STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DE PERE POLICE BENEVOLENT CITY OF DE PERE, Complainant, vs. CITY OF DE PERE, Respondent.	Case XV No. 23304 MP-879 Decision No. 16891

Appearances:
Parins & McKay, S.C., Attorneys at Law, by Mr. Thomas J. Parins and Frederick J. Mohr, for Complainant.
Condon & Hanaway, Attorneys at Law, by Mr. Donald J. Hanaway, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on July 21, 1978 and thereafter amending same on August 16, 1978 to allege that the above-named Respondent had committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Stephen Pieroni, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wis. Stats.; and the parties having waived in writing a hearing on the matter and having entered into a signed stipulation to the facts and exhibits to be considered by the Examiner; and the parties having agreed in writing to waive further hearing or right to submit any further evidence; and the parties having filed briefs until October 27, 1978; and the Examiner having considered the evidence and arguments of Counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the De Pere Police Benevolent Association, hereinafter referred to as the Complainant, is a labor organization having its principal office at 400 Lewis Street, De Pere, Wisconsin 54145; and that Conrad Aerts was a member of the bargaining unit represented by Complainant until July 30, 1978, at which time Mr. Aerts retired from the De Pere Police Department.

2. That City of De Pere, hereinafter referred to as the Respondent, is a Municipal Employer which maintains its principal offices at 335 South Broadway, De Pere, Wisconsin 54145.

3. That at all times material hereto the Respondent has recognized the Complainant as the exclusive collective bargaining representative of the personnel of the De Pere Police Department; and that Respondent and Complainant were parties to a collective bargaining agreement which at all material times hereto contained the following provisions pertinent hereto:

ARTICLE XIX

Vacations

Employees shall earn and be entitled vacation with pay according to the following schedule:

January 1st is to be used as the anniversary date in determining vacation benefits. Employees hired during mid-year shall accrue a proportional part of vacation benefits during the second year for each month of employment up to January 1st of the subsequent year. If the hiral date of the new employee was on, or prior to the 15th of the month, a full month benefit will be granted, and if the hiral date was after the 15th of the month the benefits will accrue beginning with the 1st day of the following month. In determining vacation benefits after two (2) full years of employment, January 1st of the hiral year will be used for those employes with a hiral date occurring during the first six (6) months of a calendar year, and January 1st of the subsequent year for those employees with a hiral date during the last six (6) months.

(A) One (1) work week (48 hours for employees on a 6-on 3-off schedule) after one (1) year of employment.

(B) Two (2) work weeks (96 hours for employees on a 6-on 3-off schedule) after two (2) years of employment.

(C) Three (3) work weeks (144 hours for employees on a 6-on 3-off schedule) after eight (8) years of employment.

(D) Four (4) work weeks (192 hours for employees on a 6-on 3-off schedule) after eighteen (18) years of employment.

. . .

ARTICLE XXX

Grievance Procedure

A grievance is defined as any complaint involving the interpretation application or alleged violation of the terms of this Agreement involving wages, hours and conditions of employment. A grievant may be an employee or, upon the mutual agreement of the parties hereto, grievances involving the same issues may be consolidated in one proceeding.

. . .

(Step 4.) Grievances not resolved at Step 3 may be appealed within thirty (30) calendar days to the Wisconsin Employment Relations Commission for arbitration. Such Commission shall appoint an arbitrator; the dispute shall be presented to such arbitrator for determination, which shall be final and binding.

. . .

4. That on September 10, 1976 Officer Robert Ahasay retired from the De Pere Police Department and made claim for vacation benefits earned from January 1, 1976 to the date of his termination on September 10, 1978; that said claim was made pursuant to Article XIX, Vacations, supra, of the collective bargaining agreement between the parties.

5. That Mr. Ahasay's claim was submitted to final and binding arbitration pursuant to the grievance procedure contained in the parties' collective bargaining agreement; and under date of December 29, 1977 Arbitrator Charles D. Hoornstra issued an award in which he interpreted Article XIX, Vacations to require the Respondent to pay an employe vacation benefits for the proportionate amount of time worked during the calendar year; and that in his award Arbitrator Hoornstra specifically stated as follows:

SUMMARY AND CONCLUSIONS

> ...the general rule is that vacation rights are a form of additional compensation and are thought of as "accruing or vesting in employes as they perform services." Griggs vs. Electric Auto Light Company, 37 Wis 2nd 275, 279: 155 NW 2nd 32 (1967). The language of the agreement supports the inference that the parties intended to be in accord with this general rule, as the thrust of the agreement,....is that employes were not to lose pro-rata credit for the amount of work performed....

6. That on July 30, 1978 Officer Conrad Aerts retired from the De Pere Police Department and made claim pursuant to Article XIX, Vacations, for vacation benefits earned from January 1, 1978 to the date of his termination on July 30, 1978.

7. That Complainant and Respondent have stipulated in writing there is no material discrepency of fact between Mr. Aerts' claim for vacation benefits and the situation of Mr. Ahasay noted in Finding No. 4; and the parties further stipulated that the relevant provisions of the collective bargaining agreement are the same in each instance; and that if Mr. Aerts is entitled to the vacation claimed, he would have earned 14 days vacation for the period in question; and that included in said stipulation the parties agreed to waive their right to submit any further evidence.

8. Complainant requested the City to pay Mr. Aerts his accrued vacation benefits based upon Arbitrator Hoornstra's award of December 29, 1977; and that Respondent at all times subsequent thereto has denied said request, but Respondent at all material times hereto has offered to submit said matter to final and binding arbitration pursuant to the grievance procedure contained in the parties' collective bargaining agreement.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Respondent by its refusal to accept and apply the arbitration award issued by Charles D. Hoornstra, dated December 29, 1977, as a final and binding determination of the dispute existing between the parties as to the interpretation of the Vacations provision of the parties' collective bargaining agreement which was submitted to the Arbitrator, has committed and is committing a prohibited practice within the meaning of Section 111.70(3)(a)5 of MERA.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Respondent, its officers and agents shall immediately

1. Cease and desist from refusing to accept and apply the arbitration award issued by Charles D. Hoornstra, dated December 29, 1977, as a final and binding determination of the issues submitted to the Arbitrator.

2. Take the following affirmative action which the undersigned finds will effectuate the purpose of the MERA:

   a. Make Officer Aerts whole by paying him 14 days of vacation pay at the rate applicable for the year 1978.

b. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this Order, what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 9th day of March, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

CITY OF DE PERE, Case XV, Decision No. 16891

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Introduction and Positions of the Parties:

Complainant in this case alleges that Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)5 (MERA) by refusing to accept and apply an arbitration award issued on December 29, 1977 pursuant to the final and binding arbitration provisions of the collective bargaining agreement between the parties. The parties waived hearing on the matter and stipulated to the relevant facts and exhibits. The parties also waived their right to further hearing or the right to submit any evidence not included in said stipulation.

Complainant avers that an Arbitrator's interpretation regarding a provision in a collective bargaining agreement thereafter becomes incorporated into the parties' agreement. Arbitrator Hoornstra issued an award in which he interpreted the Vacation provision of the parties' collective bargaining agreement so as to require the Respondent to pay an employe vacation benefits for the proportionate amount of time an employe worked during a calendar year. In this case the parties, the general fact situation and the contract language are substantially identical. Thus Respondent is bound by Arbitrator Hoornstra's award to apply the Vacation provision in the manner required by his award dated December 29, 1977. As legal authority, Complainant relies on State of Wisconsin, Department of Administration (13439-C) 3/76, aff'd 13539-D 4/76. In State of Wisconsin, Department of Administration, the Commission affirmed previous rulings that an interpretation of a provision of a contract by an Arbitrator is conclusive as to the meaning of that provision as long as the parties, the fact situation and the contractual language are substantially identical. For a remedy Complainant requests that Officer Aerts receive accrued vacation benefits from the period of Janaury 1, 1978 until his termination date of July 30, 1978. The parties stipulated that if Officer Aerts is entitled to the vacation benefits claimed, he would receive 14 days vacation pay.

Respondent counters with several arguments which can be summarized as follows: (1) the Respondent has complied in every way with the award of Arbitrator Hoornstra and that at no time did Respondent agree that his Arbitration award would govern subsequent grievances concerning similar issues; (2) citing several Federal cases, Respondent argues that Complainant is obligated to exhaust the agreed upon grievance procedure by submitting the Aerts grievance to binding arbitration; (3) the narrow wording of Section 111.70(3)(a)(5), Stats., as compared to the expansive wording of Section 111.06(1)(g), Stats., evinces the legislature's intent to limit the scope of an Arbitrator's award involving a Municipal Employer to the particular grievance presented; (4) to apply the doctrine of res judicata in this instance would raise serious public policy issues insofar as Municipal Employers would then be confronted with other public employes seeking to unduly extend the doctrine of res judicata to other disputes involving the same contractual language; (5) Arbitrator Hoornstra stated at the hearing involving Mr. Ahasay that his award would not be conclusive on any other employes in the bargaining unit; (6) the Commission has authority to reconsider and reverse Arbitrator Hoornstra's award. On the basis of these arguments, Respondent contends that it has not committed a prohibited practice within the meaning of Section 111.70(3)(a)5, Wis. Stats. Respondent therefore seeks dismissal of the complaint herein.

DISCUSSION:

In Wisconsin Public Service Corporation (11954-D) 5/74, the Com-

mission reaffirmed its long standing policy 1/ of applying the principles of res judicata in certain instances by stating as follows:

> ....this Commission has said repeatedly that it will apply the principles of res judicata to a prior arbitration award in complaint cases filed alleging a violation of Section 111.06(1)(g), where there is no significant discrepancy of fact involved in the prior award and in the subsequent case to which a Complainant is requesting the Commission to apply the award. A balance must be struck between the need for consistency and finality to contract interpretation as evident by prior arbitration awards and invading the province specifically reserved by the courts to the arbitrator--deciding the merits of the dispute. Where no material discrepancy of fact exists, the prior award should be applied. In these circumstances both interests are accomodated without underminding either. (Page 7, 11954-D)

Recently, the Commission again applied the principles of res judicata in a case entitled the State of Wisconsin, Department of Administration (13539-C, D) 3/76, 4/76.

Here, Complainant and Respondent have stipulated that there is no material discrepancy of fact between the claims for vacation benefits brought by Officers Ahasay and Aerts. The relevent contractual provisions are the same as well. 2/ Complainant processed Officer's Ahasay claim through the parties' grievance procedure which culminated in a final and binding arbitration award in favor of Complainant. Based upon the stipulated evidence herein, it appears that the facts underlying the arbitration award involving Mr. Ahasay are sufficiently identical to Mr. Aerts' grievance as to make the principles of res judicata applicable in the instant matter. However, Respondent argues that the Commission's previous decisions on this issue are not dispositive of the present case. Having viewed the facts and the arguments, the Examiner concludes that, contrary to Respondent's arguments, the principles of res judicata are controlling herein. This conclusion is based upon the following reasons.

Respondent initially advances the argument that it has complied in every way with Arbitrator Hoornstra's award and at no time did Respondent agree that his award would govern subsequent grievances concerning similar issues. Hence, Respondent argues that Complainant's recourse is to process Aerts' claim through the parties' agreed upon grievance procedure.

1/ Wisconsin Telephone Company (4471) 3/57; aff'd Milwaukee Co. Cir. Ct., 4/58; reversed on other grounds 6 Wis 2nd 243, 1959; Wisconsin Gas Company (8118-C) 11/67, (8118-E) 3/68, (8118-F) 4/68; Hand Craft Company (10300-A), 7/71.

2/ The Commission has previously ruled that the Union and the Employer are the actual parties to the collective bargaining agreement, and that the identity of those parties is sufficient. The fact that the grievant involved in the first case was not the same individual involved in the subsequent case was not found to be significant in Wisconsin Telephone, supra footnote 1. The Examiner finds that there was no evidence presented in the instant matter which would require deviation from this rule.

Respondent's argument in this regard must fail since the parties' collective bargaining agreement specifically contemplates and makes provision for grievances filed by the Complainant in disputes over the interpretation of the agreement. (Art. XXX) The collective bargaining agreement in evidence also establishes that the parties agreed to make arbitration awards concerning the interpretation of the agreement final and binding. (Art. XXX, Step 4) It is indisputable that Arbitrator Hoornstra's award involved a dispute over the interpretation of the parties' collective bargaining agreement. The parties litigated this very issue and at page four of his award, Arbitrator Hoornstra states: "...the Arbitrator is satisfied the grievant and the Union intended to and did present a question involving contract interpretation." The Examiner must conclude that the parties agreed to submit disputes over the interpretation of the collective bargaining agreement to final and binding arbitration. There is little dispute that in his award, Arbitrator Hoornstra was asked to and did interpret the Vacation provision of the parties' collective bargaining agreement. By force of the parties' agreement to make arbitration awards final and binding, Arbitrator Hoornstra's interpretation is binding and enforceable on the parties as long as that contractual language survives in the collective bargaining agreement between the parties. Accordingly, Complainant is not obligated to submit the issue to another arbitrator.

Respondent next argued that the Commission has not applied the principles of res judicata in cases involving Section 111.70(3)(a)5 of MERA. In its brief, Respondent states that it is aware that the Commission has applied the principles of res judicata in numerous decisions involving the application of Section 111.06(1)(g), Stats. 3/ But Respondent cites the difference in the statutory language employed in Section 111.06(1)(g), Stats., as compared to Section 111.70(3)(a)5, Stats. The language of these two sections compare as follows:

> 111.06 What are unfair labor practices.
> (1) It shall be an unfair labor practice for an employer individually or in concert with others:
>
> . . .
>
> (g) To refuse or fail to recognize or accept as conclusive of any issue in a controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.
>
> 111.70 (3) PROHIBITED PRACTICES AND THEIR PREVENTION
> (a) It is a prohibited practice for a municipal employer individually or in concert with others:
>
> . . .
>
> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

3/ Respondent cites those decisions noted in footnote 1, supra.

Respondent argues that the language of Section 111.70(3)(a)5 as compared to Section 111.06(1)(g) is sufficiently different and narrowly drafted as to clearly indicate that the legislature never intended Section 111.70(3)(a)5 to be interpreted to mean that an Arbitrator's award would be conclusive on subsequent disputes concerning the same issue. Thus Respondent contends that its' position herein is consistent with the language of Section 111.70(3)(a)5: Respondent has fully complied with Arbitrator Hoornstra's award involving Mr. Ahasay and it remains willing to arbitrate the grievance concerning Mr. Aerts. According to Respondent's argument, Section 111.70(3)(a)5 requires nothing more.

It should be noted that Respondent in its brief does not make reference to, let alone distinguish, the Commission's decision in State of Wisconsin, Department of Administration (13539-D) 4/76 supra. As previously mentioned, the Commission there affirmed the application of the principles of res judicata where the necessary identities were present. Although that case involved the application of Section 111.84 (1)(e) of SELRA, the language of that particular provision is identical to that of Section 111.70(3)(a)5. Thus the Commission has already held that the application of the principles of res judicata is compatible with the identical language found in Section 111.70(3)(a)5 of MERA.

Although it appears that Respondent's argument in this regard was not specifically raised or discussed in State of Wisconsin, Department of Administration, the Examiner finds that the evidence does not support the conclusion that the legislature intended to attach the restrictive meaning of Section 111.70(3)(a)5, Stats. which is here being urged by Respondent. Indeed, there is no sound policy basis for concluding that the legislature intended to treat the private sector differently than the municipal sector in regard to applying the principles of res judicata in this context. Absent pursuasive evidence, the Examiner concludes that Respondent's argument in this regard must also fail.

In its brief Respondent argued that to apply the principles of res judicata in this instance would raise serious public policy issues concerning how far the res judicata principles will be allowed to expand. Disagreeing with the Respondent, the Examiner concludes that the necessity of proving the requisite identities (noted above) prior to the application of the policy, has in the past prevented an undue expansion of the principles of res judicata. Further, the Commission has previously found that in applying the principles of res judicata, the interests of finality of contract interpretation and the authority of the arbitrator to decide the merits of the dispute are both accomodated without violence to either. Wisconsin Public Service Corporation (11954-D) 5/74.

In support of its position, Respondent next alleged in its brief that Arbitrator Hoornstra stated at the arbitration hearing that his award would not be conclusive on any other employes in the bargaining unit. The Examiner is prevented from even considering the statement which Respondent attributes to Arbitrator Hoornstra. It must be remembered that Respondent agreed to stipulate to the facts herein and further agreed to waive its right to present further evidence. The Respondent had an opportunity to include this alleged statement in the parties' stipulation of facts but did not do so. Since the Respondent agreed to be bound by the stipulation of facts, the Examiner will not consider anything ommitted therefrom.

Lastly, Respondent contends that the Examiner has the authority to reconsider and reverse Arbitrator Hoornstra's award. Respondent made certain arguments in its brief regarding the lack of validity of that award. However, the Examiner in this case does not possess the authority to reverse Arbitrator Hoornstra's award. If Respondent desired to contest the validity of said arbitration award, it could have employed either of two alternative procedures. Respondent could have challenged

the validity of the award by appealing to Circuit Court pursuant to ch. 298, Stats.; or second, Respondent could have refused to comply with the award and challenged the merits of the award if the Union thereafter filed a prohibited practice seeking enforcement of said award. Respondent apparently did neither. Rather, Respondent complied with Arbitrator Hoornstra's award. This Examiner does not now have the authority to reconsider the merits of Arbitrator Hoornstra's award. Based upon the evidence presented, the Examiner must conclude that the principles of res judicata are applicable to the underlying grievance herein; therefore, Arbitrator Hoornstra's interpretation of the parties' collective bargaining agreement dated 12-29-77, is controlling on the instant matter.

Dated at Madison, Wisconsin this 9th day of March, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner