STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, Complainant, vs. CITY OF MADISON, Respondent.	Case 183 No. 52622 MP-3025 Decision No. 28864-A

Appearances:

Mr. Steven J. Urso, WPPA Executive Assistant, 7 North Pinckney Street, Suite 220, Madison, Wisconsin 53703, appearing on behalf of the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

Ms. Eunice Gibson, City Attorney, City-County Building, Room 401, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710, appearing on behalf of the City of Madison.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Wisconsin Professional Police Association/Law Enforcement Employee Relations Division filed a complaint with the Wisconsin Employment Relations Commission on May 12, 1995, alleging that the City of Madison had committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1 of the Municipal Employment Relations Act. On September 30, 1996, the Commission appointed Lionel L. Crowley, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. The parties waived hearing in the matter and submitted a signed Stipulation of Facts on September 26, 1996. The parties filed briefs and reply briefs, the last of which were received on November 20, 1996. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its officers are located at 7 North Pinckney Street, Suite 220, Madison, Wisconsin 53703.

2. The City of Madison, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at the City-County Building, Room 501, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710.

3. The Association is the exclusive collective bargaining representative for the position classifications of Police Officer, Special Investigator, Detective, Sergeant and Detective Supervisor employed by the City.

4. At all times material herein, the City and the Association have been parties to a series of collective bargaining agreements setting forth the wages, hours and conditions of employment of the employes of the City who are members of the bargaining unit represented by the Association.

5. During the 1970's, 1980's and until the present, Madison police officers have been permitted to engage in "off-duty" or "special duty" employment as police officers. While they work in these "jobs," they are required to comply with police department rules and policies, as those are set forth in the police department policy manuals.

6. Until early 1995, agencies or businesses which desired to use police officers to perform services were required to sign a short contract. This contract was used until new contracts were furnished by the City in early 1995. The short contract provided, in pertinent part, as follows:

> Pursuant to Wisconsin Administrative Code Section RL 30.02, I understand that requestor shall be liable for the actions of off-duty law enforcement officers whose employment is authorized by you while these person(s) are performing services for the above-named requestor.
>
> In accepting this responsibility for each requested officer's actions, requestor hereby agrees to indemnify, defend, and save harmless the City of Madison, its officers, agents, officials and employees from and against all loss or expenses (including costs of attorney's fees) by reason of any claim or suit, or of liability imposed by law upon the City or its officers, officials, agents or employees for

> damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons or on account of damages to property, including loss of use thereof, arising from or growing out of the requestor's employment of off-duty police officer(s) of the City of Madison. I further understand that while these persons are performing services for the requestor, they are the employees of the requestor and as employer, requestor assumes any and all responsibility for payment of earnings to the employee, and if required by state or federal law, maintaining worker's compensation coverage for the employee, maintaining appropriate payroll records, and making appropriate deductions and withholding amounts from the payments made to the off-duty officer(s).

In conformity with this contract, the agencies or businesses paid the officers directly for services performed pursuant to the contract.

7. On July 7, 1992, the parties entered into a successor collective bargaining agreement. Its term was January 1, 1992 to December 31, 1993, and contained the following provision:

ARTICLE I

. . .

I. OTHER EMPLOYMENT:

> The President of the Association shall recommend to the Chief of Police at the beginning of each year the rate of pay for other employment arranged through the Department. The rate of pay shall be subject to the approval of the Chief of Police.

. . .

8. On or about July 7, 1994, the City Attorney of Madison directed to Madison Mayor Paul R. Soglin an Opinion he had requested. The City Attorney was of the opinion that off-duty officers who engaged in services under the short contract remained employes of the City with the effect that the collective bargaining agreement required overtime pay for the "outside" work.

9. In September, 1994, the parties entered into a new successor collective bargaining agreement. Its term was January 1, 1994 to December 31, 1995, which contained a grievance procedure culminating in final and binding arbitration, and contained the following provision:

ARTICLE I

. . .

I. SPECIAL DUTY:

The President of the Association shall recommend to the Chief of Police at the beginning of each year the hourly rate of pay for special duty arranged through the Department. The rate of pay shall be subject to the approval of the Chief of Police.

