

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TOWN OF MADISON,

Complainant,

vs.

WISCONSIN PROFESSIONAL POLICE
ASSOCIATION and CHRISTIAN
THOMSEN,

Respondents.

Case 51

No. 52750 MP-3038

Decision No. 28647-B

Appearances:

Lathrop & Clark, Attorneys at Law, 122 West Washington Avenue, Suite 1000, P. O. Box 1507, Madison, Wisconsin 53701-1507, by Mr. Kirk D. Strang and Ms. Malina R.P. Fischer, appearing on behalf of the Complainant Town of Madison.

Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, by Mr. Gordon E. McQuillen, appearing on behalf of Respondent Wisconsin Professional Police Association/LEER.

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P. O. Box 2965, Madison, Wisconsin 53701-2965, by Mr. John C. Talis and Mr. P. Scott Hassett, appearing on behalf of Respondent Christian Thomsen.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Town of Madison filed a complaint with the Wisconsin Employment Relations Commission on June 7, 1995, alleging that the Wisconsin Professional Police Association and Christian Thomsen had committed prohibited practices by refusing to execute a collective bargaining agreement, refusing to bargain in good faith and/or violating the terms of a collective bargaining agreement previously agreed upon. Hearing in the matter was held in Madison, Wisconsin, on September 12, 1996. The record was closed on January 21, 1997, upon receipt of post-hearing written argument. The Examiner, having considered the evidence and arguments of the parties, makes and issues the following

No. 28647-B

FINDINGS OF FACT

1. The Town of Madison, hereafter Complainant or Town, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principle office located at 2120 Fish Hatchery Road, Madison, Wisconsin 53713.

2. At all times relevant hereto, the Town has recognized the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, Town of Madison Professional Police Association, Local 111, hereafter WPPA, as the exclusive bargaining representative for all regular, permanent full-time and regular, permanent part-time employees in the Police Department having the power of arrest, including Police Officers and Sergeants, excluding the Police Chief, Police Lieutenant, office clerical employees, other supervisory personnel and all other municipal employees. WPPA is a labor organization as defined in Sec. 111.70(1)(h), Stats., and has its principle office at 7 North Pinckney Street, Suite 220, Madison, Wisconsin 53703.

3. At all times relevant hereto, Christian Thomsen, has been a municipal employee within the meaning of Sec. 111.70(1)(i), Stats., and has resided in Sun Prairie, Wisconsin. On August 10, 1994, Respondent Thomsen's employment as a Town Police Sergeant was terminated. At that time, Respondent Thomsen was a member of the collective bargaining unit represented by WPPA and held the position of President of the Town of Madison Professional Police Association (hereafter TMPPA).

4. The Town and WPPA are parties to a collective bargaining agreement which, by its terms, is effective from January 1, 1994 through December 31, 1995. The grievance procedure contained in this collective bargaining agreement includes the following:

ARTICLE VII - GRIEVANCE PROCEDURE AND ARBITRATION

Section 1 - Grievance: A grievance is defined to be a controversy between the Association and the Town, or between any employee or employees and the Employer as to:

(a) A matter involving the interpretation of this Agreement;

(b) Any matter involving an alleged violation of this Agreement in which an employee or group of employees, or the Employer, maintains that any of their rights or privileges have been impaired in violation of this Agreement.

Section 2: In the event that the controversy is over a discharge or other discipline taken against an employee, the grieving employee can resolve the issue through either the procedures set forth in section 2-11-7 of the local ordinance or the following grievance procedure, but not both.

Section 3 - Procedure: Grievances shall be processed in the following manner: (Time limits set forth shall be exclusive of Saturdays, Sundays and holidays.)

Step 1: The Employer or the employee and/or the steward shall take the grievance up orally with the employee's most immediate supervisor outside of the bargaining unit within five (5) days of the time that the person knew or ought to have known of the occurrence causing the grievance. The supervisor shall attempt to make a mutually satisfactory adjustment and, in any event, shall be required to give an answer within five (5) days.

Step 2: The grievance shall be considered settled in Step 1 unless within five (5) days after the supervisor's answer is due, the grievance is reduced to writing and presented to the department head. The department head shall respond to the grievance in writing within fifteen (15) days.

Step 3: If the grievance is not settled at the second step, either party may request one (1) mediation meeting before a mediator selected by the Wisconsin Employment Relations Commissions, (sic) and thereafter, whether the mediation session is utilized or not, if the grievance is not settled, either party may take the matter to arbitration as hereinafter provided.

Section - 4 Arbitration:

(a) The grievance shall be considered settled in Step 3 above unless within ten (10) days after the last response is received, or due, the dissatisfied party (either party) shall request in writing to the other that the dispute be submitted to an impartial arbitrator.

(b) The impartial arbitrator shall, if possible, be

mutually agreed upon by the parties. If agreement on the arbitrator is not reached within fifteen (15) days after the date of the notice requesting arbitration, or if the parties do not agree upon a method of selecting an arbitrator, then the Wisconsin Employment Relations Commission shall be requested to submit a panel of five (5) arbitrators. The parties shall alternately strike names until one (1) remains, and the party requesting arbitration shall be the first to strike a name.

(c) The arbitrator in making his/her binding award shall be subject to the following conditions and limitations:

(1) Such arbitrator shall have no power or jurisdiction to change, add to, or subtract from, or to modify or nullify any of the provisions of this Agreement for the purpose of a particular case.

(2) No arbitrator's award shall have any standing as a precedent in any subsequent arbitration.

(3) Such arbitrator shall, within the above limitations, render a decision which in his/her judgment will be equitable, knowing that nothing contained herein shall deprive either party of their right to relief under law.

(d) All costs of all arbitrations shall be borne equally by the Town and the Association, except that the cost of a reporter and one (1) original transcript of any proceeding before the arbitrator for which either party shall request a reporter, shall be paid by the party making the request. Such original transcript shall be for the use of the arbitrator and copies shall be supplied to either party upon request and the payment of the cost thereof. It is agreed that each party shall bear the cost of its own witnesses.

Section 5 - General Grievances: Town grievances or Association grievances involving the general interpretation, application or compliance with this Agreement may be initiated with the third step of the procedure.

On or about August 16, 1994, Respondent Thomsen, filed the following grievance with the Town:

TOWN OF MADISON PROFESSIONAL POLICE ASSOCIATION
W.P.P.A. Local 111
16TH AUG. 1994

TO: Lt. John Gould; Town of Madison Police Department
FROM: Chris Thomsen; T.M.P.P.A. Union President
RE: Notice of First Step grievance related to the
termination of Sgt. C. Thomsen

This is to confirm the notification of first step grievance as per our telephone conversation of 16Th (sic) Aug. 1994 @ 11:45 hrs.

It is the Union's position that the termination is not within management rights and there is no "just cause" for the termination.

Please send your response, in writing, to Mr. Steven Urso at W.P.P.A. headquarters.

cc: W.P.P.A.
files

This grievance was denied at Step 1 by Lt. Gould. Thereafter, WPPA Representative Steven J. Urso provided Town Police Chief Wayne M. Romeis with the following:

RE: Chris Thomsen Grievance (Termination)

Dear Chief Romeis:

Pursuant to Article VII, Section 3, of the current labor agreement, the Association is moving the above-captioned grievance to Step 2. Enclosed please find a copy of the grievance and the denial at Step 1.

Thank you for your assistance.

On or about September 20, 1994, Chief Romeis provided WPPA Representative Urso with the following:

RE: Christian Thomsen Grievance

Dear Mr. Urso:

I have reviewed this grievance as submitted. It is the opinion of the Town that the termination of Christian Thomsen does not violate the contract where an employee has admitted the physical inability to perform the essential functions of the position.

Therefore, the grievance is denied.

On or about September 22, 1994, WPPA Representative Urso submitted the following letter to the Wisconsin Employment Relations Commission (WERC):

RE: Town of Madison (Police Department)
Christian Thomsen Grievance, Termination

Dear Mr. Hempe:

The Association is requesting mediation for the above-referenced Grievance. Enclosed please find copies of correspondence pertaining to the grievance and a copy of the current contract.

The Town's representative is Mr. Michael J. Westcott, Axley Brynelson, P. O. Box 1767, Madison, Wisconsin 53701-1767.

Thank you for your assistance.

WPPA Representative Urso sent a copy of this letter to Town Attorney Westcott. Thereafter, the parties agreed to meet with the WERC appointed mediator on January 17, 1995. At the mediation session, the Town was represented by Attorney Kirk Strang and WPPA was represented by WPPA Representative Urso. Respondent Thomsen attended the mediation session in his capacity as grievant and, in that capacity, was represented by WPPA Representative Urso. At the conclusion of the mediation session, Town Attorney Strang, WPPA Representative Urso, Respondent Thomsen,

and other individuals, met in joint session. At that time, Town Attorney Strang and WPPA Representative Urso discussed settlement terms. At the conclusion of this discussion, Town Attorney Strang summarized the terms of settlement. Neither WPPA Representative Urso, nor Respondent Thomsen, objected to this summarization. WPPA Representative Urso advised Town Attorney Strang that the settlement would have to be reviewed and approved by WPPA Attorney Harfst.

5. During the mediation session, Respondent Thomsen advised WPPA Representative Urso that Respondent Thomsen would not sign any settlement until the settlement had been reviewed and approved by Respondent Thomsen's attorneys. At the time of this conversation, WPPA Representative Urso knew that Respondent Thomsen had a pending Sec. 40.65, Stats., claim, as well as an EEOC claim against the Town. At the time of the mediation session, Respondent Thomsen had also filed a workers' compensation claim against the Town and was consulting with an attorney regarding other potential claims against the Town. At no time during the mediation session was Town Attorney Strang advised that Respondent Thomsen would not sign the settlement until it had been reviewed and approved by Respondent Thomsen's attorneys. Following the mediation session, WPPA Representative Urso contacted Town Attorney Strang and advised him that Attorney Harfst had approved the settlement.

6. On or about February 9, 1995, Town Attorney Strang sent WPPA Representative Urso a letter which included the following:

I understand that you had an emergency situation arise today, and therefore, our meeting has been canceled. Please contact our office to reschedule as soon as it is convenient for you to do so.

Enclosed for your review is a memorandum of understanding. Upon review of same, please let me know if you have any questions or concerns. If not, please arrange for Mr. Thomsen to sign the enclosed and return the original to our office so that we can secure signatures from the appropriate Town officials.

As always, please feel free to call if you have any questions regarding this matter.

This letter enclosed the following "Memorandum of Understanding" which had been prepared by Town Attorney Strang:

MEMORANDUM OF UNDERSTANDING

The parties to this agreement, the Town of Madison (hereinafter the "Town"), Wisconsin Professional Police Association (hereinafter the "Union"), and Chris Thomsen (hereinafter "Mr. Thomsen"), have reached certain understandings that they wish to reduce to writing. Therefore, the parties do hereby agree as follows:

1. The Union and Mr. Thomsen will provide the Town with all necessary medical information required for the Town to certify in good faith that Mr. Thomsen was injured while performing his duties as a police officer pursuant to Sec. 40.65, Wis. Stats. In addition, the Union and Mr. Thomsen agree to provide the Town with any and all waivers necessary to secure such information.
2. Upon Mr. Thomsen's and the Union's satisfaction of the duties set forth in paragraph 1, above, the Town will certify that Mr. Thomsen's injuries incurred in May, 1994, were work related on Mr. Thomsen's Duty Disability Application and any related documentation required by the Department of Employee Trust Funds, Wisconsin Retirement System.
3. The Union and Mr. Thomsen agree to stay and/or refrain from commencing any and all grievances or other actions he has or may have against the Town of whatever kind or nature while Mr. Thomsen's Duty Disability Application is processed. Further, upon favorable resolution of Mr. Thomsen's Duty Disability Application, all such claims and any and all grievances shall be dropped and shall not be refiled in any other form in any other forum, consistent with paragraph 5, below.
4. Upon satisfaction of the parties' obligations set forth in paragraphs 1, 2 and 3, above, Mr. Thomsen will be treated as having retired in good standing due to a duty disability.
5. In consideration of the foregoing, Mr. Thomsen and the Union hereby agree to fully waive and forever release discharge the Town, its present and former

agents, assigns and subsidiaries of any and all claims, demands, damages, actions and causes of action of whatever kind or nature which they have or may have arising out of Mr. Thomsen's employment, his separation from employment, and any and all other employment matters without limitation including, but not limited to, matters arising at law, in equity, under the Town's collective bargaining agreement with the Union, or in state or federal agencies, courts, or other tribunals of competent jurisdiction.

6. This Memorandum of Understanding shall not constitute an admission of wrongdoing by either party, and, further, the parties to this agreement recognize that this agreement is non-precendential (sic) and that this agreement may not be utilized in any way by any person or party as evidence, except to enforce its terms or to rebut claims inconsistent with either this agreement or the circumstances giving rise to this agreement.
7. The parties mutually recognize that this agreement is a full and complete settlement, there are no other claims hereto, and the parties reserve no other rights or obligations except those specifically set forth herein.

