STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

APPLETON PROFESSIONAL POLICE ASSOCIATION, Complainant, vs. CITY OF APPLETON, Respondent.	Case 327 No. 47321 MP-2587 Decision No. 27350-A

Appearances:

Gill & Gill, Attorneys at Law, 128 North Durkee Street, Appleton, Wisconsin 54911, by Mr. Bruce Evers and Mr. Gregory Gill, appearing on behalf of Complainant Appleton Professional Police Association.

Mr. Greg Carman, City Attorney, City of Appleton, 200 North Appleton Street, Appleton, Wisconsin 54911, appearing on behalf of Respondent City of Appleton.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant filed with the Wisconsin Employment Relations Commission (WERC) a complaint on April 27, 1992, alleging that the above-named Respondent violated various provisions of the Municipal Employment Relations Act (MERA), Sec. 111.70, Stats., et. seq. On August 10, 1992, the WERC appointed the undersigned to serve as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in this matter. Pursuant to notice, the Examiner convened a hearing in Appleton, Wisconsin on September 29, 1992. A stenographic transcript of the proceeding was taken and received by the Examiner on October 20, 1992. On November 19, 1992, Complainant's attorney advised the undersigned that Complainant was not going to file a posthearing brief and pursuant to agreement between the parties that meant that the Respondent City of Appleton would also not be filing a brief in the captioned matter. The Examiner having considered the evidence and arguments of the parties makes and issues the following

FINDINGS OF FACT

1. Appleton Professional Police Association (Complainant) is a labor organization with its principal office located at 222 South Walnut Street, Appleton, Wisconsin 54911. At all times material herein, Reid H. Holdorf, was President of the Complainant Appleton Professional Police Association and with respect to his conduct relevant to the matters litigated herein, was acting as an authorized agent of Complainant Union. The Complainant Appleton Professional Police Association at all times material was the sole bargaining agent for all law enforcement employes of Respondent City of Appleton Police Department with the power of arrest, but excluding the Chief of Police, the Deputy Chief, Captains and other supervisory personnel. Paul R. Wolff at all times material was employed by the City of Appleton Police Department, either as a non-supervising police officer or as an acting supervisor.

2. The City of Appleton (Respondent) is a municipal employer with principal offices located at 200 North Appleton Street, Appleton, Wisconsin 54911. Included among the various operations of the Respondent City is the Police Department. During all times material herein, the Chief of

Police was David Gorski and with respect to the matters litigated herein he was acting as an agent of Respondent within the scope of his authority. Also, at all times material herein, David Bill was employed by the Respondent as its Director of Personnel and with respect to matters litigated herein was acting as an agent of the Respondent.

3. In or about December of 1990, police officer Wolff was assigned to the MEG unit which was a metropolitan law enforcement drug unit serving a four county area in the Fox Valley. Prior to officer Wolff being assigned to the MEG unit, officer Carlos Del Plaine had been assigned to the unit for approximately three and one-half years. Wolff's assignment to the MEG unit was like any other job assignment that a police officer for Respondent City of Appleton could expect to receive and, Complainant Union has never taken issue with such assignments.

4. In the spring of 1992, the then supervisor of the MEG unit, who was an agent for the State Division of Narcotic Enforcement, was removed from the assignment and Sergeant Roger Price with the Outagamie Sheriff's Department was put in charge of the unit. Price expressed concern to the Board of Directors as to his ability to supervise the entire unit due to its size and in response to his concerns the Board of Directors contacted Chief Holdorf about their desire to have officer Wolff continue with the MEG unit and assist Price in a supervisory capacity. Chief Holdorf discussed with officer Wolff a conversation he had had with the Board of Directors of the MEG unit, and inquired if Wolff was interested in continuing to serve in the unit but in a supervisory capacity. Wolff advised the Chief that he thought it might be possible, but he wanted to give it further thought. The Chief advised him that if he did assume additional responsibilities that he ought to receive additional compensation in return, and he advised officer Wolff that it would be his intent to promote him to acting Lieutenant which would bring with it an additional pay increase and that after one year he would return to the Appleton Police Department as a nonsupervisory patrolman. That prompted officer Wolff to inquire as to which bargaining unit he would then be in. Chief Holdorf advised him that he should speak with his union representative. Officer Wolff contacted Complainant Union President Holdorf and stated that the Respondent City wanted to temporarily promote him for one year to acting Lieutenant and pay him the Lieutenants' wages because he would be assuming additional supervisory responsibilities in his assignment to the MEG unit. Wolff expressed concern to Holdorf as to which bargaining unit he would be in, and wanted to know what the situation would be for him. Holdorf then met with the Chief on two different occasions to discuss the matter of Wolff being designated as an acting Lieutenant. Holdorf advised the Chief that he didn't believe that Wolff could be removed from the bargaining unit for a determinant amount of time, placed in an acting supervisory position, and then put back into the bargaining unit without any prior negotiation or consultation with Complainant Union. These two meetings took place prior to April 5, 1992, when the Respondent Police Chief temporarily promoted him to acting supervisor with the MEG unit and increased his pay to that of Step B of the supervisory pay range. During the meetings between Holdorf and Chief Gorski, they discussed different possibilities with respect to handling the Wolff assignment to the MEG unit, however, no agreement was reached between them as to the appropriateness of the Chief's expressed intent to promote Wolff to acting Lieutenant.

5. Complainant Union President Holdorf, by April 10, 1992, received official notice of the Chief's final decision to promote Wolff to acting supervisor effective April 5, 1992. Subsequent to receipt of that notice, Complainant Union filed a grievance contesting the Chief's actions as being violative of the parties' collective bargaining agreement and/or past practice. That grievance proceeded through the contractual grievance process and at the time of hearing was at the grievance arbitration step of the procedure or about

to be moved to that step by Complainant Union. While Respondent had indicated to Complainant Union that it believed there were procedural defects in the processing of the grievance, Respondent at no time prior to the hearing in the instant matter had refused to process said grievance including agreeing to arbitrate same.

6. Wolff voluntarily accepted the temporary promotion to acting Lieutenant after his discussion with the Chief and Holdorf. Also, the Respondent stipulated that it did not follow its normal promotion procedure when filling police department supervisory vacancies in the case of Wolff's temporary promotion to acting Lieutenant.

7. At no time subsequent to being notified of the Chief's intent to temporarily promote officer Wolff to acting Lieutenant on the MEG unit did the Union demand to bargain with respect to that decision or the impact of that decision on wages, hours and conditions of employment of officer Wolff or other members of the police department law enforcement bargaining unit. Complainant Union President Holdorf believed it was not necessary for Complainant Union to demand to bargain about such matters, and that the responsibility to initiate bargaining rested with Respondent City of Appleton who was proposing to promote, on a temporary basis, officer Wolff to a position of acting Lieutenant which was not a part of Complainant's bargaining unit.

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

CONCLUSIONS OF LAW

1. Respondent's decision to create an acting supervisory position (Lieutenant) assigned to the MEG unit and filled by officer Wolff on a temporary basis was not a mandatory subject of bargaining, and therefore, Respondent's unilateral action in not offering to bargain with Complainant about its decision did not constitute a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.

2. Complainant, by not demanding to bargain about the impact on officer Wolff or the remainder of the nonsupervisory law enforcement bargaining unit of the Chief's decision to temporarily promote Wolff to acting Lieutenant waived its rights under Sec. 111.70(2), Stats., and relieved the Respondent of its duty to bargain the impact of said decision.

3. Complainant did not establish by a clear and satisfactory preponderance of the evidence that Respondent by its conduct relative to the decision to assign officer Wolff to a temporary acting supervisory position with the MEG unit and increase his rate of pay, committed prohibited practices in violation of Secs. 111.70(3)(a)1 and 2, Stats.

4. The Commission will not assert its jurisdiction to determine whether the Respondent violated Sec. 111.70(3)(a)5, Stats., relative to officer Wolff's temporary assignment to the MEG unit as an acting supervisor effective April 5, 1992.

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 19th day of January, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Thomas L. Yaeger, Examiner

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

(Footnote 1/ continued on page 5)

1/ Continued

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

Neither party to this dispute filed prehearing or posthearing briefs. Therefore, the undersigned has done his best to glean their positions from the pleadings, opening statements, and/or remarks made on the record with respect to evidentiary objections.

The Complainant contends that the City violated the Municipal Employment Relations Act (MERA) by entering into a separate agreement, outside of its knowledge, with bargaining unit employe, Paul Wolff. This agreement was entered into while Wolff was assigned as patrolman to the Lake Winnebago MEG unit, which is a drug enforcement unit. He was assigned to the unit as a part of his patrolman responsibilities in December of 1990, and was paid his regular patrolman's rate until April of 1992, when the Chief promoted him to acting supervisor with the concomitant increase in pay. Thereafter, he was no longer included within the collective bargaining unit represented by Complainant. This was a temporary assignment that was to last until April of 1993, when he would be returned to his patrolman classification and the nonsupervisory law enforcement bargaining unit represented by Complainant. Complainant believes that the Chief engaged in individual bargaining in violation of MERA with patrolman Wolff and, the manner in which his promotion occurred violated a past practice with respect to the posting and filling of such supervisory vacancies as well as the creation of a previously abolished acting supervisory position. Also, the Association did not receive notice of the promotion and the accompanying pay increase until April 9, which was subsequent to the effective date of the promotion of April 5.

Complainant filed the prohibited practice complaint because the ability to remedy this problem under the grievance and arbitration procedure will be ineffective inasmuch as the position is a temporary position, and by the time the grievance arbitration procedure runs its course, the position will no longer be in existence. Thus, no remedy is available under the arbitration procedure. Complainant also believes that Respondent is blatantly delaying the arbitration of the grievance knowing full well that the position will be dissolved prior to hearing in the matter. Complainant asserts that by this conduct the Respondent has violated Sec. 111.70(3)(a)1, 2, 4, and 5, Wis. Stats., and requests the Examiner order Respondent to cease and desist from committing such prohibited practices and order Respondent to reimburse Complainant for attorneys fees and other costs associated with bringing this action.

The Respondent, to the contrary, denies that it negotiated any outside agreements with officer Wolff. Rather, the City merely exercised its management's rights when the Police Chief temporarily promoted Wolff to a supervisory rank. This action of the Chief did not violate any provision of the parties' collective bargaining agreement because the position of acting Lieutenant to which the Chief assigned Wolff on a temporary basis is a supervisory position and not covered by the parties' collective bargaining agreement. Thus, the Union does not have standing to challenge promotional procedures for nonunit positions and thus, the reliance on past practice relative to prior promotional procedures followed is not relevant to this dispute. Also, Respondent believes that this action is merely an attempt by Complainant to "go around the barn in another direction" in that it has failed to comply with the grievance time limits in challenging the Respondent's action as an alleged violation of the collective bargaining agreement. Thus, Respondent believes that the Commission should dismiss the complaint for lack of jurisdiction.

As best as the undersigned can discern, one of the principal contentions of Complainant is that Respondent's conduct violates the parties' collective bargaining agreement and therefore, constitutes a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats. The Commission case law with respect to asserting its jurisdiction to determine whether the collective bargaining agreement has been breached and thus a prohibited practice committed is clear. The Commission will normally not assert its jurisdiction over alleged breach of contract prohibited practice complaints where there is a contractual grievance and arbitration procedure because there is a presumption that the contractual grievance and arbitration procedure is exclusive and the Commission will not, except under certain circumstances, assert its jurisdiction. Rather, the Commission will honor the exclusivity of the parties' contractual grievance and arbitration procedures unless the parties waive their right to proceed with the grievance arbitration provisions. 2/ In the instant case, the record evidence established that a grievance was filed, is being processed through the procedure, and was at the arbitration step at the time of the hearing herein. Because none of the conditions precedent to the Commission exercising its jurisdiction to review an alleged breach of contract claim, as is being made here, are present, the undersigned will not assert the Commission's jurisdiction in this case. This conclusion means that the undersigned will not undertake a review of any of Complainant's allegations relative to conduct being violative of the parties' collective bargaining agreement, e.g., creating a temporary acting supervisory position or promoting a bargaining unit employe to the supervisory position without following the alleged past practice of first posting the position, taking bids and interviewing bargaining unit bidders.

The Union also believes that the Chief's conduct in this matter wherein he approached officer Wolff concerning the MEG unit's desire to have him stay on in the unit and function in a supervisory capacity constituted individual bargaining with Wolff. Further, the Union contends that the City did not bargain with the Union concerning the entire matter as it was required to do by law.

In or about late March, 1993, the MEG unit Board of Directors approached the Chief concerning Wolff's staying on in a supervisory capacity inasmuch as the prior supervisor was no longer assigned to the unit. The Chief's testimony was that had Wolff not been already working with the MEG unit when the request came in, he would have assigned a supervisory officer in response to the MEG unit request. However, the MEG unit specifically asked for Wolff because of his assignment with the unit and familiarity with the operation. Therefore, the Chief approached Wolff to determine his interest in functioning in a supervisory capacity and staying on with the MEG unit for another year. Officer Wolff had questions relative to his rights as an officer should he accept the assignment, and the Chief advised him that he should talk to his Union representatives. Wolff contacted Holdorf, then Union President, to discuss some of his concerns. Thereafter, Holdorf met on at least two occasions with the Chief to discuss the matter. During the coarse of those discussions, the Chief and Holdorf came to no agreement concerning Wolff's assignment to the MEG unit as an acting supervisor. Holdorf told the Chief that he did not believe the Chief had the right to make such an assignment, and the Chief was steadfast in his belief that he did have that right. Ultimately, Wolff accepted the temporary promotion to acting supervisor in the MEG unit. There is no record evidence that Wolff did not voluntarily take the assignment, and thus it must be presumed he voluntarily assumed the duties. Thus, this

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2/ Monona Grove School District, Dec. No. 22414 (WERC, 3/85); Mahnke v. WERC, 66 Wis.2d 524 (1974).

case does not present the concerns that would attend an involuntary promotion out of the bargaining unit.

The first element of the duty to bargain analysis relates to the Chief's decision to create a temporary supervisory position assigned to the MEG unit and establishing a rate of pay for that position. Clearly, the City had no duty to bargain with the Union with respect to the decision to create such a position or the rate of pay for that position inasmuch as this supervisory position was not included within the bargaining unit of nonsupervisory law enforcement officers represented by Complainant. 3/ Complainant agrees that the supervisory position did not fall within its bargaining unit. As such, this was a permissive subject of bargaining about which Respondent can act unilaterally without first bargaining with Complainant. 4/

Also, the Chief's discussions with Wolff relative to extending his assignment to the MEG unit for another year in the position of acting supervisor and what he would be paid for assuming those responsibilities for the reasons noted above, did not constitute individual bargaining with Wolff in violation of Respondent's duty to bargain with Complainant as the exclusive collective bargaining agent for nonsupervisory law enforcement personnel employed by Respondent. Furthermore, any other matters which Wolff and the Chief discussed relative to Wolff returning to the bargaining unit at the conclusion of his assignment, did not constitute a prohibited practice in violation of Sec. 111.70(3)(a)4, Wis. Stats. The contractual grievance and arbitration procedure contained in Complainant's collective bargaining agreement with the Respondent governing wages, hours and conditions of employment of nonsupervisory law enforcement personnel authorized Wolff as an individual employe to meet and discuss with Respondent Chief how that collective bargaining agreement would be applied to him vis-a-via his assignment to the MEG unit in an acting supervisory capacity and subsequent return to the nonsupervisory bargaining unit. 5/

Also, Complainant seems to be arguing that the discussions between Holdorf and the Chief did not amount to bargaining and thus, Respondent never engaged in bargaining with Complainant relative to this matter. Indeed, the Union president testified that it was his opinion that it was the City's responsibility to request bargaining with Complainant rather than the other way around. Further, Complainant insists that the Union did not have notice of the Chief's decision and thus, no opportunity to demand bargaining until after the

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3/ City of Milwaukee, Dec. No. 26058 (WERC, 6/89); Milwaukee Board of School Directors, Dec. No. 20399-A (WERC, 9/83); City of Sheboygan, Dec. No. 19421 (WERC, 3/82).

4/ Racine Unified School District, Dec. No. 25283-B (WERC, 5/89).

5/ Amery Schools, Dec. No. 26138-A (McLaughlin, 2/90) aff'd by operation of law, Dec. No. 26138-B (WERC, 3/90); Greenfield Schools, Dec. No. 14026-B (WERC, 11/77).

decision had already been made. Complainant points to the fact that it did not receive notice of the Chief's decision until April 9 or 10 whereas the decision was effective April 5, 1992.

Notwithstanding that the Respondent's formal notification was received by Holdorf on or about April 9 or 10, 1992, the Union was on notice of the Chief's intentions several days if not weeks prior to his decision actually being effectuated. It became aware of the Chief's intentions by virtue of Wolff's contact with Holdorf and Holdorf's subsequent meetings with the Chief all of which took place prior to April 5, 1992. Even though Complainant had no right to insist that Respondent bargain with it about the Chief's decision to create an acting supervisory position or the rate of pay for said position, Complainant legally could have demanded to bargain over the impact of the Chief's decision to temporarily promote an officer to an acting supervisory position out of the bargaining unit. For example, issues as to how such an employe would be selected, what would happen to his seniority rights while he was out of the bargaining unit, under what circumstances could the employe return to the bargaining unit, and what seniority rights would he have upon returning to the unit following completion of an assignment out of the unit, among other things. However, no such demand was ever made by Complainant. Consequently, there is no basis for finding Respondent guilty of a refusal to bargain with Complainant relative to such matters. Rather, it must be concluded that by its conduct Complainant waived its right to bargain about the impact of the Chief's decision.

Lastly, Complainant did not adduce any record evidence nor argue how Respondent's conduct in this matter interfered with, restrained or coerced municipal employes in the exercise of their rights as set forth in Sec. 111.70(2), Wis. Stats., or dominated or interfered with the formation organization of Complainant labor organization. Consequently, there is no basis for concluding that Respondent committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 or 2, Stats.

Dated at Madison, Wisconsin this 19th day of January, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Thomas L. Yaeger, Examiner