

PHYLLIS STONG,  
Complainant,  
vs.  
COUNTY OF MILWAUKEE (MILWAUKEE  
COUNTY MEDICAL COMPLEX),  
Respondent.

Appearances:  
Mr. Alan S. Brostoff, Attorney at Law, 606 West Wisconsin Avenue, Milwaukee, WI 53203, appearing on behalf of the Complainant.  
Mr. A. Frank Putz, Principal Assistant Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North 9th Street, Milwaukee, WI 53233, appearing on behalf of the Respondent.

Phyllis Stong having, on August 18, 1982, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the County of Milwaukee committed prohibited practices within the meaning of the Municipal Employment Relations Act, herein MERA, and the Commission having on September 16, 1982 appointed Stephen Schoenfeld, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wis. Stats.; and the Respondent having, on October 10, 1983, challenged the Commission's jurisdiction to hear and decide the merits of the complaint; and due to the unavailability of Mr. Schoenfeld, the Commission having, on November 9, 1983, substituted the undersigned as Examiner; and Complainant having, on December 2, 1983, filed an amended complaint; and, pursuant to ERB 12.04(1), the Examiner having, on January 27, 1984, held a hearing in Milwaukee, Wisconsin on the issue of the Commission's subject matter jurisdiction of the complaint, as amended; and the parties having at the hearing reserved the right to file additional arguments in support of their respective positions; and the Complainant having, on February 24, 1984, requested the Examiner to decide the issue based on the record as of that date; and the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

1. That Phyllis Stong, hereinafter referred to as the Complainant, is an individual who resides at 1651 V West Edgerton Avenue, Milwaukee, Wisconsin, and was employed by the County of Milwaukee as a registered nurse in the Milwaukee County Medical Complex from September 4, 1979 until October 13, 1981, and during that time was a municipal employee.

2. That the County of Milwaukee, hereinafter referred to as the County, is a municipal employer, and among its functions provides and delivers health care services at its Medical Complex, and its principal offices are located at 901 North 9th Street, Milwaukee, Wisconsin.

3. That the County has recognized the Staff Nurses Council of Milwaukee, Local 5001, AFT, AFL-CIO, hereinafter referred to as the Union, as the exclusive collective bargaining representative for an appropriate collective bargaining unit, of which Complainant was an individual member throughout her employment with the County.

4. That the County and the Union were parties to a collective bargaining agreement which was in effect at all times material herein and which, in material part, provides as follows:

#### PART 1

. . .

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, resolutions and executive orders. Included in this responsibility, but not limited thereto, is. . .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 employees from duties because of lack of work or lack of funds;

. . .

#### PART 4

. . .

#### 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 employee or group of employees 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) ARBITRATOR'S AUTHORITY. The arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this Memorandum of Agreement. The arbitrator shall confine himself to the precise issue submitted.

. . .

#### PART 5

#### 5.01 DISCIPLINARY SUSPENSIONS

(1) In cases where an employee is suspended for a period of 10 days or less by her department head, pursuant to the provisions of sec. 62.10, Wis. Stats., the Council shall have the right to refer such disciplinary suspension to the

(3) An employe against whom charges for discharge or demotion have been filed shall be entitled to a hearing on such charges before the Personnel Review Board.

(4) Employes may be represented at such hearings by Counsel or by their certified collective bargaining representative.

. . .

5.04 REOPENER CONTINGENT UPON AMENDMENTS  
TO CHAPTER 63, WIS. STATS.

(1) In the event that Chapter 63 of the Wis. Stats. is amended during the term of this Agreement to permit the suspension and discharge of classified employes to be treated in a manner jointly determined by municipal employers and labor organizations and/or to amend the definition of probationary service as it relates to temporary service, then this Memorandum of Agreement may be reopened. Such reopening shall be for the singular purpose of either negotiating procedures for the review of suspension and discharge as alternatives to those procedures presently provided in Chapter 63.10, Wis. Stats., or modifying the definition of probationary service. Such negotiations will be consistent with the Wis. Stats. and the regulations of the Wisconsin Employment Relations Commission.

(2) If it is determined by a tribunal of competent jurisdiction that discipline and discharge of employes of Milwaukee County is a mandatory subject of bargaining, the parties will reopen this Agreement within 30 days of receipt of such order for the purpose of negotiating those issues which are a proper subject for co-determination relating thereto. However, in the event the parties are unable to reach agreement, the provisions of s. 63.10, Wis. Stats., shall apply.

5. That on or about September 3, 1981, the Complainant was served with a Notice of Charges, which stated as follows:

You are hereby notified that as cause for your discharge David T. McGinnis, Hospital Administrator, has filed with the Milwaukee County Personnel Review Board written charges, a copy of which is attached hereto.

You are further notified that a hearing will be held on said charges by the Milwaukee County Personnel Review Board in the Assembly Room, 3rd Floor, Courthouse-Annex, 907 North 10th Street, Milwaukee, Wisconsin, on the 15th day of September, 1981, at 1:30 o'clock, p.m. If you wish to deny that there is good and sufficient charge for your discharge or to be heard in your own defense, you should be present at the hearing.

Pursuant to the Rules of the Personnel Review Board, you are hereby suspended from duty without pay until the hearing on the charges and the Board's decision thereon.

By order of the

MILWAUKEE COUNTY PERSONNEL REVIEW BOARD,

Fred J. Bleidorn /s/

Fred J. Bleidorn, Executive Secretary;

that written charges were attached to said notice and stated in pertinent part as follows:

CHARGES

General: I charge that Ms. Phyllis Stong has violated Paragraphs t, u and ee of Section 4, Rule VII, of said Civil Service Commission in that

Specific: On or about the 25 day of August, A.D.81 at \_\_\_\_\_, she initiated and continued an unsafe procedure which was contrary to established practice and constituted improper treatment which provided a serious potential risk to the patient.

(Signed) David T. McGinnis /s/  
Hospital Administrator;

and that the Milwaukee Personnel Review Board held a hearing on September 15 and October 2, 1981 and thereafter issued the following decision:

BEFORE THE MILWAUKEE COUNTY PERSONNEL REVIEW BOARD

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In the Matter of the Charges Against )  
PHYLLIS STONG ) FINDINGS OF FACT,  
Registered Nurse I ) CONCLUSIONS OF LAW,  
Milwaukee County Medical Complex ) AND ORDER  
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The hearing for the above matter was convened on September 15, 1981, pursuant to notice personally served upon the employee by a Deputy Sheriff of Milwaukee County on September 3, 1981. The appointing authority was represented by Patrick Foster, Principal Assistant Corporation Counsel. The employee appeared at the hearing personally and was represented by Mr. Richard Schwarz, Field Representative, Staff Nurses' Council of Milwaukee, Local 5001, AFT-AFL-CIO. The appointing authority thereupon introduced evidence.

FINDINGS OF FACT

On the basis of the pleadings and evidence introduced in the case, the Board makes the following Findings of Fact:

1. The employee, Phyllis Stong, at all times material to the issues herein, was employed as a Registered Nurse I at the Milwaukee County Medical Complex.

2. On August 25, 1981, the employee, while serving as the nurse on duty in the nursery, admittedly secured in the mouth of a five to seven-day-old infant a baby bottle nipple inserted in a cap and affixed such nipple and cap in the infant's mouth by applying masking tape to the infant's skin from cheek to cheek.

3. After weighing the credibility of various witnesses, the Board disregarded any testimony to the contrary and found that the employee had first performed the same procedure described in the above Findings of Fact No. 2 on the same infant the day before; that is, on August 24, 1981; and further, on observing this procedure on August 24, 1981, the employee was informed by a subordinate, Mrs. Lorraine Voight, Licensed Practical Nurse, who was also on duty at the nursery at that time, that such a procedure may result in a disciplinary action against the employee.

4. Considering the size of the pacifier and the method it was firmed in the infant's mouth, the employee caused situations of potential risk of serious harm to the patient due to aspiration.

5. Considering the chemical, adhesive, and air-tight covering qualities of the masking tape the employee applied to the infant's facial skin, the employee exposed the patient to some potential risk of harm.

6. The practice of securing a "pacifier" in the mouth of an infant as referred to in the above Findings of Fact No. 2 and 3 is contrary to established practice and considered to be improper treatment at the nurseries of Milwaukee County Medical Complex.

#### CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact, the Board makes the following Conclusions of Law:

1. The Board has jurisdiction of this case.

2. Phyllis Stong violated Rule VII, Section 4(t), (u), and (ee) of the Civil Service Rules for Milwaukee County Government, "Failure or inability to perform the duties of assigned position," "Substandard or careless job performance," and "Abusive or improper treatment toward an inmate or patient of any County facility or to a person in custody; provided the act committed was not necessarily or lawfully done in self-defense or to protect the lives of others or to prevent the escape of a person lawfully in custody."

Dated at Milwaukee, Wisconsin, this 2nd day of October, 1981.

#### MILWAUKEE COUNTY PERSONNEL REVIEW BOARD

Dated:

10/12/81 By Fred J. Knox /s/  
Fred J. Knox, President

10/13/81 Thomas J. Parker /s/  
Thomas J. Parker, Board Member

10/13/81 Robert W. Schroeder /s/  
Robert W. Schroeder, Board Member

#### O R D E R

Upon the Findings of Fact and Conclusions of Law made herein,

IT IS ORDERED that Phyllis Stong be and hereby is discharged from the classified service as of October 2, 1981.

Dated at Milwaukee, Wisconsin, this 2nd day of October, 1981.

#### MILWAUKEE COUNTY PERSONNEL REVIEW BOARD

Dated:

10/12/81 By Fred J. Knox, /s/  
Fred J. Knox, President

10/12/81 Robert W. Schroeder /s/  
Robert W. Schroeder, Board Member

Mr. Parker voted no to the order of discharge.

6. That on December 2, 1983, the Complainant filed a Second Amended Complaint which reads as follows:

The Complainant above named complains that the Respondents have engaged in and are engaging in prohibited practices contrary to the provision of Chapter 111 of the Wisconsin Statutes, and in that respect alleges:

1. The Complainant, Phyllis Stong, resides at 1651 V West Edgerton Avenue, City and County of Milwaukee, State of Wisconsin, 53221.

2. The Respondent, County of Milwaukee, is a municipal employer engaged in the delivery of health care services, with its principal office located at 8700 West Wisconsin Avenue, City and County of Milwaukee, State of Wisconsin, 53226.

3. The Respondent, Staff Nurses Council of Milwaukee, Local 5001, AFT, AFL-CIO, is a labor organization with its principal office located at 6333 West Blue Mound Road, City and County of Milwaukee, State of Wisconsin.

4. The Complaint is directed against both Respondents named above.

5. The Complainant was employed by the Respondent, County of Milwaukee (Milwaukee County Medical Complex) beginning on or about September 4, 1979 and continuing to on or about October 13, 1981.

6. On or about October 13, 1981, the Complainant was terminated by the Respondent from her employment with the Milwaukee County Medical Complex.

7. The Respondent employer terminated the Complainant as set forth in Paragraph 6 above, in violation of the collective bargaining agreement then in effect.

8. The above mentioned labor organization failed and refused to exhaust the remedies available to it on behalf of Complainant under the collective bargaining agreement, and/or did so perfunctorily and/or negligently, and/or in bad faith, and investigated her case perfunctorily, and/or negligently and/or in bad faith, and/or furnished the Complainant with erroneous advice on critical matters, and/or represented the Complainant ineptly, and/or negligently, and/or grossly negligently, and/or conducted itself in violation of its duties to Complainant of fair representation.

9. The conduct of the Respondent employer described above violated the rights of the Complainant as set forth in the Wisconsin Statutes, Chapter 111.70(3)(a) 1 & 5.

10. The conduct of the Respondent labor organization described above violated the rights of Complainant as set forth in the Wisconsin Statutes, Chapter 111.70(3)(b)1 and (c)1.

WHEREFORE, the Complainant requests, for relief, that she be made whole by both Respondents for violation of her rights; that she receive full reinstatement together with restoration of all usual rights and privileges, including seniority, customarily made a part thereof by the Commission in its remedial orders; that the Respondents post appropriate notices; that the Respondents cease and desist from said unlawful practices; and that any records or files of the Respondent containing adverse material relating to the Complainant or her termination, or the circumstances thereof, be expunged; that the Respondents individually or collectively pay attorney fees and costs to the Complainant which have been incurred in the prosecution of this proceeding; and that the Commission order such other or further relief as it deems appropriate;

and that on or about December 21, 1983 Complainant further amended its Second Amended Complaint by dismissing the Staff Nurses Council of Milwaukee, Local 5001, AFT, AFL-CIO as a party Respondent and withdrew paragraphs 3 and 10 and such portions of paragraph 4 and the WHEREFORE clause which pertained to the Staff Nurses Council, but retained paragraph 8 in its entirety.

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

CONCLUSIONS OF LAW

1. That the complaint fails to allege any facts which indicate that the County's discharge of Complainant resulted from Complainant's exercise of rights guaranteed by Sec. 111.70(2), Wis. Stats., and the County therefore cannot be considered to have committed any violation of Section 111.70(3)(a)1, Wis. Stats.

2. That the provisions of Sec. 63.10, Wis. Stats., apply to the Complainant's discharge, and the terms of the collective bargaining agreement cannot be interpreted to provide an alternate procedure applicable to Complainant's discharge; therefore the County cannot be found to have committed any violation of Section 111.70(3)(a)5, Wis. Stats.

3. That the Wisconsin Employment Relations Commission has no jurisdiction in the circumstances of this case to determine whether or not the provision of Sec. 63.10, Wis. Stats. were complied with regarding Complainant's discharge.

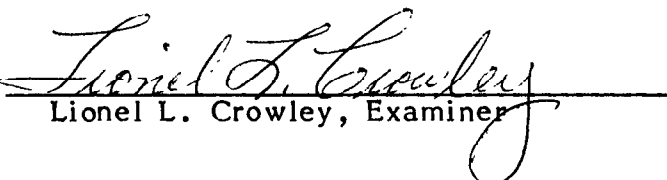
Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 9th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Lionel L. Crowley, Examiner

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER

The issue presented in this matter is whether the Wisconsin Employment Relations Commission has jurisdiction to determine whether the Complainant's termination under the provisions of Sec. 63.10, Stats., violated the terms of the collective bargaining agreement, if it is assumed that the exclusive bargaining representative breached its duty of fairly representing the Complainant before the County's Personnel Review Board.

COUNTY'S POSITION:

The County contends that the Commission has no jurisdiction to hear a prohibited practice claim alleging a violation of Sec. 111.70(3)(a)5, Stats., by the discharge of an employee by the County's Personnel Review Board because Sec. 63.10, Stats., provides the sole and exclusive procedure for the discharge of County employees. It argues that the parties' collective bargaining agreement cannot circumvent Sec. 63.10 and any such provision would be void and prohibited.

COMPLAINANT'S POSITION:

The Complainant contends that, although the County's Personnel Review Board might arguably, in certain circumstances, be the exclusive body to review a termination, the general rule does not apply to a case where the union prejudices the employee's contractual and statutory rights by its breach of the duty of fair representation. Complainant argues that Sec. 63.10, Stats., presupposes that the employee be given a meaningful "day in court" and no other forum other than the Commission exists to correct the effects of the Union's breach of its duty of fair representation. Accordingly, the Complainant submits that the Commission proceed to a hearing on the merits of the Complaint.

DISCUSSION:

Generally, the Commission will not exercise its jurisdiction to determine the merits of an employee's allegation that the employer breached the collective bargaining agreement in violation of Section 111.70(3)(a)5, Stats., absent a showing that the employee attempted to exhaust the contractual grievance procedure but was frustrated in doing so by the Union's failure to fairly represent him. 2/ For the purposes of this proceeding, the Examiner has assumed but not decided that the Union failed to fairly represent the grievant at the Personnel Review Board hearing, otherwise the Commission would not assert jurisdiction over the County on the basis that there was no breach of the duty of fair representation. But even where it can be demonstrated that the Union breached its duty of fair representation, it does not automatically follow that the Commission will exercise jurisdiction over an employee's complaint. In Otto v. Milwaukee Public Schools 3/, the Commission held that, where the Union was not a party, it need not decide the fair representation issue where the employee's complaint against the employer failed to demonstrate a violation of any rights enforceable under the provisions of Sec. 111.70(3)(a), Stats. Therefore, it must be determined if the complaint alleges any violation of rights protected by Sec. 111.70(3)(a) 1 or 5, Stats.

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2/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Mahnke v. WERC, 66 Wis.2d 523, 225 N.W. 2d 617 (1975).

3/ Decision No. 20005-B 2/84.

