STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES A. LEAVENS, Complainant, vs. CHIEF DONALD BLOEDORN and CITY OF WAUWATOSA, Respondents.	Case LXVI No. 28973 MP-1279 Decision No. 19310-B
LARRY G. GREENHILL, Complainant, vs. CHIEF DONALD BLOEDORN and CITY OF WAUWATOSA, Respondents.	Case LXVII No. 28974 MP-1280 Decision No. 19311-B
RICHARD F. MAIER, Complainant, vs. CHIEF DONALD BLOEDORN and CITY OF WAUWATOSA, Respondents.	Case LXVIII No. 29081 MP-1292 Decision No. 19312-B

Appearances

Brendel, Flanagan, Sendik & Fahl, S.C., Attorneys at Law, 6324 West North Avenue, Wauwatosa, WI 53213, by Mr. John K. Brendel, appearing on behalf of the Complainants

Mr. Harold D. Gehrke, City Attorney, 7725 West North Avenue, Wauwatosa, WI 53213, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 14, 1981 separate complaints were filed by James A. Leavens and Larry G. Greenhill, and on January 11, 1982 a complaint was filed by Richard F. Maier with the Wisconsin Employment Relations Commission, herein Commission, each alleging that the above-named Respondents had committed prohibited practices within the meaning of Sections 111.70(3)(a)3 and 5 and 111.70(3)(b)4 of the Municipal Employment Relations Act, herein MERA; and the Commission having appointed Lionel L. Crowley, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law, and Order in each of these matters as provided in Section 111.07(5), Wis. Stats.; and a hearing having been held on said complaints on March 15, 1982 in Wauwatosa, Wisconsin; and the Examiner on March 19, 1982 having consolidated the cases for purposes of hearing; and further hearings in the matters having been held on April 28 and 29, 1982 in Wauwatosa, Wisconsin; and the parties having filed briefs and reply briefs, the last of which were exchanged by September 8, 1982; and the Examiner having considered the evidence and arguments of counsel and being fully advised in the premises, issues the following consolidated Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant James A. Leavens is an individual who was employed as a probationary firefighter by the City of Wauwatosa from January 2, 1981 to December 2, 1981 and resides at 510 Hawthorne Avenue, South Milwaukee, Wisconsin; that Complainant Richard F. Maier is an individual who was employed as a probationary firefighter by the City of Wauwatosa from January 2, 1981 to December 2, 1981 and resides at 240 East Jewell Street, Oak Creek, Wisconsin; and that Complainant Larry G. Greenhill is an individual who was employed as a probationary firefighter with the City of Wauwatosa from January 2, 1981 to December 3, 1981 and resides at 4918 West Medford Avenue, Milwaukee, Wisconsin.

2. That the City of Wauwatosa, hereinafter Respondent, is a municipal employer and has its offices located at 7725 West North Avenue, Wauwatosa, Wisconsin; and that Donald Bloedorn has at all times herein been the Chief of the Fire Department of the City of Wauwatosa and has acted on its behalf.

3. That on December 19, 1980, Respondent and Milwaukee County entered into an agreement whereby Respondent agreed to provide fire protection for the County Institutions' property; that Milwaukee County thereafter laid off all its fire protection employes which included Complainants; and that the Respondent accepted applications from all of the County's former fire protection personnel to fill twelve positions created as a result of the Respondent's takeover of the fire protection responsibilities, and hired Complainants.

4. That the Respondent, City of Wauwatosa, and the Wauwatosa Firemen's Protective Association, Local 1923, International Association of Fire Fighters, herein Association, have, at all times material herein, been parties to a collective bargaining agreement which provides in relevant part as follows:

> ARTICLE V - Probationary Period
>
> An employee shall be probationary and without seniority rights for his first calendar year of service. Such probationary employee may be laid off, transferred, or discharged for cause at any time during such period without any recourse to the Grievance procedure. Thereafter, rights of seniority shall be retroactive to his date of original hire. In all other respects such employee shall be eligible for union membership and entitled to all benefits as such may provide.

5. That on December 2, 1981 at approximately 8:00 a.m., Chief Bloedorn met with Complainants Maier and Leavens and handed each of them a letter which stated as follows:

> "For cause and without comment, effective 8:00 a.m. December 2, 1981, your services as a Probationary Firefighter with the Wauwatosa Fire Department, Wauwatosa, Wisconsin are terminated.
>
> Sincerely,
>
> Donald E. Bloedorn
> Chief of Department";

and that at that time the Chief verbally informed them of the reasons for their discharge as follows:

> "You have failed to demonstrate an acceptable level of cooperation or an acceptable attitude for continued employment with the Wauwatosa Fire Department."

6. That on December 3, 1981 at approximately 8:00 a.m. Chief Bloedorn gave Complainant Greenhill a similar letter of termination; and that Chief Bloedorn verbally informed Complainant Greenhill that the reason for his termination was excessive use of sick leave.

7. That the basis for Chief Bloedorn's decision to terminate Greenhill was Greenhill's sick leave usage; that Greenhill had used all of his sick leave allotment as of November 5, 1981; that Greenhill did not report for duty on November 5, 1981 due to illness and was off the payroll for that date; that Chief Bloedorn met with Greenhill and his Union steward on a date after November 5, 1981 and stressed the importance of Greenhill's building up sick leave so that he would not be taken off the payroll; that approximately five workdays thereafter, Greenhill again did not report for duty due to illness and was off the payroll; that the reasons for Greenhill's absence in each case was due to his own personal illness or the illness of a family member; and that the dismissal of Greenhill was based on no other factors.

8. That the basis for Chief Bloedorn's decision to terminate Richard Maier was Maier's attitude toward his employment; that Maier had previously been employed by the Respondent as a firefighter from August 1971 to August 1974; that thereafter, Maier became employed by Milwaukee County as a firefighter from August 1974 until January 1981; that sometime prior to January 2, 1981 Maier filled out an application for employment as a firefighter with the Respondent; that at this time Chief Bloedorn overheard Maier make a complaint to another applicant that he had previously been employed with the Respondent and quit once before and now was coming back at the bottom; and that Chief Bloedorn stated to Maier, in effect, that no one was forcing him to apply for the position, and in response, Maier indicated that he was doing so only for economic reasons.

9. That in March or April of 1981 Maier took part in fighting a fire at the Winding Roofing Company which involved his exposure, as well as all the other firefighters present, to hydrogen chloride fumes; that after the fire, the twenty-seven (27) firefighters present were given medical treatment at County General Hospital; that Maier, thereafter contacted his own personal physician for additional medical evaluation; that Chief Bloedorn became aware of this fact and contacted Maier at his home; that the Chief's purpose in contacting Maier was to inform him that it was necessary to contact the Respondent for authorization to see his personal physician so that the proper forms could be completed so payment would be appropriately made to that physician; that during this conversation, Maier stated to Chief Bloedorn that he did not trust him and that ninety-nine percent of the firefighters did not trust him; that Chief Bloedorn directed Assistant Chief Pekel to speak with Maier concerning his attitude; that Assistant Chief Pekel did contact Maier and spoke to him concerning his attitude toward his job; that Maier informed Pekel that he had previously left the Respondent's Fire Department because he was not happy there, that his employment with Milwaukee County resulted in greater pay and fringe benefits, that his present position with the Respondent's Fire Department resulted in a loss of these benefits, that he needed a job at the present time to support his family, and that he was looking around for another position; and that Assistant Chief Pekel noted in his evaluation of Maier that he had spoken to him concerning his attitude and marked his attitude as fair.

10. That on November 19, 1981 an impromptu meeting was held with Chief Bloedorn, Battalion Chief Lussier, Union President Gary Vukovitch and Union Secretary Donald Mohr; that at this meeting, Vukovitch indicated to Chief Bloedorn that something had to be done about the morale at Station No. 3, in that there was an attitude problem with Maier because he did not like his job; and that Maier was always complaining that he did not want to be there and that he intended to quit as soon as he could find another job.

11. That Maier was dissatisfied with his position as a firefighter because of the loss of pay and benefits that he enjoyed at Milwaukee County and a perceived lack of future in his job and he expressed this dissatisfaction to other firefighters; and that Maier's attitude toward his job did affect the morale of his fellow firefighters.

12. That the basis for Chief Bloedorn's decision to terminate firefighter Leavens was a conversation Chief Bloedorn had with Mr. Mohr at the November 19, 1981 meeting, referred to in Finding of Fact No. 10; that Mohr indicated to Chief Bloedorn that Leavens was a cause of low morale at Station No. 3 in that he was loud, boisterous and abrasive and was disrespectful to an officer; and that Chief Bloedorn did not investigate to determine whether or not the statement was accurate prior to his termination of Leavens.

13. That the basis of Mohr's complaint about Leavens to Chief Bloedorn was Leaven's comments toward Lieutenant Kolberg and his loudness and boisterousness; that, on occasion, Leavens had referred to Lieutenant Kolberg as the "old one" or "old man", as did several other firefighters in Station No. 3; that Captain Accola, the Captain of Station No. 3, heard comments of this nature directed to Lieutenant Kolberg from firefighters other than Leavens; that Captain Accola approached Lieutenant Kolberg and asked if these comments were such that Captain Accola should intercede; that Lieutenant Kolberg indicated this was not a problem and that the guys were doing a little needling and there was nothing to worry about; and that the only complaint of loudness and boisterousness was that of Mr. Mohr and such conduct was not observed by Captain Accola.

14. That in the spring of 1981, Leavens informed Chief Bloedorn that he was running for County Supervisor and asked if there was any conflict of interest in his doing so; that Chief Bloedorn contacted the City Attorney, who indicated that there was no conflict of interest provided that Leavens did not campaign on duty and provided that his campaigning did not interfere with his fire fighting; that Chief Bloedorn related this to Leavens and indicated that should he be elected to County Supervisor, Leavens would have to resign his employment; that Chief Bloedorn asked Leavens to agree with this statement in writing; that Leavens indicated that he would do so; that the issue was made moot in that Leavens lost the primary election for County Supervisor; and that Leavens' failure to submit a statement in writing indicating that he would resign his employment if elected County Supervisor did not form a basis for his termination.

15. That during the course of their employment, Maier and Leavens were asked to sign an insurance application form for life insurance to be provided by the Respondent; that Maier and Leavens questioned a statement which appeared on the bottom of the card and refused to sign the card; that on several occasions thereafter, Maier and Leavens were requested to sign the insurance form, however they failed to do so; that on August 10, 1981, David P. Moore, the Employment Relations Director for the Respondent, sent a memo to Chief Bloedorn recommending that the probationary periods of Maier and Leavens be terminated; and that Chief Bloedorn did not terminate Maier or Levens on the basis of Moore's communication.

16. That the discharges of Greenhill, Maier and Leavens were not based on their performance of their duties as firefighters with the Respondent; and that the Training Officer Pekel had evaluated each of the firefighters as average employes and recommended that they be retained as members of the Fire Department.

17. That at the time Article V was placed in the collective bargaining agreement between Respondent and the Association, the parties mutually understood that the language "discharged for cause" meant that an employe would not be subject to an arbitrary and capricious dismissal.

On the basis of the above and foregoing Findings of Fact, the examiner makes the following

CONCLUSIONS OF LAW

1. That Article V of the parties' collective bargaining agreement is not a waiver of the right of employes to file complaints under Section 111.70(4)(a) and 111.07, Wis. Stats.

2. That the term "discharged for cause" in Article V of the collective bargaining agreement means that probationary employes are protected against arbitrary and capricious discharges.

3. That the termination of firefighter Greenhill was for cause within the meaning of Article V of the parties collective agreement, and therefore, was not violative of Section 111.70(3)(a)5 or (3)(b)4 of MERA.

4. That the termination of firefighter Maier was for cause within the meaning of Article V of the parties' collective bargaining agreement, and therefore, was not violative of Section 111.70(3)(a)5 or (3)(b)4 of MERA.

5. That the termination of firefighter Leavens was not for cause within the meaning of Article V of the collective bargaining agreement, and therefore, was violative of Section 111.70(3)(a)5 of MERA.

6. That the terminations of firefighters Greenhill and Maier were not motivated by their exercise of rights provided in Section 111.70(2), Wis. Stats. and therefore did not constitute a violation of Section 111.70(3)(a)3, Wis. Stats.

Based on the above Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED

1. That the City of Wauwatosa and Chief Donald Bloedorn shall immediately reinstate James A. Leavens to his former position as a probationary firefighter with the Wauwatosa Fire Department and shall make him whole by payment to him of a sum equal to the wages and benefits which he would have earned had he not been terminated, less any interim earnings and any unemployment compensation received, and shall expunge any reference to Leavens' termination from his record.

2. That the complaint of Larry G. Greenhill be, and the same hereby is, dismissed.

3. That the complaint of Richard F. Maier be, and the same hereby is, dismissed.

4. That the Respondent shall notify the Commission within twenty (20) days of the date of this Order, in writing, of what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 9th day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of

(Footnote 1 continued on Page 6)

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is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Each of the complaints allege that the City of Wauwatosa and Chief Donald Bloedorn violated the terms of the collective bargaining agreement between Respondent and the Association by discharging the Complainants without cause, thereby violating Section 111.70(3)(a)5, Wis. Stats.

COMPLAINANTS' POSITION

The Complainants contend that the Respondent had no legal cause to discharge them. They point out that the collective bargaining agreement contains no definition of the term "cause" as it is used in Article V. They argue that the term "cause" in that Article means "just cause", which requires the Respondent to show that the employes engaged in misconduct which reflects an intentional and substantial disregard of the Respondent's interests. The Complainants assert that the allegations against the Complainants do not meet the legal standards of cause.

In the case of Leavens, they point out that the failure to execute the life insurance form and his failure to tender a written document stating that he would not campaign on duty and would resign if elected County Supervisor, does not constitute cause for his termination. The allegation that Leavens was loud and boisterous during duty hours was not proved, nor was there any rule requiring silence or soft speaking in the firehouse. They claim that Leavens was an exceptional employe whose performance was satisfactory, whose retention was recommended by his superiors, and whose behavior was typical of other fire fighters.

In regard to Larry Greenhill, the Complainants note that his work performance was satisfactory and that he was recommended to be retained as a firefighter. The amount of sick leave taken was only 5.5 days in eleven months, and there was no allegation that he abused sick leave. They further contend that prior to his termination, he was never warned of possible termination if he used additional sick leave, and therefore, his discharge did not meet the "cause" standard of the contract.

The Complainants note that the discharge of Richard Maier was based on his having a "bad attitude". They admit that Maier was understandably upset because of his loss of salary, seniority, and vacation; however, this did not affect his job performance. They point out that Maier was rated as a satisfactory employe and was recommended for continued employment. They contend that his failure to sign the insurance form and his seeking an opinion from his own physician concerning his inhaling toxic fumes at the Winding fire are not sufficient reasons for terminating him.

The Complainants contend that the evidence fails to establish that there was cause for the termination of the Complainants. They further contend that the actions complained of by the Respondent are trivial, and that if any discipline is justified, discharge is inappropriate in that it is an excessive penalty in relation to the offenses. They argue that the Respondent failed to use progressive discipline to correct these trivial offenses, therefore the Respondent's decision to terminate the Complainants was arbitrary and capricious.

The Complainants contend that the Respondents' objection that the Complainants have no standing to file a complaint must be rejected, and point out that Section 111.07(2), which provides that any person claiming an interest in a dispute or controversy, as an employer, and employe, or their representative, shall be made a party, authorizes standing on the part of the Complainants.

The Complainants argue that the Respondent has the burden of proving that there was just cause to terminate the Complainants and they have failed to meet this burden. The Complainants request that they be reinstated with full back pay and benefits.

RESPONDENT'S POSITION

The Respondent contends that the Complainants do not have standing to bring complaints regarding their terminations. It argues that the interpretation of Article V is in dispute and the appropriate method of resolving this is through the contractual grievance procedure. It points out that pursuant to that procedure, the exclusive collective bargaining representative must proceed through the grievance procedure and that the individual Complainant's filing of the complaints undermines the collective bargaining agreement. It further contends that except for the circumstances specified in Wis. Stats. 111.70(2), which are not applicable to the present dispute, individual employes have no right to go to the Commission with regard to a contractual dispute. It therefore requests that the individual complaints be dismissed.

The Respondent argues that the language of Article V of the agreement provides for ease of removal of employes during their probationary period. It points to the testimony of its chief negotiator that the parties intended that probationary employes would have no rights of appeal upon their dismissal and that the language "for cause" was inserted into the agreement so that such terminations would not be done in a frivolous, arbitrary or capricious manner. It argues that the terminations of the individual probationary Complainants were for cause and were not arbitrary or capricious. It further contends that the Complainants have the burden of proof that the terminations were arbitrary and capricious. It contends that Chief Bloedorn's reasons for terminating the Complainants were based on a reasoned thought process and that these reasons were given to the individuals at the time of their termination. It points out that in the case of Maier and Leavens, the reason for their termination was their attitude which was detrimental to the morale of the Department. In the case of Greenhill, the Chief based his termination on the excessive use of sick leave. It points out that while the Complainants may disagree with these reasons, they are not arbitrary and capricious. The Respondents contend that the Chief was justified in relying on the statements made to him by the President and Secretary of the Union concerning the Complainants in applying his rationale and concluding that termination was appropriate.

The Respondent contends that if it is determined that the discharges of the Complainants were based on arbitrary and capricious action, that reinstatement is inappropriate. It contends that the appropriate remedy is to grant the Complainants damages.

DISCUSSION

It has been a long standing policy of the Commission to defer disputes arising under the contract to the procedure set forth in the contract for resolution of such disputes. This policy does not prevent the Commission from exercising its jurisdiction under Section 111.70(3)(a)5, Wis. Stats., to determine whether the contract has been breached where the contractual grievance procedure is not available or its exhaustion would be futile. 2/ The collective bargaining agreement in the instant case provides that the discharge of probationary employes shall be without any recourse to the grievance procedure. This clearly indicates that the grievance procedure would not be available to the Complainants.

The Respondent contends that this language also excludes the Complainants' legal right to file a complaint with the Commission. Waiver of a legal right must be clear and unambiguous. 3/ The collective bargaining agreement does not contain an express waiver of the right of the Complainants to file a complaint under Section 111.70(3)(a)5, Wis. Stats., but the Respondent points to negotiating history to support its position. The Respondent initially proposed in a letter dated May 1, 1974 to the Association that probationary employes could be terminated during their first year of service and that no claim or grievance could be made by the Association or the employe with respect to such termination. 4/ The Association responded with a counter proposal that probationary employes could be

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2/ Winter Joint School District No. 1, (17861-C), 5/81; Weyauwega Joint School District No. 2, (14373-B), 6/77.

3/ Faust v. Ladysmith-Hawkins School Systems, 88 Wis 2d 525, 277 N.W. 2d 303 (1979).

4/ Ex-18.

discharged "for cause" during their probationary period. 5/ On or about June 10, 1974, during the course of negotiations, the Association agreed to modify its counter proposal by adding the words "without recourse to the grievance procedure" to the probationary period language. 6/ Subsequent to this discussion, the Association made a further proposal which provided that the grievance procedure would not be available for probationary employes with respect to their discharge for cause, but the remedies provided under applicable federal or state regulations claimed to have been violated would be available. This latter provision was not included in the collective bargaining agreement with respect to probationary employes and the Respondent contends that this indicates an expressed or implied waiver of the right of probationary employes to bring a complaint with the Commission concerning their discharge while on probation.

