STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PROFESSIONAL POLICEMEN'S PROTECTIVE ASSOCIATION OF MILWAUKEE, a/k/a MILWAUKEE POLICE ASSOCIATION, Complainant, vs. CITY OF MILWAUKEE, a Municipal Corporation, and HAROLD A. BREIER, Chief of Police, City of Milwaukee, Respondents.	Case CLXV No. 20747 MP-654 Decision No. 14873-B Case CLXVI No. 20751 MP-655 Decision No. 14875-B Case CLXVII No. 20786 MP-660 Decision No. 14899-B

Appearances:

Mr. Kenneth J. Murray and Ms. Laurie Eggert, Attorneys at Law, 411 East Mason Street, Milwaukee, Wisconsin 53202, appearing on behalf of Complainant.

Mr. James B. Brennan, City Attorney, by Mr. John F. Kitzke, Assistant City Attorney, 800 City Hall, Milwaukee, Wisconsin 53202, appearing on behalf of Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed complaints with the Wisconsin Employment Relations Commission alleging that the above-named Respondents had committed prohibited practices within the meaning of the Municipal Employment Relations Act; and hearing in the matter having been conducted by Marshall L. Gratz; and the Commission, having reviewed the record, the arguments and briefs of Counsel, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Complainant Professional Policemen's Protective Association of Milwaukee, now known as the Milwaukee Police Association, hereinafter referred to as the Association, is a labor organization with offices at 411 East Mason Street, Milwaukee, Wisconsin.

2. That the Respondent City of Milwaukee, hereinafter referred to as the City, is a municipal corporation with offices at 200 East Wells Street, Milwaukee, Wisconsin; and that the City, among its functions, operates and maintains a Police Department, and that the individuals employed by the City in said Police Department, including police officers, are compensated by funds appropriated by the Common Council of the City.

3. That Respondent Harold A. Breier is the Chief of Police and is in charge of the Police Department of the City; that Respondent Breier, hereinafter referred to as the Chief, at all times material herein, has been expressly authorized by Sec. 1, Chapter 586, Laws of 1911 (codified in 1977 as Sec. 62.50, Stats.) to act as head of said Police Department; to regulate said Police Department and prescribe

rules for the governance of its members; to preserve the public peace and to enforce all laws and ordinances of the City; to be responsible for the efficiency and general good conduct of the Department; to have custody and control of the public property of the Department, and of all books, records, equipment necessary for use in the Department; and that the Chief performs his official duties on behalf of the City.

4. That at all times material herein the Association has been the certified collective bargaining representative of non-supervisory law enforcement personnel employed by the City in its Police Department, consisting of individuals holding the following positions:

Detective

Detective, Legal and Administrative

Police Patrolman

Policewoman

Identification Technician

Chief Document Examiner

Police Electronic Technician Foreman

Document Examiner

Police Alarm Operator

Police Matron

Custodian of Police Property and Stores

Assistant Custodian of Police Property and Stores

Police Electronic Technician

5. That at all times material herein the City has maintained a five member Board of Fire and Police Commissioners, hereinafter referred to as the Board; that the Mayor of the City appoints each member of the Board, which requires confirmation by the Common Council of the City; that said Board was created and empowered by Sec. 1, Chapter 586, Laws of 1911 (codified in 1977 as parts of Sec. 62.50, Stats.), to prepare and adopt rules and regulations to govern the selection and appointment of persons to be employed in the Police Department of the City; to approve all appointments to each position in the Police Department; to conduct hearings and determine charges filed against personnel of the Police Department, such charges may be filed by the Chief, the Board or any member thereof, or by any elector of the City, and to determine whether the good of the service requires that the accused officer be permanently discharged, suspended without pay for a period not to exceed sixty days, or reduced in rank; and that charges by the Chief against a non-probationary subordinate police officer, involving a penalty imposed by the Chief in excess of five days in duration may be appealed, as a matter of right, to the Board; and that Board procedures require a full adversary hearing before issuing its determination.

6. That for the past number of years, and continuing at all times material herein, there has existed in the Police Department a Trial Board, also known as a Board of Inquiry, hereinafter referred to as the BOI, where Police Department personnel stood trial, or otherwise were compelled to appear, with respect to specific written charges against such personnel; that the BOI consists of two members of the collective bargaining unit represented by the Association, ordinarily Patrolmen selected in periodic elections among Patrolmen at each Police District and Traffic Bureau, and three supervisory Police personnel, with one of the Supervisors serving as Chairman of the BOI; that BOI's are convened for the purpose of assisting the Chief in the investigation of charges against personnel, charging that departmental rules have been violated; that such BOI hearings are stenographically recorded and the record thereof is forwarded to the Chief, as is BOI recommendations as to the disposition of the charges, including what, if any, disciplinary penalty should be imposed on the police officer involved.

7. That at the BOI proceedings the accused officer is informed of the nature of the charges, is called upon to plead "guilty" or "not guilty," is confronted with direct examination by BOI members of the witnesses called by the Police Department, is permitted to cross-examine said witnesses, is called upon to make a statement in his own defense, is subject to cross-examination by BOI members, and is permitted to call and examine witnesses in his own defense, who are then subject to cross-examination by BOI members; and that the members of the BOI then adjourn to executive session for deliberation, and thereafter the BOI makes recommendations to the Chief regarding the matter.

8. That the rules and regulations promulgated by the Chief and by the Board provide that the employes of the Police Department having less than one year of employment are probationary employes; and that if such employes prove unfit or unsatisfactory during their probationary period, they are subject to discharge by the Chief with no right to appeal such action to the Board.

9. That for the past number of years the City and the Association have been parties to collective bargaining agreements covering the wages, hours and working conditions of law enforcement employes in the employ of the Police Department; that in negotiations leading up to the 1972-1974 and 1974-1976 collective bargaining agreements representatives of the Association proposed that said agreements include the following proposal of the Association (stated only as to material parts):

"Policeman's 'Bill of Rights'

. . .

4. To insure that . . . investigations [to resolve 'questions concerning the actions of members of the force'] are conducted in a manner conducive to good order and discipline, meanwhile observing and protecting the individual rights of each member of the force, the following rules of procedure hereby are established:

. . .

G. In all cases wherein a member is to be interrogated concerning all [sic] 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.

. . ."

10. That said proposal was not accepted by the City in either set of negotiations and was expressly denied in an interest arbitration award which resolved the 1972-1974 agreement, and was withdrawn by the Association during the course of an interest arbitration proceeding which resulted in the 1974-1976 agreement.

11. That during the 1975 session of the Wisconsin Legislature, representatives of the Association appeared before the Senate Governmental and Veterans Affairs Committee of the State Legislature in support of Senate Bill 52, which consisted of a "Police Bill of Rights" which included language not materially different from that quoted in Finding 9 above; and that said Bill was passed by the Senate but not by the Assembly.

12. That representatives of the Chief were present at the negotiation meetings leading up to the 1974-1976 agreement referred to in Finding 9 above; and that said agreement provided, in part, as follows:

> "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
>
> WHEREAS, it is intended by the provisions of this Agreement that there be no abrogation of the duties, obligations, or responsibilities of any agency or department of City government which is now expressly provided for respectively either by: state statutes, charter ordinances and ordinances of the City of Milwaukee except as expressly limited herein;
>
> . . .
>
> H. SUBJECT TO CHARTER
>
> In the event that the provisions of this Agreement or application of this Agreement conflicts with the legislative authority which devolves upon the Common Council of the City of Milwaukee as more fully set forth in the provisions of the Milwaukee City Charter, the Special Laws of the State of Wisconsin, Chapter 586 of the Laws of 1911 and amendments thereto pertaining to the powers, functions, duties and responsibilities of the Chief of Police and the Board of Fire and Police Commissioners or the municipal budget law, Chpater [sic] 65, Wisconsin Statutes, 1971, or other applicable laws or atatutes [sic], this Agreement shall be subject to such provisions.
>
> . . .

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. The Association recognizes the exclusive right of the Chief of Police to establish and maintain departmental rules and procedures for the administration of Police Department during the term of this Agreement provided that such rules and procedures do not violate any of the provisions of this Agreement.

2. The City and the Chief of Police have the exclusive right and authority to schedule overtime work as required in the manner most advantageous to the City. The City and the Chief of Police shall have the sole right to authorize trade-offs of work assignments.

. . .

4. The Chief of Police and the Fire and Police Commission reserve the right to discipline or discharge for cause. The City reserves the right to lay off personnel of the department.

5. The City and the Chief of Police shall determine work schedules and establish methods and processes by which such work is performed.

6. The City and Chief of Police shall have the right to transfer employes within the Police Department in a manner most advantageous to the City.

7. Except as otherwise specifically provided in this Agreement, the City, the Chief of Police and the Fire and Police Commission shall retain all rights and authority to which by law they are entitled.

. . .

11. The Association pledges cooperation to the increasing of departmental efficiency and effectiveness. Any and all rights concerning the management and direction of the Police Department and the police force shall be exclusively the right of the City and the Chief of Police unless otherwise provided by the terms of this Agreement as permitted by law.

. . .

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.

. . .

[There follows a multi-step grievance procedure with time limits which, if not complied with, render a grievance abandoned and deemed resolved in favor of the City. Thereafter, a final and binding arbitration procedure is provided to resolve all unsettled grievances.]

. . .

PART V

A. AID TO CONSTRUCTION OF PROVISIONS OF AGREEMENT

. . .

3. The Common Council of the City of Milwaukee as well as the Chief of Police recognizes that those rules and regulations established and enforced by the Chief of Police, which affect the wages, hours, and working conditions of the police officers included in the collective bargaining unit covered by this Agreement are subject to the collective bargaining process pursuant to Section 111.70, Wisconsin Statutes."

13. That shortly prior to January 12, 1977, Daniel Ziolkowski, a non-probationary police officer, in the bargaining unit represented by the Association, was served with written charges that he had committed one or more violations of the rules of the Police Department and was ordered to stand trial, or otherwise compelled to appear on January 12, 1977, before the BOI; that prior to said date Ziolkowski addressed a timely request to his supervisor that a representative of the Association be present during his appearance before the BOI; that said request was denied; that, however, Ziolkowski neglected to appear before the BOI; that thereafter Ziolkowski was dismissed from employment; and that he subsequently exercised his appeal rights before the Board, which upheld the termination.

14. That shortly prior to the dates noted below, probationary police officer Leonel Lopez, and non-probationary police officers Georgia Bejma, Charles Gumm, Gregory Cullinan, Daniel Barney and Robert Pasko, all in the bargaining unit represented by the Association, were individually served with written charges that they had individually committed one or more violations of the rules of the Police Department and were ordered to stand trial or otherwise compelled to appear on the dates noted before the BOI; that at no time prior to or during their appearance before the BOI did any of said police officers request that a representative of the Association be present during their appearance before the BOI; that said police officers appeared before the BOI on the date noted; that said police officers appeared before the BOI without Association representation; and that thereafter the Chief imposed the penalties noted upon said police officers:

Police Officer	Date of BOI Appearance	Penalty Imposed
Bejma	10-30-75	Suspension - 5 Days
Lopez	8-19-77	Dismissal
Cullinan	1-27-77	Suspension - 30 Days
Barney	8-18-77	Suspension - 10 Days
Pasko	11-11-77	Suspension - 15 Days
Gumm	11- 2-76	Suspension - 30 Days

15. That Leonel Lopez, being a probationary police officer, had no right to process an appeal to the Board, and therefore he exercised a disputed right to grieve his dismissal, pursuant to the contractual grievance procedure contained in the collective bargaining agreement existing between the Association and the City; that said grievance, at the time of the hearing herein had not been completely processed; that Georgia Bejma, having received a suspension of 5 days, grieved her suspension pursuant to the contractual grievance procedure involved; that Gregory Cullinan, Daniel Barney and Robert Pasko did not choose to exercise their right to appeal the Chief's action to the Board; and that Charles Gumm exercised such right of appeal and the Board reduced the Gumm suspension from 30 to 15 days.

16. That shortly prior to June 29, 1976, non-probationary officer, Mark Rouleau, a member of the bargaining unit represented by the Association, was served with written charges that he had committed one or more violations of the rules of the Police Department and was ordered to stand trial, or otherwise compelled to appear on June 29, 1976, before the BOI; that prior to said date Rouleau addressed a timely request to his supervisor that a representative of the Association be present during his appearance before the BOI; that said request was granted; that, however, an additional request that the representative act in the capacity of a spokesperson was not granted; that thereafter Rouleau appeared before the BOI with the limited representation granted to him; that thereafter the Chief imposed a suspension of 6 days upon Rouleau; and that thereafter Rouleau exercised his right to appeal such suspension to the Board, which sustained such suspension.

17. That all of the officers set forth below were non-probationary employes, with the exception of Judson Coleman, Howard Root and Bonnie Bauer, who were probationary employes; that all of the officers noted below were in the bargaining unit represented by the Association and were individually served with written charges that they had individually

committed one or more violations of the rules of the Police Department and were ordered to stand trial or otherwise compelled to appear on the dates noted before the BOI; that prior to their appearance before the BOI said police officers requested that a representative of the Association be present during their appearance before the BOI; that said police officers were denied such representation, but appeared before the BOI without Association representation; and that thereafter the Chief imposed the penalties noted upon said police officers:

Police Officer	Date of BOI Appearance	Penalty Imposed
James Zilke	3-24-75	Suspended - 8 Days
Robert Boyle	10-10-75	Suspended - 10 Days
Lawrence Zieger	10-18-75	Suspended - 15 Days
Thomas Schmidt	11- 3-75	Suspended - 30 Days
Donald Glaser	11- 4-75	Suspended - 5 Days
David Schauer	11- 4-75	Suspended - 5 Days
Judson Coleman	12-12-75	Dismissed
Jack Anthony	8-17-76	Suspended - 8 Days
George Butler	8-19-76	Suspended - 15 Days
Roger Hinterthuer	9-13-76	Suspended - 8 Days
Roger Cortez	12- 2-76	Suspended - 5 Days
John Niemann	12- 3-76	Suspended - 5 Days
Dennis Pajot	1-13-77	Suspended - 15 Days
Audrey Reiter	2-10-77	Suspended - 15 Days
Rosalie Valdes	2-14-77	Dismissed
Terrance Cieszki	2-24-77	Suspended - 6 Days
Leane Cymowski	3-17-77	Suspended - 15 Days
Patrick Monaghan	3-24-77	Suspended - 8 Days
Verbie Swanigan	3-29-77	Suspended - 10 Days
Thomas Wisniewski	4- 6-77	Suspended - 6 Days
Howard Root	6-24-77	Dismissed
Ronald Kalivoda	7-20-77	Suspended - 6 Days
Thomas Flynn	7-21-77	Suspended - 6 Days
Donald Workinger	7-25-77	Suspended - 10 Days
Ronald Kulinski	8-17-77	Suspended - 6 Days
Joseph Ziedonis	10-20-77	Suspended - 30 Days
Gary Piellusch	11- 3-77	Suspended - 10 Days
Eugene Kucharski	11- 4-77	Suspended - 30 Days
Bonnie Bauer	(12-27-77 (1- 9-78	((Suspended - 6 Days;

that the police officers on probation, namely, Coleman, Root and Bauer, made no attempt to appeal the action of the Chief to the contractual grievance and arbitration procedure; that Bauer also resigned from the

Police Department on January 13, 1978; that of those officers who received a suspension of 5 days, only Cortez and Niemann exercised their contractual grievance and arbitration appeal rights, and in said regard, an arbitrator reduced Cortez's suspension from 5 to 4 days, and also the suspension of Niemann was rescinded by an arbitrator; that of those police officers who received suspensions of 6 days or more only officers Pajot, Swanigan, Kalivoda, Flynn, Workinger, Ziedonis, Piellusch and Kucharski chose to exercise their appeal rights to the Board; and that in said regard the Board sustained the action of the Chief in all such appeals.

18. That the following non-probationary police officers, all in the bargaining unit represented by the Association, were individually served with written charges that they had individually committed one or more violations of the rules of the Police Department and were ordered to stand trial or otherwise compelled to appear on the dates noted before the BOI; that prior to their appearance before the BOI said police officers requested that a representative of the Association be present and be permitted to serve as spokesperson for each of the officers involved; that such requests for such representation were denied, but that said officers appeared before the BOI with a representative of the Association being present, but said representative was not permitted to act in a spokesperson capacity; that after such appearance the Chief imposed the penalties noted upon said police officers:

Police Officer	Date of BOI Appearance	Penalty Imposed
Richard Menzel	1- 9-76	Suspended - 5 Days
Helmut Schaefer	5-14 & 5-18-76	Suspended - 15 Days
Thomas Davis	4- 6-76	Suspended - 6 Days
Robert J. Davis	4- 9-76	Dismissed
Thomas Schmidt	4-20-76	Dismissed;

that Menzel exercised his grievance and arbitration appeal rights, however such action did not result in changing his suspension; that Schaefer, with respect to his May 14, 1976 appearance, had been denied a request that the Association attorney be permitted to be present; that Schaefer, Robert J. Davis and Schmidt exercised their right to appeal to the Board, however such appeals did not result in changing the penalties imposed upon Schaefer and Robert J. Davis; that Schmidt's Board appeal is still pending; that Thomas Davis did not choose to exercise his right to appeal his suspension to the Board; and that Schaefer resigned from the Police Department on April 10, 1977.

19. That James Hundt, a non-probationary police officer in the bargaining unit represented by the Association, on two occasions was served with written charges that he had committed one or more violations of the rules of the Police Department and was ordered to stand trial or otherwise compelled to appear before the BOI; that prior to his appearance on May 30, 1975, Hundt had requested that a representative of the Association be present and be permitted to represent him; that such request was denied; that after said appearance a 5 day suspension was imposed upon Hundt, and that in said regard Hundt did not exercise his right to proceed to arbitration with respect to said suspension; that further Hundt was also scheduled to appear before the BOI in a subsequent matter on May 18, 1976, where he was permitted the representation requested by Hundt; that following said appearance the Chief suspended Hundt for 15 days; and that Hundt did not choose to appeal such suspension to the Board.

20. That non-probationary police officer Timothy Oddsen, also in the bargaining unit represented by the Association, was served with written charges that he had committed one or more violations of the rules of the Police Department and was ordered to stand trial or otherwise compelled to appear on July 25, 1977, before the BOI; that prior to his appearance before the BOI Oddsen had requested that a representative of the Association be present and be permitted to serve as his spokesperson at his appearance before the BOI; that however Oddsen was not permitted any representation before the BOI; that following such appearance the Chief imposed a 3 day suspension on Oddsen; and that Oddsen appealed such action through the contractual grievance and arbitration procedure, which resulted in an arbitrator rescinding the 3 day suspension.

21. That probationary police officers Thomas Rhodes and Thomas Dudzik, also in the bargaining unit represented by the Association, were served with written charges that they had individually committed one or more violations of the rules of the Police Department and were ordered to stand trial or otherwise compelled to appear on January 12, 1976, and June 28, 1976, respectively, before the BOI; that both Rhodes and Dudzik, prior to their appearances, requested that a representative of the Association be present and be permitted to serve as the spokesperson for each of said two officers; that a representative of the Association was permitted only to be present at said BOI appearances; that Rhodes was dismissed and Rhodes did not attempt to exercise his disputed right to grieve such dismissal by the Chief; and that Dudzik was also dismissed and exercised his disputed right to utilize the contractual grievance and arbitration procedure, and such grievance was, at the time of the hearing herein, pending before the arbitrator.

22. That prior to his above trial before the BOI Dudzik had, on May 10, 1976, filed a complaint in the Circuit Court of Milwaukee County requesting a declaratory ruling and injunction, requesting the Court to require the City and the Chief to permit Dudzik an adjournment of his BOI appearance, and that the Court declare certain rules of the Police Department, alleged to have been violated by Dudzik, as being invalid on constitutional grounds; that while said Court did issue a temporary restraining order, it ultimately quashed that order and dismissed Dudzik's action in its entirety; and that Dudzik filed a grievance with respect to his dismissal; that the Respondents have contended that Dudzik is not entitled to proceed to arbitration since he was a probationary employe; and that all issues with respect to the grievance are pending in arbitration.

23. That the conduct of investigations, trials before the BOI, denials of representation, and imposition of disciplinary penalties against the various police officers, as noted above, was done, or caused to be done by the Chief in the exercise of authority under Sec. 1, Chapter 586, Laws of 1911, all on behalf of, or in the interest of, the City; and that, however, said acts were not done or caused to be done pursuant to any specific authorization by the Common Council of the City, or any officer or agent of the City other than the Chief and other supervisory personnel of the Police Department.

24. That the parties to the instant proceeding have jointly requested the Wisconsin Employment Relations Commission (WERC) to determine whether the City or the Chief, or either of them, would commit any prohibited practice by actions of supervisory Police Department personnel as follows:

"a. compelling an employe to prepare and submit to (or for use of) supervisory personnel a written report on a subject without permitting the employe a reasonable opportunity to consult with an Association representative about the matter before preparing the report where the employe has requested such opportunity for such a prior consultation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the written report; and/or

b. compelling an employe to submit to an interrogation by (or for use of) supervisory personnel without permitting the employe a reasonable opportunity to obtain the presence of and to consult with an Association representative before and at various times during the interrogation where the employe has requested such representation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the employe's responses during the interrogation.

. . .

if the conduct described in (a) and/or (b) below is found to constitute a violation of Sec. 111.70(3)(a)1 and/or (3)(c) by either or both of the Respondents, the WERC shall impose such cease and desist and other relief as it finds appropriate and within its powers (subject, of course, to judicial review in the normal course) but that such remedial order, if any, shall be prospective only and in no way retroactive to a date earlier than the date of the WERC decision containing it."

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That Respondent City of Milwaukee is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act; that Respondent Harold A. Breier, Chief of Police of the City of Milwaukee, is deemed a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act, and, therefore, said Respondents are properly subject to the jurisdiction of the Wisconsin Employment Relations Commission to determine whether said Respondents committed prohibited practices within the meaning of the Municipal Employment Relations Act.

2. That law enforcement personnel, including personnel on probation, in the employ of the Police Department of the Respondent City of Milwaukee, with the exception of supervisors, confidential, managerial and executive employes, are municipal employes within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act.

3. That the collective bargaining agreements, which were in effect at the times material herein, between the Complainant Professional Policemen's Protective Association of Milwaukee, a/k/a Milwaukee Police Association and the Respondent City of Milwaukee does not preclude the Wisconsin Employment Relations Commission from exercising its jurisdiction to determine whether the Respondents have committed prohibited practices within the meaning of the provisions of the Municipal Employment Relations Act.

4. That the fact that Complainant Association has attempted, without success, to include provisions in their collective bargaining agreements with the Respondent City which would provide for representation by Complainant Association of employes in the bargaining unit represented by it in Police Departmental proceedings leading to possible discipline or discharge of said employes does not preclude the Wisconsin Employment Relations Commission from exercising its jurisdiction to determine whether the Respondents have committed prohibited practices within the meaning of the Municipal Employment Relations Act.

5. That the fact that, at times material herein, the Complainant Association has been unsuccessful in persuading the State Legislature to adopt a policemen's bill of rights, which in part would permit police officers to be represented at departmental hearings which might lead to discipline or discharge, does not preclude the Wisconsin Employment Relations Commission from exercising its jurisdiction to determine whether the Respondents have committed prohibited practices within the meaning of the Municipal Employment Relations Act.

6. That the fact that Officer Thomas Dudzik filed an action in the Milwaukee County Circuit Court prior to his appearance before the Board of Inquiry, and the fact that Officer Thomas Schmidt is in the midst of his appeal of dismissal before the Board of Fire and Police Commissioners does not warrant the deferral of present consideration as to whether the Respondents committed any prohibited practice within the meaning of the Municipal Employment Relations Act with respect to their appearances before the Board of Inquiry prior to the imposition of the penalties imposed on them.

7. That neither the Respondent City, nor the Respondent Chief, interfered with, restrained, or coerced any law enforcement personnel in the employ of the Police Department of the Respondent City in the exercise of their right to engage in lawful concerted activity for their mutual aid and protection with respect to:

a. the denial of the request of Daniel Ziolkowski that he be permitted representation at his Board of Inquiry appearance on January 12, 1977, since Ziolkowski failed to appear at said Board of Inquiry matter;

b. Georgia Bejma, Leonel Lopez, Gregory Cullinan, Daniel Barney, Robert Pasko and Charles Gumm, upon their appearances before the Board of Inquiry on October 30, 1975, August 19, 1977, January 1, 1977, August 18, 1977, November 11, 1977, and November 2, 1977, respectively, to be represented, since none of said employes requested such representation;

c. the denial of the request of Mark Rouleau for additional representation upon his appearance at the Board of Inquiry on June 29, 1976, since said employe did not request such additional representation;

d. the appearance of James Hundt before the Board of Inquiry on May 18, 1976, since Hundt was permitted the representation requested by him;

and therefore in the above regards, neither Respondent City, nor Respondent Chief, nor their officers or agents, committed any prohibited practice within the meaning of Section 111.70(3)(a)1, or any other section, of the Municipal Employment Relations Act.

8. That Respondent City and Respondent Chief, their officers and agents, interfered with, restrained and coerced non-supervisory, non-confidential, non-managerial, and non-executive law enforcement personnel in the employ of the Police Department of Respondent City in the exercise of their right to engage in lawful concerted activity for their mutual aid and protection by:

a. Denying the following law enforcement personnel the right to have a representative present, as requested by said personnel, at appearances before the Board of Inquiry on the dates set forth:

James Zilke - March 24, 1975
Robert Boyle - October 10, 1975
Lawrence Zieger - October 18, 1975
Thomas Schmidt - November 3, 1975
Donald Glaser - November 4, 1975
David Schauer - November 4, 1975
Judson Coleman - December 12, 1975
Jack Anthony - August 17, 1976
George Butler - August 19, 1976
Roger Hinterthuer - September 13, 1976
Roger Cortez - December 2, 1976
John Niemann - December 3, 1976
Dennis Pajot - January 13, 1977
Audrey Reiter - February 10, 1977
Rosalie Valdes - February 14, 1977
Terrance Cieszki - February 24, 1977
Leane Cymowski - March 17, 1977
Patrick Monaghan - March 24, 1977
Verbie Swanigan - March 29, 1977
Thomas Wisniewski - April 6, 1977
Howard Root - June 24, 1977
Ronald Kalivoda - July 20, 1977
Thomas Flynn - July 21, 1977
Donald Workinger - July 25, 1977
Ronald Kulinski - August 17, 1977
Joseph Ziedonis - October 20, 1977
Gary Piellusch - November 3, 1977
Eugene Kucharski - November 4, 1977
Bonnie Bauer - December 27, 1977 and January 9, 1978

b. Denying the following law enforcement personnel the right to have their representatives serve as their spokespersons, after having made such a request, at appearances before the Board of Inquiry on the dates set forth:

Richard Menzel - January 9, 1976
Thomas Rhodes - January 12, 1976
Thomas Davis - April 6, 1976
Robert Davis - April 9, 1976
Thomas Schmidt - April 20, 1976
Helmut Schaefer - May 14 and 18, 1976
Thomas Dudzik - June 28, 1976

c. Denying Officer James Hundt the right to have a representative present and to represent Hundt at the latter's appearance before the Board of Inquiry on May 30, 1975, after Hundt had made a request for such representation, and

d. Denying Officer Timothy Oddsen the right to have a representative present and that said representative act as Oddsen's spokesperson at the latter's appearance before the Board of Inquiry on July 25, 1977, after Oddsen had made a request for such representation;

and, therefore, in said regards the Respondent City and Respondent Chief, their officers and agents, have committed prohibited practices within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

9. That should Respondent City or the Respondent Chief, their officers and agents, with respect to the law enforcement personnel in the employ of the Police Department of Respondent City, in the collective bargaining unit represented by the Complainant Association

a. compel an employe to prepare and submit to (or for use of) supervisory personnel a written report on a subject without permitting the employe a reasonable opportunity to consult with an Association representative about the matter before preparing the report where the employe has requested such opportunity for such a prior consultation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the written report; and/or

b. compel an employe to submit to an interrogation by (or for use of) supervisory personnel without permitting the employe a reasonable opportunity to obtain the presence of and to consult with an Association representative before and at various times during the interrogation where the employe has requested such representation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the employe's responses during the interrogation,

then said Respondents would be found to have interfered with, restrained, and coerced said law enforcement personnel in the exercise of their rights to engage in lawful concerted activity for their mutual aid and protection, and would thereby be found to have committed prohibited practices within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

1. IT IS HEREBY ORDERED that the allegations in the amended complaint filed herein relating to Daniel Ziolkowski, Georgia Bejma, Leonel Lopez, Gregory Cullinan, Daniel Barney, Robert Pasko, Charles Gumm, Mark Rouleau, and with respect to the Board of Inquiry appearance of James Hundt on May 18, 1976, be, and the same hereby are, dismissed.

2. That Respondent City and Respondent Chief, their officers and agents, with respect to law enforcement personnel in the employ of the Police Department of Respondent City, in the collective bargaining unit represented by Complainant Association, shall immediately:

a. Cease and desist from interfering with, restraining or coercing said employes in the exercise of their right to engage in concerted activity for their mutual aid and protection by:

(1) Compelling an employe to appear before a Board of Inquiry, or other type of trial tribunal, without permitting the employe, if he does appear, to have an attorney of, or any other representative of, the Complainant Association present as an advisor and/or spokesperson where the employe has requested such representation;

(2) Compelling an employe to prepare and submit to (or for use of) supervisory personnel a written report on a subject without permitting the employe a reasonable opportunity to consult with a representative of the Complainant Association about the matter before preparing the report where the employe has requested such opportunity for such a prior consultation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the written report; and

(3) Compelling an employe to submit to an interrogation by (or for use of) supervisory personnel without permitting the employe a reasonable opportunity to obtain the presence of and to consult with a representative of the Complainant Association before and at various times during the interrogation where the employe has requested such representation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the employe's responses during the interrogation.

b. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

(1) Immediately notify Judson Coleman, Thomas Rhodes, Thomas Dudzik and Howard Root by registered mail, at their last known address, with simultaneous copies to Complainant Association, that the Respondent City and Respondent Chief, their officers and agents, will proceed to fact finding with the Complainant Association acting on behalf of said individuals, in a new investigatory inquiry pertaining to the penalty imposed upon them on December 12, 1975, January 12, 1976, June 28, 1976, and June 24, 1977, respectively, provided any of the individuals involved desires to so proceed, and provided any of them so notifies the Respondent City, Respondent Chief and Complainant Association, in writing, within ten (10) days of the receipt of the notification from Respondent Chief that he will proceed to fact finding;

(2) Proceed to fact finding with the Complainant Association with respect to matters set forth above in b. (1), with regard to those individuals who properly notify the Respondent City, the Respondent Chief, and the Complainant Association that they desire to so proceed, before a single fact finder selected by the parties from a panel furnished to them by the Wisconsin Employment Relations Commission, for the purpose of conducting a hearing to adduce evidence relating to the charges leading to the penalties previously imposed on Judson Coleman, Thomas Rhodes, Thomas Dudzik and Howard Root, and upon completion thereof the fact finder shall make written findings of fact and recommendations to the Respondent Chief as to the appropriateness of the original penalties imposed upon them;

(3) In good faith duly consider the fact finder's recommendations, and within ten (10) days of the receipt of such recommendations notify, in writing, the Complainant Association and the individuals involved as to the Chief's decision in the matter;

(4) Upon receipt of a statement of the fact finder's fees, and a statement reflecting the cost of the fact finder's copy of the transcript of his hearing, if any such copy is requested by the fact finder, pay the entire amount of the fact finder's fees, as well as the cost of his copy of the transcript;

(5) Notify the employes in the bargaining unit represented by the Complainant Association, by posting, where notices to said employes are usually posted, copies of the notice attached hereto and marked Appendix "A". Copies of such

notice shall be signed by the Respondent Chief, and shall remain posted for a period of thirty (30) days from the date of posting. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other materials.

(6) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of the receipt of a copy of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Gary L. Covelli
Gary L. Covelli, Commissioner

NOTICE TO EMPLOYES IN THE BARGAINING
UNIT REPRESENTED BY MILWAUKEE
POLICE ASSOCIATION

Pursuant to an ORDER of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, you are hereby notified that:

Neither I nor any other supervisory officer of the Milwaukee Police Department will:

1. Compel an employe to appear before a Board of Inquiry or other trial-type tribunal without permitting the employe to have an attorney of, or other representative of, the Milwaukee Police Association as an advisor or spokesperson where the employe has requested such representation.

2. Compel an employe to prepare and submit to (or for use of) supervisory personnel a written report on a subject without permitting the employe a reasonable opportunity to consult with a representative of the Milwaukee Police Association about the matter before preparing such report, where the employe has requested such opportunity for such a prior consultation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from, or be based upon, in whole or in part, the written report.

3. Compel an employe to submit to an interrogation by (or for use of) supervisory personnel without permitting the employe a reasonable opportunity to obtain the presence of and to consult with a representative of the Milwaukee Police Association before and at various times during the interrogation where the employe has requested such representation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from, or be based upon, in whole or in part, the employe's responses during the interrogation.

Further, I will:

1. Immediately notify Judson Coleman, Thomas Rhodes, Thomas Dudzik and Howard Root by registered mail, at their last known address, with simultaneous copies to the Milwaukee Police Association, that I will proceed to fact finding with the Association, acting on behalf of said individuals, in a new investigatory inquiry pertaining to the penalty imposed upon them on December 12, 1975, January 12, 1976, June 28, 1976, and June 24, 1977, respectively, provided each of said employes notifies the City, me and the Milwaukee Police Association, in writing, within ten (10) days of the receipt of my notification that I am willing to proceed to such fact finding.

2. Consider, in good faith, the fact finder's recommendations, and will, within ten (10) days of the receipt of such recommendations notify, in writing, the Milwaukee Police Association and the individual involved as to my decision with respect to the fact finder's recommendations.

The City of Milwaukee shall be responsible for the payment of the fees of the fact finder and for the cost of a copy, if any, of the transcript required by the fact finder.

Dated this _____ day of _____, 1980.

By _____
Chief of Police of the City of Milwaukee

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIALS.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

HISTORY OF THE PROCEEDING

In its amended complaint the Milwaukee Police Association (Association) alleged that, on various occasions on and after March 24, 1975, Respondents have violated Section 111.70(3)(a)1 of the Municipal Employment Relations Act (MERA), and that Respondent Chief has also violated Section 111.70(3)(c), MERA, by preventing bargaining unit employes represented by the Association from receiving certain degrees of representation from Association representatives in connection with compelled investigatory interviews with supervisory officers, and allegedly compelled appearances to answer charges of violations of Police Department rules before a Board of Inquiry (BOI) consisting of supervisory and non-supervisory officers.

The subject matter of the amended complaint was, in part, initially raised in letters to the Commission 1/ from the Association for clarification and enforcement of the Commission's order in a previous case involving Respondents. 2/ In that case, pursuant to a complaint filed by Thomas M. Schmidt, the Commission affirmed Examiner Marvin L. Schurke's conclusion that the Respondents violated Section 111.70(3)(a)1, MERA, ". . .by the actions of their subordinates to deny Thomas M. Schmidt representation by the Association in proceedings before a Board of Inquiry established within the Milwaukee Police Department concerning the discipline of Schmidt, and by executing a disciplinary penalty against him arising out of recommendations made by such Board of Inquiry . . ." 3/

1/ The letters involved were dated May 20, June 8 and June 15, 1976.

2/ City of Milwaukee (13558-C) 5/76.

3/ City of Milwaukee (13558-B) 1/76. Examiner Schurke had also issued an order denying the Respondents' post-hearing motion requesting leave to file an amended answer and to reopen the hearing for consideration of theretofore unpleaded defenses which were based on a theory that the Association had contractually or otherwise waived the rights claimed violated in the Schmidt I complaint (13558-A) 8/75. The Commission expressly affirmed that aspect of Examiner Schurke's decision as well, but included the following statement at the end of its Accompanying Memorandum:

> "It should be noted 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 Association, and should the Association 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 Association 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 Commission also affirmed Examiner Schurke's Order that Respondents rescind the suspension imposed on Schmidt, make Schmidt whole, expunge his record, and both "cease and desist from refusing to permit representatives of the Association to represent employes in the recognized bargaining unit of law enforcement employes in hearings before Boards of Inquiry concerning the discipline of such employes" and "permit Thomas M. Schmidt and any employe similarly situated representation by the Association, or by any other labor organization representing such municipal employes, in any rehearing before the Board of Inquiry of the charges filed on or about March 14, 1975 or in any other disciplinary hearing before the Board of Inquiry."

Following Association's submission of the aforesaid requests for enforcement and clarification of the applicability of the Commission's May 1976 affirming order as affecting other employes, the Commission ordered that a hearing on compliance be conducted, consistent with the intent expressed in the memorandum accompanying the May 1976 affirmance. 4/ Such a compliance hearing was postponed pending the outcome of discussions of possible settlement of the Respondents' pending petition for judicial review of the Commission's decision in Schmidt I. That court proceeding 5/ was ultimately settled pursuant to a stipulation of the parties 6/ to the effect that the order would be modified so as to make reference to no employe except Schmidt and to no future BOI proceeding other than a rehearing, if any, of the charges heard in the BOI proceeding that gave rise to the Schmidt I complaint. 7/ Following that settlement of the judicial review proceeding, the Commission set aside its order for the hearing on compliance, 8/ leaving for subsequent hearing and decision the several cases involving similar issues which had arisen as of that date.

Three employes in the bargaining unit filed complaints raising the range of issues in dispute herein. 9/ Those complaints were consolidated for hearing before Examiner Marshall L. Gratz. During the course of the proceedings before the Examiner, the following procedural developments occurred.

Pursuant to notice, hearing was convened on October 7, 1976, and then adjourned for the purpose of conducting prehearing conferences, following the submission of amended pleadings. Prehearing conferences were held on January 13, 17 and 25, 1977. The Examiner issued a summary of the results of those conferences on February 25, 1977, and an amendment thereof on March 28, 1977.

4/ See, Footnote 3.

5/ City of Milwaukee and Harold A. Breier, Chief of Police v. WERC, Milwaukee County Circuit Court No. 443-342.

6/ The stipulation was executed by Counsel for the City and Chief and by Counsel for WERC; however, it was apparently entered into with the approval of Counsel for the Association and for Complainant Schmidt.

7/ Circuit Judge Robert C. Cannon issued an order to this effect on August 4, 1976.

8/ (13558-E) 3/77.

9/ Those complaints were filed by Thomas M. Schmidt on June 11, 1976, Thomas J. Dudzik on August 24, 1976, and Helmut J. Schaefer on September 3, 1976. Another complaint had been filed on February 24, 1976, by Tom H. Rhodes, Jr. See, footnote 10, below, and our disposition of said complaint issued today in Decision No. 14394-B.

As a consequence of said prehearing conferences, the pleadings were consolidated and amended; a motion to dismiss based upon Respondents' pleaded affirmative defenses was deemed to have been filed; facts and exhibits were stipulated; further hearing was waived with respect to said motion. The parties agreed that said motion should be determined before the hearing on the balance of the amended complaint was conducted, and briefs were filed with respect to said motion, the last of which was received on May 19, 1977.

On November 18, 1977, the Examiner issued an order denying the Respondents' motion to dismiss the amended complaint in all respects, and scheduling hearing with respect to the balance of the issues joined in the amended pleadings.

Thereafter, additional prehearing conferences were held in Milwaukee on December 6 and 27, 1977, February 3 and August 2 and 8, 1978; summaries of those conferences and of substantial related correspondence were issued by the Examiner on February 13, June 20 and 30, and August 11, 1978. During the course of the foregoing developments, the complaint and answer were amended further and additional affirmative defenses were pleaded by Respondents, (inter alia, in the form of a motion to dismiss dated March 30, 1979).

With regard to the alleged denials of representation in pre-Board of Inquiry procedures within the Department cited in the resultant consolidated and amended complaint, the parties agreed that if the conduct described in either (a) and (b), below, or both, is found to constitute a violation of Section 111.70(3)(a)1 and/or (3)(c) of MERA by either the City or the Chief, or both, the Commission shall impose such cease and desist and other relief as it finds appropriate and within its powers (subject to judicial review in the normal course), but that such remedial order, if any, shall be prospective only and in no way retroactive to a date earlier than the date of the WERC decision containing it:

a. compelling the employe to prepare and submit to (or for use of) supervisory personnel a written report on a subject without permitting the employe a reasonable opportunity to consult with an Association representative about the matter before preparing the report where the employe has requested such opportunity for such a prior consultation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the written report; and

b. compelling the employe to submit to an interrogation by (or for use of) supervisory personnel without permitting the employe a reasonable opportunity to obtain the presence of and to consult with an Association representative before and at various times during the interrogation where the employe has requested such representation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the employe's responses during the interrogation.

The complaint, as amended, also cites alleged denials of representation with respect to some forty-nine BOI proceedings from March 24, 1975 through December 27, 1977, which preceded the imposition of forty-seven disciplinary penalties (ranging from a 3-day suspension to dismissal) imposed on some forty-four named employes. The Association requests that each of those disciplinary penalties be rescinded, that each employe be made whole, that each employe's record with regard to said penalties be expunged, and that Respondents be ordered to cease and desist from such violations in the future.

Two days of hearing before the Examiner were held in Milwaukee on August 30 and 31, 1978, and post-hearing briefing was completed on April 13, 1979. Two additional clarifications of the pleadings and record were requested by the Examiner, by conference calls to Counsel for the parties, on March 7 and 13, 1980, and the stipulations of Counsel in those regards were summarized in a letter from the Examiner dated March 14, 1980. 10/

The parties agreed, in writing, that each waived Sections 227.09(2) and (4), Stats., to the extent necessary to permit the Commission, if it decides to do so, to issue the initial decision in this matter without an intervening Examiner decision. Consistent with that agreement, the Commission has issued the instant decision.

10/ One of those matters involved the allegation that Thomas Rhodes was denied spokesperson status for the representative present with him at his Board of Inquiry appearance on January 12, 1976. That allegation was originally contained in early versions of the amended complaint, but was deleted therefrom by agreement of the parties ". . . since a separate WERC complaint proceeding deals with the identical subject matter." [Examiner's summary letter dated February 13, 1978.] In the March 1980 discussions, the Examiner noted the possibility that the WERC disposition of the Petitions for Review in that separate proceeding [City of Milwaukee, Case CLXII] might not address the merits of the above allegation. Counsel for the parties agreed that in that event the pleadings herein should be deemed amended. Specifically, they agreed that the complaint would be deemed to set forth the above allegation and a claim that a request was made that Rhodes' representative be permitted to serve as spokesperson (or that any failure to do so was legally excusable). Respondents' Answer would be deemed amended so as to deny the allegation that such a request was made and to assert that no legally sufficient excuse exists for the failure to make such a request. Respondents' Motion to Dismiss dated March 30, 1978, and filed April 3, 1978, would also be deemed amended, to include motions to dismiss the aforesaid complaint amendment on the grounds that Rhodes was a probationary employe and that, in any event, Rhodes was permitted a representative's presence and whisper-in-the-ear advice during the BOI appearance in question. The Examiner reminded the parties that official notice had previously been taken herein of the Rhodes' case record [Examiner's summary letter dated June 20, 1978] so that an evidentiary basis would exist for resolving the factual issue joined by the above amendments of the pleadings.

Since we have, this date, issued an order (Decision No. 14394-B) disposing of the separate Rhodes complaint without addressing the merits of the alleged denial of representation in connection with the BOI appearance, the contingent agreement of Counsel noted above has been given effect.

FACTUAL MATTERS IN ISSUE

The extensive prehearing conference, correspondence, hearing and post-hearing stipulation activity in this case has left few factual matters in dispute. Evidentiary issues concern whether testimony with respect to statements alleged to have been made by the late Inspector of Police Jerome Jagmin, concerning or during certain BOI proceedings, should be stricken on the grounds that Inspector Jagmin is deceased, and whether any inference can and should be drawn from the refusal of the Chief's designee to comply with a subpoena duces tecum for transcripts of the BOI proceedings herein involved.

A major area of disputed fact involves the Association's allegations, denied by Respondents, that the employes involved in this proceeding were either ordered to stand trial, or otherwise compelled to appear before the BOI. Other factual issues involve whether a threatened ejection and the search of an Association representative's briefcase undertaken over the representative's objections at one of the BOI proceedings, were "forcible" or not. Also disputed is whether certain of the employes who were permitted a representative further requested that the representative be permitted by the BOI to act as the employe's spokesperson. Finally, the issue as to whether Georgia Bejma requested representation with regard to her BOI appearance became a disputed matter when Respondents' Counsel sought leave to withdraw from a pre-hearing stipulation that she had done so, after Bejma gave hearing testimony that arguably contradicts that stipulation.

The issues of law and of mixed law and fact are more numerous. Respondents, contrary to the Association, contend that, in general, MERA does not provide City law enforcement employes any right to representation, even in BOI proceedings, Schmidt I notwithstanding. In addition, Respondents have interposed affirmative defenses that were separately heard as a Motion to Dismiss, which was denied by the Examiner in a November 18, 1977 order without accompanying memorandum. Those defenses are detailed in the discussion thereof below. In general, those defenses are: (1) that the respective Respondents are not responsible for any prohibited practices that may have been committed herein; (2) that probationary status of certain officers precludes relief under MERA herein; (3) that resort to Fire and Police Commission, or contract grievance arbitration, or circuit court proceedings constitutes an election of remedies, precluding pursuit of the instant complaint with regard to the employes; (4) that certain of the employes have failed to exercise statutory or contractual remedies such that the instant proceedings ought to be deferred pending exhaustion thereof; and (5) that the Association has waived the rights claimed violated herein by contract and by bargaining history and other conduct inconsistent with the existence of such rights.

After the complaint was amended, inter alia, so as to cite additional named employes and additional alleged instances of BOI-related violations, Respondents were deemed to have pleaded additional affirmative defenses to alleged BOI-related violations, including the grounds specified in its Motion to Dismiss dated March 30 and filed on April 3, 1978. Those defenses, which overlap to some extent with those noted above, consist of the Respondents' contentions, contrary to the Association's that the amended complaint should be dismissed as regards those of the BOI proceedings as to which certain of the named employe(s)

1. Resigned from the Department after the Board of Inquiry;
2. Was (were) probationary employes at the time of the Board of Inquiry;
3. Failed to request any representation;
4. Failed to request the degree of representation claimed denied;
5. Failed to appear at the Board of Inquiry;
6. Elected to pursue the mutually exclusive alternate remedy by initiating a grievance under the applicable collective bargaining agreement or an appeal to the Board of Fire and Police Commissioners;
7. Failed to exhaust available remedies before either the Board of Fire and Police Commissioners or a contract grievance arbitrator; and/or
8. Were permitted the presence of a designated representative who was permitted only to whisper advice to the named employe during the course of the Board of Inquiry proceeding.

DISCUSSION

Subpoenaed Board of Inquiry Transcripts

At 5:10 p.m. on the afternoon before the two days of hearing were scheduled to be conducted in this matter, the Chief was served with a subpoena duces tecum supplied by the Examiner and caused to be served by the Association. Inspector of Police Andrew Busalacchi took the stand as designee for the Chief in response to the subpoena. Inspector Busalacchi testified that all Board of Inquiry proceedings are stenographically recorded, but that although the Departmental rule calls for transcription of each such record, it is not the case that all are in fact transcribed. The Inspector then indicated that he did not have with him the subpoenaed documents and that he did not know which of those documents then existed in transcribed form and which did not.

Counsel for Respondents interjected a motion to quash the subpoena on grounds that it was a "fishing expedition" for subsequent use in Fire and Police Commission appeals; that the subpoena was served with far too little notice to permit either a determination of whether the subpoenaed documents exist or the transcription of those that do not; and that it would be unreasonable to impose the cost of transcription upon the Respondents. Respondents' Counsel further indicated that even if there were sufficient time for the Department to comply and the costs of doing so were not imposed upon the Respondents, that the Chief would not produce the subpoenaed documents because they are confidential personnel records, the non-revelation of which protects individuals involved from harassment by the press and by others who might otherwise pursue litigation based on information contained therein. He further contended that the confidential nature of the subpoenaed documents had been previously recognized by Federal Judge Myron Gordon when he quashed a subpoena seeking similar documents. 11/

The Association argued that the subpoenaed matters are relevant to several disputed issues of fact: that the Chief has made no effort whatever to comply and has indicated that he would not do so even if

---

11/ At the Examiner's post-hearing request, Respondents' Counsel supplied a copy of the ruling involved, which was issued in a case styled Albert Ballard v. Jerald Terrak, et al., 71-C-350 (W.D., Wisc., 6-16-72). That ruling has been made a part of the record herein.

permitted additional time, such that the timeliness issue ought not control; that the fact that the Respondents would be required to do some work in producing the documents involved is not, per se, a basis for quashing the subpoena; and that for all of those reasons, there is no excuse for the Chief's failure to comply with the subpoena. Finally, the Association urged that to prevent Respondents from benefiting from their suppression of relevant evidence the Commission should draw an inference adverse to the Respondents from their subpoena noncompliance. Specifically, Association requested that the Commission draw the following inferences therefrom: that no employe was offered the opportunity to leave the BOI proceedings once they were initiated; that the general tone of the BOI proceedings reveals that it would have been futile and unwise for an employe to request representation or to request more active representation than they were permitted to enjoy; that the threatened ejection and the search of the Association representative's briefcase referred to in the complaint were, as alleged, "forcible"; and that employes permitted to have a representative present did, in fact, request that such representative be permitted to take a more active role in the proceedings.

The Examiner reserved for determination, after post-hearing arguments, the question of the inferences to be drawn from the refusal to comply with the subpoena. The Examiner offered the Association the opportunity to request an adjournment to permit it to proceed either on its own or to request that the Commission proceed in a judicial enforcement action concerning the subpoena. The Association, however, expressed its desire to avoid such an adjournment and the delays that would be entailed in a subpoena enforcement action, and it presented by way of an offer of proof those matters which it contends would be revealed by the subpoenaed transcripts if they were produced.

The Commission finds it unnecessary to address any aspect of the propriety of the subpoena, the motion to quash, or the request for adverse inferences since we find that none of the disputed issues in this case would turn on, or be decided differently even if the subpoenaed documents supported the Association's position in all respects.

Testimony Concerning Transactions and Communications with the Late Jerome Jagmin

Respondents requested that testimony concerning transactions and communications between various Association witnesses and the late Inspector of Police, Jerome Jagmin, be stricken on the grounds of the "deadman's statute" and the impossibility of Respondents to elicit testimony from Inspector Jagmin concerning those matters.

The Examiner denied the motion to strike and admitted the testimony, subject to Respondents' right to submit legal authorities in support of its position at a later time. In addition, the Examiner cited the issue of whether references to transactions and communications with Jagmin should be stricken as one of the items for post-hearing briefing.

In its brief, the Association contends that the Commission is not bound by the "deadman's statute," or other statutory rules of evidence, by reason of Section 227.08(1), Stats.; that under said provision, the test for admissability is "reasonable probative value" and "[not] immaterial, irrelevant or unduly repetitious," each of which test is met by the testimony involved; that, in any event, nearly all of the transactions involved were in the presence of several other potential witnesses, including supervisors, and were stenographically recorded as part of BOI proceedings; and that, therefore, there are available means of checking the reliability of most of the testimony in question.

We find merit in the contention that the Commission is not bound by statutory rules of evidence, such as Sections 885.16 or 17, Stats., commonly known as the "deadman's statute." Moreover, the availability of other witnesses present, including supervisors, at the BOI proceedings at issue would provide an adequate means for Respondents to have checked the reliability of the assertions of Association witnesses regarding transactions and communications at those proceedings. However, no such witnesses and no stenographic record exist with respect to an elevator conversation testified to by Georgia Bejma, wherein she claims she discussed the matter of representation with Inspector Jagmin in advance of her BOI appearance. Nevertheless, we conclude that Inspector Jagmin's unavailability to testify affects the weight to be given Bejma's testimony regarding the alleged elevator conversation, rather than its admissibility.

For the foregoing reasons, we have not stricken any of the testimony regarding communications and transactions with the late Inspector Jagmin.

Alleged Compelled Nature of Board of Inquiry Appearances

Respondents, in their answer, allege ". . . that the BOI is merely an extension of the investigative arm of the Chief of Police where employes are given the opportunity to hear the complaints against them and allow them to set forth their positions." However, Respondents expressly deny the Association's allegation that the officers were ordered to stand trial or otherwise compelled to appear before the BOI. Respondents cite Department Rule No. 44(32) for the proposition that the accused need not appear. That section of said rule provides as follows:

> "SECTION 32. If any accused member having been duly notified to appear for an inquiry shall fail to so appear, a plea of 'not guilty' shall be entered in his behalf and the Board of Inquiry shall proceed summarily to hear evidence and render such verdict on the charges as the facts disclosed may warrant."

The parties have stipulated that, upon hire, all of the employes named in the complaint were supplied with a rules book which included Rule 44, which was the same in all material respects as that reflected in Exhibit 11. [August 11, 1978 summary] The record also reveals that on one occasion when an employe listed in the complaint did not appear for his BOI proceeding, Rule 44(32) was followed in that the BOI caused a plea of "not guilty" to be entered on the accused's behalf and proceeded summarily to hear evidence and render a verdict.

The Association, on the other hand, contends that the uncontradicted testimony it elicited from seventeen of the named officers to the effect that they were informed and/or oriented to their BOI proceeding(s) in a manner that unequivocally signified that they were being ordered, or otherwise compelled, to appear at and remain throughout those proceedings warrants the inference that the balance of the individuals listed in the amended complaint (none of whom testified herein) were similarly compelled to attend and remain. The Association also contends that the accused involved could only conclude that they were being compelled to appear and remain, absent any supervisory statement to the contrary, given the personal service of written charges on the form utilized, the strict para-military nature of the Department, the existence of

Department Rules 44(15) and (28) 12/ and the fact that with only one exception to any witnesses memory all employes attended their Board of Inquiry proceedings upon service with charges. Finally, the Association notes that sometime after the last of the Board of Inquiry proceedings cited in the amended complaint, Department management altered the form upon which written charges are entered and which is served upon the accused to a new form described by Inspector Busalacchi as one ". . . we felt would explain to the Officer that he didn't have to appear if he didn't want to appear, so consequently, we . . . wrote up a new charge form which we felt would give the Officer awareness of the fact that he didn't have to appear if he didn't want to." Inspector Busalacchi testified that the aforesaid change in charge form was made "when it became obvious that officers were not aware that they either had a choice of appearing before the BOI, or not appearing."

We find the Association's contentions above to be persuasive and fully supported by the record. The form of written charges served on each of the individuals listed in the complaint contains an order signed by Respondent Chief in the form "ORDER: Trial of accused to be held on _____, 19__, at _____ o'clock ___M." Moreover, the record revealed a fairly consistent pattern of supervisory communications to the accused at the time of service of charges. That pattern involved a personal conversation with the accused at work or at home, a reading of the charges and personal service of the charges document, a direction that the accused was to appear in uniform at a BOI proceeding, and a direction that the accused should return the charges document to the BOI chairman at that time. It is noteworthy and undisputed that those few instances wherein the employe specifically asked supervisory officers whether the appearance was required supervision replied that it was. There is no instance in the record of a supervisor informing an accused to the contrary. In the contexts of the respective Rule 44(15) and (28) references to "members who have been ordered before the Board of Inquiry on charges . . ." and to the fact that ". . . the accused . . . shall remain until the conclusion of the taking of testimony and both sides of the case have rested," the arguably contradictory references in Rule 44(32) to the accused member being "notified to appear for an inquiry" and to automatic entry of a not guilty plea and to the conduct of hearing in absentia would give an employe little confidence that they could, with impunity, fail to appear or to remain at the BOI proceedings in question herein. In sum, the record overwhelmingly supports the finding of compulsion urged by the Association.

12/ Said sections read as follows:

"SECTION 15. Notice for members of the Department to appear before the Board of Inquiry as witnesses for the Department may be given by personal communication, in writing, or by telephone. Members of the Department when required as witnesses for the accused shall, upon application by the accused, be ordered by the respective commanding officers to attend an inquiry. Should valid reasons prevent compliance with such notification, the Inspector of Police shall be promptly advised.

Commanders of districts and heads of bureaus of members who have been ordered before the Board of Inquiry on charges shall be responsible for the summoning of witnesses and for the proper preparation of the cases.

Alleged Requests that Representative be Permitted to Act as Spokesperson

There is also an allegation that certain of the accused listed in the amended complaint had not only requested that a representative be permitted to be present, but also that the representative be permitted to serve as the accused's spokesperson, i.e. be permitted to address the BOI and to question witnesses. The allegation in that regard was denied as regards Thomas Dudzik, Menzel, Rouleau, R. J. Davis and Rhodes, and admitted as regards the others, as noted in the Findings of Fact.

The Association presented uncontradicted testimony to the effect that Thomas Dudzik and Menzel, themselves, requested during their BOI proceedings that their representative be permitted to act as spokesperson and that such request was denied. The Association also presented uncontradicted testimony that during the BOI proceeding regarding R. J. Davis, Jerome Dudzik, the Association representative accompanying Davis at the hearing, requested that he be permitted to serve as Davis' spokesperson and that said request was denied. Finally, in the Rhodes' record witnesses of both parties confirmed that Rhodes' representative initially complied with a directive that he not address the BOI or question witnesses, without expressly requesting a spokesperson role, but that later in the proceeding the representative addressed the BOI, outlining Rhodes' position in certain respects and ". . . insisting on doing so until he finally agreed to remain quiet. . ." at the direction of the BOI chairman.

Based on the above-noted uncontradicted testimony and on the fact that R. J. Davis and Rhodes were present when their representatives made the requests on their behalf, such that there can be no doubt that the representatives' requests reflected the accused's desires in each matter, we find that these disputed requests were made.

The testimony presented by Association witnesses concerning Rouleau was conflicting, however. Robert Kliesmet, an Association representative, and Rouleau both testified that when the two of them entered for Rouleau's BOI appearance, Inspector Jagmin informed Kliesmet that the latter's role was limited to advising Rouleau by passing notes to him. However, Kliesmet testified that Rouleau then specifically requested that Kliesmet be permitted to address the BOI and to question witnesses. Rouleau, on the other hand, testified that when Jagmin expressly limited Kliesmet's role as noted above that he, Rouleau, did not request that Kliesmet be permitted to play a more active role. Because of that conflict, we are not persuaded that the Association has carried its burden of proving that Rouleau requested that Kliesmet be permitted to serve as his spokesperson.

Lack of Allegation with Respect to "Forcible" Nature of Search of Representative's Briefcase and of Threatened Ejection of Representative

Uncontroverted testimony established that a briefcase of Jerome Dudzik, an Association representative, was forcibly searched during the BOI proceeding involving Schmidt, and that Robert Kliesmet, another Association representative, was threatened with ejection from the BOI proceeding involving Schaefer. Since no independent violation of MERA was alleged with respect to said incidents, and since the role of the Association in BOI proceedings was established by other evidence, we have made no finding of fact nor a conclusion of law with regard thereto.

Dispute Regarding Whether Georgia Bejma Requested Representation

In the pre-hearing stipulation process, Respondents admitted the allegation that Bejma requested representation in connection with her October 30, 1975 BOI appearance. However, at hearing, Respondents' Counsel, while testing Bejma's credibility, inquired, without objection, as to the identity of the supervisor to whom Bejma made her request for representation. Her responses revealed that she had not requested representation during the BOI hearing itself. Based on that testimony, Respondents' Counsel essentially requested that the previously undisputed claim that representation had been requested be deemed in dispute.

Further questioning, on cross and re-direct, revealed that Bejma had two conversations with supervisory officers concerning representation at her BOI hearing. The first was with Sergeant Stein as they left Captain Anderson's office immediately after Bejma had been served with the charges. Bejma testified, "I said to him [Stein], you mean I have to go up there alone, and his answer was, it's always been that way." The second was several days later, but sometime before Bejma's BOI hearing. Bejma testified that, on that occasion, she and Inspector Jagmin were on an elevator together ". . . and I said to him, didn't--or how I would go about getting someone in to represent me. And he said to me, everybody's been notified, and there is no further discussion. And that was the end of that. I mean, I just didn't do anything after that." The record reveals that the Association understood that the prior stipulation on the point was being disputed.

On the basis of the foregoing, we have found that the instant issue was fairly drawn back into dispute and that the Association has not carried its burden of proving by the requisite clear and satisfactory preponderance of the evidence that Bejma addressed a timely request to an appropriate supervisor that an Association representative be permitted to be present with her during the subject BOI proceeding, as alleged in the amended complaint.

The discussions with each of the supervisors in question were inquiries as to the nature of Bejma's rights rather than an exercise of a right. Bejma apparently decided to rely on the supervisors' opinions that she had no right to representation and did not request representation. Moreover, because Jagmin is unavailable to testify as to the elevator conversation, we are not inclined to give substantial weight to Bejma's testimony regarding that conversation, in any event.

The Disputes of Law and of Mixed Fact and Law

The essence of the amended complaint is that Respondents have, within the meaning of Section 111.70(3)(a)1, MERA, interfered with, restrained or coerced municipal employes in the exercise of their Section 111.70(2), MERA, rights ". . . to engage in lawful concerted activities for the purpose of . . . mutual aid and protection . . . ." As we stated in Waukesha County, which we affirmed in all respects, 13/

> ". . . some municipal employer actions that, in the broadest and most literal senses of the terms, 'interfere with' or 'restrain' municipal employes' exercise of Sec. 111.70(2) rights have been held not to violate Sec. 111.70(3)(a)1. [Citations omitted.]

13/ Decision No. 14662-A, B (3/78).

> Rather, the traditional mode of analyzing whether a violation of those quoted terms . . . [whether in MERA or in the National Labor Relations Act] has occurred has involved a balancing of the interests at stake of the affected municipal employes and of the municipal employer to determine whether, under the circumstances, application of the protections of the interference and restraint prohibitions would serve the underlying purposes of the act. . . ." [Citations omitted.]

It is the balancing analysis described above that must be applied on a case-by-case and issue-by-issue basis to determine whether, in any given set of circumstances, the municipal employer conduct involved interferes with or restrains employes in the exercise of their MERA rights. While the results of that balancing analysis may leave employes with lesser protections than they consider necessary, it should be noted that additional protections may be negotiated contractually. The Commission's determinations herein relate to the requirements of, and limitations on, the right to representation under MERA.

General Applicability of MERA Right to Representation to Board of Inquiry Proceedings

In Schmidt I the Commission held, in fact circumstances materially the same as those herein, that law enforcement employes in the Milwaukee Police Department are protected by MERA from compelled attendance at a BOI hearing investigating charges against employes, which the employes have reason to believe could result in a subsequent supervisory decision to discipline or discharge the employes, unless they are permitted to enjoy representation by the labor organization of their choice at such proceeding. While the remedial order in that case was ultimately limited to making Schmidt whole, and to proscribing a similar violation in connection with his rehearing on the same charges, and while the question of whether the above-described right had been waived by the Association was reserved for later case determination, the general conclusion of law that the conduct involved otherwise constituted a violation of Section 111.70(3)(a)1, MERA, was not affected by any of the review proceedings.

Two principal arguments were advanced by Respondents herein, besides those argued and rejected in Schmidt I, and we find neither persuades us to reverse the general conclusion of law (noted above) reached in Schmidt I. The first of those arguments is that BOI proceedings are and must remain confidential for the protection of the accused from civil or criminal prosecution and from harassment by the press and others that could be based on BOI revelations, if they were subject to disclosure to any outside parties. Respondents reason that the confidentiality of the process will be lost, along with the accompanying privilege against disclosure to outsiders, if a union representative is permitted to attend the BOI proceeding. In support of those contentions, Respondents cited a ruling of Federal Judge Myron Gordon sustaining the Chief's refusal to produce BOI transcripts in a proceeding before him.

In response to the confidentiality argument, the Association asserts that BOI proceedings are not protected by any legally recognized privilege against disclosure; that Judge Gordon's ruling is not in point herein; and that, if such a privilege exists, it runs to the accused rather than to Respondents such that the accused should be allowed to waive it by, inter alia, allowing a representative to accompany him/her at the BOI.

We are persuaded by the last argument, and on that basis we reject the notion that confidentiality interests require non-representation of employes in BOI proceedings.

Respondents' second argument is that a holding such as that in Schmidt I impermissibly interferes with and therefore contravenes what was at material times Chapter 536, Laws of 1911 (and later recreated in 1977 and codified as Sec. 62.50, Stats., by Chapter 151, Laws of 1977). The portions of that statutory provision so contravened, according to Respondents, are those making the Chief responsible for the efficiency and general good conduct of the department under his control and granting him the corresponding broad 14/ and exclusive power to regulate his department and to prescribe rules therefor; and those making provision for a "cause" standard and Board of Fire and Police Commissioners review of non-probationary discharges or suspensions of Department employes for 30 days or more, and for disposition of charges arising from complaints against members of the Department arising outside the Department, which disposition could involve a disciplinary penalty initiated by the Board of Police and Fire Commissioners. According to Respondents, the interference with those statutory powers is inconsistent with the relationship between general powers statutes and municipal labor relations statutes contemplated by the Supreme Court in the City of Neenah, 15/ Glendale Police, 16/ and Muskego-Norway 17/ cases.

In our view, those cases call, where possible, for a harmonization of the statutory provisions involved, unless an irreconcilable conflict is present. Here, we believe there is no irreconcilable conflict. Rather, the powers of the Board of Fire and Police Commissioners relate to review by that body of the merits of disciplinary penalties imposed by the Chief, and for a possible imposition of disciplinary measures by the Board itself in the case of charges initiated by an aggrieved person outside the Department. The Board's powers in those regards are not diminished by WERC adjudication and prevention of prohibited practices committed in the procedural development of discipline cases within the Department. Adjudication of such issues is not the Board's function.

The Chief's powers involved herein involve the power to impose discipline and to make rules to that end. While a recognition of the MERA right to representation will be inconsistent with the provisions of a rule promulgated by the Chief, under that statutory authority, such as Rule 44(18) which provides, in part:

> "Since Department inquiry procedures are in the nature of confidential official investigations, the accused shall not employ attorneys or other persons to defend them . . . [,]"

14/ Respondent cites, inter alia, State ex rel Kaszewski v. Board of Fire and Police Commissioners, 22 Wis. 2d 19 (1963) for the proposition that the Chief's powers are to be broadly construed in order to permit the Chief to fulfill the critical role of preserving public peace, enforcing the laws, and supervising Department personnel.

15/ [illegible]

such an inconsistency does not render MERA inconsistent with the statute empowering the Chief to make rules regarding, inter alia, Departmental disciplinary procedures. Rather, a proper harmonization of the Chief's rulemaking powers with the MERA right to representation, recognized in Schmidt I, can be achieved on the basis that Chief's powers remain intact, but must be exercised with a recognition of the procedural protections that MERA requires be afforded the employes in whatever disciplinary procedure the Chief constructs and promulgates in his rules. The interests of the Chief and of the Board of Police and Fire Commissioners are appropriately given weight in the balancing analysis described herein, and a harmonization based on the results of that balancing process appears consistent with our State Supreme Court's caselaw principles.

As will be described in greater detail below, the interests that an employe has at stake in the trial-on-charges situation, such as the BOI, are significant, the value of representation to the employe in that setting is substantial, the impairment of employer interests caused by representation is modest, and representation is consistent with, and arguably promotive of, the underlying purposes of the BOI proceeding itself. For those reasons, harmonization of the statutes involved requires the conclusion that a MERA right to representation attaches in the BOI situation.

The facts herein indicate that no BOI representation was permitted under any circumstances before Examiner Schurke's decision in Schmidt I was issued on January 5, 1976; that no BOI representation was permitted under any circumstances at any material time after Judge Cannon's order (amending the WERC Schmidt I order) was issued on August 5, 1976; and that, during the interim period, employes requesting representation at their BOI hearing were permitted to have an Association representative present, but not an Association attorney, and the representative was limited to, at most, communicating advice to the accused by whispering or passing notes.

The Affirmative Defenses Previously Rejected by the Examiner

The eight affirmative defenses initially alleged by Respondents and the bases for the Commission's conclusion that the Examiner properly rejected each are set forth below.

Affirmative Defense No. 1 - The City lacks legal authority to, and did not in fact, authorize or direct the conduct complained of, and so, it cannot be held legally responsible for same.

A charter ordinance was enacted by the Common Council and Mayor well after 1911 expressly designating the Chief of Police as an officer of the City. 18/ While the Legislature has substantially insulated the Chief

---

18/ Section 1, Charter Ordinance 310. This and all other references to Charter Ordinances are drawn from the City of Milwaukee [Wisconsin] Charter, 1971 compilation enacted on April 16, 1965. That provision carried froward language enacted in Sec. 3, Ch. Ord. 119 on May 4, 1942.

The Examiner advised the parties on November 18, 1977, that he was taking official notice of: The Milwaukee City Charter, 1971 compilation, Sections 4.01, 4.10, 4.21, 21.01-04, 21.06-07, 21.08-16, 21.19, 22.03, 22.06, and 22.11 (other portions of which are already in the record); of the fact that the language comprising said Charter Sec. 2.01 is Sec. 1 of Charter Ordinance 310 ordained by the Common Council and Mayor on April 26, 1965, and previously contained in Charter Ordinance 119 which was so ordained on May 4, 1942; of the contents of 1977 Senate Bill 224; and of the fact that the Wisconsin Senate and Assembly passed 1977 Senate Bill 224.

from political control by the Council and Mayor of the City 19/ for reasons of state-wide concern for uniform regulation of police departments, 20/ and for reasons noted below, the Chief is nonetheless acting on behalf of and in the interest of the City in his exercise of those powers. For that reason and because a municipal corporation is ordinarily legally responsible for the acts of its designated officers, 21/ the City is a proper party-respondent herein.

Affirmative Defense No. 2 - The Chief could not have committed the prohibited practices alleged, since he is neither a "municipal employer" within the meaning of Section 111.70(1)(a), MERA, nor a person acting on behalf of, or in the interest of, a municipal employer within the meaning of Section 111.70(3)(c), MERA.

The Chief argues that the Commission's decision dismissing the petition of William Stamm, Chief Engineer of the Milwaukee Fire Department, 22/ for a declaratory ruling pursuant to Section 111.70(4)(b), MERA, stands for the proposition that a Chief exercising authority under Chapter 586, Laws of 1911, is not a municipal employer. The Chief's argument in this regard draws attention to the following portion of the Commission's "DISCUSSION" in a memorandum attached to its order dismissing the petition in the case involving Stamm:

> "We conclude that the Petitioner has no standing to proceed under Section 111.70(4)(b) of MERA since the expression 'municipal employer' within the meaning of that subsection refers to an entity with the power to bargain collectively and negotiate an agreement. Petitioner has failed to allege or establish that the City of Milwaukee has empowered him to reach such an agreement."

The decisional language above makes clear that it does not stand for the argued-for propositions that municipal police and fire chiefs are free of the prohibitions of MERA.

19/ The Common Council retains the exclusive role of fixing the limit of the Chief of Police's expenditure of City funds. Sec. 18, Charter Ordinance 310, City of Milwaukee, Wisconsin.

20/ Section 66.01(15), Stats. See also, State ex rel Kaszewski v. Board of Fire and Police Commissioners, 22 Wis. 2d 19, 25-6 (1963) (Broad powers to maintain internal department discipline are vested in the Chief in order to preserve trust and confidence in the department among its personnel and the public to better serve the end of public peace and law enforcement), cited by Respondents.

21/ Section 895.46, Stats. (political subdivision of state responsible to pay judgments entered against officer for acts within scope of employment). cf. Waunakee Joint District No. 1, Decision No. 6706 (4/64) (District responsible for acts of its supervisor) and Janesville Board of Education, Decision No. 8791-A (3/69) (School District responsible for statements of Board president because of his position even though Board had not authorized the statements).

22/ In the Matter of the Petition of William Stamm, Chief Engineer of the Milwaukee Fire Department, Decision No. 15131 (12/76).

Respondents further argue that the Chief was not a "person acting on behalf of a municipal employer within the scope of his authority," because the authority he exercises derives from an act of Legislature of state-wide concern rather than from an act of the Council, Mayor or electorate of the City. That the Chief performs the duties of Chief "on behalf of" Respondent City is established from the following facts: Chapter 586, Laws of 1911, itself provides "the chief of police shall cause the public peace to be preserved and see that all laws and ordinances of the city are enforced," that the chief of police has "the custody of all public property pertaining to said department . . .," [emphasis supplied] that the chief of police is the "head" of the police department, and that the Common Council of the City is responsible for paying salaries and pensions of department personnel including the Chief. It has been stipulated herein that the Police Department is a department within the City and that the personnel in the Police Department are employed by the City; thus, the Chief regulates and supervises employes of the City; charter ordinances of the City provide that the City appropriates the monies for the expenditures of the department, 23/ and that revenues received by the department or any employe thereof as reward or compensation in the performance of official duties or special services shall become the property of the City. 24/

The "authority" referred to in Section 111.70(1)(a) does not, from the context of that section, appear required to flow from the municipal employer on whose behalf it is exercised in order for the person exercising it to be included within the term "municipal employer." The Commission concludes that such authority need not flow from a municipal employer, but may, as here, flow from an act of the Legislature. For the foregoing reasons, the Commission has concluded that the Chief is a municipal employer within the meaning of Section 111.70(1)(a). 25/

The Commission has concluded that the Chief can be held legally responsible for prohibited practices. Permeating the Respondents' arguments to the contrary has been the notion that the Chief's exercise of powers under Chapter 586, Laws of 1911, must remain unfettered by the prohibitions contained in MERA. The Commission has rejected that contention previously, 26/ noting that the Chief's power to regulate the department provided in Chapter 586, Laws of 1911, is presumed to have been known to the Legislature when it subsequently enacted employment relations laws for municipal employment, 27/ and that the two laws must be harmonized so as to reconcile any conflict if possible. 28/ In that case, the Commission declared that rules and regulations promulgated by the Chief pursuant to Chapter 586, Laws of 1911, but affecting wages, hours and/or working conditions of bargaining

---

23/ Section 18, Charter Ordinance 310.

24/ Section 3, Charter Ordinance 52.

25/ Chippewa County (17328-B) 5/80.

26/ City of Milwaukee, Decision No. 9429 (1/70), affirmed Dane County Circuit Court, sub. nom. City of Milwaukee v. WERC, No. 129-468 Sachtjen, J., 2-16-71).

27/ Citing, Muskego-Norway Consolidated Schools v. WERC, 35 Wis. 2d 540 (1967) and Town of Madison v. City of Madison, 269 Wis. 609 (1967).

28/ Citing, Muskego-Norway, above, footnote 27/; Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542 (1967).

unit personnel were subjects about which Complainant was authorized by the then Section 111.70 to petition the City for changes. Thus, where, as here, the Chief designs a system of investigation into employe conduct involving compelled employe contacts with supervisors, the MERA protections of employe rights to representation in such circumstances, if any, must also be given effect. The existence and nature of the precise nature of the MERA requirement in the instant circumstances are addressed elsewhere in this Memorandum.

Affirmative Defense No. 3 - Probationary employe status of some of the individuals at the times they were allegedly denied representation is sufficient, per se, to establish that they lack any right either to a hearing or to representation in connection with any hearing held concerning their discipline or discharge.

Respondents rely on a decision of Judge O'Connell involving an action brought by Officer Dudzik. However, Judge O'Connell's comments and those in the authorities cited by him in his decision deal only with the existence, or nonexistence, of a liberty or property interest in continued employment entitling a probationer to constitutional due process protections. Finding such an interest lacking on account of Thomas Dudzik's probationary status under rules promulgated both by the Chief and by the Board, Judge O'Connell concluded Dudzik was not entitled to the protections of constitutional due process. Such a determination is inapposite to a determination of the existence or non-existence of statutory protection of Dudzik under MERA.

Instead, the general applicability of MERA protections depends upon whether Dudzik was a municipal employe within the meaning of Section 111.70(1)(b). Since he was employed by the City, a municipal employer, Dudzik was a municipal employe. That conclusion is buttressed by the fact that he held the position of patrolman when the investigation procedures in question occurred. That position is within the certified bargaining unit and within the unit for which the Association is the representative. Neither the certification nor the contract recognition clause excludes probationary employes, and probationary employes have been treated as municipal employes within the meaning of MERA. 29/ Probationary status does not disqualify probationers, per se, from otherwise applicable protections under MERA.

Affirmative Defense No. 4 - The efforts by Schmidt and Dudzik to seek to overturn or avoid the disciplinary penalties complained of herein in one or more other forums constitutes an election by them such as must bar access to the WERC for that purpose.

Neither Schmidt's appeal to the Board, nor Dudzik's grievance and pending arbitration, nor Dudzik's complaint to the Milwaukee County Court have been shown to involve the legal issues raised herein as to whether the Respondents have violated Section 111.70(3)(a)1 of MERA by denials of rights under MERA to representation during departmental procedures, and if so, what the remedy therefor shall be. It was stipulated that the Board would not overturn a disciplinary measure on the ground that it was tainted by a MERA violation. Dudzik's Court suit was predicated on constitutional and not statutory rights. Dudzik's grievance, by its terms, "challenges the applications of the Rules as set forth in the charges filed against him," not the failure to provide representation at various stages of departmental procedures.

29/ See, Taylor County (8178) 9/67; LaCrosse County (13405) 5/75.

Moreover, while it is possible that parts of the remedies available from the other forums resorted to by Schmidt and Dudzik are identical to part of the remedies that have been requested herein, the declaration of violation of MERA and the order that Respondents cease and desist from same in the future, requested by Complainants herein, would not be. Therefore, said defense is without merit. 30/

Affirmative Defense No. 5 - To reinstate an individual such as Thomas Schmidt who has appealed his discharge to the Board would improperly divest the Board of its jurisdiction to hear said case.

Harmonization of MERA with the powers of the Board under the earlier legislated Chapter 586, Laws of 1911, must result in the conclusion that the impact on the Board proceeding which would arise from a possible WERC order to reinstate must obtain, rather than entirely defeating, the rights guaranteed by MERA to representation. It is noted in this regard that the Board chose to stay its own proceedings pending the outcome herein. The WERC did not request such a stay and did not seek to impose same. Furthermore, the defense goes to remedy rather than to a determination as to whether Schmidt has been wrongfully denied representation. The fifth affirmative defense was therefore properly rejected.

Affirmative Defense No. 6 - There have existed contractual remedies in favor of which the Commission should defer portions of the instant proceeding.

Respondents argue that since the 1974-1976 agreement provides a right to grieve disciplinary penalties of five days or less (since no appeal of same to the Board is available), the Commission should require exhaustion of that remedy before processing a prohibited practice complaint. Specifically, Respondent argues that it is the Commission's policy to defer to final and binding arbitration "in all cases involving alleged violation of the terms of a collective bargaining agreement." 31/

The principle and case cited by Respondents is inapposite herein. There is no amended-complaint allegation of a violation of the terms of a collective bargaining agreement. Nor have Respondents pointed to a provision of the agreement that the alleged denials of representation might have violated. Thus, resort to the grievance and arbitration procedure appears quite unlikely to resolve the primary issue herein, to wit, did Respondents interfere with, restrain and/or coerce municipal employes in the exercise of MERA rights by denying municipal employes representation at certain stages of certain departmental processes. While certain of the Respondents' defenses call for consideration of the effect of provisions of the 1974-1976 agreement, e.g., to determine whether they constitute a waiver of rights claimed in the complaint, that alone is not a sufficient reason to defer to the contractual dispute resolution procedure herein. The underlying issue, whether Respondents violated MERA and what remedy, if any, should be provided for any statutory violation found to have been committed, would remain to be determined herein.

30/ Citing, Madison Joint School District No. 8 (14866) 8/76.

31/ See, Melrose-Mindoro School District (11627) 2/73 and cases cited therein at footnotes 4 and 5.

For the foregoing reasons, the Commission, contrary to the Respondents' request, has asserted its jurisdiction to determine the merits of the entire amended complaint.

Affirmative Defense No. 7 - The Association waived, by contract language, any right of the sort alleged violated, and the WERC recognized the availability and validity of such defense in its June 18, 1976 order in Schmidt I. 32/

Affirmative Defense No. 8 - The Association, by certain conduct, indicated the nonexistence of, or effected a waiver of, any right of the sort alleged violated.

A majority representative can be found to have waived employe rights to its representation of the sort claimed herein on the basis of contract language and bargaining history. 33/ The Commission's June 18, 1976 order cited by Respondents did no more than recognize the possibility that Respondents could adduce evidence establishing such a defense. It did not necessarily imply that the matters Respondents sought the opportunity to prove in that case would constitute a valid defense.

The mode of analysis and proofs necessary to establish waiver of a MERA right have undergone significant developments in recent years. It now appears that the presentation and withdrawal of a bargaining proposal by a party would not, alone, suffice to waive statutory rights concerning the subject matter thereof. 34/ Instead, the entirety of the circumstances concerning the parties' interaction regarding the right at issue must be reviewed to determine whether there exists clear and unmistakable evidence of an intent to waive the right in question. 35/

As regards the language of the 1974-1976 agreement, the Commission finds none among the provisions of that agreement that either expressly or impliedly refer to a statutory right to representation, or that suggest the existence of an intent to waive any such statutory right. The contractual waiver of rights to bargain during the term of the 1974-1976 agreement about certain matters not addressed therein does not constitute a waiver of other MERA rights by the Association, such as the statutory right of bargaining unit employes to representation by the Association in certain contacts with supervisors. Furthermore, the general and enumerative contractual recognitions by the Association of the statutory authority of the Chief, the City, and the Board do not indicate the necessary clear and unmistakable intent to waive applications of MERA that would otherwise be warranted, either. For example, the Chief may conduct such investigatory proceedings as he chooses for purposes of maintaining discipline among the personnel of the department, but in circumstances in which representation by the Association is called for by MERA, the Chief's procedures must permit same. In that way, the specific MERA protection of employes from interference with MERA rights during certain contacts with supervisors is harmonized with the general statutory authorization of the Chief's rule making and maintenance of discipline. The Association's unsuccessful efforts to include the policeman's bill of rights in the contract do not necessarily reflect

---

32/ City of Milwaukee (13558-D) 6/76.

33/ Milwaukee County (8707) 10/68, as clarified in Crandon Joint School District No. 1 (10271-C) 9/71.

34/ See, State of Wisconsin (13017-D) 5/77.

35/ Id. See also, City of Brookfield (11406-A, B) 9/73; Nicolet Joint High School District (12073-B, C) 10/75.

an intent that the MERA rights claimed violated herein be waived. Such conduct is equally consistent with the interpretation that the Association sought to create contractual rights without certain knowledge that parallel statutory rights exist or one in which it sought to create contractual remedies for violations of statutory rights but in the end settled for living with statutory recourse alone. In any event, the record does not establish the requisite clear and unmistakable intent on the part of the Association to waive the rights claimed violated herein.

Within or apart from the concept of waiver, the Association's efforts to obtain contractual or specific legislative provisions containing the "police bill of rights" do not affect the extent of MERA protections available to the employes it represents. Even if such efforts proved that its agents subjectively believed that MERA did not provide the rights claimed herein, the proper interpretation of MERA derives from its language and purposes, not from the beliefs of said agents.

Finally, the Legislature's nonpassage of police bill of rights legislation 36/ does not constitute a cognizable expression of legislative intent that the rights claimed herein are not provided by MERA. Nonpassage could be explained in any number of ways, including the possibility that the Legislature considered MERA to satisfactorily provide for the representation rights referred to in SB 52, 1975. Finally, the fact that after the times material herein the Assembly and Senate passed SB 224 in the 1977 session (providing specifically that Chapter 586, Laws of 1911, powers are superceded where in conflict with the provisions of MERA) does not imply a legislative intent or understanding that existing case law is either inconsistent with that provision or inconsistent with the harmonization analysis referred to above, e.g., in the discussion of affirmative defense No. 2.

For the foregoing reasons, affirmative defenses 7 and 8 are rejected by the Commission.

Effect of Resignation of Employment on Claim of Pre-Resignation Denial of Representation

As noted in the Findings of Fact, some of the employes involved resigned sometime after their BOI appearance(s). Respondents apparently contend that such resignations moot the instant claims concerning those resignees because the resignees no longer enjoy employe status and/or because they waived any such claims by resigning. We note that there is no contention by the Association that the resignations involved were caused by the prohibited practices alleged herein. We therefore treat the resignations as voluntary.

We find no basis in the resignations for dismissing the complaint references to alleged violations involving the resignees. Each of the resignees was clearly a municipal employe at the time of the alleged prohibited practice, and a voluntary resignation of employment, without more, does not constitute a waiver of the right to adjudication of the lawfulness of the municipal employer conduct involved.

36/ Of course, Chapter 351, Laws of 1979, effective May 22, 1980, cannot be applied retroactively.

Effect of Probationary Status on MERA Right to Representation

Respondents contend that it is well settled that an employe need not be granted a hearing with regard to termination of employment during a probationary period. 37/ They further note that Rules issued by the Board of Police and Fire Commissioners and by the Chief, pursuant to their respective statutory rule-making authority, provide that probationary dischargees shall not be entitled to an appeal therefrom. Respondents contend that the legislation enabling that Board and Respondent Chief to promulgate such rules would be violated if the WERC permits Complainant to seek relief on behalf of probationary dischargees herein. Respondents also note that, while MERA was enacted after the initial creation of the general powers statutes involved, the latter provisions were recreated in 1977 in Sec. 62.50, Stats., so as to warrant the conclusion that the Legislature granted the powers with knowledge of the existence of MERA.

The rules cited appear to refer to the existence or nonexistence of an appeal on the merits of the discharge to the Board of Police and Fire Commissioners. They do not, therefore, conflict with a MERA requirement of a right to representation in BOI proceedings involving charges that could lead to discharge, or to any other BOI proceedings involving the possibility of discipline of a probationary officer. Hence, there does not appear to be a conflict between the Rules and MERA in this regard. Even if there were, appropriate harmonization of the enabling acts involved with MERA would call for a recognition of MERA procedural protections. For, the instant proceeding does not involve the merits of the charges brought against the probationary employes involved. It involves, instead, interference with and/or restraint of municipal employes (even though probationary) in the exercise of their Section 111.70(2), MERA, right to engage in mutual aid and protection.

Effect of Failure to Request Representation on Claim of Denial of MERA Right to Representation

It is undisputed that Bejma, Lopez, Cullinan, Barney, Pasko and Gumm failed to request representation in connection with their BOI appearances.

In this regard, Respondent has cited Waukesha County, wherein the Examiner stated the following:

> ". . . the evidence does not establish that [the employe involved] requested union representation at either . . . meeting. Such a request or some other means of putting the municipal employer on notice that a claim of statutory right is being made would seem to be an appropriate condition precedent to attachment of a right to union representation in an employe-supervisor contact. . . By such means, the municipal employer is made aware that the employe involved desires the representation and that legal consequences may flow from its denial. It is not enough to show that, as here [the supervisor involved] made known his position in advance that union representation would not be permitted at either of the meetings." 38/

37/ Citing, State ex rel Dela Hunt v. Ward, 26 Wis. 2d 345 (1964).

38/ Decision No. 14662-A at 25.

The Examiner therein rested his conclusion that no violation had occurred in the circumstances therein involved on the above rationale as one of two alternate holdings, and the Commission affirmed the examiner's decision in that regard. 39/

Respondents have also argued that if, contrary to its general position, the Commission considers the rationale of the Weingarten case 40/ applicable as regards the City law enforcement employes, then the Commission should give effect to the Weingarten requirement of a request for representation as a necessary element to prove a violation of the right to representation.

The Association argues that any such non-request must be deemed legally excusable in the instant circumstances and of no effect on the claims for relief with respect to the individuals involved. In support of that position, it contends that the record reveals that the requests would not have been granted even if made; that such a request would have antagonized the BOI, exposing the individual to a heightened risk of an adverse BOI recommendation; that the Department was on fair notice, without these individuals making separate requests, that all individuals appearing before a BOI desired to be represented; that it is unfair to require an employe to request representation where the availability of that right was in dispute before the WERC; that it is unfair to deem an employe to be waiving a right to representation where, as here, there is no proof that the employe knew of the existence of that right in the first place; and finally, that it is unrealistic to expect a lone employe to have the presence of mind to request representation in the generally fearsome atmosphere that existed at the BOI proceedings involved herein.

Said contentions above do not persuade us either to overturn or to make an exception herein to the Waukesha County rule noted above. In Weingarten, the United State Supreme Court stated that employes covered by the National Labor Relations Act, as amended, have a right to the presence of a union representative during a compelled appearance at an interview where the employe reasonably believes could result in discipline or discharge, but that a private sector interstate commerce employer may lawfully force the employe to choose between foregoing those rights and foregoing the interview (and any benefit it might be to the employe). The same rule was established under MERA in the Waukesha County case as regards contacts with supervisors to which the employe involved is not entitled by contract, constitution or statute. 41/

39/ Decision No. 14662-B, 3/78.

40/ NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689, 76 CCH Lab. Cas. Par. 10, 662 (1975).

41/ Waukesha County (14662-A) (in meetings to which the employe is not contractually, constitutionally or statutorily entitled,

> ". . . where . . . the municipal employer does not compel the contact with supervision in question, but rather permits the employe to choose between foregoing the advantages of a meeting to which the employe is not otherwise entitled and enduring the disadvantages of meeting without union representation, the MERA right to representation is not violated. That conclusion best balances the interests of municipal employes in just treatment and of municipal employers in efficient and orderly operations. Id.) [Footnotes omitted]

The operation of that rule obviously requires that the supervisor(s) involved be put on notice that the particular employe involved desires representation in the particular meeting or contact involved. Such a request is a condition precedent to the attachment of the right. Therefore, the futility, risks, lack of knowledge, and general fairness contentions advanced by the Association are to no avail herein. Moreover, the right to representation is individual to the employe involved. It cannot be exercised on a blanket basis by the majority representative. Therefore, history of efforts by the Association to cause representation to be permitted in all BOI proceedings does not satisfy the requirement that the request be made by the individual involved (or in circumstances making it clear that such is the desire of the individual employe involved).

The Association has alternately argued that the Waukesha County request requirement rule, above, is inapplicable herein because the employes involved herein were entitled by law to the BOI hearing at which they appeared. In that regard, it reasons as follows: Chief's Rule 44(14) mandates a BOI proceeding with respect to any charges leveled against an officer. Since procedures used in evaluating employe performance are a mandatory subject of bargaining, 42/ it follows that the procedure used to determine whether member should be disciplined is also a mandatory subject. Therefore, the Rule 44(14) mandate of a BOI proceeding could not be changed without bargaining with the Association, at least as it relates to charges that could lead to discipline or discharge of bargaining unit employes. Such employes therefore enjoy an independent right to the BOI hearing. Since Respondents could not divest the employes of that independent right without bargaining, e.g., in response to a particular employe's request for representation, the purpose served by the request requirement is not present in the instant circumstances.

Without determining the validity of the various premises upon which the Association rests its conclusion above, we do not believe that those premises would warrant that conclusion. Even if the duty to bargain required Respondents to bargain to impasse with the Association before disciplining employes without providing them with the opportunity to appear at a BOI into the matter, such is not so absolute a limitation on Respondents' ability to make such a change as to establish the existence of an independent right to a BOI hearing parallel to, e.g., absolute Section 118.22(3), Stats., right of teachers facing nonrenewal to a private conference with their employer on the subject. 43/ Therefore, the Association's alternate contention is also rejected.

For the foregoing reasons the nonrequests of the six employes result in the conclusion that no violation of MERA occurred, and, therefore, the alleged denials of representation to said employes at their BOI proceedings are dismissed.

Effect of Ziolkowski's Failure to Appear at BOI Proceeding

Prior to his scheduled appearance before the BOI Ziolkowski had requested representation be permitted him during said proceeding; however, such request was denied. Ziolkowski did not appear at his BOI proceeding for reasons not established in the record. Nonetheless

---

42/ Citing, Beloit Education Association vs. WERC, 73 Wis. 2d 43 (19__).

43/ A MERA right of representation has been recognized in regard to such conferences. See, Waterloo Joint School District No. 1 (10946-A, B) 9/73; Appleton Joint School District No. 10 (10996-A, B) 7/73.

it is alleged that he was unlawfully denied representation in violation of MERA. The right to representation in proceedings to which an employe is not independently entitled is a means of protecting the employe in the event of a compelled appearance. Where the employes does not appear, and if there is no discipline imposed on the employe for his failure to appear, it cannot be said that the employe's right to representation has been denied. Since Ziolkowski did not appear, and there is no evidence to establish that he was in any way disciplined for failing to do so, we cannot conclude that he was denied representation in violation of MERA rights, and, therefore, we have dismissed the allegation in that regard.

Effect of Resort to Alternate Forums for Relief from Penalties Imposed on Claim of Denial of MERA Right to Representation

Respondents advance two basic arguments here. First, that ". . . where a statute provides relief [e.g., in the form of an appeal to the Board of Fire and Police Commissioners], the party seeking such relief cannot at the same time attempt to go into a separate forum for the same relief," or at least the Commission ought to defer to the other forum until that forum has determined the propriety of the penalty. And second, that the right to representation is sufficiently protected when it is available in de novo review proceedings after the Chief's decision to impose a disciplinary penalty has been made. 44/

The first argument above has been substantially addressed and rejected in our discussion of Affirmative Defenses Nos. 4 and 6, above. For the reasons set forth therein, we find no basis either for deferring consideration pending the outcome of Fire and Police Commission or grievance arbitration proceedings, or for barring the instant claims on a theory of election of remedies.

The second argument is also without merit. It overlooks the fact, noted in Waukesha County, that

> "It is the potential for affecting supervisors' decisions about whether and how to discipline before those decisions are made that has led to recognition of rights to union representation in compelled investigatory supervisor-employe contacts such as the Board of inquiry hearing of charges in City of Milwaukee . . . and the theft investigation in Weingarten. . ." [Emphasis in original] 45/

On this same point, the U. S. Supreme Court majority in Weingarten expressed itself as follows:

> "Respondent [employer] suggests . . . that union representation at this [pre-discipline investigatory interview] stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. [Citation omitted.] At that point, however, it becomes difficult for the employee to vindicate

---

44/ The parties stipulated that in appeals of disciplinary penalties imposed by the Chief which are taken either to the Board of Fire and Police Commissioners or to a contractual grievance arbitrator, the aggrieved individual has a right to have an attorney or a representative of the complainant to consult with and to serve as his/her spokesperson.

45/ Decision No. 14662-A at 26, citations omitted.

himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them. 46/

Effect of Failure to Exhaust Available Alternative Remedies for Penalties Imposed on Claim of Denial of MERA Right to Representation

We have rejected Respondents' contentions that resort to the Board of Fire and Police Commission or to contractual grievance arbitration for the penalties imposed herein either bars or warrants deferral of the Commission's adjudication of the amended complaint portions involved. It follows, a fortiori, that an individual employe's election not to pursue relief from those forums is also in no way inconsistent with the Commission's proceeding to a decision on the claims of MERA violations contained in the amended complaint. The right of representation at BOI proceedings is entirely independent from possible subsequent review as to whether discipline imposed on the various officers involved herein was proper.

Sufficiency of Representative's Presence and Whisper-in-Ear Advice as Fulfillment of MERA Right to Representation

Certain of the employes who requested representation were permitted to have their representative present with them during their BOI appearance, but the representative was not permitted to address the BOI or to question witnesses and was, at most, permitted to communicate advice to the accused by whispering or passing notes. The Association contends that, in the adversary BOI hearing procedure established by the Chief, the MERA protection from being compelled to appear before the BOI without representation would be rendered of little value. The Association notes that under the Rule 44 sections governing BOI proceedings, the accused is not only called upon to answer questions and to speak in his/her own defense, but also to formally plead "guilty" or "not guilty," to cross examine Department witnesses, and to call and initially examine defense witnesses. The Association contends that the accused alone cannot be expected to "adequately present his side of the story" in such a forum since the employe will likely be nervous and apprehensive on account of the charges and because most employes are unfamiliar with adversary hearing techniques of cross examination, argument, objections, and summation. BOI members, on the other hand, are generally experienced in BOI procedures, the Association argues, such that they will be able to far more effectively develop the Department's case against the employe, and it contends that the presence of the representative does not overcome these obstacles to a balanced presentation of the facts unless the representative is at least permitted to address the Board, question witnesses on the accused's behalf and sum up the case for the accused. Accordingly, the imposition of the whispering (or note-passing) barrier does not permit the representative to effectively assist the accused in presenting his/her case to the BOI. The Association notes also that the purposes of the BOI--development of a complete factual record and recommendations for the Chief's consideration--would be promoted rather than interfered with if the representative were permitted to serve as spokesperson. For, the difficulties that the accused would have due to unfamiliarity with procedure, a disorganized and non-cohesive presentation, and rambling unfocused questioning techniques would all be substantially avoided if a union representative with more experience in BOI or adversary proceedings were permitted to serve as spokesperson.

46/ Weingarten, above, footenote 40, 76 CCH Lab. Cas. Par. 10, 662 at 18, 253.

The Respondents take the view that the active participation of a representative would interfere with the expeditious development of a factual record and thereby interfere with the administration of Department discipline generally. Respondents appear to be concerned that the introduction of Association attorneys or experienced Association representatives as spokespersons for accused would put the BOI members at a skill or knowledge disadvantage that would further weaken or prolong the BOI hearing process.

The Weingarten majority addressed this issue by citing with apparent approval the NLRB caselaw policy that ". . . the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview," and also citing with apparent approval a statement contained in the NLRB's brief to the court to the affect that

> "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."

Thereafter, however, that Court majority also cited with apparent approval the notion that

> "[Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising. . . . [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to the problem."

The Court went on to state

> "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest."

The factual setting involved in the Weingarten matter was, however, unlike the trial-type trappings attendant in the BOI procedures involved herein. Where, as here, the Respondents selected an investigatory means that invites an adversary atmosphere, it is in a poor posture from which to complain that a recognition of the right not to be compelled to appear without representation suitable to the highly adversary nature of its chosen investigatory procedure ought not be recognized because it would unduly interfere with the investigation process.

It should be noted that with regard to the Section 118.22(3), Stats., private conferences concerning whether a teacher shall be nonrenewed, the Commission reasoned that to achieve the purpose of the conference (which included, inter alia, to promote "an examination of all facts and circumstances affecting a case prior to the time at which the school board must make its decision"),

> "the teacher must also be able to effectively present his or her side of the issues raised. The representatives of the labor organization are likely to have more experience and ability in such matters than the individual employe and, by having such representation, the employe is able to have his or her position presented in a more effective manner than would be possible if the employe were his or her own spokes[person]. Finally, since some or all of the charges made against the teacher may arise out of or in connection with matters of wages, hours or conditions of employment negotiated by the labor organization for all employes in the bargaining unit, the labor organization in its own right and as a party to the collective bargaining agreement has an interest in any violation of that agreement either by an individual teacher or the school board." [Emphasis added.] 47/

So here the participation of an Association representative as spokesperson for the accused at a BOI--whether that representative is an attorney or a non-attorney--appears to us to be consistent with the purposes for which the BOI proceeding is being conducted. Such spokesperson role seems unlikely to unduly interfere with the fact finding purposes of the BOI, and it may, in fact, promote the efficiency and completeness of record of BOI proceedings to the benefit of both the accused and the Respondents.

Effect of Failure to Request More Active Representation than that Permitted

For reasons discussed earlier in this Memorandum, we have found that when BOI Chairman Jagmin initially specified a limited role for Robert Kliesmet as representative of Mark Rouleau on June 29, 1976, no request that Kliesmet be permitted a more active representative role was made to the BOI. Respondents argue that such a failure should defeat the claim that Rouleau experienced a denial of a MERA right to representation. The Association apparently contends that any such nonrequest is legally excusable either for the reasons cited by it as excusing a general nonrequest for representation or because the request for representation that the parties have stipulated that Rouleau made constitutes a request that the representative be permitted to serve as spokesperson.

47/ Whitnall School District (10268-A, B) 9/71. Accord, Waukesha County (14662-A, B) 3/78.

In our view, the reasons we noted in our earlier discussion of the necessity for a request for representation generally, apply here as well. Thus, for the Respondents to be fairly on notice that a claim of unlawful denial of representation is being raised from which legal consequences could flow unless Respondents' agents respond properly, a request for more active representation than is being permitted is necessary. Since we have found that Rouleau made no such request, and since we are satisfied that Respondents' agents cannot be deemed put on the above notice by the general representation request undisputedly conveyed by Rouleau herein, we have concluded that the Respondents did not commit a prohibited practice as it relates to the alleged denial of representation to Rouleau in connection with his June 29, 1976 BOI appearance.

Applicability of MERA Right to Representation in Past Situations Posited by the Parties

Besides the allegations, analyzed above, concerning BOI proceedings, the amended complaint also alleged denials of requested representation at two other situations of employe-supervisor contacts. Rather than litigate the various fact situations involved, the parties agreed, instead, to submit for determination whether such contacts, in specified circumstances, are subject to MERA protection of a right to representation.

The first situation is described by the agreed-upon submissions as follows:

> "a. compelling an employe to prepare and submit to (or for use of) supervisory personnel a written report on a subject without permitting the employe a reasonable opportunity to consult with an MPA representative about the matter before preparing the report where the employe has requested such opportunity for such a prior consultation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the written report."

The Association argues that the above situation falls squarely within the Weingarten and Waukesha County reasoning to the effect that employes' right to engage in concerted activities ". . . for mutual aid and protection" includes a right to representation, upon request, where an employe is compelled to attend an interview which the employe reasonably fears will result in discipline or discharge of the employe. The Association notes that the Department decides whether to further investigate a matter that could involve discipline based on the employe's written "in the matter of . . ." statements. Such statements are made available to the Chief when he ultimately decides whether to impose discipline on an employe. The posited situation does not extend to situations where the written statement is not compelled or where it does not give the employe "reasonable cause" to believe that discipline or discharge could be predicated, in whole or in part, on the written statement. The Association contends that representation is valuable to the employe faced with the posited circumstances in protecting the employe from unfair or unwarranted discipline; and that the consultation would be compatible with the employer's purposes of obtaining a complete statement of material facts so as to permit a more expeditious completion of the employer's investigation and avoid the averse morale impact of the pendency of long unresolved investigations. It also asserts that

the right to representation in the circumstances posited would not unduly interfere with the Department's ability to operate efficiently or to maintain discipline because the Department would not be prevented from taking necessary summary disciplinary action (e.g., with respect to an officer reporting intoxicated or based on information from sources other than the statement of the officer itself) and the delay in obtaining the written report could not, in any event, be significant because the opportunity posited for consultation is not absolute, but only a "reasonable" one.

Respondents contend that it is inappropriate, in the ranks of a paramilitary organization such as the Department, to introduce a delay in the response of a subordinate to the orders of a superior officer to answer in writing the superior officers' questions. Instead, ". . . an immediate response to direct orders is an absolute necessity . . ." in such an organization, according to Respondents. Respondents further contend that for the complaint to prevail on this issue ". . . will endanger the health, safety and welfare of the citizenry of the City of Milwaukee." In that regard, Respondents note that the "in the matter of" statements are utilized in a wide range of matters of Department administration so that placing the judgment as to whether the employe is entitled to representation in the hands of the employe (and the employe's subjective belief that he/she is facing discipline or discharge in connection with the information being asked for by the supervisory officer on any particular occasion) would severely undercut the employer's ability to operate effectively.

In our view, the fact situation posited falls squarely within the scope of the right to representation recognized in Waukesha County and in the Weingarten case, and we are not persuaded that the rule ought not be applied in the instant employment setting. In that regard, we note that it is only a "reasonable opportunity" to "consult" with "an" MPA representative that is posited. It is not an absolute right to so consult; it is not a reasonable opportunity to consult the representative in person (by telephone will suffice here); and it is not a reasonable opportunity to consult with a particular Association representative. Moreover, the circumstances posited do not involved many of the "in the matter of" reports submitted on a daily basis. It concerns only those which the employe is "compelled to prepare and submit to supervisory personnel," and only the subgroup of those in which the employe has ". . . reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the written report." If the employe involved requests the reasonable opportunity to consult before preparing and submitting the written report involved, Respondents' agents would be free to continue the investigation without benefit of the employe's written report, and to therefore put the employe to the choice of foregoing the consultation with the representative or of foregoing submission of the report and any benefit it might be to the employe. 48/

48/ We also wish to make it clear that to discipline an employe for the exercise of the rights to representation noted herein would also constitute a violation of Section 111.70(3)(a)1. See, International Ladies' Garment Workers' Union v. Quality Manufacturing Co., 420 U.S. 276 (1975). Thus, if an employe refuses to participate in a supervisory contact unless representation is permitted consistent with this decision, the employe runs the risk that the circumstances involved will be found not to fall within those in which the right to the representation requested applies. If, however, the employe's view that a right to representation is ultimately vindicated, then discipline or discharge based on the refusal to participate would violate MERA.

Finally, as the Association has argued, Respondents would not be precluded from taking summary action with respect to an employe by a WERC ruling herein in its favor on this issue. Respondents would, instead, be subject to a prohibited practice remedial order if it compelled the employe to provide a written statement in the matter without a reasonable opportunity to consult as noted above.

For all of the foregoing reasons, we conclude that Respondents would commit a prohibited practice within the meaning of Section 111.70(3)(a)1, MERA, if they or their agents engaged in the conduct posited above.

The other situation described in the agreed-upon submissions described in the preceding Memorandum subsection consists of:

> "b. compelling an employe to submit to an interrogation by (or for use of) supervisory personnel without permitting the employe a reasonable opportunity to obtain the presence of and to consult with an MPA representative before and at various times during the interrogation where the employe has requested such representation based upon the employe's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employe could result from or be based upon, in whole or in part, the employe's responses during the interrogation."

The Association notes that the employe's answers in the oral interrogation procedure are thereafter used by the command officer to decide whether to recommend that charges be initiated against the employe; and that said answers ultimately become a part of the information used by the Chief in determining whether a disciplinary penalty is to be imposed. Besides the values to the employe of prior consultation cited by the Association with regard to the written statement issue discussed in the preceding Memorandum subsection, it contends that the presence of the representative during the oral interrogation is needed because, unlike the written statement situation, the employe cannot know the questions in advance and therefore cannot review them with the representative by means solely of a prior consultation. Complainant also contends that the presence of the representative will calm the employe, help the employe give a more coherent and informative response to the interrogation, and will permit the employe to be advised with respect to matters of possible personal privilege not to respond before the employe is forced to decide whether or not a question infringes upon such a privilege. The Association contends that the prior consultation with, and presence and consultation with the representative during the interrogation would further the employer's purposes of obtaining the full truth expeditiously, and would not, under the standards posited, significantly delay the interrogation or reduce the overall effectiveness of discipline.

Respondents reiterate their objections to the interference with the investigatory process and with the paramilitary nature of the Department's organization and administration that recognition of a right to representation would constitute from Respondents' point of view. They specifically note that since the applicable labor agreement does not provide for employes to perform in a representative capacity during their working hours, the delays in obtaining the presence of an Association representative are likely to be lengthy, especially on other than day-shift weekdays.

In our view, the situation posited in (b), again, falls squarely within the scope of the right to representation recognized in Waukesha County and in the Weingarten case. 49/ In that regard, we note that it is only a "reasonable opportunity" to obtain the presence of and to consult with an Association representative before and at various times during the interrogation, not an absolute right in those regards. Moreover, at the interrogation itself, only the presence of and consultation with the representative, not a right to have the representative act as spokesperson that is posited. 50/ And finally, the reasonable opportunities are with regard to "an" Association representative, not to any particular Association representative. Furthermore, it is not all interrogations of employes by supervisors, but only those that are compelled by supervision that are involved. If the employe involved requests the reasonable opportunity to consult and have a representative present, Respondents' agents would be free to continue the investigation without benefit of the employe's answers to the oral interrogation, and to therefore put the employe to the choice of foregoing the consultation with and presence of the representative or of foregoing the interrogation and any benefit it might be to the employe.

We are satisfied, given those limitations, that recognition of MERA protection in the posited circumstances would serve the underlying legislative purposes of MERA by providing a lawful and concerted means of achieving mutual aid and protection of legitimate employe interests in a manner giving appropriate weight to the Respondents' interests in efficiency of operations and effectiveness of discipline.

For all of the foregoing reasons, we conclude that Respondents would commit a prohibited practice within the meaning of Section 111.70(3)(a)1, MERA, if they or their agents engaged in the conduct posited above.

Remedy

The amended complaint contains a request that the Commission order Respondents to:

> "1. Cease and desist from refusing to permit representatives of the M.P.A. or an attorney retained by either the M.P.A. or the employee to represent said employee at a Trial Board or at an interrogation of the employee where the purpose of the proceeding is disciplinary;
>
> 2. Cease and desist from refusing to permit an employee an opportunity to consult with the M.P.A. or its attorney before being compelled to prepare a written report of a matter that could result in the employee being disciplined;

49/ See also, Climax Molybdenum Co., 227 NLRB No. 14, 94 LRRM 1177 (1977) (right to representation under NLRA includes right to consult with representative prior to investigatory interview).

50/ Unlike the BOI situation, a spokesperson role for the representative is not warranted since here, as in Weingarten, the employe is being called upon only for answers, not for examination and cross examination of witnesses, etc.

3. Expunge from the employment records of all employees listed in Paragraph 5, above, any and all references to actions taken by Harold A. Breier concerning charges heard by the Trial Board on or about the dates indicated in said Paragraph 5 to the extent that such actions were taken on or after said date;

4. Remove from the employment records of all employees listed in Paragraph 5, above, all written reports, transcripts, memoranda and other documentary material obtained by Respondent by virtue of the prohibited practices described herein.

5. Withdraw the disciplinary orders issued pursuant to Harold A. Breier's findings of guilt and make the affected employees whole for any loss of pay or benefits suffered by reason of said orders.

6. Permit all of said employees representation by the M.P.A. or its attorney in any hearing before the Trial Board of the charges filed."

With respect to the issues noted in paragraph 24 of the Findings of Fact the parties have specifically agreed that the Commission "shall impose such cease and desist and other relief as it finds appropriate and with its powers (subject, of course, to judicial review in the normal course) but that such remedial order, if any shall be prospective only and in no way retroactive to a date earlier than the date of the WERC decision containing it." Accordingly, we have fashioned prospective only cease and desist and notification of Commission as to compliance relief as regards the matters referred to in Finding 24 and Conclusion 9.

We have also entered an order that Respondents cease and desist from violations of the sort found to have been committed in relation to compelled BOI appearances, both as to the presence of an Association representative, and as to the role to be played by such representative when present. Several aspects of the order in that regard are noteworthy. First, it applies only where the appearance is compelled. If the appearance is made voluntary only, the employe is thereby put to the choice (approved in Weingarten and Waukesha County) of participating without representation or foregoing the appearance and any value it may be to the employe. But where the appearance is compelled, the employe is entitled to have an Association representative present, who has the right to serve as the employe's spokesperson, because of the trial-type nature of the BOI proceedings.

A number of officers who were denied their MERA representation rights appealed their penalties either to the Board of Fire and Police Commissioners or proceeded to arbitration. Since there was no evidence to the contrary, we assume that said officers were not denied representation in those proceedings. On the other hand, other officers, who could have proceeded to either forum, depending on their penalty, chose not to do so for reasons not established in the record. To require that any officer in any of said two groups be granted a new BOI type proceeding, at least with respect to those officers who had their penalties reviewed by the Board of Fire and Police Commissioners or by an arbitrator, would, in effect, negate the latter proceedings, and, therefore, we are not requiring that said officers be granted new BOI type proceedings. Other officers accepted their penalties by not "appealing" same to either tribunal and are deemed to have waived their remedial rights in said regard.

There were six officers, who were in their probationary status, involved in this proceeding, namely, Leonel Lopez, Bonnie Bauer, Thomas Dudzik, Judson Coleman, Howard Root and Thomas Rhodes. Probationary employes have no right to appeal the dicipline imposed upon them by the Chief to the Board of Fire and Police Commissioners. The Respondents have contested the right of probationary employes, at least in the case of Dudzik, to utilize the grievance and arbitration procedure set forth in the collective bargaining agreement with respect to imposed discipline or dismissal.

Lopez did not request any representation at his BOI proceeding leading to his dismissal. He was not, therefore, denied MERA rights. Bauer, Dudzik, Coleman, Root and Rhodes, all requested such representation at their BOI proceedings, which requests had been denied, and in said regard the Respondents have been found to have violated their MERA rights. Bauer, who had been suspended for six days, resigned from the Department within the week following her BOI appearance. Dudzik, Coleman, Root and Rhodes were all dismissed following their BOI appearances. Dudzik attempted to have such action, as it pertained to him, processed through the contractual grievance and arbitration procedure. The issue as to whether he has a right to do so, at least at the time of the hearing herein, was pending in arbitration. Grievances were not filed on behalf of the remaining probationary employes. Absent any evidence to the contrary, we assume that the Respondents would, as they did with Dudzik, contest their right to do so.

Since Bauer resigned voluntarily, we see no reason to require that she be granted a new investigatory proceeding. The penalties imposed by the Chief on the remaining four individuals have not been reviewed and determined on their merits in any "appeal" type forum, where said individuals would have the right to be represented by the Association. Therefore, we deem it appropriate to require that said individuals have the opportunity, if they so desire, to be represented by the Association in a new proceeding. To avoid any appearance of "unfairness" or of built in "bias" or "prejudice," rather than ordering a new BOI proceeding conducted by members of the Department, we have required that an impartial fact finder should conduct the proceeding, where the individuals involved may be represented by the Association or its attorney, and where the facts relevant to the incident leading to the dismissal involved can be established, in order that the fact finder can issue his recommendation, as to the penalty to be imposed, for the Chief's consideration. 51/

We have also issued the usual order relating to notifying the Commission as to compliance, and as to posting of notices to employes.

Dated at Madison, Wisconsin, this 26th day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Gary L. Covelli, Commissioner

51/ In Schmidt I the Commission affirmed the remedy ordered by the Examiner, which included purging of the record, back pay, and also a new BOI proceeding for Schmidt, for the reason that Schmidt did not take exception to Examiner's remedy as to a new BOI proceeding. Furthermore, Schmidt was only suspended and not dismissed. We are of the opinion, that under the circumstances herein, the proceeding before a fact finder is more appropriate to remedy the prohibited practices committed. See also, NLRB v. Potter Electrical Signal Co., 101 LRRM 2378 (1979).