STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION /
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, Complainant,

and

CITY OF ONALASKA and
CHIEF OF POLICE RANDY A. WILLIAMS, Respondents.

Case 46
No. 65558
MP-4226

Decision No. 31661-A

Appearances:

Gordon McQuillen, Director of Legal Services, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, WI 53713, appearing on behalf of the Complainant.

O'Flaherty Heim Egan Ltd., U.S. Post Office Box 1147, La Crosse, WI 54602-1147, by Dawn Marie Harris, Attorney at Law, appearing on behalf of the Respondents.

ORDER DENYING RESPONDENTS' MOTIONS TO DISMISS

Daniel Nielsen, Examiner: The above-named Complainant, Wisconsin Professional Police Association/LEER Division, having on February 1, 2006, filed with the Commission a complaint, alleging that the above-named Respondents, City of Onalaska and Chief of Police, Randy A. Williams, have violated the provisions of Ch. 111.70, MERA, by discriminating against employees on the basis of their involvement with concerted activity, and by interfering with the rights of municipal employees to engage in protected concerted activity; and the Commission having appointed Daniel Nielsen, an Examiner on its staff to conduct a hearing and to make Findings of Fact and Conclusions of Law, and to issue appropriate Orders; and a hearing having been scheduled on the complaint for June 27 and 28, 2006, at the City Hall in Onalaska, Wisconsin; and the City having, on May 12, 2006, filed an Answer to the complaint and Motions to Dismiss; and the Association having, on June 7, amended its complaint; and

the City having moved to Dismiss the Amended Complaint as well; and, on June 9, the Association having filed a response in opposition to the Motions to Dismiss; and the Examiner having reviewed the pleadings, the Motions, and the arguments in support and opposition to the Motions, and being fully advised in the premises; it is hereby

ORDERED

That the Motions to Dismiss are denied, and that the hearing will proceed as scheduled on June 27 and 28, 2006.

Dated at Racine, Wisconsin, this 20th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

City of Onalaska

MEMORANDUM ACCOMPANYING ORDER DENYING RESPONDENTS' MOTIONS TO DISMISS

BACKGROUND

The Association's Complaint makes the following basic allegations:

A. Events between November of 2004 and May of 2005

Kevin Johnson is a Police Officer, who has been active with the Association. On December 24, 2003, Johnson posted materials on a bulletin board customarily used by the Union for posting, including article allegedly written by the Mayor, captioned "Energy Booster: Be Serious About Fun." Sgt. Troy Miller removed the material that same day, on the grounds that the materials undermined Department morale. Miller also issued an order to employees to cease such postings. Subsequently, Johnson posted another article from the Association of Chiefs of Police, concerning the use of sergeants as beat officers.

Daniel McCluskey is also a Police Officer who has been active with the Association. McCluskey too posted several articles on the bulletin board, including two addressing abusive supervisors. On January 21, 2005 Sergeant Knute Aasen directed him to meet with Captain Mark Moan to discuss the articles. McCluskey requested that Johnson accompany him as a Union representative for the meeting. Both men attended the meeting, and in the course of it they raised issues that they believed were creating morale problems within the Department. While neither man requested any action nor made any formal charges against anyone, as a result of their statements, Captain Moan prepared and submitted a report to Chief of Police Williams, entitled "INTERNAL INVESTIGATION/Allegations against Sgt. Keith Roh."

On March 8, 2005 Sergeant Roh filed a complaint with Chief Williams charging that Johnson and McCluskey were harassing him. Three days later, Chief Williams issued a memo to Roh, McCluskey and Johnson saying he found nothing to the charges by McCluskey and Johnson against Roh. He also sent the two officers a copy of Roh's complaint against them.

On April 7 Chief Williams issued written reprimands to Johnson and McCluskey for harassment and creating a hostile work environment. The Association filed grievances on behalf of both officers. A grievance meeting was held before the City's Personnel Committee on May 9, but the Committee took no formal action. Within an hour after the Personnel Committee meeting, Sergeant Roh sent an e-mail to McCluskey threatening insubordination charges against him for not performing assigned tasks. McCluskey replied by e-mail that he was not assigned those tasks.

B. The Suspension of Officer Johnson

On June 1, 2005, Officer Johnson was relieved of duty and placed on administrative leave for harassing the mayor during a social event on May 26th. Two days later, Chief Williams advised Johnson he would seek to terminate him and showed him a draft charge for the Police and Fire Commission's consideration. After further discussion, Johnson declined to seek any redress before PFC and instead accepted an unpaid disciplinary suspension.

C. The Performance Evaluation of Officer Johnson and His Response

On August 19, Johnson received his semi-annual performance evaluation. He received poor marks in areas that had previously been acceptable. He wrote his responses to the evaluation on the evaluation form. He was then ordered to meet with Williams on September 6 to discuss his responsive comments. In that meeting, Williams said he was pissed off by the responsive comments and was thinking of suspending him for five days for his comments. He also told Johnson that the materials Johnson posted on the bulletin boards are derogatory to supervisors and that he did not believe Johnson's explanation that he thought his recent postings had to do with improving efficiency. Williams said that he was removing Johnson's responsive comments from the evaluation, but would change the evaluation to a "meets expectations" if Johnson went the rest of the year without problems.

D. The Performance Evaluation of Officer McCluskey and His Response

On August 25, Officer McCluskey received his semi-annual performance evaluation from Sgt. Aasen. He received poor marks in several categories he had previously been judged satisfactory in, to which he replied with remarks written on the evaluation. He was ordered to meet with Aasen on September 6 to discuss his reply to the evaluation. In the course of that meeting, McCluskey advised Williams that some information provided in the earlier investigation about Sergeant Roh may have been inaccurate. Williams responded by making threats to him.

E. The Investigation of McCluskey's Concerns About Supervisors

On September 20, Chief Williams sent a memo to Officer McCluskey directing him to provide additional information to Captain Moan regarding the allegations made in the September 6th meeting. In response, McCluskey produced a memo on September 29, describing concerns raised by another officer about supervisors. In the meantime, on September 26, Sgt. Aasen provided Moan and McCluskey with a memo describing an incident from late 2004 where McCluskey had reported that another officer had expressed concern about the conduct of Sgt. Roh. Moan proceeded with plans to investigate the allegations, although McCluskey expressed reservations about Moan's ability to be impartial. Moan conducted the investigations, and on December 27th, issued a memo saying that McCluskey's allegations and concerns about Department supervisors were unfounded.

F. The January 2006 Day Trades Meeting Between Chief Williams, Officer McCluskey and Association President Danou

In the amended complaint, the Complainant raises three additional allegations. The first concerns a meeting on a contract interpretation issue, and the aftermath of that meeting. On January 17, 2006, Officer McCluskey and Officer Danou, President of the Association, met with Chief Williams regarding day trades. McCluskey and Williams disagreed about the issue. Near the end of the meeting Williams ordered McCluskey to leave the office. After McCluskey left, Williams told Danou he was thinking of sending McCluskey home because he was "upset, argumentative and disrespectful."

After the meeting, Williams sent McCluskey a memo saying he had been disrespectful, that his conduct was unacceptable and would not be condoned, that his evaluation would reflect that he was defective in providing feedback to supervisors, that his supervisor was being told to document the incident, and that he would be subject to discipline and poor evaluation if his behavior was repeated.

G. The Directive for Bargaining Unit Members to Meet with Chief Williams to Review Their Planned Testimony on Behalf of Another Officer

On May 12, 2006, four bargaining unit members were identified as being among twelve potential witnesses for the officer in a PFC proceeding seeking the termination of Officer Proctor. Each of the four was ordered to respond to a series of questions from Chief Williams about their anticipated testimony, under penalty of termination. Only bargaining unit members were served with demands for answers.

H. Removal of the Association's Access to the Bulletin Board

On May 22, Association President Danou posted the Chief's order to the four witnesses in the Proctor hearing on the bulletin board used by the Union. The following day the Chief had the materials removed and placed on Danou's desk. He also sent a memo to all officers advising them that the privilege extended to the Union to use a bulletin board was rescinded effective immediately.

The Association identifies all of these actions as violating the rights of the Officers and the Association under Sections 111.70(3)(a)1 and 3, MERA.

THE MOTIONS TO DISMISS AND THE ASSOCIATION'S RESPONSE

The Respondents' Motions to Dismiss the original Complaint are predicated on two theories. The first is that the adverse actions of the Chief are solely within the jurisdiction of the Police and Fire Commission, per Sec. 62.13, Stat. The second is that the Association and the individuals failed to pursue their available contractual remedies under the grievance procedure. As to the Amended Complaint, the Respondents take the position that questions concerning

witnesses in a Police and Fire Commission proceeding are exclusively within the jurisdiction of the Police and Fire Commission. With respect to the bulletin board issue, the Respondents assert that removal of bulletin board was a discretionary act of management, to prevent further harassment of supervisors by members of the Association, and that nothing in the collective bargaining agreement requires the Department to maintain a bulletin board.

The Association opposes the Motions to Dismiss, noting that WERC precedent strongly disfavors motion practice, and requires the conduct of a hearing whenever a timely complaint, liberally construed, raises a genuine issue of fact or law. The Respondents' Answer to the Complaint here denies many of the Association's central factual allegations, and there are clearly genuine issues of fact to be heard and decided. Further the scope of Sec. 62.13 and the Respondents' claim that there is a requirement to proceed through the grievance procedure raise issues of law. For these reasons, the Association submits that there is no basis on which to dismiss these claims without a hearing.

DISCUSSION

A. The Standard for Dismissal Prior to Hearing

The standard for dismissing a timely complaint prior to hearing is whether on reviewing the admitted facts, the disputed facts as alleged by the Complainant, and the alleged violations, the Examiner can state with certainty that there is no material dispute as to fact or law, and that the Complaint, liberally construed, does not present any theory under which the Complainant would be entitled to relief from the Wisconsin Employment Relations Commission.[1] Here there are certain allegations, notably the content of the meeting of January 21, 2005; the meeting of the Personnel Committee in May 2005; the nature of the administrative leave and subsequent suspension of Johnson; the background and content of the September meeting between McCluskey, Moan, and Williams; the interactions between McCluskey, Aasen and Moan after that meeting; the background and content of the meeting between Johnson and Williams in September; and the January meeting involving Williams, McCluskey and Danou, which are in whole or in part denied by the Respondents, or are not addressed in the Answers. As to those matters, which are the bulk of the allegations in the Complaint, it appears that there are material disputes of fact. If any portion of the Complaint is to be dismissed, then, it must be that no relief is available as a matter of law. The Respondent contends that this is the case, because the Commission lacks jurisdiction over police disciplinary matters and/or because the Commission lacks jurisdiction as a result of the Complainant's failure to exhaust other remedies.

[1] RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 15915-B (HOORNSTRA, 12/77)

B. Section 62.13, Stats.

Section 62.13, Stats. provides for a uniform system of regulating police and fire departments within the State of Wisconsin. Section 62.13(5) addresses the discipline of officers:

62.13(5)
(5) Disciplinary actions against subordinates.
62.13(5)(a)
(a) A subordinate may be suspended as hereinafter provided as a penalty. The subordinate may also be suspended by the commission pending the disposition of charges filed against the subordinate.

62.13(5)(b)
(b) Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

62.13(5)(c)
(c) A subordinate may be suspended for just cause, as described in par. (em), by the chief or the board as a penalty. The chief shall file a report of such suspension with the commission immediately upon issuing the suspension. No hearing on such suspension shall be held unless requested by the suspended subordinate. If the subordinate suspended by the chief requests a hearing before the board, the chief shall be required to file charges with the board upon which such suspension was based.

62.13(5)(d)
(d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges shall be public, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas which shall be issued by the president of the board on request and be served as are subpoenas under Ch. 885.

62.13(5)(e)
(e) If the board determines that the charges are not sustained, the accused, if suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

62.13(5)(em)
(em) No subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board under par. (e), based on charges filed by the board, members of the board, an aggrieved person or the chief under par. (b), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:

62.13(5)(em)1.
1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

62.13(5)(em)2.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.

> 62.13(5)(em)3.
> 3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
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> 62.13(5)(em)4.
> 4. Whether the effort described under subd. 3. was fair and objective.
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> 62.13(5)(em)5.
> 5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
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> 62.13(5)(em)6.
> 6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
>
> 62.13(5)(em)7.
> 7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

. . .

> 62.13(5)(i)
> (i) Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice of the appeal on the secretary of the board within 10 days after the order is filed. Within 5 days after receiving written notice of the appeal, the board shall certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes. The action shall then be at issue and shall have precedence over any other cause of a different nature pending in the court, which shall always be open to the trial thereof. The court shall upon application of the accused or of the board fix a date of trial, which shall not be later than 15 days after such application except by agreement. The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence by the board. The question to be determined by the court shall be: Upon the evidence is there just cause, as described under par. (em), to sustain the charges against the accused? No costs shall be allowed either party and the clerk's fees shall be paid by the city. If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to pay as though in continuous service. If the order of the board is sustained it shall be final and conclusive.

. . .

The Respondent contends that the Commission lacks jurisdiction over the claimed adverse actions against Association members because their sole recourse is to the Police and Fire Commission. In recent years, the role of the Police and Fire Commission ("PFC") vis-à-vis other tribunals has been the subject of a considerable amount of litigation, and the courts have substantially narrowed the reach of outside decision makers in matters within the PFC's jurisdiction. In a case involving the duty to arbitrate,[2] I had occasion to discuss the course of recent court decisions on the topic:

[2] CITY OF OSHKOSH, DEC. NO. 30443-A (NIELSEN, 10/9/03), hereinafter referred to "Oshkosh".

> In JANESVILLE, the appeals court found that a contract provision allowing discipline imposed by a Police and Fire Commission to be reviewed *de novo* by an arbitrator rather than through an appeal to the circuit courts could not be harmonized with the provisions of Sec. 62.13, Stats. Section 62.13 provides a comprehensive system for the imposition of discipline on a police officer, beginning with the filing of charges against the officer with the Police and Fire Commission (§62.13(5)(b) and, on request, a just cause hearing before the PFC (§62.13.(5)(c) and (d)), which then determines the existence or non-existence of just cause (§62.13(5)(em)), using statutorily defined factors(§62.13(5)(em) 1-7). The decision of the PFC is appealable to the circuit court (§62.13(5)(i)). The appeals court concluded that allowing appeal to an arbitrator, who would then have an opportunity for *de novo* consideration of the cause issue, amounted to elimination of the PFC's statutory powers to make that decision. In the court's view, this could not be reconciled with the provision in the statute that the PFC's decision would be "final and conclusive" if its just cause finding was sustained by the circuit court.
>
> JANESVILLE stands for the proposition that, in matters of discipline against subordinate officers, arbitration may not be invoked at the expense of the Police and Fire Commission's authority. Since JANESVILLE, the Wisconsin Supreme Court has considered whether a PFC's decisions regarding probationary promotions and in discipline cases involving claims of discrimination were subject to review by arbitrators or other administrative agencies. The answer, in MADISON V. WERC and MADISON V. DWD was "no." MADISON V. WERC concerned an effort to arbitrate the rescission of a probationary promotion in a fire department. MADISON V. DWD concerned an effort to challenge a firefighter's disciplinary termination as being contrary to the Wisconsin Fair Employment Act. In each case, the Court determined that decisions of a PFC made pursuant to Sec. 62.13 were reserved exclusively to the PFC, and that the appeal to circuit court under that statute, or in limited cases, common law certiorari, would be the only appropriate venue for review of the PFC decision.[3]

In the wake of JANESVILLE and MADISON V. DWD, it is fair to say that a Police and Fire Commission acting under Section 62.13 has very broad authority in disputes concerning the existence of just cause for officers who have been charged by the Chief, and subsequently "suspended, reduced, suspended and reduced, or removed by the board", which are the disciplinary acts falling under PFC jurisdiction. This includes review of claims of employment discrimination normally within the purview of the Department of Workforce Development. Having said that, I note that none of the actions complained of concerning Johnson and McCluskey involved the actual bringing of charges nor was there any action by the PFC. Only the June 2005 suspension of Johnson would have constituted a disciplinary action rising to the

[3] OSHKOSH, at pages 16-17

level of a PFC proceeding under the statute, and the PFC never became involved in that dispute.[4] Thus the Johnson suspension is the only disciplinary matter that is arguably pre-empted by PFC jurisdiction, and as to that there are unresolved legal questions, including:

1. The effect of the Chief's failure to invoke the PFC's jurisdiction through the bringing of charges;
2. Whether the decision in MADISON V. DWD concerning employment discrimination extends to anti-union animus within the jurisdiction of the WERC;
3. If the PFC has exclusive jurisdiction over the question of whether relief is due to the disciplined employee for the penalty imposed, whether the WERC retains jurisdiction to provide other remedies which remedy the alleged violation of Sec. 111.70(3)(a)1 and 3, but do not disturb the PFC's penalty determination;
4. If the PFC is the exclusive venue for the disciplined employee, whether the WERC is precluded from providing a remedy for the chilling effect of such discrimination on other employees in violation of Section 111.70(3)(a)1.

This list of questions, which is not exhaustive, present unresolved questions of law.[5] Without purporting to answer them in this ruling, I conclude that a hearing is required to develop an evidentiary record on these points, and that dismissal without hearing is unwarranted.

The Respondent also argues the preclusive effect of the PFC on the question of possible witness intimidation in the Proctor case. As I read the complaint, the Complainant is not addressing Officer Proctor's rights before the PFC. Rather, the allegation goes to whether these four bargaining unit members were singled out for interviews and intimidation because they are members of the Association, who were engaged in protected concerted activity by being listed as witnesses for another bargaining unit member. There is nothing in the line of court decisions to date which suggests that this issue would be within the jurisdiction of the PFC.

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[4] In KRAUS V. CITY OF WAUKESHA PFC, 2003 WI 51, 261 WIS.2D 485, 662 N.W.2D 294, at footnote 19, the Court noted:

> Whether a job action is "disciplinary" is not determined by the consequences of the action, such as suspension, reduction in rank, or removal. It is determined by whether a "charge" is filed by the chief to impose a penalty.
>
> A job action that is not disciplinary may still require a due process hearing if the affected employee has a protected property interest, but the due process hearing need not conform to the dictates of Wis. Stat. § 62.13(5)(em). Schultz v. Baumgart, 738 F.2d 231, 236 (7th Cir. 1984). We disavow any language in Hussey that implies otherwise.

[5] The Respondent also asserts the existence of a settlement agreement, which precludes Johnson from challenging the suspension. The existence and effect of such an agreement are matters to be determined at hearing.

C. Exhaustion of Remedies

The Respondent also asserts that the Complaint should be dismissed because the employees and the Association have failed to exhaust their contractual remedies. The collective bargaining agreement here contains, inter alia, provisions touching on most aspects of the dispute:

ARTICLE I – RECOGNITION

. . .

1.2 The City recognizes the Association as the exclusive collective bargaining representative of all regular full-time and regular part-time law enforcement employees with the power of arrest employed in the Police Department of the City of Onalaska, but excluding supervisory, managerial, confidential and all other employees for the purposes of collective bargaining on the questions of wages, hours and conditions of employment.

ARTICLE II – ADMINISTRATION

2.1 Except as otherwise provided in this Agreement, the City retains the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to determine the construction, maintenance or services to be rendered, the materials and equipment to be used, the size of the work force, and the allocation and assignment of work or workers; to schedule when work shall be performed, to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; and to adopt and enforce reasonable rules and regulations

. . .

ARTICLE III - ASSOCIATION ACTIVITIES

3.1 - Association Activities. No employee shall engage in any Association internal problems not directly concerned with Association and City relations with any other employee during work hours. The Association agrees to conduct its routine Association business off the job, but this shall not prevent the proper conduct of grievances. Reasonable amounts of time spent in grievances with the employer
during working hours on or off the premises will not be deducted from wages of the authorized employee Association representatives involved, however, all grievance meetings outside the third (3rd) step in the grievance procedure shall be handled outside of the regular working hours. It is further agreed that any such time spent in grievance resolution shall not result in overtime wages.

. . .

3.3 - Association Officers. It shall be the Association's responsibility to immediately notify the City in writing of all present officers and change of officers which may occur during the life of this Agreement.

. . .

ARTICLE IV - TENURE AND PROBATIONARY PERIOD

4.1 - Seniority. Tenure shall begin with the original date of employment following satisfactory completion of the one year working probationary period. Thereafter, said employee shall have tenure as a

permanent employee, unless notified otherwise, in writing, prior to the completion of the one year working probationary period. The Field Training Officer (FTO) Program shall not exceed twelve (12) weeks in duration, and the total probationary period shall not exceed one (1) year and twelve (12) weeks.

4.2 – Termination During Probationary Period/Extension of Probationary Period. Employees failing to qualify within this one-year period shall be subject to termination without recourse to any grievance procedure. By mutual agreement of Employee and City, the working probationary period may be extended for a period not to exceed six (6) more months. Any such extension must be in writing and a copy shall be provided to the Association.

. . .

ARTICLE XI - GRIEVANCE PROCEDURE AND ARBITRATION

11.1 - Termination of Employee. Any employee being discharged shall be so notified in writing therein which writing shall contain the reasons for such action. A copy shall be submitted to the President of the Association upon the written agreement with the involved officer.

11.2 - Grievance Defined. In the event of any disagreement concerning the meaning or application of any provision of this Agreement, such disagreement shall be resolved in the manner hereinafter set forth. A representative(s) selected by the grievant(s) shall be allowed to be present and participate at any stage of the procedure. Representation from the Local Association shall be limited to one (1) representative. Time limits referred to in the procedure may be waived by mutual consent of the parties in writing.

Step 1. Any eligible employee(s) having a grievance shall, within five (5) work days of alleged violation, present his/their grievance to his/their immediate supervisor to attempt to reach a settlement. This can be presented orally and the supervisor may give his/her response orally within three (3) work days of presentation of the grievance. The supervisor shall be as defined in the Municipal Employment Relations Act 111.70 and 111.71.

Step 2. If no satisfactory settlement is reached within three (3) work days after commencement of a grievance under Step A above, the matter shall be reduced to writing and presented to the Chief within ten (10) working days. The Chief shall meet and confer with the grievant within ten (10) working days after receiving the written grievance. The Chief shall respond, in writing, within ten (10) working days after such conference.

Step 3. If no satisfactory settlement is reached in Step 2, the grievance shall be submitted, in writing, to the Finance and Personnel Committee within ten (10) work days after receipt of the written decision of the Chief in Step 2 above. The Finance and Personnel Committee shall meet and confer with grievant within fifteen (15) working days after receipt of the grievance. The Finance and Personnel Committee shall render a written decision within fifteen (15) working days after such conference.

Step 4. Arbitration. If no satisfactory settlement is reached in Step 3, the grievant shall notify the Finance and Personnel Committee within ten (10) working days after receipt of the Committee's decision, of an intent to submit the grievance to arbitration. A grievance shall be submitted to arbitration as follows:

1. The Association shall request the Wisconsin Employment Relations Commission to provide a panel of five (5) impartial arbitrators from which a selection shall be made. The parties shall alternately strike names from this panel until one (1) remains. The party requesting arbitration shall strike first.

The remaining arbitrator shall be notified of his/her selection as sole arbitrator in the matter. Each party shall bear its own expenses for witnesses and representatives, and both parties shall equally bear expenses of the arbitrator.

2. Grievances subject to this arbitration clause shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and about alleged violations of this Agreement. The arbitrator shall have no power to add to, or subtract from, or modify any of the terms of the Agreement, nor shall substitute his/her discretion for that of the City or the Association where such discretion has been retained by the City or the Association, nor shall he/she exercise any responsibility or function of the City or the Association. The wage structure of this Agreement may not be changed through the grievance procedure.

3. It is further agreed that the arbitrator shall render a written decision, which shall be final and binding upon both parties.

The exhaustion of remedies is a discretionary requirement, and is imposed in cases where the Complainant seeks relief under Section 111.70(3)(a)5, which makes it a prohibited practice for an Employer to violate a collective bargaining agreement. It is imposed in those cases because the Commission, as a matter of labor relations policy and administrative economy, judges that it is preferable to require parties to use their agreed upon contractual dispute resolution system – i.e. the grievance procedure – to address claims that are purely contractual.[6] There is also a line of cases deferring to the grievance procedure for the disposition of unilateral change claims brought under Section 111.70(3)(a)4, the duty to bargain in good faith. In those cases, however, the Commission insists on agreement to submit the matters to arbitration, including a waiver of procedural defenses, and retains supervisory jurisdiction over the complaint, to review the disposition of the grievance and determine whether the outcome is consistent with the requirements of the statute.[7]

This Complaint raises issues which implicate contractual rights. However, the cause of action here is neither a contract violation nor a unilateral change. The Complaint asserts alleged violations of Sections 111.70(3)(a)1 and 3 – interference with protected rights and discrimination for engaging in concerted activity. As noted in a recent Examiner decision involving a Respondent's insistence that a complaint be deferred to arbitration:

> The complaint contends in paragraph 13 that the discharge of the Complainant was motivated, at least in part, by retaliation and anti-union animus for the Complainant's lawful concerted activities on behalf of herself and other employees. While an arbitration decision should resolve the matter of just cause for discipline, it could not address allegations of discrimination for union activity and interference with the right to engage in concerted activity. Those claims are rooted in the statute and not in the contract, and they are important issues of law. Thus, deferral to arbitration is inappropriate.[8]

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[6] See JANESVILLE JT. SCHOOL DISTRICT, DEC. NO. 15590-A (DAVIS, 1978).

[7] See for example, CADOTT SCHOOL DISTRICT, DECISION NO. 27775-C (WERC, 6/23/94); BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83).

[8] STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), DEC. NO. 31384-A (MAWHINNEY, 8/9/05) at page 4.

The Commission has likewise rejected the notion that contractual grievance mechanisms can or should oust the WERC from its role as the decision maker in statutory complaints. In a case arising under MERA's companion private sector statute, the Commission held:

> Implementation of the Corporation's interpretation of Sec. 111.06(2)(c), Stats. would result in waiver of all Seeman's statutory and common law causes of action arising out of the Corporation conduct litigated before the Arbitrator. Although the Examiner correctly concluded that we have not previously been confronted with the precise notion being advanced by the Corporation herein, we have previously concluded that an employee can pursue grievance arbitration alleging a contractual violation by the employer while contemporaneously citing the same employer action as a basis for a finding of an unfair labor practice by the Commission. In that instance, we held:
>
> It is not unusual for contracts providing for arbitration to also forbid conduct which is likewise proscribed by "unfair labor practice" statutes. In fact, discrimination based upon union activity and unilateral employer action are two types of conduct often so doubly prohibited.
>
> There can be no doubt that this Board has the authority to make determinations and order relief in cases involving noncontractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters. The possibility of full relief through arbitration does not preclude this Board from fully adjudicating alleged noncontractual violations of the statutes which it enforces.
>
> Thus, we are not persuaded the Legislature intended to deprive litigants of the opportunity to pursue statutory or common law rights before administrative agencies or courts merely because the propriety of the conduct in question has already been litigated in a contractual forum. No argument has been presented which would warrant the conclusion that the Legislature in effect found it appropriate to clothe contractual grievance arbitrators with authority to definitively determine statutory rights.[9]

[9] UNIVERSAL FOODS CORPORATION, DECISION NO. 26197-B, WERC. (6/8/90).

For the same reasons cited by Examiner Mawhinney in DEPARTMENT OF CORRECTIONS and by the Commission in UNIVERSAL FOODS, I conclude that the failure of the Association and the individual employees to submit these matters to the grievance procedure does not waive their rights to a hearing and decision on their Section 111.70(3)(a)1 and 3 claims. Together with my conclusions that dismissal is not required by Sec. 62.13, Stats., and that there are material disputes as to fact and law to be determined through the hearing process, this leads me to ultimately conclude that the Motions to Dismiss must be denied.

Dated at Racine, Wisconsin, this 22nd day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner