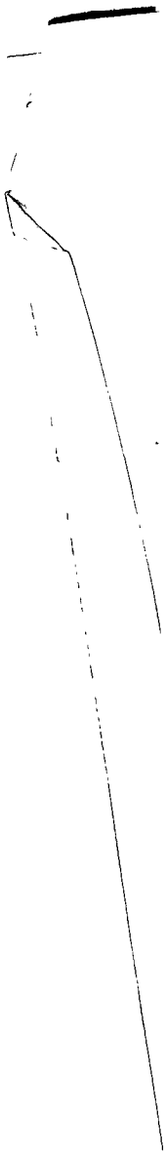

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO,		
Complainant,		Case CVI No. 23193 MP-870 Decision No. 16448-B
vs.		
MILWAUKEE COUNTY,		
Respondent.		

Appearances:
Podell & Ugent, Attorneys at Law, by Ms. Nola J. Hitchcock Cross, appearing on behalf of the Complainant.
Mr. Robert G. Ott, Esq., Principal Assistant Corporation Counsel, Milwaukee County, appearing on behalf of the Respondent.

INTERLOCUTORY FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and the Commission having appointed James D. Lynch, a member of the Commission's staff to act as Examiner; and a hearing on said complaint having been held at Milwaukee, Wisconsin, on August 8, 1978 before the Examiner; and the parties having filed post-hearing briefs on January 16, 1979; and the Examiner having considered the evidence, arguments of Counsel and being fully advised in the premises, makes and files the following Interlocutory Findings of Fact, Conclusion of Law and Order.

INTERLOCUTORY FINDINGS OF FACT

1. That Milwaukee District Council 48, American Federation of State, County & Municipal Employees, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization with offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

2. That Milwaukee County, hereinafter referred to as the Respondent, is a Municipal Employer with offices located at Milwaukee County Courthouse, Milwaukee, Wisconsin.

3. That at all times material hereto, the Complainant has been the exclusive bargaining representative of certain employes of Respondent among whom are Pearlie Duncan, Isreal Harris, Kirby Daniels, Debra Milton and Billy Prince each of whom was employed as Neighborhood Security Aide by Respondent; that the Complainant and Respondent are signatories to a collective bargaining agreement which was in effect at all times material hereto.

4. That said collective bargaining agreement contains, inter alia the following provisions:

PART I

1.01 RECOGNITION. The County of Milwaukee agrees to recognize and herewith does recognize Milwaukee District Council 48, Americal Federation of State, County and Municipal Employees, AFL-CIO, and its appropriate

affiliated Locals, as the exclusive collective bargaining agent on behalf of the employes of Milwaukee County in accordance with the certification of the Wisconsin Employment Relations Commission, as amended, in respect to wages, hours and conditions of employment, pursuant to Subchapter IV, Chapter 111.70, Wis. Stats., as amended.

. . .

1.05 MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employes from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agrement, [sic] nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe for the purpose of discrediting or weakening the Union.

The County does have the right to contract or subcontract work which cannot be performed or is uneconomical to be performed by bargaining unit employes.

The County is genuinely interested in maintaining maximum employment for all employes covered by this Agreement consistent with the needs of the County.

In planning to contract or subcontract work, the County shall give due consideration to the interest of County employes by making every effort to insure that employes with seniority will not be laid off or demoted as a result of work being performed by an outside contractor.

In the event a position is abolished as a result of contracting or subcontracting, the County will hold advance discussions with the Union prior to letting the contract. The Union representatives will be advised of the nature, scope of work to be performed, and the reasons why the County is contemplating contracting out work.

. . .

PART 4

4.01 RESOLUTION OF DISPUTES. The disputes between the parties arising out of the interpretation, application or enforcement of this Memorandum of Agreement, including employe grievances, shall be resolved in the manner set forth in the ensuing sections.

4.02 GRIEVANCE PROCEDURE.

(1) APPLICATION: EXCEPTIONS. A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute by an employe or group of employes concerning the application of wage schedules or provisions relating to hours of work and working conditions. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under other existing procedures.

. . .

4.07 REPRESENTATION AT DISCIPLINARY HEARINGS

(1) At meetings called for the purpose of considering the imposition of discipline upon employes, the employe shall be entitled to Union representation but only at the administrative level at which suspension may be imposed or effectively recommended, that is, at the level of the appointing authority or his designee for such purposes.

(2) It is understood and agreed that such right is conditioned upon the following:

(a) At the hearing before the appointing authority or his designee for disciplinary purposes, the employee may be represented by Union officials equal to the number of management officials present at such hearing.

(b) The meeting at which the Union official is permitted to be present shall not be an adversary proceeding. The Union official may bring to the attention of the appointing authority or his designee any facts which he considers relevant to the issues and may recommend to the appointing authority on behalf

of the employe what he considers to be the appropriate disposition of the matter. The employe shall not be entitled to have witnesses appear on his behalf nor shall the supervisory personnel present at such hearing be subject to cross-examination or harassment. These restrictions recognize that the purpose of Union representation at such hearings is to provide the employe with a spokesman to enable him to put his case before the appointing authority and, further, to apprise the Union of the facts upon which the decision of the appointing authority or his designee is made. These restrictions are in recognition of the further fact that, in accordance with other terms and conditions of this Agreement, the employe has recourse from the decision of the appointing authority or his designee to the permanent umpire where the employe is entitled to a full measure of due process.

(c) Recognizing that discipline is most effectively imposed as contemporaneously as possible with the incident leading to discipline, it shall be the obligation of the employe to make arrangements to have his Union representative present at the time the meeting is set by the appointing authority or his designee to consider the imposition of discipline. In order to carry out the intent of this Agreement, written notice of the meeting shall be provided to the employe and the Union not less than 48 hours prior to such a meeting, and such notice shall be accompanied by a brief statement of the basis for the proposed discipline. The inability of the employe to secure the services of any particular Union representative shall not be justification for adjourning such hearings beyond the date and time originally set by the appointing authority.

(d) Nothing contained herein shall in any way limit the authority of supervisory staff to impose summary discipline where the circumstances warrant such action. If summary discipline is in the form of a suspension, it is understood that a review of the action of the supervisor will be made at the level of the appointing authority or his designee to review the action taken by the immediate supervisor. Hearings to review such summary suspensions shall be held as soon as practicable at the level of the appointing authority or his designee. At such hearing the employe shall be entitled to the rights set forth herein.

5. That on December 20, 1977, Respondent summarily suspended Pearlie Duncan, Israel Harris, Kirby Daniels, Debra Milton, Billy Prince and Flamond France as the result of incidents which allegedly occurred on that date at the O.C. White Soul Club.

6. That on said date, John D. Hayes, a supervisor of the six aides ordered them to report to the office of the Neighborhood Security

aide program in the Milwaukee County Courthouse at 10:30 a.m. on December 21, 1977 to participate in a disciplinary interview.

7. That during the course of disciplinary interviews held with the aides on December 21, 1977 and December 27, 1977, Respondent's Agents, William Chase, Director of the NSAP, and Joseph Radtke, Assistant of the NSAP denied the six individuals their right to union representation.

8. That on January 4, 1978 Respondent terminated the employment of the six aides; that a grievance regarding denial of union representation at their disciplinary interviews was filed by these individuals on December 21, 1977 and on or about January 5, 1978, Complainant requested that Respondent submit to arbitration the disputes involving the summer's suspension, denial of union representation and termination of the six aides.

9. That Respondent subsequently agreed to proceed to arbitration on the grievances regarding Flamond France but refused, and continues to refuse, to process the grievances of the other five aides to arbitration.

Upon the basis of the above and foregoing Interlocutory Findings of Fact, the Examiner makes the following

INTERLOCUTORY CONCLUSION OF LAW

That Respondent, Milwaukee County, has violated, and continues to violate, the terms of the collective bargaining agreement existing between it and the Complainant, Milwaukee District Council 48, American Federation of State, County & Municipal Employees, AFL-CIO by refusing to submit the grievances relating to the suspension, denial of union representation and discharge of the five named Neighborhood Security aides to arbitration and, by refusing to arbitrate said grievance has committed, and is committing prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Interlocutory Findings of Fact and Conclusion of Law, the Examiner makes the following

INTERLOCUTORY ORDER

That Respondent, Milwaukee County, and its agents, shall immediately:

1. Cease and desist from refusing to submit the aforesaid grievance and issues related thereto to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of Section 111.70(3)(a)5 of the Municipal Employment Relations Act:

   (a) Comply with the arbitration provisions of the collective bargaining agreement existing between Respondent and Milwaukee District Council 48, AFSCME, AFLL-CIO, with respect to the subject grievance of the five named Neighborhood Security aides.

   (b) Notify the Milwaukee District Council 48, AFSCME, AFL-CIO that Respondent will proceed to arbitration on said grievance and the issues concerning same.

   (c) Participate with Milwaukee District Council 48, AFSCME, AFL-CIO, in the arbitration proceedings concerning same.

(d) Participate with Milwaukee District Council 48, AFSCME, AFL-CIO, in the arbitration proceedings before the arbitrator to resolve the grievance.

(e) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

(f) Request the permanent umpire to furnish the Examiner with a copy of its Arbitration Award.

IT IS FURTHER ORDERED that the allegations of the complaint in the proceeding that Milwaukee County has violated Section 111.70(3)(a), 1 and 4 of the Municipal Employment Relations Act be, and hereby are, deferred, and held in abeyance, without any determination by the Examiner until the Examiner has had the opportunity to review the Arbitration Award in order to determine whether the Examiner should dismiss said allegations, or make a determination on the merits thereof.

Dated at Madison, Wisconsin this 27th day of April, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James D. Lynch
James D. Lynch, Examiner

MILWAUKEE COUNTY, CVI, Decision No. 16448-B

MEMORANDUM ACCOMPANYING INTERLOCUTORY FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The complaint filed in this matter alleges that the Respondent has interfered with the exercise of employe rights by denial of union representation at disciplinary interviews, has refused to bargain by its failure to execute an alleged oral agreement to arbitrate issues concerning CETA employes and has violated the collective bargaining agreement by refusing to proceed to arbitration concerning its suspension, denial of union representation and subsequent discharge of five probationary employes employed as Neighborhood Security Aides. The Respondent, in its amended answer and in the opening statement of its attorney at hearing, admitted that it had denied employes their rights to union representation at disciplinary interviews and that it has refused to proceed to arbitration regarding grievances of the five probationary security aides. However, it denied the existence of any oral agreement to arbitrate issues regarding CETA employes. Complainant, in its prayer for relief, requests that the Employer be ordered to arbitrate the underlying disputes. Respondent raises, as a bar to the requested relief, the argument that any such order would contravene state law as probationary employes are not entitled to a just cause discharge hearing.

DISCUSSION:

The relevant facts are undisputed and are hereinafter recited: that six individuals employed by the Respondent as Neighborhood Security Aides were summarily suspended on December 20, 1977; that all of these employes, save Flamond France, were probationary employes; that on December 21, 1977 and December 27, 1977, the Respondent, by its agents, denied these individuals their right to union representation at disciplinary interviews; that on January 4, 1978, these employes were terminated; that a grievance was filed on their behalf on December 21, 1977 protesting their denial of union representation; that on or about January 5, 1978, Complainant requested Respondent to submit for arbitration the questions of the employes' summary suspension, denial of union representation, discharge; that Respondent has refused to proceed to arbitration on these matters except in the case of Flamond France. The collective bargaining agreement contains a provision for final and binding arbitration of unresolved disputes.

Commission law regarding the refusal of a party to submit disputes to arbitration is well settled. Initially, though, a threshold issue, namely the question of whether deferral of Complainant's statutory allegations to arbitration is appropriate, must be discussed. 1/ Insofar as the interference allegation concerns an admitted denial of union representation at disciplinary interviews and as the collective bargaining agreement guarantees Respondent's employes such a right, the issue to be decided by the Examiner or the permanent umpire appears to be substantially congruent. As the refusal to bargain allegation concerns the existence of an alleged oral agreement between the parties and Respondent's alleged refusal to execute same, it is the sort

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1/ Recent federal sector cases, although not controlling precedent, raise substantial doubt regarding the efficacy of deferring to the arbitral forum issues concerning alleged violations of statutory rights, save those between the contracting parties alleging a refusal to bargain. In this respect, see Roy Robertson Chevrolet, 228 NLRB No. 103, 94 LRRM 1474 (1977) and Great American Transportation Corporation, 228 NLRB No. 102, 94 LRRM 1483 (1977).

of disputed factual determination concerning the parties' contractual relationship which arbitrators commonly undertake, the resolution of which may obviate the need for proceeding in this forum. Thus, the interests of the parties both in judicial economy and in fostering the use of their voluntarily established dispute resolution mechanism would be best served by deferral. The Examiner will, however, retain jurisdiction over the interference and refusal to bargain allegations pending the issuance of the arbitrator's award. 2/

Turning then to the refusal to arbitrate issue, the Commission has for years held that if the grievance states a claim which on its face is governed by the collective bargaining agreement, it is substantively arbitrable. 3/ As the grievance procedure contains no provision exempting probationary employes from the scope of its coverage, the Examiner finds these disputes to be prima facie arbitrable. As to the question raised by Respondent regarding the legality of the probationary employes' rights to a hearing and its argument that such is a bar to the Commission's power to order arbitration, this issue is a procedural defense and is reserved to the arbitrator for decision. 4/ It is not a defense to a refusal to proceed to arbitration charge. 5/

In view of the foregoing, the Examiner has found that Respondent has violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act by refusing to process the subject grievances to arbitration and hereby orders Respondent to do same.

Dated at Madison, Wisconsin this 27th day of April, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James D. Lynch, Examiner

2/ Milwaukee Elks Lodge No. 46, No. 7753 (10/66).

3/ Oostburg Joint School District No. 14, No. 11196-A, B (12/72); Seaman Andall Corporation, No. 5910 (1/62).

4/ Monona Grove Joint School District No. 4, No. 11614-A, B (8/73).

5/ Spooner Joint School District No. 1, No. 14416-A (9/76).