STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MENOMONEE FALLS POLICE ASSOCIATION, Complainant,

vs.

VILLAGE OF MENOMONEE FALLS, Respondent.

Case 96
No. 71852
MP-4742

Decision No. 34017-A

Appearances:

Brendan Matthews, Attorney, Cermele and Matthews, Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appearing on behalf of the Complainant Association.

Daniel Vliet and Sarrie Devore, Attorneys, Buelow Vetter Buikema Olson & Vliet, LLC, Attorneys at Law, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, appearing on behalf of the Respondent Village.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 15, 2012, Menomonee Falls Police Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Village of Menomonee Falls (hereinafter the Village or the Employer). The complaint alleged that when the Village implemented a new health care plan on January 1, 2013, that new plan resulted in significant changes and additional costs to employees. The complaint further alleged that the Village's new insurance plan "stems from a flawed reading of the Village's authority under Sec. 111.70(4)(mc)6, Stats." The complaint contended that this change in insurance violated both the parties' collective bargaining agreement, and Sec. 111.70(3)(a)3, and derivatively Sec. 111.70(3)(a)1, Stats. On December 17, 2012, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On January 4, 2013, the Village filed an answer denying the

allegations. Hearing on the complaint was set for January 10, 2013, but that hearing was cancelled per the parties' agreement. Instead, the parties decided to submit stipulated facts to the examiner in lieu of a hearing. On February 13, 2013, the parties submitted a Stipulation, along with attachments, to the Examiner. The Stipulation consisted of 23 factual paragraphs. The attachments consisted of 15 exhibits. The parties then filed briefs pursuant to an agreed upon arrangement: the Association filed an initial brief on March 18, 2013; the Village filed a brief on April 19, 2013; and the Association filed a reply brief on May 3, 2013. Having considered the stipulated record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

Findings of Fact 1-23 were stipulated to by the parties:

1. Complainant Menomonee Falls Police Association ("Association" or "MFPA"), is a labor organization with offices located at W156 N8480 Pilgrim Road, Menomonee Falls, Wisconsin 53051, and has been certified as the exclusive collective bargaining representative of non-supervisory law enforcement employees of the Menomonee Falls Police Department ("Department"), all of whom are municipal and "public safety employees" under §111.70, et seq.

2. Respondent Village of Menomonee Falls ("Village"), is a municipal employer, with a mailing address of W156 N8480 Pilgrim Road, Menomonee Falls, Wisconsin 53051, and a signatory to the 2011-12 Labor Agreement ("2011-2012 Agreement") between the Village and the Association covering non-supervisory public safety employees represented by the Association.

3. Anna Ruzinski is, and was at all time material, employed by the Village as the Chief of Police ("Chief"), overseeing the Village's police department.

4. The parties executed the 2011-12 Agreement following a Consent Award dated May 26, 2010.

5. The parties' Agreement expired on December 31, 2012.

6. Attached and marked as *Exhibit 1* is a true and correct copy of the Village's petition for "Final and Binding Arbitration" with the Association.

7. Attached and marked as *Exhibit 2* is a true and correct copy of the Consent Award issued between the parties on May 26, 2010.

8. Attached and marked as *Exhibit 3* is a true and correct copy of the parties' 2011-2012 Agreement.

9. Attached and marked as *Exhibit 4* is a true and correct copy of an e-mail dated October 24, 2012, sent by Chief Ruzinski to all full-time employees of the Village Police and Fire Departments, including MFPA members.

10. Chief Ruzinski's e-mail of October 24, 2012, attached as a part of Exhibit 4, made a distinction about the available health insurance plans based on whether the employee contributes to the WRS.

11. Prior to the implementation of the new health insurance plans on January 1, 2013, the Village changed its position and required all MFPA members to participate in the same plan regardless of whether the employee contributed to the WRS.

12. Attached and marked as *Exhibit 5* is a true and correct copy of correspondence received by all MFPA members from Mary Burg, the Village's Human Resource Coordinator, dated November 5, 2012, indicating that the Village would be changing health insurance plans effective January 1, 2013, and providing a list of costs for the new plans.

13. Attached and marked as *Exhibit 6* is a true and correct copy of the minutes from the Village's meeting on November 19, 2012, at which time the Village Board passed a resolution adopting a new operating budget for calendar year 2013. The 2013 operating budget authorized new health insurance plans for all eligible Village employees, including MFPA members, effective January 1, 2013.

14. Attached and marked as *Exhibit 7* is a true and correct copy of the outlines for health insurance plans adopted by the Village on November 19, 2012.

15. Attached and marked as *Exhibit 8* is a true and correct copy of the grievance filed by the Association dated November 5, 2012 regarding the 2013 health care changes.

16. Attached and marked as *Exhibit 9* is a true and correct copy of the Village's grievance denial dated November 19, 2012.

17. Attached and marked as *Exhibit 10* is a true and correct copy of a list of all current bargaining unit members, specifying their date of hire, job title, whether the employee participates in the Village's health insurance plan, the plan the employee is covered under and whether the employee makes a contribution to the WRS.

18. Attached and marked as *Exhibit 11* is a true and correct copy of a summary of the health insurance plans in existence during the 2007-2008 collective bargaining agreement between the parties.

19. Attached and marked as *Exhibit 12* is a true and correct copy of the Village Police Department's 2011 Annual Report.

20. Attached and marked as *Exhibit 13* is a true and correct copy of the Village Manager's PowerPoint presentation to the Village Board on November 19, 2012 regarding its 2013 Proposed Operating Budget.

21. Attached and marked as *Exhibit 14* is a true and correct copy of the Village's 2013 Budget, which was approved by the Village Board on November 19, 2012.

22. Attached and marked as *Exhibit 15* is a true and correct copy of the Village's "Notice of Public Hearing" for the Village Board's November 19, 2012 meeting.

23. The parties agree that the Hearing Examiner can resolve both the pending prohibited practice charge and the grievance filed by the Association referenced in paragraph 14 (sic) above. The parties also agree there are no other facts in dispute and the parties agree that no evidentiary hearing is needed in this case. Therefore, the parties request that the record be closed.

(Examiner's Note: The 15 exhibits referenced in Findings of Fact 1-23 are not attached to this decision, but are part of the case file.)

24. The parties' 2011-2012 collective bargaining agreement referenced in Finding 8 contained a grievance procedure in Article XIX, Section 19.01. Step 3 of that procedure – which is not reproduced here – provides for arbitration of unresolved grievances. The agreement also contained the following relevant provisions:

> ARTICLE V – MANAGEMENT RESPONSIBILITIES
>
> Section 5.01: The normal functions of management and the direction of working forces including, but not limited to, the hiring of employees, suspending, discharging, or otherwise disciplining of employees, establishing reasonable rules and regulations, scheduling of work, the determination of methods and means of operation, and the control and regulation and use of all equipment are exclusive functions of the Village; provided, however, that in the exercise of such functions the Village shall observe the provisions of this Agreement and applicable State and local laws.
>
> . . .
>
> ARTICLE XV – HOSPITALIZATION AND LIFE INSURANCE
>
> Section 15.01: Effective April 1, 2004, and subject to the provisions of Section A and B below, the employer agrees to pay the full premium for the United Health Care Choice Plus Plan in effect on October 7, 2004, minus the employees' contributions.

Effective January 1, 2010, employees will pay seven and one-half percent (7.5%) per month, not to exceed one hundred twenty dollars ($120.00) per month toward the family premium and fifty dollars ($50.00) toward the single premium, based on the actual monthly premium costs of the insurance.

Effective May 1, 2011, employees will pay seven and one-half percent (7.5%) per month of the actual monthly premium costs of the insurance.

Effective September 1, 2012, employees will pay ten percent (10.0%) per month of the actual monthly premium costs of the insurance.

. . .

Section 15.05: The Village may change any of the health insurance carriers or the dental carrier if it gives the Association at least sixty (60) days written notice in advance and maintains coverage, benefit levels, and administration equal to or greater than the plans in existence during the 2007-2008 agreement.

. . .

(Examiner's Note: In footnote 3 of its initial brief, the Association makes the following statement about the language just quoted: "the parties agree that the language of Article XV, Section 15.05 inadvertently references the '2007-2008 agreement' instead of the '2011-2012 agreement.'")

. . .

ARTICLE XXVII – SAVINGS CLAUSE

Section 27.01: If any Article or Section of this Agreement or any addendum should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any article or section shall be restrained by such tribunal, the remainder of the Agreement and addendum shall not be affected, and the parties shall enter into immediate collective bargaining negotiations for the purpose of arriving at a mutually satisfactory replacement for such Article or Section.

ARTICLE XXVIII – DURATION

Section 28.01: This Agreement shall become effective January 1, 2011 and this Agreement shall terminate at the close of business through the 31st day of December, 2012. In the event the Agreement is not reached for renewal of

> the contract by that date, the existing terms and conditions shall continue to apply until a new Agreement is executed. Conference and negotiations shall be carried on between the Employer and Association during the last year of the contract as follows: Either party wishing to amend the Agreement shall notify the other party no later than September 1st. Thereafter the parties shall mutually agree to a date to exchange proposals and commence bargaining.

25. The Employer was obligated to follow, and did follow, Act 32 when it implemented its health care plan and design changes on January 1, 2013 after the parties' 2011-2012 collective bargaining agreement expired.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Act 32, specifically Sec. 111.70(4)(mc)6, Stats., allowed the Employer to make unilateral changes to the health care plan and design that existed in the parties' 2011-2012 collective bargaining agreement upon the expiration of that agreement, notwithstanding the language contained in Article XXVIII of the expired agreement.

2. When the Employer unilaterally changed the health care plan and design that existed in the parties' 2011-2012 collective bargaining agreement after that agreement expired, it did not violate the agreement. Additionally, that action did not violate either Secs. 111.70(3)(a)4 or 5, Stats.

3. By its actions herein, the Employer did not refuse to bargain with the Association, and therefore did not violate Sec. 111.70(3)(a)4, Stats.

4. The Employer has not been shown to have committed any prohibited practices within the meaning of Secs. 111.70(3)(a)3 and 1, Stats., by its actions herein.

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

ORDER

The Association's grievance is denied, and the prohibited practice complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 22nd day of May, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

VILLAGE OF MENOMONEE FALLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Association's Initial Brief

The Association argues that the Village violated both the parties' collective bargaining agreement and the Municipal Employment Relations Act (MERA) when it unilaterally changed the health insurance plan effective January 1, 2013. Thus, the Association's complaint has two interrelated components: one component involves a grievance and the other involves its prohibited practice claims under MERA.

The Association addresses its grievance claim first. It contends that the Employer's unilateral actions violated two separate provisions of the collective bargaining agreement.

First, the Association maintains that the Village violated and repudiated Article XXVIII. According to the Association, that provision is "crystal clear" in requiring the Village to maintain the "status quo"on every provision of the expired labor agreement. To support that premise, it points out that the second sentence in that article says that in the event a successor agreement is not reached, then "the existing terms and conditions shall apply until a new agreement is executed." The Association reads this sentence to mean that the parties "shall" maintain every existing term and condition until a new agreement is executed. It points out that a new agreement has not been reached. The Association avers that here, though, the Employer didn't do that (i.e. maintain the existing health care coverage), but instead implemented new health care coverage on January 1, 2013. Since the Village did not comply with the mandate contained in that contract provision, it's the Association's position that the Village has violated Article XXVIII.

Next, the Association addresses why the Village has done that (i.e. why the Village has refused to maintain the terms and conditions of the 2011-2012 collective bargaining agreement). In its view, it's "because in the Village's half-hearted estimation, it has the 'authority' under 2011 Wisconsin Act 32 to unilaterally modify any terms or conditions relative to health insurance – regardless of any contract language to the contrary." According to the Association, that "authority" stems from the Village's "flawed and unsubstantiated reading of Sec. 111.70(4)(mc)6, Stats., which makes 'bargaining' over 'health care coverage plans' a prohibited subject of bargaining." The Association avers that the prohibition identified in Sec. 111.70(4)(mc)6, Stats. "has no application" to the Association's grievance, "as the Association never demanded to 'bargain' any portion of health care beyond the premium itself." Building on that, the Association opines that since "'bargaining' health care is therefore not an issue, Sec. 111.70(4)(mc)6, Stats. cannot impact the parties' covenant to maintain the 'status quo'

with respect to all contractual terms." As part of this contention, the Association also addresses the Village's contention that the "status quo" doctrine applies only to mandatory subjects of bargaining. The Association acknowledges that the "status quo" doctrine "typically" only covers mandatory subjects of bargaining following the expiration of a contract, citing City of Brookfield, Dec. No. 19822-C (WERC, 11/84). Expanding on that, the Association submits that there is nothing prohibiting the parties from agreeing to expand the typical doctrine of "status quo" to encompass more than just mandatory subjects of bargaining. According to the Association, that's what the parties did when they agreed on Article XXVIII. As the Association sees it, that contract language expanded the status quo concept to include all matters within the Agreement. The Association maintains that "the parties have the authority to bargain for things in excess of what is normally required by law", citing Sun Prairie Area School District v. WERC, No. 2006-CV-3031 (Dane County, 2007) and Village of Saukville, Dec. No. 28032-B (WERC, 3/96). Building on that premise, the Association asserts that that's what the parties did when they agreed on Article XXVIII. Thus, the Association believes that the Village had a contractual obligation to maintain the "status quo" of all terms (including those identified in the health care article), until a new agreement was executed.

Returning to its contract claims, the Association also asserts that the Village violated Section 15.05 by modifying its health care coverage "to the extent that it is no longer 'equal to or greater than' the plans previously in existence." The Association notes that that section allows the Village to change any of the health insurance carriers offered, as long as it gives the Association at least 60 days written notice and "maintains coverage, benefit levels, and administration equal to or greater than the plans in existence during the 2007-2008 agreement." The Association further points out that on January 1, 2013, the Village implemented changes to the health care coverage offered to Association members. The Association avers that those changes failed to maintain "coverage, benefit levels and administration" equal to or greater than the coverage previously in existence. Specifically, it contends that the insurance changes which were implemented "limited the extent of coverage offered, lowered most benefit levels, created deductibles, co-pays, and changed the employee premium contribution amounts, amongst other changes." The Association also maintains that the Village does not even claim that the changes to the insurance plan it imposed were "equal to or greater than" those previously in place. Instead, the Association notes that when the Village denied the grievance, its denial stated that "health insurance is now an illegal subject of bargaining. . .[and] any future change in health insurance. . .is not subject to the grievance procedure." As the Association sees it, the Village is essentially saying "it has the authority to do anything it pleases with respect to health insurance." The Association therefore urges the examiner to "rule in favor of the Association on its grievance."

The focus now turns to the Association's prohibited practice claims. Simply put, it's the Association's view that the Village's actions in modifying its health care coverage also constituted prohibited practices under MERA.

First, the Association maintains that the Village violated Sec. 111.70(3)(a)4 by refusing to bargain "anything" with the Association. According to the Association, at a minimum, the Village has an "absolute obligation to bargain all mandatory subjects set forth in the labor agreement." The Association asserts that that didn't happen though, "based upon the unsupportable assertion that a prohibition on bargaining the 'design and selection' of health care coverage plans under Section 111.70(4)(mc)6, somehow impacts its obligation to bargain each and every mandatory subject contained in the Labor Agreement."

The Association also contends that the Village violated Sec. 111.70(3)(a)4 by refusing to bargain over the employees' share of the premium for the health care coverage implemented January 1, 2013 "under the same misguided belief that Sec. 111.70(4)(mc)6 somehow reaches to a premium or premium equivalent." While the Association acknowledges that the scope of Sec. 111.70(4)(mc)6 is presently being determined by the Wisconsin Court of Appeals District I and IV, it avers that "interpretation of that statutory provision is not necessary to resolve this proceeding." Here's why. It submits that the WERC's decision in Eau Claire County, Dec. No. 33662 (WERC, 2/12), recognized that a premium was, in fact, outside of the reach of the prohibition on bargaining contained in Sec. 111.70(4)(mc)6, and therefore remains a mandatory subject of bargaining. Thus, the employer was still required to bargain over the employee "premium contribution" to any offered health care coverage. While the Association acknowledges that the Eau Claire County decision was subsequently overturned at the circuit court level, WPPA v. WERC, 12-CV-1123 (Dane County, 10/12), it opines that "that does nothing to diminish the Village's obligation to bargain." According to the Association, the Village has ignored the precedent from Eau Claire County. Additionally, it opines that "there is not a single case in this state that supports the Village's refusal to bargain the premiums associated with its health care 'design and selection'."

Second, the Association argues that the Village also violated Sec. 111.70(3)(a)5 when it failed to adhere to Article XXVIII of the collective bargaining agreement. Once again, that's the contract provision which requires the Village to maintain every term and condition of the parties' agreement until a new agreement is executed. According to the Association, the Village did not act in good faith when it "repudiated" that contract provision without any valid justification. It cites Elkouri for the proposition that the parties who enter into a labor agreement will act in good faith and honor their contractual obligations. The Association maintains that the Village "has failed in both respects."

In sum then, it's the Association's position that the Village violated both the parties' collective bargaining agreement and MERA when it unilaterally changed the health insurance plan. The Association asks the examiner to remedy those violations.

Employer's Brief

Here's an overview of the Employer's argument. The Village sees the Association's grievance and prohibited practice claims as attempting to delay the implementation of the

provisions of 2011 Wisconsin Act 32 (Act 32) that allow the Village to determine the health care plan and design for the Village's employees. In its view, the Association focused on reviewing the parties' expired 2011-2012 collective bargaining agreement "in a legal vacuum, ignoring the effects of Act 32." The Village sees that as problematic, and maintains that the Association's reasoning is "fatally flawed". As the Employer sees it, the Association's argument is based on the premise that Act 32 plays no role in this case because the parties are not currently engaged in bargaining. According to the Employer, based on the statutory definition of collective bargaining, it is clear that the parties have been and are in the process of bargaining (i.e. resolving questions raised by the Association arising under the 2011-2012 contract by pursuing a grievance under the grievance procedure involving plan design issues). Building on that, the Employer maintains it is evident that Act 32 applies to the parties in this case, and expressly allows the Village to make unilateral changes to the health care plan and design effective upon expiration of the old agreement. Therefore, it's the Village's view that it did not violate the 2011-2012 contract or commit a prohibited practice when it followed Act 32 and modified health care coverage after the expiration of the 2011-2012 contract on December 31, 2012. As for the other alleged prohibited practices that the Association raises (i.e. that the Employer has refused to bargain over the 2013-2014 contract, or refused to bargain the health insurance premium contributions for the 2013-2014 contract), the Employer maintains these claims must be summarily dismissed because they have no basis in the stipulated record before the examiner. The Employer asserts that these claims improperly raise new issues that are not addressed in either the complaint or the stipulation of facts. It elaborates on these contentions as follows.

The Employer addresses the Association's contract claim first. It notes at the outset that the Association, as the grieving party, has the burden of proof. As the Employer sees it, the Association needs to prove its claim of a contract violation by clear and convincing evidence. According to the Employer, the Association has wholly failed to meet its burden of proving a contract violation, whether by clear and convincing evidence or otherwise.

Next, the Employer addresses the Association's contention that the Village had a duty to maintain the status quo with regard to health insurance and Article XXVIII after the expiration of the 2011-2012 contract until a successor contract between the parties was reached. The Employer notes that while the Association acknowledges that Act 32 allows the Village to unilaterally make changes to the health insurance plan and design for a successor contract, the Association contends that the provisions of Act 32 do not relate, in any manner, to the grievance and prohibited practice complaint before the Hearing Examiner. The Village disputes that contention and asserts that Act 32 controls. It elaborates as follows.

As just noted, the Employer argues that it is required to comply with Act 32. While the Association insists that Act 32 has no role in determining whether the Village is required to continue to provide the same health insurance benefits it provided under the expired contract, the Employer argues that the examiner cannot ignore Act 32 in evaluating this case. That's because Act 32 specifies that any action the Village takes to bargain over the health care plan or design is an illegal subject of bargaining. The Employer posits that in applying Act 32, the examiner

should recognize the tenet of statutory construction that if the meaning of the statute is plain, that is where the inquiry ordinarily ends. It opines that the language of Act 32 is plain and clear, and prevents the parties from bargaining over the health care plan and design, including any deductibles. It cites the recent Court of Appeals decision in Milwaukee Police Association, Local 21 v. City of Milwaukee, 2013 WI App 2013_, WL 1579815, to support that proposition.

As part of its argument on this point, the Employer addresses the Association's argument that Act 32 does not affect the parties until the parties sit down to bargain specific health care issues that are prohibited by the statute. The Employer's response is that in making that claim, the Association failed to consider the statutory definition of "collective bargaining" under Sec. 111.70(1)(a), Stats. The Employer points out that that definition includes grievance resolution within the definition of bargaining. The Employer avers that since the Association's grievance and prohibited practice complaint specifically request that the examiner determine the question of whether Article XXVIII in the 2011-2012 collective bargaining agreement requires the Village to maintain health care coverage, the Association is indeed "bargaining" with the Village on this issue. The Employer maintains that pursuant to Act 32's clear prohibition on bargaining over the health care issues such as the Association's request to maintain "coverage, benefit levels and administration equal to or greater than the plans in existence during the 2007-2008 agreement", the examiner "cannot condone the Association's request to circumvent the new law." Finally, the Village cites Elkouri for the proposition that it is not proper for the examiner to grant any type of award which the parties are prohibited by law from negotiating themselves. Building on the premise that it is impossible for the parties to negotiate over whether to continue the provisions of the health insurance coverage from the 2011-2012 contract past its expiration, the Village opines that the examiner has no choice but to dismiss the grievance and the complaint.

Next, the Village points out that the parties specifically included a Savings Clause in the 2011-2012 contract in Sec. 27.01. The Employer submits that by doing that (i.e. including a savings clause in their collective bargaining agreement), they were making it clear that the parties intended that the terms of the agreement cannot be applicable if they are inconsistent with the law. As the Employer sees it, the situation that exists here is similar to what occurred in Milwaukee County, Dec. No. 16713-B (Crowley, 11/81); aff'd., Dec. No. 16713-D (WERC, 4/82). There, the WERC was required to determine the impact of a newly enacted law which made a section of the parties' collective bargaining agreement an illegal subject of bargaining. In that case, the union had filed a prohibited practice complaint against Milwaukee County because Milwaukee County made a unilateral change to the union's insurance coverage to comply with a new law enacted by the Wisconsin Legislature during the term of the parties' collective bargaining agreement. This new law prohibited a county from authorizing funds for or to pay for the performance of an abortion. Because the County's then-current insurance, as provided for in the parties' collective bargaining agreement, allowed funds for elective abortions, this became illegal as soon as the new law was enacted. The WERC found that the insurance coverage providing funds for abortion became an illegal subject of bargaining as a result of the newly enacted law, and as such, it was not a violation of MERA for Milwaukee County to unilaterally change the scope of insurance coverage to remove the illegal subject of bargaining from the

collective bargaining agreement. In addition, the WERC found that the Savings Clause eliminated the original section pertaining to insurance coverage because "the Savings Clause of the parties' collective bargaining agreement makes clear that the parties intended the terms of the agreement cannot be applicable if they are inconsistent with the law." The Village contends that while it did not unilaterally make changes to the Association's insurance coverage in the middle of a collective bargaining agreement (like what happened in the Milwaukee County case), the same Savings Clause analysis applies to this case because the design and plan of the health insurance coverage is now an illegal subject of bargaining pursuant to Act 32.

Finally, the Employer addresses the two refusal to bargain claims. It notes that these two additional bases for the Association's prohibited practice complaint were raised for the first time in the Association's initial brief. It objects to their being raised for the first time in a brief. Here's why. It notes that the parties entered into a stipulation in this matter in order to avoid the need for a hearing and to streamline the issues for the examiner. In its initial brief though, the Association seeks to introduce new "evidence" that was not part of the Stipulation. According to the Employer, it is universally recognized that an arbitrator will not allow a party to introduce new evidence as part of its post-hearing brief. It cites Elkouri and two arbitration awards to support this premise, and also cites the portion of the Wisconsin Administrative Code that says that no party may submit additional evidence in a prohibited practice complaint after the record has closed. It emphasizes that in this case, the parties specifically agreed that the factual statements included in the Stipulation were the only background facts necessary for resolution of this matter. Also within the Stipulation, counsel for the Association unequivocally agreed to close the record for this case, prohibiting either party from presenting additional evidence for the examiner's consideration. In its initial brief though, the Association blatantly ignores the Stipulation and proffers a number of legal arguments based on factual allegations not in the record. According to the Employer, the Association "simply creates facts as necessary to support arguments that were never raised previously." The Employer then opines further:

> This cavalier disregard for the truth demonstrates the weakness of the Association's case. Rather than address the allegations in the complaint and the grievance, the Association prefers to bring new issues into the case. At best the Association has shown that it has only a passing familiarity with the truth. Because the underlying factual allegations are not before the Hearing Examiner, all legal arguments based on such facts must be summarily rejected by the Hearing Examiner.

Having given that overview, the Employer then addresses each of the two (new) proffered claims. First, the Employer disputes the Association's assertion that it "refused to bargain anything with the Association." The Employer acknowledges that the Association's brief contains some factual allegations, but it argues that what is missing are any citations to the record to establish those factual allegations. The Employer avers that the factual allegations made by the Association in its brief are not addressed in any of the twenty-three paragraphs of the Stipulation or any of the exhibits. Specifically, there is no mention of a "bargaining session", "bargaining

proposals" or "refusal to bargain" anywhere in the Stipulation. According to the Employer, this proves that the Association's claim is erroneous and unfounded. Aside from that, the Employer characterizes the assertion that it has refused to bargain "anything" with the Association as "blatantly false". It submits that "from the Village's perspective, there is no dispute that the parties must bargain the terms of the 2013-2014 contract."

Second, the Employer disputes the Association's assertion that it refused to bargain health care premiums for 2013-2014. Once again, the Employer argues that there is no evidence before the examiner regarding any refusal to bargain by the Village, much less a specific refusal to bargain with the Association over health care premiums for 2013-2014. It notes in this regard that the word "premium" is not contained anywhere in the Stipulation. According to the Employer, this proves that the Association's claim is erroneous and unfounded. The Village also points out that when it responded to the grievance, it specifically stated: "[g]iven the fact that the terms of health insurance are no longer bargainable, the Village is prepared to bargain over revisions to Article XV to bring it into compliance with current law." It also notes that Article XV of the 2011-2012 contract specifically addresses the health care insurance premium contributions. Putting the foregoing points together, the Employer asserts that it recognizes its duty to bargain over premiums, and when it responded to the grievance it offered to bargain over the specific provisions of Article XV not affected by Act 32 which specifically includes the health insurance premium. Thus, it's the Employer's position that the record evidence contradicts the Association's refusal to bargain claim. The Employer goes on to opine that "while the Association expends a significant portion of its Primary Brief addressing WERC decisions to establish that the language of Sec. 111.70(4)(mc)6 as amended by Act 32 still requires municipal employers to bargain over the health care insurance premiums, such precedent is completely irrelevant to this case."

In sum then, it's the Employer's position that the Association is not entitled to any relief on either its grievance or its prohibited practice complaint. It therefore asks that the Association's grievance be denied and dismissed and the prohibited practice complaint also be dismissed in its entirety.

Association's Reply Brief

Here's an overview of the Association's reply brief. The Association sees this case as essentially being about agreeing to something and then following through with that agreement. It emphasizes in that regard that the parties' collective bargaining agreement contains a provision (namely, Article XXVIII) which addresses the scope of "status quo" upon expiration of the Agreement, and prevents the parties from modifying any term or condition of the Agreement until a successor agreement is executed. The Association contends that the Village has not complied with that Article's mandate. It submits that the Village ignores that mandate and instead focuses on an erroneous and unsupportable interpretation of Act 32 "as a means of justifying its actions." According to the Association, the changes ushered in via Act 32 did nothing to modify obligations already agreed upon and placed in the collective bargaining

agreement. The Association also disputes the Village's assertion that it offered to bargain revisions to Article XV (Health Insurance), including "health insurance premium contributions." It further notes that while the Village stated in its brief that it "recognizes its duty to bargain over premiums", the Association contends that the Village unlawfully unilaterally implemented changes to Association members' health care coverage (including premiums), without bargaining over those changes. It elaborates as follows.

First, it's the Association's view that Article XXVIII should control the outcome of this case; not Act 32 or Sec. 111.70(4)(mc)6. Here's why. The Association notes that Article XXVIII requires maintenance of the "status quo" as to each and every term and condition until a successor agreement is executed. According to the Association, that provision – which both sides agreed to – expands the doctrine of "status quo" during a contract hiatus to encompass more than just mandatory items. Expanding on that point, the Association avers that the intent of Article XXVIII is that the parties are stuck with their expired agreement until they agree on a new one. The Association opines that this clear language "was meant to foster bargaining and prevent unilateral changes. It could not be a more simple concept to grasp and comply with." The Association argues that the Village's actions demonstrate a complete disregard for Article XXVIII and its mandate. That disregard constitutes not only a violation of the parties' agreement, but is also a prohibited practice under Section 111.70(3)(a).

Second, the Association argues that even if Act 32, via Sec. 111.70(4)(mc)6, impacted Article XXVIII's mandate (which according to the Association it does not), "there is a difference between when a statute becomes 'effective' and when it can be 'implemented'". According to the Association, the Village confuses the two concepts. It argues that just because Act 32 became "effective" upon the expiration of the parties' last agreement, that does not mean that changes can be "implemented" at that time. That's because the statute is *silent* regarding the ability of a municipality to "implement" changes to existing health care coverage plans. As the Association sees it, the statute's "effective" date does not equate to the "implementation" date. The Association maintains that that distinction is important here because Art. XXVIII requires maintenance of each and every term and condition until a successor agreement is executed. Thus, it's the Association's view that the Village is prohibited from "implementing" changes to existing health care coverage plans until a new agreement is executed. Said another way, the Village's "implementation" authority "must yield to the specific, agreed upon language found in Article XXVIII of the Agreement."

Third, the Association asserts that "emerging case law provides additional support for the Association's position." In support thereof, it cites the Brown County Circuit Court Case of Green Bay Professional Police Association, et al v. City of Green Bay, et al, Case No. 11-CV-2195. The Association avers that in that case, Judge Hammer ruled "in favor of the municipalities' interpretation of the statute (which mirrors the Village's "primary" interpretation in this case)." However, the judge subsequently ruled in favor of the labor associations "as to whether or not the municipalities were required to follow the language in their respective agreements which prevented the municipalities from 'implementing' changes to health care

coverage plans during a contract hiatus until a new successor agreement was reached amongst the parties." The Association summarizes Judge Hammer's decision thus: he ruled "that the municipalities could do whatever they wanted to do with respect to 'design and selection' of health care coverage, but they still could not implement those changes until a successor agreement was reached between the parties (regardless of whether the parties were currently in a contract hiatus)." The Association maintains that the scenario here is nearly identical to the situation in Green Bay, so the Village should still be prevented from "implementing" changes until a new Agreement is executed. It's the Association's view that given Judge Hammer's decisions in Green Bay, Article XXVIII must control.

As part of its argument on this point, the Association also argues that Article XXVIII has no bearing on the "powers" granted to the Village via Act 32. According to the Association, the Village is still free to unilaterally "design and select" health care coverage plans "until the cows come home." It submits that nothing in Article XXVIII infringes on that authority, or infringes on the prohibition of bargaining over same. It emphasizes that Article XXVIII does not require the Village to bargain over its "selection and design" changes, or their impact on the wages, hours and conditions of Association members. Instead, Article XXVIII "simply controls the date of implementation, an issue not addressed in Act 32."

Next, the Association contends that nothing in Act 32 bans health insurance articles from being included in labor agreements, or makes it "illegal" or "prohibited" for a collective bargaining agreement to contain language referencing health care or health care coverage plans. Instead, the language of Sec. 111.70(4)(mc)6 only prohibits bargaining over the design and selection of health care coverage plans, as well as bargaining over the impact of the same on wages, hours and conditions of employment. The Association avers that its stated prohibition is limited to "bargaining", and is silent with respect to whether a health insurance article can exist within a contract. The Association maintains that the Village "erroneously ignores this crystal clear distinction. That ignorance is fatal." The Association points out that the Village does not cite any legal authority (other than Act 32) to support its assertion that it is somehow "illegal" for health insurance provisions to exist in a labor agreement. The Association opines that "that failure is likely because there exists no law in Wisconsin to support such an assertion." The Association submits that the Court of Appeals decision in City of Janesville v. WERC, 193 Wis. 2d 492 (Ct. App. 1995), is instructive on this point. In that case, the court held that a contractual provision that "runs counter to an express statutory command is void and unenforceable." Id. Wis. 2d at 500. The Association submits that here, the "express statutory command" is plain in that public safety employees are now prohibited from "bargaining" the design and selection of health care coverage plans, as well as the impact of the same on wages, hours and conditions of employment. However, nothing in Sec. 111.70(4)(mc)6 expresses - let alone implies – that specific health care costs to be imposed on public safety employees may not continue to exist (or be placed) in a labor agreement. The Association further opines that "the flaw in the Village's logic stems from an apparent confusion over the difference between what a 'prohibited' subject of bargaining is and what is considered a 'void' or 'illegal' contractual provision." It cites the following illustration to prove that point. It submits that prior to the

Civil Rights Act of 1964, a labor agreement could have contained language that discriminated against women based on their gender. After passage of the Act though, that provision would have become "illegal" and "void" as it would be at odds with the express statutory command of the Act itself. Such an "illegal" or "void" provision would be unenforceable, and would arguably "evaporate" from the agreement. The Association contends the illustration just noted is a "far cry" from the issues before this examiner (namely, the issue of health care coverage, which was a mandatory subject of bargaining at the time the labor agreement was executed, but which is now a prohibited subject of bargaining, "yet is required to remain in place until a new agreement is executed based on the language of Article XXVIII which prohibits any changes to the 'status quo' prior to the execution of a new agreement"). Thus, it's the Association's view that Article XV's language was not voided by Act 32.

The Association now turns to its refusal to bargain claims. For the purpose of background, it notes that after the parties' collective bargaining agreement expired on December 31, 2012, the Village implemented their health insurance changes. According to the Association, the Employer implemented these changes unilaterally, and did not bargain with the Association over those changes. The Association notes that it responded by filing both a grievance and the instant prohibited practice complaint. The Association contends that if those undisputed facts "do not validate, verify and prove a refusal to bargain on their own", then the examiner can certainly find, based on the stipulated facts, that the Village's actions "imply" a refusal to bargain in violation of Sec. 111.70(3)(a).

Finally, the Association argues that the Savings Clause (Article XXVII) which the Village invokes, has no application to this case. According to the Association, there is nothing in the Agreement that is "inconsistent with the law." It avers that nothing in Act 32, including Sec. 111.70(4)(mc)6, makes it illegal or "inconsistent with the law" to mention health care or contain health care related articles in a labor agreement. Building on that, the Association opines that for that reason alone, the Savings Clause should be ignored.

In sum then, the Association asks that the examiner find that the Village violated Sec. 111.70(3)(a) by its actions here. It further asks the examiner to rule in the Association's favor on its contract grievance.

DISCUSSION

My discussion is structured as follows. First, I'll address some pertinent background. Second, I'll review some of the stipulated facts. Third, I'll address the Association's grievance and two of its prohibited practice claims. Specifically, I'll address the Association's Sec. 111.70(3)(a)5 violation of contract claim and their Sec. 111.70(3)(a)4 status quo claim. The discussion on those prohibited practice claims is subsumed into the discussion on the grievance. Finally, I'll address the Association's two Sec. 111.70(3)(a)4 refusal to bargain claims.

I. Some Pertinent Background

In 2010, the parties entered into a collective bargaining agreement for the period of January 1, 2011 through December 31, 2012. Among its provisions were Sections 5.01, 15.01, 15.05, 19.01, 27.01 and 28.01.

During the term of that contract, the Wisconsin Legislature drastically changed the scope of public sector collective bargaining by enacting 2011 Wisconsin Act 10 (hereinafter Act 10) and 2011 Wisconsin Act 32 (hereinafter Act 32). The changes in Act 32 focused on collective bargaining between municipal employers and public safety employees, such as Association members. One of the ways Act 32 modified collective bargaining for public safety employees was to specify that ". . .the design and selection of health care coverage plans by the municipal employer for public safety employees. . ." was a prohibited subject of bargaining. The section in question specifically provides that it is a prohibited subject of bargaining for public safety employees to bargain with respect to "the design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of the design and selection of the health care coverage plans on the wages, hours and conditions of employment of the public safety employee." Section 111.70(4)(mc)6, Stats. Act 32 became law on July 1, 2011. As it relates to this case, it applied to Association members when the 2011-2012 collective bargaining agreement "expires or is extended, modified, or renewed, whichever occurs first." [Section 9332(2r) of 2011 Wisconsin Act 32]. As already noted, the 2011-2012 bargaining agreement expired on December 31, 2012.

II. The Stipulated Facts

Knowing that Act 32 would apply to these employees effective January 1, 2013, the Village Board notified them in November, 2012 that it was going to implement changes to the design and selection of health care coverage starting January 1, 2013. Specifically, the Village provided a letter to all Association members on November 5, 2012, detailing the new health insurance plan and corresponding costs. The changes included a monthly decrease of premium costs, a deductible for single and family plans, as well as changes to which health care providers are "in-network" for the plan.

That same day, the Association filed a grievance with the Village alleging that the Village's plan to implement health insurance changes on January 1, 2013 violated the terms of the 2011-2012 contract, including Article XV, Section 15.05; Article XXVIII, Section 28.01; and Article V, Section 5.01. The grievance provided in pertinent part:

. . .

Date Grievance Filed: 11/05/12

Article or Section of Contract Violated: Article XV, Section 15.05; Article XXVIII, Section 28.01; and Article V, Section 5.01.

Statement of Grievance:

Re Article XV, Section 15.05

The Village plans on implementing (on 1/1/13) changes to the offered health insurance benefit levels that are not "equal to or greater than" the health insurance plan in existence during the 2007-2008 Agreement. The changes require additional monies from the Grievant (and all others similarly situated), and drop the benefit levels below the levels in existence during the parties' 2007-2008 agreement. *Please see attached documents for additional details.* The current Agreement provides that the Village may change health insurance carriers if it gives the Association at least sixty (60) days written notice *AND* "maintains coverage, benefit levels, and administration **equal to or greater than** the plans in existence during the 2007-2008 agreement." (Emphasis added). Thus, the Agreement requires the Employer to maintain, at the very least, the current benefit levels, even when switching health insurance carriers or modifying a health insurance plan design. The Village has not done so in this instance.

Re Article XXVIII, Section 28.01

The current Agreement between the parties terminates on December 31, 2012. If a new Agreement is not reached prior to that date, the "existing terms and conditions shall continue to apply until a new Agreement is executed." As such, the Village cannot unilaterally change existing benefit levels that exist under the current Agreement simply because the Village desires so and the Agreement will terminate on December 31, 2012.

Re Article V, Section 5.01

The Village has an absolute obligation to adhere to the parties' Agreement and to the law. It has violated both. With respect to violations of the law, the Village has violated Wis. Stats. §111.70 by interfering with the bargaining rights of the Grievant (and others similarly situated). With respect to the current Agreement, the Village, in addition to the violations enumerated above, has failed to adhere to and maintain the "status quo" during an anticipated contract hiatus between the parties.

Relief Sought:

Cease and desist from discriminating against the Grievant (and all others similarly situated). Maintain at least "status quo" on current health insurance benefit levels, unless and until the parties bargain over any proposed changes to health insurance benefit levels. Make the Grievant (and all others similarly situated) "whole."

. . .

On November 15, 2012, the Association filed the instant prohibited practice complaint. The complaint raised the same issues as were raised in the grievance, and contended that the Employer's actions violated Sec. 111.70(3)(a)3, and derivatively Sec. 111.70(3)(a)1 of MERA.

On November 19, 2012, Police Chief Anna Ruzinski denied the grievance. The denial provided, in pertinent part:

I am responding to the grievance you filed on November 5, 2012 at step 2 of the grievance procedure. The grievance filed by you and on behalf of all similarly situated Association members addresses the change in health insurance the Village intends to implement effective January 1, 2013. The grievance alleges violations of Sections 15.05, 28.01 and 5.01 of the 2011-2012 Collective Bargaining Agreement. The grievance is denied for the following reasons:

1. The grievance is premature since health insurance currently provided by the Village has not changed and will not change until the current collective bargaining agreement expires at the end of the year. Therefore, there is no current violation of the agreement and no officer has been affected.

2. Under current law, the Village is prohibited from bargaining with the Association over the design and selection of health insurance as well as the impact of the design and selection of the health insurance coverage on wages, hours and conditions of employment. Effectively, health insurance is now an illegal subject of bargaining. Therefore, any future change in health insurance, occurring after the current agreement has expired, is not subject to the grievance procedure.

3. Under Section 27.01, if any article or section of this agreement is invalid by operation of law, the parties are obligated to bargain over a replacement provision. Given the fact that the terms of health insurance are no longer bargainable, the Village is

prepared to bargain over revisions to Article XV to bring it into

compliance with current law.

. . .

Because of the overlap between the grievance and the prohibited practice claims, the parties agreed to combine them into one action. In lieu of a hearing before the examiner, the parties jointly submitted a Stipulation that provided all the facts necessary for resolution of the grievance and prohibited practice. Their stipulation consisted of 23 factual paragraphs. Those 23 factual paragraphs have been denominated herein as Findings 1 through 23. The last factual stipulation, denominated as Finding 23, provides thus:

> The parties agree that the Hearing Examiner can resolve both the pending prohibited practice charge and the grievance filed by the Association referenced in paragraph 14 (sic) above. The parties also agree that there are no other facts in dispute and the parties agree that no evidentiary hearing is needed in this case. Therefore, the parties request that the record be closed.

III. The Grievance, the Breach of Contract Prohibited Practice Claim and the Status Quo Prohibited Practice Claim

The three items referenced in the caption above were combined because they overlap with one another. Since I view them as interrelated, I've decided to address them together.

As noted in the stipulated facts, after the Employer notified bargaining unit employees that it was going to implement changes to its health insurance plan effective January 1, 2013, the Association filed both a grievance and the instant prohibited practice complaint challenging the Employer's action. While the complaint alleged violations of Sec. 111.70(3)(a)3, and derivatively Sec. 111.70(3)(a)1, the Association didn't mention Sec. 111.70(3)(a)3 anywhere in their briefs. Instead, it claimed that the Employer's actions violated Secs. 111.70(3)(a)4 and 5. Section 111.70(3)(a)5 makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Section 111.70(3)(a)4 makes it a prohibited practice for a municipal employer "to refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit." As part of its obligation to bargain collectively under that section, a municipal employer is legally obligated to maintain the status quo during a hiatus period after the expiration of an agreement with respect to mandatory subjects of bargaining (i.e. wages, hours and conditions of employment). A change in the status quo in those areas during a hiatus period constitutes a refusal to bargain and thus a violation of the section just referenced.

I begin with the following comments about my jurisdiction to address those claims. While neither side challenged my authority to address those two prohibited practice claims, as

well as my jurisdiction to address the merits of the grievance, I've nonetheless decided to address those points. Here's why. When a contractual grievance arbitration provision exists – as is the

case here – it is presumed to be the exclusive mechanism for resolving grievances and violation of contract claims. See, for example, Madison Metropolitan School District, Dec. No. 32065-A (Jones, 11/2007); aff'd. by operation of law (WERC, 2/2008). Thus, WERC examiners don't normally adjudicate the merits of Sec. 111.70(3)(a)5 breach of contract claims and/or the underlying grievance where the parties' collective bargaining agreement provides for final and binding arbitration of such disputes and such procedure has not been exhausted. The Commission's rationale for not asserting its jurisdiction in such circumstances is to give full effect to the parties' agreed-upon procedures for resolving disputes under their contract. As already noted, in this case the parties' collective bargaining agreement contains an arbitration provision. The stipulated facts don't address whether the contractual grievance mechanism has been exhausted, or whether the Employer has refused to arbitrate the Association's grievance. Nonetheless, in Finding 23, the parties specifically asked me to "resolve both the pending prohibited practice charge and the grievance filed by the Association." Additionally, it is further noted that the parties fully litigated the merits of the grievance, the breach of contract claim and the status quo claim as part of their overall case, and neither party ever asserted that the examiner should defer it, or any portion thereof, to arbitration. In School District of Hudson, Dec. No. 33220-B (Davis, 9/2011), aff'd. by operation of law (WERC, 10/2011), Examiner Davis faced a similar circumstance where a contractual arbitration provision existed – which had not been exhausted – and the complainant raised a Section 111.70(3)(a)5 claim. He opined that under these circumstances, "it can well be argued that assertion of Sec. 111.70(3)(a)5 jurisdiction is not appropriate. However, in the interests of bringing closure to all aspects of this dispute, I have nonetheless done so." Footnote 3, page 6. Based on the rationale noted above, I've decided to follow Davis' lead. Thus, I'm going to address the merits of the grievance, the breach of contract prohibited practice claim and the status quo prohibited practice claim. All of the aforementioned are subsumed into the discussion which follows.

. . .

To help frame my discussion, I'm going to review what happened here and the parties' responses to same. After the parties' 2011-2012 collective bargaining agreement expired, the Employer made various unilateral changes to the health insurance plan that existed in the parties' 2011-2012 collective bargaining agreement. The Association argues that by making those changes, the Employer violated both the parties' collective bargaining agreement and MERA. With regard to the former (i.e. the collective bargaining agreement), the Association asks the examiner to apply the language in Articles XXVIII and XV to the facts and find that the Employer violated those provisions by making the changes that it did. With regard to the latter (i.e. MERA), the Association contends that the Employer was obligated to maintain the status quo with regard to the duration and health insurance contract provisions just noted after the 2011-2012 contract expired until a successor agreement was reached. The Association contends that since the Employer didn't do that (i.e. maintain the status quo until a successor agreement was reached), it violated both Secs. 111.70(3)(a)4 and 5. The Employer disagrees. In its view, it did

not violate either the 2011-2012 collective bargaining agreement or commit prohibited practices when it modified the health care coverage after the 2011-2012 collective bargaining agreement

expired on December 31, 2012. According to the Employer, it was obligated to follow, and did follow, Act 32. The Association disputes that contention and maintains that the provisions of Act 32 do not relate, in any manner, to the grievance and prohibited practice complaint before the examiner.

Next, I'm going to put some of the matters just referenced into a historical perspective. Prior to 2011, Wisconsin's public sector case law dealing with unilateral changes made during a contract hiatus period was, for the most part, well settled. Specifically, case law had established that when a collective bargaining agreement expired, the employer was required to maintain the status quo concerning mandatory subjects of bargaining (i.e. wages, hours and conditions of employment) during the contract hiatus, and could not make unilateral changes to the aforementioned without bargaining over same. If it did, it committed a prohibited practice. See, for example, City of Brookfield, Dec. No. 19822-C (WERC, 11/1984); Green County, Dec. No. 20308-B (WERC, 11/1984); and School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/1985).

As previously noted, during the term of the parties last collective bargaining agreement, Act 32 became law. One of the ways Act 32 modified collective bargaining for public safety employees was to specify that ". . .the design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of the design and selection of the health care coverage plans on the wages, hours and conditions of employment of the public safety employee" was a prohibited subject of bargaining. Prior to the enactment of Act 32, the foregoing topics had been mandatory subjects of bargaining. See, for example, City of Jefferson, Dec. No. 15482-A (Davis, 8/77), aff'd. by operation of law, Dec. No. 15482-B (WERC, 9/77). Act 32 changed that for public safety employees. This change in the law allows municipal employers to determine the health care plan and design for their public safety employees.

The Association acknowledges that Act 32 allows the Village to unilaterally make changes to the health insurance plan and design for a successor contract, but the Association contends that the provisions of Act 32 do not relate, in any manner, to this grievance and prohibited practice complaint. As the Association sees it, that's because the contract language controls and requires the Employer to maintain every single provision in the 2011-2012 collective bargaining agreement, including those provisions that are now illegal subjects of bargaining until the parties execute a successor agreement. As noted above, the Employer disagrees, and contends that Act 32 controls. Given the foregoing, the first question to be answered is which one controls the outcome of this case: does the contract language control or does Act 32 control?

Based on the following rationale, I find that Act 32 controls and applies to the parties in this case. While the Association insists that Act 32 has no role in determining whether the Village is required to continue to provide the same health insurance benefits it provided under the expired contract, the examiner cannot ignore Act 32 in evaluating this case. That's because

Act 32 specifies that any action the Village takes to bargain over the health care plan or design is an illegal subject of bargaining. Although the question of what Sec. 111.70(4)(mc)6 (from Act 32)

means is being litigated in the courts, the most recent – and highest-ranking decision to date – is that of the District 1 Court of Appeals in Milwaukee Police Assoc. Local 21 v. City of Milwaukee, 2013 WI App. _, paragraphs 8-10, 2013 WL 1579815 (Slip. Copy April 16, 2013). In that decision, the court concluded that deductibles, co-pays and prescription costs are prohibited subjects of bargaining within the meaning of Sec. 111.70(4)(mc)6.

The Association's argument that Act 32 does not relate to either the grievance or the prohibited practice complaint is based on the premise that the parties are not currently engaged in bargaining over health insurance issues. As the Association sees it, Act 32 does not affect the parties until the parties sit down to bargain specific health care issues that are prohibited by the statute. I find that assumption to be flawed because it ignores the statutory definition of "collective bargaining" under Sec. 111.70(1)(a). While sitting down to bargain a successor collective bargaining agreement is certainly one common view of collective bargaining, the Wisconsin statute which defines collective bargaining has a more expansive view than that. Specifically, Sec. 111.70(1)(a) includes the grievance process within the definition of collective bargaining. Subsumed into that is grievance resolution (i.e. resolving questions which have arisen under a grievance procedure). Thus, while the Association believes "bargaining" can only occur during negotiations for a new/successor collective bargaining agreement, the section just noted includes a grievance resolution process within the definition of bargaining. As previously noted, both the Association's grievance and the prohibited practice complaint specifically request that the examiner determine whether Article XXVIII in the 2011-2012 collective bargaining agreement requires the Village to maintain (the old) health care coverage past December 31, 2012. That being so, the Association is indeed attempting to engage in "bargaining" with the Village over the health care plan and design by pursuing this grievance. The problem with that, of course, is that Act 32 makes it impossible for the parties to negotiate over whether to maintain/continue the old health care coverage from the 2011-2012 contract past its expiration. That's because such bargaining is prohibited under Act 32.

The second question to be answered is when could the Employer implement its health care plan and design changes. Was it January 1, 2013 (as the Employer contends), or was it when a successor collective bargaining agreement is executed (as the Association contends)? Consistent with the above-stated rationale, I find that the Employer could implement those insurance changes after the 2011-2012 agreement expired. That occurred on December 31, 2012. At that point, the design and selection of the health care coverage plan became a prohibited subject of bargaining for the Employer and the Association. Thus, the Employer could implement its health care plan and design changes for its public safety employees on January 1, 2013.

Next, I find that the contractual Savings Clause contained in the 2011-2012 collective bargaining agreement (Sec. 27.01) provides another basis for the Association's grievance and Secs. 111.70(3)(a)4 and 5 claims to be dismissed. The following discussion shows why. That

clause says that any provision in the contract that is inconsistent with the law cannot be applicable to the parties. By including a savings clause in their collective bargaining agreement, the parties made it clear that they intended that the terms of the agreement cannot be applicable if they are

inconsistent with the law. The situation that exists here is similar to what occurred in Milwaukee County, Dec. No. 16713-B (Crowley, 11/81); aff'd., Dec. No. 16713-D (WERC, 4/82). In that case, the examiner addressed the impact of a newly-enacted law which made a section of the parties' collective bargaining agreement an illegal subject of bargaining. Here are the pertinent facts of that case. The parties' collective bargaining agreement provided for hospital insurance coverage for, among other things, services rendered in connection with abortions. During the term of the parties' collective bargaining agreement, a new law was enacted by the state legislature. This new law prohibited counties from authorizing funds for the payment of non-therapeutic abortions. As already noted, the County's then-current insurance coverage allowed funds for elective abortions, so pursuant to the new law the County withdrew coverage for same for the remainder of the contract term. The Union then filed a prohibited practice complaint against the County alleging, among other things, that the County made an unlawful unilateral change to the Union's insurance coverage. The examiner found that the existing insurance coverage providing funds for abortion became an illegal subject of bargaining as a result of the newly enacted law, and as such, it was not a violation of MERA for Milwaukee County to unilaterally change the scope of insurance coverage to remove the illegal subject of bargaining from the collective bargaining agreement. The examiner further found that the contractual Savings Clause eliminated the original section pertaining to insurance coverage because "the Savings Clause of the parties' collective bargaining agreement makes clear that the parties intended the terms of the agreement cannot be applicable if they are inconsistent with the law." On appeal, the Commission affirmed the examiner's findings. I find that the savings clause analysis from Milwaukee County applies to this case. Here's why. Since the design and selection of health care coverage plans is no longer a subject that a municipality may bargain with unions representing public safety employees pursuant to Act 32, it logically follows that the contractual Savings Clause applies when reviewing the Association's dispute under the 2011-2012 contract. As a result, the provisions of the old contract which the Association alleges require the Village to maintain health insurance coverage past the expiration of the contract are inapplicable to the parties because of Act 32. Said another way, the Savings Clause prohibits the application of Article XXVIII to Article XV because this would be inconsistent with Act 32.

Based on the above, I find that Act 32 allows the Village to make unilateral changes to the health care plan and design effective upon the expiration of the old agreement, notwithstanding the language contained in Article XXVIII of the expired agreement. Consequently, the Employer did not violate either the 2011-2012 contract, or Secs. 111.70(3)(a)4 or 5 of MERA when it followed Act 32 and implemented its health care plan and design changes on January 1, 2013 after the parties' 2011-2012 collective bargaining agreement expired on December 31, 2012.

IV. The Two Refusal to Bargain Claims

In its initial brief, the Association raised these two refusal to bargain claims: 1) that the

Village has refused to bargain "anything" with the Association; and 2) that the Village has refused to bargain health care premiums for 2013-2014.

I begin my discussion concerning these claims with the following preliminary comments. First, the two refusal to bargain claims just noted were not raised in either the grievance or the original prohibited practice complaint. Instead, they were raised for the first time in the Association's initial brief. Second, the parties entered into a stipulation concerning the facts that would be submitted to the examiner for a decision herein. Specifically, they agreed that the 23 factual paragraphs in the Stipulation were the only background facts which the examiner would consider in deciding this matter. Also, within the Stipulation, both sides unequivocally agreed to close the record in this case. That action precluded either party from presenting additional evidence for the examiner's consideration. In its initial brief though, the Association proffered a number of legal arguments based on factual allegations which are not in the stipulated record. In other words, the Association cites "new" facts to support its "new" refusal to bargain claims. That's problematic, because "new" evidence and "new" claims are not supposed to be introduced as part of a post-hearing brief. That statement applies to both arbitration and prohibited practice complaint forums.

Notwithstanding the foregoing comments, I'm nonetheless going to address the two refusal to bargain claims.

First, the Association asserts that it is entitled to relief because the Village "refus[ed] to bargain any portion of the labor agreement." The Association goes on to assert that the Village refused to bargain "anything" with the Association. In order to establish such a prohibited practice, the Association must establish the underlying facts surrounding the parties' bargaining for the 2013-2014 contract. Implicitly recognizing that requirement, the Association's initial brief references the following "facts":

> In fact, when the parties met during their one and only "bargaining" session, the Village declined to provide the Association with any proposal with respect to a new agreement. The Village did however, promise that it would be making changes to health care coverage and that it would not bargain over "anything" until after this litigation was adjudicated. The Village has remained true to its word. It continues its unlawful refusal to bargain what both parties agree are mandatory subjects of bargaining.

What is missing from the Association's factual allegations to the examiner, however, are any citations to the record to establish those factual allegations. That's not surprising, because the factual allegations made by the Association in its initial brief are not addressed or supported in any of the 23 paragraphs of the Stipulation or any of the exhibits. Specifically, there is

absolutely no mention of a "bargaining session" or "bargaining proposals" anywhere in the Stipulation. That being so, the Association's claim has not been substantiated.

In its reply brief, the Association asks the examiner to "imply" a refusal to bargain from the stipulated facts. I decline to do that. Proof of a violation is needed, and is lacking here. The Association can, of course, file another prohibited practice charge if it desires regarding the Village's alleged refusal to bargain over the 2013-2014 contract. However, there is no compelling reason to shoehorn the Association's unsubstantiated allegations into this case. Since the Association did not establish any of the underlying factual allegations necessary for a prohibited practice under Sec. 111.70(3)(a)4 for refusing to bargain any portion of the 2013-2014 labor agreement, this claim is dismissed.

Second, the Association asserts that it is entitled to relief because the Village "refus[ed] to bargain health care premiums" for 2013-2014. As was noted above, in order to establish that the Employer committed a refusal to bargain under Sec. 111.70(3)(a)4, proof of a violation is needed. Once again, it is lacking here. A review of the 23 factual paragraphs in the Stipulation shows that the word "premium" is not contained anywhere in the Stipulation.

Aside from that, it is noteworthy that the Village's response to the grievance (which is quoted verbatim in Part II of my discussion) specifically states in item number 3: "[g]iven the fact that the terms of health insurance are no longer bargainable, the Village is prepared to bargain over revisions to Article XV to bring it into compliance with current law." Section 15.01 in Article XV of the 2011-2012 contract specifically addresses the health insurance premium contributions. It's apparent from the foregoing that the Employer recognized its duty to bargain over premiums, and when it responded to the grievance on November 19, 2012, it offered to bargain over the specific provisions of Article XV not affected by Act 32 which specifically includes the health insurance premium. This record evidence contradicts the Association's claim that the Village refused to bargain with the Association over health care premiums for 2013-2014.

In its initial brief, the Association calls the examiner's attention to a number of decisions which collectively stand for the proposition that Sec. 111.70(4)(mc)6 still requires municipal employers to bargain over the health insurance premiums. Here, though, the facts before the examiner establish the Village's willingness to bargain over the specific provisions of Article XV not affected by Act 32 which includes health insurance premiums. As such, the Village recognizes its duty to bargain over premiums. I therefore find that the Association's claim that the Village has refused to bargain over health care premiums for 2013-2014 has not been proven.

In its reply brief, the Association asks the examiner to "imply" a refusal to bargain (over health care premiums) from the stipulated facts. Once again, I decline to do that. Proof of a violation is needed, and is lacking here.

. . .

Finally, as was noted in Part III, in the complaint the Association also alleged violations of Sec. 111.70(3)(a)3, and derivatively Sec. 111.70(3)(a)1. The examiner deems the claimed violation of Sec. 111.70(3)(a)3 to have been abandoned, because it was not mentioned in either of the Association's briefs. Assuming for the sake of discussion that it was not abandoned, it was not

proven. That same conclusion also applies to the claimed derivative violation of Sec. 111.70(3)(a)1. It was not proven either. Accordingly, no violations of Secs. 111.70(3)(a)3 and 1 were established.

. . .

In sum then, I have found that the Association is not entitled to relief on either its grievance or its prohibited practice complaint. Accordingly, the Association's grievance is denied, and the prohibited practice complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 22nd day of May, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

REJ/gjc
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