

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE
ASSOCIATION/LAW ENFORCEMENT
EMPLOYEE RELATIONS DIVISION,

Complainant,

vs.

VILLAGE OF KIMBERLY,

Respondent.

Case 17
No. 54070 MP-3169
Decision No. 28759-A

Appearances:

Mr. Steven J. Urso, Executive Assistant, Wisconsin Professional Police Association/ LEER Division, 7 North Pinckney Street, No. 220, Madison, WI 53703, appearing on behalf of the Complainant, Wisconsin Professional Police Association/LEER Division.

Godfrey & Kahn, S.C., Attorneys at Law, 100 West Lawrence Street, P. O. Box 2728, Appleton, WI 54913-2728, appearing on behalf of Respondent Village of Kimberly.

ORDER DENYING PRE-HEARING MOTION
TO DISMISS THE COMPLAINT

On May 1, 1996, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereafter Complainant or WPPA/LEER, filed a complaint of prohibited practices against the Village of Kimberly, hereafter Respondent, alleging that the Respondent had violated Sec. 111.70(3)(a)5, Stats., by failing to comply with a collective bargaining agreement to "grandfather" a past practice educational incentive policy. On May 29, 1996, the Respondent filed a pre-hearing Motion to Dismiss the complaint. Complainant responded to the Motion to Dismiss on May 29, 1996. On June 18, 1996, the Commission

No. 28759-A

appointed Coleen A. Burns, a member of its staff, as Examiner to make and issue Findings of Facts, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. The Examiner, having considered the record and the arguments of the parties, makes and issues the following:

ORDER

Respondent's pre-hearing Motion to Dismiss the complaint is denied.

Dated at Madison, Wisconsin, this 18th of July, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

VILLAGE OF KIMBERLY

MEMORANDUM ACCOMPANYING
ORDER DENYING PRE-HEARING MOTION
TO DISMISS THE COMPLAINT

Background

On May 1, 1996, Complainant filed a complaint of prohibited practices alleging that Respondent had breached an oral collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., when it failed to provide educational incentive benefits which were due at the end of calendar year 1995. On May 29, 1996, Respondent filed a Motion to Dismiss the complaint and Complainant filed a response to the Motion to Dismiss.

Position of the Parties

Respondent

Respondent asserts that, at all times material hereto, the Village of Kimberly and the Village of Little Chute have been parties to a collective bargaining agreement with the Fox Valley Metro Professional Police Association, WPPA/LEER. Respondent further asserts that this agreement contains a procedure for the final and binding arbitration of grievances and that neither the Village of Kimberly, nor the Village of Little Chute, has refused to abide by the grievance procedure of the written collective bargaining agreement. Respondent argues that the complaint should be dismissed because (1) the basis of the complaint is fully encompassed within the confines of the controlling collective bargaining agreement and its contractual grievance arbitration procedure and (2) the complaint was not filed within the statutory limitations period set forth in Sec. 111.07(14), Stats.

Complainant

Complainant asserts that Respondent has violated an oral collective bargaining agreement which is separate and distinct from the written collective bargaining agreement relied upon by Respondent. Complainant argues, therefore, that the alleged violation of Sec. 111.70(3)(a)5, Stats., cannot be resolved through the contractual grievance arbitration procedure relied upon by the Respondent. Complainant further argues that the complaint was filed within the one year statutory limitations period.

Discussion

The complaint alleges the following: Respondent is a municipal employer; Complainant is a labor organization which represents employes of the Respondent; Complainant and Respondent have entered into an oral collective bargaining agreement which requires the Respondent to provide certain educational incentive benefits to employes represented by the Complainant; this oral collective bargaining agreement is separate and distinct from the written collective bargaining agreement covering the Fox Valley Metro Professional Police Association; Respondent has failed to provide the educational incentive benefits which are required by the oral collective bargaining agreement; and that, by failing to provide these educational incentive benefits, Respondent has violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats.

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer "to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes. . . ." The Commission has recognized that an oral agreement may be a collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5, Stats. 1/ Thus, the complaint, on its face, states a cause of action under the Municipal Employment Relations Act.

In the three cases cited by Respondent, 2/ the Examiner or the Commission refused to assert jurisdiction over a Sec. 111.70(3)(a)5 claim which was also a grievance that was subject to the parties' contractual grievance procedure. The rationale for the refusal to assert jurisdiction is that the grievance-arbitration procedure is presumed to constitute a grievant's exclusive remedy and that this presumption may be overcome only by express language. 3/

The contractual grievance procedure relied upon by the Respondent contains the following language:

ARTICLE XII - GRIEVANCE PROCEDURE

Section 12.01: Both the Association and the Employer recognize that grievances and complaints shall be settled promptly and at the

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- 1/ City of Prairie du Chien, Dec. No. 21619-A (Schiavoni, 7/84); City of Madison, Dec. No. 20656-C, 20657-C (WERC, 9/84).
 - 2/ City of Madison, Dec. No. 15079-D, 15171-C (Yaeger, 1/78); Beloit School District, Dec. No. 14702-B (Davis, 3/77); and City of Menasha (Police Department), Dec. No. 13283-A (WERC, 2/77).
 - 3/ City of Menasha (Police Department), Id.

earliest possible stage and that the grievance process must be initiated within ten (10) days of the incident or within ten (10) days that the grievant knew or should have known of the incident, Saturday, Sunday and holiday excluded. Any grievance not reported or filed within the time limit set forth above shall be invalid.

Section 12.02: Any member of the bargaining unit having a grievance concerning any provision of this Agreement shall be handled in the following manner:

- a. First Step Procedure: The Association or aggrieved member of the bargaining unit shall orally present the grievance to the Chief of Police either alone or accompanied by an Association representative. The Chief of Police shall attempt to settle the grievance within ten (10) days, Saturday, Sunday and holiday excluded, after the oral presentation thereof, and . . .

. . .

The "Agreement" referenced in Sec. 12.02 is the written collective bargaining agreement between the Villages of Little Chute and Kimberly and the Fox Valley Metro Professional Police Association.

Complainant's Sec. 111.70(3)(a)5 claim does not concern any provision of the written collective bargaining agreement between the Villages of Little Chute and Kimberly and the Fox Valley Metro Professional Police Association. Rather, Complainant's Sec. 111.70(3)(a)5 claim is an allegation that Respondent has violated an oral collective bargaining agreement which exists separate and distinct from the written collective bargaining agreement.

Complainant's Sec. 111.70(3)(a)5 claim is not a grievance within the meaning of Sec. 12.02 of the written collective bargaining agreement relied upon by Respondent. Thus, there is no presumption that the contractual grievance procedure constitutes Complainant's exclusive remedy. In the present case, it is appropriate for the Commission to assert jurisdiction over Complainant's breach of contract claim.

Sec. 111.07(14), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides:

The right of any person to proceed under this section shall not

exceed beyond one year from the date of the specific act or unfair labor practice alleged.

The complaint alleges that Respondent violated Sec. 111.70(3)(a)5, Stats., when it failed to pay certain educational benefits at the end of the 1995 calendar year. Since the complaint was filed on May 1, 1996, the complaint was filed within one year from the date of the unfair labor practice alleged in the complaint.

Summary

Liberally construed, the complaint states a timely claim of prohibited practice which, if proved, would entitle Complainant to relief under the Municipal Employment Relations Act. The Examiner is satisfied that this is a contested case requiring a full hearing on the pleadings. Accordingly, the Examiner has denied Respondent's pre-hearing Motion to Dismiss the complaint.

Dated at Madison, Wisconsin, this 18th day of July, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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