WHEREFORE, the parties have read the foregoing agreement, fully understand its terms, have had an opportunity to consult their representatives concerning this agreement, and agree to be forever bound thereto.

FOR THE TOWN

FOR THE UNION

Name

Name

Title

Title

Date

Date

Mr. Chris Thomsen

Date

On or about March 7, 1995, WPPA Representative Urso provided Respondent Thomsen with a letter which stated the following:

RE: Memorandum of Understanding

Dear Chris:

I am forwarding to you in writing my request that you again review the enclosed memorandum of understanding. It is my understanding from our last conversation that you had objections to paragraph 5. I also understood, however, that you did not have substantive disagreements with the document other than with paragraph 5.

I am recommending to you that you sign off on it as soon as possible. My desire is to see you obtain your Wis. Stats. 40.65 benefit as soon as possible. If by amending paragraph 5 in a manner which meets with your approval and the approval of the Town, we can reach an agreement on this matter, then I propose we do just that as soon as possible.

Frankly, my goal is to help you obtain all the benefits to which you are entitled and hopefully action on this memorandum will serve to expedite the process.

The "Memorandum of Understanding" enclosed in this letter is the "Memorandum of Understanding" which had been prepared by Town Attorney Strang. Prior to sending this letter, WPPA Representative Urso had discussed the "Memorandum of Understanding" with Respondent Thomsen. During this discussion, WPPA Representative Urso recommended that Respondent Thomsen sign the "Memorandum of Understanding." Respondent Thomsen responded that he did not believe that the "Memorandum of Understanding" accurately reflected the settlement agreement which had been reached during mediation. Following receipt of the "Memorandum of

Understanding," Respondent Thomsen provided copies of the "Memorandum of Understanding" to his attorneys. Each of his attorneys advised Respondent Thomsen not to sign the "Memorandum of Understanding." Thereafter, Respondent Thomsen advised WPPA Representative Urso that the "Memorandum of Understanding" had been reviewed by Respondent Thomsen's attorneys and that these attorneys had advised Respondent Thomsen not to sign the "Memorandum of Understanding." At all times material hereto, Respondent Thomsen has refused to sign the "Memorandum of Understanding." By letter dated April 5, 1995, WPPA Representative Urso advised Town Attorney Strang of the following:

RE: Chris Thomsen Termination

Dear Mr. Strang:

You and I have had occasion to review this matter previously, and on March 7, 1995, I forwarded to Mr. Thomsen a copy of the memorandum of understanding which we had put together as a result of our mediation session on January 30, 1995. Mr. Thomsen has declined to sign off on the memo, and the Association at this point in time is notifying the Town of Madison and Mr. Thomsen that we are withdrawing the grievance and will not be proceeding further with this matter.

If you have any questions, please feel free to contact me.

7. On June 7, 1995, the Town filed a complaint of prohibited practices against the WPPA and Christian Thomsen alleging that each Respondent had committed prohibited practices by refusing to execute a collective bargaining agreement, refusing to bargain in good faith and/or violating the terms of a collective bargaining agreement. At hearing on the complaint, the Respondent WPPA and the Town entered into a settlement agreement pursuant to which the Town withdrew its complaint against the Respondent WPPA. WPPA Representative Urso and Town Attorney Strang agree that the "Memorandum of Understanding" accurately reflects the settlement which was reached at the mediation session of January 17, 1995. Respondent Thomsen denies that the "Memorandum of Understanding" accurately reflects the settlement which was reached at the mediation session of January 17, 1995. Respondent Thomsen maintains that he did not agree to waive any and all claims against the Town as set forth in Paragraph Five of the "Memorandum of Understanding."

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

CONCLUSIONS OF LAW

1. Respondent Thomsen was not acting on behalf of the WPPA when he refused to execute the "Memorandum of Understanding."
2. There are three parties to the settlement of January 17, 1995, i.e., the WPPA, the Town and Respondent Thomsen.
3. Respondent Thomsen's agreement to the settlement of January 17, 1995 was conditioned upon having the settlement reviewed and approved by Respondent Thomsen's attorney.
4. The "Memorandum of Understanding" is not a valid grievance settlement agreement.
5. Respondent Thomsen has not violated a collective bargaining agreement, refused to bargain in good faith, or refused to execute a collective bargaining agreement previously agreed upon.
6. Respondent Thomsen has not violated Sec. 111.70(3)(b)3, Sec. 111.70(3)(b)4, or Sec. 111.70(3)(c), 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 against Respondent WPPA and the complaint against

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

(footnote continued on Page 13)

Respondent Thomsen be, and the same hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin, this 28th day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

1/ (footnote continued from Page 12)

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

TOWN OF MADISON

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint filed on June 7, 1995, alleges that Respondent WPPA and Respondent Thomsen committed prohibited practices by refusing to execute a collective bargaining agreement by refusing to bargain in good faith and/or violating the terms of a collective bargaining agreement previously agreed upon. At hearing on the complaint, the Complainant withdrew its complaint against WPPA and, for that reason, the complaint against WPPA has been dismissed. The remaining Respondent, Christian Thomsen, denies that he has committed the prohibited practices alleged in the complaint.

COMPLAINANT'S POSITION

The Commission has recognized the following: (1) a grievance settlement agreement is a collective bargaining agreement within the meaning of MERA; (2) a collective bargaining representative and an individual municipal employee who is acting on behalf of the collective bargaining representative violate Sec. 111.70(3)(b)3, Stats., when they refuse to execute a grievance settlement; and (3) a collective bargaining representative who violates a grievance settlement agreement, and a grievant who violates a grievance settlement agreement, also violates Sec. 111.70(3)(b)4, Stats.

The "Memorandum of Understanding" is a grievance settlement and, thus, is a collective bargaining agreement within the meaning of MERA. At all times material hereto, Respondent Thomsen was acting on behalf of the collective bargaining representative. By refusing to execute the settlement agreement, Respondent Thomsen has violated Sec. 111.70(3)(b)3, Stats.

The Town and WPPA agree that the "Memorandum of Understanding" accurately reflects the grievance settlement agreement reached in mediation. Respondent Thomsen's assertion that certain terms of the "Memorandum of Understanding" are inaccurate is contrary to the record evidence, as is Respondent Thomsen's assertion that there was no meeting of the minds on the terms of the settlement agreement.

The grievance settlement agreement reached by the Town and WPPA is binding upon Respondent Thomsen. Respondent Thomsen has refused to perform under the terms of this agreement and, thus, has violated a collective bargaining agreement previously agreed upon by the parties in violation of Sec. 111.70(3)(b)4, Stats.

By repudiating the mediated settlement, Respondent Thomsen has unilaterally repudiated the grievance procedure contained in the parties' collective bargaining agreement and, thus, has violated Sec. 111.70(3)(b)4, Stats. Respondent Thomsen is a "person" who has violated Sec. 111.70(3)(b)3 and/or 4, Stats., and, as such, has violated Sec. 111.70(3)(c), Stats.

Respondent Thomsen should be found to have violated Sec. 111.70(3)(b)3 and 4, Stats., and Sec. 111.70(3)(c), Stats. Additionally, Respondent Thomsen should be ordered to execute the grievance settlement set forth in the "Memorandum of Understanding."

RESPONDENT THOMSEN

There are five principles of law applicable to the present facts: (1) the Commission lacks jurisdiction to deprive Respondent Thomsen of claims wholly external to a collective bargaining agreement; (2) the Town's purported settlement fails as a matter of law; (3) the Town's assertion of a settlement fails on the facts of this case; (4) the Town's claim of a binding settlement fails due to a lack of authority on the part of the WPPA representative to represent Respondent Thomsen regarding claims external to the collective bargaining agreement; and (5) Respondent Thomsen has no duty to bargain as an individual.

The purported settlement document attempts to release all claims. By definition, such a release encompasses claims which are external to the collective bargaining agreement. Thus, the purported settlement is not a collective bargaining agreement within the meaning of MERA.

Controlling law holds that a collective bargaining agreement and/or agent cannot waive federal rights which accrue to individuals. A union has no authority to waive individual, constitutional or statutory rights. The Commission does not have subject matter jurisdiction to enforce a settlement of claims which are external to the collective bargaining relationship.

The purported settlement agreement does not comport with the requirements of Sec. 807.05, Stats. Therefore, it is unenforceable as a matter of law.

The Town asserts that there was a waiver of all claims. Respondent Thomsen testifies that only the grievance and a potential ADA claim were waived. Since the parties have radically different understandings of the tentative agreement, there has not been a meeting of the minds.

The settlement was not final and binding. Rather, it was conditioned upon review of the settlement by Respondent Thomsen's attorneys.

The Town never certified Respondent Thomsen as disabled for purposes of Sec. 40.65, Stats.; rather, the Town forced Respondent Thomsen to wait years for a hearing before the Department of Workforce Development and then failed to appear at this hearing. Even if a binding

contract exists, the Town breached that agreement by failing to take the action necessary to allow Respondent Thomsen to obtain his Sec. 40.65, Stats., benefits.

Respondent Thomsen appeared at the mediation session as the grievant and not as a representative of the Union. The Town's protestations that it had no idea that the Union and Respondent Thomsen were two distinct parties is not credible. An individual employe is not a proper party to a refusal to bargain charge pursuant to Sec. 111.70(3)(b)3, Stats., where, as here, he is not acting on behalf of the Union.

There is no binding grievance settlement which can be enforced by the Commission. The complaint must be dismissed.

DISCUSSION

Jurisdiction

The Town claims that Respondent Thomsen has violated Sec. 111.70(3)(b)3 and 4, Stats., as well as Sec. 111.70(3)(c), Stats. For the reasons discussed in Town of Madison, Dec. No. 28647-A (Burns, 6/96), the Commission has jurisdiction to hear and decide these claims.

Sec. 111.70(3)(b)3

Sec. 111.70(3)(b), Stats., states that:

It is a prohibited practice for a municipal employe, individually or in concert with others:

...

3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employes in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

...

A grievance settlement agreement is a collective bargaining agreement within the meaning of MERA. 2/

2/ Brown County, Dec. No. 27624-A (Nielsen, 4/93); Oneida County, Dec. No. 15374-B (Yaeger, 12/77), affd, Dec. No. 15374-C (WERC, 6/78)

It is the recognized or certified exclusive collective bargaining representative of municipal employes which has the statutory duty to bargain with a municipal employer. 3/ Thus, for an individual municipal employe to violate Sec. 111.70(3)(b)3, Stats., the employe must be acting on behalf of the recognized or certified exclusive collective bargaining representative.

The Town argues that, at all times material hereto, Respondent Thomsen has been acting on behalf of the "recognized exclusive collective bargaining representative"; that the "Memorandum of Understanding" is a grievance settlement agreement; and, thus, Respondent Thomsen's refusal to execute the "Memorandum of Understanding" is a refusal to execute a collective bargaining agreement previously agreed upon in violation of Sec. 111.70(3)(b)3, Stats.

3/ As Examiner McLaughlin has stated in Amery School District, Dec. No. 26138-A (2/90):

Section 111.70(1)(a), Stats., defines "Collective bargaining" as the "mutual obligation of a municipal employer . . . and the representatives of its employes . . . to resolve questions arising under . . . an agreement, with respect to wages, hours and conditions of employment". Section 111.70(3)(a)4, Stats., enforces the duty defined in Sec. 111.70(1)(a), Stats., by making a refusal of a municipal employer to "bargain collectively with a representative of a majority of its employes" a prohibited practice. The duty defined and enforced by the Municipal Employment Relations Act thus extends to the District as a municipal employer and to the NUE as the majority representative of the bargaining unit composed of the District's teachers. In the absence of a valid defense, collective bargaining by a municipal employer with individual members of a bargaining unit is proscribed by Sec. 111.70(3)(a)4, Stats.

Respondent Thomsen filed the grievance as Union President. The body of the grievance states that 'It is the Union's position that the termination is not within management rights and there is no "just cause" for the termination.' It is reasonable to conclude, therefore, that Respondent Thomsen did not file the grievance as an individual employe, but rather, filed the grievance on behalf of the WPPA.

The grievance filed by Respondent Thomsen specifically requested that the Town respond, in writing, to Mr. Steven Urso at WPPA headquarters. The Town honored this request. Thereafter, WPPA Representative Urso processed the grievance on behalf of WPPA.

As set forth in WPPA Representative Urso's letter of September 22, 1994, the Association requested Step 3 mediation. At the mediation session, WPPA Representative Urso spoke on behalf of the WPPA and negotiated a grievance settlement agreement on behalf of the WPPA. Contrary to the argument of the Town, Respondent Thomsen did not represent WPPA at "all times material hereto."

On at least two occasions, WPPA Representative Urso advised Respondent Thomsen to sign the "Memorandum of Understanding." Contrary to the advice of the WPPA, Respondent Thomsen has refused to sign the "Memorandum of Understanding."

In summary, Respondent Thomsen was not acting on behalf of the WPPA when he refused to execute the "Memorandum of Understanding." Thus, assuming *arguendo*, that the "Memorandum of Understanding" is a "collective bargaining agreement previously agreed upon" within the meaning of Sec. 111.70(3)(b)3, Stats., Respondent Thomsen's conduct in refusing to execute the "Memorandum of Understanding" does not violate Sec. 111.70(3)(b)3, Stats.

Sec. 111.70(3)(b)4

Sec. 111.70(3)(b), Stats., states that:

It is a prohibited practice for a municipal employe, individually or in concert with others:

...

4. 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 awards as final and

binding upon them.

...

As discussed above, a grievance settlement agreement is a collective bargaining agreement within the meaning of MERA. Under Commission case law, a collective bargaining representative who violates a grievance settlement agreement violates Sec. 111.70(3)(b)4, Stats. 4/ It has also been found that a grievant who violates a grievance settlement agreement violates Sec. 111.70(3)(b)4, Stats. 5/

The Town argues that the "Memorandum of Understanding" is a grievance settlement agreement; that Respondent Thomsen has violated this "Memorandum of Understanding"; and, thus, Respondent Thomsen has violated Sec. 111.70(3)(b)4, Stats. The initial question to be determined is whether or not there is a valid grievance settlement agreement.

As the Town recognizes in the introductory paragraph of the "Memorandum of Understanding" there are three parties to the settlement which was reached on January 17, 1995, *i.e.*, the WPPA, the Town, and Respondent Thomsen. Respondent Thomsen's agreement to the settlement of January 17, 1995, was conditioned upon having his attorneys approve the settlement. Since Respondent Thomsen's attorneys did not approve the "Memorandum of Understanding," Respondent Thomsen is not obligated to sign the "Memorandum of Understanding."

To be sure, on January 17, 1995, when Town Attorney Strang recited the terms of the settlement, the Town had not been advised that Respondent Thomsen's agreement to the settlement was conditional. However, by advising the individual who was representing Respondent Thomsen at the mediation session, *i.e.*, WPPA Representative Urso, that Respondent Thomsen would not sign any settlement unless the settlement had been approved by Respondent Thomsen's attorneys, Respondent Thomsen preserved his right to have the settlement reviewed and approved by his attorneys.

The "Memorandum of Understanding" is not a valid grievance settlement agreement because it has not been agreed to by all three parties to the settlement. Thus, the "Memorandum of Understanding" is not a collective bargaining agreement within the meaning of Sec. 111.70(3)(b)4, Stats. Contrary to the argument of the Town, Respondent Thomsen does not have a Sec. 111.70(3)(b)4, Stats., duty to execute, or comply with the terms of the "Memorandum of Understanding."

4/ Madison Metropolitan School District, Dec. No. 17514-C (McGilligan, 2/82); aff'd, Dec. No. 17514-D (WERC, 2/83).

5/ South Shore School District, Dec. No. 16935-A (Hawks, 12/79); aff'd by operation of law, Dec. No. 16935-B (WERC, 1/80).

Article VII, Section 3, Step 3, of the collective bargaining agreement provides a mechanism for mediating grievances. Contrary to the argument of the Town, this provision of the collective bargaining agreement does not require Respondent Thomsen to execute the "Memorandum of Understanding." Nor does it require Respondent Thomsen to comply with the terms of the "Memorandum of Understanding." Contrary to the argument of the Town, Respondent Thomsen has not repudiated the contractual grievance procedure in violation of Sec. 111.70(3)(b)4, Stats.

Sec. 111.70(3)(c)

Section 111.70(3)(c), Stats., makes it "a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b)." Complainant Town alleges that Respondent Thomsen is a "person" who has violated Sec. 111.70(3)(b)3 and 4, Stats., and, thus, has violated Sec. 111.70(3)(c), Stats.

As discussed above, Respondent Thomsen has not violated Sec. 111.70(3)(b)3 and 4, Stats. Thus, there is no merit to the Town's allegation that Respondent Thomsen has violated Sec. 111.70(3)(c), Stats.

Conclusion

The Town has not established by a clear and satisfactory preponderance of the evidence that Respondent Thomsen has violated Sec. 111.70(3)(b)3, Sec. 111.70(3)(b)4, or Sec. 111.70(3)(c), Stats. Accordingly, the complaint against Respondent Thomsen has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 28th day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner