

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-C

VILLAGE OF KIMBERLY, Complainant,

vs.

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**, Respondent.

Case 18
No. 54279
MP-3193

Decision No. 28793-A

Appearances:

Mr. Richard Thal, WPPA General Counsel, 7 North Pinckney Street, Suite 220, Madison, Wisconsin 53703, appearing on behalf of the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

Godfrey & Kahn, S.C., Attorneys at Law, 100 West Lawrence Street, P. O. Box 2728, Appleton, Wisconsin 54913-2728, by **Mr. James R. Macy**, appearing on behalf of the Village of Kimberly.

No. 28759-C

No. 28793-A

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 1, 1996, the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereafter WPPA/LEER, filed a complaint of prohibited practices against the Village of Kimberly alleging that the Village had violated Sec. 111.70(3)(a)5, Stats., by failing to comply with an oral collective bargaining agreement to "grandfather" an educational incentive policy. On July 1, 1996, the Village filed a complaint of prohibited practices against WPPA/LEER alleging that, by filing its complaint, WPPA/LEER has violated a collective bargaining agreement and its statutory duty to bargain in violation of Sec. 111.70(3)(b)3 and 4, Stats. Thereafter, the Wisconsin Employment Relations Commission appointed Coleen A. Burns, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order in the two matters as provided in Secs. 111.70(4)(a) and 111.07, Stats. Hearing was held in Kimberly, Wisconsin, on March 20, 1997. The record was closed on May 27, 1997, upon receipt of post-hearing written argument. The Examiner, having considered the evidence and arguments of the parties, makes and issues the following

FINDINGS OF FACT

1. The Village of Kimberly, hereafter also referred to as the Employer, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal office located at 515 West Kimberly Avenue, Kimberly, Wisconsin.

2. Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereafter WPPA/LEER, is a labor organization as defined in Sec. 111.70(1)(h), Stats., and has its principal office at 7 North Pinckney Street, Suite 220, Madison, Wisconsin 53703. At all times material hereto, the Kimberly Professional Policemen's Association, the Little Chute Policemen's Association and the Fox Valley Metro Professional Police Association have been labor organizations as defined in Sec. 111.70(1)(h), Stats., and have been affiliated with, and represented by, WPPA/LEER for purposes of collective bargaining. The bargaining unit represented by WPPA/LEER and its affiliated Kimberly Professional Policemen's Association includes all regular full-time employes with the power of arrest in the Kimberly Police Department, excluding the Chief of Police, Assistant Chief, and all clerical personnel.

3. In 1994, the Villages of Little Chute and Kimberly advised WPPA/LEER of their intent to consolidate their respective Police Departments into a single Fox Valley Metro Police Department, hereafter Metro Department and, subsequently, voluntarily recognized the Fox Valley Metro Professional Police Association, hereafter also referred to as the Association, as the exclusive bargaining representative of all full-time law enforcement personnel with the power of arrest, excluding the Chief of Police, supervisory, managerial, confidential, and part-time Police Officers, of the combined Villages of Little Chute and Kimberly. On December 8, 1994, Edward

Vander Bloomen, WPPA/LEER Business Agent; Officer Ron Springer, President of the Kimberly Professional Policemen's Association; Officer Lance Steidl, President of the

Little Chute Policemen's Association; James Macy, attorney for the Villages of Little Chute and Kimberly; David Peterson, Little Chute Police Department Chief of Police and Acting Chief of the Kimberly Police Department; Russell Van Gompel, Little Chute Village Administrator; and Rick Hermus, Kimberly Village Administrator, met to negotiate an initial collective bargaining agreement for the Fox Valley Metro Professional Police Association. At the time of this meeting, Vander Bloomen represented WPPA/LEER and its three affiliated locals, i.e., the Fox Valley Metro Professional Police Association, the Kimberly Professional Policemen's Association, and the Little Chute Policemen's Association. The 1994-95 collective bargaining agreement between the Village of Kimberly and the Kimberly Professional Policemen's Association contained the following "educational pay" provision:

ARTICLE XV - PROFESSIONAL POLICEMEN'S INCENTIVE PROGRAM

Section 15.01: The employer, in order to provide incentive for the Association members to continue their education, shall pay them \$5.00 per month for each successfully completed six (6) credits. This pay shall continue as long as the member is employed by the employer.

Section 15.02: Accredited courses shall be those offered in the Police Science Program at Fox Valley Technical Institute for the first sixty-five (65) credits.

The employer shall pay for no more than an additional twelve (12) credits per year, and no more than a total accumulation of seventy-two (72) credits. Seventy-eight (78) credits, effective 01/01/86 per Association member.

Those credits earned beyond the sixty-five (65) initial credits shall be at an institution of higher learning recognized by the Police and Fire Commission with the exception of those courses deleted by the Commission in either case. A "C" grade, or better, must be obtained for each course completed before the course will be accepted for incentive pay.

Section 15.03: The total payment for school incentive shall be made in one check to be paid on the first payday of December of the calendar year.

Section 15.04: Association members shall be allowed to accumulate as many credits as desired in any one year, and shall be allowed to apply them towards the succeeding years.

Section 15.05: Association members who have in the past completed acceptable courses, shall be given compensation of up to twelve (12) credits per

year, beginning January 1, 1975, after successfully completing a one (1) year probationary period.

Section 15.06: This complete Article shall only apply to those officers currently employed prior to January 1, 1989.

During the meeting of December 8, 1994, the parties discussed "educational pay." As a result of this discussion, WPPA/LEER Representative Vander Bloomen and Officer Springer concluded that the Village of Kimberly and WPPA/LEER had reached an oral agreement on "educational pay." The parties did not discuss "educational pay" at any subsequent bargaining session on the initial Metro collective bargaining agreement. At the time of the December 8, 1994 meeting, each party understood that bargaining representatives could not enter into binding agreements because all agreements were subject to ratification by the parties. At the time of the December 8, 1994 meeting, the parties had a practice of reducing all tentative agreements to writing. On or about December 15, 1994, representatives of the Village of Little Chute prepared a document which contained the language of each provision of the Kimberly and Little Chute police contracts, as well as the written tentative agreements which had been reached on each of these provisions. This document was provided to WPPA/LEER and Association representatives on or about December 15, 1994. This document references Article XV of the Kimberly contract, but does not indicate that the parties had reached an agreement on "educational pay." Association representatives did not question the fact that this document did not reference an agreement on "educational pay." The Association and the Villages ratified all of the written tentative agreements which were reached during the negotiation of the initial Metro contract. At the time that the Association ratified these written tentative agreements, Association representatives advised the Association's membership that the parties had reached an oral agreement to grandfather the Village of Little Chute retiree health insurance and the Village of Kimberly "educational pay" and presented these oral agreements to the Association for ratification. The Kimberly Village Board and the Little Chute Village Board were not presented with any oral agreement on "educational pay" and did not ratify an oral agreement on "educational pay." The written tentative agreements ratified by the Village Boards and the Association did not include an agreement on "educational pay." Edward Vander Bloomen does not have any written bargaining notes confirming that the parties had reached an oral agreement on "educational pay."

4. The initial collective bargaining agreement between the Villages of Kimberly and Little Chute and the Fox Valley Metro Professional Police Association was effective April 1, 1995. This agreement did not contain the "educational pay" provision of the 1994-95 Kimberly police contract, nor any other educational incentive provision. This agreement contained the following:

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 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 . . .

. . .

ARTICLE XVIII - NO OTHER AGREEMENT

Section 18.01: The Village of Kimberly and Little Chute agree not to enter into any other agreement, oral or written with the members of the bargaining unit of the department included in this Agreement, individually or collectively, which in any way conflicts with the provisions of this Agreement.

All of the above provisions are included in the successor 1996-98 Metro contract.

5. Edward Vander Bloomen terminated his employment with WPPA/LEER in August of 1995. Thereafter, the Villages of Little Chute and Kimberly negotiated a successor 1996-98 Metro contract with the Association. The successor Metro contract, unlike the initial Metro contract, contained the following provision:

ARTICLE XIX - EDUCATION

Section 19.01 Officers who pursue work related education, (to be determined by the Chief of Police), at an accredited school or college, shall be reimbursed upon completion of each class as follows:

Grade 4.0 - 100% reimbursement for books and tuition

Grade 3.0 - 75% reimbursement for books and tuition

Grade 2.0 - 50% reimbursement for books and tuition

Grade 1.0 - No reimbursement

Section 19.02 A request to attend classes must be submitted to the Chief of Police prior to September 1 for the upcoming year. Officers attending school will have a maximum spending cap of \$1,000 per calendar year. The Villages retain full authority to approve or not approve all requests.

The Village of Kimberly ratified this agreement on December 4, 1995, and the Village of Little Chute ratified this agreement on December 6, 1995. On December 28, 1995, representatives of the Villages of Kimberly and Little Chute and the Association executed the successor Metro contract. By its terms, the successor Metro contract is in effect from January 1, 1996 through December 31, 1998. During the negotiation of the successor Metro contract, the Association was represented by WPPA/LEER Business Agent Richard Daley, Metro Officer Lance Steidl and Metro Officer Ronald Springer. On December 28, 1995, the Villages and the Association executed the following agreement:

Between

Villages of Kimberly & Little Chute
and
Fox Valley Metro Professional Police Association

This Settlement Agreement is entered into between the Villages of Kimberly and Little Chute, hereinafter "Villages" and the Fox Valley Metro Professional Police Association, hereinafter "Association", and in exchange of mutual consideration, the parties hereby agreed to settle WPPA Grievance 95-274 (Andres and Lund), as follows:

1. Villages agree to pay officers Andres and Lund the July, 1995 increase they would have received under the prior collective bargaining agreement which existed before the consolidated collective bargaining agreement.
2. The Association and grievants agree to dismiss the grievance with prejudice, and without precedent.
3. The Association agrees that this settlement resolves any and all issues regarding the consolidation of the collective bargaining agreements.

This settlement agreement was signed by WPPA/LEER Representative Richard Daley, Officer Lance Steidl and Officer Ronald Springer. The grievance which gave rise to this settlement agreement was dated August 22, 1995, and alleged a violation of the initial Metro agreement. During the processing of this grievance, rights granted by the prior Little Chute collective bargaining agreement were a subject of discussion. On January 12, 1996, Metro Department Police Chief Peterson approved 1995 "educational pay" for Metro Officer Roger Van Heuklon in the amount of \$420.00 and for Metro Officer Robert Riesterer in the amount of \$780.00. Officers Riesterer and Van Heuklon had received "educational pay" when they were employes of the Village of Kimberly Police Department. On February 15, 1996, Village Administrator Van Gompel responded to Chief Peterson's request by stating, inter alia, "Since these items are neither in the Metro Budget nor are they included in the collective bargaining agreement, I cannot proceed with processing payments for these requests." On May 1, 1996, WPPA/LEER filed a complaint of prohibited practice alleging that the Village of Kimberly's failure to pay 1995 "educational pay" to Officers Riesterer and Van Heuklon violated an oral collective bargaining agreement. WPPA/LEER did not file a grievance on this denial of "educational pay."

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

CONCLUSIONS OF LAW

1. WPPA/LEER and the Village of Kimberly are appropriately named as parties in this proceeding.
2. The Wisconsin Employment Relations Commission has jurisdiction to determine the merits of WPPA/LEER's allegation that the Village of Kimberly has violated Sec. 111.70(3)(a)5, Stats., and it is appropriate for the Wisconsin Employment Relations Commission to assert such jurisdiction.
3. WPPA/LEER has failed to establish, by a clear and satisfactory preponderance of the evidence, that the Village of Kimberly and WPPA/LEER are parties to an oral collective bargaining agreement which requires the Village of Kimberly to provide the Professional Policemen's Incentive Program benefits set forth in Article XV of the 1994-95 collective bargaining agreement between the Village of Kimberly and the Kimberly Professional Policemen's Association, i.e., "educational pay," to officers of the Metro Department who had been employed by the Village of Kimberly Police Department.
4. The Village of Kimberly did not violate Sec. 111.70(3)(a)5, Stats., when it failed to provide 1995 "educational pay" to Metro Department Officers Van Heuklon and Riesterer.

5. The Village of Kimberly has failed to establish, by a clear and satisfactory preponderance of the evidence, that WPPA/LEER has violated any collective bargaining agreement or that WPPA/LEER has acted in bad faith, or otherwise violated its statutory duty to bargain.

6. WPPA/LEER has not violated Sec. 111.70(3)(b)3 or 4, Stats., as alleged by the Village of Kimberly.

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 filed by WPPA/LEER against the Village of Kimberly is hereby dismissed in its entirety.

2. IT IS FURTHER ORDERED that the complaint filed by the Village of Kimberly against WPPA/LEER is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 18th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

VILLAGE OF KIMBERLY

**MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

On May 1, 1996, WPPA/LEER filed a complaint of prohibited practices against the Village of Kimberly alleging that the Village violated Sec. 111.70(3)(a)5, Stats., by failing to comply with an oral collective bargaining agreement which required the Village of Kimberly to grandfather "educational pay" for former Village of Kimberly police officers. On July 1, 1996, the Village filed a complaint of prohibited practices against WPPA/LEER alleging that, by pursuing this complaint, WPPA/LEER violated a collective bargaining agreement and its statutory duty to bargain in violation of Sec. 111.70(3)(b)3 and 4, Stats. WPPA/LEER denies that it has violated Sec. 111.70(3)(b)3 and 4, Stats., as alleged by the Village of Kimberly. The Village of Kimberly denies that it has violated Sec. 111.70(3)(a)5, Stats., as alleged by WPPA/LEER.

POSITION OF WPPA/LEER

An oral agreement may be a collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5, Stats. On December 8, 1994, the parties entered into an oral agreement to grandfather "educational pay" for former Kimberly officers and retiree health insurance benefits for former Little Chute officers.

At the December 8, 1994 meeting, Attorney Macy, the chief bargaining spokesperson for the two Villages, clearly indicated that there was no disagreement with respect to the two grandfathered benefits and that this threshold agreement need not be reduced to writing. By stating that the parties' oral agreement was sufficient, Attorney Macy clearly indicated that this agreement would not be included in the Employer's compilation of the tentative agreements to be incorporated into the written collective bargaining agreement. The Employer may not evade its collectively bargained obligation to provide Officers Riesterer and Van Heuklon with educational incentive pay payments because its bargaining team failed to seek authorization for these payments.

By failing to provide Officers Riesterer and Van Heuklon with the grandfathered "educational pay" at the end of 1995, the Employer violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats. As a remedy for this prohibited practice, the Employer should be ordered to comply with the terms of the oral agreement and provide Officers Riesterer and Van Heuklon with all "educational pay" due them under the oral collective bargaining agreement.

WPPA/LEER's complaint was timely filed; the Village of Kimberly is an appropriate party; WPPA/LEER's complaint of prohibited practices does not directly concern any provision included in the written Metro collective bargaining agreement and, therefore, the Association has no duty to exhaust contractual grievance procedures contained in the Metro collective bargaining agreement; the Association did not waive its right to bring this complaint; and the Sec. 893.80 notice of claim requirements do not require the dismissal of this case. WPPA/LEER has not committed prohibited practices as alleged by the Employer.

POSITION OF THE EMPLOYER

The WERC has no jurisdiction over WPPA/LEER's complaint because it was not filed within the time limits set forth in Sec. 111.07(14), Stats.; neither the Village of Kimberly nor the Association are appropriate parties to this proceeding; WPPA/LEER has failed to exhaust the agreed-upon grievance procedure for resolving such disputes; and the Association failed to file the requisite notice of claim as required by Sec. 893.80, Stats.

The burden of proving the terms of a contract rests with the party seeking enforcement. Vagueness or indefiniteness as to any essential term of agreement prevents the creation of an enforceable contract. WPPA/LEER's misperceptions regarding discussions which occurred on December 8, 1994, do not constitute a binding collective bargaining agreement. The facts in this case do not support a "meeting of the minds."

The Metro contract provisions differ dramatically from those of the Kimberly and Little Chute contracts. Either no educational reimbursement was provided (1995) or the terms of educational reimbursement were completely different (1996-1998). Since WPPA/LEER's purported oral agreement is in direct conflict with the actual written contract, it would be absurd to conclude that the parties had entered into such an "oral agreement."

Collective bargaining agreements may be subject to the State statute of frauds. The terms of the purported oral agreement could not possibly have been accomplished within one year from the making of the contract and, therefore, even if made, would not be enforceable under the statute of frauds.

There was no oral collective bargaining agreement or other form of contract which entitles the two Officers to the "educational pay" claimed by the Association. Moreover, Attorney Macy had neither actual, nor implied, authority to bind the Village of Kimberly to any collective bargaining agreement. The respective Village boards neither approved, nor ratified, the purported oral agreement to grandfather "educational pay."

WPPA/LEER has waived its right to claim "educational pay" or is equitably estopped from

making such a claim because it proposed and subsequently dropped a request for "educational pay" when the parties bargained the initial Metro contract; it entered into a binding

settlement agreement which resolved all post-consolidation disputes; it entered into a successor Metro contract which contains separate and distinct educational reimbursement provisions; it agreed to negotiation ground rules which required written proposals, written tentative agreements and ratification of all agreements; and it failed to note and object to the omission of the purported oral collective bargaining agreement when it was provided with the list of written tentative agreements, on or about December 15, 1994.

WPPA/LEER's complaint against the Employer should be dismissed. WPPA/LEER's lack of any well-reasoned and fairly debatable legal positions supporting its claim under applicable law entitles the Village to attorneys' fees and costs.

By pursuing this complaint, WPPA/LEER has violated a collective bargaining agreement by violating the voluntary recognition clause of the Metro contract; by violating the grievance arbitration provision of the Metro contract; by violating the "No Other Agreements" provision of the Metro contract; and by violating Paragraph Three of the grievance settlement agreement of December 28, 1995.

WPPA/LEER has violated its statutory duty to bargain with the Metro Police Department by attempting to enforce the alleged oral agreement and by failing to utilize agreed upon grievance procedures. WPPA/LEER's bad faith conduct in filing this complaint is demonstrated by the following: WPPA/LEER has admitted that it has no bargaining relationship with the Village of Kimberly; WPPA/LEER brought this action after entering into the December 28, 1995 side agreement, which by its terms resolves all issues relating to the consolidation of the Kimberly and Little Chute Police Departments; WPPA/LEER entered into the Metro 1996-1998 collective bargaining agreement which contained educational reimbursement provisions which conflict with the purported oral agreement; and WPPA/LEER did not claim the 1995 educational incentive benefit until after the parties had completed the negotiation of the 1996-1998 contract and it had gained added wages and a new educational incentive benefit.

The Employer's complaint against WPPA/LEER, alleging that WPPA/LEER has violated Secs. 111.70(3)(b)3 and 4, Stats., should be sustained.

DISCUSSION

Complaint of WPPA/LEER

WPPA/LEER argues that the Employer violated an oral collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., and that by violating Sec. 111.70(3)(a)5, Stats., the Employer has violated Sec. 111.70(3)(a)4, Stats., derivatively. The Employer asserts that WPPA/LEER's complaint must be dismissed due to a lack of jurisdiction and merit.

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.

WPPA/LEER alleges that the Employer violated Sec. 111.70(3)(a)5, Stats., when it failed to pay certain educational benefits which were due at the end of the 1995 calendar year. Inasmuch as WPPA/LEER's complaint was filed on May 1, 1996, it was filed within "one year from the date of the specific act or unfair labor practice alleged." Contrary to the argument of the Employer, the complaint of WPPA/LEER is timely filed.

In December of 1994, the Employer and WPPA/LEER had the legal right to enter into collective bargaining agreements concerning the wages, hours and conditions of employment affecting all regular full-time employes of the Village of Kimberly Police Department with the power of arrest, excluding the Chief of Police, Assistant Chief, and all clerical personnel. Since WPPA/LEER's complaint alleges that the Employer has violated such a collective bargaining agreement, WPPA/LEER and the Employer are parties in interest over whom the WERC may assert jurisdiction to determine the merits of WPPA/LEER's Sec. 111.70(3)(a)5 claim.

Generally, the WERC will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides a grievance procedure with final and binding arbitration. [ROCK COUNTY, DEC. NO. 28494-A (JONES, 1/96); JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY, ET AL., DEC. NO. 16753-A (YAEGER, 12/79); BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. NO. 15825-B (YAEGER, 6/79); OOSTBURG JOINT SCHOOL DISTRICT, DEC. NO. 11196-A, B (WERC, 12/72)] The reason being that the WERC wishes to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. A grievance arbitration procedure is presumed to constitute a grievant's exclusive remedy unless the parties to the agreement have express language which provides it is not. [MAHNKE V. WERC, 66 WIS.2D 524, 529] 1/

The collective bargaining agreement relied upon by the Employer provides for final and binding arbitration of grievances. Section 12.02 of this collective bargaining agreement provides a right to file a grievance "concerning any provision of this Agreement." The referenced "Agreement" is the collective bargaining agreement which was negotiated by the Fox Valley Metro Professional Police Association and the Villages of Little Chute and Kimberly, jointly.

As discussed in the Order Denying Pre-Hearing Motion to Dismiss the Complaint [VILLAGE OF KIMBERLY, DEC. NO. 28759-A (BURNS, 7/96)], WPPA/LEER'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, WPPA/LEER claims that the Village of Kimberly violated an oral collective bargaining agreement between WPPA/LEER and the Village of Kimberly which pre-dates and is independent of the

Metro contract.

WPPA/LEER's Sec. 111.70(3)(a)5 claim does not present a grievance which, on its face, is subject to the final and binding grievance arbitration provisions of the Metro contract. Thus, the grievance arbitration procedure contained in that contract does not constitute WPPA/LEER's exclusive remedy. Under the facts of this case, it is appropriate for the WERC to assert jurisdiction over WPPA/LEER's breach of contract claim.

The Employer argues that the complaint should be dismissed because WPPA/LEER failed to file the notice of claim required by Sec. 893.80, Stats. Neither the language of that statute, nor prior case law, demonstrates that Sec. 893.80 is applicable to complaints of prohibited practices filed under the Municipal Employment Relations Act.

A grievance settlement agreement is a collective bargaining agreement within the meaning of MERA. [BROWN COUNTY, DEC. NO. 27624-A (NIELSEN, 4/93); ONEIDA COUNTY, DEC. NO. 15374-B (YAEGER, 12/77), AFF'D, DEC. NO. 15374-C (WERC, 6/78)] A waiver of a statutory right by contract must be established by clear and unmistakable contract language or bargaining history. [SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); CITY OF WAUWATOSA, DEC. NO. 19310-C (WERC, 4/84)]

The evidence of "bargaining history" demonstrates that rights granted under the 1994-95 Little Chute contract were a subject of discussion when the parties negotiated the grievance settlement agreement of December 28, 1995. It is not evident, however, that there were any discussions of rights granted under MERA. Neither the evidence of "bargaining history," nor the language of the grievance settlement agreement, establishes that WPPA/LEER clearly and unmistakably waived its statutory right to allege a breach of a prior collective bargaining agreement.

In summary, the WERC has jurisdiction to hear and decide WPPA/LEER's allegation that the Village of Kimberly has violated Sec. 111.70(3)(a)5, Stats. It is appropriate for the WERC to assert such jurisdiction.

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 WERC has recognized that an oral agreement may be a collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5, Stats. [CITY OF PRAIRIE DU CHIEN, DEC. NO. 21619-A (SCHIAVONI, 7/84); CITY OF MADISON, DEC. NO. 20656-C, 20657-C (WERC, 9/84)] To prevail upon its complaint of prohibited practice, WPPA/LEER must establish, by a clear and satisfactory preponderance of the evidence, that the Employer has violated Sec. 111.70(3)(a)5, Stats.

WPPA/LEER claims that, on December 8, 1994, the Employer and WPPA/LEER reached an oral collective bargaining agreement to provide the Professional Policemen's Incentive Program

benefits set forth in Article XV of the 1994-95 collective bargaining

agreement between the Village of Kimberly and the Kimberly Professional Policemen's Association, i.e., "educational pay," to officers of the Metro Department who had been employed by the Village of Kimberly Police Department. Of the five witnesses who testified at hearing, only Edward Vander Bloomen and Officer Springer claimed that there was such an oral agreement. 2/

On December 8, 1994, WPPA/LEER Representative Vander Bloomen represented WPPA/LEER and its three affiliated locals, i.e., the Fox Valley Metro Professional Police Association, the Kimberly Professional Policemen's Association, and the Little Chute Policemen's Association. When asked to describe what occurred at the meeting of December 8, 1994, WPPA/LEER Representative Vander Bloomen stated as follows:

. . . The issues that stood out in the very beginning were the educational pay credits and the longevity. And our concern was two employees for the Kimberly Police Department. Our concern was that once the parties got together with the negotiations with respect to those two issues, the concern was that nobody would be left behind in that, we didn't want anybody to suffer any loss by the inclusion of those two agreements. What we had attempted to do, at least from the Association's perspective, was to make all the employees who were on-board at that time for the two departments to be made whole and not lose any benefits. In other words, if they did not necessarily fall in the categories of their longevity or educational pay credits, it was our proposal to the employer to grandfather those people in and allow whatever restrictions or language that were to take effect when the new labor agreement came about apply to people hired after that. So that issue itself, the longevity and educational pay credits, was one that we were concerned about. And as I recall, and I don't have any written notes on it, but it's my recollection that the employer -- and I have to think that Mr. Macy being the spokesman, although I can't say for certain -- there was discussion that that issue would not be a problem. 3/

When asked what he meant by "that issue," WPPA/LEER Representative Vander Bloomen replied "The educational pay credits and the longevity would not be a problem, and that we could move forward on the other remaining issues that were still outstanding at the time." 4/

On December 8, 1994, Officer Springer was the President of the Kimberly Professional Policemen's Association. When asked to recall the discussion on "educational pay," Officer Springer stated as follows:

Well, the mood was so that, you know, it was very congenial, so-to-speak, it was like both sides were agreeing that, you know, we needed to get this agreement

in place so that the merger could take place and go on smoothly, that it was important that no officer lost benefits was a big part of our point. Mr. Macy was explaining that as far as he was concerned he could agree with that although certain things would need to be negotiated as there were differences within the contract of how certain things were handled. And those two issues, anyway, the health insurance for Little Chute and the employee incentive pay for the education, were two issues that were immediately discussed and basically said, this will not be a problem, it will be set aside, it will be taken care of, it will be handled, and we didn't need to discuss it any further. 5/

Officer Springer further recalled that WPPA/LEER Representative Vander Bloomen asked Mr. Macy if the agreement on "educational pay" had to be placed in a separate written document and that the Villages' Attorney responded "No, it would be taken care of." 6/

The above testimony indicates that, on December 8, 1994, when the parties met to discuss their proposals for the first time, WPPA/LEER made a general statement of position, *i.e.*, that WPPA/LEER did not want any Officer to lose benefits as a result of the merger of the two Police Departments and that the Villages' Attorney responded that he was agreeable to this general position, but that the parties would have to negotiate the specifics. Within the context of this conversation, the Villages' Attorney's remarks that "educational pay" would not be a problem or that "educational pay" will be set aside, or taken care of, are ambiguous. One may reasonably interpret these remarks to mean that the Villages were agreeing to grandfather "educational pay," as argued by WPPA/LEER. However, it is also reasonable to interpret the remarks attributed to the Villages' Attorney to mean that the Villages were receptive to the idea of grandfathering "educational pay," but that this issue presented a "difference" which would have to be worked out in negotiations. Given this ambiguity, the testimony of WPPA/LEER Representative Vander Bloomen and Officer Springer is not sufficient to establish that the Village of Kimberly and WPPA/LEER reached the oral agreement on "educational pay" alleged by WPPA/LEER.

Assuming *arguendo*, that the testimony of WPPA/LEER Representative Vander Bloomen and Officer Springer did demonstrate that, on December 8, 1994, the parties had reached the oral agreement alleged by WPPA/LEER, such an agreement would not be an enforceable collective bargaining agreement until it had been ratified by all parties to the agreement. While the Association may have ratified an oral agreement on "educational pay," the Village of Kimberly did not.

In conclusion, WPPA/LEER has failed to establish, by a clear and satisfactory preponderance of the evidence, that WPPA/LEER and the Village of Kimberly entered into the oral collective bargaining agreement claimed by WPPA/LEER. Therefore, the Examiner rejects the claim that the Village of Kimberly violated Sec. 111.70(3)(a)5, Stats., when it failed to pay 1995

"educational pay" to Metro Officers Riesterer and Van Heuklon.

Employer's Cross-Complaint

The Employer argues that, by pursuing this complaint, WPPA/LEER has violated a collective bargaining agreement and violated its statutory duty to bargain in violation of Sec. 111.70(3)(b)3 and 4, Stats., which state as follows:

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.

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 award as final and binding upon them.

...

Contrary to the argument of the Employer, WPPA/LEER is not seeking to bargain with the Employer after the effective date of the voluntary recognition clause contained in the Metro contract. Rather, WPPA/LEER is seeking to enforce an oral collective bargaining agreement which allegedly pre-dates the effective date of the Metro contract.

At the time that the parties are alleged to have entered into the oral collective bargaining agreement, WPPA/LEER represented the Village of Kimberly Professional Policemen's Association for the purposes of collective bargaining. By filing its complaint, WPPA/LEER has not violated the recognition clause of the Metro contract, nor has it refused to bargain with the Metro Police Department.

As discussed above, WPPA/LEER's alleged breach of contract claim is not a grievance within the meaning of the Metro contract. By filing its complaint, WPPA/LEER has not failed to

use the agreed-upon grievance procedures contained in the Metro contract.

While it is evident that the parties had a "practice" of reducing tentative agreements to writing, it is not evident that the parties had any agreement which expressly prohibited "oral" agreements. By claiming that WPPA/LEER and the Employer entered into an oral collective bargaining agreement, WPPA/LEER has not acted in bad faith by violating historical negotiation ground rules.

Although the Employer argues that WPPA/LEER dropped its "educational pay" proposal during the negotiation of the initial Metro contract, this claim is not supported by the record evidence. Rather, the record indicates that WPPA/LEER's representatives erroneously concluded that the parties had reached an oral agreement on the issue of "educational pay."

WPPA/LEER is claiming "educational pay" for 1995. The Metro contract in effect in 1995 contains a "No Other Agreement" clause which restricts the Employer's right to enter into agreements which conflict with provisions of the Metro agreement. The "educational pay" agreement claimed by WPPA does not conflict with any provision of the 1995 Metro contract. By filing its complaint after entering into the initial Metro contract, WPPA/LEER has not acted in bad faith, nor has it violated the provisions of the initial Metro contract.

The 1996-98 Metro contract was not in effect in 1995. Thus, its provisions cannot be relied upon to argue that WPPA/LEER is claiming a benefit which conflicts with the express provisions of a written collective bargaining agreement.

As discussed above, the grievance settlement agreement of December 28, 1995, does not waive WPPA/LEER's statutory right to file its complaint. Nor does this grievance settlement agreement prohibit WPPA/LEER from filing its complaint. By filing its complaint after entering into the grievance settlement agreement, WPPA/LEER has not acted in bad faith, nor has WPPA/LEER violated the grievance settlement agreement of December 28, 1995.

At the time of the alleged "oral agreement," WPPA/LEER was represented by Edward Vander Bloomen. As WPPA/LEER Representative Vander Bloomen stated at hearing, he did not have any written bargaining notes confirming the "oral agreement" and the "oral agreement" was not otherwise reduced to writing.

At the time that the parties agreed upon the successor Metro contract, Vander Bloomen had terminated his employment with WPPA/LEER. It is not evident that his successor, Richard Daley, had any knowledge of the claimed oral agreement until February, 1996, when Village Administrator Van Gompel denied the request to pay 1995 "educational pay" to Officers Riesterer and Van Heuklon.

Officers Springer and Steidl were present at the time that the parties are alleged to have entered into an oral agreement which required the Employer to pay 1995 "educational pay." It is not evident, however, that either Officer knew that the Employer would not provide 1995

"educational pay" until February, 1996, when Village Administrator Van Gompel denied the Police Chief's request to provide Officers Riesterer and Van Heuklon with 1995 "educational pay."

The record does not demonstrate that, during the negotiation of the successor Metro contract, WPPA/LEER representatives purposely mislead the Villages into agreeing to Article XIX of the successor Metro contract, or otherwise acted in bad faith. Nor does the fact that WPPA/LEER did not raise the issue of "educational pay" until after the parties had negotiated and executed the successor Metro contract, establish that WPPA/LEER has acted in bad faith.

A responding party, such as WPPA/LEER, does not tacitly admit to a complainant's allegations when it fails to address the allegations in post-hearing written argument.

In conclusion, the Employer has not proven, by a clear and satisfactory preponderance of the evidence, that WPPA/LEER has violated a collective bargaining agreement or its statutory duty to bargain, in violation of Sec. 111.70(3)(b)3 or 4, Stats., as alleged by the Employer. Accordingly, the Employer's complaint has been dismissed in its entirety.

The Employer requests that it be awarded costs and attorneys' fees on the basis that WPPA/LEER's complaint is a frivolous action brought in bad faith. The WERC has held that attorneys' fees are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. [WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-C (WERC, 8/90)] The allegations and defenses have not been shown to be so frivolous, in bad faith or devoid of merit so as to warrant the imposition of costs and attorneys' fees to either party.

Dated at Madison, Wisconsin, this 18th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

ENDNOTES

1/ There are certain exceptions which excuse the failure to exhaust the contractual grievance procedure such as the employer's repudiation of the grievance procedure, unfair representation by the union and futility.

2/ Lance Steidl, who was President of the Little Chute Policemen's Association, recalls that, on December 8, 1994, he was interested in maintaining the health insurance retirement benefit for Little Chute officers hired prior to September 1, 1980 and that he understood that this would not become an issue in the negotiations because the affected employes were grandfathered. Officer Steidl neither confirmed, nor denied, that the parties reached an agreement on "educational pay" for Village of Kimberly Officers because Officer Steidl did not provide any testimony on this point. Russell Van Gompel, Little Chute's Village Administrator, was present at the December 8, 1994 meeting and recalls the following: the parties concentrated on dividing issues into those that could be agreed upon and setting aside those that needed further discussion; there were discussions about grandfathering positions or pay, but that he does not recall anything about grandfathering educational incentive pay; and that he does not recall any representative of the Village of Little Chute or the Village of Kimberly making any statement that employes who were currently receiving the Village of Kimberly educational incentive pay would be grandfathered under the Metro contract. Rick Hermus, Kimberly's Village Administrator, was present at the December 8, 1994 meeting and recalls that WPPA/LEER voiced concern about not losing the Kimberly educational incentive pay, but that the Villages did not agree to continue the educational incentive pay. Attorney Macy and Police Chief Peterson, who were also present at the December 8, 1994 meeting, did not testify at hearing.

3/ T. at 24.

4/ T. at 25.

5/ T. at 43.

6/ T. at 52.

CAB/mb
28759-C.D