

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE PROFESSIONAL POLICEMEN'S  
ASSOCIATION,

Complainant,

vs.

CITY OF MILWAUKEE, A MUNICIPAL  
CORPORATION, HAROLD A. BREIER, CHIEF  
OF THE MILWAUKEE POLICE DEPARTMENT,

Respondents.

Case CLX  
No. 20003 MP-561  
Decision No. 14251-A

Case CLXI  
No. 20004 MP-562  
Decision No. 14252-A

Appearances:

Mr. James H. Schaefer\*, Attorney at Law, for Complainant.  
Mr. John Kitzke, Assistant City Attorney, for Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Milwaukee Professional Policemen's Association having filed complaints of prohibited practices with the Wisconsin Employment Relations Commission alleging that City of Milwaukee, a Municipal Corporation, and the Chief of the Milwaukee Police Department, Harold A. Breier, have committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act, herein MERA; and the Commission having appointed Stanley H. Michelstetter II, a member of its staff, to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07 (5), Wisconsin Statutes<sup>1/</sup>; and pursuant to notice, hearing on said Complaints having been held at Milwaukee, Wisconsin on February 23, 1976 before the examiner; and the examiner having considered the evidence and the arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order

FINDINGS OF FACT

1. That Milwaukee Professional Policemen's Association herein referred to as Complainant is a labor organization with offices at 411 East Mason Street, Milwaukee, Wisconsin.

<sup>1/</sup> All citations to statutes are to Wis. Rev. Stat. (1976) unless otherwise noted.

\* After hearing, Attorney Kenneth J. Murray replaced Mr. Schaeffer.

2. That the City of Milwaukee, Wisconsin, herein referred to as Respondent City, is a Wisconsin municipality having offices at City Hall, Milwaukee, Wisconsin; that among other municipal services Respondent City operates a police department; that at all relevant times Harold A. Breier, herein referred to as Respondent Breier, has been the Chief of Police of Respondent City's Police Department.

3. That at all relevant times Complainant was the representative of certain of Respondent City's Police Department personnel and in that regard Complainant and Respondent City have been party to various collective bargaining agreements, one of which covered the period November 3, 1972 to November 2, 1974, and which provided in relevant part:

" . . .

#### Part I

#### D. DURATION OF AGREEMENT

1. This Agreement covers the time period commencing November 3, 1972 and expiring November 2, 1974.

. . .

3. Any matter which directly or indirectly relates to wages, hours, or conditions of employment, or which relates to other matters, whether the same are specifically covered by this Agreement or not, will not be a subject for bargaining during the term of this Agreement, provided, however, this item is subject to the provisions of Part V, C of this Agreement.

. . .

#### Part III

#### GRIEVANCE AND ARBITRATION PROCEDURE

#### 1. GRIEVANCE PROCEDURE

#### A. GRIEVANCES

1. Differences involving the interpretation, application or enforcement of the provisions of this Agreement or the application of a rule or regulation of the Chief of Police affecting wages, hours or conditions of employment and not inconsistent with the 1911 Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto shall constitute a grievance under the provisions set forth below.

Matters of departmental discipline involving application of the rules or regulations of the Chief of Police which are not subject to appeal

to the Board of Fire and (sic) Commissioners shall constitute a grievance under the aforementioned provisions and matters of departmental discipline involving application of the rules or regulations of the Chief of Police which are subject to appeal to the Board of Fire and Police Commissioners shall not constitute a grievance under the aforementioned provisions.

Obligations of the City under Chapter 65, Wisconsin Statutes, and any pension matter under the exclusive jurisdiction or control of any duly constituted pension board shall not constitute a grievance under the provisions aforementioned.

2. Grievances over discipline shall be initiated at the level of the Grievance Procedure immediately above the level of the chain of command at which the discipline was administered, except that in cases of discipline administered by the Chief of Police the grievance shall be initiated at step 4 of the Grievance Procedure and be reviewed by the Chief of Police.
3. All grievances and grievance appeals shall set forth the provisions of the Agreement and/or rule or regulation of the Chief of Police under which the grievance was filed. All appeals of duly filed grievances not submitted by the Association or employee (hereinafter referred to as "member") within the time limit specified shall be termed abandoned grievances and as such shall be considered as being resolved in favor of the City and not subject to provisions of this GRIEVANCE AND ARBITRATION PROCEDURE. By mutual agreement, the parties may waive any of the steps contained in this GRIEVANCE AND ARBITRATION PROCEDURE.

B. STEPS IN THE GRIEVANCE PROCEDURE

STEP 1:

The aggrieved member shall reduce his grievance to writing on a provided numbered form and shall present such written grievance to his shift representative. The shift representative shall meet with the grievant and if the grievant so desires and the shift representative so determines, the shift representative shall present the written grievance to the grievant's immediate supervisor within ten (10) days of the occurrence of the incident leading to the grievance. Thereafter, the grievant, his shift representative and his immediate supervisor shall meet and discuss the grievance in a friendly manner and shall make every effort to resolve the grievance. Following said meeting, the immediate supervisor shall answer the grievance in writing, setting forth the reasons for his decision and submit same to the shift representative and the aggrieved within five (5) days of receipt of the written grievance.

STEP 2:

If the written answer of the immediate supervisor does not result in a resolution of the grievance, the shift representative may appeal the grievance by presenting the written grievance and answer of the immediate supervisor, or copies thereof, to the commanding officer of the district or bureau in which he serves, within five (5) days of the receipt of the answer to the grievance by the immediate supervisor. The commanding officer, if he deems it appropriate, may discuss the grievance with the grievant's shift commander and thereafter shall set a hearing on the grievance at a date and time mutually agreed upon, during which hearing the grievant shall be afforded the opportunity to present his position, and if he so desires, may be represented at the hearing by his shift representative. Within ten (10) days of the close of the hearing, the commanding officer shall answer the grievance and on the same date submit copies thereof to the grievant and to his shift representative.

STEP 3:

If the grievance is not resolved in step 2 above, the PPPA Grievance Committee Chairman may, within ten (10) days of the receipt of the decision of the commanding officer, appeal said decision to a panel of not more than three, designated by the Chief of Police. Failure to appeal said decision within said period of time shall constitute a settlement of the grievance. Said appeal shall be in writing and shall be submitted to the Bureau of Personnel and therein a request shall be made for a meeting with said panel to consider the decision of the commanding officer. The panel and PPPA Grievance Committee Chairman shall meet at a mutually agreeable time. The grievant shall be entitled to be present at such appeal meeting and shall have the right to be represented by the Grievance Committee Chairman and the parties shall discuss the commanding officer's decision in good faith and attempt to resolve the matter. Within ten (10) days of said meeting, said panel shall, in writing, advise the Grievance Committee Chairman and the grievant of its determination with respect to the grievance setting forth the reasons for its decision.

STEP 4:

If the grievance is not resolved in step 3 above, the Chairman of the PPPA Grievance Committee may, within ten (10) days of receipt of the answer from the Chief's panel, appeal the grievance to the Chief. Failure to appeal said answer within this prescribed period of time shall constitute a settlement of the grievance. Such appeal shall be in writing and therein a request should be made for a meeting between the Chief of Police, the grievant and the Chairman of the PPPA Grievance Committee. At the meeting, to be held at a mutually agreeable time, the parties shall discuss the

grievance and the various answers and decisions in regard thereto in good faith in an attempt to resolve the grievance. Within ten (10) days of such meeting, unless the time period is mutually extended by the parties, the Chief shall, in writing, advise the Chairman of the PPPA Grievance Committee and the grievant as to the Chief's decision with respect to the grievance. If an Association grievance is not settled at the fourth step, the Association may proceed to final and binding arbitration as hereinafter provided.

## II. GRIEVANCE ARBITRATION

- A. Final and binding arbitration may be initiated by serving upon the employer a notice in writing of an intent to proceed to the final and binding arbitration within 30 days of receipt of the fourth step answer. Said notice shall identify the grievance and the employees involved.
- B. Unless the parties can, within seven (7) calendar days following the receipt of such written notice, agree upon the selection of an arbitrator, either party may in writing request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators to both parties. The parties, by their respective attorneys, shall, within seven (7) calendar days of the receipt of said list, select the arbitrator by alternately striking names from said list until one name remains. Such person shall then become the arbitrator.
- C. The arbitrator so selected shall hold a hearing at a time and place convenient to the parties within fifteen (15) calendar days of notification of his selection, unless otherwise mutually agreed upon by the parties. The arbitrator shall take such evidence as in his judgment is appropriate for the disposition of the dispute. Statements of position may be made by the parties and witnesses may be called. In disputes involving application of rules or regulations of the Chief of Police, the Chief of Police or his representative shall be permitted to participate in the proceeding and to state the Chief of Police's position on the dispute.
- D. The arbitrator shall neither add to, detract from, nor modify the language of the Agreement or of the rules and regulations in arriving at a determination of any issue presented that is proper for final and binding arbitration within the limitations expressed herein. The arbitrator shall have no authority to grant wage increases or wage decreases.
- E. The arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority to determine any

other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination.

- F. In reviewing any difference over application of a departmental rule or regulation under this grievance and arbitration procedure the arbitrator shall take into account the special statutory responsibilities granted to the Chief of Police under the 1911 Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto. The arbitrator shall not impair the ability of the Chief of Police to operate the department in accordance with the statutory responsibilities under the Special Laws of the State of Wisconsin, Chapter 586 of the Laws of 1911 and amendments thereto nor shall he impair the authority of the Chief of Police to maintain, establish and modify rules and regulations for the operation of the Police Department, provided such rules and regulations are not in violation of the specific provisions of this Agreement. In addition, the arbitrator shall not prohibit the Chief of Police from executing departmental rules and regulations in a fair and equitable manner.
- G. All expenses which may be involved in the arbitration proceedings will be borne by the parties equally. However, the expenses relating to the calling of witnesses or the obtaining of depositions or any other similar expense associated with such proceedings shall be borne by the party at whose request such witnesses or depositions are required.
- H. For the purpose of receiving testimony and evidence, the provisions of Section. 298.06 and 298.07 of the Wisconsin Statutes shall apply. The arbitration award shall be reduced to writing, subject to Sections 298.08 through and including 298.15 of the Wisconsin Statutes. All other sections and provisions of Chapter 298 are hereby expressly negated and of no force and effect in any arbitration under this Agreement.
- I. It is contemplated by the provisions of this Agreement that any arbitration award shall be issued by the arbitrator within sixty (60) calendar days after the notice of appointment unless the parties to this Agreement shall extend the period in writing by mutual consent.
- J. The arbitrator shall submit in writing his award to:
  - 1. The Labor Negotiator of the City of Milwaukee
  - 2. Attorneys of Record
  - 3. Professional Policemen's Protective Association

. . .

. . . .

PART V

A. AID TO CONSTRUCTION OF PROVISIONS OF AGREEMENT

1. It is intended by the parties herein that the provisions of this Agreement shall be in harmony with the duties, obligations and responsibilities which by law devolve upon the Common Council and the Chief of Police and these provisions shall be interpreted and applied in such manner as to preclude a construction thereof which will result in an unlawful delegation of powers unilaterally devolving upon them.

2. The Association recognizes the powers, duties and responsibilities of the Chief of Police as set forth in Chapter 586, Session Laws of 1911 and that pursuant thereto the Chief of Police and not the Common Council of the City of Milwaukee has the authority to establish rules and regulations applicable to the operation of the Police Department and to the conduct of the police officers employed therein.

3. The Common Council of the City of Milwaukee as well as the Chief of Police recognizes that those rules and regulations established and enforced by the Chief of Police, which affect the wages, hours and working conditions of the police officers included in the collective bargaining unit covered by this Agreement are subject to the collective bargaining process pursuant to Section 111.70, Wisconsin Statutes.

4. The provisions of this Agreement are binding upon the parties for the term thereof. The Association having had an opportunity to raise all matters in connection with the negotiations and proceedings resulting in this Agreement is precluded from initiating any further negotiations for the term thereof relative to matters under the control of the Chief of Police, the Common Council or the Board of Fire and Police Commissioners, including rules and regulations established by the Chief of Police and the Board of Fire and Police Commissioners.

5. During the term of this Agreement prior to the establishment of new rules or regulations or changes in existing rules or regulations, the Association shall be afforded the opportunity to negotiate with the Chief of Police in accordance with the procedures agreed upon between the Association and the Chief of Police and set forth in department rules provided such new rules or regulations or changes in existing rules or regulations do not fall within the Chief of Police's unfettered management functions.

6. Any rules or regulations of the Chief of Police affecting wages, hours or conditions of employment promulgated by the Chief of Police after negotiation but without agreement may be tested relative to

whether they violate the specific provisions of this Agreement as well as the propriety of their application in accordance with the provisions of this Agreement pertaining to grievances and arbitration.

. . . "

4. That prior to March 20, 1975, Complainant and Respondent City entered negotiations for a successor to the agreement specified in Finding of Fact 3, above; that thereafter, but prior to March 20, 1975 the parties reached an impasse in said negotiations; that at no time during said negotiations did either party propose a relevant change in the grievance and arbitration provisions of Part III thereof nor did either party propose a change in Part V, Sections 1 through 6, inclusive, thereof; that at no relevant time did either party unilaterally change the grievance provision procedure thereof.

5.<sup>2/</sup> That by Order dated March 20, 1975, the Wisconsin Employment Relations Commission designated E. J. Forsyth as the arbitrator under Section 111.70 (4) (jm) to determine the dispute referred to in Finding of Fact 4, above; that Forsyth concluded hearing in the above matter on July 12, 1975 subject to the later presentation of briefs; that on August 26, 1975 the parties thereto filed their briefs; that on October 17, 1975 Forsyth issued his final award in the matter which Award was received October 28, 1975 by the Wisconsin Employment Relations Commission and which provided in relevant part:

" . . .

#### AWARD - RETROACTIVITY

Measures related to the Contract are made retroactive to November 1, 1974. Of course, as the Association and the City realize there are some matters which cannot be made retroactive. Matters such as working conditions and insurance do not lend themselves to retroactivity.

The Matter of wages and salaries do, and those have been indicated in the Awards, and if there is any question the Arbitrator will so address himself to them.

. . . "

6. That by its complaint filed in the instant matter, Complainant alleged:

---

<sup>2/</sup> The examiner takes judicial notice of the records of the Wisconsin Employment Relations Commission and the decision of Arbitrator Forsyth contained therein for the facts found in Findings of Fact 5 and the inferences drawn therefrom in Finding of Fact 4.



"That on or about September 3, 1975 the Respondent, Harold A. Breier, unilaterally promulgated an order precluding the use of attache cases and canvas bags by officers to carry extra equipment and personal effects, while in the course of their assignments or while on squad patrol."

That by letter dated September 12, 1975 Complainant requested Respondent Breier to meet, confer and bargain with respect to the aforementioned alleged unilateral change; that by letter dated September 15, 1975, Respondent Breier answered the above letter stating in relevant part:

"Please be advised the practice has never been authorized by the Chief.

Therefore, your request for a meeting is denied."

7. That by letter dated September 12, 1975, Complainant requested that Respondent Breier meet with it concerning the proposal that when one of its members is involved in an incident in which he fires upon a citizen, he be afforded the opportunity to speak to Complainant's attorney and/or representative before the member is required to make any statements or file any reports; that by letter dated September 15, 1975 Respondent Breier responded to the foregoing request in relevant part as follows:

"Be advised it is my feeling that no meetings relative to proposals should be held during the pendency of arbitration.";

that, in response to further correspondence from Complainant, Respondent Breier by letter dated September 29, 1975 stated to Complainant in relevant part:

"Inasmuch as the Association is precluded from initiating any negotiations during the term of the contract, your request for a meeting is denied."

8. That on November 20, 1975 Complainant and Respondent City executed a new agreement for the term November 3, 1974 to October 31, 1976 which contains provisions in all relevant respects the same as those found in Part III and Part V of the agreement specified in Finding of Fact 3, above.

9. That at all relevant times Respondent Breier has maintained Rule 1, Section 2 which states in full:

" . . .

RE: RULES AND REGULATIONS - Amendment of Rule 1, Section 2

Effective immediately, Section 2 of Rule 1 of Department Rules and Regulations is rescinded and recreated to read as follows:

Section 2: The Chief of Police, in the exercise of his duties, shall have the power to prescribe, promulgate, and enforce rules and regulation for the government of members of the Department.

In establishing new rules or in effectuating changes in existing rules, the following procedure shall apply.

Whenever the Chief of Police proposes to establish a new rule or change in an existing rule which proposal in its operation will affect wages, hours, or conditions of employment of members of the bargaining unit represented by the Professional Policemen's Protective Association (herein after referred to as the PPPA) he shall present his written proposal to the President of the PPPA. At a mutually agreeable time, not more than thirty days following such presentment, the Chief shall meet with not more than three representatives of the PPPA and shall confer in good faith with said representatives with the intent to reach an agreement consistent with the Chief's powers, duties, functions and responsibilities under law. If no agreement is reached between the Chief and the Association through its representatives within thirty days of such initial meeting, the Chief of Police may establish the proposed new rule or proposed change in an existing rule unilaterally.

In cases of emergency, the emergency to be determined by the Chief, the Chief shall have the right to establish a rule or rules unilaterally, and such rule or rules shall become effective immediately.

In the event the Association wishes to propose a change in an existing rule and such proposal will affect wages, hours or conditions of employment of members of the bargaining unit represented by the P.P.P.A., the Association shall first present its written proposal to the Chief of Police.

At a mutually agreeable time, not more than thirty days following such presentment, the Chief shall meet with not more than three representatives of the P.P.P.A. and shall confer in good faith with said representatives with the intent to reach an agreement consistent with the Chief's powers, duties, functions and responsibilities under law. If as a result within thirty days the Chief and the Association through its representatives reach an agreement on a change in an existing rule, the Chief shall effectuate such agreement in the rules of the Department. If no such agreement is reached within the prescribed time, the Chief shall be under no obligation to establish or to effectuate any rule change. Such disposition does not in any way preclude the Association at a later date from requesting a rule change covering the same or similar subject matter; provided, however, such proposal shall not be made earlier than 120 days from the previous disposition.

. . . "

10. That on January 8, 1976 Complainant filed the instant two Complaints.

11. That the negotiation procedures specified in Part V, Section 5 and 6 of the agreement specified in Finding of Fact 3

above and specified in Respondent's Breier's Rule 1, Section 2 are conditions of employment of employees in the instant bargaining unit represented by Complainant.

On the basis of the above and foregoing Finding of Fact, the examiner makes and files the following

CONCLUSION OF LAW

1. That since Complainant Milwaukee Professional Policemen's Association failed to exhaust applicable, exclusive procedures for the resolution of the allegations of the instant complaints, the examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission to determine whether Respondents City of Milwaukee and Harold A. Breier breached a collective bargaining agreement in violation of Section 111.70 (3) (a) 5 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the examiner makes and files the following

ORDER

IT IS ORDERED that the complaints of prohibited practices filed in the instant matter be, and the same hereby are, dismissed.

Dated at Milwaukee, Wisconsin, this 8th day of December, 1976

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II  
Stanley H. Michelstetter II  
Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

Complainant filed two complaints on January 8, 1976, alleging in substance that Respondent Breier unilaterally promulgated an order on September 3, 1975 precluding unit members from using attache cases for carrying personal effects while on duty, and refused Complainant's request of September 12, 1975 to meet with him concerning the foregoing and its proposed rule to allow unit members involved in shooting incidents the right to consult with Complainant prior to making any statements to Respondents.

At the commencement of hearing, Respondents moved for dismissal of the Complaints, challenging, inter alia, the existence of the relevant collective bargaining agreements, which motion the examiner reserved for full hearing on either the motion or complaints. Respondents later additionally moved to dismiss because Complainant failed to exhaust applicable grievance and arbitration provisions. The examiner thereupon limited hearing to the latter motion to dismiss.

POSITION OF THE PARTIES

Although the parties jointly contend that the predecessor agreement was extended solely by application of Section 111.70 (4) (jm) 13, Respondent argues the successor agreement, executed after the alleged occurrences, supercedes the previous comprehensive agreement, but that the relevant substantive terms are not retroactive.<sup>3/</sup> Alternatively, it urges dismissal because Complainant failed to exhaust contractual grievance and arbitration provisions contained in both comprehensive agreements.

In Complainant's view Respondent Breier's alleged conduct violates his own Rule 1, Section 2 and separately violates Part V, Section 5 and 6 of the comprehensive collective bargaining agreement, in contravention of Section 111.70 (3) (a) 5.<sup>4/</sup> It contends that the predecessor agreement continued in effect after its termination by operation of Section 111.70 (4) (jm) 13. Alternatively, it alleges that the successor agreement executed after the alleged occurrences, is retroactive to that period. Although it concedes

---

<sup>3/</sup> Respondents' position on this issue varied during the hearing. See transcript at pages 3-4, 5.

<sup>4/</sup> At page 7 of the transcript Complainant expressly limited its allegations to a violation of Section 111.70 (3) (a) 5.

the grievance provisions were in effect at all relevant times, it denies that they are applicable to the subject matter of this dispute.<sup>5/</sup> Alternatively, it argues that it has the right to elect proceeding under Section 111.70 (3) (a) 5 without exhausting the procedures.

#### DISCUSSION

##### Existence of Collective Bargaining Agreement<sup>6/</sup>

1. Substantive Terms. Contrary to the parties' joint contention Section 111.70 (4) (jm) 13<sup>7/</sup> did not extend their previous comprehensive collective bargaining agreement. Instead, it regulates the entirely different matter of the parties' authority to make unilateral changes after the filing of a petition for interest arbitration, if any is filed. Since the parties did not agree to extend the previous comprehensive collective bargaining agreement, it expired by its terms on November 2, 1974. No comprehensive collective bargaining agreement existed during the period of November 3, 1974 to approximately November 20, 1975.<sup>8/</sup>

On its face, the successor agreement executed November 20, 1975 is retroactive to the hiatus period during which the alleged violations occurred.<sup>9/</sup> In Joint School District No. 15, Barneveld

---

<sup>5/</sup> Complainant's full argument in this regard, found at Page 16 of the transcript, follows:

"...When a new rule is to be implemented or an old rule is to be changed, the Contract itself gives the Chief the authority to determine what those procedures will be. That is the rule--that is what we have submitted as Exhibit 3 in this hearing. He has defined what he believes are the equitable provisions to implement the negotiations contemplated in Paragraph 5. We are asking only the opportunity to follow the Chief's procedure..."

<sup>6/</sup> The parties stipulated Rule 1, Section 2 remained in effect at all relevant times and is an implementation of the procedural rules required by Part V, Section 5, of the parties' agreement.

<sup>7/</sup> Section 111.70 (4) (jm) 13 provides:

"Subsequent to the filing of a petition before the commission pursuant to subd. 1 and prior to the execution of an agreement pursuant to subd. 9 neither party may unilaterally alter any term of the wages, hours and working conditions of the members of the police department."

<sup>8/</sup> However, this is not to say that the parties did not have obligations in the hiatus period under Sections 111.70 (3) (a) 4, (3) (b) 3, (4) (jm) 13 and other provisions where the same are applicable.

<sup>9/</sup> Part 1, Section D.1.

(13538-B) 11/75, the Commission declined to find an employer's non-renewal of a teacher violated retroactively created agreement provisions first restricting the employer's right to non-renewal. The Commission stated at page 9 of its memorandum:

"We conclude that, in the absence of a specific provision setting forth that all provisions of the collective bargaining agreement involved are to be retroactively applied from the initial date of the term of the agreement, provisions in the agreement affecting conditions of employment, which, if retroactively applied, would negate any action by the employer, which action was otherwise proper prior to the date of the execution of the collective bargaining agreement involved, will not be applied by the Commission in determining whether the Employer violated said agreement."

Unlike Barneveld, supra, the instant substantive provisions (Part V Sections 5 and 6) and grievance and arbitration provisions (Part III) are unchanged in relevant part from the previous agreement. Nor did either party propose a relevant change in those provisions, or implement a unilateral change in the grievance procedure. Without undue discussion of legal theories not raised in this matter, the examiner is satisfied that under the policy expressed in Barneveld, supra, Part V, Sections 5 and 6 are retroactively applicable.

2. Existence of Grievance Procedure. In Racine Unified School District (11315-B) 1/74, at pages 14-15, 20; aff'd. (11315-D) 4/74, the Commission found the employer's unilateral restriction of the scope of an expired agreement's grievance and arbitration procedure a violation of Section 111.70 (3) (a) 4. Like the procedures for negotiation or arbitration of grievances, the procedures specified in Part V, Sections 5 and 6 and Rule 1, Section 2 are themselves mandatory subjects of bargaining. Therefore, under the rationale of that case, Respondents would have been obligated under Section 111.70 (3) (a) 4 to process a grievance concerning their enforcement, if it were an appropriate subject for the procedure.

Scope of Grievance Procedure<sup>10/</sup>

Part III, Section 1.A.1. of both comprehensive agreements specified:

"Differences involving the interpretation, application or enforcement of the provisions of this Agreement or the application of a rule or regulation of the Chief of Police affecting

---

<sup>10/</sup> Scope of determination of arbitrability see Drake Bakeries, Inc. vs. Local 50, American Bakery and Confectionery Workers International Union, AFL-CIO, et. al. 3 70 U.S. 254, 825 Ct. 1346, 50 L.R.R.M. 2440, @ p. 2442 (1962).

wages, hours, or conditions of employment and not inconsistent with the 1911 Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto shall constitute a grievance under the ...[grievance and arbitration procedure]."

The instant disputes both involve the provisions of the successor agreement, particularly Part V, Sections 5 and 6, and Respondent Breier's Rule 1, Section 2. Since the matters involving the terms of the agreement fall clearly within the broad category of, "differences involving the interpretation, application or enforcement of the provisions of this Agreement...", they are subject to the grievance and arbitration provisions.

Despite Complainant's argument to the contrary, the terms of Rule 1, Section 2 are essentially consensual.<sup>11/</sup> If by virtue of its inter-relationship with Part V of the comprehensive agreement, Rule 1, Section 2 is not effectively part thereof for grievance purposes, it is still "...a rule or regulation of the Chief of Police..." not otherwise specifically excepted from enforcement through the grievance procedure. Nor can it be said under the facts of this case that the instant issue exceeds the broad category of "application" of the rule.<sup>12/</sup> The matters in dispute are appropriate subjects for the grievance procedure.

#### Failure to Exhaust Applicable Grievance Procedure

It is the Commission's policy to refuse to assert its jurisdiction to determine complaints for violation of collective bargaining agreement, when the complaining party has failed to use applicable, mutually agreed procedures for resolution of the dispute.<sup>13/</sup> The Commission ought to similarly decline to assert its jurisdiction when the complaining party fails to attempt to use an applicable grievance procedure then only enforceable under Sections 111.70 (3) (a) 4 and (3) (b) 3 to resolve its "grievance" dispute involving

---

<sup>11/</sup> Part V, Section 5 states in relevant part:

"...in accordance with the procedures agreed upon between the Association and the Chief of Police and set forth in departmental rules..."

<sup>12/</sup> See note 5 above: Complainant did not address the specific exclusions or limited topic of the grievance procedure.

<sup>13/</sup> Lake Mills Joint School District No. 1 (11529 A, B) 7/73, 9/73.

provisions of a prior agreement neither party seeks to change in the successor.

On the basis of the foregoing, the examiner is satisfied that the instant complaints should be dismissed.<sup>14/</sup>

Dated at Milwaukee, Wisconsin, this 8th day of December, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II  
Stanley H. Michelstetter II  
Examiner

---

<sup>14/</sup> To the extent the Respondents' arguments at pages 17-18 of the transcript waive the Commission's normal policy, the examiner is satisfied that had a grievance been processed Respondents would have had the duty to arbitrate it as of the date of agreement. Dismissal is thus still warranted.