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer: "To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." Section 111.70(2), Stats., provides that employees have the right to engage in or refrain from certain "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . ." The complaint fails to allege any facts that the Complainant engaged in or refrained from any concerted activities or that the discharge was in any way connected with lawful concerted activities. Therefore, it must be concluded that the County's conduct did not tend to interfere with, restrain or coerce the Complainant in the exercise of any right guaranteed her under Sec. 111.70(2), Stats., and the County cannot be found to have violated Sec. 111.70(3)(a)1, Stats. 4/

Section 111.70(3)(a)5, Stats., provides that it is a prohibited practice for an employer "To violate any collective bargaining agreement previously agreed upon by the parties. . . ." The complaint alleges that County terminated the Complainant in violation of the parties' collective bargaining agreement. Where the provisions of a collective bargaining agreement contradict the terms of a statute, the Commission attempts to harmonize the two to give effect to both, but where there is an irreconcilable conflict, the statute prevails. 5/ Here, the County contends that Sec. 63.10, Stats., provides the exclusive procedure for the discharge of employees. Sec. 63.10, Stats., provides the procedures to be followed for a dismissal of an employee, and in particular, Sec. 63.10(2) provides that the decision of the Board shall be final. The Commission has previously indicated that the provisions of Sec. 63.10, Stats., which make the Personnel Review Board's decision final, would necessarily be contradicted by a collective bargaining agreement, which would provide for an alternate method for the appeal of a discharge. 6/ Otherwise, the provision making Personnel Review Board decisions final would be contradicted. 7/

A review of the applicable collective bargaining agreement is necessary to determine if it contains any procedures applicable to employee discharges. Section 5.04 of the collective bargaining agreement between the County and the Union provides that, if Chapter 63 is amended, or if the discharge of employees is found by a tribunal of competent jurisdiction to be a mandatory subject of bargaining, the agreement would be reopened to negotiate those issues. These provisions establish that the County and the Union did not negotiate any procedure or standard for the discharge of an employee but left discharges subject solely to the procedures of Sec. 63.10, Stats. Thus, it must be concluded that the agreement between the Union and the County is not violated where an employee is discharged pursuant to the provisions of Sec. 63.10, Stats., as the agreement must be interpreted as providing that Sec. 63.10, Stats., is the exclusive procedure for a discharge. Even where the complaint is liberally construed in favor of the Complainant, it fails to state facts on which to base a claim that the Complainant's discharge pursuant to Sec. 63.10, Stats., comes under the collective bargaining agreement, and hence the County cannot be found to have committed a violation of Section 111.70(3)(a)5, Stats.

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4/ Id.

5/ Glendale Professional Policemen's Association v. City of Glendale, 83 Wis. 2d 90, 264 N.W. 2d 594 (1978).

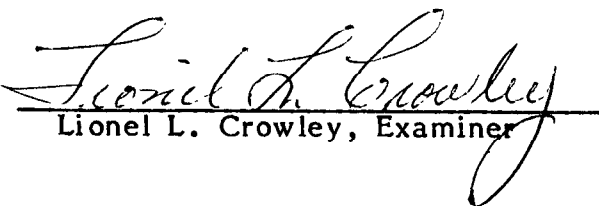
6/ Milwaukee County, (17832) 5/80.

7/ See City of DePere, (19703-B) 12/83 for a similar analysis of Sec. 62.13, Stats., with respect to the finality of Circuit Court decisions under that statute.

The Complainant contends that the Commission is the only forum in which the Complainant can enforce her right to have her "day in court". MERA was not enacted to grant the Commission an unlimited authority to generally oversee an employer's employment relations decisions. 8/ The statutory rights of the Complainant with respect to her discharge are controlled by Sec. 63.10, Stats., and not by any of the provisions of MERA; therefore the Commission has no jurisdiction to enforce such rights. Accordingly, the Complaint as amended is dismissed for lack of jurisdiction. 9/

Dated at Madison, Wisconsin this 9th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY   
Lionel L. Crowley, Examiner

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8/ Milwaukee Public Schools, (20005-B) 2/84.

9/ While there is no basis to assert jurisdiction over the County, even assuming that there has been unfair representation by the Union, the Union was not a party to the amended complaint, but had the Union been a party, the Commission would have jurisdiction to determine the merits of a prohibited practice charge against the Union for its failure to fairly represent the Complainant, in the absence of a showing that the Union had no duty of fair representation to the Complainant.