

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TOM H. RHODES, JR., :
 :
Complainant, :
 :
vs. : Case CLXII
 : No. 20205 MP-583
 : Decision No. 14394-A
CITY OF MILWAUKEE (POLICE DEPARTMENT), :
 :
Respondent. :
 :

Appearances:

Mr. Jerome J. Dudzik, Secretary-Treasurer, Professional Policemen's Protective Association, appearing on behalf of the Complainant.
Mr. John F. Kitzke, Assistant City Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Tom H. Rhodes, Jr., hereinafter Complainant or Rhodes, having filed a complaint of prohibited practices on February 24, 1976 with the Wisconsin Employment Relations Commission, alleging that the City of Milwaukee (Police Department) committed a prohibited practice; and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Section 111.70(4)(a) of MERA; and hearing on said complaint having been held at Milwaukee, Wisconsin on March 30, 1976; and the parties having submitted briefs by September 1, 1976; and the Examiner being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Tom H. Rhodes, Jr., is an individual who resides in Milwaukee, Wisconsin; he was appointed to the City of Milwaukee (Police Department) on October 13, 1975, and that he was required to serve a one-year probationary period prior to becoming a "regular" patrolman with said department; and he remained employed in said department of the City of Milwaukee through January 12, 1976. ^{1/}
2. That the named Milwaukee Police Department, or the City of Milwaukee (Police Department) or the City of Milwaukee Police Department, hereinafter Respondent, operates a municipal police department in the City of Milwaukee with offices located in the City of Milwaukee, Wisconsin.
3. That the Professional Policemen's Protective Association, hereinafter PPPA, is the certified exclusive collective bargaining representative of all patrolmen, including probationary patrolmen employed by Respondent.

^{1/} Unless indicated otherwise, references to October, November and December are to those months in 1975 and references to January are to that month in 1976.

4. That from October 13 through January 12 Complainant was a recruit in the Police Academy of the City of Milwaukee where he received training for the position of patrolman; that the progress of all recruits in Complainant's class was noted and reviewed with each recruit on the 4th, 8th and 12th weeks of the training program; that evaluations were made by two of the recruit's instructors on a four-page form containing 12 indicia of a recruit's performance; a recruit's scores on various written tests and his grades in his shooting ability were also noted on the evaluation form. That a composite of the evaluations received by Complainant in the three evaluation periods appears in the following chart: 2/

	1st-Nov. 6, '75	2nd-Dec. 5, '75	3rd-Jan. 2, '77
I. Ability to Make Reports	Often incomplete. Lacks ability to make clear understandable reports. Much room for improvement.	Often incomplete. Lacks ability to make clear understandable reports. Much room for improvement.	Often incomplete. Lacks ability to make clear understandable reports. Much room for improvement.
II. Ability to Understand Instructions	Somewhat slow to understand and perform assignments.	Has great difficulty in understanding and is lax in performance.	Has great difficulty in understanding and is lax in performance.
III. Aggressiveness and initiative	Usually takes initiative in class work.	Usually takes initiative in class work.	Usually takes initiative in class work.
IV. Appearance	Makes a presentable appearance most of the time.	Makes a presentable appearance most of the time.	Makes a presentable appearance most of the time.
V. Attention to Studies	Usually prepared for all class work.	Lacks initiative and usually not prepared for class work.	Lacks initiative and usually not prepared for class work.
VI. Attitude	Demonstrates effort in acquiring police skills.	Indifferent in attitude toward police work.	Displays no apparent effort in acquiring police skills.
VII. Conduct	Department acceptable, occasionally needs correction.	Careless about deportment.	Careless about deportment.
VIII. Judgment	Might often use better judgment.	Might often use better judgment.	Uses poor Judgment.
IX. Physical	Usually well,	Poor physical	Usually well,

	1st-Nov. 6, '75	2nd-Dec. 5, '75	3rd-Jan. 2, '76
XI. Reliability	Not generally reliable or dependable.	Never reliable or dependable.	Never reliable or dependable.
XII. Temperament	Has good control but occasionally shows irritability or excitement.	Usually well controlled, seldom becomes excited.	Has good control but occasionally shows irritability or excitement.

Written Test Scores

1st evaluation - Rules and Regulations - 92

2nd evaluation - Criminal law - 82
Principles of Arrest - 75.5
Rules of evidence - 74

3rd evaluation - City ordinances - 82.75
Criminal law - 82
First Aid - 80.19
Principles of Arrest - 75.5
Rules of evidence - 74
Rules and Regulations - 92

Firearms Scores 3/

2nd evaluation - 29

3rd evaluation - 54.3

Written Comments by Instructors

1st evaluation - "The officer must be constantly supervised to insure that he complete requirements which are placed upon the class. He attributes this failure to do so to human error and forgetfulness. He does not appear to have a great sense of responsibility."

2nd evaluation - "Although this recruit continually expresses a desire to improve verbally, he has not shown this by performance. He does not follow instructions and his work is incomplete. He lacks physical endurance. He lacks firearms proficiency. He must be continually supervised to exact a minimum performance in all areas of training. Therefore, I feel the recruit should not be continued as a police officer."

Captain Gersonde noted the following remarks on Complainant's second evaluation:

"12/9/75 12:45 p.m. I discussed this report with Ptlmn Rhodes in my office. I informed him that he has so far failed to demonstrate his suitability for police work. I informed him that he must make every effort to improve his performance if he expects to be retained on the Milwaukee Police Dept."

3/ The scores appearing on the second and third evaluations do not agree with those related in the evaluation report of the firearms instructor Sgt. Dupies. However, it appears from both the evaluations noted above and Dupies' report that the Complainant failed to achieve a passing score in firearms.

3rd evaluation - "Recruit still cannot function on his own. Needs constant supervision. Does not understand instructions. Does not accept constructive criticism. Academic and physical accomplishments [sic] are unsatisfactory. He has failed to qualify in firearms training, in spite of special instructions. Unsuitable for police work."

5. That Complainant did not ask to have a representative present nor did he bring a representative to the three evaluation meetings between himself and his instructors; that the following conversations between Complainant and instructors and supervisors at the Police Academy took place at or proximate to Complainant's second and third evaluations: (a) during the second evaluation meeting which transpired on or about December 5, Sgt. Sutter, one of Complainant's instructors, asked Complainant if he wished to resign from Respondent; at that time, he also advised Complainant that a resignation would not hinder his ability to seek further employment as a dismissal from Respondent might; Complainant stated that he had no desire to resign from Respondent; that on December 9, Captain Gersonde met with Complainant concerning his second evaluation, at which time Gersonde informed Complainant that his performance would have to improve; and that Complainant did not ask to have a representative present nor did he bring a representative to this meeting with Gersonde; (b) after receiving his third evaluation on or about January 2 or 4, Complainant was told by his instructor that he would meet on January 8 with Deputy Inspector Ziolkowski, the Director of the Police Academy; Ziolkowski presented Complainant with a copy of charges which stated among other things that Complainant was "unfit for the performance of police duties"; and Ziolkowski told Complainant on January 8 to appear before a Board of Inquiry on January 12; that Complainant did not ask to have a representative present nor did he bring a representative to the January 8 meeting with Ziolkowski; furthermore, once Complainant was presented with a copy of the charges against him and told of the Board of Inquiry hearing, he did not ask Ziolkowski about his right to have a representative present at the Board of Inquiry hearing.

6. That on January 12, 1976, a hearing of the Board of Inquiry of the Police Department of the City of Milwaukee, hereinafter the Board, was convened to hear the charges alluded to in paragraph 5 above. The Board of Inquiry was chaired by Inspector of Police Jagmin; other members of the Board consisted of two patrolmen and two captains; and further, that Inspector Jagmin is responsible for determining whether charges filed by his subordinates should be presented to a Board of Inquiry; and it was his decision to convene a Board of Inquiry hearing on the charges initiated against Complainant by Deputy Inspector Ziolkowski.

7. That on January 12 just prior to and at the commencement of the Board hearing, Complainant requested to have a Union representative present at the hearing; that Bill Ward, a member of the staff of the PPPA was brought to the Board hearing by Complainant and Ward was permitted to be present in the Board hearing room while the hearing was in progress; that the Board hearing is normally conducted in the following manner and Complainant's hearing on January 12 was so conducted:

The officer charged is permitted to have a representative present in the hearing room, but the representative may not participate in the hearing. Witnesses with testimony in support of the charges filed with the Board appear and testify. The witness is first questioned by Jagmin; then the witness may be questioned by the other panel members; then the officer charged may question the witness; at the hearing on January 12 Complainant was permitted to ask questions of the witnesses, Ward was not; that the officer charged may not call witnesses in his own behalf; that a transcript is made of the hearing which is made available to the Chief of Police but it is not made available to the officer charged;

That Ward was permitted to confer with Complainant and Complainant was permitted to confer with Ward; however, Ward was not permitted to address the Board or ask any questions of any of the witnesses appearing before the Board; these ground rules were relayed to Complainant and Ward immediately prior to the commencement of the hearing on January 12 and were followed during the course of said hearing; but that these ground rules are not incorporated in any written rules of Respondent's Chief of Police or of Respondent's Board of Fire and Police Commissioners; that on one occasion during the January 12 hearing, Ward addressed the Board of Inquiry directly and he was ruled out of order by Jagmin.

8. That at the conclusion of the January 12 hearing, the members of the Board voted unanimously to recommend to Chief of Police Breier that Complainant be terminated; pursuant to the recommendation of the Board of Inquiry and on January 12 soon after the Board's decision, Chief Breier signed Order No. 7233 dismissing Complainant from the service of Respondent Police Department.

9. That Respondent's decision to terminate and its termination of Complainant was not related to Complainant's request for representation, but it was based upon the evaluations made by Respondent's instructors of Complainant's performance at the Police Academy.

10. That the PPPA and Respondent have entered into several collective bargaining agreements; that the agreements most pertinent to this proceeding are the 1973-1974 and 1974-1976 agreements; that the 1973-1974 agreement was entered into pursuant to an arbitration award issued by Arbitrator Martin Wagner; and that Respondent and the PPPA entered into a 1974-1976 agreement pursuant to the arbitration award of Arbitrator E. J. Forsythe; that in negotiations for both the 1973-1974 and 1974-1976 agreements, the PPPA submitted the following proposal among many other proposals for inclusion in these respective agreements; Arbitrator Wagner did not include the following bill of rights proposal in his award and that the PPPA withdrew the bill of rights proposal in the process of paring down the issues already before Arbitrator Forsythe; that the bill of rights proposal states the following:

"Policeman's 'Bill of Rights'"

MEMBERS' RIGHTS

1. Members of the Milwaukee Police Department hold a unique status as public officers in that the nature of their office and the performance of their duties involves the exercise of a portion of the police power of the City and State.

2. The security of the City, its citizens depends to a great extent upon the manner in which Milwaukee Police Department members perform their manifold duties. The performance of such duties involves those members in all manner of contacts and relationships with the public.

3. Out of such contacts and relationships may arise questions concerning the actions of members of the force. Such questions may require prompt investigation by superior officers

A. The interrogation of any member shall be at a reasonable hour, preferably when the member is on duty, and during the daylight hours unless the exigencies of the investigation dictate otherwise. In the latter event, reassignment of the member's tour of duty shall be employed.

B. The interrogation [sic] shall take place at a location designated by the investigating officer, usually at a police installation.

C. The member shall be informed of the rank, name and command of the officer in charge of the investigation, as well as the rank, name and command of the interrogating officer and the identity of all persons present during the interrogation. If a member is directed to leave his post or assignment and report for interrogation to another command, his command shall be promptly notified of his whereabouts.

D. The member shall be informed of the nature of the investigation before any interrogation commences. Sufficient information to reasonably apprise the member of the allegations should be provided. If it is known that the member being interrogated is a witness only, he shall be so informed.

E. The interrogation shall be completed with reasonable dispatch. Reasonable respites shall be allowed. Time shall be provided also for personal necessities, meals, telephone calls, and rest periods as are reasonably necessary.

F. The member shall not be subjected to any offensive language, nor shall he be threatened with transfer, dismissal or other disciplinary punishment. No promise of reward shall be made as an inducement to answering questions. Nothing herein is to be construed as to prohibit the investigating officer from informing the member that his conduct can become the subject of disciplinary action resulting in disciplinary punishment.

G. In all cases wherein a member is to be interrogated concerning all alleged violation of Rules and Regulations which, if proven, may result in his dismissal from the service or the infliction of other disciplinary punishment upon him, he shall be afforded a reasonable opportunity and facilities to contact and consult privately with an attorney of his own choosing and/or a representative of the P.P.P.A. before being interrogated. An attorney of his own choosing and/or a representative of the P.P.P.A. may be present during the interrogation, but may not participate in the interrogation except to counsel the member. However, in such cases, the interrogation may not be postponed for purpose of counsel and/or a representative of the P.P.P.A. past 10:00 A.M. of the day following notification of interrogation.

H. Requests for consultation and/or representation or the recording of questioning in administrative investigations shall be denied unless sufficient reasons are advanced.

I. The complete⁶ interrogation of the member shall be recorded mechanically or by a stenographer. There will be no 'off-the-record' questions. All recesses called during the questioning shall be noted in the record.

J. If a member is under arrest or is likely to be, that is, if he is a suspect or the target of a criminal investigation, he shall be given his rights pursuant to the Miranda decision.

K. Under the circumstances described in paragraph G, the member shall be given an exact copy of any written statement he may execute, or if the questioning is mechanically or stenographically recorded, the member shall be given a copy of such recording or transcript if requested by him. He shall be allowed to provide his own mechanical recording device.

1. The refusal by a member to answer pertinent questions concerning any non-criminal matter may result in disciplinary action.

5. No member shall be ordered or asked to submit to a polygraph (lie-detector) test for any reason. Such test may be given if requested by the member.

6. No member shall be ordered or asked to submit to a blood test, a breathalyzer test or any other test to determine the percentage of alcohol in the blood for any reason except as may be provided otherwise by specific, statutory law. Such test may be given if requested by the member."

and that the PPPA by withdrawing the bill of rights proposal did not waive the right of members of the bargaining unit to request representation before a Board of Inquiry; and that the 1974-1976 agreement contains the following provisions pertinent hereto:

"WHEREAS, it is intended that the following Agreement shall be an implementation of the provisions of Section 111.70, Wisconsin Statutes, consistent with the legislative authority which devolves upon the Common Council of the City of Milwaukee, the Special Laws of the State of Wisconsin, Chapter 586 of the Laws of 1911 and amendments thereto, relating to the Chief of Police and the Board of Fire and Police Commissioners, the municipal budget law, Chapter 65, Wisconsin Statutes, 1971, and other statutes and laws applicable to the City of Milwaukee; and

. . .

PART II

A. RECOGNITION

1. The Association is recognized as the exclusive bargaining agent for employes in the following classifications:

Detective
Detective, Legal and Administrative
Police Patrolman
Policewoman
Police Identification Supervisor
Identification Technician
Chief Document Examiner
Document Examiner
Police Alarm Operator
Police Matron
Custodian of Police Property and Stores
Assistant Custodian of Police Property and Stores
Police Electronic Technician Foreman
Police Electronic Technician

. . .

C. MANAGEMENT RIGHTS

1. The Association recognizes the right of the City and the Chief of Police to operate and manage their affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes.

. . .

PART III

GRIEVANCE AND ARBITRATION PROCEDURE

I. GRIEVANCE PROCEDURE

A. GRIEVANCES

1. Differences involving the interpretation, application or enforcement of the provisions of this Agreement or the application of a rule or regulation of the Chief of Police affecting wages, hours, or conditions of employment and not inconsistent with the 1911 Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto shall constitute a grievance under the provisions set forth below.

Matters of departmental discipline involving application of the rules or regulations of the Chief of Police which are not subject to appeal to the Board of Fire and Police Commissioners, shall constitute a grievance under the aforementioned provisions and matters of departmental discipline involving application of the rules or regulations of the Chief of Police which are subject to appeal to the Board of Fire and Police Commissioners shall not constitute a grievance under the aforementioned provisions.

. . .

PART V

A. AID TO CONSTRUCTION OF PROVISIONS OF AGREEMENT

. . .

4. The provisions of this Agreement are binding upon the parties for the term thereof. The Association having had an opportunity to raise all matters in connection with the negotiations and proceedings resulting in this Agreement is precluded from initiating any further negotiations for the term thereof relative to matters under the control of the Chief of Police, the Common Council or the Board

aggregate of one (1) year of actual active service unless the Board specifies a longer or shorter time for any position or group of positions. If during the probationary period the appointee proves unfit for the position, the Chief of the interested department may discharge said appointee. A full statement of the reasons for the discharge must be filed with the Board within five (5) days of said discharge. There shall be no appeal from this discharge. If the probationary period is completed in a satisfactory manner, the appointee shall then be classified as a regular employee."

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

CONCLUSIONS OF LAW

1. That the City of Milwaukee and its police department are municipal employers as that phrase is defined by Section 111.70(1)(a) of the Municipal Employment Relations Act.

2. That the Professional Policemen's Protective Association did not waive the right of individual patrolmen to have a representative present at a Board of Inquiry hearing who may interrogate witnesses, and voice objections and address arguments to the Board, which rights are guaranteed under the instant circumstances, by Section 111.70(2) of the Municipal Employment Relations Act.

3. That by prohibiting Complainant's representative from addressing the Board of Inquiry or asking questions of the witnesses called to appear before the Board of Inquiry on January 12, 1976 and by in fact restricting Ward's participation in said hearing, and by permitting him to speak only with Complainant, Respondent denied Complainant his right to representation at a pre-disciplinary Board of Inquiry hearing, thus Respondent interfered with Complainant's right guaranteed by Section 111.70(2) of MERA and thereby Respondent violated Section 111.70(3)(a)1 of MERA.

4. That Respondent's termination of Complainant was unrelated to his request for representation or any concerted activity engaged in by Complainant, and thereby Respondent did not violate Section 111.70(3)(a)1 of MERA.

5. That Complainant failed to prove by a preponderance of the evidence that Respondent in fact denied Complainant of representation at any evaluation meeting between himself and Sutter or Gersonde or Ziolkowski in December and January, and therefore Respondent did not violate Section 111.70(3)(a)1 of MERA, in this regard.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

I. IT IS ORDERED that that portion of the complaint alleging that Respondent denied Complainant of the right to representation at evaluation meetings with supervision, is hereby dismissed.

II. IT IS FURTHER ORDERED that the Respondent, City of Milwaukee (Police Department), its officers and agents, shall immediately:

1. Cease and desist from:

(a) Refusing to permit persons chosen by individual police officers to represent them at pre-disciplinary Board of

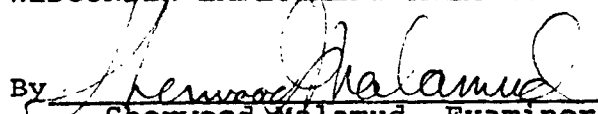
Inquiry hearings from asking questions of witnesses and addressing the Board of Inquiry at its hearings concerning the discipline of such officers.

- (b) Giving effect to Order No. 7233 or any decision or recommendation made by or on the basis of the Board of Inquiry hearing on January 12, 1976 in connection with the dismissal of Tom H. Rhodes, Jr.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
- (a) Expunge from the employment records of Tom H. Rhodes, Jr., any and all reference to his dismissal and to any decision made on the basis of the January 12, 1976 Board of Inquiry hearing and to the Board of Inquiry hearing itself.
 - (b) Withdraw Order No. 7233, and offer to provide Complainant with a Board of Inquiry hearing at which he is permitted to appear with the representative of his choice and permit said representative to consult with Complainant, ask questions of witnesses called to testify before the Board and present argument to the Board. And only after Respondent has afforded Complainant with the right to such a hearing, and if Complainant chooses to be represented at such hearing, permit such representative to ask questions of witnesses, to address objections and make argument to the Board, and then any decision concerning Complainant's employment status must be made on the basis of the evidence presented at such hearing. However, if Respondent offers to convene the Board but Complainant indicates that he does not desire such hearing, then a Board hearing need not be convened.
 - (c) Post the notice attached hereto (Appendix A) in all places where employe notices are posted, and it shall remain posted for a period of sixty (60) days thereafter.
 - (d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 20th day of September, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all employees that:

WE WILL afford all employees, represented by the Professional Policemen's Protective Association, and charged with violations of Departmental rules promulgated by the Chief of Police or regulations of the Board of Fire and Police Commissioners of the City of Milwaukee, and directed to appear before a Board of Inquiry for the purpose of investigating a charge which might result in disciplinary action, with the opportunity to be represented by a representative of his/her own choosing, and that representative will be permitted to ask questions of witnesses appearing before said Board, raise objections and present argument to said Board.

Dated this _____ day of _____, 1977.

By _____
Harold Breier, Chief of Police
City of Milwaukee Police Department

THIS NOTICE MUST REMAIN POSTED FOR A PERIOD OF SIXTY (60) DAYS
AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

In his handwritten complaint Rhodes asserts that:

". . . While employed as a police recruit for the Milwaukee Police Dept. . . . [I] was asked to resign for being unfit for police duty on January 7th 1976 at the Milwaukee Police Academy at 11:45 A.M. by Sergeant Joseph Sutter, I asked Sgt. Sutter if I may have a union represented [sic] before I talk to him and other member's [sic] of the police academy staff. He stated I could not have union representation, and if I contacted the PPPA I would be fired on the spot if he found out about it."

At the outset of the hearing, Mr. Jerome J. Dudzik, the Secretary-Treasurer of the Professional Policemen's Protective Association appeared on behalf of and represented Complainant at the hearing. Dudzik orally amended the complaint at the hearing and charged Respondent with a violation of 111.70(3)(a)1 of MERA; originally the complaint contained no reference to the section of MERA allegedly violated by Respondent. In a motion to dismiss filed with its answer, and, in a motion stated at the commencement of the hearing, Respondent claims that the Milwaukee Police Department is not a legal entity and that no order could be entered against such department. Respondent objected to the Examiner's alteration of the caption of this case to read City of Milwaukee (Police Department). And further, Respondent's counsel stated that the City of Milwaukee was not a proper party to the complaint. Under Ch. 586 of the Laws of 1911, it claims that the Chief of Police, Harold A. Breier, was the only party to whom an order could be directed to remedy any violation found, and that Breier was not named as a party to the complaint. Respondent cited the decision of the Hon. John W. Reynolds, U.S. District Judge for the Eastern District of Wisconsin in the case of White v. Fleming et al., Civil Action No. 76-C-794 (1974) in support of its position.

The federal cases cited by Respondent are not applicable to the within matter. The jurisdiction of the Commission is established by the Municipal Employment Relations Act. Under this act a:

"'Municipal employer' means any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied." (Emphasis added)

Clearly, the City of Milwaukee is a municipal employer under MERA, and the Milwaukee Police Department is a department of the City. Accordingly, it falls within the definition of a municipal employer. Furthermore, the Chief of Police is an agent of the City; he is not a political entity or subdivision of the state. He may enjoy a degree of autonomy from the Mayor and Common Council of the City of Milwaukee, however he, nonetheless, is an agent of the City and action taken by him in his capacity of Chief of Police may serve as the basis for the issuance of an order by the Commission to Respondent City of Milwaukee.

The Examiner altered the caption from Milwaukee Police Department to read City of Milwaukee (Police Department). In effect, the change was in form but did not effect any substantive rights of Respondent, and it was not prejudiced by the Examiner's action. Under Section 111.07 which is made applicable here under 111.70(4)(a) of MERA it is the Commission which serves process on parties to a proceeding. That process was served on the Milwaukee City Clerk and a copy was served on its Police Department. As a result, in personum jurisdiction has been extended over the City of Milwaukee and a department of the City, namely its Police Department.

Before turning to the several issues raised by the parties in this case, it is worth noting that the merits of Complainant's termination is not at issue here. Although a substantial amount of evidence concerning Complainant's conduct and achievement were introduced into the record, it was received for the sole purpose of determining whether Complainant's termination was related to his concerted activity. Accordingly, the Examiner has not made any finding whether Complainant's termination was for cause.

Complainant alleges in his complaint that he requested the presence of a PPPA representative during a January 7 meeting with his instructor Sutter. At the hearing the parties introduced conflicting evidence concerning Complainant's alleged request for representation at the December and January evaluation meetings. Although not alleged in the complaint, they also fully litigated and briefed the nature and extent to which Complainant received representation at Complainant's January 12 Board of Inquiry hearing. Since both Complainant and Respondent have fully litigated the representation issue before the Board of Inquiry as well as the representation issue raised in the complaint, the Examiner has determined both issues. In the discussion below, the Examiner resolves the issue raised in the complaint, the right of Complainant to representation at an evaluation meeting, on the basis of credibility. Then follows analysis of the nature and extent of Complainant's representation at the Board of Inquiry hearing.

In the Findings of Fact, the Examiner found that prior to the date of the Board of Inquiry hearing, Complainant did not ask to have a representative present nor did he receive such representation in any of the three evaluation meetings with his instructors: in Complainant's meeting with Captain Gersonde after he received his second evaluation; and in his meeting with Deputy Inspector Ziolkowski after his third evaluation. Finally, the Examiner found that even while he was meeting with Ziolkowski, Complainant did not ask for representation before the Board of Inquiry nor did he bring a representative to the Ziolkowski meeting. It was only on January 12, prior to the commencement of the Board of Inquiry hearing, that Respondent first became aware of Complainant's desire for representation.

The above findings run contrary to Complainant's testimony. The Examiner credited Sutter's testimony over Complainant's on the issue of representation on the basis of the following analysis. In his complaint, Complainant asserts that on January 7 at 11:45 a.m. he asked Sgt. Sutter for representation prior to continuing a meeting with him and prior to meeting with anyone else from supervision. At the hearing, Complainant first stated that his request for representation was made on January 7. 4/ Then, in response to questions put to him by the Examiner, Complainant testified as follows: 5/

"Q And that was when--was this at the time when they were reviewing your evaluation--second evaluation?

A Yes, sir.

Q Okay. Could you indicate what was said to you concerning your right to have representation?

A I was just told 'no.' What it was--I was called back in, in the presence of Sutter, Gielow, and Zellmer; and Sutter was, you know, doing all the talking, getting hostile; and he

4/ Tr. p. 19-20.

5/ Tr. p. 52-53.

asked me if I had ever been fired from a job and I said 'No.'

. . .

A He asked have I ever been fired from a job. I said, 'No.' He said did I know what effect it would have on me, finding another if I got fired from that job; and I told him 'yes,' I knew what it would be. He asked did I want to resign, then. I said 'No.' He told me I would be going down--he would turn in the evaluation report--to the Inspector's Office--that is what he told me. Later on that evening during gym--because I approached him and asked him--I said, 'You asked us to resign.' I said, 'How long do we have to wait before we know anything?' He said, he just filled out the reports and would turn them in. He said, 'You will be talked to next week.' And I asked--I told him--I said, 'Well, I want to get Union representation out here'; and he said--he said something about--if I--I would get fired 'on the spot' if he found out about it.

Q That statement was made by Mr. Sutter in December?

A Yes--Sgt. Sutter--in December; yes, in December.

. . ."

Sgt. Sutter's testimony is in conflict with Complainant's. On direct examination he testified as follows:

"Q And what is the purpose of the first and second evaluations?

A To give the recruit an idea of how he is progressing.

Q And this is to help the recruit?

A Yes. If there are some deficiencies in any of the areas, these are pointed out to the recruit. They sit down with you and review the report. We go over each item on the report with the recruit.

Q And did you, in fact, do this with former Officer Rhodes on future evaluations?

A Yes, I did.

Q And when did he first ask you to have a Union representative present?

A At no time did he ever ask for a Union representative to be present.

Q Did you ever make the statement to him that if he talked to the Union, he would be immediately fired?

A No, I did not.

Q Do you have the power to fire an officer?

A No, I do not; and I explained it to Mr. Rhodes several times on each one of the evaluations." 6/

The Examiner is mindful that it is not unusual for witnesses to confuse dates. However, here, the dates and statements are tied to significant divisions in the testimony, i.e., the second and third evaluations received by Complainant. Furthermore, in his handwritten complaint, Complainant alleges these events occurred on January 7, 1976. ^{7/} He even specifies the time of day on which the statements were allegedly made. Nonetheless, his testimony changed on this issue.

What is troublesome in Complainant's story, whether Complainant asked Sutter for a PPPA representative on the day of the second evaluation or at the third evaluation meeting, is why the representation issue did not arise at the January 8 meeting with Ziolkowski. Complainant did not bring a representative to the meeting, nor did he ask for representation for the Board of Inquiry hearing which he was told would meet on January 12. The portion of Complainant's testimony which meets this concern appears strained. He stated in effect that Sutter's threat intimidated him, and only after he consulted with an attorney on January 8 or 9 ^{8/} did he pursue his right to have a representative of the PPPA present at the January 12th Board of Inquiry. Yet, the evidence indicates otherwise. Even before he received his third evaluation, Complainant realized the precariousness of his employment status. This is evidenced by his request for additional shooting instruction and practice just several days after receiving his third evaluation. ^{9/} Furthermore, Rhodes testified ^{10/} that on January 7, Sutter told Complainant he was untrustworthy and unreliable and that he would meet with Ziolkowski on January 8. It would appear then, that given this foreknowledge of the January 8 meeting with the Director of the Police Academy and after being called untrustworthy by his instructor, that the issue of representation would have come up at the January 8 meeting even in the face of a threat of dismissal (whether made in December or in January). This is especially so if a request for representation had been made prior to January 8. It is on the basis of the comparison of Complainant's inconsistent testimony with Sutter's direct presentation of the facts and Complainant's conduct at the January 8 meeting, that the Examiner credited Sutter's testimony as to Complainant's alleged request for representation at the December and January evaluation meetings. ^{11/}

Despite the above finding, it is undisputed that Complainant brought Ward to the Board hearing to represent him at that hearing. He was permitted to have a representative present in the hearing room with whom

^{7/} On page 26 of the transcript, Complainant stated that the third evaluation meeting was on January 4 and that he asked for additional shooting instruction several days after his evaluation. However, on page 54, Complainant stated that the third evaluation occurred on January 2. The Examiner found in his findings of fact, that either January 2 or 4 was more likely the date on which the evaluation occurred rather than January 7, because of Complainant's request for additional shooting practice several days after his third evaluation. Since his meeting with Ziolkowski was on January 8, it is unlikely that Rhodes asked for shooting practice after that meeting.

^{8/} Tr. p. 21.

^{9/} Tr. p. 25.

^{10/} Tr. p. 19-20; the Examiner credited Rhodes' testimony to the effect that he was advised at his evaluation meeting of a forthcoming meeting with Ziolkowski. See footnote 6.

^{11/} In light of the Examiner's credibility findings, he does not reach the question of whether Complainant had a right to representation at the evaluation meetings had complainant requested such representation.

he was permitted to confer, but the representative was not permitted to address the Board or ask questions of witnesses. The restrictions placed on Ward's participation by Inspector Jagmin raise the issue of the nature and extent of Complainant's right to representation before the Board of Inquiry. In the discussion which follows, the Examiner determines Complainant's right to representation, and then analyzes the extent and nature of that right.

In City of Milwaukee (13558-B) 1/76, 5/76, aff'd and stipulated order entered by the Milwaukee County Circuit Court 8/76, hereinafter the Schmidt case, the Commission determined that a patrolman had a right to representation before the pre-disciplinary Board of Inquiry hearing. 12/

Respondent argues that Complainant had no right to a hearing and it cites several 13/cases in support of its argument. Respondent's argument is misplaced. While it may be argued that Complainant had no constitutional or statutory right to a hearing in the first instance, once Respondent established a Board of Inquiry and ordered Complainant to appear at such hearing, under Schmidt, Complainant was entitled to representation at that hearing.

This right of representation may be waived and the issue of whether the PPPA waived that right by agreement or by its conduct in its negotiation of the 1973-1974 and 1974-1976 collective bargaining agreements was not resolved in Schmidt. The Commission noted in affirming the Examiner's decision:

" . . . that the Order issued by the Examiner was based on the record made before him at the hearing on the pleadings filed prior to the close of the hearing before the Examiner. Should any other law enforcement officer, or the individual Complainant involved herein, become involved in another hearing before the Board of Inquiry, and should said Board of Inquiry not permit said law enforcement officer so involved to be represented by the PPPA, and should the PPPA or the particular officer involved request that the Commission seek enforcement of the Order of the Examiner as affirmed herein, and should the Respondents contend that in an existing collective bargaining agreement the PPPA waived its right to represent the officer involved, prior to seeking enforcement of the instant Order, the Commission will hold a hearing to determine whether there has been such a contractual waiver of the right of representation."

The waiver issue was fully litigated in the instant case. In resolving that issue, the Examiner takes note of the following principles developed by the Commission in answering the waiver question. First, the Commission

12/ In Schmidt, Respondent is the same City of Milwaukee and the issue there, just as here, concerned the right to representation before a Board of Inquiry of the City of Milwaukee Police Department.

13/ Swiedarke v. Board of Police and Fire Commissioners, Mil. Cir. Ct., Case No. 335-144 (1/66, Judge Dreschler), Appeal dismissed, Wis. Supreme Court, June 29, 1966. State ex rel. Dela Hunt v. Ward, 25 Wis. 2d 345, Board of Regents v. Roth, 408 U.S. 564 (1972); Cornell v. Higgenbotham, 403 U.S. 207, Bishop v. Wood, 96 S. Ct. 2074 (1976), No. 74-1303, 6/10/76.

has often stated that waiver of a statutory right will be found only when there is clear and unmistakable evidence of such waiver. 14/

The issue then is whether the PPPA clearly and unmistakably waived an individual police officer's right to representation at an investigatory pre-disciplinary proceeding - a Board of Inquiry hearing. In deciding this issue, it is necessary to determine and set some standards to ascertain whether the evidence of waiver is clear and unmistakable. In The State of Wisconsin, supra, the Commission established such standard; it stated that:

"In describing what constitutes clear and unmistakable evidence of a waiver, one line of authority requires that the union have explored and consciously considered the particular item allegedly waived. The better line of thought, in our opinion, is to give such effect to a blanket waiver as the negotiating history and other surrounding circumstances seem to make appropriate, at least in any cases where its application is not repugnant to the basic policies of the law." (Citations omitted).

The Examiner has employed the "better line of thought" in the evaluation of the evidence. The record evidence supporting a finding of waiver is as follows: (1) that Part V, A, Section 4 of the 1974-1976 agreement contains a blanket waiver of the PPPA's right to bargain during the term of the agreement over matters under the control of the Chief of Police, the Common Council or the Board of Fire and Police Commissioners; 15/ (2) that the collective bargaining agreement, by its own terms is subject to Ch. 586 of the Laws of 1911 and the Milwaukee City Charter and the authority vested thereby in the Board of Fire and Police Commissioners to establish rules for the appointment and termination of probationary patrolmen, and it permits the Chief of Police to administratively establish procedures for the management of the Milwaukee Police Department such as the Board of Inquiry; that the PPPA attempted to modify the Board of Inquiry procedures through its Policeman's Bill of Rights proposal which it was unsuccessful in incorporating in the 1973-1974 or 1974-1976 agreements; (3) that the PPPA submitted a proposal for a Policeman's Bill of Rights in negotiations for a 1973-1974 agreement which proposal was rejected by Arbitrator Wagner; that the very same proposal was introduced in bargaining for a 1974-1976 agreement, but was withdrawn by the PPPA when it reduced the number of issues to be decided by Arbitrator Forsythe.

The above evidence falls short of establishing waiver for the following reasons.

Part V, A, Section 4 may be interpreted to provide for a waiver of bargaining over those matters under the control of "the Chief of Police,

14/ Sheboygan Joint School District (11990-B) 1/76; Joint School District No. 5, City of Fennimore (11865-A, B) 6/74, 7/74; City of Green Bay (12411-B) 4/76; The State of Wisconsin (13017-C, D) 7/75, 5/77. These cases all dealt with a union's waiver of its right to bargain with an employer. However, the standard expressed in those cases is applicable here since the right to bargain and the right to representation are both statutory rights. It is true that the rights differ in that the right to bargain is a right which inures to the Union and the right to representation inures to the benefit of individual employees. However, the standard to be employed in determining a waiver certainly should not be any less where a union is waiving a statutory right which inures to individual employees, rather than the union's statutory right to bargain which inures to itself.

15/ See Finding of Fact No. 10.

the Common Council or the Board of Fire and Police Commissioners", but that language does not state that the statutory right to representation before a pre-disciplinary Board of Inquiry is waived. The fact that the right to bargain may be waived does not mean that the statutory right to representation before a Board of Inquiry is waived unless there is specific language to that effect. There is no such language in the 1974-1976 agreement.

The bill of rights proposal does not specifically mention Boards of Inquiry. It speaks to situations arising out of contacts between policemen and members of the public, and deals with the right of officers to representation when they are being interrogated during internal investigations arising out of such contacts. The focus of the bill is police internal procedures other than the Board of Inquiry. If the proposal were meant to apply to Board of Inquiry proceedings, it would state as much. Since the Bill of Rights proposal does not touch upon Board of Inquiry proceedings, the PPPA's presentation of that proposal in negotiations and its failure to obtain its inclusion in either the 1973-1974 or 1974-1976 agreements has no bearing on the waiver issue here.

Finally, the right of the Respondent to unilaterally establish its Board of Inquiry is wholly independent of the right of a patrolman to representation before the Board of Inquiry established by the Employer. By making the 1974-1976 agreement subject to Ch. 586 of the Laws of 1911, the PPPA may have waived its right to bargain over the establishment of a board of inquiry and the manner in which Respondent may investigate police misconduct, 16/ but even so there is no evidence that the PPPA by agreement or by its conduct in negotiations waived the right of individual officers to have representation at these pre-disciplinary Board of Inquiry proceedings.

After reviewing all the evidence in this case, the Examiner concludes that Respondent did not demonstrate that the PPPA waived the right of individual patrolmen to representation before pre-disciplinary Board of Inquiry proceedings.

Thus far, the Examiner has concluded that Complainant had a right to representation at a pre-disciplinary Board of Inquiry and that that right was not waived by the majority representative in its bargaining relationship with the Respondent Municipal Employer.

In order to resolve the issue in this case, it is necessary to refine the broad right delineated in Schmidt with a specific definition of that right. The Commission, in Schmidt did not limit the employer's prerogative to adopt any investigative tool it desires to gather and assess facts prior to making its disciplinary decision. What it did was give expression to the statutory right of an individual employee to have a representative present at a pre-disciplinary Board of Inquiry hearing. What remains to be decided is if Complainant received that right at his January 12 Board of Inquiry hearing in light of the limitations placed on his representative's participation in the hearing.

Again, Respondent permitted Ward, a representative of the PPPA to be present at the hearing; he was permitted to counsel Rhodes, but he was

16/ It should be noted that Complainant was permitted to have a representative present in the Board of Inquiry hearing room. Captain Busalacchi testified at page 64 of the transcript that the procedures of the Board of Inquiry permit a patrolman charged with a violation of departmental rules to have a representative present at the Board hearing.

not permitted to question witnesses or address argument to the Board of Inquiry. Did these proscriptions effectively deny Complainant of the right to representation?

The answer to this question is difficult because the right to a hearing, here, is not based upon any constitutional or statutory right where the nature, purpose and procedural underpinnings for the hearing are fixed. Furthermore, it is important to remember that the issue here is Complainant's right to representation during a pre-disciplinary investigation which Respondent established in the form of a Board of Inquiry to suit its own purposes. Other public employers may use a broad spectrum of techniques other than a board of inquiry for the investigation and assessment of facts prior to the imposition of discipline. Consequently, any statement concerning the minimum requirements necessary to meet that right of representation must reflect the individual circumstances of the case, as well as the variety of settings in which this right to representation at a hearing or meeting would occur.

Several questions may be asked in the determination of the extent of an employee's right to representation in a particular case; and they are:

- (1) What is the employee's role in the pre-disciplinary process established by the employer;
- (2) Is it reasonable to expect that a representative of an employee undertake those tasks contemplated by the employer's procedure;
- (3) What is the level of representation required to ensure an employee adequate representation while at the same time preserving the setting and procedures used by the employer to conduct its investigation.

Turning specifically to the case at hand, Complainant had a representative present with whom he was permitted to consult. Under many circumstances that may have met the statutory requirements outlined above. For instance, if the Employer were merely interrogating an employee, then the presence of a representative with whom the employee could consult may very well fulfill the statutory right to representation at pre-disciplinary meetings.

Here, Respondent did not just interrogate Complainant. Instead, it erected a Board of Inquiry which had many of the trappings of a trial. Complainant was not called upon to only answer questions. In order to defend his position, Complainant had to be able to interrogate witnesses and make argument to the Board of Inquiry. Complainant not only was required to inform the Board with his answers, he had to be skilled in eliciting testimony from witnesses who were testifying against his interests, and he had to have the presence of mind and objectivity to make argument to the Board of Inquiry concerning his own tenure of employment. 17/ It must be remembered that Complainant could not call witnesses in his own defense; he could not call individuals with whose testimony he was familiar. The above undertaking would be a considerable challenge for the most skilled and experienced attorney. But the Employer may adopt any technique it desires to conduct such investigation. The right to representation comes into play only when the Employer involves the employee in its investigation procedures. Here, the factor requiring

17/ At Tr. p. 75, Deputy Inspector Ziolkowski, who was present throughout Rhodes' Board of Inquiry hearing, testified that Complainant was initially confused and he did not know how to go about asking questions of witnesses, etc.

broader participation by the representative of Complainant is the provision by the Board for Complainant's active participation in the Board's proceedings. He not only had to answer questions, but he was called upon to ask questions of witnesses, voice objections and address argument to the Board. For the right to representation to have any meaning, Complainant must be afforded the right to have his representative act on his behalf where Complainant is called upon to do more than answer questions put to him by the Board. To find otherwise would permit the Employer to undermine Complainant's right to representation at a pre-disciplinary Board of Inquiry hearing guaranteed by Section 111.70(2) of MERA.

Thus, a balance is struck between Complainant's statutory right to representation at the pre-disciplinary Board hearing and Respondent's right to establish its own procedures for the investigation of facts prior to the imposition of discipline. If Respondent continues to employ its Board of Inquiry proceeding, the affected officers are entitled to representation as outlined above and such representative shall be permitted to function as outlined above to afford the employee the representation mandated by Section 111.70(2) of MERA. On the other hand, the procedure and format established by Respondent for ascertaining the facts remains intact. It must be remembered, that it is the intent of MERA to foster labor peace. The presence of a skilled representative during a Board of Inquiry will permit the presentation of pertinent facts to Respondent and thus provide it with an opportunity to make a more informed decision. 18/

It follows from the above that by preventing Ward from asking questions of witnesses, raising objections and presenting argument at the Board of Inquiry hearing, the Employer denied Complainant his right to representation which is afforded to him under Section 111.70(2) of MERA, and it thereby violated Section 111.70(3)(a)1 of MERA.

REMEDY

The Examiner has ordered Respondent to post notices (Appendix A). He has ordered Respondent to offer Complainant an opportunity to be represented at a Board of Inquiry hearing by a representative who would have an opportunity to question witnesses and present objections and argument to said Board. If Respondent offers to convene a Board of Inquiry, but Complainant chooses not to return to the position of patrolman with the Milwaukee Police Department, then no Board hearing need be convened nor need Respondent reinstate Complainant. In any case, all reference to any decision made pursuant to the January 12 Board of Inquiry hearing and reference to that hearing itself must be removed from his personnel file. Through the above remedy, the Examiner has attempted to restore the status quo ante. However, no back pay has been ordered, because the Examiner found there was no relationship between Complainant's request for representation and his termination. There is no showing here that Respondent acted intentionally to deprive Complainant of his right to representation or that it acted in bad faith when it established the ground rules for Ward's participation in the hearing. Finally, the violation found here is a technical one. Any back pay order under the above circumstances would constitute a windfall to Complainant, and as a result a make-whole remedy was not ordered.

Dated at Madison, Wisconsin this 20th day of September, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner

18/ See NLRB v. Weingarten 88 LRRM 2689, at page 2693, footnote no. 7.