STATE OF WISCONSIN
CIRCUIT COURT BRANCH 1
DANE COUNTY

CHRISTIAN THOMSEN,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, and
TOWN OF MADISON, WISCONSIN,

Respondents.

MEMORANDUM DECISION AND ORDER
Case No.: 98 CV 1437
[Decision No. 28647-D]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

ADMINISTRATIVE AGENCY REVIEW

The matter before the court is Petitioner Christian Thomsen's Wis. Stat. ch. 227 petition for judicial review of a decision of the Wisconsin Employment Relations Commission (Commission), made under the Municipal Employment Relations Act (MERA), Wis. Stats. §§111.70-111.77. The Commission reversed its Examiner in part and found Thomsen in violation of §111.70(3)(b)4 of the MERA. After careful review, the court must affirm the Commission's decision, with modification.

BACKGROUND

Petitioner Thomsen was a law enforcement officer with the Town of Madison (Town) for approximately eight years. The Town is a municipal employer as defined in §111.70(1)(j), Wis. Stats. The Wisconsin Professional Police Association (WPPA) is a labor organization as defined in §111.70(l)(h), and was at all times pertinent to this case the exclusive bargaining

representative for all regular, permanent full-time and regular, permanent part-time employees in the Town of Madison Police Department having the power of arrest. In 1994, the Town terminated Thomsen's employment. Thomsen was represented for collective bargaining purposes by the Town of Madison Professional Police Association (TMPPA), and served as President of the TMPPA. Thomsen filed a grievance concerning his termination on August 16, 1994, and the Town denied the grievance at the first step of the grievance procedure on August 22, 1994. The TMPPA is affiliated with the WPPA, and WPPA Business Representative Steve Urso appealed Thomsen's grievance to step two of the grievance procedure on August 30, 1994. The Town denied the grievance at the second step on September 20, 1994.

Thomsen and the WPPA sought mediation of the grievance on September 22, 1994, and a mediation session was held before representatives of the Commission on January 17, 1995. At the mediation session, the Town was represented by Attorney Kirk Strang and the WPPA was represented by WPPA Representative Urso. 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, Strang, Urso, and Thomsen (along with other individuals) met in joint session, during which Strang and Urso discussed settlement terms. On or about February 9, 1995, Strang reduced to writing a "Memorandum of Understanding" which purported to be a written understanding of what was agreed to by the parties in the joint session, and which provided in part:

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 for 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 cause 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 matter without limitations 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 or 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-precedential (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.

. . . .

Following receipt of the "Memorandum of Understanding," Thomsen advised Urso that the "Memorandum of Understanding" had been reviewed by Thomsen's attorneys and that his attorneys had advised him not to sign the "Memorandum of Understanding." At all times material hereto, Thomsen has refused to sign the "Memorandum of Understanding."

On June 7, 1995, the Town filed a complaint with WERC, alleging that the WPPA and 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 in violation of §§111.70(3)(b)3, 111.70(3)(b)4, and 111.70(3)(c), Wis. Stats. At the hearing on the complaint, the WPPA and the Town entered into a settlement agreement under which the Town withdrew its complaint against the WPPA. One of the main issues considered by the WERC Examiner in her decision was whether the "Memorandum of Understanding" accurately reflected the agreement reached by the parties in grievance mediation. The WERC Examiner made the following findings of fact regarding the mediation and joint sessions:

> 4. . . . At the conclusion of this discussion [the joint session], Town Attorney Strang summarized the terms of the 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.

Examiner's Decision at 6-7.

In a decision dated August 28, 1997, the WERC Examiner dismissed the complaint against Thomsen in its entirety. As to the alleged §111.70(3)(b)4 violation, the Examiner found that by advising the individual who was representing Thomsen at the mediation session, i.e. Urso, that he would not sign any settlement unless it was approved by Thomsen's attorneys, Thomsen preserved his right to have the settlement agreement reviewed by his attorneys. Therefore, since the "Memorandum of Understanding" was not a valid grievance settlement because it was not agreed to by all three parties to the settlement, and was not a collective bargaining agreement within the meaning of §111.70(3)(b)4, Thomsen did not have a duty to execute or comply with the terms of the "Memorandum" and was not in violation of §111.70(3)(b)4, Wis. Stats.

The Town filed a petition with the WERC seeking review of the Examiner's decision. In a decision dated May 11, 1998, the Commission affirmed all of the Examiner's findings of fact and made one additional finding of fact as follows: "The Memorandum of Understanding accurately reflects the settlement agreement reached by Strang, Urso and Thomsen on January 17, 1995." Commission's Decision at 2. The Commission affirmed two of the Examiner's conclusions of law, reversed and set aside four of her conclusions of law and substituted the following conclusion of law: "By failing to sign the Memorandum of Understanding, Respondent Thomsen did not violate Sec. 111.70(3)(b)3, Stats. but did violation Sec. 111.70(3)(b)4, Stats." Commission's Decision at 2. The Commission ultimately affirmed the Examiner's order as to

the dismissal of the §§111.70(3)(b)3 and 111.70(3)(c) claims, but reversed the Examiner's order to the extent that it dismissed the alleged violation of §111.70(3)(b)4 by Thomsen. The Commission thus ordered Thomsen to sign the "Memorandum of Understanding."

Thomsen now appeals the Commission's decision pursuant to ch. 227, Wis. Stats.

STANDARD OF REVIEW

The scope of review for this court is found in § 227.57, Wis. Stats. This court must affirm the Commission's decision unless the court finds a basis for setting aside, remanding, or ordering agency action under a specific provision of § 227.57. Wis. Stat. § 227.57(2). However, this court will reverse or remand a case to the agency if the agency's exercise of discretion is: (1) outside the range of discretion delegated to the agency by law; (2) inconsistent with an agency rule, an officially stated agency policy or a prior agency practice; or (3) is otherwise in violation of a constitutional or statutory provision. Wis. Stat. §227.57(8); Barakat v. DHSS, 191 Wis. 2d 769, 782, 530 N.W.2d 392 (Ct. App. 1995). If the court finds the Commission has "erroneously interpreted a provision of law and a correct interpretation compels a particular action," the court shall set aside or modify the action. Wis. Stat. § 227.57(5). The court must accord due weight to the "expertise, technical competence, and specialized knowledge" of the Commission as well as "discretionary authority conferred upon it." Wis. Stat. § 227.57(10).

The Commission's findings of fact must stand if they are supported by substantial evidence in the record. Wis. Stat. § 227.57(6). "[J]udicial review under ch. 227 is limited to whether the evidence was such that the agency might reasonably make the finding that it did." Boynton Cab. Co. v. ILHR Dept., 96 Wis. 2d 396, 405, 291 N.W.2d 850 (1980). Even if

more than one inference can reasonably be drawn from the evidence, the finding of the agency is conclusive if it is supported by substantial evidence in the record. Village of Whitefish Bay v. WERC, 103 Wis. 2d 443, 448, 309 N.W.2d 17 (Ct. App. 1981).

Although the court is not bound by the Commission's interpretations of law, Local No. 695 v. LIRC, 154 Wis. 2d 75, 82, 452 N.W.2d 368 (1990), the supreme court has set out the appropriate standards of review of an agency's legal and statutory interpretation:

> This court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the *de novo* standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented.

Jicha v. DILHR, 169 Wis. 2d 284, 290-91, 485 N.W.2d 256 (1992) (citations omitted).

DECISION

Petitioner Thomsen has set forth six arguments which he asserts warrant reversal of the Commission's decision. Thomsen first argues that the Commission's decision must be reversed because none of the Commission's conclusions are entitled to any deference. While it is possible that the court may review some of the Commission's conclusions without deference, this by itself does not compel the finding that the Commission's decision must be reversed. Instead, the court will address the level of deference to be accorded the Commission's conclusions as each of Thomsen's arguments are considered.

The second argument raised by Thomsen is that the Commission should be reversed because the Commission violated Thomsen's due process rights by making adverse credibility

findings without consulting the Examiner, which the court will review *de novo*. Respondents maintain that the Commission did not violate Thomsen's due process rights because the Commission did not actually reverse any of the factual findings made by the Examiner. Instead, the Commission specifically affirmed the findings of fact made by the Examiner and added one new finding of fact, namely that "The Memorandum of Understanding accurately reflects the settlement agreement reached by Strang, Urso and Thomsen on January 17, 1995."

Thomsen argues, however, that the addition of this finding of fact is simply a de facto modification or reversal of the Examiner's factual findings. Thomsen cites to Shawley v. Industrial Comm., 16 Wis. 2d 535, 541-42, 114 N.W.2d 872 (1962), for the proposition that

> [w]here credibility of witnesses is at issue, it is a denial of due process if the administrative agency making a fact determination does not have the benefit of the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing.

Likewise, Thomsen refers to Falke v. Industrial Comm., 17 Wis. 2d 289, 295, 116 N.W.2d 125 (1962), wherein our supreme court found that

> there is a constitutional right to the benefit of demeanor evidence which is lost if an administrative agency decides the controversy without the benefit of participation of the hearing officer who heard such testimony, and credibility of a witness is a substantial element in the case.

Based on this reasoning, Thomsen maintains that the Commission's additional finding involved credibility determinations which required consultation with the Examiner. The following is the Commission's explanation for its new finding that the Memorandum of Understanding was an accurate reflection of the settlement agreement reached by Strang, Urso and Thomsen:

> 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 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 [an individual present at the hearing].

Thomsen claims that the Examiner ruled in his favor and did not make any adverse credibility findings against him, whereas the Commission drew negative credibility inferences from the record without first consulting with the Examiner.

Respondents agree that where the credibility of a witness is at issue and the Commission reverses its Examiner and makes contrary findings, then due process requires that the Commission consult with the Examiner regarding credibility and include in a memorandum opinion an explanation for its disagreement with the Examiner. Pieper Elec., Inc. v. LIRC, 118 Wis. 2d 92, 97-98, 346 N.W.2d 464 (Ct. App. 1984). However, in this case, Respondents maintain that the additional finding made by the Commission did not involve any reversal of a credibility determination made by the Examiner, and therefore the Commission was not required to consult with the Examiner before making this finding.

The court agrees with Respondents. In Appleton v. ILHR Dept., 67 Wis. 2d 162, 172, 226 N.W.2d 497 (1974), the supreme court held that

> the failure of the record to affirmatively show that the ILHR commission consulted with the hearing examiner in respect to his impressions and conclusions in regard to the credibility of the witnesses, coupled with the failure of the ILHR commission to prepare a separate statement or memorandum opinion setting forth the reasons, facts and ultimate conclusions relied upon *in rejecting the recommendations of the examiner and in substituting its own findings,* requires that the decision of the circuit court be reversed with directions to remand to the ILHR. (emphasis added)

In reaching its decision in Appleton, the supreme court relied on the following proposition: "Fundamental fairness requires that administrative agencies, as well as courts, set forth the reasons why a fact-finder's findings are being *set aside or reversed,* and spell the basis for

independent findings substituted." Id. at 171 (emphasis added) (quoting Transamerica Ins. Co. v. ILHR Dept., 54 Wis. 2d 272, 284, 195 N.W.2d 656 (1972). Likewise, in Pieper, the court of appeals found:

> Where the credibility of a witness is at issue *and a commission reverses its examiner and makes contrary findings,* due process requires that the commission (1) glean, from the record or from personal consultation with the examiner, the examiner's personal impressions of the material witnesses and (2) include in a memorandum opinion an explanation for its disagreement with the examiner.

118 Wis. 2d at 97-98 (emphasis added). While the Commission in the case at hand did make some credibility determinations in making its additional finding of fact, it did not reverse any of the Examiner's findings or make contrary findings. The extent to which the Examiner commented on the accuracy of the Memorandum of Understanding can be encapsulated by the Examiner's Finding of Fact #4, which states in part: ". . . At the conclusion of this discussion [the joint session], Town Attorney Strang summarized the terms of the settlement. Neither WPPA Representative Urso nor Respondent Thomsen objected to this summarization. . . . " The court finds that the additional finding of fact made by the Commission does not contradict or reverse the findings of fact made by the Examiner, and in fact tends to reinforce the Examiner's finding that the terms of the settlement summarized at the end of the joint session were not objected to by either Urso or Thomsen. Therefore, since the Commission affirmed all of the factual findings of the Examiner and made one new finding that did not reverse the Examiner, the court finds that Thomsen was not denied due process.

The third argument raised by Thomsen is that the Commission plainly exceeded its jurisdiction in attempting to enforce a settlement agreement of claims external to the collective bargaining agreement. Paragraph 5 of the Memorandum of Understanding provides that in

consideration for the Town certifying that Thomsen's injuries were work-related on his Duty Disability Application and treating Thomsen as having retired in good standing, Thomsen would

> 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 cause 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 matter without limitations 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 or competent jurisdiction.

