

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

vs.

VILLAGE OF WEST MILWAUKEE, Respondent.

Case 46
No. 66812
MP-4333

Decision No. 32147-A

Appearances:

Andrew D. Schauer, Staff Counsel, Wisconsin Professional Police Association/LEER Division, 340 Coyier Lane, Madison, Wisconsin 53713, appearing on behalf of the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

Susan M. Love, Davis & Kuelthau, S.C., Attorneys at Law, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the Village of West Milwaukee.

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

On March 12, 2007, the Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association (“WPPA”) filed a complaint with the Wisconsin Employment Relations Commission, asserting that the Village of West Milwaukee (“Village”) had committed prohibited practices in violation of Sections 111.70(3)(a)1, 111.70(3)(a)4, 111.70(3)(a)5, and 111.70(3)(a)7 of the Municipal Employment Relations Act (“MERA”), when it changed its family and medical leave benefit. On July 16, 2007, the Village filed an answer to the complaint, denying any alleged violation of MERA and making certain affirmative defenses. The Commission appointed Danielle Carne to act as Examiner, to make and issue Findings of Fact and Conclusions of Law and to issue appropriate Orders. A hearing on the matters at issue in the case was held in the Village of West Milwaukee, Wisconsin, on July 26, 2007. Thereafter, WPPA and the Village each submitted an initial brief and a reply brief, the last of which was received on October 19, 2007, whereupon the record was closed.

No. 32147-A

Based on the evidence, the arguments of WPPA and the Village, and the record as a whole, the Examiner makes and issues the following

FINDINGS OF FACT

1. WPPA is a labor organization which, at all relevant times, has been the exclusive collective bargaining representative for employees in a bargaining unit consisting of all regular full-time law enforcement employees with the power of arrest employed by the Village of West Milwaukee Police Department (“Police Department”) in the classifications of Sergeant of Police, Detective of Police, and Patrol Officer.

2. The Village, at all relevant times, has engaged the services of employees.

3. WPPA and the Village were parties to a collective bargaining agreement (“Agreement”), which was implemented pursuant to an arbitration award issued on November 14, 2006, and which was effective from January 1, 2006, through December 31, 2007.

4. Section 9.09 of the Agreement states as follows:

The paid and unpaid leave provisions contained in this Agreement are designed to meet the minimum requirements of Wisconsin and Federal Family and Medical Leave Laws, are intended to run concurrent with and not in addition to the leave provided for under such Wisconsin and Federal Laws, and are considered to be in satisfaction of the obligations under such Wisconsin and Federal Laws.

The language of Section 9.09 of the Agreement has remained unchanged through at least two prior collective bargaining agreements between WPPA and the Village.

5. In 1997 or 1998, a “Personnel Policies and Procedures Handbook” (“Handbook”) was adopted by the Village. The Handbook states the following, with regard to family and medical leave:

Employees of the Village of West Milwaukee are covered under the Federal and State Laws regulating Family and Medical Leave. A copy of the procedures governing Family and Medical Leave can be obtained from the Village Clerk/Treasurer’s Office.

6. Section 11.01 of the Agreement provides the following:

The rules and regulations of the Police Department relating to wages, hours, and working conditions as established by the Village, shall be made a part of this Agreement by reference.

7. Section 18.01 of the Agreement provides the following:

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make requests and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. The Village and the Association, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not referred to or covered in this Agreement, but which could have been discussed during the negotiations for this Agreement, and referred to or covered in this Agreement.

8. In the spring of 2006, Village representatives began to discuss the upcoming budget cycle of fiscal year 2007. The Village was facing financial short-falls. Through a series of meetings that occurred in the spring and early summer months of 2006, Village representatives discussed the need to control Police Department expenditures and, more particularly, the need to control Police Department overtime costs. Village representatives decided to target three specific areas for potential cost savings: Police Department reorganization, the use of part-time employees in the Police Department, and Police Department leave-related issues such as family and medical leave entitlement.

