

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PRAIRIE DU CHIEN POLICE,	:	
LOCAL 1972, WCCME, AFSCME,	:	
AFL-CIO,	:	
	:	
Complainant,	:	Case XXV
	:	No. 33120 MP-1583
vs.	:	Decision No. 21619-A
	:	
CITY OF PRAIRIE DU CHIEN,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, Route 2, Sparta, Wisconsin 54656, appearing on behalf of Complainant.

Mr. Thomas F. Peterson, Assistant City Attorney, City of Prairie du Chien, Box 335, Prairie du Chien, Wisconsin 53821, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Prairie du Chien Police, Local 1972, WCCME, AFSCME, AFL-CIO, having on March 29, 1984, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Prairie du Chien has committed prohibited practices in violation of Sec. 111.70(3)(a)4 and 5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sec. 111.07(5), Wis. Stats.; and a hearing on said complaint having been held on May 10, 1984, at Prairie du Chien, Wisconsin; and the Complainant having filed a brief on June 8, 1984; and the Respondent having advised the Examiner on June 25, 1984, that it did not intend to file a brief; and the Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Prairie du Chien Police, Local 1972, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization with its principal offices located c/o Daniel Pfeifer, Route 1, Sparta, Wisconsin 54656.
2. That the City of Prairie du Chien, hereinafter referred to as the City, is a municipal employer which operates a police department in Prairie du Chien, Wisconsin; that its principal offices are located at the Prairie du Chien City Hall, Prairie du Chien, Wisconsin 53821; and that Thomas Peterson is the Assistant City Attorney for the City and has functioned as an agent of the City at all times material herein.
3. That at all times material hereto, the Union has been the exclusive collective bargaining representative for certain of the City's employes in a unit consisting of "all regular full-time and regular part-time law enforcement personnel who are deputized including patrolmen, sergeants and investigators employed by the City but excluding the chief of police and all other employes."
4. That the City and the Union have been parties to a series of collective bargaining agreements, the most recent agreement covering the period of January 1, 1982 through December 31, 1982; and that said contract contained the following provisions with respect to wages and duration:

ARTICLE XII - HOLIDAYS

12.02 Employees who work on a holiday or any part of a holiday shall receive pay at a rate of one and one-half (1 1/2) the normal straight time pay for the day worked, plus his/her holiday pay at the normal straight time rate. Employees who work on a holiday shall receive a maximum of two and one-half (2 1/2) times their regular rate of pay. An employee who works on a holiday may elect to have compensatory time off, in which case he or she will be paid at a rate of one and one-half (1 1/2) times for holiday time worked, and will receive the compensatory time off. Compensatory time off will be taken at a time mutually agreeable to the employee and the Chief of Police.

. . .

ARTICLE XXIV - SALARY SCHEDULE

24.01 <u>Classification</u>	<u>1982 Hourly Wage Rate</u>	<u>Monthly Wage Rate</u>
First Sergeant	\$8.44	\$1,369.16
Sergeant	8.34	1,352.93
Investigator	8.34	1,445.60
Patrolman	8.01	1,299.40
Probationary Patrolman	7.61	1,234.51
Part-Time Patrolman	6.50	

. . .

ARTICLE XXV - DURATION

25.01 This Agreement shall be effective as of January 1, 1982 and is to remain in full force and effect up to and including December 31, 1982. It shall continue in full force and effect thereafter until such time that either party desires to open, alter, amend, or otherwise change this Agreement, and notice of such change by either party shall be given to the other party by September 1st.

5. That Robert Niedziejko, hereinafter referred to as Niedziejko, has been a patrolman employed by the City for approximately three years; that Niedziejko was involved in an incident wherein he fired a service revolver loaded with a blank round directly at a fellow employe in the spring of 1983; and that, as a result, he was suspended for approximately ten days with pay and twelve days without pay pending a hearing before the City's Police and Fire Commission for violation of a work rule.

6. That Niedziejko immediately retained James Czajkowski, a private attorney in Prairie du Chien, to represent him in any legal proceedings arising from the incident described in Finding of Fact 5; that Czajkowski conferred with Peterson in an attempt to settle the matter prior to the pending hearing; that he spoke with Peterson on the telephone two or three times; and that pursuant to these conversations, Czajkowski and Peterson reached a settlement on or around March 15, 1983.

7. That the settlement was never reduced to writing but that both Czajkowski and Peterson agree that it was to involve a twelve-day suspension whereby Niedziejko's serving out the suspension would be adjusted to the 6-3, 6-3 work schedule of the police department; that under the terms of the agreement, Niedziejko was to be suspended for a three day off period, a six day on period, and for a three day off period; that Peterson and Czajkowski disagree as to whether the actual amount of days or money to be deducted from Niedziejko's pay was discussed and/or agreed upon; that pursuant to the agreement, Niedziejko went to see the Chief of Police, Gary Knickerbocker, about the actual days to be served and about spreading out the economic impact of the suspension; and that Knickerbocker and Niedziejko agreed that Niedziejko would be off as follows: March 15, 16 and 17 (working days); March 18, 19 and 20 (non-working days); March 27, 29 and 29 (non-working days); and March 30, 31 and April 1, 1983 (working days).

8. That the above settlement agreement was with the knowledge and consent of the Union; that the Union was a tacit party to said agreement; that the Union relied upon it; and that said oral settlement is a collective bargaining agreement.

9. That Niedziejko received deductions from his March 30, April 13, and April 27, 1983, paychecks in the amount of \$599.71.

10. That, thereafter, a dispute arose as to the amount of money which Niedziejko was to lose as a result of the suspension.

11. That on August 5, 1983, Peterson submitted a letter to Niedziejko's employment file which sets forth the terms and conditions of the unwritten agreement as follows:

LETTER TO EMPLOYMENT FILE

RE: OFFICER ROBERT E. NIEDZIEJKO
SHOOTING INCIDENT, APRIL 27, 1983

On April 27, 1983, it was alleged that Officer Robert Niedziejko, while in the employment of the Prairie du Chien Police Department, fired a service revolver loaded with a blank round directly at Radio Operator, Russell Sheckler.

As a result of that alleged action, disciplinary proceedings were commenced with the Police and Fire Commission for the City of Prairie du Chien, and Officer Niedziejko was suspended with pay until a time set for hearing in front of said commission. Prior to said hearing, it was agreed by all the parties concerned that the allegations would be admitted and the hearing in this matter canceled with the following disciplinary action to be taken against Officer Niedziejko:

Suspension without pay for a six (6) day work period, and further, that said Officer would be ineligible for work during a six (6) day period that consisted of a three (3) day period prior to the six (6) day work suspension and a three (3) day period following the six (6) day work suspension.

This report is to be made a part of Officer Robert E. Niedziejko's permanent work file.

12. That the Union took the position that Niedziejko should only have suffered a six day loss of pay equal to an \$8.01 hourly rate times 8 hours times 6 days while the City took the position that an amount equal to a twelve day pro-ration of Niedziejko's monthly salary should be deducted from his pay; 1/ and that the Union submitted its proposal to the City's Personnel Committee, which denied the Union's request by letter dated September 23, 1983.

13. That the instant complaint alleging violations of the bilateral agreement reached between the parties constituting a violation of Secs. 111.70(3)(a)4 and 5 of MERA was then filed on March 29, 1984.

14. That the City violated the oral settlement agreement when it deducted \$599.71 from Niedziejko's pay.

1/ At hearing, the City conceded that it had improperly deducted \$599.71. According to counsel for the City, the amount to be deducted should have been \$519.72 which is twelve days of pay based upon a monthly pro-ration. There is no evidence that the City has repaid Niedziejko the \$79.99 which it agrees it improperly deducted.

15. That the Union did not plead in its complaint nor litigate at the hearing an allegation that the City also violated the 1982 collective bargaining agreement by deducting the \$599.71 from Niedziejko's pay; that the first time the Union raised this argument was in its post-hearing brief to the Examiner; and that the City has not filed a post-hearing brief.

CONCLUSIONS OF LAW

1. That the City of Prairie du Chien violated an oral settlement agreement by deducting a pro-ration of twelve days of pay from Patrolman Robert Niedziejko's monthly salary (\$599.71) instead of six days' pay and therefore violated Secs. 111.70(3)(a)5 and 1 of MERA by its action.

2. That the City of Prairie du Chien by deducting a pro-ration of twelve days' pay from Patrolman Robert Niedziejko failed and refused to bargain in good faith with the Union, and therefore, it did violate Sec. 111.70(3)(a)4 and 1 of MERA by its actions.

3. That the Union failed to properly plead or litigate at hearing an additional allegation that the contract setting forth wage rates was also breached by the \$599.71 deduction, and therefore, the Examiner declines to determine whether or not the City of Prairie du Chien violated a collective bargaining agreement, other than the settlement agreement, by deducting \$599.71 from Niedziejko's pay, thus committing an additional violation of Sec. 111.70(3)(a)5 and 1 of MERA in this respect.

ORDER 2/

1. IT IS HEREBY ORDERED that the City of Prairie du Chien:

- (a) Immediately pay to Patrolman Robert Niedziejko the difference between \$599.71 and the amount representing six days of pay, plus other benefits which he should have received and did not

2/ 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.

receive. The City shall also pay interest at a rate of 12% per year ^{3/} on these monetary amounts due and owing to Niedziejko from the date of its wrongful failure to pay these monies to him through the date of the City's full compliance with the monetary requirements of this Order.

- (b) Cease and desist from violating an oral settlement agreement between the City, Patrolman Robert Niedziejko, and the Union and from unilaterally failing to implement terms and conditions other than those to which it has agreed.
- (c) Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked Appendix "A". That notice shall be signed by the President of the City Council and such other officials of the City who normally sign official communications and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondents to ensure that said notice is not altered, defaced or covered by other material.
- (d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps shall be taken to comply herewith.

2. FURTHER, IT IS HEREBY ORDERED that the additional allegation of a violation of Sec. 111.70(3)(a)5 is herewith dismissed.

Dated at Madison, Wisconsin this 13th day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was filed on December 1, 1982. At that time, the rate in effect was 12% per year. Sec. 814.04(4), Wis. Stats. Ann. (1983). See, Wilmot Schools, Dec. No. 18820-B (12/83) citing Anderson v. LIRC, 111 Wis. 2d 245 (1983) and Madison Teachers v. WERC, 115 Wis. 2d 623 (Ct. App., 1983).

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

We will cease and desist from violating an oral settlement agreement.

We will bargain in good faith by honoring said agreement in the future.

Dated this _____ day of _____, 1984.

City of Prairie du Chien

By _____
President, City Council

THIS NOTICE MUST REMAIN POSTED FOR SIXTY DAYS AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

The complaint alleges that the City violated Secs. 111.70(3)(a)4 and 5 by breaching an oral settlement agreement entered into between the City and an individual employe with the full knowledge and consent of the Union.

The City, in its oral answer, admitted the existence of the oral settlement agreement but denied breaching said agreement, and furthermore denied that any discussion was had as to the amount of monies to be deducted from the individual employe's salary.

The Union, on the other hand, argues that there was a specific agreement as to the amount of money to be deducted from the employe's salary. By deducting either \$599.71, which according to the Union's calculations is approximately 9.35 days of pay based upon an average amount of income during a fourteen day period, or \$519.72, which is approximately 8.11 days of pay based upon the average amount of income during a twelve (12) day period, the Union argues that the City breached the oral agreement. According to the Union, the appropriate amount to be deducted is \$384.48. It argues that the City committed a prohibited practice in violation of Sec. 111.70(3)(a)4 and 5 by failing to appropriately implement the settlement agreement and further, a violation of Sec. 111.70(3)(a)5 because it violated the wage schedule of the parties' collective bargaining agreement.

Discussion:

The initial issue to be addressed in the instant case is whether the oral settlement agreement between the City and an individual employe with respect to the imposition of discipline constitutes an enforceable collective bargaining agreement. Generally speaking, an employer's violation of an agreement between the employer and individual employes covering wages, hours, and working conditions is not a prohibited or unfair labor practice since such an agreement is not a collective bargaining agreement. 4/ Here, however, the City has admitted in its oral answer to the pleadings that the agreement between the employe and the City was with the knowledge and consent of the Union. 5/ This fact, when coupled with the Union's acquiescence to the discipline imposed, its reliance upon the agreement in failing to pursue the matter further through the filing of a grievance, and its pursuit of the alleged breach of said agreement, supports the conclusion that the Union was a tacit party to the agreement. Settlement agreements of this nature, even when they are only oral agreements 6/, have been found to be

4/ Hotpoint, Inc., Dec. No. 2122 (WERC, 6/49).

5/ ERB 12.03(7) provides as follows:

Failure of a party filing an answer specifically to deny or explain therein a material allegation of a complaint shall constitute an admission of and a waiver by such party of a hearing as to the facts admitted.

The Examiner therefore finds the City's oral answer to be an admission in this respect.

6/ Kauffman's Lunch Co., Dec. No. 1632 (WERC, 5/48) Aff. 215-016 (CirCt Milw. 7/48); Elm Tree Baking Co., Dec. No. 6383 (WERC, 6/63).

"collective bargaining agreements," the breach of which have been held to violate Sec. 111.06(1)(f) of WEPA and Sec. 111.70(3)(a)5 of MERA, respectively. 7/ Accordingly, the Examiner concludes that the oral settlement agreement in the instant dispute constitutes an enforceable collective bargaining agreement since the Union was a tacit party to it by fully consenting to it and relying upon it.

The City disputes the Union's contention that it agreed to withhold only six days' pay from Niedziejko. Assistant City Attorney Peterson's recall of the terms of the settlement agreement on this point differs substantially from that of Niedziejko's attorney, Czajkowski. Other than their testimony, the only other independent evidence is a letter placed in Niedziejko's personnel file by Peterson approximately five months after the fact. This letter, in pertinent part, states as follows:

Suspension without pay for a six (6) day work period, and further, that said Officer would be ineligible for work during a six (6) day period that consisted of a three (3) day period prior to the six (6) day work suspension and a three (3) day period following the six (6) day work suspension. (Emphasis added)

The City argues that this agreement merely shows how the suspension was to be served, given the 6-3, 6-3 schedule of the Police Department. The Examiner must reject this contention. The above agreement specifically states that six of the days would be without pay, while on the other six days, Niedziejko's off days, he would merely be ineligible for work, or in other words, to be called in to earn overtime. Had the parties intended to deduct twelve days of pay from Niedziejko's salary, said agreement would have specified twelve days without pay and then set forth the terms under which the suspension was to be served. To hold otherwise, in light of this letter, would permit the City to deduct pay from Niedziejko for days that he did in fact work, a highly unusual arrangement.

Czajkowski's testimony buttresses this conclusion. It is corroborative of the letter of August 5, 1983. He recalled the conversation with Peterson as to the amount of pay to be deducted because Niedziejko was sensitive to the amount he was to be docked. According to Czajkowski, Niedziejko was living in an apartment over the Copper Penny property and expressed concern amount making ends meet. Czajkowski testified the he remembered speaking with Peterson about the amount of money to be deducted because of Niedziejko's concern. He testified that the parties agreed Niedziejko would be suspended for twelve days, but the net effect on his pay would be a loss of six days' pay plus the loss of overtime opportunities on the three off days both before and after the six working days on which he was to be suspended. The testimony as to this point is detailed and comports with the terms set forth in the August 5 letter.

Peterson, on the other hand, testified that to his recollection regarding the conversations with Czajkowski nothing was said as to how pay was going to be deducted in the matter. According to Peterson, both he and Czajkowski were totally silent and somewhat deficient as to discussing the question of pay deduction. Peterson testified that it was his understanding that Niedziejko was to receive a twelve day suspension and would be deducted for twelve days' pay. He testified, however, that he did not recall any conversations with Czajkowski as to the net effect on Niedziejko's pay or any other conversations as to how pay was to be deducted -- only that it was to be a twelve day suspension. Peterson's testimony does not comport with the August 5, 1983, letter in that said letter specifies that six days of the suspension, the working days, were to be unpaid and the other six off days were to be days when Niedziejko was ineligible for work. If the parties were silent on the issue of pay deduction, there would have been no reason for Peterson to specify in the letter that the six working days of the suspension were to be unpaid. Moreover, Peterson's initial statement that the parties were silent on the issue of pay deduction does not square with his understanding that Niedziejko was to have twelve days' pay deduction. Peterson never

7/ Packerland Packing Co., Dec. No. 7414-C (WERC, 11/66); Fugarino Excavating, Dec. No. 11846-A, B (WERC, 8/73); Milwaukee Area District VTAE Board, Dec. No. 17322-A (Malamud, 11/80) aff'd Dec. No. 17322-B (WERC, 12/80); and Kenosha County, Dec. No. 17384-A (Lynch, 9/80) aff'd Dec. No. 17384-C (WERC, 10/80).

did explain the basis for his understanding. Based upon an examination of the record evidence including the letter of August 5, the Examiner finds that Czajkowski's recall of the conversations resulting in the oral agreement is more accurate than Peterson's and credits Czajkowski's testimony coupled with the August 5 letter over that of Peterson. Therefore, she finds that the City breached the oral settlement agreement by deducting an amount greater than six days' pay from Niedziejko's salary. This breach violated Sec. 111.70(3)(a)5 and 1 of MERA.

The Union, in its letter brief, argues that the City has also violated Sec. 111.70(3)(a)4 by its failure to properly implement an agreed-upon settlement agreement. The Examiner agrees with the Union. Having agreed to deduct six days' pay from Niedziejko's salary, the City's unilateral deduction of an amount in excess of the six days warrants a finding that the City has also violated Sec. 111.70(3)(a)4 and 1 of MERA.

While the Union did not plead a violation of the wage schedule of the parties' collective bargaining agreement in its complaint nor did it litigate said allegation at the hearing, nevertheless, in its letter brief, the Union argues that the City also breached the wage schedule in violation of Sec. 111.70(3)(a)5. At hearing, the Union introduced a collective bargaining agreement covering the contract year 1982. It did not introduce any evidence as to whether this agreement was in full force and effect at the time the City docked Niedziejko's salary, sometime in the summer of 1983. Nor did it claim at the hearing that the City had violated the 1982 agreement or amend its pleadings at or after the hearing. The City, which did not file a brief in this matter, had notice of this allegation for the first time upon receipt of the Union's brief. Under these circumstances, where the allegation has not been properly pled or litigated at hearing, the Examiner declines to rule on whether the City had, in fact, also breached the 1982 agreement by its actions. 8/

Having found, however, that the City did breach the oral settlement agreement, the Examiner orders the City to deduct six days' pay from Patrolman Niedziejko's salary. The City is ordered to reimburse Niedziejko the difference between \$599.71 and the sum equivalent to six days of pay, plus interest. The 1982 agreement contains both hourly and monthly rates for patrolmen. The testimony of City Clerk-Treasurer Gary Koch established that an officer's regular salary is based upon the monthly rate. He further testified that work arising outside of the officer's regular schedule such as overtime, holidays, working holidays, etc., is computed based upon the hourly rate. During the applicable period of time, from April through August of 1983, Koch testified that the City was utilizing rates contained in the 1982 agreement. He further testified that should an employe take a day off without pay, the deduction would probably be based upon the hourly rate but that he was not completely certain. Based upon Koch's testimony, the Examiner orders the City to compute the six days to be deducted from Niedziejko's pay in a manner consistent with pay deductions which would be made when employes take scheduled time off without pay. The City is also ordered to pay or provide to Niedziejko any other benefits which he should have received, but did not receive, because of its breach along with interest on said monetary amounts.

Dated at Madison, Wisconsin this 13th day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schavon