This issue is of particular importance to Thomsen because he currently has a First Amendment claim pursuant to 42 U.S.C. §1983 pending in the Seventh Circuit Court of Appeals. *See* Thomsen v. Romeis, et al., 7th Circuit No. 98-1343. In its decision, the Commission found that it is not precluded from enforcing a waiver of non-contractual claims, and that waivers such as the one found in the Memorandum of Understanding are commonplace when discharge grievances are settled. Commission's Decision at 8. Whether the Commission is authorized to enforce such agreements is a question of law which appears to be one of first impression; therefore, the court will review this issue *de novo*.

Respondents contend that there does not appear to be any legal prohibition against including such a general release in a settlement agreement, and that the Commission is entitled to require Thomsen to sign the written settlement agreement. The court disagrees. It is well-established that an administrative agency is created by the legislature and has only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates. Kimberly-Clark Corp. v. Public Serv. Comm., 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983). The WERC Commission derives its authority from the MERA, which was enacted by the legislature in an effort to encourage voluntary settlement of disputes. Local 60

American Fed. v. Wisconsin Employ., 217 Wis. 2d 602, 608, 579 N.W.2d 59 (Ct. App. 1998). This policy is set forth in the statutes:

> DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining.

Section 111.70(6), Wis. Stats. Section 111.70(l)(a), Wis. Stats., specifically defines "collective bargaining as relating primarily to "wages, hours and conditions of employment." While the court recognizes that the MERA is to be read broadly, Id. at 612, the court finds no statutory authority for the Commission to enforce a settlement agreement which waives a §1983 constitutional claim such as Thomsen's.

In addition, in Wright v. Universal Maritime Serv., 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998), the Supreme Court considered the issue of whether a union can waive an employee's right to a federal judicial forum for statutory antidiscrimination claims. The Court found that

> the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA [collective bargaining agreement]. The CBA in this case does not meet that standard. Its arbitration clause is very general, providing for arbitration of "matters under dispute" . . . And the remainder of the contract contains no explicit incorporation of statutory antidiscrimination requirements.

Id. at 396. The MERA governs wages, hours and conditions of employment. The Commission is given the explicit authority in mediation disputes with law enforcement to "function as a mediator in labor disputes. . . . The function of the mediator shall be to encourage voluntary settlement by the parties but no mediator shall have the power of compulsion." Section 111.70(4)(c)l., Wis. Stats. There is no language in the MERA which explicitly waives a statutorily protected right such as a §1983 claim. Likewise, the Memorandum of Understanding contains no "clear and unmistakable" waiver of a statutorily protected right. Id. (quoting

Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708, 75 L. Ed. 2d 387 (1983). The court finds that the Commission did exceed its authority by enforcing a settlement agreement that waived a statutorily protected §1983 claim without an explicit waiver stating so. Accordingly, the court must set aside the enforceability of the Memorandum of Understanding to the extent that it waives Thomsen statutorily protected right to pursue a §1983 claim.

The fourth issue raised by Thomsen is that the Commission plainly erred when it concluded that Thomsen was not entitled to rely on the contingency of attorney approval as a valid basis for refusing to sign the Memorandum of Understanding, despite the fact that Thomsen notified Urso that he would not sign the settlement agreement until it was reviewed and approved by his attorneys. Whether a party is entitled to assert attorney approval as a valid basis for refusing to sign a settlement agreement presents a question of law, and the court will give the Commission's conclusions great deference since this is an issue which the Commission has dealt with before.

The Examiner made the legal conclusion that Thomsen's agreement to the settlement of January 17, 1995, was conditioned upon having the settlement reviewed and approved by Thomsen's attorneys. Examiner's Decision at 11. However, the Commission found that since Thomsen did not state to the Town, the opposing party in this case, that its agreement was contingent on attorney review, then Thomsen was bound to the settlement and would be in violation of the agreement if he failed to comply with it. The Commission has consistently held that contingency of attorney approval could be a bona fide reason to allow a bargaining team members to oppose a tentative agreement they had reached without violating their duty to bargain in good faith; however, such contingencies must be stated to the opposing party **during**

bargaining. See Joint School District No. 5, City of Whitehall, Dec. No. 10812-A (Torosian, 9/73), *aff'd* in pertinent part, Dec. No. 10812-B (WERC, 12/73); Hartford Union High School District, Dec. No. 11002-A (Fleischli, 2/74) *aff'd* in pertinent part, Dec. No. 11002-B (WERC, 9/74); City of Columbus, Dec. No. 27853-B (WERC, 6/95). Based on WERC precedent, the court must affirm the Commission's conclusion that Thomsen failed to preserve the contingency of attorney review by not revealing to the Town that the settlement reached was subject to the review of his attorneys.

