STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION,	:	
Complainant,	:	Case 40 No. 40907 MP-2127
vs.	:	Decision No. 25768-A
CITY OF WHITEWATER,	:	
Respondent.	:	

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Gordon E. McQuillen, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of the Wisconsin Professional Police Association/LEER Division.

Lindner & Marsack, S.C., Attorneys at Law, by Mr. James R. Scott, Suite 1000, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Whitewater.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Professional Police Association/LEER Division having, on July 20, 1988, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Whitewater had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 5, and derivatively, Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on November 22, 1988, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held in Whitewater, Wisconsin on December 9, 1988; and the parties having filed briefs and the Association having filed a reply brief in the matter, which was received on February 21, 1989; and the Examiner having considered the evidence and the arguments of counsel 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 the Wisconsin Professional Police Association/LEER Division, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the exclusive bargaining representative of employes in a bargaining unit consisting of all sworn law enforcement officers in the City of Whitewater Police Department excluding all supervisory, managerial, confidential and executive employes; that its offices are located at 9730 W. Bluemound Road, Wauwatosa, Wisconsin 53226; and that Robert Pechanach is the Association's business agent and has acted on its behalf.

2. That the City of Whitewater, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 312 West Whitewater Street, Whitewater, Wisconsin 53190.

3. That the Association and the City have been parties to a series of collective bargaining agreements, the latest of which covers the time period of January 1, 1988 through December 31, 1989; that said agreement contains a grievance procedure that provides for the final and binding arbitration of disputes arising thereunder; and that the present agreement does not contain language on the weight control program.

4. That commencing about 1977, the then Chief of Police, Don Simon, using an FBI weight chart, directed certain officers to lose weight; that on June 18, 1982, Officer Rollman was ordered to lose a certain amount of weight by September 20, 1982 and additional weight by December 20, 1982; that Officer Rollman grieved the

weight requirement; and that this grievance was resolved by the Association and the City entering into a weight control agreement which provided as follows:

WEIGHT PROGRAM

1. Twice annually the City may weigh the officers for purposes of compliance with the City of Whitewater Weight Control Program. The Chief may direct that individual officers be weighed more frequently if in the Chief's judgment the officer has an overweight problem. The weight standard to be used will be the desired weight established by a physician employed by the City plus 12 lbs. The physician will take into account frame size, height and age of the individual officer and will establish a desired weight consistent with good health practices. In no event will presently established weight standards be lowered. Because slower metabolic rates are associated with the aging process, the City agrees to periodic weight re-evaluations. If the officer believes that the desired weight established by the City's physician is incorrect, he may at his sole expense have the desired weight determination reviewed by his own physician and that physician's evaluation may be communicated to the City for its consideration.

2. After each weigh-in, the officer will be advised of his desired weight standard and his actual weight. If his/her weight exceeds the standard, the notice shall constitute a warning of the overweight condition.

3. Any officer exceeding the standard will be required to lose weight at the rate of five pounds per thirty day period, unless a physician directs that a lesser monthly weight loss is required for medical reasons. No officer shall be required to lose more than five pounds in any one month. The receipt of the notice of overweight will begin the running of the thirty day period.

4. Any officer failing to meet the scheduled weight loss for a given thirty day period will serve one hour of suspension without pay for each one pound over the weight he was to be at the end of the thirty day period. Scheduled weight loss for the next thirty day period will be measured from weight at the end of the preceding thirty day period but not to exceed five (5) pounds.

5. Any officer who fails to meet his scheduled weight loss for three consecutive thirty day periods will be suspended without pay until he meets the scheduled weight for that time period and all successive thirty day time periods until he attains his desired weight.

6. Any officer subject to an indefinite suspension described in paragraph 5 for three (3) successive months or who is on suspension have (sic) thirty (30) calendar days shall be subject to discipline in the manner provided in Section 62.13.

5. That the weight control program was not included in the parties' collective bargaining agreement; that no proposed changes in the program were made in 1983 and 1984; that in negotiations for the 1985 agreement, the Association made the following proposal: "Discuss and develop a new weight program for members of the Association."; that as the result of discussions on the weight program, the 12 pound addition to the desired weight was increased to 15 pounds and the weight loss requirement of five pounds in thirty days was decreased to 4 pounds; and that although the weight program was changed, there was no evidence of any signed document memorializing the changed weight control program.

6. That after 1985, there were no proposals for any modification in the weight control program made by the Association in negotiations for the 1987 or 1988-89 contracts; that the parties reached tentative agreement for the 1988-89 contract on January 12, 1988 and during the negotiations leading up to the tentative agreement, there had been no discussion of the weight control program; that the Association by Mr. Pechanach prepared a draft of the 1988-89 contract and submitted it to the City; that Pechanach attached the weight control program to the draft of the contract on the basis that the disc in the Association's word processor printed out the weight control program after the 1987 contract; that upon receipt of the Association's draft, the City objected to certain provisions and stated that the weight control program was not an integral part of the contract; that the signed contract for 1987 did not contain the weight control program; and that on February 11, 1988, the parties signed the 1988-1989 collective bargaining agreement which did not contain the weight control program.

7. That on January 13, 1988, the City's Chief of Police posted a memo for the annual weigh in of police officers; that officer Thomas Rutledge was found to be overweight and was directed to weigh 193 pounds or less by February 18, 1988; that officer Rutledge was weighed on February 18, 1988 and was 10 pounds above his allowed weight and was directed to weigh 191 or less by March 18, 1988; that on March 17, 1988, officer Rutledge weighed 191 pounds and was directed to weigh 187 by April 20, 1988; that on April 18, 1988, officer Rutledge's weight was 191 pounds; that officer Rutledge asked to be reevaluated by his own physician at the City's expense; that the request to be reevaluated by his own physician was granted but the City maintained that any expense would be borne by officer Rutledge; and that officer Rutledge was reevaluated by his physician with the result that his weight to meet the weight control program was set at 195 pounds, which was met by officer Rutledge.

8. That on May 11, 1988, officer Rutledge submitted his doctor's bill and requested payment; that the City denied payment that same day; that on May 16, 1988, the Association filed a grievance on behalf of officer Rutledge seeking reimbursement for the doctor's bill as well as two hours pay for a suspension on February 18, 1988 for exceeding the weight limit as provided in the weight control program; that on May 23, 1988, Lieutenant Guequierre denied the grievance; that on this same day the grievance was appealed to the next step and the grievance was denied by the Chief of Police on May 27, 1988; and that the grievance was not processed any further through the contractual grievance procedure.

9. That the weight control program was formalized and resulted as a settlement of the Rollman grievance and was not a physical part of the collective bargaining agreement; that changes to this settlement agreement were made in 1985 but the weight control program was not included physicially as part of the collective bargaining agreement in 1985 or thereafter; that the City's objection to including the weight control program in the 1988-1989 agreement was in accordance with the parties previous understandings and agreements and did not constitute a repudiation or abandonment of the weight control program; that the weight control program continued from its inception to the present time and was not unilaterally reimposed in 1988; that the Association never requested the City to bargain over the weight control program for the 1988-89 contract or to bargain over it during the term of said ageement; and that the Association failed to exhaust the contractual grievance procedure over Rutledge's claims to reimbursement of his doctor's bill and his two hour suspension without pay.

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

CONCLUSIONS OF LAW

1. That the Association's failure to exhaust the parties' contractual grievance procedure over Rutledge's claims precludes the Association's independent pursual of a violation of the collective bargaining agreement under Sec. 111.70(3)(a)5, Stats.

2. That the City did not refuse to bargain with the Association by its continued use of the weight control program, and thus did not violate Sec. 111.70(3))(a)4, Stats., nor did it derivatively violate Sec. 111.70(3)(a)1, Stats.

Based on 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 in its entirety.

Dated at Madison, Wisconsin this 9th day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley, Examiner

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.

CITY OF WHITEWATER

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, the Association alleged that the City committed prohibited practices in violation of Secs. 111.70(3)(a)4 and 5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats. by the City's refusal to bargain over the weight control program and to include it in the collective bargaining agreement, thereby causing it to lapse, and the City's subsequent unilateral readoption of the weight control program thereby unilaterally altered the conditions of employment for employes represented by the Association, particularly officer Rutledge. The City answered the complaint by denying that the Association ever expressed an interest in bargaining over the weight control program for the 1988-89 contract and averred that the weight control program had been in place since 1979 and its continued application did not constitute an unilateral change in conditions of employment. It claimed that the complaint was vexatious, frivolous and designed to harass the City. It asked for its dismissal with costs and attorneys fees.

ASSOCIATION'S POSITION

The Association contends that the formal weight control agreement was part of the parties' collective bargaining agreement. It insists that the weight control agreement was the end result of settlement negotiations over officer Rollman's grievance and was incorporated by practice into the parties' collective bargaining agreement. It points out that the weight control agreement was renegotiated during the 1985 contract negotiations when two changes were made which reflected the result of the parties' negotiations. It claims that the weight agreement was attached physically to the 1987 agreement. Additionally, it notes that the weight agreement was always physically kept with the collective bargaining agreement and officers were allowed to utilize the grievance procedure to object to portions of it. It maintains that the weight agreement was administered the same as any other provision of the agreement and accordingly, was part and parcel of the collective bargaining agreement. The Association argues that when Pechanach included the weight control agreement in the draft of the 1988-89 agreement, the City objected to its inclusion, and by doing so, the City proposed to delete it. It asserts that the Association's agreement to delete it meant that the weight agreement expired and has no effect. It submits that when the City weighed officers in 1988 and took action against officer Rutledge and others, the City unilaterally reinstated the weight agreement after allowing the prior weight agreement to lapse. The Association contends that by reinstituting the lapsed weight agreement without bargaining with the Association, the City's actions constitute a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats. as well as a derivative violation of Sec. 111.70(3)(a)1, Stats. It asks that the City be ordered to cease and desist from enforcing its weight agreement, to bargain collectively over the weight agreement, to make whole any bargaining unit member for losses they may have suffered, and to pay the costs and attorneys fees of this action.

CITY'S POSITION

The City contends that the weight control program is not now and never was a part of the parties' collective bargaining agreement. It submits that there is little concrete evidence that there was a meeting of the minds that the weight program was an integral part of the contract. It notes that the express terms of the weight program with the exception of 1985 were not the result of proposals made during the course of negotiations. It refers to Pechanach's testimony that he commenced representing the Association in 1987 and during the negotiations for the 1988-89 agreement, the Association made no proposals and did not discuss the weight program. The City points out that Pechanach attached the weight program to the draft of the 1988-89 agreement because the disc in the Association's word processor printed the weight program out after the 1987 agreement. The City notes that the Association produced no signed copy of the 1985 changes in the weight program. It concludes that the mere presence of the weight program on the disc does not indicate the intent of the parties. The City also argues that the

mere presence of the weight program with the contract whether attached or not in the same folder or binder in the squad room in no way controls or establishes that the parties had a meeting of the minds that the weight program would be included in the collective bargaining agreement. The City, referring to the signed contracts kept in the custody of the City Clerk, asserts that none of the signed contracts included any copy of the weight control program thereby refuting the claims by the Association.

With respect to the 1985 Association proposal on the weight program and the subsequent changes in it, the City submits that any discussion and modification occurred outside of negotiations, but if they had occurred in the 1985 negotiations, the parties are free and often do make agreements not intended to be part of the agreement. The City concludes that the evidence indicates the parties never expressly agreed to incorporate the weight control program in their agreement and there was never a meeting of the minds or conduct which support and/or imply that result. The City contends that the weight control program was an independently negotiated grievance settlement which was intended to be enforced as a work rule. It maintains that officer Rollman filed a grievance in reference to the Chief's weight program and initially the Association did not wish to have any program, but the Association's representatives advised the Association that the City had the right to issue a work rule related to weight and the Association's best avenue was to pursue conditions on the weight program. The City concludes that the result of these negotiations on officer Rollman's grievance was nothing but a grievance settlement enforceable as a work rule.

The City takes the position that it never abandoned the weight control program. It notes that there were no discussions or proposals on the weight program in negotiations for the 1988-89 agreement and when the Association put it in the draft of the agreement, the City advised the Association that there had been no agreement pertaining to its inclusion in the agreement but never indicated it was no longer interested in the weight program. It asserts that there was no meeting of the minds that the City was abandoning the weight program and the City began the annual weigh-in right after the tentative agreement had been reached indicating no abandonment of the weight program.

The City contends that the Association has waived the right to contest and/or bargain over the weight control program. It points out that officer Rutledge's grievance never mentioned any lapse in the weight program and the Association failed to timely pursue this grievance through the contractual grievance procedure. The City alleges that the Association's complaint is an attempt to circumvent the grievance procedure. Furthermore, the City asserts that the contractual Management Rights clause as well as the "zipper clause" support a finding that the City was free to readopt a weight control program because the Union had bargained away its right to negotiate over rules and procedures for the duration of the agreement. The City concludes that the complaint is without merit and the City has not violated Sec. 111.70(3)(a) 1, 3 or 4, Stats. and it asks that the complaint be dismissed in its entirety.

ASSOCIATION'S REPLY

The Association responds that the City is wrong in asserting that the weight program is not part of the collective bargaining agreement. It submits that a collective bargaining agreement includes grievance settlements, side letters, memoranda of understanding and other non-collective bargaining agreement documents and oral understandings, and thus, the weight program is, in fact, a part of the parties' overall collective bargaining agreement.

With respect to the City's contention that there was no meeting of the minds on the inclusion of the weight program in the agreement, the Association insists that it did not agree to a continuation of the weight program when the City indicated it did not want the weight program continued as part of the parties' agreement. It alleges that once the City rejected the Association's offer to continue the weight agreement pursuant to the status quo, there was no longer any weight program in effect.

The Association claims that the genesis of the weight program agreement, even if viewed as a grievance settlement, was modified in subsequent negotiations, the result of which was its incorporation into the collective bargaining agreement. The Association asserts that the City's arguments with respect to the physicial placement of the weight control agreement in the file folder and its absence in the Clerk's files prove nothing and if the City concluded that there was no

meeting of the minds, the Association's offer to include the weight control program in the collective bargaining agreement, which the City declined, meant that the weight program ceased to be in effect.

The Association disagrees that the weight program was an independently negotiated grievance settlement and maintains that the evidence failed to establish any other "work rule" that was negotiated and not incorporated into the agreement. It claims that the City abandoned the weight program because Pechanch proposed to continue it as a status quo item and the City rejected this proposal and in doing so abandoned the program. The Association points out that the reimplementation of the weight program by the City violated Sec. 111.70, Stats. Contrary to the City's arguments on waiver by the Association, the Association insists that it was the City that waived bargaining on the weight program by rejecting Pechanach's proposal to include the program in the parties' agreement.

The Association denies that it is attempting to resurrect Rutledge's grievance because it was the City's position that the grievance alleged no violation of the parties' agreement which is consistent with saying that the weight program was not part of the agreement, a contention the Association agreed with inasmuch as the weight program no longer existed. The Association further maintains that the City's reliance on the "zipper clause" is misplaced because the Association had offered to incorporate the weight program in the agreement and it was the City who disavowed interest in the matter, so the "zipper clause" precludes the City from now reimplementing the weight program. The Association reinterates that the City's conduct in reinstituting the weight program is a prohibited practice and renews its request for appropriate relief.

DISCUSSION

Although the initial complaint alleged a violation of Sec. 111.70(3)(a)5, Stats., this allegation was essentially abandoned by the Association. Generally, the Commission will not assert its statutory complaint jurisdiction over a breach of contract claim when there is available a contractual procedure for the final impartial resolution of disputes over contractual compliance. 2/ Here, the parties' collective bargaining agreement provides for final and binding arbitration and the Association failed to exhaust the grievance procedure over Rutledge's grievance, and thus, the Examiner will not assert the Commission's jurisdiction over the allegation of a violation of Sec. 111.70(3)(a)5, Stats., and this allegation has been dismissed.

Certain general principles are applicable to the instant dispute. A work rule which primarily relates to wages, hours or conditions of employment is a mandatory subject of bargaining. 3/ Work rules can also be separate from the collective bargaining agreement. 4/ Work rules, directives, policies, grievance settlements, sidebar agreements and various other procedures, which are mandatory subjects of bargaining, are not always embodied physically in a collective bargaining agreement because the result would be a voluminous and cumbersome contract which would be difficult to use. Past practice also gives meaning to the parties' collective bargaining agreement and an arbitration award finding past practice applicable would likewise not be a physical part of the agreement. Work rules, directives, policies, etc., which are mandatory, cannot be changed without first bargaining with the bargaining representative unless there is a waiver of such bargaining. Additionally, these may be bargained during regular negotiations by bargaining proposals.

The origin of the weight control program is relevant to the disposition of the instant matter. The evidence established that commencing about 1977, the then

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2/ Waupun School District, Dec. No. 22409 (WERC, 3/85); Monona Grove School District, Dec. No. 22414 (WERC, 3/85).

3/ City of Milwaukee, Dec. No. 9419 (WERC, 1/70); Milwaukee County, Dec. No. 15420-A (WERC, 6/82).

4/ Pet, Inc., 111 LRRM 1495, 264 NLRB No. 166 (1982).

Chief of Police, using an FBI weight chart, requested officers to lose weight. 5/ This informal method of regulating the weight of officers could be described as an unilaterally implemented directive, policy or work rule of the Chief. In 1982, officer Rollman filed a grievance over the weight program. 6/ Representatives of the Association and the City met and negotiated a settlement of Rollman's grievance which resulted in the formal weight program. 7/ The weight program was signed by the parties on January 19, 1983. 8/ No provision of this agreement provided that it would be included physically in the parties' collective bargaining agreement and the evidence indicated that it was not to be included in the collective bargaining agreement. 9/ Thus, the weight program signed in January, 1983, must be viewed as a work rule, directive, policy and/or grievance settlement. Whatever its designation, it was not physically part of the agreement. As noted above, if this work rule, directive or policy is a mandatory subject of bargaining, the City was obligated to first bargain over any change in the work rule before implementing the change, absent waiver. The City has argued that it has the right to make unilateral changes in the work rules, directives, policies, etc. pursuant to the Management Rights clause set forth in the agreement. It is unnecessary to consider this argument because the evidence fails to prove any change in the weight program that was not first bargained with the Association. In 1984, the Association demanded to negotiate a new weight program. 10/ In subsequent negotiations, the old weight program was modified in two respects; the addition to the desired weight was increased from 12 pounds to 15 pounds and the weight loss rate of five pounds per month was decreased to four pounds per month. 11/ Again, there is nothing in the modified weight program indicating that it was to be included as an express term of the parties' collective bargaining agreement, 12/ and it remained a work rule, directive, policy, grievance settlement or sidebar agreement. Whatever term is used is not significant because the weight program remained unchanged since those negotiations and no proposals to change it were made in any subsequent negotiations. 13/ Essentially, it continued to exist as part of the status quo. Additionally, there was no request to include this provision in the contract during any of the negotiations prior to 1988-89 and as discussed above, the weight program was not a physical part of the agreement.

At the conclusion of the negotiations for the 1988-89 agreement, the Association drafted the agreement. Although the weight program had never been discussed during the negotiations for the 1988-89 agreement, Pechanach included the weight control program on the basis that it was included on the Association's computer disc that contained the previous contract. 14/ The Association sent this draft to the City and the City reviewed it and sent a letter to Pechanach dated February 4, 1988 which stated: "The weight agreement is not an integral part of the labor agreement." 15/ The agreement was signed on February 11, 1988 which did not include the weight program. 16/ Pechanach never informed the City that by not

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5/ Tr. - 65-66.

6/ Tr. - 66.

7/ Ex. - 14, 15, 16, 17 and 18.

8/ Ex. 14.

9/ Tr. - 63.

10/ Ex. - 19.

11/ Ex. - 21, Tr. - 70.

12/ Ex. - 21.

13/ Ex. - 19.

14/ Tr. - 104.

15/ Ex. - 2.

16/ Ex. - 1.

including the weight control agreement physically in the collective bargaining agreement, he considered it no longer effective or part of the status quo.

It appears that the inclusion of the weight agreement in any prior agreement was merely speculation by Pechanach 17/ and his inclusion of it in the 1988-89 draft was based solely on its presence on the disc and not on any prior signed contract. Pechanach's draft version of the 1988-89 agreement does not constitute a demand to bargain over the weight program nor was it a request to include it in the agreement. Pechanach had assumed incorrectly that the weight program was in the agreement so his inclusion of it in the draft was merely that and not a request or demand that it be put in the agreement. The City in pointing out errors in the draft mentioned that the weight program was not an integral part of the contract, a position with which the Association thereafter agreed. The City's merely pointing out that it had not agreed to include the weight program within the four corners of the contract cannot be found to be a refusal to bargain over the weight program. It is noted that there were no proposals related to it made in the 1988-89 negotiations and it was never discussed in negotiations. All that appears is that Pechanach's incorrect assumption was corrected and that ended the matter.

The Association's arguments that the City abandoned the weight program are not persuasive. Pechanach testified that he didn't get the impression that the City didn't want to maintain the weight control program or that it had abandoned it. 18/ It should be noted that tentative agreement was reached on January 12, 1988 and the annual weigh-in pursuant to the weight agreement began on January 13, 1988, evidencing that the City had no intent to abandon the program. Additionally, the Association had taken the position that it did not want any weight program 19/ and the City had insisted on it. It strains all credibility to believe that the Association in including the program in the contract was seeking to continue it and the City was seeking to abandon or get rid of the weight program. The evidence failed to establish that any prior agreement physically included the weight program in the agreement and the only conclusion that can be reached is that the weight program was separate from the contract. The Association's contention that the weight program was included in the agreement because it was attached to the contract and/or in the same binder in the squad room is not sufficient to establish a contrary result. Having found that the weight program was separate from the collective bargaining agreement, the Association's arguments that the City abandoned the weight program are not supported by the evidence. The evidence establishes that there was no change in the weight program since 1985 and it remained in full force and effect as part of the status quo and was never abandoned. The City made no changes in the weight program without negotiations and maintained the status quo so it could continue to enforce it during the 1988-89 agreement and by doing so did not violate Sec. 111.70(3)(a)4 or 1, Stats.

Thus, it is concluded that the complaint lacks merit and has been dismissed in its entirety.

The City's request for costs and attorneys' fees has been denied because the Association's conduct has not been shown to be so frivolous, in bad faith or wholly devoid of merit so as to warrant imposition of same. 20/

Dated at Madison, Wisconsin 9th day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

17/ Tr. - 105.

18/ Tr. - 20.

19/ Tr. - 55.

20/ Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81).