STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY PROFESSIONAL POLICE ASSOCIATION, Complainant

vs.

CITY OF GREEN BAY AND CRAIG M. VAN SCHYNDLE, Respondents.

Case 380
No. 66429
MP-4309

Decision No. 32107-A

Appearances:

Attorney Thomas J. Parins, Sr., Parins Law Firm, S.C., 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305, on behalf of the Association.

Attorney Dean R. Dietrich and Christopher M. Toner, Ruder Ware, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050 on behalf of the City and Police Chief Van Schyndle.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS COMPLAINT COUNTS I, IV and XI

On October 31, 2006, the Association filed a Complaint of prohibited practices with the Wisconsin Employment Relations Commission and on November 27, 2006 an Amended Complaint, alleging specifically at Counts I and IV (respectively) that the Respondents violated Sec. 111.70 (3)(a) 4 and 5, Stats., by assigning Association President Resch undesirable Green Bay Packer overtime assignments in 2005 and 2006 without regard for Resch's seniority because the Association "had filed other grievances and taken concerted action involving the acts or omissions. . . "of Respondent's agents, all of which constituted a violation of the labor agreement and a refusal to bargain with the Association and also alleging that Respondents' refusal to assign Packer overtime by seniority constituted a violation of past practice and of Article 6 of the labor agreement. (No allegation was made indicating Resch personally had engaged in protected concerted activity, only that he was discriminated against because he was President of the Association).

Conciliation efforts were then conducted. Thereafter, the Examiner was appointed by the Commission on May 18, 2007 and the Respondents filed their Answer and Affirmative Defenses to the Complaint on June 4, 2007. On June 6, 2007, the Respondents submitted their Motion to Dismiss those portions of Counts I and IV which alleged violations of Sections 111.70(3)(a) 4 and 5, Stats. On June 23, 2007, the Association filed a Brief in Opposition to the Motion to Dismiss and on August 26, 2007, Respondents filed their Reply Brief in Support of the Motion to Dismiss. On September 9, 2007 the Association filed a Response in Opposition to Respondent's Motion and Reply Brief.

According to the Notice of Hearing, hearing was scheduled and held in part on June 26, 2007. At the June 26th hearing, the Examiner granted Respondent's oral Motion to make more Definite and Certain but directed the Respondents' to put details of their Motion into writing so that Complainant could respond. The Examiner also attempted to mediate the dispute on June 26th and she drafted and suggested settlement language to the parties. Ultimately, the Examiner requested that the parties brief/respond to Respondents' Motions before proceeding further with the hearing.

On July 15, 2007 Respondents filed their written Motion to Make More Definite and Certain. On August 11, 2007 the Association rejected the proposed June 26th settlement. On September 9, 2007, the Association responded to Respondent's Motion to Make More Definite and Certain by filing its Response in Opposition to Respondents' Motion.

On September 23, 2007, Respondent submitted Circuit Court Judge Kelley's ruling concerning the Association's suit to set aside Arbitrator Emery's May 18, 2006 Award. Thereafter, the Association submitted an undated Surreply Brief in Opposition to the Respondents' Motion to Dismiss.

The Examiner, having considered the record to date and the arguments of the parties makes and issues the following

ORDER

The Motion to Dismiss is granted as to all paragraphs of Claims I and IV which allege violations of Sec. 111.70(3)(a) 4 and 5, Stats., specifically Complaint paragraphs 6-12 and 14 and, in part, 15 are dismissed and Complaint paragraphs 31, in part, and 32-37, and 39-42 are also dismissed.

The Motion to Dismiss is denied as to those portions of Claims I and IV which allege violations of Sec. 111.70(3)(a)1 and 2, Stats., specifically paragraphs 10, and in part 15, and in part 31 and 38.

The Motion to Dismiss Claims I through VII of the Complaint because the Association's response to Respondents' Motion to Make More Definite and Certain was one month late is denied.

The Motion to Defer Claim XI to arbitration is granted.

Dated in Oshkosh, Wisconsin, this 17th day of January, 2008.

Sharon A. Gallagher /s/
Sharon A. Gallagher

SAG/dag

CITY OF GREEN BAY

MEMORANDUM ACCOMPANYING ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

The City asserts that the Association filed a grievance which resulted in the May 18, 2006 Award by Arbitrator Emery wherein Emery rejected the Association's argument that there was a clear past practice of assigning specific Packer game overtime by seniority to officers who had signed a posting for those specific openings. In the Emery Award, the issue was whether the City had discriminated against Officer Scott Peters by denying him his preferred Transport Officer position, in violation of Section 2.02 of the contract. Section 2.02 read then as it does now, as follows:

> ARTICLE 2. PURPOSE OF AGREEMENT
>
> 2.02 DISCRIMINATION. Neither the Employer nor the Union shall discriminate in any manner whatsoever against any employee as defined in Section 111.32 et seq. of the Wisconsin Statutes.

Arbitrator Emery also quoted Article 6 as "pertinent" to the dispute:

. . .

> ARTICLE 6. OVERTIME
>
> 6.06 OVERTIME FOR GREEN BAY PACKER GAMES. (1) Two postings shall be placed on the bulletin board once each year by July 1. All officers interested in working Packer games or working any extra overtime beyond what would be normal for traffic or field assignments are requested to sign the respective postings. These postings shall contain the anticipated manpower needs for the games.
>
> (1) Officers who sign the above said posting shall be assigned to work each of the Packer games in the year in question on the basis of departmental seniority.

Arbitrator Emery summarized the parties' arguments in that case. Emery's description, in part, of the Association arguments was as follows:

. . .

> The City has admitted that it made the assignment change on the basis of sex and presented no evidence that sex is a "bona fide occupational qualification" for the position of Transport Officer. Instead, it admitted that transport duties are gender neutral. Its defense is based solely on the proposition that it has some type of unrestricted discretion to make position assignments at Packer games as it sees fit. The Union disagrees and contends that the record clearly establishes that such assignments are to be made on the basis of seniority. Even if the City were right, however, it still does not have the discretion to make the assignments based on impermissible reasons. Sex discrimination is prohibited by law and by the contract and the City's action was, thus, impermissible and the Arbitrator should so find.

Arbitrator Emery then summarized the City's initial arguments, as follows:

. . .

> There was no discrimination. The Grievant simply was not chosen to work as a Transport Officer based on a good faith, reasonable and fair appraisal of the security force needs by Commander Brodhagen. Brodhagen continually assesses the strengths and needs of the security force and makes adjustments accordingly. His actions with regard to the Grievant were not discrimination, but were a valid exercise of his authority and discretion.

. . .

> Sec. 6.06 governs Packer game assignments. Officers may sign up to work Packer games and are chosen based on seniority. Seniority determines which officers are chosen and when their shifts start, as more senior officers are eligible for more overtime. Specific work assignments are the prerogative of the Commander. The Grievant had no pre-existing right to a Transport position and there is no contractual or unofficial bidding process for those positions, contrary to his assertions. The Arbitrator should not, therefore, create a right where none previously existed. This should be accomplished through bargaining.

The Association chose not to file reply brief in the Emery case. Arbitrator Emery summarized the City's reply brief follows:

> The City points out that the contract does not provide for Packer game assignments to be made on the basis of seniority. The Union has been unable to obtain this benefit through bargaining and the arbitrator cannot modify the contract to provide it, which is what the Union seeks.

> The Union argues that the Grievant is the victim of sex discrimination. This is a false claim. The City does not disagree with the Union that male and female officers are equally qualified to perform the Transport position. That is not at issue. In this case, Commander Brodhagen used his discretion to replace one officer with another whom, (sic) in his opinion, was better suited to the position. This was his prerogative and was not barred by contract nor restricted by seniority.

Arbitrator Emery held that the City was not required to seek officers' Packer game assignments preferences and that the City had no obligation to honor officers' game assignment preferences in making such duty assignments, so long as the City did so without discrimination. Arbitrator Emery held as follows:

> The City has no contractual obligation to allow officers to express preferences or to honor them. Its only obligation under the contract is to offer generic game assignments to officers signing the interest sheet on the basis of seniority and without discrimination. As far as the record shows, the City fulfilled its obligation, in that the Grievant was offered a game assignment, to which he was entitled based on his seniority. I am satisfied that once game assignments were made Commander Brodhagen retained the discretion to determine how to best allocate the security force and appears to have done so on a rational basis. Had the City not permitted the officers to express preferences, or had it refused to honor them in any way whatsoever, there would have been no basis for a grievance. I do not find that its willingness to honor requests where possible constituted a waiver of its discretion to make the assignments according to the Security Commander's assessment of how best to allocate the security force.
> CITY OF GREEN BAY, CASE 366, NO. 64976, MA-13073 (SLIP OP. AT P. 8).

In the instant case, the City urged that all Section 111.70 (3)(a) 4 and 5, Stats., allegations of Counts I and IV of the instant complaint must be dismissed where they rely upon the allegation that Packer game overtime assignments have to be based on seniority as that claim was fully litigated in the case which lead to the Emery Award. Counts I and IV of the Complaint read as follows:

First Claim
Green Bay Packers Game Assignment Retaliation

> 6. In December 2005 respondents took away a preferred Green Bay Packers game overtime job assignment from the President of the GBPPA and ordered him to work the job assignment of patrolling the playing field which is an undesirable job assignment. This action by respondents was in direct response and retaliation to the filing of grievances and other concerted actions taken by the GBPPA involving both then Commander Brodhagen and then Caption Arts.

7. For several Packer seasons, including the 2005 Packers season up until December 2005, Officer Resch, president of the GBPPA, bid for and received the Packer game job assignment of patrolling the Club Seat Section at Lambeau Field. Officer Resch is one of the more senior police officers in the Green Bay Police Department and would under all circumstances be entitled to and bid for one of these job assignments. At all times material to this Complaint Officer Resch performed these duties in an efficient, commendable and professional manner.

8. Commander Brodhagen was the Officer in Charge of the policing of Packer games by the Green Bay Police Department until his retirement at the end of the 2005 Packers season. Commander Brodhagen was the Commander of Operations in the Green Bay Police Department. Captain Arts was promoted to Commander of Operations after Commander Brodhagen's retirement and took over the duties of Officer in Charge of policing Packer games for the 2006 season.

9. The job assignment of patrolling the Club Seats was taken away from Officer Resch within days of the GBPPA filing a grievance in December 2005 challenging the right of Commander Brodhagen and then Captain Arts to be given overtime assignments at Packer games. The grievance questioned Commander Brodhagen and then Captain Arts being paid double time to perform job duties which could have been performed by lower paid GBPPA members. Before this December 2005 grievance filing the GBPPA had filed other grievances and taken concerted action involving acts or omissions of Commander Brodhagen.

10. There exists a history of respondent's using reassignment regarding overtime job assignments at Packer games as a tool for retaliating against GBPPA representatives for concerned activities, and the reassignment of Officer Resch to the job duties of patrolling the field was such a retaliatory action.

11. The GBPPA objected to and made complaints to respondents concerning the retaliatory reassignment of Officer Resch. Then Captain Arts indicated that the situation would be rectified upon the anticipated retirement of Commander Brodhagen following at the end of 2005. To the contrary, now Commander Arts has continued to decline and refuse to assign Officer Resch to the job duties patrolling the Club Seats and has continued to assign Officer Resch to patrolling the field, or other undesirable job assignments. Now Commander Arts is the designated person to be promoted to the position of Chief of Police upon the anticipated retirement of Respondent Chief Van Schyndle in December 2006.

12. There exists no legitimate reason for the reassignment of Officer Resch from his assignment to patrol the Club Seats to the assignment of patrolling the field. To the contrary, Officer Resch was fully familiar with the duties involved, the makeup of the fans seated in the Club Seats, and is inexperienced regarding patrolling the field and the other Packer game job assignments that have been given to him since the time of his reassignment.

13. Respondents, including Commander Brodhagen and Arts, have a history of communicating with GBPPA Members in a disparaging and critical manner concerning the attitude, policies and positions of GBPPA Representatives, particularly Officer Resch, and generally disparage how these representatives go about representing the GBPPA Members, all with the implication that GBPPA Members should take internal action with the labor organization to make changes in the makeup of the GBPPA Representatives or act to change the policies and positions of the organization. The retaliatory action against Officer Resch was calculated to reinforce this message by showing Officer Resch as being disfavored by management, ineffectual and without influence or standing, all to the end that Officer Resch might be replaced as president by the GBPPA Membership or that the policies and positions of the GBPPA be changed by the GBPPA Membership.

14. Officer Resch was contractually entitled to bid for and receive the job assignment of patrolling the Club Seats under the terms of the Collective Bargaining Agreement, as administered. Commander Brodhagen knew this when he reassigned Officer Resch in December 2005, and the reassignment was an intentional violation of the terms of the Collective Bargaining Agreement ("CBA"). The continuation of this reassignment in 2006 by Commander Arts is equally intentional.

15. The above acts and omissions are prohibited practices under Wis. Stat. §111.70(3)(a)1,2,4 and 5 in that they constitute a retaliation meant to interfere with, restrain and coerce the GBPPA in the exercise of lawful rights, an attempt to interfere with the internal administration of the GBPPA, a refusal to bargain the issues contained in the grievance and other concerted activities of the GBPPA regarding the acts and omissions of either Commander Brodhagen, Arts or both, and an intentional violation of the CBA between respondents and the GBPPA.

Fourth Claim
Green Bay Packers Game Overtime Assignment Change

31. Incorporated herein by reference all of the allegations set forth in paragraphs 1 through 30 above as it fully set forth herein.

32. Policing Green Bay Packers games at Respondent City's Lambeau Field is a significant activity for the Green Bay Police Department that is done almost exclusively by way of overtime job assignments. Overtime assignments are for both policing at Lambeau Field and traffic and crowd control in the surrounding areas. Each game involves approximately 80 non-supervisory members of the GBPPA with many officers being given more than one specific overtime job assignment (e.g. an officer may have a job assignment for traffic control at an intersection followed by a different job assignment at Lambeau Field itself).

33. Article 6 of the CBA governs the subject of overtime assignments generally and CBA Section 6.06 makes specific reference to overtime assignments at Packer games.

34. CBA Article 6 requires that overtime assignments, including Packer game assignments, be on the basis of departmental seniority and before the acts or omissions set forth in this claim there existed a firm practice and agreement between respondents and the GBPPA as to the methods for allocating Packer game overtime assignments amongst GBPPA members based on seniority.

35. Specific day to day overtime job assignments in the Green Bay Police Department are offered on an individual basis with each specific job assignment being posted (offered) and allocated by seniority amongst those qualified. Because of the large number of specific job assignment (sic) for each Packer game, and the number of officers involved, posting of each specific job assignment would be an administrative challenge. Accordingly, the parties have administered the allocation of specific overtime job assignments at Packer games by seniority in a manner somewhat different than other overtime job assignments.

36. The allocation of specific overtime job assignments for Packer games has been administered by the parties by allowing officers who have a preference for a specific job assignment to indicate that preference to the Officer in Charge of Packer game assignments. According to practice, these preferences would be honored based upon seniority to the extent feasible, with the understanding that officers having a preference would continue to receive the specific preferred assignment from game to game. This practice of administering Packer game overtime assignments was all to the end that officers would, at least over the course of several games, receive their preferred specific overtime assignments based on departmental seniority, with junior officers or officers not having a preference, filling in assignment gaps.

37. Starting with the first preseason Packer game in 2006 respondents unilaterally and without notice to the GBPPA stopped allowing officers to designate preference for job assignments, declined and refused to allocate job assignments based on seniority, and substantially reassigned officers from preferred job assignments held by those officers at previous Packer games and seasons. Respondents now allocate overtime assignments as they may determine from Packer game to Packer game with many changes taking place with each and every game.

38. The action of respondents in changing the way Packer game overtime assignments are made under CBA Article 6 was in direct retaliation for the grievances and concerted activities of the GBPPA described in the First Claim above and a continuation of respondents course of conduct described above to hold the GBPPA and its elected and acting officers in a bad light and undermine their collective bargaining activities.

39. As a direct and proximate result of respondents changing the way CBA Section 6.06 is administered in regards (sic) to allocation of overtime job assignments, senior officers have been denied Packer game overtime assignments to which they had indicated a preference, and even to which they had been assigned in past games, and senior officers have been denied overtime opportunities in that the length of many overtime job assignments have been cut short.

40. In CBA Section 1.02 entitled "Management Rights" Respondent City has agreed that it may not exercise its management rights, prerogatives, powers, or authority in any manner which changes or modifies any terms of the labor agreement, as administered without first collectively bargaining either the change or modification or the effects thereof.

41. Immediately upon learning that respondents changed the way that CBA Article 6 was administered for Packer games the GBPPA objected and demanded that respondents return to the manner of administration previously employed and further demanded that respondents not make any changes or modifications in the way that overtime assignments had been allocated in prior Packer seasons without first collectively bargaining.

42. Respondents have declined and refused to return to the manner of administrating allocation of overtime job assignments at Packer games and further have declined and refused to collectively bargain with the GBPPA concerning this issue. Rather, respondents have falsely stated that no changes have been made in the way that the allocation of overtime job assignments at Packer games are administered despite the fact that officers are no longer allowed to be assigned to preferred job assignments by seniority, and the fact many senior officers have been reassigned from Packer game job assignments

enjoyed by them over time.

43. The above acts and omissions are prohibited practices under Wis. Stat. §111.70(3)(a)1, 2, 4 and 6 in that they constitute a retaliation meant to interfere with, restrain and coerce the GBPPA in the exercise of lawful rights, an attempt to interfere with the internal administration of the GBPPA, a refusal to bargain in good faith by falsely claiming no changes have been made by unilaterally making the changes, and an intentional violation of the CBA between respondents and the GBPPA.

POSITIONS OF THE PARTIES

The City argued that for claim preclusion to be applicable, three items must be proven here: that the parties in the two cases are identical; that the two cases "present identical claims - - that the City violated the Agreement by failing to award Packer game assignments based on seniority" (Motion to Dismiss, p. 4); and that the prior case (the Emery Award) must constitute a final judgment. DANE COUNTY V. AFSCME, LOCAL 65, 210 WIS. 2D 267, 565 N.W. 2D 540 (CT. APP. 1997); NORTHERN STATES POWER CO V. BUGHER, 189 WIS. 2D 541, 525 N.W. 2D 723 (1195). If these conditions are met claim preclusion is applicable to bar this, the second action. In these circumstances, the City urged dismissal of the Section 111.70 (3)(a) 4 and 5 Stats., portions of Counts I and IV.

Concerning issue preclusion, the City urged that this requires dismissal of issues which have actually been litigated in a prior proceeding after applying a fundamental fairness analysis Dane County, supra. Here, the City asserted that as the Association argued in the Emery case that the City was required to make Packer game assignments by seniority and because Arbitrator Emery expressly rejected this argument, it would be unfair for the Examiner to allow the Association to relitigate this identical issue herein.

In response, the Association conceded that issue and claim preclusion have been applied in WERC cases in the past, citing and quoting from this Examiner's decisions IN HORTONVILLE SCHOOL DISTRICT, DEC. NO. 30437-A (2/5/03) and MCKEON V. REED, DEC. NO. 31098-A (2/2/05). The Association then argued that the May 18, 2006 Emery Award is not a final judgment as the Association has appealed it and that appeal was still pending. The Association also argued that the issue before Emery had to do with Section 2.02 of the labor agreement and Wisconsin sex discrimination law; that the Emery Award did not refer to seniority and that no allegations in the instant case concern Section 2.02 or sex/gender discrimination under Sec. 111.32, Stats**.** Furthermore, in the Association's view, claim preclusion should not be applied in this case as the claim herein did not arise out of the same transaction as was at the base of the Emery Award (a November, 2004 Packer game assignment).

In any event, the Association urged that the Examiner should not apply issue preclusion without first determining whether such application would be fair to the Association: whether the Association had an adequate opportunity or incentive to fully litigate the job assignments involved in the Emery Award. In this regard, the Association noted that it specifically argued that the City's failure to assign Officer Peters to his preferred Packer Transport duty discriminated against Peters and thereby violated Section 2.02 only. Here, the Association asserted that the Examiner must find that Emery's determination whether Peters had a contractual right to the Transport assignment in the prior case was not necessary to the resolution/disposition of that case.

Finally, the Association urged that it would be inappropriate for the Examiner to apply claim or issue preclusion to Claim IV as none of the issues/claims therein were actually litigated in the case which resulted in the Emery Award. Specifically, the Association contended in its Brief in Opposition:

. . .

> The claim in the Emery Award involved the transaction of the City taking away from Officer Peters his Transport Officer job and giving it to a female officer during the 2004 Packer season. The issue framed by Arbitrator Emery was whether that action constituted discrimination as prohibited under CBA Section 2.02. Arbitrator Emery also decided the issue of whether Officer Peters had a contract right under CBA Section 6.06 to the Transport Officer job or whether the City retained management discretion to re-assign Officer Peters as it deemed fit in its discretion.
>
> The allegations contained in Claim IV relating to a failure to bargain have nothing to do with either the Officer Peters Transport Officer job transaction or either of the issues determined by Arbitrator Emery. In fact, Claim IV has nothing specifically to do with the 2004 Packer season itself.
>
> Claim IV is a claim that in 2006 the City modified and changed the way it administered Packer game overtime job assignments under CBA Section 6.06 without first collectively bargaining these changes and modifications with the GBPPA.
>
> The GBPPA is alleging in Claim IV that this modification or change by the City violated the terms of the management rights clause of the CBA contained in Section 1.03. Section 1.03 reads as follows:
>
> > "MANAGEMENT RIGHTS. The Union recognizes the prerogative of the City, subject to its duties to collectively bargain, to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not abridged, delegated or modified by this

Agreement, are retained by the City, including the power of

> establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote, and discipline for just cause, to determine reasonable schedules of work, to establish the methods and processes by which such work is performed. The City further has the right to establish reasonable work rules, to delete positions from the Table of Organization due to lack of work, lack of funds, or any other legitimate reasons, to determine the kinds and amounts of services to be performed as pertains to City government and the number and kinds of classifications to perform such services, to change existing methods or facilities, and to determine the methods, means and personnel by which City operations are to be conducted. The City agrees that if (sic) may not exercise the above rights, prerogatives, powers or authority in any manner which alters, changes or modifies any aspect of the wages, hours or conditions of employment of the Bargaining Unit, or the terms of this agreement, as administered, without first collectively bargaining the same or the effects thereof.."

Although the management rights clause bestows significant and rather broad powers and discretion to the City, it also contains in its last sentence a significant restriction on the City's right to exercise its management rights. In the last sentence the City agrees not to exercise its management rights to make modifications or changes in the way it administers any provision of the CBA without first collectively bargaining with the GBPPA.

If in fact the GBPPA can show at the evidentiary hearing that the City in fact modified or changed the way that it administered overtime job assignments for Packer games for the 2006 season different from the way it administered that contract provision in previous seasons, and also proves that the City did not first collectively bargain the modification or change, such would constitute a violation of the terms of CBA Section 1.03 and would also constitute a failure to bargain under the contractually created duty to bargain contained in Section 1.03.

It is the contention of the GBPPA that the last sentence of Section 1.03 puts significant restrictions on the City's ability to use its management rights to change the way it administers the provisions of the CBA. Without this restriction the City would have the ability to exercise its management rights to modify or change the way it administers the CBA unless it is a violation of a binding past practice. The last sentence of Section 1.03 raises the bar considerably. Under the last sentence of Section 1.03 the City may not make modifications or changes in the way it administers the provisions of the CBA even if the methods of administration were established unilaterally by the City

under its management rights.

As can be seen, Claim IV has nothing to do with the transaction disposed of, or the issues determined in the Emery Arbitration. Accordingly, the application of claim or issue preclusion is not appropriate. There simply is no relationship between the transaction and issues determined in the Emery Arbitration and the transactions or issues involved in Claim IV. (Assoc. Brief in Opposition pp. 17-19).

Regarding Claim I, the Association argued herein that the City's actions toward Resch constituted retaliation against the Association, (not Resch), as follows:

. . .

Claim I involves allegations that the City took away Officer Resch's job of patrolling club seats at Packer games in retaliation for concerted activities being conducted by the WERC (sic) within the immediate time frame of this retaliation. The evidence will be that the taking away of Officer Resch's Packer game overtime assignment job was only one act of retaliation against the GBPPA. The evidence will show that this retaliation, and other actions of the City were calculated to influence the collective bargaining process both in regards to contract and grievance collective bargaining. As such, these constitute and support the charge of failure to bargain in good faith.

As to violation of the contract, the retaliatory action against Officer Resch is in violation of Section 2.01 of the CBA. That Section reads as follows:

> "GENERAL. It is the intent and purpose of the parties hereto that this agreement shall promote and improve working conditions between the City and the Green Bay Police Department Bargaining Unit and to set forth herein rates of pay, hours of work, and other terms and conditions of employment to be observed by the parties hereto. In keeping with the spirit and purpose of this agreement, the City agrees that there shall be no discrimination by the City against any employee covered by this agreement because of membership or activities in the Bargaining Unit, nor will the City interfere with the right of such employees to become members of the Bargaining Unit. The City retains all rights, powers, or authority that it had prior to this contract."

In the above contract section the City specifically agreed that it would not discriminate against Officer Resch because of his activities in the Bargaining Unit. Taking away his Club Seat Packer game overtime job assignments was such an act of discrimination.

. . .

DISCUSSION

The City has argued that both claim and issue preclusion should be applied in this case so that the Section 111.70(3)(a) 4 and 5, Stats. allegations contained in Claims I and IV of the Complaint as amended must be dismissed. The concepts of claim and issue preclusion, although similar, are distinct and should not be confused. As Examiner McGilligan stated in CITY OF NEW LISBON, DEC. NO. 29885-A (MCGILLIGAN, 8/00), claim preclusion

> . . .is the term now applied to what used to be known as res judicata. This doctrine establishes that "a final judgment between the parties is conclusive for all subsequent actions between those same parties, as to all matters which were, or which could have been, litigated in the proceeding from which the judgment arose." DANE COUNTY VS. AFSCME LOCAL 65, 210 N.W. 2D 268, 565 N.W. 2D 540 (CTAPP, 1997).
>
> The Commission has applied the doctrine of res judicata since at least 1957. WISCONSIN TELEPHONE COMPANY, DEC. NO. 4471 (WERC, 3/57). The Commission has applied the doctrine of claim preclusion in cases arising under the Wisconsin Peace Act, the Municipal Employment Relations Act, MORAINE PARK VTAE ET AL., DEC. NO. 22009-B, (WERC, 11/85), and the State Employment Labor Relations Act. STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, DEC. NO. 23885-D (WERC, 2/88).

Accord, MILWAUKEE COUNTY, DEC. NO. 28951-B AND C (NIELSEN, 7/98). For claim preclusion to apply, an identity of parties, issues and remedy must be present in both actions and there can exist "no material discrepancy of fact" between the prior and subsequent disputes. MCKEON V. REED, DEC. NO. 31098-A (GALLAGHER, 2/05); WEAC, ET AL., DEC. NO. 28543-B (WERC, 12/97).

In contrast, collateral estoppel or issue preclusion necessarily requires an analysis whether the parties had a fair opportunity procedurally, substantively and evidentially to litigate an issue before a second litigation will be precluded, Dane County, supra. Thus, actual litigation of an issue necessary to the outcome of the first action must have occurred for issue preclusion to apply, although an identity of parties in both cases is not required. MILWAUKEE COUNTY, DEC. NO. 28951-B (NIELSEN, 7/98); aff'd by op. of law, Dec. No. 28951-C (9/98). See also, RACINE ED. ASSOC., DEC. NO. 29184-A (SHAW, 11/97); CLARK COUNTY, DEC. NO. 29480-A (CROWLEY, 3/99); MILWAUKEE COUNTY, DEC. NO. 30351-C (SHAW, 2/03).

Applying first a claim preclusion analysis, in the instant case, there is an identity of parties in the Emery case and the instant case. The question then arises whether the issues and remedies are also identical. A close comparison of the allegations made in Association Claims I and IV with Arbitrator Emery's description of the parties' arguments before him as well as the Association's arguments made in this case clearly demonstrate that the Association is attempting to re-litigate the issue fully considered by Arbitrator Emery - whether there was an effective past practice that required the City to honor officers' preferences for specific Packer

game assignments based only on their seniority.

On this point, I note that in its brief before Arbitrator Emery, the Association clearly argued that Officer Peters was entitled to the Packer game Transport Officer position because he had greater seniority than the officer selected, as follows:

> Another item of contention at hearing had to do with seniority rights to job assignments at Packer games.
>
> . . .
>
> As to seniority rights, Officer Peters testified that in fact officers specified preferences to job assignments at Packer games and received these assignments based on seniority as a general matter.
>
> . . .
>
> All of this testimony and documentary evidence supports Officer Peters position that he in fact had expectations of receiving the Transport assignment based on seniority. All of the witnesses testified that the female officer replacing Officer Peters had less seniority than Officer Peters.
> (Assoc. Brief before Emery, pp 1, 4-5.)

In addition, examples of the Association's arguments on this point were summarized by Arbitrator Emery as follows:

> . . .
>
> The Union asserts that officers routinely indicated position preferences when they signed up for Packer game assignments, as indicated in City Ex. #1, and that there was a practice of honoring those preferences, when possible, according to seniority. Thus, the officers had an expectation interest in receiving the position assignments they had requested. By denying the Grievant's request for gender-based reasons, therefore, the City violated the anti-discrimination provision in the contract.
>
> . . .

The quoted material above demonstrates that the seniority/past practice issue was, in fact, fully litigated in the Emery case. This fact is further buttressed by the Association's Response in Opposition to Respondents' Motion wherein the Association references the December 4, 2004 "Peters Sex Discrimination Grievance" as the factual underpinning for Claims I and IV (Response, pp. 5-6 and 11-12). Based upon the Association's prior arguments before Arbitrator Emery and its admissions and arguments herein, this Examiner finds no material discrepancies between the Emery case and Claims I and IV.

In this Examiner's view, the fact that the formal issues Arbitrator Emery stated for his determination did not include a past practice issue does not detract from or undercut Emery's clear holding that no such past practice existed to limit the discretion of City Management to decide which particular Packer game assignments senior officers should receive. Therefore, I believe the Association has admitted herein that the pivotal issue in Arbitrator Emery's case is the same as that which the Association seeks to raise in Claims I and IV herein.

The Association has argued that because there is no claim of sex discrimination or a violation of Section 2.02 of the agreement and because the instant case involves events which occurred after the 2004 Packer game season assignments that these factors show that the Emery case and this case arose out of different events or transactions, making claim preclusion inappropriate. These arguments must fail. Were the Association to prevail on this point, all it would need to do to relitigate in an MERA complaint forum an issue previously finally decided by an arbitrator is to submit the same allegation or claim but base it on actions taken at a different time, concerning a different grievant and/or allege different contract/statutory violations. This is precisely the kind of relitigation the doctrine of claim preclusion was designed to deter.

Furthermore, this Examiner also believes that the remedy sought by the Association in Claims I and IV is the same remedy as it sought before Arbitrator Emery - - an award requiring the City to assign senior officers to their preferred Packer game duties based solely upon their seniority. Here, the Association requested the following relief on Claims I and IV in its Amended Complaint:

. . .

WHEREFORE, complainant seeks and demands the following remedies:

A. On the first claim complainant requests a determination that respondents actions surrounding the taking away of Officer Resch's Packer game overtime assignment violated Wis. Stat. §111.70(3)(a)1, 2, 4 and derivatively 1, and 5, and upon such determination that the WERC issue appropriate affirmative relief requiring respondents to:

1. Reinstate Officer Resch to his customary and usual club seat section Packer game overtime assignment, or to grant to Officer Resch any other Packer game overtime assignment to which his departmental seniority entitles him;
2. Post a notice in a form, in the place and with the content determined by the WERC that will inform Green Bay Police officers of the violations committed by respondents, the remedies to be taken, and an appropriate statement that respondents will cease, desist and refrain from such violations in the future.

D. On the fourth claim complainant requests a determination that respondents violated Wis. Stat. §111.70(3)(a)1, 2, 4 and 5 upon such determinations issue appropriate affirmative relief requiring respondents to:

1. Reinstate the bidding and selection procedure for Packer game overtime assignments in force and effect prior to the 2006 Packer season which consisted of allowing officers to indicate preferred assignments and allocating assignments as preferred according to departmental seniority: and
2. Refrain from making any changes or modifications in the administration of Packer game overtime assignment allocation excepting after collective bargaining and agreement with complainant; and
3. Post a notice in a form, in the place and with the content determined by the WERC that will inform Green Bay Police officers of the violations committed by respondents, the remedies to be taken, and an appropriate statement that respondents will cease, desist and refrain from such violations in the future.

. . .

As indicated above, the Association sought the posting of a notice herein (assuming the Commission found violations of Sec. 111.70(3)(a) 4 and 5 Stats. Although such notices as the Association seeks herein are not available in grievance arbitration, the Emery Award, had it been favorable to the Association, would have had the similar affect of requiring the City to cease and desist from future violations. Thus, the essential relief sought in this case is exactly what Arbitrator Emery would have ordered had he ruled in favor of the Association in that case. And the remedy sought by the Association herein, were WERC to grant such a remedy, would effectively overturn Arbitrator Emery's prior award. Thus, the remedies sought in the two cases are identical on all essential points.

In addition, I note that in the prior case, Arbitrator Emery held that the City had discretion to assign senior offices to specific Packer game duties and that there was no past practice to the contrary so that no unlawful discrimination could have occurred when the City refused to assign Officer Peters to Transport duty. Thus, Arbitrator Emery's holdings finally resolved the issues whether the contract was violated and whether the City refused to bargain and whether it made a unilateral change. HORTONVILLE SCHOOL DISTRICT, DEC. NO. 30437-A (GALLAGHER, 2/03) AFF'D BY OP. OF LAW, DEC. NO. 30437-B (WERC, 3/03). In these circumstances, claim preclusion should be applied to foreclose the Association from getting a "second bite at the apple" in contention in the Emery case simply by cloaking its Claim I and

IV in the mantle of MERA.[1]

1 The Association argued that the Emery Award is not a "final judgment." The City submitted Judge Kelley's August, 2007 ruling which neither set aside the Emery Award nor demonstrated sufficient grounds upon which Judge Kelley could have done so. As such, this Examiner believes the Emery Award constitutes a final judgment.

Based upon the above analysis, I find that paragraphs 6 through 12 and 14 as well as the Section 111.70(3)(a) 4 and 5 Stats., portions of paragraph 15 in Claim I are barred as an attempt to relitigate issues raised in the Emery case and they are dismissed on the same grounds of claim preclusion, as stated above. This leaves the allegations of paragraphs 13 and 15, (in part) only to the extent that they allege violations of Sec. 111.70(3)(a) 1, and 2, Stats;[2], these specific allegations were not raised in the Emery case and are therefore appropriately before the Commission for determination herein. These very narrow allegations must therefore be heard.

A similar analysis must be applied to paragraphs 31 (in part) and 32, through 37, 38 (in part) and 39 through 43 of Claim IV.[3] Notably, the language of Claim IV demonstrates that the parties are the same, that the Association is seeking to relitigate the claim whether Article 6 of the labor agreement and past practice require the City to assign preferred Packer game overtime work by seniority and that the remedy sought by the Association is the same as the one it sought before Arbitrator Emery. Therefore, the above paragraphs of Claim IV have been dismissed. The allegations remaining in paragraph 31 and 38, in part, which pertain to conduct violative of Section 111.70(3)(a) 1 and 2, Stats., only, must be litigated herein for the reasons stated above regarding similar Claim I allegations.

In their Reply Brief in Support of its Motion to Dismiss, Respondents argued that because the Association did not respond to their Motion to Make the Complaint More Definite and Certain (filed July 15, 2007) by August 3, 2007, the Examiner should dismiss Claims I through VII. There is absolutely no basis in law or fact for such a drastic action and this part of Respondents' Motion is denied. I note the Association responded in detail to Respondents' Motion to Make More Definite and Certain by its Response in Opposition dated September 7, 2007 and that it filed a Motion to Extend Time on August 23, 2007 stating valid reasons for further time to file its response.

In its Reply Brief in support of its Motion, the City also argued that as Claim XI was then being processed through the grievance procedure, that claim should be deferred to arbitration. Respondents' Motion on this point read as follows:

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2 The Association has specifically stated it is not raising any issue of a violation of Sec. 111.70(3)(a) 3 retaliation/discrimination herein having stated that these complaint allegations are "by way of background and motive only" (Brief in Opp, pp. 5-6 and 7). Thus, no Sec. 111.70(3)(a) 3, Stats. allegation is before me.

3 It is also clear that the allegations in paragraph 40 could have been litigated in the Emery case.

III. MOTION TO DEFER COUNTY XI TO GRIEVANCE ARBITRATION

> On June 26, 2007, the City moved to defer Count XI of the Complaint on the basis that the matter is currently pending as a grievance. To the extent the Association claims that the City violated Wis. Stats. §111.70(3)(a)5 and intentionally violated the labor agreement, there is no reason to litigate this matter twice before two separate hearing examiners.

The Association responded to this portion of Respondents' Motion in its undated Surreply Brief, as follows:

> There is a grievance pending which alleges that Offices Powell should be paid at the overtime rate for all hours worked outside of Officer Powell's normally scheduled working hours.
>
> The defense of the City in that grievance was that it had reached an agreement with Officer Powell to change his hours. The prohibited practice charge was filed after the filing of the grievance.
>
> . . .
>
> There is merit to the City's contention that there exists no reason to litigate this matter twice between two different hearing examiners. The GBPPA would suggest that this matter only be heard before this examiner and that the grievance hearing be held in abeyance pending the decision in this prohibited practice complaint matter (Assoc. Surreply Brief pp 5-6).

From the above quote it is clear that Respondents' Motion to Defer Claim XI was, in essence, a request to require the parties to exhaust the on-going grievance arbitration process regarding Officer Powell's pending grievance. The WERC has for many years recognized the value of exhaustion of the grievance process prior to Commission consideration of the same issue. For example, in MILWAUKEE COUNTY, DEC. NO. 30848-B (WERC, 9/05), the Commission refused to assert jurisdiction of Sec. 111.70(3)(a)5, Stats., complaint allegations because the parties had failed to exhaust the grievance procedure concerning the same conduct/issue. See also, MILWAUKEE COUNTY, DEC. NO. 31394-A (MAWHINNEY, 3/07).

From the above quotation, the Association appears to admit that it has failed to exhaust the grievance procedure regarding Officer Powell's grievance and that that grievance is still pending. The Commission has long recognized the benefits of deferring disputes to final and binding arbitration. In these circumstances, this Examiner refuses at this time to take jurisdiction of the Powell grievance and instead she finds that the parties should first exhaust their grievance procedure on this point and that this allegation will be held in abeyance pending the results of the grievance arbitration on this issue. NORTHCENTRAL TECHNICAL COLLEGE, DEC. NO. 31117-C (WERC, 2/06); MILWAUKEE COUNTY, DEC. NO. 30848-B(WERC, 9/05). See also MILWAUKEE COUNTY, DEC. NO. 31394-A (MAWHINNEY, 3/07).

For the above reasons[4], Respondents' Motions to Dismiss have been granted in part and denied in part.

Dated in Oshkosh, Wisconsin this 17th day of January, 2008.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

4 Respondents argued herein that the issue preclusion doctrine would also require dismissal of the Section 111.70(3)(a) 4 and 5, Stats., allegations of Claims I and IV. I need not and have not decided this issue herein given my determinations that claim preclusion applies to require the dismissal of those portions of Claims I and IV.