Thomsen's fifth argument is that the Examiner erred by permitting the Town's counsel, Strang, to testify as a witness at the hearing held before the Examiner, and that the Commission should have excluded Strang's testimony. This presents a question of law which the court reviews *de novo*. Thomsen contends that Strang's testimony should have been excluded by SCR 20:3.7, which provides in pertinent part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

Although courts should not usually permit an attorney who is an advocate in a trial to testify in that trial, this is not an absolute rule and a court may in its discretion permit an attorney to testify when justice requires. State v. Foy , 206 Wis. 2d 629, 643-44, 557 N.W.2d 494 (Ct. App. 1996).

Attorney Strang bargained the settlement agreement for the Town. When the accuracy of the settlement agreement was challenged by Thomsen at the hearing, Strang asked and was

allowed to testify as to his recollection of the settlement agreement, which was also reflected in his notes from the mediation session. As to whether Strang's testimony should have been excluded by SCR 20:3.7, the court is not particularly persuaded that it was foreseeable that Strang was "likely to be a necessary witness" at the hearing. In addition, even if Strang's testimony had been excluded, Strang's notes and the testimony of Urso provided substantial evidence to support the Commission's conclusions. Therefore, the court finds no reason to reverse the Commission on the basis of SCR 20:3.7.

Finally, the last argument set forth by Thomsen is that the settlement agreement Thomsen was ordered to sign does not constitute a binding contract because of failure of consideration. This argument was not considered by the Commission and this is the first time that it has been raised by Thomsen. Respondents argue that under ch. ERC 12, Wis. Admin. Code, which governs procedure relating to prohibited practices proscribed by §l11.70, Wis. Stats., an answer shall contain a "specific detailed statement of any affirmative defenses." Sec. ERC 12.03(4)(b), Wis. Admin. Code. In his Answer to the Town's prohibited practice complaint, Thomsen raised four affirmative defenses; failure or want of consideration was not one of them. According to §802.02(3), Wis. Stats., affirmative defenses must be pled in a responsive pleading, and Respondents maintain that Thomsen has therefore waived this argument.

The court agrees with Respondents that Thomsen has effectively waived his affirmative defense of failure of consideration by not pleading it. However, Thomsen's argument fails even on its merits. The basic terms of the settlement agreement called for the Town to certify Thomsen's §40.65, Wis. Stats., duty disability claim, and to treat Thomsen as having retired in good standing due to a duty disability, and Thomsen in exchange would waive all claims against

the Town. Thomsen maintains that at the time the Town sought enforcement of the settlement agreement, the agreement had nothing to offer Thomsen because he had already brought a §40.65, Wis. Stats., duty disability claim to hearing on his own. To the extent that the settlement agreement does not waive Thomsen's statutorily protected right to pursue a §1983 claim, the court has already upheld the Commission's finding that the Memorandum of Understanding accurately reflects the settlement agreement reached by the Town and Thomsen. Likewise, the court has found that Thomsen failed to reserve the contingency of attorney approval as a valid basis for refusing to sign the Memorandum of Understanding. Therefore, at the time the settlement agreement was reached, there was consideration. The fact that Thomsen by his own actions destroyed the ability of the Town to fulfill the terms of the agreement and denied himself the benefit of that aspect of the bargain does not dictate a different conclusion.

CONCLUSION

Therefore, for the reasons stated above, the court must **affirm** the Commission's order, with the exception that the Memorandum of Understanding does *not* include a waiver of Thomsen's statutorily protected right to pursue a §1983 claim.

IT IS SO ORDERED.

Dated this 20 day of May, 1999.

BY THE COURT:

Robert A. DeChambeau

Honorable Robert A. DeChambeau
Circuit Court, Branch 1