STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PETER DUNCAN, Complainant,

v.

OPEIU LOCAL 35, and OZAUKEE COUNTY, Respondents.

Case 89
No. 70304
MP-4630

Decision No. 33295-A

Appearances:

Mr. Richard Saks, Hawks Quindel, S.C., Attorneys at Law, 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of OPEIU Local 35.

Mr. Ronald Stadler, SmithAmundsen, LLC, 4811 South 76th Street, Suite 306, Milwaukee, Wisconsin 53220, appearing on behalf of Ozaukee County.

Ms. Felicia Miller-Watson, Miller-Watson Law Office, LLC, 2602 West Silver Spring Drive, Lower, Glendale, Wisconsin 53209-4292, appearing on behalf of Peter Duncan.

ORDER DENYING MOTION TO DISMISS

On November 1, 2010, Peter Duncan filed a complaint with the Wisconsin Employment Relations Commission (the Commission). The Complaint alleges that 1) Ozaukee County violated a collective bargaining agreement by terminating his employment and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1, Stats., and 2) the Office and Professional Employees International Union (OPEIU) Local 35 breached its duty of fair representation by failing to arbitrate his termination grievance and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(b)1 and 4, Stats.

On November 18, 2010, the County filed a motion to dismiss the Complaint allegations against it. Such allegations, according to the County, are untimely and pertain to matters over which the Commission will not assert jurisdiction. In response to the motion, Duncan asked that the complaint allegations against the County be dismissed. OPEIU objected to the

dismissal and Duncan subsequently withdrew his request to dismiss the allegations. On February 11, 2011, OPEIU filed a brief in opposition to the motion to dismiss, and on February 24, 2011, the County filed a reply brief.

Having considered the pleadings and the written argument, I make and issue the following

ORDER

The motion to dismiss the complaint allegations against Ozaukee County is denied.

Dated at Madison, Wisconsin, this 3rd day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/
John C. Carlson, Jr., Examiner

OZAUKEE COUNTY

**MEMORANDUM ACCOMPANYING ORDER
DENYING MOTIONN TO DISMISS**

The County's motion to dismiss asserts that Duncan's complaint against the County is untimely and raises a contractual claim as to which the Commission will not assert jurisdiction. As the County correctly notes, for the purposes of ruling on a pre-hearing motion to dismiss, I must accept the truth of Duncan's complaint allegations. WEST SALEM SCHOOL DISTRICT, DEC. NO. 32696-D (WERC, 10/09).

Duncan alleges the County violated his rights under a collective bargaining agreement between the County and OPEIU by terminating his employment. Such an alleged contractual breach is also a violation of Sec. 111.70(3)(a)5, Stats. Nevertheless, where, as here, the collective bargaining agreement provides for final and binding grievance arbitration, the Commission generally does not asserts its jurisdiction over the breach of contract claim, since the grievance/arbitration procedures are presumed to be the exclusive means of resolving such alleged claims. MAHNKE v. WERC, 66 Wis. 2D 524 (1974); RACINE EDUC. ASS'N. V. RACINE UNIFIED SCHOOL DIST.., 176 WIS. 2D 273 (CT. APP. 1993); GRAY v. MARINETTE COUNTY, 200 WIS. 2D 426 (CT. APP. 1996); CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77); MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/85); WEST SALEM SCHOOL DISTRICT, DEC. NO. 32696-D (WERC, 10/09).

If Duncan, however, can prove that the OPEIU, his collective bargaining representative, failed to fairly represent him and thereby thwarted his efforts to pursue a grievance over the alleged breach of contract, the Commission will assert its jurisdiction to determine whether the agreement has been violated. MAHNKE, *supra*; GRAY, *SUPRA*; MILWAUKEE BOARD OF SCHOOL DIRECTORS (BISHOP), DEC. NO. 31602-C (WERC, 1/07); WEST SALEM SCHOOL DISTRICT, *supra*. In addition to allowing an employee to invoke our jurisdiction over his contract claim against the County, a union's breach of its duty of fair representation may also be alleged as a prohibited practice, in violation of Sec. 111.70(3)(b)1, Stats. Here, Duncan's complaint asserts that OPEIU violated the law by breaching its duty of fair representation in the way it handled his grievance and also asserts that the County violated the law by breaching his rights under the collective bargaining agreement.

In light of the foregoing analysis, I reject the County's argument that Duncan's complaint raises a claim against the County as to which the Commission will not assert jurisdiction. I now turn to the County's claim that the complaint allegations against it are untimely.

In its seminal decision in HARLEY-DAVIDSON MOTOR CO., DEC. NO. 7166 (WERB, 6/65), interpreting analogous provisions of the Wisconsin Employment Peace Act, the Board (now the Commission) held that to encourage the parties to use the contractual dispute resolution mechanism, the one-year limitations period for an employee to file a breach of

contract claim against an employer would be tolled during the employee's or union's pursuit of the contractual grievance procedure. *SEE ALSO* LOCAL 950, INT'L UNION OF OPERATING ENGINEERS, DEC. NO. 21050-F (WERC, 11/84). Refining this rule, CITY OF MEDFORD, DEC. NO. 30537-B (WERC, 2/04) added the proviso that the grievance procedure itself must have been invoked within one year after the employee knew or should have known about the breach of contract. Thus, pursuant to the foregoing standards, Duncan's complaint against the County will be timely if 1) he attempted to invoke the contractual grievance procedure within one year of the date he knew or should have known that the County had allegedly violated his rights under the collective bargaining agreement; and 2) he filed his prohibited practice complaint within one year of the date he knew or should have known that the grievance procedure had been exhausted.

Duncan alleges that he was terminated on September 9, 2009, and that on or before November 11, 2009, a grievance regarding the termination was filed. Thus, Duncan's complaint clears the first timeliness hurdle noted above (a grievance was filed within one year of the date of termination). In addition, Duncan's complaint was filed on November 1, 2010. During the one-year period prior to that date, Duncan alleges that 1) on November 11, 2009, and April 23, 2010, OPEIU advised him that his grievance would be proceeding to arbitration, but 2) on October 15, 2010, he learned OPEIU had never filed an arbitration request. Assuming these facts to be true (as I must for the purposes of this motion), I conclude that Duncan did file the instant complaint within one year of the date he knew or should have known that the grievance procedure had been exhausted (the second element of the timeliness analysis). Thus, contrary to the County's argument, the complaint allegations against it are timely.

Based on the foregoing analysis, I deny the County's motion to dismiss.[1]

Dated at Madison, Wisconsin, this 3rd day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C Carlson, Jr. /s/
John C. Carlson, Jr., Examiner

[1] The County also moves to dismiss an allegation of interference against it, because, according to the County, no allegations in the complaint support such a finding in violation of Sec. 111.70(3)(a)1, Stats. Commission decisions, however, do support the proposition that finding a derivative violation of Sec. 111.70(3)(a)1, Stats., is appropriate if there is a violation of Sec. 111.70(3)(a)5, Stats. *See, e.g.,* NORTHLAND PINES EDUCATION ASSOCIATION, DEC. NO. 26096-C (WERC, 9/90). Thus, I am not dismissing the allegation of interference under Sec. 111.70(3)(a)1, Stats., at this point.