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The parties agreed that a companion case, TARKOWSKI VS. MILWAUKEE COUNTY AND MILWAUKEE DISTRICT COUNCIL 48 AFSCME, AFL-CIO, LOCAL 882, DEC. NO. 30848-A (JONES, 4/05), AFF'D (WERC, 9/05), developed all the facts that are pertinent to this case and asked the Examiner to take notice of that case. The Findings of Fact and Conclusions of Law as stated by Examiner Raleigh Jones are the following:

> 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.
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> 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.
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> 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.

2. The instant complaint filed on March 16, 2005, had the following statement attached to it:

1) County: Failure to observe time limits in regards to proper Grievance Procedure, & refusal to take Grievance seriously. #33237 on 08-28-03 Union: Failure to seek requested relief. Was told I got what I wanted. The Union said that the County promised not to do it (discriminate against us) anymore. Requested relief was that me & the other 101 PMW I's be made whole for all lost wages & benefits, & reinstatement without prejudice. Also request signed copy of letter from March 29, 2004, & my request was refused.

2) Milw. County: Refusal to honor my right as an employee, to file a Grievance within 90 days of a Grievable event. They said I was no longer an Employee, because I was laid off. But I was still an employee on a lay-off recall list for 3 years & a day. This was in reference to Grievance's #33245 on (11-04-03), #35297 on (11-18-03), & #35301 or #35031? On (12-09-03).

3) Milw. County: Refusal to honor Grievance procedure regarding Grievance #38107 on (04-01-04). This was regarding the same grievable event, in which I filed Grievance #3301 or 3031? On (12-09-03).

4) Milw. County: This has to do with Grievance #38108 on (May 25, 2004). This had to do with a written reprimand that I was given on (03-12-04). I feel that it was given to me in response to observing my rights as an employee to pursue matters, concerning what I feel were violations of our contract. I was also misled by Milw. County, saying they were going to take it out of my personal history folder (written reprimand), but they never did.

5) Milw. County: This has to do with Grievances #38106 on (05-25-04) & #32791 on (08-02-04). Continued violations of our Grievance procedure, & intentionally misleading me as to times of Grievance Hearings.

These are the Sections from our contract that I feel were violated:
Sec.: 1.03; 1.05; 2.10; 2.25; 2.37; 2.37 Par.(2) P. 48 Lines 26 & 27.
Sec. 3/14; 3.141; 4.01; 4.02; 6.04; 8.02.

I feel that Milw. County & the Parks Dept. intentionally violated the Collateral agreement with our union. It was from Oct. 14, 1991.

I also feel that they violated an order from the W.E.R.C., dated 07-30-84. This was from case CXC No. 33229 MP-15694 Decision No. 21732-A. This was signed by Richard B. McLaughlin, Examiner.

3. On July 12, 2005, this Examiner sent the parties a letter to summarize a pre-hearing conference held on July 7, 2005, and to sort out which elements of the complaint noted above in Finding of Fact #2 still needed to go to hearing. The letter stated:

> This is to summarize the pre-hearing conference held on July 7, 2005, in the above case. The first paragraph of the attachment to the complaint is the same matter being appealed to the WERC currently. Because the matter is on appeal, the hearing in this case should not be scheduled until the appeal is resolved. The appeal involved Decision No. 30809-A.
>
> Paragraph Nos. 2 and 3 refer to the same matter. As I understand the issue, Mr. Allemang had objected to the County's refusal to allow him to file a grievance while on layoff. The issue was resolved by an arbitrator, who determined that laid off employees did have the right to the grievance procedure in this instance. If there is a portion of this complaint that remains, Mr. Allemang may amend his complaint at any time, up to the beginning of a hearing before me on this complaint.
>
> Regarding Paragraph No. 4, the failure of the County to remove a reprimand from the file, Mr. Schoewe is to check on this mater and attempt to resolve it.

The reference in the first paragraph of the above letter to Decision No. 30809-A is incorrect. The Decision No. should have been noted as 30848-A.

4. On September 8, 2005, the WERC issued its decision on review of Examiner Jones' decision in Decision No. 30848-B, in which it affirmed all Findings of Fact 1 through 29. The WERC affirmed the Examiner's Conclusions of Law 1 through 3, 6 and 7. It set aside Conclusion of Law 4 and made the following Conclusion of Law:

> 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.

The WERC also set aside the Examiner's Conclusion of Law 5 and made the following Conclusion of Law:

> 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.

On October 25, 2005, the WERC denied Tarkowski's petition for rehearing in Decision No. 30848-C.

5. On October 18, 2005, Complainant Allemang sent the following either as an amendment or clarification to his complaint:

> First of all, let me start by addressing (3) issues.
> (1) The fact that some or all of the Park Maintenance Worker I's who were laid off on Sept. 12, 2003, came back to work at some point in time, it should have no bearing on any of the issues in the complaint that I've registered with the W.E.R.C.
> (2) The fact that Milwaukee County claimed to have financial or fiscal issues that caused them to make decisions that affected the PMW I's in the manner in which they did, should also have no bearing on the issues in the complaint that I've registered with the W.E.R.C.
> (3) Neither me or the other 101 PMW I's had anything to do with the contract or pension deal that was agreed upon, between Milwaukee County & our union.
>
> It is my understanding that a decision has been made in the Donald Tarkowski case with the W.E.R.C. That is why I am requesting that my case with the W.E.R.C. move forward & be heard as soon as possible.
>
> I would like to clarify just exactly what I'm charging Milwaukee County/Parks Dept. & our Union with in my complaint.
> (1) I have accused Milwaukee County on several fronts of intentionally violating terms of our contract that they signed & agreed upon, with our union.
> (2) I have accused them of not allowing me to exercise my rights as an employee to follow a grievance procedure that was set-up & designed to settle issues that arose out of the language or misinterpretation of the meaning of terms & language in our contract.
> (3) I have accused them of violating a collateral agreement from 1991 that is still in effect today.
> (4) I have accused them of punishing me for trying to protect my rights as an employee, by giving me an unwarranted written reprimand. Surely this is not legal, given the fact that to the best of my knowledge, other things that were more serious from that same area, were left ignored, without even a warning.
> (5) I have accused them of intentionally misleading me as to dates & times of grievance hearings. This was done mostly at first step hearings, because that's as far as the few that were started ever got.
> I could swear that I have an order from the W.E.R.C. that warns Milwaukee County about adhering to proper grievance procedure.

(6) I have accused them of refusing to let me file grievances within 90 days of a grieveable matter when I was laid off. These had to do with what I felt were very serious matters.

Now to address what I have filed in my complaint against our union.
I have accused the Union of not pursuing what I felt & what they lead me to believe, were very serious contract violations.
And also of not fairly representing me or the other 101 PMW I's.
This is in regards to my very 1st grievance. After about 7 or 8 months, with only a first step meeting, the union said they withdrew it & the grievance was resolved, because the union said it had no merit. When I asked the president of our union, "What was going on with my grievance?" He said "It was settled, & I got what I wanted." I said, "I did?" And he said, "Yeah, the County promised not to do it again." I said, "Do what?" He said "If there was another layoff, they promised not to discriminate against anyone." I really thought he was joking! I don't remember anything in my requested relief that required the County just to promise not to discriminate against anyone anymore. Let me make it perfectly clear as to what my requested relief was. That all 102 PMW I's be made whole for all lost wages & benefits, without prejudice! This was a very serious grievance that I was kept in the dark about, not knowing what was going on with it, not pursuing it, not taking it seriously, you name it! When the Union said they withdrew it, I asked for a signed copy of their decision to withdraw it & even to this day, as I'm writing this, they have refused my request!

The Union encouraged us, at our union meetings, to go out & catch people, in the Parks, doing our jobs! When I personally caught a Park Worker 3 who was cutting grass with a very large Mower, that was supposed to be operated by a PMW I, or a Seasonal PMW I. I filed a grievance on this & Milwaukee County refused to honor it because they said I was no longer an employee. When it was decided that I had a right to file within 90 days, as our Contract specifically states, the Union refused to pursue the grievance. Even though I did what they told me to do.!!

The Union failed to pursue a grievable matter that I had to file a grievance twice on the same thing. The reason I had to do this was because the first time I filed I received the grievance back, saying I couldn't file because I was no longer an employee. Well, that argument has since been decided in my favor. Guess what! I was an employee after all. I filed on the same matter when I was called back to work. This was a grievance against Milwaukee County for letting a Supervisor

> from the Lake Park area promote (2) Park Worker 3's to Seasonal PMW I's, right around or shortly after the time we were laid off. These were the (2) park worker 3's that I know of, but I wouldn't be surprised if there were more. This promotion happened during 2003, in the midst of their budget troubles, when all promotional advancements were supposed to be frozen. Yes, even Seasonal PMW I's.
> How do I know that? Well the list of all the frozen positions came with my last paycheck.
> The Vice President of the Union kept on encouraging me on this one, leading me to believe that this was a clear violation, & that they were going to pursue this matter. Not so!
>
> There was an audit done by Milwaukee County on the grievance procedure. The people who did the audit came to the conclusion that the grievance procedure between Milwaukee County & our Union could best be described as dysfunctional. They were left with the overriding impression that each side was more concerned about winning & protecting turf, not resolving issues.
>
> Workers rights are there to protect them. Without the rule of law, those rights are meaningless!!
>
> There has been a decision #30848-B Case 541 No. 63136 MP-4003 Donald Tarkowski.
>
> I wish my case 564 No. 64613 MP-4141 Decision No. 31395 to move forward as soon as possible. James Allemang
>
> I would request to address & dispute information in the Tarkowski decision that was dated on the 8th day of September, 2005 in Madison, Wisc.

6. The grievances referred to by the Complainant are as follows. Grievance #33237 is the grievance decided by the TARKOWSKI decision. Grievance #33245, filed November 4, 2003, and complained of in the original complaint, alleged harassment by the Parks Department and the County. Grievance #35297, filed November 18, 2003, complains that a Park Maintenance Worker III was operating a large mower at Greenfield golf course. Grievance #35301, filed December 9, 2003, grieves that two PMW III's from Lake Park that were temporarily appointed to a PMW I seasonal position, and that those positions should have been offered to PMW I's on layoff. Those three grievances - # 33245, #35297 and #35301 – were denied by the County when it claimed that Allemang was not an employee because he was on layoff. The Union challenged that opinion and received a favorable ruling from the

permanent umpire on December 16, 2004. By that time, Allemang had been recalled to his Park Maintenance Worker I position, and he was advised to file new grievances but he did not do so. District Council 48 Staff Representative William Mollenhauer had been assued by the Parks Department that parks workers III's would not operate equipment that I's were supposed to operate. Grievance #38107, dated April 1, 2004, states that two park workers III's were temporarily appointed to PMW seasonal positions while PMW I's were still on layoff. Grievance #38108, dated May 25, 2004, is a written reprimand, which was subsequently pulled from Allemang's personnel file. Grievance #38106, filed May 25, 2004, and #32791, filed August 2, 2004, were not entered into the record and there was no testimony about those grievances.

David Sikorski, the Vice President and Chief Steward of Local 882, AFSCME, Milwaukee District Council 48, thought that some of the grievances filed by Allemang posed interesting questions and that is why the Union pursued them. At the time of the hearing in the instant case, Sikorski believed that all of the grievances had become untimely, because the time to arbitrate them had expired. One of the grievances went through a grievance committee and was slated for arbitration, but it never got there because all of the Park Maintenance Workers had been called back to work. Christopher Pegelow, the President of Local 882, noted that the Union was using various strategies, including grievances, budget talks, and negotiations with the County and Board members, in an attempt to get everybody back to work. Pegelow noted that arbitrating one of Allemang's grievances about seasonal workers supplanting PMW I's would not have the remedy the Union sought, such as getting all the PMW I's back to work.

7. The Union did not act arbitrarily or in bad faith or discriminate against the Complainant in the manner in which it handled the Complainant's grievances.

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

CONCLUSIONS OF LAW

1. Respondent Milwaukee District Council 48, AFSCME, did not violate its duty of fair representation towards Complainant James Allemang in the manner in which it handled his grievances, and therefore, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b)1, Stats.

2. Because Respondent Milwaukee District Council 48, AFSCME, did not violate its duty to fairly represent Complainant, 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.

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

ORDER

IT IS ORDERED that the complaint be dismissed in its entirety.

Dated at Elkhorn, Wisconsin this 10th day of January, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

MILWAUKEE DISTRICT COUNCIL 48

MEMORANDUM ACCOMPANYNG FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

At the end of the day in the hearing in this matter, the Union and the County moved to dismiss the complaint and filed briefs to support that motion. The Complainant was given ample opportunity to file a brief in response to the Union and County briefs but did not do so. Because this complaint is based on all the facts developed at the hearing in the TARKOWSKI case, they are not repeated here but are relied upon for the Findings of Fact and Conclusions of Law. Some of the relevant portions of Examiner Jones' decision in the TARKOWSKI case are as follows:

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).

Allemang's case:

Complainant Allemang brought nothing new to the hearing that had not been explored by Examiner Jones in the prior hearing in the TARKOWSKI case, particularly with respect to proving that the Union violated the duty of fair representation. Because Allemang participated in that case and helped represent Tarkowski, he should have known that it was his burden to prove that the Union acted in an arbitrary, discriminatory or bad faith manner in the way in which it handled his grievances.

The Union did not ignore Allemang's grievances, and in fact, Pegelow thought that some of his grievances raised interesting questions. However, some became moot when the parks workers were recalled to work. That was the major remedy the Union sought all along. Allemang's grievances – at least those in this complaint that are not repetitive of his grievance in the Tarkowski case -- would not have gotten employees recalled to work. The Union acted well within the scope of its duties and responsibilities by pursing remedies that would apply to all the laid off employees. The grievance involving a written reprimand is moot since it has been pulled from Allemang's personnel file. The grievance over who can use what equipment was pursued by Mollenhauer who received assurances that it would not happen again.

While the County argued that the complaint should be barred by the statute of limitations, it was the County that laid off people and then denied their grievances on the basis that they were no longer employees. The Union had to get a ruling from the permanent umpire that laid off employees could file grievances. After it was determined that those laid off employees could indeed file grievances, the County cannot later assert that their grievances were barred by the statute of limitations when it was the party that delayed the process by its own position that they were not employees entitled to use the grievance procedure. It should be estopped by its own conduct. The umpire ruled on December 16, 2004, that the laid off employees could file grievances. Allemang's complaint was filed on March 16, 2005. Therefore, his complaint is not barred by the statute of limitations.

The Union has argued that the complaint should be dismissed on the principle of issue preclusion. The original complaint can be read to allege that the Union violated its duty of fair representation only with respect to grievance #33237, the grievance decided by the TARKOWSKI case. However, the amendment or clarification filed by the Complainant on October 10, 2005, complains that the Union did not pursue a matter that Allemang filed twice. This must be grievance #35301 and #38107, which appear to be similar complaints regarding parks workers being placed in PMW seasonal positions while PMW I's were still on layoff. The Complainant did not develop any evidence that the Union breached its duty of fair representation regarding those grievances, or any other grievances in his complaint.

Since the Complainant did not bring forth any evidence of any kind that the Union breached its duty of fair representation toward him in the manner in which it handled any and all of his grievances, the Examiner has dismissed the complaint in its entirety.

Dated at Elkhorn, Wisconsin, this 10th day of January, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

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