9. In 2004, 2005, and through the first half of 2006, the Village had extended to its employees the leave benefits available under the federal family and medical leave statute ("FMLA") and the Wisconsin family and medical leave statute ("WFMLA"). The Village had done so without having taken a census to determine whether it employed enough people to be legally obligated to comply with the leave requirements of the FMLA/WFMLA.

10. In the meetings of the spring and summer of 2006, Village representatives decided to take steps to determine the Village's legal obligations under the FMLA/WFMLA. The Village obtained a legal opinion which set out the criteria for evaluating an employer's leave obligations under those statutes. The Village then conducted a census of its employees in mid-summer of 2006. The census revealed that, in 2005 and for the first half of 2006, the Village employed fewer than fifty people and, therefore, was not obligated to comply with the leave requirements of the FMLA/WFMLA.

11. Even after the census was taken, however, the Village continued to comply, for the remainder of 2006, with the leave benefit provisions of the FMLA/WFMLA. During that period of time, the attention of Village representatives was focused on a reorganization of the Police Department, rather than on the leave issues. Further, an employee census for evaluating an employer's obligation under FMLA/WFMLA must be based on a certain look-back period,

and the Village intended to account for the entire 2006 calendar year in calculating its employee population.

12. In the late fall of 2006, the Village refocused its attention on the family and medical leave issue. The issue was discussed at a Personnel Committee meeting on December 18, 2006.

13. In correspondence dated January 4, 2007, Village Administrator Timothy Freitag informed Thomas Bahr of the WPPA, as well as the employees of the Village, that a census had established that the Village employed fewer than fifty employees and, therefore, the Village was no longer obligated to provide and Village employees were no longer eligible to take leave under the FMLA/WFMLA.

14. On January 11, 2007, Village Administrator Freitag sent a memorandum to, among others, Robert Bennett, the President of WPPA and a sergeant employed by the Village, which stated the following:

Please find attached a copy of the proposed Village of West Milwaukee Emergency Family Leave Policy scheduled for consideration at the Monday, January 15, 2007 Village Board Meeting. This policy is proposed to replace the recently rescinded Family Medical Leave Act (FMLA) policy. If you have any questions please feel free to contact me.

15. WPPA received the memorandum of January 11, 2007, and concluded that it did not wish to demand to bargain as to the Emergency Family Leave Policy proposed therein.

16. On January 15, 2007, the Village Board considered the proposed Emergency Family Leave Policy and adopted it.

17. Since the Emergency Family Leave Policy was adopted, the Village has declined to extend the leave benefit provided under the FMLA/WFMLA to at least two Village Police Department employees.

18. Article 10 of the Agreement sets out the following, with regard to the grievance procedure:

10.01 – This Agreement provides a method for orderly adjustment of grievances. Therefore, it is understood and agreed that there shall be no slowdowns by individuals or employees of the Police Department. Any one or more employees participating in any such slowdown, strike, or mass sick calls will be subject to discipline up to and including discharge.

10.02 – Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under

the provisions set forth in this Article. Disciplinary matters shall be handled exclusively in the manner set forth in the provisions of Section 62.13(5), Wisconsin Statutes. In the event a grievance is required to be in writing under this section, it shall specifically state the section or sections of this Agreement alleged to have been violated.

10.03 – Both parties agree that every reasonable effort shall be made in good faith to endeavor to settle grievances promptly and in a friendly and cooperative spirit. Such negotiations may be held by the employees individually with the Commanding Officer or through the following regular grievance procedure.

Step 1: The employee individually, or if he desires, accompanied by a member of the Association's Grievance Committee, or the Association may explain the grievance orally to the Commanding Officer of the shift involved.

Step 2: If the grievance cannot be settled at the first step, it shall be reduced to writing and submitted to the Chief of Police within thirty (30) days from the date the events of the grievance arose. The Chief of Police shall, within five (5) days, hold an informal meeting with the employee and the Grievance Committee, and shall give his written answer within five (5) days of such meeting.

Step 3: If the grievance is not settled at Step 2, the Association shall, within five (5) days after receipt of the Chief of Police's answer or last date due, serve written notice on the Village Clerk requesting a meeting with the Personnel and Publicity Committee of the Village Board. A meeting shall be scheduled within twenty (20) business days and an attempt shall be made by the parties to settle the grievance. Both parties may be represented by their own retained legal counsel at such meeting. The Personnel and Publicity Committee shall give its written answer to the Association within ten (10) business days of such meeting.

Step 4: In the event a grievance is not satisfactorily settled at Step 3, it shall be submitted within fifteen (15) days of receipt of the answer of the Personnel and Publicity Committee or last date due to arbitration by serving written notice on the other party. Within ten (10) days thereafter, the parties shall meet to select an arbitrator. If the parties cannot agree on an arbitrator, they shall request a list of five (5) arbitrators from the Wisconsin Employment Relations Commission. Both parties shall delete two names from the list in alternate strikes, the party requesting arbitration making the first strike, and the remaining person on the list becoming the arbitrator. The decision of the arbitrator shall be final and

binding on the parties, but the arbitrator shall neither add to, detract from, nor modify the language of the Agreement between the parties.

The expenses and compensation incident to the services of the arbitrator shall be paid jointly by the Village and the Association. The Village shall pay no part of the Association's attorney fees and the Association shall pay no part of the Village's attorney fees.

10.04 – The Association shall furnish the Village Board and Chief of Police with a current list of the members of the Grievance Committee. No more than one member of the Grievance Committee will be afforded time off as may be reasonably required to attend grievance meetings.

10.05 – The Association shall furnish the Village Board and Chief of Police with an up-to-date list of its officers, trustees, and members of the Grievance Committee, and keep that list up-to-date. If the grievance is one subject to the jurisdiction of the Fire and Police Commission, the provisions of the Wisconsin Statutes shall govern said proceedings.

10.06 – No lawsuit shall be started by the Association or by any individual member thereof against the Chief of Police, the Village, or the Village Board, until the grievance procedure outlined herein has been fully and completely utilized in an attempt to settle the question involved.

10.07 – The time limits indicated in this Article shall not include Saturdays, Sundays, or holidays. In the event the Association fails to process a grievance within the time limits set forth in this Article, such grievance shall be barred unless the time period is extended in writing by the Village.

19. At no time did WPPA file or attempt to file a grievance relating to the allegations contained in Findings of Fact 1 through 17.

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

CONCLUSIONS OF LAW

1. WPPA is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats.
2. The Village is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats.

3. The Commission will not assert its jurisdiction to determine whether the Village violated Section 111.70(3)(a)5, Wis. Stats., by its action here.

4. Because the Agreement contained a provision covering the subject of FMLA/WFMLA leave, there was no duty to bargain as to the Village's action of declining to extend the FMLA/WFMLA leave benefit, and the Village, therefore, did not violate Section 111.70(3)(a)4, Wis. Stats.

5. Because WPPA's inaction constituted a waiver of its right to bargain, the Village's action with regard to the proposed Emergency Family Leave Police did not violate Section 111.70(3)(a)4, Wis. Stats.

6. The Village's actions did not interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in Section 111.70(2), Wis. Stats., in violation of Section 111.70(3)(a)1, Wis. Stats.

7. The Village's actions did not constitute a failure to implement the interest arbitration decision of November 14, 2006, in violation of Section 111.70(3)(a)7, Wis. Stats.

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

ORDER

It is ORDERED that the complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 23rd day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/

Danielle L. Carne, Examiner

VILLAGE OF WEST MILWAUKEE

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

This case concerns WPPA's complaint that the Village engaged in prohibited practices in violation of MERA, when, in January of 2007, it began providing family and medical leave under a newly implemented Emergency Family Leave Policy, rather than extending, as it had done in the past, the leave benefit available under the FMLA/WFMLA. WPPA alleges that the Village's actions constituted a unilateral change to the Agreement between WPPA and the Village, in violation of Sections 111.70(3)(a)1, 4, and 5, Wis. Stats. Further, it alleges that the Village's actions constituted a refusal or failure to implement the interest arbitration decision implementing the Agreement, in violation of Section 111.70(3)(a)7, Wis. Stats.

1. Alleged Violation of Section 111.70(3)(a)5, Wis. Stats.

WPPA alleges that the Village's act of changing its leave benefit violated Section 111.70(3)(a)5, Wis. Stats. That Section provides, in pertinent part, that it is a prohibited practice

[t]o violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees....

It is undisputed that WPPA did not file a grievance relating to any of the events alleged in the present complaint.¹ As WPPA suggests, a labor organization enjoying exclusive representative status does have standing as a "party in interest" under Sec. 111.07(2)(a), Wis. Stats., to file a complaint with the Commission under Sec. 111.70(3)(a)5, Wis. Stats., of MERA alleging that an employer has violated the parties' collective bargaining agreement. *GENERAL DRIVERS & HELPERS UNION LOCAL 662 v. WERB*, 21 Wis.2d 242, 251 (1963); *MELROSE-MINDORO JOINT SCHOOL DISTRICT NO. 2*, DEC. NO. 11627 (WERC, 2/73). However, where the labor organization has bargained a contract with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission has a long-standing tradition of refusing to assert its statutory complaint jurisdiction over breach of contract claims, because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. *WAUPUN EDUCATION*

¹ In addressing the threshold issue of whether WPPA's failure to utilize the contractual grievance process should impact the Commission's willingness to exercise jurisdiction over WPPA's statutory breach of contract claim, both the Village and WPPA rely on *RACINE UNIFIED SCHOOL DISTRICT*, DEC. NO. 29203-B (WERC, 10/98), and its progeny. Such reliance is misplaced. Those cases apply to situations in which parties are in a contractual hiatus. In the instant case, the interest arbitration award implementing the Agreement was issued on November 14, 2006. The events that are the basis for the complaint occurred two months later, in January of 2007. At that time, the Agreement was in full force and effect, and the current matter, therefore, is not one that revolves around a period of hiatus. The cases on which this decision turns apply to non-hiatus situations.

ASSOCIATION, DEC. NO. 22409 (WERC, 3/95); MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/83); MAHNKE v. WERC, 66 Wis. 2d 524, 529-30 (1974); HARNISHFEGER CORP., DEC. NO. 3899-B (WERB, 5/55). An exception to this rule will be made where the employer has repudiated the grievance procedure, there has been unfair representation by the union, or there is a showing that it would have been futile to attempt to utilize the contractual procedure. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, 10/89). None of the circumstances warranting exception to the rule apply in the present case.

WPPA asserts that this dispute would not have been appropriate for the grievance process, because it involves an issue that impacts the entire collective bargaining unit rather than the rights of just a few select members. Along the same line, WPPA asserts that grievance arbitration would have offered a remedy specific to each individual violation, rather than providing the desired restoration of the abolished leave benefit. The language of the Agreement between WPPA and the Village does not support WPPA's argument. The grievance procedure set forth in the Agreement applies to "matters involving the interpretation, application or enforcement of the terms" of the Agreement. The Agreement does not limit the grievance procedure only to disputes involving individual grievants or remedies of individual violations. Furthermore, there is no policy reason for recognizing a new exception to the Commission's exhaustion requirement for cases that involve alleged unit-wide contract violations or remedies.

WPPA also argues that it chose to pursue a prohibited practice complaint against the Village, rather than a grievance, because the prohibited practices WPPA alleges go beyond a mere breach of contract claim. Indeed, the complaint filed by WPPA alleges that the Village's actions also constituted an interference with and restraint of WPPA's right to bargain collectively with the Village in violation of Section 111.70(3)(a)1, Wis. Stats., a refusal to bargain collectively on the part of the Village in violation of Section 111.70(3)(a)4, Wis. Stats., and a failure on the Village's part to implement an arbitration decision in violation of Section 111.70(3)(a)7, Wis. Stats. According to WPPA, these additional, statutory claims would preclude this dispute from being entirely resolved at the "lowest level", which WPPA asserts is the purpose of the Commission's rule requiring the parties to utilize their mutually agreed upon grievance process.

This argument also does not excuse WPPA's decision to bypass the grievance process. The Commission's rationale for requiring that the contractual grievance procedure be exhausted is to give full effect to the parties' agreed upon procedure for resolving disputes and to encourage the voluntary settlement of disputes. MINERAL POINT UNIFIED SCHOOL DISTRICT, DEC. NO. 14970-C (WERC, 10/78). That purpose is served even when a dispute presents other claims that cannot be addressed through the grievance procedure. Indeed, the Commission often has encountered prohibited practice cases in which an alleged breach of contract is only one of several claimed violations of MERA, and it consistently has declined to take jurisdiction over the breach of contract component of such cases where there was an unexcused failure to utilize the contractual grievance process. See, e.g., MADISON METROPOLITAN SCHOOL

DISTRICT, DEC. NO. 32065-B (Jones, 11/07); BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83), CITY OF KENOSHA, DEC. NO. 16392-A (WERC, 12/78).

As a proposed alternative to crafting a new exception to the exhaustion requirement, WPPA argues that any of its asserted reasons for pursuing a prohibited practice claim rather than a grievance could also justify a finding that it would have been futile to pursue grievance arbitration, thereby granting it leave to proceed with its statutory breach of contract claim under one of the already established exceptions to the exhaustion requirement. For the same reasons that WPPA's arguments do not justify a new exception, they also do not fit within an existing one. There is no evidence of futility.

The decision that the Commission does not have jurisdiction over WPPA's 111.70(3)(a)5, Wis. Stats., breach of contract claim precludes any analysis of the leave provisions at issue here, as well as any exploration of WPPA's arguments regarding the Village's past practice under these provisions.

2. Alleged Violation of Sec. 111.70(3)(a)4, Wis. Stats.

WPPA also alleges that the Village refused to bargain in violation of Section 111.70(3)(a)4, Wis. Stats. Section 111.70(3)(a)4, Wis. Stats., provides, in pertinent part, that it is a prohibited practice for a municipal employer

[t]o refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.

It is well-established that, during the term of an agreement,² the duty to bargain collectively does not extend to matters covered by the agreement or to which the union has waived its right to bargain through bargaining history or specific contract language. CITY OF MADISON, DEC. NO. 27757-B (WERC, 10/94); SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); BROWN COUNTY, DEC. NO. 20623 (WERC, 5/83); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82). Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and they are entitled to rely on whatever bargain they struck. CITY OF MADISON, SUPRA.

The Agreement between WPPA and the Village embodies that same principal:

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make requests and proposals with respect to any subject or matter not removed by law from the

² As discussed above, the present case does not involve a period of hiatus. Although WPPA relies on DODGELAND EDUCATION ASSOCIATION, DEC. NO. 31098-C (WERC, 2/07), for the general principal that unilateral changes are tantamount to an outright refusal to bargain, DODGELAND applies to matters involving a contractual hiatus. DODGELAND and the principal articulated therein do not apply here.

area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. The Village and the Association, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not referred to or covered in this Agreement, but which could have been discussed during the negotiations for this Agreement, and referred to or covered in this Agreement.

Here, the Agreement addresses the subject of FMLA/WFMLA coverage, at Section 9.09 and through incorporation of the Handbook provision.³ While there is a dispute between the parties as to how those provisions should be interpreted and applied, it is clear that the Agreement covers that subject. Given the fact that the Agreement addressed FMLA/WFMLA coverage, any alleged failure on the part of the Village to comply with those statutory provisions may have constituted a breach of contract, but it did not constitute a refusal to bargain.

Once the Village, however, sent its letter of January 4, 2007, stating it would no longer be providing the leave available under the FMLA/WFMLA, it arguably left the Agreement with a void on the subject of family and medical leave benefits. That being the case, the Village did have an obligation to bargain with WPPA regarding the Emergency Family Leave Policy proposed on January 11, 2007. Absent a waiver, Section 111.70(3)(a)4, Wis. Stats., precludes a municipal employer from unilaterally implementing any change in a mandatory subject of bargaining unless it has discharged its duty to bargain with the bargaining representative of its employees. NEW RICHMOND JOINT SCHOOL DISTRICT, DEC. NO. 15172-A (Schoenfeld, 7/77).

The record indicates, however, that WPPA waived its right to bargain with the Village regarding the change. On January 11, 2007, the Village sent the memorandum enclosing the proposed Emergency Family Leave Policy to WPPA President Robert Bennett (among others). After becoming aware of the proposal, WPPA never demanded that the Village bargain about the same. It was incumbent on WPPA to make such a demand, and the failure to do so constituted a waiver by inaction. CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85); GREEN BAY JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 16753-B (6/81); CITY OF APPLETON, DEC. NO. 17034-D (5/80).

WPPA argues that any demand to bargain would have been a “tacit admission” on its part that the Village had the right to stop providing benefits under the FMLA/WFMLA. WPPA could have protected itself from making such an admission, however, by explicitly

³ The Handbook provision set forth at Finding of Fact number 5 is incorporated into the Agreement through Section 11.01, which makes a part of the Agreement, by reference, “the rules and regulations of the Police Department relating to wages, hours, and working conditions as established by the Village”.

presenting its demand to bargain on a contingent basis, subject to the outcome of any challenge WPPA chose to pursue regarding the legality of the Village's actions.

WPPA also asserts that it did not respond to the Village's proposal of the Emergency Family Leave Act, because it had surmised that any attempt to talk the Village out of its intended action to adopt the proposed policy would have been futile. A party cannot be deemed to have waived its right to bargain by inaction where circumstances indicate that the request to bargain would have been a futile gesture. CITY OF APPLETON, DEC. NO. 17034-C (McCrary, 1/80); GREEN BAY SCHOOL DISTRICT, DEC. NO. 16753-A (Yaeger, 12/79); WALWORTH COUNTY, DEC. NO. 15429-A, 15430-A (Gratz, 12/78). The record does not support WPPA's conclusion on this point. Although Administrator Frietag conceded that the Village had made up its mind with regard to the new policy at the time when WPPA received notice that it was being proposed, he also testified credibly that he could not conclude whether a discussion between the Village and WPPA would have changed the Village's mind with regard to the policy.

3. *Alleged Violation of Section 111.70(3)(a)1, Wis. Stats.*

Section 111.70(3)(a)1, Wis. Stats., makes it a prohibited practice for a municipal employer

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Wis. Stats., sets forth the rights referenced in Section 111.70(3)(a)1, Wis. Stats., as follows:

- (2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

To prevail on a Section 111.70(3)(a)1, Wis. Stats., claim, a complainant must establish, by a clear and satisfactory preponderance of the evidence, that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section 111.70(2), Wis. Stats., rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. WERC v. EVANSVILLE, 69 WIS. 2D 140 (1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an employee's exercise of Section 111.70(2), Wis. Stats., rights generally will not be found to

violate Section 111.70(3)(a)1, Wis. Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

WPPA describes the theory underlying its independent Section 111.70(3)(a)1, Wis. Stats., claim, as follows:

By allowing the union members the right to full family and medical leave benefits over three consecutive collective bargaining agreements, and by holding out a policy . . . stating that the employees were covered under the state and federal FMLA, the Village gave the Association and its members every indication that it would grant the leave accordingly. By misleading the Association in this way, it interfered with its right to bargain for more (or a more secure) family and medical leave benefit, since through its actions, the Village held itself out to grant the same.

The Examiner disagrees that the Village's act of providing an FMLA/WFMLA leave benefit and then changing the leave policy in early 2007 constituted a violation of Section 111.70(3)(a)1, Wis. Stats. There is simply no evidence that the Village somehow tricked WPPA by providing a benefit only so it could take it away mid-contract, thereby interfering with WPPA's collective bargaining rights. The fact that WPPA believed, based on the written provisions and the Village's past practices, that it had a secure benefit and was surprised by the Village's interpretation of those provisions, does not make the Village's interpretation and application of the leave provisions an act of interference. Whether the Village was correct in its interpretation of those provisions is a question that would properly be analyzed as a 111.70(3)(a)5, Wis. Stats., breach of contract claim – not as an interference claim.

4. Alleged Violation of Sec. 111.70(3)(a)7, Wis. Stats.

Finally, WPPA asserts that the Village's act of changing its leave policy constituted a failure to implement the interest arbitration decision that resulted in the parties Agreement, in violation of Section 111.70(3)(a)7, Wis. Stats. In support of this claim, WPPA points out that the Village adopted the new Emergency Leave Policy "a mere six days" after the Village Administrator signed the Agreement, arguing that this timeline provides evidence that the Village changed the leave policy to retaliate against WPPA for its success in interest arbitration.

Section 111.70(3)(a)7, Wis. Stats., is intended to reach situations in which there has been a basic refusal to implement an interest arbitration award. See, e.g. CITY OF NEW BERLIN, DEC. NO. 17748-A (WERC, 5/81); TOWN OF BROOKFIELD (FIRE DEPARTMENT), DEC. NO. 30033-A (Levitan, 6/01); CITY OF NEW LISBON, DEC. NO. 29557-A (Shaw, 10/99). Here, the Village did not fail to implement the award. Rather, it failed to apply the family and medical leave provisions as WPPA thought they should have been applied.

To the extent that WPPA's claim is that the Village's change to the leave benefit constituted a retaliation, on the part of the Village, for WPPA's victory in the interest arbitration – an allegation that, if proven, would constitute a violation of Section 111.70(3)(a)1, Wis. Stats. – that claim is not supported by the record. The Village presented evidence showing that the process that ultimately resulted in the adoption of the Emergency Leave Policy began in the spring of 2006, months before the interest arbitration decision was issued. The Village faced financial shortfalls when it began its budget process in the spring of 2006, had decided to focus its attention on cutting Police Department expenditures, targeted several specific areas, including family and medical leave, that could present cost savings, and in the summer of 2006 sought a legal opinion as to its obligations under the FMLA/WFMLA and conducted the necessary employee census. The Village waited until late 2006 and early 2007 to take the step of revamping its leave policy, because it wanted to complete its reorganization of the Police Department and it wanted its census to be based on the full 2006 calendar year. All of this credible and undisputed evidence setting forth the history of the policy change undermines the likelihood that the Village's actions could have been taken in retaliation against WPPA for its November, 2006 interest arbitration victory.

WPPA further asserts that the issuance of the interest arbitration award at the very least might have eliminated any second-guessing the Village may have been experiencing regarding making a change to its leave policy. This assertion falls short, because there is no evidence on the record of any second-guessing on the Village's part.

WPPA also argues that the Village's claim that it implemented a new leave benefit to obtain cost savings cannot be legitimate because the Village Administrator testified at hearing that he did not know whether leave had been taken under the former policy and, therefore, could not have established that the benefit had caused excessive expenditures. Village Administrator Frietag's lack of knowledge on this point, however, is not significant. The fact that he was unable to recall, at hearing, whether FMLA/WFMLA leaves had been taken in previous years does not undermine the assertion that Village representatives were operating under the general concern that the leave benefit had resulted or could result in expenditures for the Village. The possibility that their concerns may have been unfounded does not make the Village's act of changing its leave policy retaliatory.

CONCLUSION

Based on the foregoing, WPPA's complaint alleging prohibited practices in violation of Section 111.70(3)(a)1, 4, 5 and 7, Wis. Stats., is dismissed.

Dated at Madison, Wisconsin, this 23rd day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/

Danielle L. Carne, Examiner

