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-C
LARRY G. GREENHILL, Complainant, vs. CHIEF DONALD BLOEDORN and CITY OF WAUWATOSA, Respondents.	Case LXVII No. 28974 MP-1280 Decision No. 19311-C
RICHARD F. MAIER, Complainant, vs. CHIEF DONALD BLOEDORN and CITY OF WAUWATOSA, Respondents.	Case LXVIII No. 29081 MP-1292 Decision No. 19312-C

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.

ORDER MODIFYING THE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 9, 1982, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order, with accompanying memorandum, in the above-entitled matters. The Examiner found that the City of Wauwatosa and its Fire Chief Donald Bloedorn had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Wis. Stats., by discharging probationary firefighter James A. Leavens. The Examiner also found that the Respondents had not committed prohibited practices by discharging probationary firefighters Larry G. Greenhill and Richard F. Maier. The Examiner ordered the Respondents to reinstate Leavens to his former position and make him whole for monetary losses, and dismissed the complaints of Greenhill and Maier.

Respondents and Complainants both timely filed petitions, pursuant to Sec. 111.07(5), Stats., stating that they were dissatisfied with the Examiner's decision and requested the Commission to review said decision. The parties filed briefs, the last of which was received on January 18, 1983. The Commission has reviewed the entire record, the petition for review, and the briefs, and on that basis is satisfied that the Examiner's Findings of Fact and Conclusions of Law and Order should be modified.

NOW, THEREFORE, it is

ORDERED

That the Examiner's Findings of Fact are hereby revised to read as follows:

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 with 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 responsibilties, 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 agreement language referred to in Finding of Fact 4, above, was first negotiated into the parties' collective bargaining agreement in 1974; that prior to the introduction of that clause at that time, the parties' collective bargaining agreements contained no express provision concerning a probationary period or status.

8. That each of the parties' collective bargaining agreements in effect at material times, including the agreement immediately preceding the one negotiated in 1974, has contained a grievance procedure culminating in final and binding arbitration of unresolved grievances.

9. That at all material times before and after 1974, Sec. 62.13(4), Stats., has provided that: hiring of fire department subordinates was and is to be by appointment of the Fire Chief subject to approval by the Board of Fire and Police Commissioners, and that appointments of fire department subordinates at entry level positions shall be "from an eligible list provided by examination and approval by the board . . . (and) for the choosing of such list the board shall adopt . . . rules calculated to secure the best service in the departments."

10. That at all material times before and after 1974, firefighters in the employ of the City who had not yet successfully completed their first year of service were formally employed on "probationary" appointments by the Fire Chief that were approved by the City's Board of the Fire and Police Commissioners; that permanent appointments by the Fire Chief have been granted with respect to such employes only after their successful completion of a one year probationary period; and that said appointment practices were engaged in pursuant to the powers vested in the Chief and Board by Sec. 62.13(4), Stats.

11. That the instant Complainants were each employed pursuant to probationary appointments at the times of their discharges noted above; and that each of the Complainants was aware that his status was that of "probationary firefighter" because each had signed an "oath of officer" form prior to beginning his most recent employment with the City which form specified his position as that of "probationary firefighter."

12. That neither the contract language noted in Finding of Fact 4 nor any other provision of the parties' collective bargaining agreement constitutes an express provision that discharges of employes during their probationary period shall be subject to contract enforcement review by the WERC or by any other third party.

13. That an interpretation of the parties' collective bargaining agreement to the effect that discharges of probationary firefighters

shall be subject to contract enforcement review by the WERC or by any other third party is not supported by the language and bargaining history of the agreement.

Based on the foregoing revised Findings of Fact, the Commission hereby modifies the Examiner's Conclusions of Law to read as follows:

MODIFIED CONCLUSIONS OF LAW

1. That an interpretation of the parties' collective bargaining agreement to the effect that discharges of probationary firefighters shall be subject to contract enforcement review by the WERC or by any other third party is not supported by the language of the parties' agreement or by the history of bargaining of that agreement.

2. That neither Article V nor the parties' collective bargaining agreement as a whole constitutes a basis for WERC reviewing the merits of the discharges of the probationary firefighters as regards alleged violations of Sec. 111.70(3)(a)5, Stats.

3. That there is no basis in the instant record upon which to conclude that the City violated Sec. 111.70(3)(a)5, Stats., by terminating the employment of the Complainants.

4. That the discharges of Complainants were not motivated by their exercise of rights provided in Sec. 111.70(2), Stats., and therefore did not constitute violations of Sec. 111.70(3)(a)3, Stats.

5. That the discharges of Complainants did not constitute violations of Sec. 111.70(3)(b)4 and/or (3)(a)4, Stats.

Based on the foregoing Modified Findings of Fact and Modified Conclusions of Law, the Commission hereby modifies the Examiner's Order in this matter to read as follows:

MODIFIED ORDER 1/

That the complaints filed in the instant matters are hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

I concur in the outcome but in only parts of the rationale, as noted in my separate concurring opinion.

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

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
(Footnote One continued on Page Five)

1/ (Continued)

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 the decision of the agency upon all parties under s. 227.11. If a rehearing 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.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CITY OF WAUWATOSA,
Case LXVI, Decision No. 19310-C
Case LXVII, Decision No. 19311-C
Case LXVIII, Decision No. 19312-C

MEMORANDUM ACCOMPANYING ORDER MODIFYING THE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Before the Commission are petitions for review of an Examiner's decision finding that the City of Wauwatosa and its agents violated Sec. 111.70(3)(a)5, of the Municipal Employment Relations Act (MERA) by the discharge of probationary firefighter James Leavens and that it did not violate MERA by the discharges of two other probationary firefighters, Larry Greenhill and Richard Maier. The Complainants petitioned for review in the cases involving Greenhill and Maier and the Respondents petitioned for review in the case involving Leavens.

The essential facts in these matters are as follows. All three Complainants are experienced firefighters who were hired by the City of Wauwatosa following a cessation of fire protection services by Milwaukee County, their former employer, and the transfer of those responsibilities to the City. Complainants, like other firefighters employed by the City, are represented by Wauwatosa Firemen's Protective Association, Local 1923, International Association of Fire Fighters. In 1974, the Association and City agreed upon a provision in their collective bargaining agreement referring for the first time to a probationary period. The terms of that provision are specified in Modified Finding of Fact No. 4. When in December, 1981 the City discharged all three of the Complainants "for cause," the Complainants alleged in separate complaints, which were consolidated for purposes of hearing, that none of the discharges was for cause as that term is commonly understood and that the discharges consequently violated the contract, and in turn, Sec. 111.70(3)(a)5.

THE EXAMINER'S DECISION

The Examiner concluded that the intent of the parties in their 1974 negotiations was that the term "for cause" would prohibit the City from discharging a probationary firefighter for arbitrary or capricious reasons. The Examiner further found that the restriction on the filing of a grievance concerning a probationer's discharge did not amount to a blanket restriction on appeals of such discharges. From this the Examiner reasoned that the Complainants are not precluded from pressing the instant cases under Sec. 111.70(3)(a)5 of the statute, which prohibits violation of collective bargaining agreements. The Examiner essentially held in this respect that the facts did not amount to an Association waiver of the right to process a Sec. 111.70(3)(a)5 prohibited practice complaint case over a probationer's discharge. The Examiner went on to determine the merits of each of the three cases according to the "arbitrary and capricious" standard which he reasoned must have been intended to apply. The Examiner found Leavens to have been arbitrarily discharged, but that Maier's and Greenhill's discharges were supported by some degree of substance. He therefore ordered a reinstatement and backpay remedy for Leavens and dismissed the other two complaints.

THE COMPLAINANTS' PETITION FOR REVIEW

Complainants Greenhill and Maier filed a petition for review alleging that the Examiner erred in finding that the standard for review of the discharges was whether they were arbitrary or capricious. Complainants maintain in essence that the term "for cause" in Article V of the contract equates to the term "just cause" which appears elsewhere in the contracts between the City and the Association. In the Complainants' view, these terms are so commonly equated that no other interpretation is justified. The Complainants explain the identical standard of review applied both to a probationer and a regular employe on the basis that the bargain struck with the City in 1974 was that the probationer would give up the right to proceed in three different forums simultaneously, namely the grievance procedure, circuit court and the WERC. The Complainants contend that the

grievance arbitration forum was the only avenue of appeal of probationary employes that the Association ever conceded at the bargaining table and therefore that the probationary firefighters retain the right to proceed for review of a discharge before the WERC, although not in a grievance.

The Complainants proceed from this analysis to a discussion of the merits of their particular circumstances, which will not be recounted because of our conclusion expressed below.

THE RESPONDENTS' PETITION FOR REVIEW

Respondents petitioned for review of the Examiner's decision to reinstate and make whole Leavens and as to the Examiner's conclusions that a right of WERC contract enforcement review of a probationer's discharge exists and that any such right had not been waived entirely by the Association. Respondents contend essentially that in the particular context of the 1974 negotiations, the term "for cause" was intended to equate to the "arbitrary and capricious" standard and was mutually understood to be so. Respondents further contend that the agreement by the Association to forego any right to grieve a probationer's discharge also applies to any right to pursue the same end by another means, i.e., through the WERC's enforcement of Sec. 111.70(3)(a)5. The Respondents contend that the sole purpose of putting a standard for the discharge of probationers into the collective bargaining agreement was to have it serve as a guide for decisions made by the Fire Chief, rather than as an indication that any review of the Chief's decisions was intended.

Respondents, like Complainants, addressed in their briefs the merits of the particular discharges involved here, which will not be discussed for the same reason as noted above.

Respondents also allege that the Complainants' petition for review was untimely filed.

DISCUSSION

With respect to timeliness to the Complainants' petition for review, the petition was received by the Commission on December 6, 1982. The Examiner's decision had issued on November 9, 1982; but on November 19, the Examiner corrected, by letter, the appeal period footnote in the decision. The Complainants' petition would be untimely if dated from the original issuance of the decision on November 9; but we find as the Examiner's correction was material, and particularly as it involved the appeal period itself, that the final date of the Examiner's decision was November 19, 1982. The Complainants' petition for review is therefore timely.

With respect to the merits, the central issue before us on this review is whether the contractual job security protection implicit in the Article V reference to "for cause" in relation to probationary employe discharges is enforceable through Sec. 111.70(3)(a)5, Stats.

Ordinarily, where parties have an agreed-upon method of resolving disputes as to the meaning and application of their collective bargaining agreement, Sec. 111.70(3)(a)5 of MERA is not available as a concurrent forum because the WERC declines to exercise its jurisdiction under that provision in order to give full effect to the parties' agreed-upon procedure. 2/

Here, however, the agreement expressly makes the general contract grievance procedure inapplicable to transfers, layoffs and discharges of probationary firefighters. Contrary to the City's contention that the claim involved herein should nonetheless be deferred to the contract grievance procedure, we agree with the Union that the grievance and arbitration procedure is not available to defer to as regards the instant disputes.

2/ See, Oostburg Schools, 11196-A, B (12/72), and, under parallel statutory provisions governing the private sector see, River Falls Cooperative Creamery, 2311 (1/50) and F. Hurlburt Company, 4212 (12/55).

The question of whether WERC's Sec. 111.70(3)(a)5, Stats., jurisdiction is an available forum to decide whether the instant probationary employe discharges were "for cause" within the meaning of Article V turns on an interpretation of the parties' agreement. Specifically, it turns on whether the record establishes that the union waived such rights to enforcement of the contractual "for cause" provision. Waivers of statutory rights must be established by clear and unmistakable contract language or bargaining history. 3/

While it is a close question, we are persuaded that, contrary to the Examiner's view, the record establishes that the union waived the applicability of Sec. 111.70(3)(a)5, Stats., to disputes as to whether discharges of probationary firefighters are "for cause."

An express reference to "for cause" in relation to discharge conventionally connotes procedural and substantive protections. Such a reference would be of much less value to the Complainants if no contract enforcement forum were available to hear and decide disputes as to whether those protections have been breached in a given case. Nevertheless, the "for cause" reference would not be rendered entirely meaningless if we find no basis for a Sec. 111.70(3)(a)5 complaint herein. For, it would nonetheless be an arguable basis for a claim that Complainants have a judicially enforceable due process property interest in their jobs; and it would, even if contractually unenforceable, constitute an agreed-upon guide for the Chief's conduct.

The language of Article V makes no affirmative provision for the enforcement of the "for cause" provision. Rather Article V contains only an express provision that discharges, layoffs and transfers of probationary employes are not subject to the grievance procedure. It contains neither an express waiver of Sec. 111.70(3)(a)5, Stats., as a contract enforcement forum for those purposes nor an express acknowledgement that Sec. 111.70(3)(a)5, Stats., or any other contract enforcement forum shall be available for those purposes.

Bargaining history evidence concerning the offers exchanged by the parties in 1974 is inconclusive. It shows that the City attempted unsuccessfully to include language in Article V that "No claim or grievance shall be made by the Association or the employes with respect to lay-off, transfer or discharge of the employee during such period of probation." But it also shows that the Union attempted unsuccessfully to have Article V include a proviso that for purposes of layoff, transfer and discharge of probationary employes, "the contract grievance procedure shall not be available to the employe who shall instead be limited to enforcement of any rights deemed violated under the applicable federal or state regulations claimed to have been violated."

Nevertheless, in the legal context in which the Agreement was negotiated, we conclude that the appropriate interpretation of the agreement is that by waiving the grievance procedure for the above purposes, the parties also waived the Sec. 111.70(3)(a)5, Stats., procedure as well.

By definition, a "probationary" employe is ordinarily understood to be one whose employment is subject to termination without recourse to any third party review procedure. Thus, for example, in State ex rel Dela Hunt v. Ward, 26 Wis. 2d 345, 350 (1964), the Supreme Court stated,

> "We think the vital distinction between the status in a probationary period and in permanent employment is the very fact that during a probationary period one may be separated without a hearing."

Id. at 350. More recently the Supreme Court has stated,

> "There is no doubt that the use of a probationary period is an excellent means of examining candidates and is well-suited to

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3/ City of Brookfield, 11406-A (7/73).

securing the best service available. . . . Probation is a continuation of the hiring process."

Kaiser v. Board of Police and Fire Comissioners of the City of Wauwatosa, 104 Wis. 2d 498, 504 (1981).

The availability of a contractual enforcement forum for review of the merits of terminations of probationary employes appointed under Sec. 62.13(4), Stats., is not a contract interpretation favored in the law. Recent caselaw suggests that because of its effects on Sec. 62.13(4), Stats., powers of Chiefs and Boards of Fire and Police Commissioners, third party contract-enforcement review of probationary employe terminations should not be deemed required by a collective bargaining agreement unless the agreement so provides in express and specific terms. Milwaukee Police Assn. v. Milwaukee, 4/ As noted in the Modified Findings, it is clear from the record that, pursuant to Sec. 62.13(4), Stats., the City's Fire Chief, with the approval of the Board of Fire and Police Commissioners, appointed Complainants as "probationary firefighters." Each of the Complainants was on notice of the probationary nature of their status in that each signed an oath of office specifying their positions as that of probationary firefighters. The record indicates that the City has at all material times (from at least 1973 through the instant hearing) followed a procedure of appointing firefighters as probationary firefighters for one year and then appointing them as permanent firefighters if they successfully complete the one year probationary period. It is also clear that the Chief and Board appointments procedures were developed pursuant to Sec. 62.13(4), Stats. As noted, the language of Article V makes no affirmative statement at all about the availability of a review forum. It only addresses that question by implication: from the express negation of grievance procedure availability, and from the reference to discharge "for cause." It would appear possible under existing precedents to subject terminations of probationary employes appointed pursuant to Sec. 62.13(4) to contract enforcement review by

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4/ 113 Wis. 2d 192 (Ct. App., 1983) review pet. den. (Sup. Ct. 9/19/83). In that decision issued after this Commission review was fully submitted, the Court of Appeals held that the terminations of probationary employes were not arbitrable under the police collective bargaining agreement. One of the grounds for the Court's holding in that regard was that making probationary police officer terminations subject to third party review presents a conflict with the statutory authority of the Chief and Board of Fire and Police Commissioners under Sec. 62.13(4), Stats. to carry out the examination and hiring process for subordinates. It emphasized that the union was attempting to have

> "a collective bargaining agreement, without any such express term, . . . in effect, ultimately transfer to the arbitrator the chief's or the board's power to determine that an officer should advance from probationary to permanent status or should be terminated during probation."

Id. at 197. (emphasis added). The Court further stated,

> "We believe that to make a probationary termination arbitrable is to wholly vitiate the significance of a probationary term. . . . Were we to so read the collective bargaining agreement to allow such a termination to be arbitrable, we would be allowing a general contractual term to govern over an express power to select as vested in police chiefs and boards granted in sec. 62.13(4), Stats. and a clear manifestation of legislative intent that the standards for the training and education of police officers are matters of statewide concern, as evinced in sec. 165.85(1), Stats. That we cannot do. . . "

113 Wis. 2d at 196. (emphasis added). While the case involved law enforcement personnel and cited the specific Sec. 165.85, Stats., references to probationary status police officers, the Court's references to 62.13(4) noted above appear equally applicable to fire subordinates as to police subordinates.

WERC or some other contract enforcement forum by means of an express, specific, affirmative contractual provision to that effect. However, the Complainants herein are attempting to overcome the presumption to the contrary established by Sec. 62.13(4) merely by implication, and hence either "without any such express term" or, at most, on the strength of " general contract term" contrary to the teaching of Milwaukee Police, supra.

In addition to the Sec. 62.13(4), Stats. considerations noted above, the overall context of the 1974 bargaining also supports the notion that Article V did not imply a right to enforce the "for cause" standard in a Sec. 111.70(3)(a)5, Stats. forum. For, prior to the 1974 negotiations, the grievance procedure in the procedure in the predecessor agreement would have been the parties' exclusive contract enforcement mechanism. 5/ Then, in 1974, the parties unambiguously agreed that that exclusive mechanism would no longer be available to adjudicate disputes concerning probationary employe transfers, layoffs and discharges. Absent a clear statement in the agreement to the contrary it seems to us far more reasonable to conclude that the parties thereby agreed that there was to be no contract enforcement forum in which to adjudicate such matters, than it is to conclude that they intended to have such matters resolved in a separate contract enforcement forum from that applicable to all other contract disputes. As noted, the former interpretation does not render the "for cause" reference in Article V meaningless. While it requires an interpretation of "for cause" that is unconventional, such an interpretation must be compared with the Union's interpretation requiring the even more unconventional conclusions that the parties intended Article V to grant probationary firefighters a full just cause protection; that they intended to invoke an outside statutory contract enforcement forum for three particular matters (probationary firefighter layoff, transfer and discharge matters); and that they found it appropriate that those three particular types of disputes would be subject to the one year time limitation for filing a prohibited practice complaint rather than to the far more stringent time limit for grievance initiation under the contractual grievance procedure.

For the foregoing reasons, we conclude that the instant agreement does not constitute a basis upon which the Complainants are entitled to WERC review of their claims that their terminations during probationary period violated the collective bargaining agreement and thus Sec. 111.70(3)(a)5, Stats.

We have modified the Examiner's Findings, Conclusions and Order accordingly, and have dismissed each of the complaints. 6/ Since the Examiner's Findings concerning the merits of the terminations involved are not material to the outcome herein under our analysis, above, we have not ruled upon or included his Findings in those regards in the Modified Findings that we have adopted herein.

5/ "A grievance-arbitration procedure is presumed to constitute a grievant's exclusive remedy, and this presumption may be overcome only by express language." City of Menasha (Police Department), 13283-A (2/77); accord, Mahnke v. WERC, 66 Wis. 2d 524 at 529-30 wherein the Court cited with approval the Republic Steel v. Maddox, 379 U.S. 650, 657-8 (1965) for the proposition that an employe with a right to process a matter through a contractual grievance procedure is presumed to be without the right to seek contract enforcement by resort to a judicial forum unless the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclusive remedy.

6/ Complainants' petition for review appears to us to have taken issue solely with the Examiner's Findings, Conclusions and Order bearing on whether the City violated Sec. 111.70(3)(a)5, Stats. by its terminations of the Complainants. Consistent with the statutory sections cited in Complainants' pleadings, the Examiner entered a Conclusion of Law that the terminations of Complainants Greenhill and Maier were not violative of, inter alia, Sec. 111.70(3)(b)4, Stats. Complainants have referred to their initial allegations as if they had alleged that the instant terminations constituted violations of Secs. 111.70(3)(a)3, 3(a)4, and (3)(a)5, Stats. We have addressed all four of those statutory sections in our Modified Conclusions of Law.

CONCURRING OPINION OF CHAIRMAN TOROSIAN

While I concur in the outcome, I do not join in that portion of my colleagues' analysis that is based on a waiver theory. In my view, there is no need to reach the question of waiver or to enter a Finding and Conclusion as broadly stated as Modified Finding 13 and Modified Conclusion 1.

Rather, the Milwaukee Police case appears to me to control the outcome herein regardless of whether or not the Union can be said to have clearly and unmistakably waived Sec. 111.70(3)(a)5, Stats., rights. That case requires specific and express contract language, at a minimum, for a contract enforcement review of probationary terminations to be lawful in the face of the countervailing policy represented by the Sec. 62.13(4), Stats. appointment powers of the Chief and Board of Police and Fire Commissioners.

As stated in the Commission decision, e.g., Modified Finding 12, there is no specific or express provision for contract enforcement regarding probationary employe terminations contained in the instant agreement. I would dismiss the complaints on that basis alone.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

I concur in the outcome but in only parts of the rationale, as noted in my separate concurring opinion above.

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner