

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MENOMONEE FALLS PROFESSIONAL
POLICEMEN'S ASSOCIATION, by its
President, ARTHUR E. LUNDE; DENNIS
YULE,

Complainants,

vs.

VILLAGE OF MENOMONEE FALLS,

Respondent.

Case XI
No. 21851 MP-765
Decision No. 15650-C

Appearances:

Herbon & McLaughlin, Attorneys at Law, by Mr. Mark T. Baganz,
appearing on behalf of Complainants.
Charne, Glassner, Tehan, Clancy & Taitelman, Attorneys at Law,
by Mr. F. Thomas Olson, and Quarles and Brady, Attorneys
at Law, by Mr. Laurence E. Gooding, Jr., appearing on
behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants filed a complaint with the Wisconsin Employment Relations Commission on July 8, 1977, alleging that Respondent had committed prohibited practices within the meaning of Section 111.70, Stats. By Order dated July 14, 1977, the Commission appointed Marshall L. Gratz, to conduct hearing on said complaint and to make and issue Findings of Fact, Conclusions of Law and Order in the matter. Thereafter on August 17, 1977, Complainants filed an Amended Complaint and Respondent, on September 12, 1977, filed an Answer to the Amended Complaint. Pursuant to the mutual request of the parties, hearing on the matter was postponed until April 5, 1978, and by Order dated March 30, 1978 the Commission ordered the substitution of the undersigned Examiner, Stephen Pieroni, to conduct hearing on said complaint and to make and issue Findings of Fact, Conclusions of Law and Order in the matter.

The Examiner conducted hearing in the matter at Milwaukee, Wisconsin, on April 5, 1978. Following distribution of the hearing transcript, the parties submitted briefs and reply briefs, the last of which was received by the Examiner on December 4, 1978. The Examiner has considered the evidence and the arguments of Counsel, and, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant, Menomonee Falls Professional Policemen's Association, hereinafter referred to as the Association, is a labor organization having its principal offices at Menomonee Falls, Wisconsin; that at all times material hereto, Arthur E. Lunde was employed as a Police Officer by the Menomonee Falls Police Department and at all material times hereto was the President of the Association; and that at all material times hereto Dennis Yule was employed as a Police Officer by the Menomonee Falls Police Department and was a member of the Association.

No. 15650-C

2. That the Village of Menomonee Falls, hereinafter referred to as the Respondent, is a Municipal Employer which operates a Police Department, under the direction and control of Chief Charles L. Kuhn, hereinafter the Chief.

3. That all times material herein the Association has been the voluntarily recognized exclusive bargaining representative of the patrolman employed in Respondent's Police Department.

4. That upon initial employment with Respondent Police Department, a patrolman is given a copy of a Rules and Regulations Manual which pertains to the duties and responsibilities of patrolmen; that from time to time said rules and regulations are revised by Respondent but copies of said revisions are not given to individual patrolmen or the Association; that a separate manual containing departmental memoranda and orders pertaining to the duties of patrolmen does not exist in Respondent's Police Department; that memoranda and orders are issued by the Police Department from time to time but copies of same are not given to individual patrolmen or the Association; that the Rules and Regulation Manual states that all patrolmen are required to abide by departmental rules, regulations, memoranda and orders which pertain to the duties of patrolmen and that failure to do so may result in disciplinary action.

5. That Officer Lunde sent a letter dated, May 19, 1977 to the Chief which stated in the body as follows:

On behalf of the Menomonee Falls Professional Policemen's Association, I hereby request true, complete and accurate copies of all current rules, regulations, orders and memoranda of the department issued to date which deal specifically and generally with the duties of a Police Officer of the Village of Menomonee Falls Police Department. (Exhibit No. 3);

that at no time after receiving said letter did the Chief or anyone on his behalf respond in writing to same; that said letter was written by Lunde in his capacity as President of the Association and constituted a legitimate and proper request within the scope of the Association's obligation to represent Union employees with respect to their conditions of employment.

6. That Officer Lunde sent a letter, dated June 22, 1977 to Frederick E. Gottlieb, Village Manager, with a copy to the Chief, which stated in the body as follows:

Notice is hereby given to employer, the Village of Menomonee Falls, that the Menomonee Falls Professional

7. That sometime shortly after June 22, 1977, Lt. Bantin, a supervisor in Respondent's Police Department, approached Officer Pledl, then Vice President of the Association, while both men were on duty; that Bantin engaged Pledl in a conversation wherein Bantin inquired whether Pledl knew anything about Officer Lunde's letter to Mr. Gottlieb, dated June 22, 1978; that Pledl responded that he was not aware of the contents of said letter; that Lt. Bantin responded that "It's got the Village Fathers very upset . . ." and suggested to Pledl that he find out what the letter was about and do something "because if these letters or actions by the Association continued, the men would not receive anything at bargaining time."; that Bantin's statement, made in his capacity as an agent of Respondent, constituted Respondent's only response to the Association's previous legitimate requests for information dated May 19, 1978 and June 22, 1978, and that said statements constituted conduct likely to interfere with, restrain or coerce the employees in the exercise of their MERA rights.

8. That on June 14, 1977, at approximately 2:50 a.m., Officer Yule was found sleeping on duty by Sgt. Wolterstorff, who ordered Yule to report to Lt. Bantin's office; Lt. Bantin placed Yule under suspension and ordered him to report to the Chief's office that morning at 9:00 a.m.; that Yule did appear in the Chief's office at 9:00 a.m. on June 14, 1977 at which time the Chief, Sgt. Wolterstorff, and Lt. Bantin were also present, all of whom are supervisory personnel; that the door to the Chief's office was closed while the Chief asked Yule for an explanation concerning the charge that he was found sleeping while on duty; that said conversation was recorded on a tape recorder; that Yule admitted to the Chief that he had been sleeping in a Police Department vehicle while on duty for approximately thirty minutes when Sgt. Wolterstorff awoke him; that after discussing the matter with Yule for approximately ten minutes, the Chief told Yule that he either wanted Yule's resignation or he would be dismissed from the force; that Yule did not immediately respond to the Chief's ultimatum, but instead attempted to discuss his inability to sleep during the day; that within a couple of minutes of the Chief's first ultimatum to Yule to either resign or be dismissed, the Chief again asked Yule if he wished to resign or be dismissed from the force; that Yule's response was to request some time to discuss it with the Association President or the Association lawyer; that the Chief's response was to advise Yule that he was dismissed from the Department effective immediately and the conversation was thereby terminated after a brief discussion concerning the return of Yule's departmental equipment.

9. That following the Chief's interview with Yule described in Finding No. 8, no further interviews occurred between Yule and the Police Supervisors; that on June 30, 1977 the Chief filed charges with the Village of Menomonee Falls Police and Fire Commission (hereinafter PFC) seeking to terminate Yule's employment; that at about the same time as said charges were filed with the PFC, the Chief informed Yule that his notice of termination was converted to suspension without pay retroactive to June 14, 1977, pending the outcome of the PFC hearing; that on June 27 the Complainants herein filed a complaint (Case X) with the Wisconsin Employment Relations Commission alleging, among other things, that Respondent had committed prohibited practices in regard to the discharge of Yule; that Respondent did not receive notice of said complaint until July 8, 1977; that on July 19, 1977 Respondent withdrew its charges against Yule which were pending before the PFC because of technical errors and refiled charges on or about the same date; that Respondent's second set of charges filed with the PFC contained the same charges as were alleged in the first set of charges against Yule.

10. That Respondent's decision to terminate Yule and its recommendation for termination filed with the PFC was neither related to Yule's request for representation nor with the Association's filing of a prohibited practice complaint.

11. That on two occasions, on or about August 3, 1977 and August 4, 1977 Officer Pledl attempted to obtain certain records from the Police Department Record Division in preparation for his testimony at the PFC hearing on behalf of Yule; that the person in charge of the Record's Department informed Pledl that if he sought records in regard to the Yule matter he would have to obtain permission from the Chief before he could obtain them; that Pledl had not previously been required to obtain permission from the Chief before reviewing records, nor did the Chief require permission to review the records after the PFC hearing concerning the Yule discharge; that although the Chief was available on the two occasions that Pledl sought the records concerning the Yule matter, Pledl did not request permission from the Chief to obtain said records; that Yule's legal counsel did not subpoena the records that Pledl intended to obtain; and that Pledl testified at the PFC hearing without the use of said records; and that no evidence was presented herein which would tend to establish that the Chief would have denied Pledl access to said records because of his activities on behalf of Yule and/or the Association.

12. That Officer Bramm at all times material hereto was a member of the Association; that on August 3, 1977 Bramm received a subpoena ordering him to appear at the PFC hearing concerning Yule on August 4, 1977 at 7:00 p.m.; that Bramm was scheduled to be on patrol duty the evening of August 4, 1977 but did not advise his Supervisor or otherwise make arrangements to find a replacement for his patrol duty while he attended the PFC hearing; that shortly before 7:00 p.m. on August 4, 1977 Bramm advised the Police Dispatcher that he was leaving his patrol area for the reason that he was subpoenaed to attend the PFC hearing at that time; that Bramm was released from said hearing at approximately 10:00 p.m. and during the period from 7:00 to 10:00 p.m. the other patrolmen on duty were required to cover Bramm's patrol area; that on August 4, 1977, just before Bramm returned to his patrol duty Lt. Horn, the Shift Commander, requested Bramm to accompany him to the Chief's office; that the Chief ordered Bramm to write a detailed report explaining why he had not notified his Shift Commander in advance that he would be required to be away from his patrol area and said report was to be submitted that night before Bramm went off duty; that Bramm did write such a report and gave it to Lt. Horn before he went off duty; that upon reviewing said report, Lt. Horn chastised Bramm for not following directions correctly and for failing to supply the specific information requested of him; that the record evidence indicated that Bramm substantially complied with the Chief's specific requests for detailed information to be included in said report; and that Lt. Horn and the Chief were irritated with Bramm for failure to notify the Commanding Officer of his subpoena because it left the patrol force short-handed during the period that Bramm attended the PFC hearing; that the actions of Lt. Horn and the Chief in expressing their disapproval with Bramm did not amount to interference or harassment of Bramm for any protected activity under MERA.

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

CONCLUSIONS OF LAW

1. That Complainant Association by its act of requesting of the Chief on or about May 19, 1977 copies of all current rules, regulations, memoranda and orders pertaining to the duties of Police Officers was engaged in protected activity within the meaning of the

Municipal Employment Relations Act; and that by completely ignoring said request of the Association, Respondent did interfere with, restrain or coerce the employees in the exercise of their rights guaranteed in Section 111.70(2), Stats., and therefore Respondent did commit a prohibited practice within the meaning of Section 111.70(3)(a)1, Stats. 1/

2. That Complainant-Association has failed to prove by a clear and satisfactory preponderance of the evidence that the Respondent's failure to respond to the Association's request for copies of all proposed rule revisions was conduct likely to interfere with, restrain or coerce the Association in violation of Section 111.70(3)(a)1, and therefore Respondent has not committed a violation of Section 111.70(3)(a)1.

3. That Respondent, by the conduct of Lt. Bantin, noted in Finding of Fact No. 7, did interfere with, restrain and coerce employees in the exercise of their rights under Section 111.70(2) of MERA and therefore, Respondent has thereby committed a prohibited practice within the meaning of Section 111.70(3)(a)1, Stats.

4. That during the interview of June 14, 1977 between the Chief and Yule, the latter was not denied a right of representation, and that Respondent's termination of Complainant Yule was unrelated to his request to take time to discuss the matter with his Union Attorney or any concerted activity engaged in by Complainants, and thereby Respondent did not violate Section 111.70(3)(a)1 or 3, Stats.

5. That Respondent, by the conduct of the Chief in requiring Pledl and other employees to request permission from the Chief before obtaining department records relating to the PFC hearing on the charges against Yule, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)1, Stats.

6. That Respondent, by the conduct and statements of the Chief and Lt. Horn noted in Finding of Fact No. 12, did not interfere with, restrain or coerce Officer Bamm in the exercise of his rights under Section 111.70(2), Stats., and therefore Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a)1, Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and files the following

ORDER

IT IS ORDERED that Respondent, Village of Menomonee Falls, its officers and agents shall immediately

1. Cease and desist from threatening employees or in any other manner interfering with, restraining or coercing employees in the exercise of their right to engage in concerted activity on behalf of the Association or any other labor organization.
2. Take the following affirmative action that the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

1/ That although the pleadings alleged generally that Respondent's overall conduct constituted a violation of Section 111.70(3)(a)1 and 3, no evidence or argument was presented to support a finding of a violation of Section 111.70(3)(a)3 and same is therefore dismissed for failure of proof.

- a) Respond to the Association's written request, dated May 19, 1977 for copies of all current rules, regulations, orders and memoranda of the department which pertain to the duties of a Police Officer and, at a minimum, provide the Association with access to said data.
- b) Notify all of its employees in the bargaining unit represented by the Association by posting in conspicuous places on its premises where notices to such employees are usually posted, copies of the notice attached hereto and marked Appendix "A". (Such copies shall bear the signature of the Chief Police and shall remain posted for thirty (30) days after initial posting.) Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by other materials.
- c) Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days of the date of service of this Order as to what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that all remaining portions of the complaint shall be, and hereby are, dismissed.

Dated at Madison, Wisconsin this 28th day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Stephen Pieroni
Stephen Pieroni, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES REPRESENTED BY THE
MENOMONEE FALLS PROFESSIONAL POLICEMEN'S ASSOCIATION

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

WE WILL respond to all requests for information from the Association concerning data which we possess and which reasonably relates to the wages, hours and working conditions of employees represented by the Association.

WE WILL NOT make statements to employees which can be reasonably interpreted by such employees as threats to disrupt collective bargaining negotiations, and which tend to restrain the exercise by such employees of their right to request information from the Municipal Employer which reasonably relates to the wages, hours and working conditions of said represented employees, and

WE WILL refrain from all other forms of interference, restraint and coercion of employees in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act.

Dated this ____ day of _____, 19__.

By _____

Chief of Police, Village of
Menomonee Falls Police Department

THIS NOTICE MUST REMAIN POSTED FOR A PERIOD OF THIRTY (30) DAYS AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY OTHER MATERIAL.

VILLAGE OF MENOMONEE FALLS (POLICE DEPARTMENT), XI, Decision No. 15650-C

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

In its complaint filed July 8, 1977 and amended August 17, 1977 Complainants alleged that Respondent had committed prohibited practices within the meaning of Section 111.70(3)(a)1 and 3, Stats. by (1) refusing to respond to the Association's request to provide copies of all current rules, regulations, memoranda and orders pertaining to the duties of Police Officers; (2) refusing to respond to the Association's request for copies of all proposed rule revisions; (3) making threatening statements to the Vice President of the Association; (4) denying Complainant Yule the right of representation; and discharging said employee in retaliation for requesting said representation and for filing the instant complaint; (5) denying an Officer access to police records in preparation for testifying at a Police and Fire Commission hearing concerning the discharge of Complainant Yule; and (6) requiring Officer Bramm to write a detailed report on why he attended a PFC hearing concerning the discharge of Complainant Yule and by otherwise verbally harassing Bramm for attending said hearing. 2/ Respondent denied Complainant's allegations.

The parties' arguments concerning the specific incidents are noted in the respective discussions infra. The pertinent facts surrounding each incident are noted in the respective findings of fact and will not be repeated in detail herein. Each incident is examined in the chronological order in which it occurred.

I. Refusal To Respond to Letter Dated May 19, 1977 Requesting
Copies Of All Current Rules, Regulations, Memoranda and
Orders Pertaining To The Duties Of A Police Officer.

Complainant's brief alleges that the Chief's refusal to respond to the Association's request, (Exhibit No. 3), for copies of all current rules, regulations, memoranda and orders pertaining to the duties of a Police Officer tended to interfere with the right of the Association to engage in protected activity within the meaning of MERA and therefore constituted interference within the meaning of Section 111.70(3)(a)1, Stats. Respondent counters by contending that no violation occurred because Complainants: (1) did not state the reason for said requests; (2) did not state that time was of the essence or otherwise give a deadline for providing said information; (3) did not demonstrate that the lack of response resulted in prejudice to the Complainants' pending proceedings or negotiations; and (4) did not prove that Complainants were unfamiliar with said data or that they did not have access to same.

Respondent's reliance upon Waukesha County 3/ in this context is misplaced in the opinion of the Examiner. The decision in Waukesha County makes clear that an allegation of violation of Section 111.70(3)(a)1, Stats. must be analyzed on a case-by-case basis, taking into consideration the actual conduct as well as the total context of the circumstances surrounding the alleged statutory violation. In Waukesha County the Municipal Employer ultimately turned over access to the requested files after initially denying said request; there the Examiner found that the

2/ Complainants during the course of the hearing withdrew without prejudice certain allegations of prohibited practices contained in paragraphs 8(K) and 8(L) of the amended complaint and therefore same will not be discussed herein.

3/ AFSCME, Local 2490 and AFSCME, Local 2494 vs. Waukesha County
Decision No. 14662-A (1/68).

Employer's response was reasonable under the circumstances. For the reasons discussed below, the undersigned concludes that by refusing to give any response whatsoever to the Association's request referred to herein, Respondent's conduct was likely to interfere with, restrain or coerce the employees in the exercise of their MERA rights.

The record contains un rebutted testimony that departmental memoranda and orders as well as revisions of the rules and regulations handbook were promulgated, but copies of same were not supplied to Officers. The rules provide that Officers are required to become familiar with all the current rules, regulations, orders and memoranda pertaining to the duties of Police Officers and failure to do so could be cause for discipline. It is axiomatic that it would be difficult, at best, for the Officers to become familiar with current rules, regulations, memoranda and orders since they did not receive copies of same upon issuance.

It is important to note that Respondent in its brief first raised the point that Complainants failed to prove they lacked access to said rules etc. However, the unavoidable inference raised by Complainants' testimony was that they did not have access to said data; if in fact Complainants had access to said data, Respondent's witness, Chief Kuhn, presumably would have said as much at hearing. More importantly, it was Respondent's duty to prove that Complainants possessed access to said rules, memoranda and orders and the Examiner concludes that Respondent failed to meet its burden of proof on this issue.

Based upon the record evidence, the undersigned finds a substantial relationship between the rules, regulations, orders and memoranda which the employees are obligated to obey, and the working conditions of employees represented by the Association. The request for information at issue herein, was therefore relevant to the obligation of the Association to represent unit employees with respect to their conditions of employment, and was thereby a form of lawful, concerted activity within the meaning of Section 111.70(2), Stats.

Further, the absence of a specific grievance currently under consideration between the parties does not detract from the potential value of the information requested as pertinent data which the Association should be supplied in order to assist in its task of representing unit employees with respect to their conditions of employment. It is apparent that said information would be helpful to the Association in preparing for future negotiations.

Complainant-Association did not herein allege that Respondent's failure to respond to its request for information amounted to a refusal to bargain in violation of Section 111.70(3)(a)4, Stats. 4/ Nevertheless, by ignoring the Association's request for said information without explanation, it is apparent to the undersigned that Respondent interfered with and/or restrained employees in the exercise of its MERA rights.

Lastly, it is noted that Respondent has not argued that the instant request for information was so overbroad and/or burdensome as to justify its refusal to respond. However, the undersigned has

4/ See for example, Western Massachusetts Electric Company and Local 455, International Brotherhood of Electrical Workers, AFL-CIO 1978 CCH NLRB para. 18553 for discussion of Union's right to information in possession of Employer - refusal to bargain case.

not ordered the Respondent to provide copies of said data to the Association; rather the Respondent's statutory duty in this instance only requires a response to said request and reasonable provisions for access to said data by the Association representative.

II. June 22, 1977 Request To Village Manager for Copies Of All Proposed Rule Revisions (Exhibit No. 4).

Complainants argue that Respondent's failure to respond to this request likewise constituted interference within the meaning of Section 111.70(3)(a)1 and further, that such failure tended to undermine "the right of the employees to form, join and administer the Association." Respondent substantially realleged the same arguments as it presented in regard to the Association's May 19, 1977 request discussed above. Further, Respondent counters by contending that the Complainants failed to produce any evidence that the Village in fact proposed any rule revisions and hence the Village was not obligated to respond to the Association until same were indeed proposed.

If Complainants had proved that Respondent had adopted proposed rule changes, then a violation of MERA would be found for failure to provide same to the Association. Whereas, in regard to the incident discussed above, Complainants demonstrated by clear and satisfactory preponderance of the evidence that in the past memoranda, rules and orders had been promulgated but not provided to the Officers; here Complainants failed to illicit any evidence or inference therefrom upon which the Examiner could conclude that Respondent had proposed any rule revisions. Therefore no statutory violation is found to flow from Respondent's lack of response to Complainants' letter to the Village Manager, dated June 22, 1977.

III. Lt. Bantin's Statements To Officer Pledl In Late June, 1977.

The record contains un rebutted testimony that sometime shortly after June 22, 1977, Lt. Bantin engaged Officer Pledl in a conversation while both men were on duty. Bantin is a supervisory officer and Pledl at that time was the Vice President of the Association. Bantin inquired about the two letters Officer Lunde had written on behalf of the Association, (Exhibits No. 3 and 4), and when Pledl responded that he wasn't aware of the contents of said letters, Bantin told Pledl that the letters made the "Village Fathers very upset" and "... if these letters or actions by the Association continued, the men would not receive anything at bargaining time"

Complainants assert that these statements constituted interference with the employees' right under MERA to engage in lawful, concerted activity. Further, Complainants at hearing asserted that on April 5, 1978, the night before the hearing in the instant matter, Bantin again threatened Pledl by stating as follows: "... that the incident that I had with him prior to this . . . if I thought I had a bad deal on that, just wait . . ." (Tr. 19, 20) Respondent argues: (1) that Bantin wasn't aware of the contents of said letters, but merely described the "impact" of said letters upon the Village Fathers and, as such, Bantin's statements were a legitimate exercise of his right of free speech; and (2) that Pledl wasn't aware of the letters in question and Complainants failed to establish that Pledl took Bantin's statements as a threat of reprisal or promise of benefit and therefore said allegations must be dismissed.

To meet its burden of proof, Complainants must demonstrate by a clear and satisfactory preponderance of the evidence that Bantin's statements contained a threat or promise of benefit which could tend to interfere with Pledl's and other employees' right to engage

in lawful, concerted activity as protected by MERA. It is apparent that Bantin's statement went substantially beyond merely describing the "impact" the letters had on the Village Fathers. By telling the Vice President of the Association that the employees "would not receive anything at bargaining time" if they continued to engage in concerted activities, Respondent's statements clearly constituted a threat which could tend to interfere with the employees' rights under MERA. Inasmuch as Lt. Bantin was functioning in his capacity as Respondent's agent when he made the statements, Respondent is found to have committed a prohibited practice within the meaning of Section 111.70(3)(a)1, Stats.

Complainants alleged in their initial reply brief that Bantin's statement noted above on the day before the hearing on the instant complaint constituted a separate and independent violation. However Complainants did not seek to amend the pleadings to include said allegation and Respondent did not attempt to litigate or argue the merits of that issue. Moreover, even though Bantin's statement of late June 1977 tends to corroborate the alleged threat of April 5, 1977, the latter statement without additional testimony, is too vague and ambiguous to constitute an independent technical interference. For these reasons the Examiner concludes that Complainants failed to plead or prove a violation of MERA with respect to Bantin's statement of April 5, 1977.

IV. Dismissal Of Officer Yule.

The Commission has recognized that an employee has the right to Union representation when he/she is compelled to participate in an investigatory meeting with supervisory personnel concerning matters that reasonably may result in discipline or discharge. 5/ In such cases where the employee requests Union representation, the Employer is obligated to allow the representation requested or afford the employee the option of either proceeding without representation or foregoing the interview altogether. The Commission has concluded that such a ruling best balances the employee's interest in just treatment and the Employer's interest in efficient and orderly operations. In Waukesha County (14662-A, 1/78) it was noted that it is the potential for affecting Supervisors' decisions about whether and how to discipline, before those decisions are made, that has led to the recognition of the right to Union representation in such instances. A good faith discussion of the problem prior to the Employer making a decision provides an opportunity for reaching a mutually satisfactory resolution thereof without resort to costly litigation. It is this legal principle that Complainants allege was violated during the interview of June 14, 1977.

The essential facts upon which Complainants base their charges against Respondent in this regard are found in Findings of Fact No. 8 and No. 9. Complainants assert: (1) that Yule was denied his right of representation at an investigatory interview which he reasonably believed could result in discipline; (2) that Respondent discharged Yule in response to Yule's request for legal representation during the interview of June 14, 1977; and (3) that Respondent filed charges against Yule with the PFC requesting his dismissal in retaliation for filing a complaint against the Respondent with the WERC.

5/ Waukesha County, supra, footnote 2; and Tom H. Rhodes, Jr. vs. City of Milwaukee (Police Department) Decision No. 14394-A (9/77).

Complainants request broad make whole relief for Yule, including reinstatement, backpay, expungement of records and punitive damages. Respondent denies these allegations and requests dismissal of same.

As previously mentioned, Complainants assert that Yule had a statutory right to Union representation at the June 14, 1977 interview because it was an investigatory interview in which Yule had a reason to believe that management could decide to discipline or discharge him. 6/ During the interview Yule requested additional time to discuss the matter with the Association President or its attorney and immediately thereafter Yule was advised that he was dismissed.

Respondent first argues that since the Chief had made his decision to discharge Yule in advance of the June 14, 1977 meeting, rather than being an "investigatory interview", said meeting was merely for the purpose of imposing discipline. Therefore, according to case law, no right of representation attached. 7/ In the alternative, Respondent argues that even assuming Yule had a right of representation at said meeting, he did not timely exercise that right. It was only at the end of the meeting, in response to the Chief's ultimatum to either resign or be dismissed, that Yule requested additional time to seek Union representation, whereupon the Chief advised Yule that he was fired and the meeting was concluded. Respondent argues that legal authority does not support Yule's contention that he was denied a right to representation in this context, since no further discussion regarding Yule's conduct took place after he requested legal counsel. 8/

In resolving this issue, the Examiner has benefited from the opportunity to listen to a tape recording of the June 14, 1977 conversation between the Chief and Yule as well as reading the transcript of said conversation (Exhibit No. 5). There is therefore no dispute concerning the content of said conversation. Listening to the voice recording reveals that the conversation was noncoercive in tone and substance. The voice demeanor of the participants indicates that the conversation proceeded in a low key, matter-of-fact fashion. It is undisputed that during the interview Yule did not request Union representation until after he had admitted to all of the damaging allegations that had been alleged against him (i.e. sleeping while on duty, failing to report location to the dispatcher per departmental rules). The flow of the conversation was such that after Yule admitted to the rule violations, the Chief twice asked Yule whether he wanted to resign or be terminated. It was at that juncture that Yule requested time to discuss the matter with Union counsel. It is clear to the Examiner that the Chief at that point considered the interview at an end and therefore advised Yule that he was terminated. Thereafter no further discussion of Yule's conduct took place.

Hence, even assuming that a right of representation existed and assuming further that Yule's request for additional time to discuss the matter with Union counsel constituted such a request for representation, it is apparent that subsequent to Yule's request, no

meeting or interview of the sort contemplated by the decision in Waukesha County (14662-B, 1/78) and City of Milwaukee (Police Department) (13558-B, 1/76) took place. By not proceeding with the interview, the situation did not give rise to an obligation in Respondent to afford Yule the option of either proceeding without representation or foregoing the interview altogether. Therefore, it is concluded that Respondent did not deny Yule his right of representation and thereby no violation of MERA is found.

Complainants second allegation in this regard is that Respondent discharged Yule in response to Yule's request for legal representation during the interview of June 14, 1977. To meet its burden of proof in this regard, Complainants must prove by a clear and satisfactory preponderance of the evidence that Yule was engaged in concerted activity which is protected by MERA; that Respondent was aware of Yule's protected concerted activity; that Respondent was hostile toward said activity; and that the discharge was motivated at least in part by Respondent's opposition to said activity. 9/ Uncontroverted evidence reveals that the Chief twice asked Yule whether he wanted to resign or be dismissed before Yule requested additional time to seek Union representation. As indicated earlier, the tape recording of this conversation leads the Examiner to conclude that the Chief at that point considered the interview at an end and was merely giving Yule the choice of resigning or being dismissed. Although Lt. Bantin was present during this interview and it could perhaps be inferred from Bantin's statements to Pledl in late June, 1977 (discussed above III) that he harbored animus toward protected Union activity, there is no evidence whatsoever to support the contention that the Chief was hostile toward Yule's request for Union representation; nor is there evidence that the Chief's decision to discharge Yule was motivated in any way by Yule's request for Union representation. Therefore this charge has been dismissed.

Complainants' third allegation in this regard concerns Respondent's act of filing charges against Yule with the PFC, requesting Yule's dismissal in retaliation for filing a complaint against Respondent with the Wisconsin Employment Relations Commission. This allegation must also fail for lack of evidence. The record contains un rebutted evidence that Respondent filed its initial petition for dismissal with the PFC on June 30, 1977. Although Complainants' initial complaint was filed with the WERC on June 27, 1977, that complaint was not received by the Respondent until July 8, 1977, approximately eight days after the Respondent had filed charges against Yule with the PFC. Hence, the conclusion follows that Complainants failed to prove that Respondent had knowledge of the complaint filed with the WERC at the time Respondent filed its petition for Yule's dismissal with the PFC. Therefore, this allegation must be dismissed.

Complainants argue that Respondent's action of withdrawing and then refileing its charges against Yule with the PFC on July 19, 1977 somehow supports its allegation of impermissible retaliation against Yule. Such an argument is untenable since the evidence reveals that Respondent's subsequent withdrawal and simultaneous refileing of charges with the PFC on or about July 19, 1977 was to cure technical defects. No inference of illegal retaliation against Yule may be drawn from the refileing of the PFC charges, since the evidence established that the identical charges alleged on June 30, 1977 were refiled on July 19, 1977 (Exhibits No. 9 and No. 10). Therefore, Complainants' contentions in this regard must also be dismissed.

9/ Drummond Education Association vs. Drummond Integrated School District Decision No. 15909-A (3/78).

V. Denial Of Access To Police Records.

Complainants' next contend that Officer Pledl was denied access to Police records which he wished to obtain in preparation for the PFC hearing concerning Yule on August 3 and 4, 1977. Pledl testified at hearing that he was informed by the Records Clerk on the nights of August 3 and 4, 1977 that the Chief issued an Order that the Chief's permission was to be obtained before anyone could obtain records. Pledl testified he never had to obtain permission from anyone prior to or subsequent to the Yule-PFC hearing. Complainants argue that said rule was in effect only during the Yule-PFC hearing and, as such, constituted interference with the rights of employees to assist its labor organization and to engage in concerted activity for mutual aid and protection.

As indicated earlier, to meet its burden of proof, Complainants must demonstrate by a clear and satisfactory preponderance of the evidence that the Chief's order requiring his permission prior to obtaining Police records could tend to interfere with employees' rights under MERA to engage in concerted activity on the Association's behalf. Assuming, arguendo, that Pledl's attempt to obtain Police records in this instance amounted to concerted, protected activity, Pledl admitted in his testimony that neither he nor anyone on his behalf made any attempt to obtain the Chief's permission. (Tr. 27) Pledl admitted also that the Chief was available on both nights in question. In light of the fact that Pledl did not attempt to obtain the Chief's permission, coupled with the absence of any evidence that such permission would have been denied if requested, the Examiner finds the allegation too speculative and without substantial evidence in the record to sustain the finding of a technical violation of Section 111.70(3)(a)1.

It is further noted that Complainants did not allege or argue that Respondent refused to bargain with the Association prior to implementing the alleged change in past practice of allowing employees to obtain records without permission. Therefore these facts have not been discussed in the context of a refusal to bargain and no comment is made thereon.

VI. Incident Concerning Officer Bramm on August 4, 1977.

Complainants allege that Bramm attended a PFC hearing concerning the Yule matter on August 4, 1977 pursuant to a subpoena; that after attending said hearing Bramm was confronted and verbally harassed by the Chief and Lt. Horn and required to write a report as to why he attended said hearing; and that on August 10, 1977 Bramm was advised by Respondent that he would be charged for an alleged violation of Police Department procedure for his attendance at the PFC hearing on August 4, 1977.

The testimony at hearing reveals that on the evening of August 4, 1977 the Chief required Bramm to write a detailed report concerning his failure to advise his Supervisor of the fact that he was subpoenaed to attend the PFC hearing at 7:00 p.m. on August 4, 1977 and would therefore be unavailable for his patrol duty. Bramm received the subpoena on the morning of August 3, 1977. Although he worked on August 3 and part of the evening on August 4 while his Supervisor was on duty, Bramm failed to notify his Supervisor of the situation. Thus a replacement was not found for the period that Bramm would be unavailable for patrol duty. Bramm merely notified the Police Dispatcher at the last minute before leaving his patrol area that he would be in attendance at said hearing. Bramm attended said hearing from approximately 7:00 p.m. to 10:00 p.m. during which time the other patrolmen on duty were required to cover Bramm's patrol area. Bramm had received a prior reprimand for leaving his patrol area without authorization.

Bramm substantially complied with the Chief's instructions in filling out said report regarding his absence from patrol duty. Although Lt. Horn chastised Bramm for not following directions in completing said report, it appears from the record that this amounted to no more than mere "nitpicking." The evidence in this regard reveals that Lt. Horn and the Chief expressed their disapproval of Bramm's failure to notify the Commanding Officer that he (Bramm) would not be available for a full tour of duty on the evening of August 4, 1977. Further, there was no evidence of record to substantiate that on August 10, 1977 Bramm was told that he would be charged with the violation of departmental procedure in this regard. Even if same had been proven, the evidence is insufficient to establish that the actions of Lt. Horn and the Chief, in this context, amounted to interference or harassment for Bramm's alleged protected activity. Thus, Complainants' allegation in this regard must be dismissed.

Dated at Madison, Wisconsin this 28th day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Stephen Pleroni
Stephen Pleroni, Examiner