STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS M. SCHMIDT, Complainant, vs. CITY OF MILWAUKEE, and HAROLD A. BREIER, Chief of Police, City of Milwaukee, Respondents.	Case CLIV No. 19032 MP-453 Decision No. 13558-A

ORDER DENYING MOTION FOR LEAVE TO FILE AMENDED ANSWER AND TO REOPEN HEARING

The above named Complainant having, on April 9, 1975, filed a complaint with the Wisconsin Employment Relations Commission wherein he alleged that the above named Respondents had committed prohibited practices within the meaning of the Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and the Respondents having, on May 2, 1975, made answer to said complaint and the matter having been heard at Milwaukee, Wisconsin, on May 12, 1975, before the Examiner; and the Respondents having, on June 13, 1975, filed a motion for leave to file an amended answer alleging an affirmative defense not previously asserted in the proceeding, and to reopen the hearing in the matter to introduce evidence in support of such affirmative defense; and the Complainant having objected to the granting of said motion; and the Examiner having considered said motion, the affidavit in support thereof, and the opposition thereto, and being fully advised in the premises;

NOW, THEREFORE, it is

ORDERED

1. That the motion of the City of Milwaukee and Harold A. Breier for leave to file an amended answer in the above entitled matter be, and the same hereby is, denied.

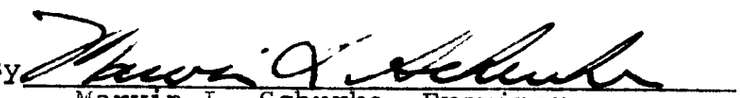
2. That the motion of the City of Milwaukee and Harold A. Breier to reopen the hearing in the above entitled matter be, and the same hereby is, denied.

3. That the arrangements made at the close of the hearing for the filing of briefs in the above entitled matter be, and the same hereby are, revised as follows: The initial briefs of both parties shall be filed with the Examiner in the Madison office of the Commission, post-marked on or before August 20, 1975, and shall, at the same time, be served on counsel for the opposite party. Any reply brief shall be

filed with the Examiner in the Madison office of the Commission, postmarked on or before September 2, 1975, and shall, at the same time, be served on Counsel for the opposite party.

Dated at Madison, Wisconsin this 8th day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Marvin L. Schurke, Examiner

CITY OF MILWAUKEE, (POLICE DEPARTMENT), CLIV, Decision No. 13558-A

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION FOR LEAVE TO FILE AMENDED ANSWER AND TO REOPEN HEARING

The complaint filed on April 9, 1975 to initiate the instant proceeding alleges that the Complainant was required to appear before a "Trial Board" established within the Milwaukee Police Department, to answer certain charges against him; that he asserted a desire to be represented in such proceedings by a representative of the labor organization which is recognized as the exclusive collective bargaining representative of police officers employed by the City of Milwaukee, including the Complainant; that the Complainant's request for union representation was denied; that the inquiry proceeded; and that a disciplinary suspension of the Complainant resulted therefrom. The Complainant alleges that the suspension order was invalid, being "tainted" by the claimed illegal refusal to permit the Complainant representation by the labor organization of his choice during the Trial Board hearing. The answer filed by the City on May 2, 1975 appears to take issue with the exact nature of the charges which were being made against the Complainant in the proceedings before the Trial Board, but substantially admits to the allegations of the complaint concerning the Complainant's request for Union representation and the denial of that request. The City however, denies any violation of the Municipal Employment Relations Act, alleging that the suspension was made by the Chief of Police under his statutory authority pursuant to Chapter 586 of the Laws of Wisconsin of 1911. No reference is made in the complaint or answer to the collective bargaining agreement between the City and the Complainant's Union, and no reference was made to that agreement, nor was it placed in evidence, during the hearing held in this matter on May 12, 1975. That hearing lasted less than two hours and the transcript of the proceedings is less than 22 pages in length. After the examination of one witness, Counsel for the City indicated that he had no further witnesses and that his only further request was that the Examiner take notice of the provisions of Chapter 586 of the Laws of 1911, as amended. That request was granted and the hearing was closed, with arrangements specified for the filing of briefs on or before June 13, 1975 and the filing of reply briefs on or before June 23, 1975.

On June 13, 1975 the Respondents filed with the Examiner a motion and an affidavit in support thereof, wherein the Respondent requests the Examiner to act pursuant to Section ERB 12.03(5) Wis. Adm. Code, to grant the Respondent leave to amend its answer and further requests the Examiner to act pursuant to Section ERB 10.19 to reopen the hearing in the matter to permit the Respondents to introduce evidence in support of the affirmative defense set forth in the proposed amended answer. The nature of the proposed amendment to the answer is that there was a collective bargaining agreement in effect between the City and the labor organization named in the complaint, wherein the labor organization is claimed to have waived any claim of right to assist the Complainant in proceedings of the type involved in the allegations of the complaint. The Complainant has opposed the motion as being untimely and immaterial to the issues raised by the complaint.

While the sections of the Commission's rules which are relied upon by the Respondents appear to be broad enough to give the Examiner discretion to grant the motion of the Respondent here, the Commission, by decision, has given the Examiner further guidance as to how and to what extent that discretion should be exercised. The standards for determination of motions to reopen hearings under Section 111.07, Wisconsin Statutes, are, in fact, well established in previous decisions

of the Commission. 1/ As stated in the Examiner decision in Gehl, in order for a hearing in an adversary proceeding before the Commission to be reopened, the moving party must show:

> "(a) That the evidence is newly discovered after the hearing, (b) that there was no negligence in seeking to discover such evidence, (c) that the newly discovered evidence is material to that issue, (d) that the newly discovered evidence is not cumulative, (e) that it is reasonably possible that the newly discovered evidence will affect the disposition of the proceeding and (f) that the newly discovered evidence is not being introduced solely for the purpose of impeaching witnesses."

Also, as stated by the Examiner in Gehl, such motions to reopen are not granted lightly. After consideration of the Respondent's motion and supporting affidavit, it is apparent to the Examiner that the Respondents have not met the test set forth above. At a minimum, it is difficult to imagine a set of circumstances in which a collective bargaining agreement which the Respondents entered into on March 25, 1974 could be described by the Respondents as being newly discovered after May 12, 1975. It is apparent from the motion and suporting affidavit that it is not the existence of the potential evidence, but rather its potential relevance, which has been newly discovered following the close of the hearing.

Dated at Madison, Wisconsin this 8th day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

1/ Gehl Company (9474-C) 5/71, affirming Examiner decision (9474-B) 12/70, Archdiocese of Milwaukee (6695) 4/64, citing Erickson v. Clifton 265 Wis. 236 (1953), and Gilson Bros.(1831-B) 11/48, affirmed: Ozaukee Co. Cir. Ct., 2/49, affirmed. 255 Wis. 316 (1949).