

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**MILWAUKEE POLICE ASSOCIATION**, Complainant,

vs.

**THE CITY OF MILWAUKEE**, a municipal corporation, Respondent.

Case 449  
No. 56245  
MP-3403

**Decision No. 29412-A**

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Appearances:

Eggert Law Offices, S.C., by **Attorney Jonathan Cermele**, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

**Mr. Thomas J. Beamish**, Assistant City Attorney, City of Milwaukee, 200 East Wells Street, 8<sup>th</sup> Floor, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Respondent.

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

On March 11, 1998, the Milwaukee Police Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein it alleged that the City of Milwaukee had refused to abide by the provisions of a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats. On July 31, 1998, the Commission appointed Coleen A. Burns, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order. Hearing was held on September 3 and October 6, 1998, in Milwaukee, Wisconsin, and a stenographic transcript was made of the hearing. The post-hearing briefing schedule was completed by December 3, 1998.

Having considered the evidence and arguments of the parties, the Examiner makes and issues the following

No. 29412-A

### FINDINGS OF FACT

1. The City of Milwaukee, hereinafter the Respondent or City, is a municipal employer with its principal offices located at City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551.

2. The Milwaukee Police Association, hereinafter the Complainant or Association, is a labor organization having offices at 1840 North Farwell Avenue, Milwaukee, Wisconsin 53202.

3. For at least 25 years, the Association has been the exclusive collective bargaining representative of certain employes of the City of Milwaukee Police Department. On September 17, 1970, the Association and the City entered into a Memorandum of Understanding (MOU) that replaced Part III of the 1969-70 collective bargaining agreement. The MOU, in pertinent part, stated that "The arbitrator so selected shall hold a hearing at a time and place convenient to the parties within fifteen (15) calendar days of notification of his selection, unless otherwise mutually agreed upon by the parties." This language remained in the contract through the end of the 1981-82 collective bargaining agreement. In the 1983-84 collective bargaining agreement, this language was replaced with "The umpire so elected shall hold a hearing at a time and place convenient to the parties." In the 1985-86 collective bargaining agreement, this language was replaced with "The umpire shall hold a hearing at a time and place convenient to the parties." This language continued in all subsequent collective bargaining agreements, including the 1995-97 collective bargaining agreement that remains in effect pursuant to an agreement of the parties. The parties' 1995-97 collective bargaining agreement contains a grievance procedure that culminates in final and binding arbitration.

4. On July 5, 1973, the Wisconsin Employment Relations Commission issued a decision that excluded Sergeants from the collective bargaining unit represented by the Association. Subsequently, City representative James Mortier orally agreed to Association representative Robert Kleismet's request to hold grievance arbitration hearings at the Association's offices. Mortier, who is deceased, represented the City in labor negotiations from 1956 until his retirement at the end of 1981. Kleismet represented the Association in collective bargaining matters from the late 1960's until his retirement in 1984. Patrick Doyle is the Association's Secretary-Treasurer and grievance chairman. The Association's records indicate that from November of 1972 through May of 1997, grievance arbitration hearings were held on approximately 113 days; on all but ten of these days, the hearings were held at the Association's office; and, of these ten days, grievance arbitration hearings were held at the City Hall on November 28, 1972; March 8 and 26, 1973; April 24, July 11 and December 3, 1974; February 8, 1983; and April 10 and June 12, 1984. With respect to grievances that resulted in an award, the Association's records are substantially accurate. Scheduling letters reflect that grievance arbitration hearings were scheduled to be heard at the City Hall on January 20, 1983; May 20, 1983; and February 23, 1983. At times, grievance arbitration hearings were rescheduled to a different time or hearing location. Not all of the Association

grievances that were scheduled for arbitration resulted in an award. Since at least the 1971-72 collective bargaining agreement, the parties' collective bargaining agreement has contained language that recognizes that the written collective bargaining agreement constitutes an entire agreement between the parties and that no verbal statement shall supersede any of its provisions. The parties' 1995-97 collective bargaining agreement does not contain a maintenance of standards clause.

5. In 1983 and 1984, Michael Whitcomb was an attorney in the office of the City Attorney and represented the City at grievance arbitration hearings involving the Association. At the time that Whitcomb began such representation, the City labor negotiator, James Geissner, told Whitcomb that, under a prior agreement between the Association and the City, grievance arbitration hearings were scheduled at the Association's offices. During the time period in which Whitcomb represented the City, Association grievance arbitration hearings were held at the Association's office, unless another location was needed to accommodate the schedule of either the Association or City attorney, witnesses, or the arbitrator. John Tries was the City's labor negotiator in 1988 and the City's Director of Employment Relations in 1989. In 1990, Tries became the Mayor's Chief of Staff. During Tries' tenure as a City representative in labor relations, grievance arbitration hearings were held at the Association's offices and the location of the grievance arbitration hearings was never at issue. Josef Ellis worked in the City's office of labor negotiations from 1969 through 1989, at which time Ellis became the Personnel Director of the City police department. Ellis remained in the position of Personnel Director until he retired in September of 1997. Ellis, who worked closely with Mortier, oversaw grievance arbitration scheduling letters; testified at grievance arbitration hearings; and assisted the City Attorney's office in preparing exhibits for grievance arbitration hearings. Mortier did not tell Ellis that there was an agreement to hold the Association's grievance arbitration hearings at the Association's offices. John Kitzke, an attorney with the City Attorney's office, represented the City at Association grievance arbitration hearings from the middle of the 1970's until the early 1980's. Thomas Goeldner, an attorney with the City Attorney's office, represented the City at Association grievance arbitration hearings from the middle of the 1980's until the middle of the 1990's. Frank Forbes has been the City labor negotiator since November of 1993. Forbes has reviewed the City's files and has not found any documentation of an agreement to hold all Association grievance arbitration hearings at the Association's offices. In 1997, the Assistant City Attorney who represents the City in Association grievance arbitration hearings refused to schedule all arbitration hearings at the Association's offices. Since that time, the parties have not scheduled any grievance arbitration hearings because they are unable to agree upon a location for grievance arbitration hearings.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

**CONCLUSIONS OF LAW**

1. The Association has not demonstrated, by a clear and satisfactory preponderance of the evidence, that the Association and the City are parties to any collective bargaining agreement that requires all Association grievance arbitration hearings to be held at the Association's offices.

2. The Association has not demonstrated, by a clear and satisfactory preponderance of the evidence, that the City violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., when the City did not agree to schedule all Association grievance arbitration hearings at the Association's offices.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

**ORDER**

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

Dated at Madison, Wisconsin, this 5th day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

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Coleen A. Burns, Examiner

CITY OF MILWAUKEE

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

The Association filed a complaint of prohibited practices with the Commission alleging that the Respondent refused to abide by the terms of a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., when it refused to hold all Association grievance arbitration hearings at the Association's office. The Respondent denies that it has committed a prohibited practice.

**ASSOCIATION**

In the early 1970's, the parties negotiated a collectively bargained agreement to conduct the "binding arbitration step" of the grievance procedure at the offices of the Milwaukee Police Association. That collectively bargained agreement was separate and distinct from the parties' then-existing contract and was never incorporated within subsequent contracts negotiated by the parties. The parties adhered to such agreement, with minor exceptions made for the convenience of the parties and the arbitrator, for some 25 years. The City has unilaterally refused to adhere to the separately negotiated and collectively bargained agreement and, therefore, has committed a prohibited practice under Sec. 111.70(3)(a)5, Stats.

**CITY**

The Association has failed to establish, by a clear and satisfactory preponderance of the evidence, that the City violated any collective bargaining agreement with respect to the location of grievance arbitration hearings. The Association implausibly suggests the existence of an oral collective bargaining agreement that is inconsistent with the parties' written collective bargaining agreement. From 1970 through 1997, the collective bargaining agreements between the City and the Association have provided, in substantially similar language, that grievance arbitration hearings are to be held "at a time and place convenient to the parties." The parties' contracts have also provided that no verbal statements could supersede the written provisions of the parties' contract. At all times, the City has been willing to arbitrate at a location mutually agreed upon by the parties. The City submits that it is the Association that is refusing to comply with the parties' actual documented agreement as to location of these hearings. The Association has not shown a violation of Sec. 111.70(3)(a)5, Stats., and the complaint should be dismissed.

**DISCUSSION**

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 employees. . . ." To prevail upon its complaint of prohibited practice, the Complainant must establish, by a clear and satisfactory preponderance of the evidence, that the Respondent has violated Sec. 111.70(3)(a)5, Stats.

Generally, where as here, a collective bargaining agreement is in effect and that collective bargaining agreement contains a grievance procedure, the Commission refuses to assert jurisdiction over a Sec. 111.70(3)(a)5 breach of contract claim unless the complainant has exhausted that grievance procedure. MINERAL POINT UNIFIED SCHOOL DISTRICT, DEC. NO. 14970-C (WERC, 10/78). An exception to this general rule will be made where the employer has repudiated the grievance procedure; there has been unfair representation by the union; or futility. CITY OF MADISON, DEC. NO. 28864-A (CROWLEY, 1/97).

As a result of this dispute, the parties have not been able to schedule any grievance arbitration hearings. Under the circumstances, it would be futile to require the exhaustion of the contractual grievance procedure. Accordingly, it is appropriate for the Commission to assert its jurisdiction to hear and decide Complainant's Sec. 111.70(3)(a)5 breach of contract claim.

Robert Kleismet recalls that, following the Commission decision which led to the exclusion of Sergeants from the collective bargaining unit represented by the Association, he and James Mortier reached an oral agreement that all grievance arbitration hearings would be held at the Association offices. According to Kleismet, the quid pro quo for Mortier's agreement was that the Association would not contest the Commission decision on the bargaining unit status of the Sergeants.

Mortier is deceased. Kleismet does not claim, and the record does not establish, that any other individual witnessed the making of this oral agreement. At the time of the alleged oral agreement, Kleismet represented the Association in collective bargaining matters and Mortier represented the City in collective bargaining matters.

In 1983 and 1984, Michael Whitcomb was the Assistant City Attorney who represented the City at grievance arbitration hearings involving the Association. Whitcomb recalls that the then City labor negotiator, James Geissner, advised Whitcomb that, under a prior agreement between the parties, arbitration hearings were to be scheduled at the Association offices. Whitcomb further recalls that, during the time that he represented the City at grievance arbitrations, the hearings were held at the Association's offices, unless another location was needed to accommodate the schedule of either the Association or City attorney, witnesses, or the arbitrator.

Between 1988 and 1990, John Tries represented the City in labor negotiations. Tries recalls that, during his tenure as a City labor relations representative, Association grievance arbitration hearings were held at the Association's offices and that the location of grievance arbitration hearings was never at issue.

Patrick Doyle is the Association's Secretary-Treasurer and grievance chairman. Doyle reviewed the Association's file of arbitration awards and found that, from November of 1972 through May of 1997, grievance arbitration hearings were held on approximately 113 days. Doyle further found that, on all but ten of these days, the hearings were held at the Association's office. With respect to grievances that resulted in an award, the Association's records are substantially accurate.

Josef Ellis worked in the City labor negotiations office from 1969 through 1989 and in the Police Department personnel department from 1989 until his retirement in September of 1997. Ellis states that it is possible that Mortier would not put an agreement into a formal contract. Ellis maintains that, if Mortier had made the claimed oral agreement, then Mortier would have informed Ellis of the agreement. Ellis states that Mortier never advised Ellis that there was an agreement to hold Association grievance arbitration hearings at the Association's offices. Ellis believes that City representative John Kitzke agreed to hold grievance arbitration hearings at the Association's offices because Kitzke enjoyed being away from the office and that City representative Thomas Goeldner agreed to hold grievance arbitration hearings at the Association's offices because he lived nearby.

Frank Forbes, the City's labor negotiator since November of 1993, states that he reviewed the files in his office and was unable to find any documentation of an agreement to hold grievance arbitration hearings at the Association's offices. Forbes recalls that Goeldner represented the City at Association grievance arbitration hearings at the time that Forbes became the City's labor negotiator. Forbes further recalls that Goeldner told Forbes that Goeldner held arbitration hearings at the Association's offices because he liked to. According to Forbes, the individual in the City Attorney's office who is currently responsible for the Association's grievance arbitration hearings does not want to hold all of the hearings at the Association's offices.

The evidence that Ellis and Forbes were not aware of the claimed oral agreement gives rise to the inference that such an agreement did not exist. The Examiner, however, considers this inference to be rebutted by the other evidence.

Crediting Kleismet's testimony, the Examiner is persuaded that, in the 1970's, Mortier and Kleismet orally agreed that Association grievance arbitration hearings would be held at the Association offices. 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. VILLAGE OF KIMBERLY, DEC. NO. 28759-C (BURNS, 11/97); CITY OF MADISON, DEC. NO. 20656-C, 20657-C (WERC, 9/84); CITY OF PRAIRIE DU CHIEN, DEC. NO 21619-A (SCHIAVONI, 7/84).

Section 111.70(3)(a)4, Stats., limits collective bargaining agreements to a duration of three years. Thus, assuming arguendo, that the oral agreement between Mortier and Kleismet were a collective bargaining agreement, it would no longer be in effect.

Whitcomb's testimony indicates that, as late as 1984, the City recognized that there was an agreement to arbitrate grievances at the Association's offices. However, neither Whitcomb's testimony, nor any other record evidence, demonstrates that the parties' subsequently renewed this agreement.

As with the 1970's oral agreement, the agreement referenced by Whitcomb would exceed the three-year requirement of Sec. 111.70(3)(a)4, Stats., and, thus, would not be effective as an independent collective bargaining agreement. It is not evident that the parties subsequently entered into an oral agreement, or any other agreement, regarding the location of grievance arbitration hearings, other than the parties' written collective bargaining agreement.

Evidence of the parties' prior understandings and conduct may be used to interpret ambiguous provisions of a labor contract, but cannot be used to alter the terms of unambiguous contract language. The grievance procedure contained in the 1995-97 collective bargaining agreement states that the "umpire shall hold a hearing at a time and place convenient to the parties." This contract language is not ambiguous.

The only entity that can determine whether or not a place is convenient to a party is the party itself. Thus, under the clear and unambiguous provisions of the parties' 1995-97 collective bargaining agreement, arbitration hearings must be held at a place that is agreeable to each party.

The provisions of the 1995-97 collective bargaining agreement provide Respondent with the right to agree, or to not agree, to hold arbitration hearings at the Association's offices. Accordingly, Respondent did not violate the provisions of the 1995-97 collective bargaining agreement when it did not agree to hold all arbitration hearings at the Association's offices.

### **Conclusion**

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent's refusal to conduct all arbitration hearings at the Association's offices has violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats. Accordingly, the Examiner has dismissed the Association's complaint.

Dated at Madison, Wisconsin, this 5<sup>th</sup> day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

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Coleen A. Burns, Examiner

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