

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-C

Appearances:

Lathrop & Clark, by **Attorney Kirk D. Strang**, 122 West Washington Avenue, Suite 1000, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the Town of Madison.

Lawton & Cates, S.C., by **Attorney John C. Talis**, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Christian Thomsen.

**ORDER AFFIRMING AND MODIFYING EXAMINER'S
FINDINGS OF FACT AND AFFIRMING IN PART AND
REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW AND ORDER**

On August 28, 1997, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondent Christian Thomsen had not committed prohibited practices within the meaning of Secs. 111.70(3)(b)3 or 4, or (3)(c), Stats. She therefore dismissed the complaint.

Complainant Town of Madison timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received October 16, 1997.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

No. 28647-C

Having considered the matter and being fully advised in the premises, we hereby make and issue the following

ORDER

- A. Examiner Findings of Fact 1-7 are affirmed.
- B. The Commission makes the following additional Finding of Fact:
 - 1. The Memorandum of Understanding accurately reflects the settlement agreement reached by Strang, Urso and Thomsen on January 17, 1995.
- C. Examiner's Conclusion of Law 1 is affirmed as modified to read:

Respondent Thomsen was not acting as a representative of the Wisconsin Professional Police Association during the grievance settlement negotiations of January 17, 1995.
- D. Examiner Conclusion of Law 2 is affirmed.
- E. Examiner Conclusions of Law 3-6 are reversed and set aside and the following Conclusion of Law is made:
 - 3. By failing to sign the Memorandum of Understanding, Respondent Thomsen did not violate Sec. 111.70(3)(b)3, Stats. but did violate Sec. 111.70(3)(b)4, Stats.
- F. Examiner Order is affirmed to the extent it dismisses the complaint as to Respondent Wisconsin Professional Police Association and as to the Secs. 111.70(3)(b)3 and (3)(c), Stats. allegations against Respondent Thomsen. Examiner Order is reversed to the extent it dismisses the alleged violation of Sec. 111.70(3)(b)4, Stats, and the following Order is made in that regard.

ORDER

Respondent Thomsen shall sign the Memorandum of Understanding.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of May, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

TOWN OF MADISON

**MEMORANDUM ACCOMPANYING
ORDER AFFIRMING AND MODIFYING EXAMINER'S
FINDINGS OF FACT AND AFFIRMING IN PART AND
REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW AND ORDER**

BACKGROUND

In its complaint, Town of Madison alleged that Respondents Wisconsin Professional Police Association (WPPA) and Christian Thomsen violated Secs. 111.70(3)(b)3 and 4 and (3)(c), Stats. by bargaining in bad faith, refusing to execute a collective bargaining agreement, and violating a collective bargaining agreement. The Town asked that Respondents be ordered to execute the Memorandum of Understanding reached by the Town, WPPA and Thomsen and to pay the Town's attorney's fees.

Respondent Thomsen moved to dismiss the complaint as to Thomsen and Respondent WPPA filed an answer seeking dismissal as to it. The Examiner issued a pre-hearing Order (DEC. NO. 28647-A) denying the requests that the complaint be dismissed and the matter proceeded to hearing.

At hearing, the Town withdrew its complaint against WPPA.

The Examiner's Decision

As to the allegation that Respondent Thomsen engaged in bad faith bargaining and thereby violated Sec. 111.70(3)(b)3, Stats. by refusing to sign the Memorandum, the Examiner concluded that because Thomsen was not acting as a representative of WPPA, his refusal to sign the Memorandum did not violate Sec. 111.70(3)(b)3, Stats.

Turning to the contention that Thomsen's refusal to sign the Memorandum constituted a violation of a collective bargaining agreement and thus a violation of Sec. 111.70(3)(b)4, Stats., the Examiner concluded that Thomsen conditioned his willingness to settle upon the review of the settlement agreement by his attorneys. Because his attorneys advised Thomsen not to sign the resultant Memorandum of Agreement, the Examiner concluded that no valid agreement existed. Thus, she determined that Thomsen's refusal to sign the Memorandum did not violate Sec. 111.70(3)(b)4, Stats.

Having concluded that Thomsen did not violate Sec. 111.70(3)(b)3 or 4, Stats., the Examiner also dismissed the alleged related violations of Sec. 111.70(3)(c), Stats.

POSITIONS OF THE PARTIES ON REVIEW

The Town

The Town asserts the Examiner erred when she dismissed the complaint against Thomsen and asks that she be reversed.

The Town contends that the Memorandum accurately reflects the agreement reached by the parties and that Thomsen should be compelled to sign the Memorandum to remedy his violations of Secs. 111.70(3)(b)3 and 4 and (3)(c), Stats.

Citing Commission precedent which the Town contends the Examiner failed to follow, the Town argues that Thomsen cannot rely on the contingency of attorney review because he failed to communicate that contingency to the Town when the settlement was reached. Thus, the Town asserts that Thomsen is obligated to sign the Memorandum and that his failure to do so violated Sec. 111.70(3)(b)4, Stats.

The Town argues the record also supports a conclusion that Thomsen was acting both as the grievant and as a representative of WPPA during the settlement negotiations. Pointing to Thomsen's status as Local President, the Town alleges that because Thomsen was a WPPA representative, his refusal to sign the Memorandum also violates Sec. 111.70(3)(b)3, Stats.

The Town urges rejection of Thomsen's claim that the Memorandum is unenforceable to the extent it waives federal causes of action. The Town contends that litigants are free to waive such causes of action when settling a grievance and that such waivers are enforceable under the Municipal Employment Relations Act. The Town argues that Thomsen has presented no persuasive precedent to the contrary.

Given the foregoing, the Town asks that Thomsen be ordered to sign the Memorandum.

Thomsen

Thomsen urges affirmance of the Examiner.

He argues that the Examiner's Findings of Fact accurately portray his lack of understanding that the grievance settlement waived any federal claims. He further asserts the Examiner correctly concluded that he was not a WPPA representative during the settlement negotiations. Thomsen notes in this regard that WPPA ultimately dropped the grievance without his consent and that WPPA acknowledges that it had no authority to represent him as to any claims external to the bargaining agreement.

In the alternative, Thomsen asserts the Commission lacks jurisdiction to enforce a settlement agreement which covers claims external to the bargaining agreement.

Given the foregoing, Thomsen asks that the complaint against him be dismissed.

DISCUSSION

We affirm the Examiner's dismissal of the alleged Sec. 111.70(3)(b)3, Stats. duty to bargain violation because she correctly determined that Thomsen was not acting as a representative of WPPA when the settlement agreement was bargained. However, we reverse her dismissal of the alleged Sec. 111.70(3)(b)4, Stats., breach of contract violation because we are satisfied that: (1) the Memorandum accurately reflects the agreement reached by the Town, WPPA and Thomsen; (2) we have jurisdiction to enforce the terms of the Memorandum; and (3) Thomsen failed to advise the Town that his agreement to the Memorandum was contingent upon his attorneys' review and thereby lost his ability to rely on this contingency as a valid defense.

As to the alleged violation of Sec. 111.70(3)(b) 3, Stats., the Examiner correctly acknowledged that Thomsen identified himself as the "Union President" when he filed the grievance over his termination and stated in the grievance that "It is the Union's position that the termination is not within management rights and there is no 'just cause' for the termination." However, as the Examiner also found, the record makes clear that beginning with Step 2 of the grievance procedure, WPPA representative Urso assumed and thereafter retained status as the representative of the WPPA for the purposes of representing Thomsen as to his grievance with the Town. Thus, because the duty to bargain runs between the bargaining representative of the employes (WPPA) and the Town and because Thomsen was not the representing WPPA's bargaining rights or interests during the settlement discussions, his failure to execute the Memorandum is not actionable under Secs. 111.70(3)(b)3 or (3)(c), Stats.

However, a different result is appropriate when Thomsen's conduct is viewed in the light of a Sec. 111.70(3)(b)4 Stats. violation of contract claim.

Section 111.70(3)(b)4, Stats. makes it a prohibited practice for a municipal employe to violate a collective bargaining agreement. It is undisputed that grievance settlement agreements are collective bargaining agreements within the meaning of Sec. 111.70(3)(b)4, Stats. However, Thomsen asserts his refusal to sign the grievance settlement Memorandum does not violate Sec. 111.70(3)(b)(4). Stats. because: (1) the Memorandum does not accurately reflect the settlement terms; (2) his agreement to settle was contingent on his attorneys' review and approval of the Memorandum and that contingency was not satisfied because his attorneys did not approve the Memorandum; and (3) the Commission lacks jurisdiction to enforce those portions of the

settlement agreement which relate to non-contractual claims.

Page 7
Dec. No. 28647-C

As to the contention that the Memorandum is inaccurate, we have made an express Finding of Fact to the contrary. We base our Finding on the testimony of Urso and Strang (and Strang's contemporaneous notes), the individuals who bargained the agreement as adversaries, but who both agree that the Memorandum accurately reflects the terms of the settlement agreement. From our review of the entire record and the context within which the settlement agreement was reached, we find the testimony and evidence presented by Urso and Strang to be more credible and consistent than that of Thomsen and Ratliffe.

Having concluded that the Memorandum accurately reflects the settlement reached, we turn to the question of whether Thomsen is entitled to rely on the contingency of attorney approval as a valid basis for refusing to sign the Memorandum. The Town correctly notes that in CITY OF COLUMBUS, DEC. NO. 27853-B (WERC, 6/95), we concluded that a party cannot refuse to enter into a collective bargaining agreement based upon the desire for subsequent review by a third party unless the party desiring such review advises the other party of such a contingency at the time the agreement is reached. Although that conclusion was reached in the context of a duty to bargain/contract ratification dispute, we find that holding applicable to this dispute. As is true for a union and employer when bargaining a contract, parties bargaining a grievance settlement are entitled to presume that the settlement is not subject to any unstated contingencies. If a grievant such as Thomsen 1/ states no such contingencies to the opposing party (in this case the Town), then there is no "ratification" process applicable to the grievant. Such a grievant is bound to the settlement to which he or she agrees and violates the grievance settlement "collective bargaining agreement" if he or she fails to comply with their obligations under same. SOUTH SHORE SCHOOL DISTRICT, DEC. NO. 16935-A (Hawks, 12/79) AFF'D BY OPERATION OF LAW, DEC. NO. 16935-B (WERC,1/80).

1/ Given his position within the Local Union and viewing the record as a whole, we are satisfied Thomsen is experienced in the collective bargaining process. We are further satisfied that he had the opportunity to advise Strang of the contingency of attorney review and knowingly chose to remain silent-even when Urso advised the Town that the settlement was contingent on the review of a WPPA attorney. Thus, although there might be circumstances involving a naive or misled grievant which would warrant a different result as to the contingency issue, such circumstances are clearly not present here.

The Examiner found that the Town was never advised of the contingency of review by

Thomsen's personal attorneys during the settlement negotiations, including the portion of the negotiations during which the settlement was summarized by Strang in the presence of Thomsen

Page 8
Dec. No. 28647-C

and Urso and at which time Urso advised Strang that the settlement was contingent on the review of a WPPA attorney. We affirm that Finding as being supported by the record, particularly through the testimony of Urso. Viewing the record as a whole, we again find Urso's testimony to be more credible than that of Thomsen. Having concluded that the Town was never advised of the contingency of review by Thomsen's attorneys, we find that he cannot rely on that contingency as a valid basis for refusing to sign the Memorandum.

Lastly, we are confronted with the question of whether a grievance settlement agreement can waive non-contractual claims and, if so, whether there is any jurisdictional impediment to enforcement of such waiver provisions in the context of a Sec. 111.70(3)(b)4, Stats. proceeding. We have reviewed the cases cited by Thomsen in support of these jurisdictional arguments and concur with the Town's view that none of them preclude waiver of non-contractual claims in a grievance settlement agreement or hold that such a settlement agreement is unenforceable through state administrative proceedings. Indeed, in our experience, such waivers are commonplace when discharge grievances are settled and, like any other bargaining agreement, are enforceable before this agency. We also reject Thomsen's claim that the settlement agreement is not binding because it does not meet the requirements of Sec. 807.05, Stats. Chapter 807 sets forth "Miscellaneous Provisions" applicable to "Civil Procedure" and is not applicable to our administrative proceedings.

Given all of the foregoing, we have reversed the Examiner's dismissal of the complaint as to the Sec. 111.70(3)(b)4, Stats. allegation 2/ and have ordered Thomsen to sign the Memorandum.

2/ Having found a violation based on Thomsen's status as a "municipal employe", it is appropriate to dismiss the alleged violation of Sec. 111.70(3)(c), Stats. which was brought against Thomsen as a "person."

Dated at Madison, Wisconsin this 11th day of May, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/ _____
Paul A. Hahn, Commissioner

gjc
G0001G.01