1. All requests for Special Duty Officers shall be subject to the following provisions:

   a. Payment for all such services shall be through City Payroll with appropriate benefits and an administrative fee.

   b. All such duty shall be strictly voluntary.

   c. The City shall continue to encourage the use of City Police Officers to provide services in conjunction with any event requiring a city permit. When traffic direction is necessary, the use of City Police Officers will help insure that coordination occurs with other city agencies and that total community needs are considered.

2. Officers working Special Duty pursuant to this section, which because of their complexity require significant department planning and/or supervision, shall be subject to the regular contractual rates.

3. When officers are working at the Special Duty pay rate, no other officers who are working at regular

contractual rates may be assigned to that Special Duty employment. This would not apply to unanticipated emergencies requiring the short-term response of other on-duty officers and/or supervisors or to incidental work of officers assigned to the area.

4. Except as in 3. above, if the Madison Police Department assumes immediate direction and control of officers on Special Duty, regular contractual hourly rates will apply to the work of such officers, following assumption of direction and control of the Department.

5. Officers who are required to work beyond the hours set by the Special Duty employer, as a result of law enforcement action taken during those hours, will be compensated at the applicable hourly rate as specified in the contract if the work is authorized by the Department.

10. On or about August 31, 1994, the City of Madison and Madison Professional Police Officers Association (MPPOA) entered into a memorandum of understanding (MOU), which provided as follows:

> WHEREAS, the City of Madison and the Madison Professional Police Officers Association desire to resolve the issue of off-duty employment pursuant to Article I, Section I, and Article VIII, Section B, of the collective bargaining agreement between the City and MPPOA.
>
> NOW, THEREFORE, the parties hereto agree as follows:
>
> A. Representatives of the parties will meet to review all requests from other employers who seek to utilize the services of MPPOA members at the "OTHER EMPLOYMENT" rate of pay described in Article I, Section I of the parties' agreement and will jointly determine which such employers do fall under the provisions of Article I, Section I; all other such employers will be subject to Article VIII, Section B of the parties; (sic) agreement. Other employment opportunities under Article I, Section I, shall be

generally described as work performed for a separate and independent employer and the work is not performed under the direct control of Madison Police Department.

B. The City will add the following cautionary notice to all sign-up sheets for supplemental employment opportunities to which the parties have stipulated pursuant to paragraph A, above; (sic)

"The MPPOA agrees that this employment opportunity falls under the provisions of Article I, Section I (Other Employment) of the collective bargaining agreement in effect between the City and MPPOA. Article VIII, Section B (Overtime) does not apply to this employment opportunity.

Any officer who agrees to participate should be aware that there is some doubt as to whether the provisions of Chapter 40, Stats. (Retirement, Duty Disability Retirement) apply to this employment opportunity. The Madison City Attorney has issued an opinion stating that officers who perform such supplemental employment are subject to the City's worker's compensation coverage. As to Chapter 40, Duty Disability Retirement, the State of Wisconsin Employee Trust Fund is not bound by the City Attorney's opinion.

C. In consideration of the foregoing, MPPOA agrees that it will not arbitrate any possible grievances filed by its members challenging the rate at which they are paid for participating in other employment opportunities; (sic) agreed to in A above.

D. The provisions of this Memorandum shall expire on Nov 6, 1994 when the new provisions under Art. I. section I. in the 1994-1995 aggreement (sic) will be implemented.

11. On November 2, 1994, Joe Durkin, the President of MPPOA, sent a letter to Gary Lebowich, then the City's Director of Labor Relations, which stated the following:

As you know, the MOU reached on 8-31-94 concerning the bridge between our old "Off Duty Employment" system and our new

"Special Duty Employment" provisions is set to expire on November 6, 1994. I understand the need for the Common Council Resolution and the need for new contracts between the City and the potential employers. I would hope that documents could be finalized in the next two weeks so we could give 3-4 weeks lead time to the special duty employers to be informed and understand the changes in the system. The MPPOA is willing to extend the MOU of 8-31-94 to December 4, 1994. I will be requesting Chief Williams to delay the implementation of the new "Special Duty" Pay rate and have it coincide with the implementation of the Special Duty provisions. The MPPOA would appreciate any assistance you could provide in seeing that these provisions be implemented by December 4, 1994.

12. On or about December 30, 1994, the President of MPPOA, Joe Durkin, directed a second letter to Gary Lebowich, which stated the following:

The membership is concerned about the Special Duty provisions provided for in the contract that have yet to be implemented. Members have made decisions based on these provisions to be in place at this time. I believe we both had hoped this transition could be accomplished smoothly, without alienating our own payroll people or our Special Duty Employers. While I believe most of the pieces are in place to implement the new system I have not seen all pieces in writing. I will recap what I know and don't know about what is being done.

1. We have the contract provisions in place.

2. I have notified the Chief, recommended and received approval of a $15/hr wage rate when the provisions are put into effect.

3. I have seen the Resolution for the City Council, but have not seen it on their agenda yet.

4. I have not seen, and more importantly our Department Clerk who administrates the Special Duty System has not received new contracts to send out to employers for the new provisions.

5. I have sent out a letter to the employers explaining changes

from our perspective (see attached), but think it would be wise for the City to do the same, with copies of the new contracts they have to sign with a breakdown of costs.

6. While I believe City Payroll is ready to run the Special Duty pay through City Payroll, our Departmental Payroll clerks have not been provided any information.

7. I hope someone is working on the billing system that will have to be used for this new system.

The MPPOA feels a two month extension to the agreement was reasonable given the circumstances. Beginning January 15, 1995 I am advising all MPPOA members to request payment for Special Duty assignments, through the City payroll system, for all special duty work performed after that date. If Officers would receive a check from an employer for this work they would of course turn it over to the City. It is the MPPOA's hope that all these matters will be taken care of prior to January 15th.

13. Also, on or about December 30, 1994, the President of MPPOA, Joe Durkin, directed a letter to persons and entities who had used Madison police officers to perform "off-duty" work in a policy capacity, which stated the following:

Dear Employer,

During 1994, you or your agency employed Off-Duty Madison Police Officers at your business, facility or event. The MPPOA has negotiated changes to our contract that will have some impact on you. The MPPOA represents most of the Officers who performed the work for you. (Lieutenants & Captains are represented by AMPS).

We are looking for implementation on or about January 15, 1995. The first change will be to whom you pay. In the past all payments for work were made directly to the Officer. The new provisions will require all payments for off-duty work in a Police capacity, which we call Special Duty, be paid through City of Madison payroll. While the Officer's actual hourly wage rate will drop to $15/hr, the City will add on the cost of retirement benefits, F.I.C.A., workers compensation and unemployment. The cost to you will be around $20/hr.

These changes were necessary for several reasons, from the

MPPOA's perspective. The off-duty employment of the Officers working in a Police capacity, is regulated and controlled by the Madison Police Department. Officers are at all times required to abide by Police Department Policies, Procedures and work rules. They were in fact acting as employees of the City of Madison Police Department and not the individual off-duty employer. Without these new provisions, we felt these Officers were at substantial risk of being ineligible for certain workers compensation and/or duty disability benefits provided by State Law and our contract, if they were injured while performing this work. Some of the work was not in compliance with other contract terms.

We feel these new provision (sic) not only protect the officer better, but can also reduce your liability as and (sic) employer.

The members of the MPPOA appreciate your organizations (sic) use of Madison Police Officers in the past and hope you will continue to use the services of Madison Police Officers. These new provisions will protect the benefits of the officers and will provide for all wages to be paid through City of Madison payroll. There are no changes in how Officers sign up for this work.

14. On February 7, 1995, the Common Council of the City of Madison approved a resolution authorizing the Chief of Police to sign, on behalf of the City of Madison, new contracts with persons or entities who use "special duty" officers, and authorizing the City Comptroller to establish the accounts necessary to process payments under the agreements.

15. On or about March 7, 1995, City Attorney Eunice Gibson and Police Captain George Silverwood sent letters to all previous non-government users of "special duty" police officers, enclosing a proposed agreement. A new contract for "special duty" replaced the short contract and required users to pay the City a certain dollar per hour rate for officers and required general liability insurance of $1,000,000, as well as $1,000,000 in automobile liability, with the City named as an insured as well as other matters.

16. On or about March 17, 1995, Joe Durkin, the President of MPPOA, sent a letter to all previous non-governmental users of "special duty" police officers, which read as follows:

To: Requestors of Special Duty Police Services

Some of you have recently received a contract regarding your request

> to have Madison Police Officers at your business, facility or event. (Contract for Special Duty Police Work) As you may recall, I sent you a letter in early January indicating that certain changes were going to take place in the way you contract for the services of Madison Police Officers. Those of you that have already received a contract have noticed that the City of Madison is requiring you to retain an Insurance Policy for $1,000,000 in general liability and $1,000,000 in Automobile liability naming the City as an additional insured. (see back for excerpt of the contract)
>
> The MPPOA agrees with those who have found this portion of the contract disturbing. Nothing in contract settlement between the City and the MPPOA requires the City to secure this insurance coverage from those that seek additional Police Services. The MPPOA believes it is the opposite message the City of Madison should be sending. The City should be assisting those organizations and/or businesses who are acting responsibly by seeking additional Police Services at their own expense. In most cases this type of proactive use keeps most anticipated problems from occurring in the first place or provides for the immediate response of an Officer.
>
> The requirement of this insurance was approved by your elected representatives on advice of the City Attorney. If you are concerned about this requirement please contact your elected City of Madison representatives.
>
> The members of the MPPOA appreciate your organizations (sic) use of our Officers in Special Duty assignments. The MPPOA believes this Insurance requirement is counterproductive for establishing a reasonable working relationship between the City, the MPPOA and the citiizens (sic) who wish to utilize Police Officers in a Special Duty capacity.

17. During the months of March and April, 1995, the City Attorney, and the Risk Manager contacted users who had not signed the contract, in order to learn why they had not signed it and in order to answer their questions about the contract. The City Attorney also sent follow-up letters to some users who had not signed the contract. The letter stated, in pertinent part, as follows:

> Early in March, I wrote you a letter, enclosing copies of a Contract for Special Duty Employment of Police Officers. I also

> enclosed a resolution setting forth the Common Council's requirements as to this contract.
>
> Since that time, I haven't heard from you. If you intend to continue making use of special duty police officers, the City must have a fully executed contract. If I do not receive the contracts by June 16, 1995, special duty police officers cannot be made available.

18. In late 1994 and early 1995, users of "special duty" police officers who had not yet signed a new contract with the City of Madison, continued to pay the officers directly, as they had done before the new contract was authorized. The officers were paid $15.00 per hour. Certain of the police officers turned these checks over to police supervisors. The supervisors subsequently returned the checks to the officers. Officers either cashed their pay checks or placed them into a separate account at their personal bank. No grievances were filed over the returning of checks to the officers.

19. After users of "special duty" police officers signed the new contract with the City of Madison, they paid the City of Madison as called for in the contracts and the City Comptroller paid the police officers at the rate agreed to in the collective bargaining agreement.

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

CONCLUSION OF LAW

Inasmuch as the 1994-95 collective bargaining agreement between the Association and the City provides for arbitration of disputes and that contractual procedure has not been exhausted, the Examiner will not assert the Commission's jurisdiction over the allegation that the City violated the terms of the parties' 1994-95 collective bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

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

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

1/ See footnote on Page 12.

Dated at Madison, Wisconsin, this 8th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

CITY OF MADISON

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the City violated Secs. 111.70(3)(a)5 and 1, Stats., by failing to comply with the parties' collective bargaining agreement. The City denied that it committed any prohibited practices and alleged that the matters alleged in the complaint concerned the interpretation and application of the agreement which was subject to the grievance procedure, including arbitration, and the Association failed to use the agreed-upon grievance procedure.

ASSOCIATION'S POSITION

The Association contends that the City violated the 1994-95 collective bargaining agreement by failing to pay officers for "special duty" work through the City payroll system. It asserts that Article I, Section I is clear and unambiguous and requires that officers who work "special duty" be compensated through the City payroll "with appropriate benefits."

The Association argues that it complied with its responsibilities under this language and it seeks to have the City do the same. It points out that reasons for payment by the City was: (1) employer indemnification of officers in uniform and armed who may be required to take law enforcement action; (2) workers' compensation coverage; and (3) protection for duty-incurred illness or injury under Sec. 40.65, Stats. It notes that the parties reached agreement on the contract in September, 1994, and agreed to an implementation date of November 6, 1994, for Article I, Section I. This was extended to December 4, 1994, and further extended to January 15, 1995, two months after it should have been implemented. The City failed to meet any of these dates. It anticipates that the City will argue that it needed additional time, but it submits that the City had ample time to set up the payroll system and adopt a resolution when it was given a legal opinion as of July, 1994. It claims that the City's failure to live up to its part of the bargain deprived officers of their due compensation, benefits and protection as provided in the collective bargaining agreement. It states that officers had no contribution paid toward the employe's pension nor were the employe's earnings reported to the Department of Employe Trust Funds. It points out that officers who attempted to turn in checks from users to the City were told they would not be accepted or had their checks returned. The Association argues that it had no recourse but to file the instant complaint.

The Association argues that the City's failure to comply with the contract deprived officers of the appropriate contributions to the retirement system and they did not increase their earnings for the three highest years averaging. It insists that bargaining unit members did not receive the benefit of the contractual provision. It asserts that the City could go back and make these employes whole.

It concludes that the City has blatantly and willfully refused to comply with the terms of the contract it had agreed to. The Association requests a finding on its behalf and the City be ordered to make the employes whole. It calculates that seven employes are owed a total of $2,712.60 in retirement contributions. It seeks that this loss be adjusted.

CITY'S POSITION

The City argues that the Commission should not take jurisdiction over the complaint. It points out that Article IV of the parties' collective bargaining agreement sets forth a detailed grievance procedure and the application of the contract terms related to special duty were subject to the grievance procedure. It submits that the Memorandum of Understanding provided that the Association would not arbitrate grievances over "special duty" pay and this was extended to December 4, 1994, with no further extensions and yet no grievance was ever filed. It insists that the grievance procedure is presumed to be the sole remedy for an aggrieved employe unless the contract provides otherwise. It submits that an employe must make use of the grievance procedure except when (1) the employer acts in a manner repudiating the contract, (2) use of the procedure would be futile, (3) the Union with sole power to proceed at the higher stages wrongfully refused to process the grievance, and (4) the grievance procedure is not intended to be the exclusive remedy. It claims that no such allegations are contained in the complaint. It argues that the failure to exhaust the grievance procedure requires the complaint to be dismissed for lack of jurisdiction.

The City contends that the complaint fails to state facts sufficient to state a claim of a violation of Sec. 111.70(3)(a)1, Stats. It notes that the complaint does not allege that the City has done anything that constitutes interference, but on the contrary, asserts that the parties reached agreement and then complains about the City's conduct. It asserts that there are no facts which, if proved, establish a violation of Sec. 111.70(3)(a)1, Stats.

The City alleges that there is no violation of Sec. 111.70(3)(a)5, Stats. It notes that the Association was anxious to implement Article I, Section I and there was some delay in getting Council approval and in circulating new contracts which delayed the City's implementation of Article I, Subsection I. 1. a. It points out that requests for special duty officers as well as payment for special duty work comes from users and the payment for benefits and an administrative fee must be agreed to by users. It submits that the record establishes that the City did what it could to obtain agreement from the users. The City maintains that it had to insist on proof of insurance to protect the City against liability and the Association's letter to users encouraged their refusal to agree to the new system. The City asserts that any delay in implementation was equally the fault of the Association and it cannot claim that the delay is the City's fault for which the City solely must be held responsible.

The City argues that even if the Commission should find in favor of the Association, the Commission has no authority to award costs to the Association and its claim for costs should be

stricken.

The City concludes that the dispute ought to be resolved in the grievance arbitration procedure and the Commission should decline to exercise jurisdiction. It states that no violation of Sec. 111.70(3)(a)1, Stats., was shown and the evidence failed to show any contract violation. It agrees there was a delay in implementation but both parties were equally responsible for it and it asks that the complaint be dismissed.

ASSOCIATION'S REPLY

The Association agrees conceptually that the grievance procedure should be used to resolve disputes whenever possible but the instant case is distinguishable for a number of reasons. The Association states that the first reason was the Memorandum of Understanding whereby the Association agreed not to use the grievance procedure to settle disputes over special duty pay and the second reason is that the City does not dispute that it violated the terms of the agreement but pleads insufficient time to do what it needed to do and third, the Association granted the City two extensions until January 15, 1995, because it felt it would be better to accommodate the City.

The Association claims that the direct impact of the City's failure to act is that employes were not compensated accurately but the indirect impact is not easy to determine and that is how many officers decided not to perform special duty work because the City might not properly compensate them. The Association believes that the City's actions intimidated employes from reaping the benefits which they were entitled to under the contract. It argues that the City cannot defend its actions because users would not agree to a contract with the City as such a requirement is not covered in the Memorandum of Agreement or the collective bargaining agreement.

The Association reiterates that the City violated the collective bargaining agreement. It maintains that the language speaks for itself and the City violated Article I, Section I by refusing to pay officers through the City payroll. The City, according to the Association, stalled the process and discouraged private employers from hiring special duty officers and the City's reference to the Union's letter of March 17, 1995, is not persuasive as this letter was simply to explain to users how the City was acting in contradiction of the contract. It alleges that the City is overlooking the Association's December 30, 1994 letter to users and the Association claims its later letter was to encourage special duty users to continue to use officers and to convey its belief that the City needed to be more accommodating toward private employers.

The Association argues that this matter was handled in an adversarial manner when the situation did not require it. It is asking that its members be made whole for an ongoing loss that has existed for too long which should be resolved without further delay.

CITY'S REPLY

The City argues that nothing in the Association's brief explains why the grievance procedure was not followed in this case and the Commission should not exercise jurisdiction over the complaint but should require the parties to use the agreed-upon process.

The City reiterates that it did not violate Sec. 111.70(3)(a)5, Stats. It refers to the contract language of Article I, Section I. 1. a. which states that "all requests for Special Duty Officers" shall be subject to payment through City payroll. It argues that the requests must come to the City from users and the City must be paid for these services and the City then pays Special Duty Officers through the City payroll. It alleges that when officers accepted direct payments, they knew the payments were not part of the new system set up by the contract. The City could have cut off all users who didn't comply, but the Association might also have viewed this as a violation of the contract.

In conclusion, the City asks that the complaint be dismissed for failure to exhaust the grievance procedure or a failure to establish a violation of Sec. 111.70(3)(a)5, Stats.

DISCUSSION

The complaint alleges a violation of Sec. 111.70(3)(a)5, Stats., and presumably a derivative violation of Sec. 111.70(3)(a)1, Stats. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

> 5. 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. . . .

Generally, the Commission 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. 2/ The

2/ Rock County, Dec. No. 28494-A (Jones, 1/96); Joint School District No. 1, City of Green Bay, et al., Dec. No. 16753-A, B (WERC, 12/79); Board of School Directors of Milwaukee, Dec. No. 15825-B (WERC, 6/79); Oostburg Joint School District, Dec. No. 11196-A, B (WERC, 12/79).

rationale for this is 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. 3/ Here, the parties' collective bargaining agreement provides for final and binding arbitration and contains no express language that it is not the exclusive remedy. It is undisputed that no grievances were filed in this matter. Thus, it must be concluded that the Association has failed to exhaust the contractual grievance procedures.

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. None of these exceptions are present in this case. The Association has asserted three defenses. The first is the Memorandum of Agreement where it agreed not to file a grievance to settle disputes over special duty pay. Essentially, the Association agreed to waive its right to grieve for a certain period of time. It cannot later assert a violation of Sec. 111.70(3)(a)5, Stats., because the same waiver applies in the instant case. In other words, a party cannot waive the grievance procedure over a contract provision and then turn around and claim a statutory violation of the same provision because the parties are bound by their Memorandum of Agreement. Thus, this defense must fail.

The second argument is that the City does not dispute the fact it violated the agreement. However, the City, in its brief, denied violating the agreement. Even if the City had conceded to violating the contract, this does not excuse the failure to seek appropriate relief under the contractual grievance procedure. This too fails to excuse exhaustion of the grievance procedure.

The third defense is that the Association volunteered to extend the time lines twice and attempted to accommodate the City. How does this excuse the Association's failure to file a grievance on alleged violations after the time extensions expired? It simply does not. This defense also fails.

The parties have a contract which contains a grievance procedure which culminates in final and binding arbitration. The parties have agreed to have an arbitrator determine whether there has been a violation of the contract. This agreement must be given effect and as noted above, no exceptions apply. It is therefore the arbitrator that should decide the merits of the Association's claim. This is the parties' exclusive remedy and the Examiner will not assert the Commission's jurisdiction to determine whether or not the City violated the parties' contract. Thus, the alleged violation of Sec. 111.70(3)(a)5, Stats., as well as the derivative violation of Sec. 111.70(3)(a)1, Stats., are dismissed in their entirety.

3/ Mahnke v. WERC, 66 Wis.2d 524, 529, 225 N.W.2d 617, 621 (1975).

Dated at Madison, Wisconsin, this 8th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner