STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| OAK CREEK PROFESSIONAL POLICEMEN'S ASSOCIATION,<br><br>Complainant,<br><br>vs.<br><br>CITY OF OAK CREEK,<br><br>Respondent. | Case 91<br>No. 46112 MP-2512<br>Decision No. 27074-B |

Appearances:

Gimbel, Reilly, Guerin & Brown, S.C., Attorneys at Law, by Ms. Marna M. Tess-Mattner, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Oak Creek Professional Policemen's Association.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Robert H. Buikema, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Oak Creek.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 12, 1991, Oak Creek Professional Policemen's Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Oak Creek had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and (5), Stats., by its unilateral implementation of an investigator position. The Commission, on October 31, 1991, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on May 28, 1992, in Oak Creek, Wisconsin. The parties filed briefs and reply briefs, the last of which were exchanged on August 4, 1992. The Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

## FINDINGS OF FACT

1. Oak Creek Professional Policemen's Association, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the exclusive collective bargaining representative of employes in the City's Police Department in a bargaining unit defined

to include all sergeants, detectives, patrolmen, and the police steno-clerk/matrons or dispatcher. Its principal offices are located at 7625 South Howell Avenue, Oak Creek, Wisconsin 53154.

2. The City of Oak Creek, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal offices are located at 8640 South Howell Avenue, Oak Creek, Wisconsin 53154.

3. At all times material herein, the Association and the City were parties to a collective bargaining agreement which by its terms was effective from January 1, 1990 through December 31, 1991.

4. In April, 1991, the city decided to establish the assignment/position of Police Investigator with proposed qualifications and salary as follows:

QUALIFICATIONS AND REQUIREMENTS

1. Minimum of 3 years experience as a police officer and 2 years with the City of Oak Creek Police Department.

2. High school diploma or GED certificate.

3. Positive recommendations from shift commander(s).

4. Familiarity with evidence processing, handling and inventorying, as demonstrated in work history.

5. Ability to communicate effectively both orally and in writing, as demonstrated in work history.

6. Ability to work with others to gain information needed (interviewing ability), as demonstrated in work history.

SALARY

Top police officer pay plus 4% (*).

Will receive the same clothing allowance as presently received by detectives.

This is an appointed (special assignment) with an initial appointment of 2 years which can be renewed annually by the Chief. The officer will be subject to reassignment at any time in the best interest of the department and the community. The additional pay is a pay premium which the officer will receive while serving in this assignment. The days and hours of the assign-ment will be determined by the Chief to best suit the needs of the department and the community.

(*)The 4% premium pay would raise the salary level of a person in this position to $36,034.41 per year, effective July 1991. In comparison, the 1991 detective's salary is $37,160.22 and the top police

officer's pay effective July 1991 is $34,648.47.

5. The City's Police Department had four budget detective positions in its table of organization. Thereafter, two detectives retired and these positions have not been filled. The Police Chief intended to utilize two investigators instead of the two detectives and for this reason did not fill the detective positions.

6. On April 11, 1991, the City's Police Chief scheduled a meeting with the Association's president to discuss the City's decision to establish the Investigator position. The meeting was held on April 18, 1991. On May 14, 1991, the Chief sent the following letter to the Association's president:

> Enclosed I am attaching an amendment to the labor contract. This amendment covers those items that we discussed at our meeting on April 18, 1991. It is my intent to implement the investigator positions on or about July 1, 1991, and certainly hope we can include this amendment into the existing labor contract.
>
> Please contact me if you have any questions, concerns, or problems with the amendment as I have submitted you.

7. On July 7, 1991, the Chief sent the Association's president the following letter:

> RE: INVESTIGATOR POSITION
>
> I received your letter dated May 21, 1991. As I told you in our conversation on May 15, the positions of investigators have been created with the Oak Creek Police Department and I would certainly like to fill those positions on or about July 1, 1991. I do understand that your Association has several concerns regarding these positions.
>
> I am therefore requesting a bargaining session with your Association to discuss any specific aspects of this proposal. I would like to set this bargaining session up within the next two weeks.
>
> It is the position of the City that the investigator positions are bargaining unit positions and we will treat these employees as bargaining unit members, applying all provisions of the contract with the exception of those unique to the investigator positions as I have outlined to you.
>
> I am again enclosing a copy of the job description, as well as the selection process, for your review.
>
> Thank you for your time and attention to this matter. If I can provide any additional information, please do not hesitate to contact me.

8. The Association by a letter from its attorney dated June 19, 1991, responded as follows:

> As you know, I represent the Oak Creek Professional Policemen's Association. The Association

has become aware of numerous proposed changes in the police department, some of which apparently are scheduled to go into effect on or about July 1, 1991. Either the changes themselves or the impact of the changes are mandatory subjects of bargaining. The Association therefore demands bargaining on the following subjects:

1. Minimum Staffing Levels: The current staffing levels create safety hazards for the officers and reduce their effectiveness. In addition, bargaining unit work is being assigned outside the bargaining unit.

2. Investigator Positions: As presently formulated, the Association is not willing to accept the investigator positions as bargaining unit positions. If the position is a promotional position governed by all of the contractual provisions, we will be more willing to include it in the unit. We reserve the right, however, to bargain about other aspects of the new position.

3. Diminishment of Bargaining Unit Positions: Your plan to eliminate the four detective positions is a diminishment of the bargaining unit. Even if the two investigator positions are eventually modified so as to be assimilated into the bargaining unit, the unit as a whole will be diminished by two positions, by reduced earning potential, and by reduced promotional potential.

4. Changing Sergeant's Duties: Recent revisions in the sergeants' (sic) job description indicate that the sergeants will be expected to perform supervisory functions significantly greater than those they now perform. As you know, bargaining unit members cannot recommend discipline for their bargaining unit colleagues, nor can they participate in managerial decisions.

Please contact me to arrange a time to bargain regarding these matters. I am sure you are aware that unilaterally changing or refusing to bargain about mandatory subjects constitutes a prohibited practice. I am certain, however, that we can resolve these issues without WERC intervention.

9. A bargaining session in connection with the impact of the City's decision to implement the Police Investigator assignment/position was held on July 12, 1991. The parties reached impasse after that bargaining session.

10. On July 24, 1991, the Chief posted the following notice:

Any officer wishing to be considered for an appointment to an investigator position should submit a letter of interest to the Chief outlining your required qualifications and any other pertinent information that you feel may apply. All letters of interest should be received by the Chief by August 5, 1991.

> See attached job description, required qualifications and salary information.
>
> Any officer wishing any further clarification should contact me.

11. The Chief received applications from three bargaining unit employes who were interested in the Investigator position and the Chief appointed Patrolman Daniel Daily to one of the Investigator positions effective September 3, 1991.

12. On August 6, 1991, the Association filed a petition for interest arbitration with the Commission concerning the Investigator assignment/ position. The City submitted a written objection to said petition on August 6, 1991.

13. On August 12, 1991, the Association filed the instant complaint alleging the City's unilateral implementation of the Investigator position constituted a prohibited practice. The Association recognizes the City's right to create a new position but believes the City's attempt to implement the new position without bargaining and/or going to arbitration on the impact of its decision to create that assignment/position is a prohibited practice.

14. On August 21, 1991, the Chief announced his intention to fill the investigator position effective September 3, 1991.

15. On August 28, 1991, the Association obtained a temporary restraining order prohibiting the City from implementing the new position and on September 4, 1991, the Association obtained a temporary injunction prohibiting the City from implementing the Investigator position pending resolution of the dispute by the Commission.

16. Bargaining for a successor contract to the 1990-1991 contract began on October 15, 1991. During these contract negotiations the issue of the Investigator position came up with the City proposing it be included in the contract. The Union responded by indicating they didn't want to talk about that position or issue. The matter was dropped and accordingly, the Association waived bargaining and the right to proceed to interest-arbitration for the 1992-93 contract period concerning the Investigator position.

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

## CONCLUSIONS OF LAW

1. Based upon the stipulation of the parties, the City had no duty to bargain collectively with the Association within the meaning of Sec. 111.70(1)(a) of the Municipal Employment Relations Act, with respect to the City's decision to create the new position of Investigator, and therefore did not violate any provision of Sec. 111.70(3)(a), Stats., by refusing to bargain over its decision to create said position.

2. The City did not refuse or fail to bargain collectively with the Association over the impact of its decision to create the Investigator position prior to its attempt to implement said position and was not obligated to proceed to interest arbitration on the impact related to said position, and therefore the City did not commit a prohibited practice in violation of Sec. 111.7093)(a)4, Stats.

3. The Association waived its right to bargain on and to proceed to interest arbitration in the successor agreement to the 1990-91 agreement when it had the opportunity to negotiate on the Investigator position and to proceed to interest arbitration and it offered no proposals and declined the City's offer to negotiate on the issue.

4. The Commission will not assert its jurisdiction to determine whether the City has violated Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 2nd day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____

Lionel L. Crowley, Examiner

1/ Please find footnote 1/ on page 7.

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the City had committed prohibited practices in violation of Secs. 111.70(3)(a)4 and 5, Stats., by its unilateral implementation of the Investigator position without bargaining and/or going to arbitration on the impact of its decision to create the Investigator position. The City answered the complaint denying it committed any prohibited practices and asserted the decision to establish the Investigator position was a permissive subject of bargaining and that it satisfied its obligation to bargain the impact of said decision and was free to implement it once impasse was reached.

Association's Position

The Association contends that the City's decision to implement the Investigator position without waiting for interest arbitration was a prohibited practice in violation of Secs. 111.70(3)(a)4 and 5, and derivatively Sec. 111.70(3)(a)1, Stats. The Association, citing Wausau School District Maintenance and Custodial Union v. Wisconsin Employment Relations Commission, 157 Wis. 2d 315, 459 N.W.2d 861 (Ct. App. 1990), asserts that interest arbitration procedures apply to new bargaining unit positions added during the term of an existing contract. It submits that it is a prohibited practice to implement a final offer concerning a mandatory subject of bargaining while arbitration is pending with the exception that arbitration is not available for disputes that arise during the term of a labor agreement about mandatory subjects which are already included in the labor agreement. The Association takes the position that the new Investigator position was not included in the labor agreement so interest arbitration is available. The Association maintains that under Wausau School District, supra, interest arbitration applied once the parties reached impasse as to the mandatory aspects of the Investigator position. It claims that unilaterally implementing a final offer while arbitration is pending is a prohibited practice absent bona fide necessity or a clear waiver by the Association. It argues that there has been no showing of necessity and the Association has not waived its rights. The Association insists that the City's decision to go ahead and implement the Investigator position after impasse was reached, but before receiving an arbitration award, is a prohibited practice. It asks that the City be ordered to cease and desist from any further implementation efforts until an interest arbitration award is received and the City be directed to arbitrate the impact items of the Investigator position.

City's Position

The City contends that the complaint must be dismissed because the Association failed to exhaust its exclusive remedies under the labor agreement's grievance procedure. It points out that the complaint alleges a violation of Sec. 111.70(3)(a)5, Stats., by attempting to implement the Investigator position. It alleges that these claims turn on the City's contractual right to establish and/or implement positions under Article 6 of the collective bargaining agreement. It notes that the labor agreement has a grievance procedure culminating in final and binding arbitration but the Association never filed any grievance over the Investigator position. It argues that it is a well established Commission policy not to assert jurisdiction over breach of contract claims except under certain circumstances not present in this case. The City claims that the Association's failure to exhaust the grievance and arbitration procedures under the labor agreement demands that its complaint be dismissed.

The City contends that it did not violate Sec. 111.70(3)(a)4, Stats., by attempting to implement the Investigator position after the parties reached impasse. It asserts that the decision to create or eliminate positions is a permissive subject of bargaining and the Association has fully admitted the City had the legal and contractual right to establish the position without bargaining with the Association. It submits that it met its duty to bargain over the impact of its decision by meeting with the Association and bargaining to impasse. It maintains that it is not obligated to reach a complete agreement on impact items before implementing the position because the matter arose during the term of the 1990-91 agreement and was covered by the broad management rights set forth in Article 6 of the agreement. The City insists that it bargained to impasse on the impact items and it could then implement the position and such implementation was not a prohibited practice.

The City takes the position that interest arbitration was not available to the Association under Sec. 111.77, Stats., as the dispute arose during the term of the agreement and the Investigator position was a bargaining unit position which would be filled by an existing bargaining unit member. The City states that their case does not involve an accretion to the bargaining unit or other situation where interest arbitration would be available. It concludes that the complaint must be dismissed.

Association's Reply

The Association submits that it had no obligation to exhaust its remedies under the contractual grievance procedure. It admits that the City had the right to create a new Investigator position under its management rights clause but this has no bearing on the City's obligation to bargain the impact of the City's decision, such as the wages, hours and conditions of employment which are not yet included in the agreement. The Association maintains that the impact items are not covered by the management rights clause and are not subject to the grievance procedure but are mandatory subjects of bargaining. It claims that the issue is not a breach of the labor agreement but unilateral implementation after reaching impasse on a matter subject to interest arbitration.