The undersigned is not persuaded by the Respondent's argument. On June 10, 1974, the Association had made a proposal, that the Respondent abide by all federal and state laws against discrimination and that a violation of said laws would be adjusted by mutual agreement. 7/ The Respondent rejected this proposal. The Association then transferred this language to the Probationary proposal. 8/ This was also rejected by the Respondent. The Association then reverted to its prior Probationary proposal which became Article V of the present contract. This bargaining history indicates that the language with respect to state and federal regulations which had been proposed and subsequently dropped, related to discrimination only and not to the rights of employes under Section 111.70, Wis. Stats. In the light of this negotiating history, the undersigned finds that there was no clear and unmistakeable waiver by the Association of its or the employe's statutory right to enforce the contract under 111.70(3)(a)5 Wis. Stats.

The Respondent contends that the individual Complainants do not have standing to file a complaint in this matter. Section 111.07(2)(a) provides, in part, that "Any other person claiming interest in a dispute or controversy, as an employer, an employe, or their respresentative, shall be made a party upon application". Wisconsin Administrative Code, ERB 12.02, provides that a complaint may be filed by any party in interest, and the Commission has previously held that individual employes have standing to file complaints. 9/ Therefore, the undersigned concludes that the individual Complainants in this instant case have standing to file their complaints.

The Respondent also argues that it is inappropriate for the Commission to take jurisdiction of the matter because the meaning of the words "for cause" is in dispute and the appropriate resolution for determining the meaning of these words is through the contractual grievance procedure. Clearly, the dispute in this case is the termination of the Complainants, who are probationary employes, and such terminations are not subject to the grievance procedure as previously discussed above. The discharge of the Complainants obviously involves a determination of the words "for cause". Application of the grievance procedure to determine the meaning of those words would not resolve the instant disputes, as this meaning would then be applied to the instant complaints. Requiring the Complainants to exhaust the grievance procedure in this case would merely resolve an incidental issue to the main dispute. Under these circumstances, exhaustion of the grievance procedure is not required as it is not available to resolve the main issue in dispute. Therefore, the undersigned concludes that it is appropriate to assert the Commission's jurisdiction to determine on the merits of the complaints concerning the discharges of the Complainants.

5/ Ex-20, Ex-21.

6/ Ex-21.

7/ Ibid.

8/ Ex-22.

9/ City of New Berlin, (7293), 3/66; Whitehall School District, (10268-B), 10/71; Weyauwega Joint School District, (14373-B), 6/77; Berlin Area School District, (16326-A), 11/78.

The Complainants contend that the words "for cause" in the probationary article of the contract means just cause, as that term is commonly used in collective bargaining agreements. The undersigned rejects the Complainants' position for two reasons. First, it must be noted that the provision referred to appears in Article V related to probationary employes. The term "probation" or "probationary employes" has an established meaning in the collective bargaining relationship. The meaning of a probationary period is that it is a time of trial so that an employe can prove that he/she is suitable and fit for the position he/she occupies and a probationary employe may be released from employment without the employer having to prove just cause for such release. 10/ To hold otherwise would grant to probationary employes the same rights as employes who have completed their probationary period. There would be no reason to refer to these employes as being on probation. The express language of the agreement provides that probationary employes gain no seniority until completion of a calendar year of service, which suggests that the probationary employe is not entitled to the same consideration as an employe with seniority. Therefore, a plain reading of the contract supports the conclusion that the parties did not agree to a just cause standard for the termination of probationary employes.

Second, the negotiating history supports the conclusion that a just cause standard was not agreed to by the parties for the discharge of probationary employes. The Respondent's chief negotiator testified without contradiction that the words "for cause" were added to the probationary language solely to prevent discharges of probationary employes on the whim or caprice of the Fire Chief. In light of this evidence, it must be concluded that the words "for cause" were not to be equated with the term "just cause", and therefore, the undersigned will not apply the just cause standard to the Complainants' discharges.

Turning then to the meaning of the contractual language "for cause", the undersigned concludes it means that the standard to be applied to the discharge of probationary employes is the arbitrary and capricious standard. The Wisconsin Supreme Court has defined capricious to mean an action which is either so unreasonable as to be without a rational basis or the result of an unconsidered, willful and irrational choice of conduct. 11/ This may be referred to as the "rational basis" test which means that there must be reasons for the termination. The Respondent in this case argues that there are reasons for the discharges, and that as long as there is any reason, a discharge decision is not arbitrary and capricious. The undersigned cannot agree that any reason is sufficient to establish that a discharge is not arbitrary and capricious. Rather, there must be a fair and legitimate reason for the termination. Otherwise, the employer could say the reason for termination was because the employes parted their hair on the wrong side or a similar reason which could be arbitrary and capricious; essentially, a result the parties agreed would violate the agreement. The standard which must be applied in the instant cases is not whether the Respondent had sufficient reasons to support a discharge of the Complainants, i.e., "just cause", rather the standard is whether they had legitimate reasons to terminate the Complainants and in fact terminated them for those reasons. The determination must end if legitimate reasons are found, as the undersigned cannot weigh the sufficiency of them to support a discharge. Applying this test to the facts of each case, it must be determined whether "cause" existed for the discharge of fire fighters Greenhill, Leavens, and Maier.

In the case of Greenhill, the evidence established that Greenhill did go off the payroll due to his use of sick leave. There is no question that he had legitimate illnesses for each of the instances he used sick leave. The evidence established that when he first went off the payroll, he was admonished by the Fire Chief to use his sick leave carefully. Shortly thereafter, Greenhill went off the payroll again. The undersigned concludes that the Chief determined to terminate the Complainant on the basis of his sick leave usage. The undersigned concludes that the discharge was "for cause". The reason is legitimate as an Employer has a right to expect regular attendence by its employes even where absences are due

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10/ San Jose Mercury News, 48 LA 145 (Burns, 1966); Pullman-Standard, 40 LA 757 (Sembower, 1963).

11/ Town of Pleasant Prairie v. Johnson, 34 Wis. 2d 8, 148 N.W. 2d 27 (1967).

to legitimate illnesses. The undersigned also finds that Greenhill's discharge was for the reason given, i.e., use of sick leave. While the undersigned may not agree with the Chief's decision to terminate firefighter Greenhill, the undersigned cannot conclude that the discharge was arbitrary and capricious. Therefore, the discharge of firefighter Greenhill did not violate the collective bargaining agreement.

Turning to firefighter Maier, the Chief's reason for his termination was his attitude toward his job. The evidence established that Maier was dissatisfied with his job. The Chief was aware that Maier expressed his dissatisfaction with his job to other employes and to the Chief himself. The Chief had the Training Officer discuss this attitude with Maier. While Maier was dissatisfied with his job because it involved a loss of pay, benefits and status, this does not excuse his actions. Life is not always fair to everyone and the Respondent was offering Maier the same opportunity it had offered to the other former employes of Milwaukee County. The undersigned credits the testimony of Chief Bloedorn that Gary Vukovitch told him that firefighter Maier was making complaints to other employes about his situation and this did affect the morale of the other firefighters. Maier admitted he made comments about a loss of pay and no chance for advancement. An employer is not required to retain a malcontent in its employment to harm the morale of its employes. Therefore, the reasons expressed by the Chief for his termination of firefighter Maier were legitimate and the discharge was for these reasons. The undersigned concludes that the termination of firefighter Maier was not arbitrary and capricious and did not violate the collective bargaining agreement.

In regard to the termination of firefighter Leavens, the reason for his termination was his attitude, in that he was loud and abusive in the Fire Station. The reason was based on the statement of Motor Pump Operator Mohr to the Chief that Leavens was loud and abusive and boisterous. The term loud is a relative term and what may be loud for one individual is not necessarily loud for another. The evidence presented in the case failed to establish that Leavens was unusually loud or boisterous. It must be noted that the sole proof offered by the Respondent was the statement to Chief Bloedorn by Mr. Mohr. The Chief did not conduct any investigation on his own of this allegation, but took Mohr's statement as "gospel". Therefore, this is not a case where the Chief had conflicting evidence and had to exercise his judgment to determine the underlying facts. The evidence presented indicated that while Mr. Mohr felt that Leavens was loud and abusive, Captain Accola, who was in charge of Station No. 3, indicated that Leavens was no louder than any of the other firefighters. Other than Mr. Mohr's report, there was no evidence that Leavens was loud and boisterous. In regard to Leavens being abusive, it was asserted that Leavens had referred to Lieutenant Kolberg as "the old man". The evidence established that many of the firefighters refer to Lieutenant Kolberg as "the old man". Also, it was alleged that Leavens, while at a nursing home with Lieutenant Kolberg, asked if the Lieutenant had reserved a room there for himself. Captain Accola testified that he heard these comments, and they were made by other firefighters, not Leavens. He spoke to Lieutenant Kolberg, who indicated to him that the firefighters were just ribbing him and that there was nothing to it and that Captain Accola should take no action concerning these comments. Mr. Mohr also approached Lieutenant Kolberg about being called an "old man" and Lieutenant Kolberg told him it didn't bother him. The term "old man" is used frequently in the military; for example, the U.S. Navy where the Captain of a ship is referred to as "the old man". This is not a reflection on his age, but is merely a reference to his authority. The reference to Lieutenant Kolberg as "the old man" was made by many individuals, including Leavens, and yet Lieutenant Kolberg did not report this to anyone nor did he take any action against any individual who made that comment to him. The undersigned concludes that the reference to Lieutenant Kolberg as "the old man" was not abusive. The evidence therefore fails to establish Leavens was loud, boisterous, or abusive toward Lieutenant Kolberg or anyone else in authority.

The Respondent also asserted that Leavens failure to submit a letter to the Chief concerning his running for County Supervisor and Leavens' failure to sign the insurance form were reasons for his termination. Chief Bloedorn testified that these two incidents were not sufficient to terminate Leavens. 12/ The

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undersigned concludes these reasons were not a basis for Leavens termination. Inasmuch as the evidence failed to prove reasons for the termination of Leavens, the Respondent did not have cause for his termination; and therefore, it violated the terms of the collective bargaining agreement and Section 111.70(3)(a)5.

In regard to the remedy for the Respondent's violation of 111.70(3)(a)5, the Respondent contends that where a probationary employe is involved, the appropriate remedy for improper discharge is not reinstatement of the employe to his employment, but the employe is simply permitted to sue in court for damages. The undersigned rejects this argument and has issued a make whole order whereby the Respondent is directed to reinstate firefighter Leavens to his position as a probationary firefighter until he has completed one calendar year of service and has directed the Respondent to pay Complainant Leavens a sum of money to compensate him for the loss of salary between the date of his termination and the date of reinstatement. The undersigned deems the remedy to be appropriate for a violation of the collective bargaining agreement.

The Complainants in their complaint further alleged a violation of 111.70(3)(a)3, asserting that the Respondent discharged the Complainants to serve as a deterrent for the Complainants' participation in Union membership. In order to establish a charge of interference, the Complainants were required to show: 1) that they were engaged in protective activity; 2) that the Respondent was aware of this protective activity and was hostile to it; and 3) that the Respondent took action against the employes for such conduct. The record fails to establish any evidence that any of these Complainants had engaged in any protective activity, that the Respondent was hostile to such activity, or that their terminations were the result of any engagement in such protected activity. Inasmuch as the Complainants have failed to show that the necessary elements for a charge of interference were present, the undersigned has dismissed this allegation in its entirety. Although Complainants asserted a violation of Section 111.70(3)(b)4, no proof was offered on such allegation and this allegation is also dismissed.

The Complainants have requested attorneys fees and costs in this matter. This request is denied in that the Complainants failed to cite any contractual or statutory language in support of its position. 13/

In light of the above, the undersigned has dismissed the complaints of Greenhill and Maier and has found that the Respondent has violated the contract in its discharge of Leavens and has ordered him reinstated with full back pay.

Dated at Madison, Wisconsin this 9th day of November, 1982.

By Lionel L. Crowley
Lionel L. Crowley, Examiner

13/ Madison Metropolitan School District, (16471-D), 1/82.