

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

|                         |   |                      |
|-------------------------|---|----------------------|
| -----                   |   |                      |
| RACINE POLICEMEN'S      | : |                      |
| PROFESSIONAL AND        | : |                      |
| BENEVOLENT CORPORATION, | : |                      |
|                         | : |                      |
| Complainant,            | : |                      |
|                         | : |                      |
| vs.                     | : | Case 201             |
|                         | : | No. 33168 MP-1587    |
|                         | : | Decision No. 21640-A |
| CITY OF RACINE,         | : |                      |
|                         | : |                      |
| Respondent.             | : |                      |
|                         | : |                      |
| -----                   |   |                      |

Appearances:

Schwartz, Weber, Tofte and Nielsen, Attorneys at Law, by Mr. Robert K. Weber, appeared on behalf of the Complainant.  
 Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Michael L. Roshar, appeared on behalf of the Respondent.

FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having, on April 9, 1984, filed a complaint with the Wisconsin Employment Relations Commission, wherein it is alleged that the above-named Respondent has committed a prohibited practice within the meaning of the Municipal Employment Relations Act (MERA); and the Commission, on May 1, 1984, having appointed William C. Houlihan, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5) Stats.; a hearing on said complaint was conducted in Racine, Wisconsin, on July 26, 1984 1/ before the Examiner; a transcript of the proceedings was provided to the Examiner and to the parties on August 27, 1984; briefs were submitted by November 12, 1984; 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.

FINDINGS OF FACT

1. Racine Policemen's Professional and Benevolent Corporation, hereinafter Union, is an organization, organized and existing, at least in part, for the purpose of engaging in collective bargaining concerning grievances, labor disputes, wages, hours, and conditions of employment and whose offices are c/o Schwartz, Weber, Tofte & Nielsen, 704 Park Avenue, Racine, Wisconsin.
2. The City of Racine is a City, organized and existing under and by virtue of the laws of the State of Wisconsin, which engages the services of numerous employes, and whose address is Racine City Hall, 730 Washington Avenue, Racine, Wisconsin.
3. The Union is, and at all material times has been, the duly certified and recognized exclusive collective bargaining representative of the law enforcement employes of the City.
4. The Union and the City were signatories to a collective bargaining agreement covering the wages, hours, terms and conditions of employment of the members of the bargaining unit represented by the Union, which agreement covered the period 1982-83 and was extended by agreement of the parties at the time this complaint was filed.

---

1/ The evidentiary hearing was postponed in order to permit the parties to litigate essentially the same subject matter before the Racine Police and Fire Commission. The Police and Fire Commission hearing was conducted in the months of April and May, 1984. The parties to this proceeding stipulated that the transcript of the Police and Fire Commission hearing, as well as the exhibits in that proceeding, be considered a part of the record in this matter.

5. The collective bargaining agreement contains the following provision:

ARTICLE XXXI - PROHIBITED PRACTICES

In the event either party desires to file a prohibited practice charge with the Wisconsin Employment Relations Commission against the other for any reason authorized under State law, it shall so notify the other party in writing by certified mail summarizing the specific details surrounding the potential charge. Such charge may not be filed for a period of fifteen (15) days following delivery to the other party and upon receipt of this notice, the parties agree to meet and and confer in an attempt to resolve the dispute during the fifteen (15) day period.

6. The Union did not notify the City by certified mail that it intended to file this charge, the record is silent as to whether the parties met and/or conferred over this matter during the 15 days prior to April 9, 1984. However, the parties spent several days in hearing before the Racine Police and Fire Commission on this matter.

7. David Marino is and at all material times has been, a police officer employed by the City, represented by the Union, and covered by the provisions of the collective bargaining agreement.

8. Each police officer in the Racine Police Department fills out a daily activity report, referred to by the parties as a PP-1. The form identifies 15 areas of reportable activity, including 1. Accidents, 2. Accident U.T.C. (arrests related to accident investigations), 3. Other U.T.C. (arrests unrelated to accidents, i.e. traffic citations), 4. Parking Tickets, 5. Warning Tickets, 6. UMCC's (Municipal Citations), 7. Warrants, 8. Juvenile Apprehension, 9. Adult Felony Arrests, 10. Adult Misdemeanor Arrests, 11. Assists, 12. Crime Reports, 13. Supplements (Information Report), 14. Evidence Technician Assignments, 15. Other.

9. On a monthly basis, information from the PP-1 forms is collected and reported, by officer, on monthly officer activity reports reflecting some, but not all, of the categories identified by the PP-1 form. The five monthly report categories are; 1. Total Traffic Citations, 2. Total Parking Tickets, 3. Total Criminal Matters, 4. Warning Tickets, 5. Tickets and Municipal Court Citations.

10. In November of 1982 Officer Marino reported 1 UTC, 2 Criminal Matters, and no Parking Tickets, Warning Tickets, or Tickets and Municipal Court Citations. The 11 man squad, to which he was assigned averaged 6.6 UTC's, 33 Parking Tickets, 4 Criminal Matters, 10.72 Warning Tickets, and no Tickets/Municipal Court Citations.

11. On, or about, December 4, 1982 Sgt. Domic LoPiccolo, who was Officer Marino's first level supervisor at the time, conferred with Marino about his low productivity during November, 1982. LoPiccolo noted that "it is further evident that little effort was made in parking enforcement or criminal matters". 2/ LoPiccolo advised Marino to put forth more effort.

12. In January of 1983 Officer Marino reported 2 UTC's, 7 Parking Tickets, no Criminal Matters, 12 Warning Tickets, and 1 Ticket/Municipal Court Citation. The 10 man squad average was 7.6 UTC's, 46.8 Parking Tickets, 5.4 Criminal Matters, 21.1 Warning Tickets, and 0.3 Tickets/Municipal Court Citations.

13. On, or about, February 1, 1983 Sgt. David Rannow, who was Officer Marino's first level supervisor at the time, conferred with Marino about his low productivity during January, 1983. Rannow advised Marino that his work was substandard in all areas. Rannow issued the following:

---

2/ Exhibit #3.

Subject: LOW PRODUCTIVITY CONFERRAL WITH OFFICER  
D. MARINO #1521

On 02-01-83 a conferral was held with OFFICER D. MARINO. This conferral was extensive in time spent and subjects covered. It was pointed out to D. MARINO that he was substandard in all areas of performance. D. MARINO stated he knew his enforcement was down, but felt his effort in warning tickets was going unnoticed. It was shown to D. Marino that his effort in warning tickets equaled approximately 60% of what the average for his squad was and therefore, he was very low in that area also.

The quality of his reports were also discussed and it was displayed to him that he needs more concentration on his reports. Several options were made available to him, such as training, ride along, and close supervision. D. MARINO refused all these, stating his only problem is in asserting himself and not giving everyone a pass. D. Marino then stated that this month was an isolated case and he is a better officer than his activity of January 1983 would indicate.

At this point, a review of the entire year of 1982 was conducted and it was displayed to him that the activity being conducted in January 1984 was exactly indicative of his performance for the entire year of 1982.

This month D. MARINO is assigned to area 7 and promises to change his dismal past record. To assist him, he was told to stay in area 7 for eight hours of aggressive patrol and to cease his roaming throughout the northside and giving attention to everyone's calls except his own. It was also pointed out he is scheduled for radar training to assist him in his traffic record.

It is my feeling when confronted with his record, he has made a decision to change it. I will monitor him in February and if this self-motivation policy he wants to try is not forthcoming, other action will be taken in March.

SGT. D. RANNO

14. In February of 1983 Officer Marino reported no UTC's, 20 Parking Tickets, 3 Criminal Matters, 2 Warning Tickets, and no Municipal Court Citations. The squad average for the month was 7.1 UTC's, 44.6 Parking Tickets, 1.4 Criminal Matters, 7.9 Warning Tickets, and no Municipal Court Citations.

15. On, or about March 1, 1983 Sgt. David Rannow and Lt. Arthur Miller conferred with Officer Marino about low productivity during February of 1983. Rannow advised Marino that his work was substandard and that he had failed to motivate himself. Miller asked Marino if he needed help; Marino answered that he did not but subsequently indicated that he would like radar training. In response, radar training was made available to Marino earlier than had been scheduled. Rannow issued the following memo:

Subject: CONFERRAL FOR POOR ACTIVITY WITH OFFICER  
D. MARINO FOR THE MONTH OF FEBRUARY 1983

On this date OFFICER D. MARINO was again conferred for a dismal performance record for February. OFFICER MARINO was assigned Area 7, an area of normal activity. It was pointed out his record for traffic for February was 0, MARINO's work in warning tickets was also substandard.

OFFICER MARINO was reminded that he had stated in February he would motivate himself and that he has failed to accomplish this.

The conferral was held with LT. MILLER. OFFICER MARINO maintains that he is applying selective enforcement and making a concerted effort toward traffic, but has failed to observe any violations he felt required enforcement action.

OFFICER MARINO maintains he will change his activity and perform at an acceptable level.

SGT. DAVID C. RANNO, SR. /s/  
SGT. DAVID C. RANNO, SR.

DR:df

16. In March of 1983 Officer Marino attended Radar School. In August of 1983 Marino operated radar equipment and on September 3 received a high productivity conferral. Sgt. LaMere issued the following:

On 9/3/83 writer contacted Officer D. Marino during his tour of duty and commended him for his above average productivity, especially in the area of traffic, for August 1985.

17. On September 5, 1983 Captain of Patrol William Voss met with Officer Marino and instructed him to discontinue his practice of lowering speeds on all tickets issued to 10 miles above the speed limit.

18. In September, 1983 officer Marino reported 1 UTC, 4 Parking Tickets, 0 Criminal Matters, 1 Warning Ticket, and 0 Municipal Court Citations. The squad average for the month was 10.6 UTC's, 18.7 Parking Tickets, 7.8 Criminal Matters, 2.2 Warning Tickets, and 0.4 Municipal Court Citations.

19. On October 4, 1983 Sgts. Michael Ackley and Bernie LaMere conferred with Officer Marino relative to low productivity. The Following memo was issued:

Subject: Low productivity conferral

On todays date, Officer David Marino, 1521, was given a low productivity conferral for his sub-standard activity in the month of September, 1983.

The conferral was given to him by both Sgt. LaMere and Ackley, and lasted aprx. 15 minutes.

Officer Marino was told that any further displays of sub-standard performances like September's would result in further action on our part which included, but was not limited to a conferral with A.C. Jerdee, having a Sergeant for a partner, etc.

Officer Marino stated that the reason he did not accomplish much in September, was because he was over-burdoned (sic) with personnal (sic) problems. Officer Marino included numerous personnal (sic) dilemmas in this reason, but stated that he was already doing better, and was sure to improve in the future.

The appropriate entries were made on Officer David Marino's PP-5.

20. In November of 1983 Officer Marino had 2 UTC's, 8 Parking Tickets, 8 Criminal Matters, 12 Warning Tickets, and 1 Municipal Court Citation. The squad average for the month was 11.9 UTC's, 48.5 Parking Tickets, 13.9 Criminal Matters, 8 Warning Tickets, and 0.9 Municipal Court Citations.

21. On December 2, 1983 Sgts. LaMere and Ackley conferred with Officer Marino over low productivity. The following memo was issued:

TO CAPT. VOSS/LT. KLOFANDA DATE December 2, 1983

FROM SGT. LaMERE/SGT. ACKLEY

Subject LOW PRODUCTIVITY CONFERRAL

On today's date Officer DAVID MARINO was given a low productivity conferral for the month of November 1983.

Officer MARINO had a total of 11 arrests for the month of November, eight being criminal, and two being UTC's. Sgt. LaMere and Sgt. Ackley feel that this is at best a border line performance, and in view of his past performance record, that his performance should not be allowed to slip to levels such as this without attempting to more highly motivate Officer MARINO. He was advised that his daily activity sheets had been reviewed, and that there were too many days in which little or nothing was shown on these sheets as far as any type of work goes. This includes enforcement action, case reports, accidents, etc.

Officer MARINO was advised that he was extremely close to receiving a low productivity conferral from Assistant Chief JERDEE. He was further advised that to avoid such an conferral, he must immediately improve his work record.

Respectfully submitted,

Sgt. MICHAEL S. ACKLEY

Sgt. BERNIE J. LaMERE

22. In December of 1983 Officer Marino issued 2 warning tickets and had no other objective actions reported. The squad average for December, 1983 was 4.7 UTC's, 28.9 parking tickets, 7.9 criminal matters, 5.9 warnings, and 0.4 municipal court citations.

23. On January 2, 1984 Sgts. Ackley and LaMere sent the following memo.

TO CAPT. W. VOSS DATE 1-2-84

FROM SGT. ACKLEY/SGT. LaMERE

Subject Low Productivity

This letter takes the place of a low productivity conferral for OFFICER DAVID MARINO. Last months records indicate that the only self-initiated activity produced by OFFICER MARINO during the entire month of December, 1983 was two warning tickets. OFFICER MARINO had one accident report and a couple of supplements and case reports during the course of the month, but even this routinely assigned work was far below any expected norm or average.

Within the past twelve months OFFICER DAVID MARINO has received low productivity conferrals for the months of January, February, September, and November. In August he also received an instruction from SGT. ACKLEY in regards to his borderline productivity in the month of July. On December 4, 1983, when he was conferred for his low productivity in November, he was advised that any further productivity problems would result in his next conferral being made by the Assistant Chief. OFFICER MARINO was further advised that Chief Jerdee or his designee would most assuredly take stronger actions than either of his Sergeants. OFFICER MARINO was further advised that with fifteen days being held in abeyance because of prior charges and specifications against him, that further low productivity could possibly initiate the issuing of the remaining 15 day suspension.

As OFFICER MARINO has been given four low productivity conferrals up to this point, this being the fifth, and one instruction in regards to low productivity, SGT. LaMERE and myself feel that the low productivity conferrals have done no good, and that stronger measures should be taken at this time.

As of the writing of this memorandum, OFFICER MARINO has not been spoken to about his total December performance package, as we are requesting more stringent measures be taken in the matter.

24. Ackley and LaMere formally requested discipline on January 5, 1984 by filing a complaint against Marino which read as follows:

As a result of extremely low productivity, which Officer David Marino has shown in the month of December, 1983, along with past conferrals, Officer David Marino has been found to be in violation of Policy and Procedure #400-C-17.

In the thirteen month period prior to this month (December, 1983), Off. David Marino received five low productivity conferrals from his various sergeants. These five conferrals were for the months of November, 1982, January, 1983, February, 1983, September, 1983 and November, 1983. Officer David Marino also received training to improve his productivity because of his performance in the month of July, 1983. This last mentioned training was conducted on August 4, 1983, by having Sgt. Ackley ride with Officer David Marino and give Officer Marino instructions on how to improve both the quality and quantity of his work. This conferral for the month of December, 1983 will be Officer Marino's fifth of 1983, and sixth in fourteen months. As other officers have performed the same assignments as he did during the same times as Officer Marino, and have not had problems with their productivity, we feel that number one, Officer David Marino is not performing consistent with the average ability of equivalent members of the department, and number two, the conferrals given to Officer David Marino in the past, have done no good whatsoever, it should be noted that Officer David Marino, in his past conferrals, has given no acceptable explanations for his low productivity.

25. On January 10, 1984 an interview meeting was conducted, Lt. Klofonda, Sgt. Ackley, Officer Marino, and Officers Chessen and Ladd, representing Marino were present. Klofonda advised Marino of the fact that discipline was being recommended and asked Marino if he had any response. Marino indicated that he would have no response at that time but would submit a written response at a later date. During the course of the conversation Lt. Klofonda said "Let's be honest, Dave and Bill, we are talking about enforcement of traffic tickets."

26. On, or about, January 13, 1984 Officer Marino submitted the following written response to the charges:

I have a question with respect to the nature of the charge.

The charge itself states that I inadequately performed some aspects of the following:

"Report writing, physical intervention, booking, charging and processing prisoners, firearms qualification and knowledge of the criminal law."

I am not aware of my inadequacies in those areas -- at least, not in comparison to other equivalent members of the department. If the charge is related to one or more of the items listed in the charge, I would appreciate it if you could be more specific so that I know what duties precisely I did not adequately perform. This would assist me in responding to the charges.

If I am charged with something else under the "reasonably expected aspects of public related work" mentioned in the charge. I am still unable to respond adequately without knowing what aspects you are referring to.

If it is directed toward my productivity, I would point out that evaluations and discipline must be based on a variety of factors in addition to productivity -- attitude; performance on civil trouble calls; ability to deal with the public and co-employees; investigative ability; back-up performance; paperwork performance and performance of other duties -- by virtue of an arbitration case (June 7, 1983) entitled City of Racine and Racine Police Professional and Benevolent Corporation A/P M-83-201. A copy is attached.

Even with respect to the productivity factor I do not believe I am outside an acceptable range of performance.

I am not attempting to avoid my responsibility to answer the charge or to evade the question, and I appreciate the time extension given to me. The more I study the charge, the more unclear I am on what I am charged with. If you can be more specific, I will be available at any time to answer your questions in a satisfactory manner.

/s/ David Marino  
Officer David Marino

27. Klofanda investigated the charges, determined that discipline was appropriate, and on or about January 17, 1984 called Marino into his office. Klofanda advised Marino that he could accept command discipline of 1 day off without pay or decline Command discipline without formal charges and specifications. Marino asked for time to consider the options.

28. On January 20, 1984 the Union filed a complaint of prohibited practice (Case CXCVI, No. 32822, MP-1556, Dec. No. 21639-A) with the Wisconsin Employment Relations Commission which alleged that the discipline of Officer Marino violated the terms of a prior agreement resolving a previous arbitration. Specifically, the complaint alleged that Marino was being disciplined pursuant to a quota system, which the parties had agreed would not be used.

29. On January 24, 1984 Marino, accompanied by Officer Ladd, came to Klofanda's office and indicated that he would not accept command discipline.

30. Following that meeting Klofanda initiated charges and specifications. Formal charges were issued on March 13, 1984. Those charges read as follows:

STATE OF WISCONSIN COUNTY OF RACINE CITY OF RACINE

Before the POLICE AND FIRE  
COMMISSION OF THE CITY OF RACINE

---

|                          |   |                 |
|--------------------------|---|-----------------|
| IN THE MATTER OF         | * |                 |
|                          | * |                 |
| DAVID MARINO             | * | CHARGES AGAINST |
|                          | * |                 |
| An Officer of the        | * | A SUBORDINATE   |
| Racine Police Department | * |                 |

---

TO: FRANK SAVAGLIO  
Chairman  
Police and Fire Commission  
703 Center Street  
Racine, Wisconsin 53403

PLEASE TAKE NOTICE THAT I, JAMES J. CARVINO, Chief of the Police Department of the City of Racine, do hereby prefer charges, pursuant to Section 62.13(5)(b), Wisconsin Statutes, against Police Officer David Marino, a member of this Department, which charges arise from the fact that the said officer violated the Rules of Conduct of the Racine Police Department Manual.

That specifically Officer Marino has violated Procedure #400 Rules of Conduct, Section C(17) entitled "Inefficiency and Incompetence" which provides:

INEFFICIENCY AND INCOMPETENCE. No member shall fail to adequately perform any specific, reasonably expected aspect of police related work. Such reasonably expected aspects include, but are not limited to: report writing, physical intervention, booking, charging and processing prisoners, firearms qualification and knowledge of the criminal law. "Adequately perform" shall mean performance consistent with the average ability of equivalent members of the Department."

Officer Marino has violated the above quoted provision of the Rules of Conduct as set forth in the Racine Police Department Manual in the following manner:

During the months of December, 1982, through December, 1983, inclusive, Officer Marino's work performance taken as a whole has been, objectively and subjectively, substandard and inadequate when compared with the average ability of other police officers assigned to street patrol in his squad and/or shift.

Officer Marino had ample notice and explanation of his substandard and inadequate work performance due to at least five work performance conferrals with his supervisors during the forementioned thirteen month period, said conferrals occurring on the following dates with the following supervisors:

|                   |                         |
|-------------------|-------------------------|
| December 4, 1982: | Sgt. Lopiccolo          |
| February 1, 1983: | Sgt. Rannow             |
| March 1, 1983:    | Sgt. Rannow             |
| November 4, 1983: | Sgts. Ackley and LaMere |
| December 2, 1983: | Sgts. Ackley and LaMere |

Objectively, Officer Marino's work performance has been substandard and inadequate when his performance standard is viewed from the standpoint of quantitative data.

Subjectively, Officer Marino's work performance has been substandard and inadequate in that, inter alia: his attitude has been elitest and he has conferred to his supervisors an impression of disdain for normal, routine police work; his investigative abilities were limited and he impressed his supervisors as being poorly motivated and wanting to do only the bare investigative minimum; and his abilities in completing required paperwork, including report writing were likewise at a bare minimum, according to his supervisors.

Dated at Racine, Wisconsin this 16th day of March, 1984.

Respectively submitted,

James J. Carvino /s/  
James J. Carvino

Chief of Police

31. On April 9, 1984 the Union filed this complaint. In April and May of 1984 the Racine Police and Fire Commission heard evidence on the propriety of the discipline imposed.



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

CONCLUSIONS OF LAW

1. Racine Policemen's Professional and Benevolent Corporation is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.
2. City of Racine is a Municipal Employer within the meaning of Sec. 111.70(1)(j), Wis. Stats.
3. The Wisconsin Employment Relations Commission has, and properly exercises, jurisdiction of this matter pursuant to Sec. 111.70(4)(a) Wis. Stats.
4. Neither the filing of formal charges nor the form and scope of the charges filed against David Marino by the City of Racine discriminated against Marino because of his exercise of rights guaranteed under the Municipal Employment Relations Act within the meaning of Sec. 111.70(3)(a)3 Wis. Stats.
5. None of the acts described above interfered with, restrained, or coerced Officer Marino in the exercise of rights guaranteed by the Municipal Employment Relations Act, within the meaning of Sec. 111.70(3)(a)1 Wis. Stats.

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

ORDER 3/

That the Complaint is dismissed.

Dated at Madison, Wisconsin this 12th day of July, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan  
William C. Houlihan, Examiner

---

3/ 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.

CITY OF RACINE (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT CONCLUSIONS  
OF LAW AND ORDER

JURISDICTION

Respondent City of Racine urges the Commission to refuse to assert jurisdiction until such time as Article XXXI of the parties' agreement has been satisfied. It is undisputed that the notice called for in that Article was not given. The City seeks to have jurisdiction deferred until the contractually contemplated notice is given and the parties have met in an attempt to resolve the dispute. The City argues that such a result encourages voluntary settlement of disputes, and cites WERC case law authority in support of its position. 4/

The Complainant urges this Examiner to deny Respondent's Motion to Dismiss. The Complainant argues that a contractual clause limiting access to the Commission is illegal. It argues that oral notice was given and that several meetings were held in attempts to resolve the underlying matter. Complainant points out that this alleged deficiency was never raised in the answer and that the Complainant should be precluded from first raising it at the hearing. Finally, the Complainant points out that a procedural dismissal results only in a further delay in these proceedings.

I believe the matter is properly before the Commission. The complaint was filed on April 9, 1984. Hearing on the matter was postponed to July 26, 1984 to permit Police and Fire Commission proceedings to take place. The parties had 3 1/2 months to resolve this dispute. The record is silent as to whether or not such meetings took place, though Complainant contends that they did. Numerous days of hearing before the Police and Fire Commission did take place affording the parties ample opportunity to work this out if they wanted to. The stated purpose of the 15 day notice is to provide an opportunity to resolve the underlying dispute. Under the facts presented here, the parties had that opportunity.

The Motion to Dismiss was not contained in the answer, but rather was first raised at hearing. Wis. Adm. Code, Section ERB 12.03(4) provides as follows:

ERB 12.03 Answer to complaint. (1) WHO SHALL FILE: FORM AND JURAT: NUMBER OF COPIES. The respondent shall, and any other party named in the complaint may, file with the commission the original and four copies of an answer, the original being sworn to, on or before the date designated therefor in the notice of hearing.

(2) SERVICE. Copies of the answer shall be served by the respondent or other parties upon the complainant or other parties who are designated in the notice of hearing as required to be served, on or before the date designated therefor in the notice of hearing.

(3) MOTION TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN. If a complaint is alleged to be so indefinite as to hamper the respondent or any other party in the preparation of its answer to the complaint such party may, within 5 days after the service of the complaint, by motion request the commission to order the complainant to file a statement supplying specified information to make the complaint more definite and certain.

---

4/ Brown County (Sheriff-Traffic Dept.) WERC Dec. No. 19314-B (6/83); Milwaukee Public Schools, WERC No. 2005-A (6/83). See also Mineral Pt. United School District, WERC Dec. No. 14970-C (10/78); Marinette County (Sheriff's Department), WERC Dec. No. 19127-C (11/82); Chippewa County, WERC Dec. No. 17328-B (5/80); Sauk Prairie School District, WERC Dec. No. 15282-B (7/78).

(4) CONTENTS. The answer shall contain the following:

(a) A specific admission, denial, or explanation of each allegation of the complaint, or if the filing party is without knowledge thereof, he shall so state to that effect, such statement operating as a denial; admissions or denials may be to all or part of an allegation but shall fairly meet the substance of the allegation.

(b) A specific detailed statement of any affirmative defense.

(c) A clear and concise statement of the facts and matters of law relied upon.

(5) AMENDMENT. The respondent may, for good cause shown, amend his answer at any time prior to the hearing. During the hearing and prior to the issuance of the order, he may amend his answer where the complaint has been amended, within such period of time as may be fixed by the commission, or by the commission member or examiner authorized by the commission to conduct the hearing. Whether or not the complaint has been amended, the answer may, upon motion granted, be amended upon such terms and within such period as may be fixed by the commission, commission member or examiner, as the case may be.

I believe the jurisdictional defense is most properly treated as an affirmative defense as that term is used in ERB 12.03(4)(b). As such, it should have been raised in the answer. Respondent has essentially attempted to amend its answer at the hearing without establishing the existence of good cause, which, on its face, does not exist. Respondent was aware of the contractual provision at the time the complaint was filed. Had it raised its objection at that time the complainant would have been put on notice of the objection and could have attempted to cure any possible jurisdictional defect.

The Respondent is not seeking a dismissal of the charges. Rather, the Respondent seeks to have the matter deferred until such time as the contractually specified notice is provided. At this point in the proceedings I believe the only consequence of granting the motion would be further, and undesirable delay. The parties have had all the time in the world to sit down and resolve the matter.

All cases cited by Respondent in support of its motion involved breach of contract allegations which were deferred to the contractual grievance arbitration provision. The cases are easily distinguishable from this matter in that the Complainant is not seeking to have a contractual right enforced by the W.E.R.C. under circumstances where he has agreed to grievance arbitration as his exclusive relief. This case alleges discriminatory retaliation for the exercise of protected rights. As such, the substantive cause of action derives from the statute, not the contract. It is undisputed that the W.E.R.C. is the appropriate forum for resolution of such claims.

In light of the above, it is unnecessary to consider whether or not the clause is illegal or unenforceable.

#### DISCRIMINATORY MOTIVE

The parties agree that the applicable burden of proof in discrimination cases is the following:

It is the Complainant's burden to document, by a clear and satisfactory preponderance of the evidence, that (employee) was engaged in protected concerted activity; that the Respondent was aware of such activities, that the Respondent felt animus toward such activities and that (the action taken

by the employer) was motivated, at least in part, by Respondent's animus toward such activity. 5/

Complainant alleges that the filing of the complaint on January 20, 1984 over the discipline of Marino constituted protected concerted activity. Respondent, while not contesting that the filing of the complaint is protected activity points out that the Union, and not Marino, filed the complaint in an effort to enforce a previous grievance resolution. Respondent argues that Marino was not engaged in protected activity.

For purposes of this analysis I believe the filing of the complaint is properly imputed to Marino. It is his discipline that caused the complaint to be filed. The record suggests that he was a willing participant in that dispute. He is named in that complaint and is the immediate beneficiary of the relief sought. In short, that matter focuses exclusively on Officer Marino.

As a practical matter, the conclusion that Marino enjoys protected activity status, is indispensable and necessary. To find that Marino is not so protected requires dismissal of this action on that basis with a somewhat anomalous result that the Employer is granted free reign to engage in retaliatory actions against bargaining unit members in response to their Union engaging in protected activity on their behalf. This result offends the underlying purpose of the statute.

When the Union executed the original grievance settlement with the City and filed the complaint over Marino's discipline, it was engaged in protected activity on behalf of its members. It is those members interests that are being represented. Under these circumstances, the Union acts as the representative of the individual.

The City must certainly be held to notice that Marino, and his Union, was engaged in protected activity. Marino told his commanding officers that he would not accept command discipline. The City was formally served notice that the complaint was filed.

I find little or no evidence of animus or hostility toward the protected activity. The initial discipline was brought about through the efforts of Sgt. LoPiccolo, Sgt. Rannow, Lt. Miller, Cpt. Voss, Sgt. Ackley, Sgt. LaMere and Lt. Klofanda. The record supports a finding that Marino and Rannow have a poor personal relationship and that Marino and LoPiccolo enjoy a particularly good personal relationship. The record otherwise supports a finding that Marino has a satisfactory personal and working relationship with those officers involved in his conferrals and discipline. There is nothing in the record which suggests that any of these officers even considered any protected activity of Marino's in making the decisions they made. Marino is not a particularly active or outspoken Union adherent.

The heart of the Complainant's case is that the charges were expanded following the filing of the complaint. Specifically, the subjective portions of the charges are alleged to have been added to the original complaint in response to the filing of a charge with the Commission. The "charges" document is signed by Chief of Police Carvino. However, it was prepared by the City Attorney, upon the recommendation of Lt. Klofanda. Klofanda, who investigated the matter, acted upon the complaint of Ackley and LaMere. The Union points to previous litigation between the parties where the Chief was found to harbor hostility toward the Union. However, it appears that the Chief had no actual role in the initiation, development or drafting of the charges against Marino. There is no evidence of hostility, Union based or otherwise, toward Marino on the part of any of those who did play a role in the drafting of the charges.

Part of what forms the background to this case is the allegation by the Union that the City utilizes a quota system in evaluating and disciplining officers. The charge is denied by the City. The case cited by Marino, in his January 13 memo involves the disposition of a grievance which alleged that a quota system was in effect. One portion of that disposition was that the parties agreed that there was not to be a quota system used.

---

5/ Cf. Union High School District, City of Lake Geneva, WERC Dec. No. 17939-A, 4182, LaCrosse Co., Dec. No. 14704-A.

Marino's letter of January 13 points out to his commanding officers that discipline should turn on more than productivity alone. Marino points to attitude, investigative ability, paperwork and other duty performance, as being relevant to the propriety of discipline.

Based upon the events leading to its issuance, the contents of the formal charging document were predictable. Marino had been warned repeatedly, over a long period of time, that his productivity was low. Ultimately this found its way into the "objective" portion of the complaint. The Union complained that productivity based discipline was tantamount to quota based discipline and filed a charge. Marino warned the department that certain other attributes of his performance had to be taken into account in any decision to discipline. By refusing command discipline the matter was referred to the City Attorney for formal charges. What emerged was a formal document which incorporated all of the "objective" complaints of the department, along with a subjective section. The subjective section deals with the areas raised by Marino as necessary to sustain discipline. It addresses attitude, investigative ability, and paperwork and report writing; matters specifically cited by Marino in his letter.

I believe the charges, as drawn, were responsive to the letter Marino wrote and the prior charge filed by the Union over the discipline. The Union, in its complaint, alleged that discipline based solely upon "objective" factors was illegal. Marino picked up on the theme and outlined more subjective areas he felt required analysis. The City's response was to include those subjective matters in its formal charging document. That met one objection squarely.

The City did not increase the proposed discipline as a result of the complaint or letter. It merely beefed up the complaint once it was forced to submit its proposed discipline to Police and Fire Commission review. The Complaint was beefed up in a fashion which addressed at least a portion of the criticism leveled by the Union and by Marino. I find nothing objectionable or discriminatory about that action.

This award does not address the propriety or validity of any of the charges brought against Marino. That analysis is reserved for another forum.

Dated at Madison, Wisconsin this 12th day of July, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan  
William C. Houlihan, Examiner