The Association argues that the City overlooked or ignored Wausau School District, supra, which requires interest arbitration when bargaining unit positions are added during the term of a contract. It submits that the court in Wausau School District, supra, noted that absent a duty to engage in interest arbitration, employes in new bargaining unit positions would have no mechanism for resolving disputes over wages, hours and conditions of their new positions. It concludes that interest arbitration therefore is required for new bargaining unit positions, and because the City implemented its final offer prior to

interest arbitration, it committed a prohibited practice in violation of Secs. 111.70(3)(a)4 and 5, and derivatively, Sec. 111.70(3)(a)1, Stats. It requests appropriate relief be directed.

City's Reply

The City asserts that the Association has made no argument and offered no evidence to support its position that the City violated Sec. 111.70(3)(a)5, Stats. Absent evidence of an attempt to exhaust the grievance procedure, the City demands that the Sec. 111.70(3)(a)5 charge be dismissed.

The City maintains that the Association had no right to interest arbitration in this case. The City claims that the Association's reliance on Wausau School District, supra, is misplaced given the facts of this case. The City contends that the instant case is controlled by the Commission's decision in Dane County, Dec. No. 17400 (WERC, 11/79), which held that a mid-term dispute over the impact of a decision to eliminate a program was not subject to interest arbitration. It points out that Dane County did not involve an issue of accretion. It states that under the WERC's accretion doctrine, previously unrepresented employes who are included in an existing collective bargaining unit with whom they share a "community of interest," have available interest arbitration for mid-term disputes in wages, hours and conditions of employment. The City contends that the court in Wausau School District adopted Commissioner Torosian's dissent in Greendale School District, Dec. No. 20184 (WERC, 12/82). It submits that Commissioner Torosian simply distinguished in Greendale, supra, the mid-term deadlock over impact issues in Dane County from the accretion question in Greendale. The City distinguishes Wausau School District, supra, for two reasons: First, it did not relate to the impact of permissive subjects of bargaining and second, the Investigator position does not involve an accretion of new employes. It concludes that interest arbitration was not available under these circumstances and the complaint must be dismissed.

DISCUSSION

The Association has succinctly stated the issue presented in this case as follows:

> Did the City commit a prohibited practice by unilaterally implementing a new position in the department after bargaining to impasse but before receiving an interest arbitration award?

The Association has conceded and stipulated that the City could create the new position of Investigator. 2/ The creation of the Investigator position was a permissive subject of bargaining and therefore is not subject to the duty to bargain by the City. This is comparable to a decision to layoff which also is a permissive subject of bargaining and there is no duty to bargain said decision. 3/ The impact of a decision to layoff is a mandatory subject of bargaining, however, the obligation to bargain the impact does not necessarily preclude implementation of the layoff. 4/ The obligation to bargain over the impact may require the parties to bargain to the point of impasse prior to

2/ Stipulated Facts. #14.

3/ City of Brookfield v. WERC, 87 Wis. 2d 819 (1979).

4/ Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83).

implementation. Here, the parties have stipulated that they reached impasse prior to implementation of the Investigator position. 5/ The issue then is whether the impact dispute is subject to the interest arbitration procedures. The Commission has held that there is no obligation to exhaust the statutory impasse procedures prior to the implementation of permissive subjects of bargaining. 6/ The Association contends that the recent decision in Wausau School District 7/ provides that the statutory impasse procedures apply to the mandatory subjects of bargaining aspects of the Investigator position. The Association has misapplied the holding in that case. In Green County, the Commission reaffirmed the continuing availability of an impasse defense in disputes not subject to interest arbitration. 8/ The Commission held that disputes arising during the term of an existing agreement are not subject to the statutory interest arbitration procedures. 9/ The Commission indicated that mediation-arbitration was available only with respect to negotiation disputes concerning new agreements or to disputes arising out of formal reopener provisions in existing agreements. 10/ Wausau School District adds another instance when interest arbitration is available and that is the accretion of new employes to an existing bargaining unit. 11/ Contrary to the Association's arguments, there was no accretion in the creation of the Investigator position. The Association is attempting to broaden the holding of Wausau School District to the creation of positions in the bargaining unit. An accretion however is not the creation of a bargaining unit position but rather it is the addition of new employes to an existing bargaining unit. The basis for the court's decision and Commissioner Torosian's dissent in Greendale School District 12/ is stated as follows:

> Here we have a group of employes who prior to their accretion were not represented for purposes of collective bargaining agreement. Under such circumstances the Commission has long held, as noted by the majority, that accreted employes are not automatically covered by the terms of an existing collective bargaining agreement covering employes in the accreted-to unit, and that said accreted employes have the right, and the employer has the duty, to bargain over their wages, hours and conditions of employment. It follows then that the parties must in good faith make an attempt to reach an agreement over matters that are mandatorily bargainable. The resultant agreement, if negotiated,

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5/ Stipulated Facts. #9.

6/ City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

7/ 157 Wis. 2d 315, 459 N.W.2d 861 (Ct. App. 1990).

8/ Decision No. 20308-B (WERC, 11/84) at n.9.

9/ Citing Dane County (Handicapped Children's Education Board, Dec. No. 17400 (WERC, 11/79), aff'd Dec. No. 80-CV-0097 (Cir. Ct. Dane, 6/80).

10/ Green County, Dec. No. 20308-B (WERC, 11/84) at n.9.

11/ 157 Wis. 2d 315, 459 N.W.2d 861 (Ct. App. 1990).

12/ Decision No. 20184 (WERC, 12/82) aff'd Case No. 603-055 (Cir. Ct. Milw., 10/83).

> is in my opinion, a new initial agreement; a new initial agreement because it covers employes who were not previously represented and who were not covered by an agreement. The fact that they have gained bargaining rights by way of an accretion to a larger unit of employes, does not in my opinion change the fact that said employes are negotiating for a new agreement. As such they have a right to utilize the mediation-arbitration process to secure same.

In the instant case, no group of employes who were unrepresented have been transferred to the bargaining unit. If they were, the City could have unilaterally established their wages, hours and working conditions without even bargaining with the Association and only after an accretion would bargaining on all mandatory subjects of bargaining with interest-arbitration be available to resolve any disputes over these items.

By way of illustration, suppose the City decided to eliminate two Patrolman positions and convert these to Investigator positions. If two Patrolmen were laid off and there were no layoff provisions of the contract, interest arbitration would not be available for the impact items under Dane County. 13/ If, on the other hand, two Patrolmen post for the new positions and are given these positions such that there is no layoff, the City would have to bargain the impact of the creation of the Investigator position but it would not make sense to assert that interest arbitration was available because there would be no employes who were previously unrepresented. Essentially, the same bargaining unit employes would be under the same contract and bargaining rights were not gained by accretion but rather by the exercise of a permissive subject of bargaining just like the layoff situation noted above. In short, this is not an accretion situation wherein the impasse defense is not available but rather this is an in-term change in a permissive subject, the impact of which is not covered by the terms of the contract and the impasse defense is available because interest arbitration is not available to resolve said dispute over the impact items. 14/ Therefore, Wausau School District, 15/ does not apply, but rather Dane County 16/ applies and because there is no specific reopener provision involved, the City was free to implement the decision as well as the impact items after reaching impasse.

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13/ Decision No. 17400 (WERC, 11/79).

14/ Dane County, ibid. For a similar discussion of this matter see City of Eau Claire, Dec. No. 22795-C (Honeyman, 5/86) set aside on other grounds, Dec. No. 22795-E (WERC, 3/89).

15/ 157 Wis. 2d 315, 459 N.W.2d 861 (Ct. App., 1990).

16/ Decision No. 17400 (WERC, 11/79).

In the negotiations for a successor agreement to the 1990-91 agreement, the Association was free to negotiate the impact items of the Investigator position and additionally could take these items to interest arbitration. The City raised the issue once in negotiations and several times during mediation but the Union did not want to talk about it. 17/ This action on the part of the Association constitutes a waiver on its part. 18/ Thus, the City did not violate Sec. 111.70(3)(a)4, Stats., with respect to the Investigator position and it is free to implement it in accordance with its last position when the parties reached impasse. 19/

Dated at Madison, Wisconsin this 2nd day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

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17/ TR-17-18.

18/ See City of Antigo, Dec. No. 27108-A (Honeyman, 5/92) aff'd by operation of law, Dec. No. 27108-B (WERC, 6/92).

19/ The complaint also alleged a violation of Sec. 111.70(3)(a)5, Stats. Inasmuch as the parties' Agreement provides for final and binding grievance arbitration and no evidence or argument has been presented regarding the alleged violation, the Commission will not assert its jurisdiction to decide the allegation.