STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION, Complainant, vs. THE CITY OF MILWAUKEE, a municipal corporation, BOARD OF FIRE AND POLICE COMMISSIONERS for the City of Milwaukee and PHILIP ARREOLA, Chief of Police of the City of Milwaukee, Respondents.	:	Case 352 No. 43651 MP-2323 Decision No. 26354-A

Appearances:

Mr. Kenneth J. Murray, with Ms. Laurie A. Eggert on the brief, Adelman, Adelman & Murray, S.C., Attorneys At Law, 1840 North Farwell, Suite 403, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Police Association.

Mr. Thomas C. Goeldner, with Ms. Mary Rukavina-Kuhnmuench on the brief, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of City of Milwaukee et. al.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Milwaukee Police Association (MPA) filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission (Commission) on February 12, 1991, alleging that the City of Milwaukee, the Board of Fire and Police Commissioners and Philip Arreola (City et. al.) had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 4 and 5, Stats. The MPA, in a letter filed with the Commission on February 14, 1990, requested a hearing "within 40 days after the filing" of the complaint. On March 12, 1990, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a), and Sec. 111.07, Stats. Hearing was scheduled for March 22 and 23, 1990, in Milwaukee, Wisconsin. The March 22, 1990, hearing date was, with the parties' consent, converted to a pre-hearing conference date, and the March 23, 1990, hearing was postponed. An informal pre-hearing conference was conducted in Milwaukee, Wisconsin on March 22, 1990. A letter summarizing that conference was issued to the parties on March 26, 1990. Formal hearing was rescheduled for May 22 and 23, 1990. Hearing was conducted in Milwaukee, Wisconsin on May 22, 1990. The May 23, 1990, hearing was postponed. After efforts to informally resolve the matter proved unsuccessful, further hearing was set for August 6 and 7, 1990. On July 13, 1990, the MPA amended the complaint. The hearing was again postponed from August 6 and 7, 1990, to August 29 and 30, 1990. Hearing was again postponed, and was ultimately conducted in Milwaukee, Wisconsin, on September 17 and 18, 1990. A transcript of the September 17 and 18, 1990, hearing was provided to the Commission on October 15, 1990. A transcript of the May 22, 1990, hearing was provided to the Commission on November 1, 1990. The parties established a responsive briefing schedule, and the last of those briefs was filed with the

Commission on September 23, 1991. In a letter to the parties dated November 12, 1991, I stated:

> Throughout the processing of (this) matter, the possible presence of issues of external law has been touched upon. Before closing the evidentiary record, I noted to each party the possibility that such issues might require further argument (See Transcript, Volume III, at 184-185).
>
> The Union has argued (See Transcript, Volume I, at 14) that issues of external law may be relevant to the interpretation of Article 64. I have noted, in my review of the record that Article 5, Section 1, of the labor agreement (Joint Exhibit 1) makes the City's exercise of its management rights subject to "the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes." I have not yet completed my review of the record and related research, but it would appear that the interpretation of outside law may be necessary to resolve the issues posed by the complaint.
>
> I write to determine if either of you wish further opportunity to submit citations of external law. More specifically, I write to determine if you wish to supplement your argument regarding what, if any, precedent exists demonstrating that the City either had and reserved under Article 64 and/or Article 5, or failed to have and reserve under those provisions, a legal right, under state or federal law, to test incumbent police officers on a standard of reasonable suspicion instead of probable cause. If such precedent is irrelevant to a determination of the matter, you should feel free to say so. If you do not wish to make any further argument, you should feel free to say so. I write this letter not to require such argument, but to determine if you wish that opportunity. If you do not wish to submit such argument, I will proceed to

complete my review of the record, and to issue a decision. If you do wish to submit such argument, please advise me as soon as possible.

In a letter received by the Commission on November 21, 1991, Counsel for the City advised me that both parties "have discussed your offer of allowing us both an opportunity to submit citations of relevant external law, and we have agreed that this would be a worthwhile exercise." The parties sought, and were granted, until February 28, 1992, to submit this argument. The City submitted its argument on February 24, 1992, and the MPA submitted its argument on February 27, 1992. These submissions prompted further argument, the last of which was filed with the Commission on March 13, 1992.

FINDINGS OF FACT

1. The Milwaukee Police Association, referred to below as the MPA, is a labor organization which maintains its offices at 1840 North Farwell Avenue, Suite 400, Milwaukee, Wisconsin 53202.

2. The City of Milwaukee, referred to below as the City, is a municipal employer which maintains its offices at 200 East Wells Street, Milwaukee, Wisconsin 53202.

3. The City has, in conformance with the laws of the State of Wisconsin, a Board of Fire and Police Commissioners, referred to below as the FPC, which maintains its offices at 749 West State Street, Milwaukee, Wisconsin 53201.

4. The City employs Philip Arreola as the Chief of its Police Department, which maintains its offices at 749 West State Street, Milwaukee, Wisconsin 53201.

5. The City and the MPA have been parties to a series of collective bargaining agreements, including an agreement in effect, by its terms, from January 1, 1987, through December 31, 1988. That agreement includes, among its provisions, the following:

> ARTICLE 5
>
> MANAGEMENT RIGHTS
>
> 1. The Association recognizes the right of the City, the Chief of Police and the Board of Fire and Police Commissioners to operate and manage their affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes . . .
>
> . . .
>
> ARTICLE 64
>
> DRUG TESTING
>
> If the City chooses to modify its current drug testing practices, beyond that which is currently in effect, the parties will engage in collective bargaining as to those aspects of the modification

which are primarily related to wages, hours and conditions of employment. In the event that the parties are unable to arrive at an agreement, those matters still in dispute will be submitted to final and binding arbitration before an arbitrator selected by the parties from a list provided by the Wisconsin Employment Relations Commission.

Article 64 first appeared in the parties' 1987-88 agreement. Appendix D of the 1987-88 agreement is a letter, dated November 13, 1987, from James F. Blumenberg, Executive Director of the FPC to Bill Krueger, then President of the MPA. That letter states:

. . .

The FPC designates the City Labor Negotiator as its representative in collective bargaining matters. The FPC will abide by the terms of the labor agreement that the City Labor Negotiator negotiates with the MPA.

The parties' collective bargaining agreement for 1989-90 did not make any changes to the language of Article 64. The 1989-90 agreement also continued in effect the November 13, 1987, letter set forth in the 1987-88 agreement as Appendix D.

6. The MPA believes it first proposed the language of Article 64 and the City believes it first proposed the language of Article 64. During the collective bargaining for a 1987-88 contract, James Geissner, the City's then incumbent Labor Negotiator, served as the City's Chief Spokesman. Krueger served as the MPA's. The minutes maintained by the City's Division of Labor for the August 31, 1987, negotiations session detail the parties' conflicting positions on a provision regarding drug testing thus:

Mr. Krueger stated that the Union's position on #77, Drug Testing, is that drug testing should be bargained with the Union. The Union objects to the FPC setting up a program outside of collective bargaining. Mr. Krueger stated that the MPA is definitely opposed to random testing. He stated that the MPA is willing to go to an expedited arbitration proceeding in order to be sure that a rule can be made in a timely manner. Mr. Geissner responded that meetings with the FPC had been held, that the MPA is invited and didn't choose to attend to even to inform itself on the processes being contemplated. The City does not believe that all of the issues regarding drug testing have to be bargained.

. . .

Mr. Geissner asked if the Union objects to testing for cause when the City has a reasonable suspicion that the employee is under the influence of drugs or alcohol. Mr. Murray stated that the MPA wants a higher standard than reasonable suspicion. The MPA wants the City to have to meet a probable cause standard. In addition, the MPA wants to have a Union steward on the scene to corroborate the behavior of the employee which is giving rise to the City's decision to test the employee.

> Mr. Geissner asked if the Union could go along with testing prior to sensitive assignments, such as the narc squad. Mr. Murray responded that the MPA is opposed. Mr. Geissner asked if they were in agreement that the employee should be tested at the end of the assignments. Mr. Murray said they were opposed. Mr. Krueger stated that the Union has a major problem with the Chief's position that anyone caught using illegal drugs will be disciplined or terminated.

Similar minutes for the September 2, 1987, session detail the point thus:

> The City and the Union are unable to agree on #77, Drug Testing because the Union wishes to bring it to the bargaining table with a provision for expedited arbitration if no agreement is reached. Mr. Geissner stated that the City has not yet developed a policy on drug testing. The City will bargain whatever needs to be bargained on that policy after it is developed.

In a mediation session conducted by an interest arbitrator on March 23, 1988, the parties reached a tentative agreement on the language which would eventually be inserted into the collective bargaining agreement as Article 64. The parties executed their 1987-88 collective bargaining agreement on December 21, 1988.

7. For at least the past thirty-seven years, the City has required police officers it believed were acting under the influence of alcohol to submit to a test to determine the presence of alcohol in the officer's system. For the bulk of that thirty-seven year period, the City used a urinalysis test to determine the presence and amount of alcohol in an officer's system. For roughly the past three years, the City has used an intoxilyzer to make such tests. The City has not had any written policy governing the standard appropriate for ordering such a test or governing the testing protocol. In August of 1987, the City ordered a police officer to submit to a urinalysis to test for the presence of illegal drugs. This was the first test for such substances ordered by the City. In September of 1988, the City ordered Officer James L. Williams, Jr., to submit a urine sample to permit the City to test that sample for the presence in his system of illegal drugs. The City ultimately disciplined Williams based on the positive result obtained from that test. In October of 1988, the City ordered Officer William Landrum to submit a urine sample to permit the City to test that sample for the presence in his system of illegal drugs. The City ultimately disciplined Landrum based on the positive result obtained from that test. In May of 1989, the City ordered Officer LaRon Glover to submit to an intoxilyzer test of his breath. Glover refused to submit to the test. The City then ordered Glover to submit a urine sample to permit the City to test that sample for the presence in his system of illegal drugs. Glover refused to provide such a sample. The City disciplined him for not complying with those orders. Each of the drug tests noted above was ordered by the City after the Division of Internal Affairs became convinced there was sufficient evidence to create a reasonable suspicion that the individual officer was under the influence of a controlled substance. Before administering the first such test in August of 1987, Walter Franklin, the City's Deputy Inspector of the Division of Internal Affairs, sought the advice of the City's Legal Department and of the Assistant Chief of Police regarding whether or not reasonable suspicion existed to justify the test.

8. At various points in 1985 and 1986, the City's Personnel Department, Legal Department, Fire Department, FPC and City Service Commission

were considering the advisability of adopting a formal drug screening program for employes. James P. Springer, then Personnel Director for the City, issued the following letter, dated December 23, 1986, to "All City Department and DPW Bureau Heads":

> At its meeting of December 17, 1986, the Board of City Service Commissioners directed that all general City departments and DPW bureaus be surveyed to determine the extent of drug related performance problems. Your input is requested to assist the Commission in determining the need to establish a drug testing program for City employees on a "probable cause" basis. The Commission is especially interested in your views regarding the following areas:
>
> 1. Your observations regarding the degree of drug related employee performance problems existing in your agency.
>
> 2. Is there any significant concentration of drug related performance problems among types of employees such as office employees, field employees or equipment operators?
>
> 3. Do you feel that the existing disciplinary and Employee Assistance Program procedures are adequate for dealing with drug related employee performance problems?
>
> 4. If you do not believe that existing disciplinary and EAP measures are adequate, could they be modified sufficiently to deal adequately with drug-related employee performance problems without imposing drug testing? How?
>
> 5. Do you believe that a program of drug testing on a "probable cause" basis would be essential in controlling drug related employee performance problems?
>
> Please make your responses available by January 7, 1987 so that they may be included in a report to the Commission.

Blumenberg responded, for the FPC, in a letter dated January 5, 1987, which states:

> Your memorandum of December 23, 1986, sought a response to five questions. On behalf of this department, I would respond as follows.
>
> 1. I have identified no drug-related employee performance problems in this department.
>
> 2. Drug-related performance problems based upon functional assignment within this department do not exist.
>
> 3. The existing disciplinary and Employee

Assistance Program procedures appear to be adequate to deal with potential drug-related employee performance problems.

4. See No. 3 above.

5. I would suggest that the "probable cause" standard is too high; and that reasonable suspicion, based on specific facts and rational inference drawn from those specific acts that conclude drug abuse is apparent, is perhaps the better standard.

Personally, I would support an employee drug testing program to address the problem within the work environment, provided it adequately addressed legal, ethical and technical considerations.

The FPC issued a "POLICY STATEMENT" headed "DRUG TESTING PROGRAM" and dated March 26, 1987. That policy statement included the following provision:

> Applicants for the position of Police Officer, Police Aide, Firefighter, Paramedic, and other entry-level positions as the Commission may designate, shall be routinely tested for drug or narcotic usage as part of their pre-employment medical examination. Refusal to take the test or test results reporting a presence of illegal drugs or narcotics or the use of non-prescription drugs shall be the basis of discontinuing an applicant in the selection process. The results of drug test on applicants shall be kept confidential, and the results will be divulged only on a need-to-know basis.

This policy statement did not apply to incumbent Police Officers. The FPC established an Ad Hoc Committee On Substance Abuse (the Committee). In a letter to Krueger dated June 4, 1987, Blumenberg detailed the mission of the Committee and invited the MPA to participate. That letter reads thus:

> The Fire and Police Commission has a strong and continuing interest in police and fire employee safety in the workplace, employee wellness, productivity, and maintenance of high moral standards not to become involved with illegal chemical substances that alter the ability to perform assigned duties effectively. Police Chief Ziarnik has described substance abuse as pervasive in our society and a social problem that must be resolved.
>
> The use, abuse or possession of controlled substances as it may affect our members and the workplace must be addressed. The integrity of our public safety departments is paramount. The Fire and Police Commission is committed to do whatever is necessary to preserve the integrity of our departments, the wellness of our members and to establish standards and procedures that will make all our members proud of their profession and invoke the confidence and credibility of the citizenry they serve.

The Fire and Police Commission, on May 21, 1987, determined that this serious matter can effectively be addressed by the creation of an ad hoc committee whose purpose would be to study all relevant aspects of the problem and report back to the Commission periodically, with recommendations for future Commission action. This committee is intended to be broad-based, drawing on numerous disciplines and be a joint management/union approach. Each entity on the committee shall have on representative.

On behalf of the Fire and Police Commission, I extend to you, or your designee, an invitation to be a member of this committee. Would you kindly advise me relative to your availability to serve. The committee will meet periodically and remain in effect until the Commission determines that its work is concluded. The first meeting is scheduled for June 22, 1987 . . .

The invited representation on this committee consists of two Fire and Police Commission members, Chiefs of the Police and Fire Departments, the Milwaukee Police Supervisors' Organization, Chief Officers' Association--Fire Department, the Milwaukee Police Association, the Milwaukee Professional Fire Fighters' Association, City Attorney's Office, Labor Negotiator, a P.O.S.T. representative, and the City's Employee Assistance Program Specialist.

Commission Chairman Gore has stated that this committee offers an opportunity "to come together to determine the shape of our response to what is obviously a problem affecting the police and fire departments." The intent in creating this committee is to set aside institutional and systematic barriers by melding our best thinking to manage this issue. This is a matter that merits this unique approach and an issue we all need to come together on to the greatest extent possible for the good of our professions. I stress that the committee's approach is a positive one, not a negative challenging approach; a problem-solving approach, not a problem-creating approach.

We must recognize that there are contractual rights involved. Appropriate members are invited to identify what they perceive to be mandatory subjects of collective bargaining. Those concerns must be effectively merged with the work of the committee. The goal, of course, is to reach accord in any developed recommendations. Our commitment to service and to department members merit a united effort.

. . .

Krueger responded in a letter to Blumenberg dated June 18, 1987, which reads thus:

This is in response to your communication dated

> 6/4/87 regarding the ad hoc committee to study drug use/abuse within the protective services.
>
> While this matter concerns all of us, it is the opinion of the Executive Board of the Milwaukee Police Association that those items to be discussed, in view of the make up of the committee, are best left to the bargaining process. As I am sure you are aware, we are currently in contract negotiations with the City represented by many of those selected to participate on this committee.
>
> We would urge instead, that Mr. Geissner, the City Labor Negotiator be instructed to bring this subject to the proper place in the form of contract negotiations.
>
> Because of the aforementioned, and on behalf of the Executive Board, I respectfully decline your invitation to participate.

The Committee first met on June 22, 1987. Committee meetings were open to the public. Blumenberg prepared a proposed policy statement to be considered by the Committee at its August 24, 1987, meeting, regarding drug testing. That policy statement included the following provision:

> 4. When reasonable suspicion, based on objective standards, exists to indicate that an employee is using or is under the influence of controlled substances in the workplace, a substance abuse drug screening test may be conducted.

The August 24, 1987, meeting included the following discussion of item 4 between Blumenberg and Robert J. Ziarnik, then Chief of the City Police Department:

> BLUMENBERG - Going to number 4, "When reasonable suspicion, based on objective standards, exists to indicate that an employee is using or is under the influence of controlled substances in the workplace, a substance abuse drug screening test may be conducted." And that is, that nearly describes what's in existence today.
>
> ZIARNIK - We have it now.
>
> BLUMENBERG - Yes.
>
> ZIARNIK - Probable cause.
>
> BLUMENBERG - Sure. Right. That sort of exists, states what's existing today . . .

A revision of this policy statement was considered by the Committee at its October 22, 1987, meeting. Item 4 of that statement reads thus:

> 4. When reasonable suspicion, based on objective standards, exists to indicate that an employee is using or is under the influence of a drug

> which is impairing the ability to perform their job, a substance abuse drug screen test may be conducted.

The FPC has continued, from 1987 through the present, to research and consider issues relating to the implementation of a drug screening policy including the possibility of random testing of incumbent Police Officers.

9. In a letter to Arreola dated December 27, 1989, Blumenberg stated the following:

> Please find enclosed a "Notice of Meeting." I ask your consideration in approving distribution of this notice to all work locations in your department. I believe it appropriate that we inform all employees about the subject matter of this meeting. You will receive a separate letter from me concerning this matter.
>
> I wish to highlight that the Board invites your advisement regarding how other departments operate their random testing programs and your recommendations on the type of program you would like to see established for your department.

The "Notice of Meeting" referred to in this letter reads thus:

> NOTICE OF MEETING
>
> The Fire and Police Commission announced on December 21, consistent with the recommendation of its Policy Committee, that a meeting of the Board will be conducted on January 4, 1990, immediately following the Regular Meeting. The purpose of the meeting is to receive input from all interested and effected entities and persons concerning expansion of the substance abuse testing program to provide for random testing of employees.
>
> The question posed is, what should the Fire and Police Commission consider in developing and adopting a random substance testing program? All parties are invited to present recommendations on a program to be developed and implemented.
>
> There was an expression of concern raised by a union representative that their input statements in this setting would preclude their ability to function in the collective bargaining arena. We encourage those holding these concerns to contact the City Labor Negotiator and seek a suitable resolution of this concern.

This notice, referred to below as the Notice, was sent to, among others, the MPA and the League of Martin (an organization whose members are black Police Officers in the City's Police Department). In addition, supervisors read the Notice to MPA represented officers at roll call, and the City posted the Notice on departmental bulletin boards throughout the Police Department. Such notification is not routinely done regarding FPC meetings.

10. On February 12, 1990, Arreola issued MEMO 90-109, to "ALL DEPARTMENT MEMBERS" regarding "CURRENT DEPARTMENTAL DRUG/ALCOHOL TESTING POLICY". That memo reads thus:

> All Department members are to take notice and be cognizant of the fact that current Department policy requires a member to submit to a drug and/or alcohol test whenever two or more supervisors observing the member have a reasonable suspicion to believe that the member is:
>
> (1) Using illegal drugs/controlled substances;
> (2) Illegally using drugs/controlled substances; or
> (3) In violation of Departmental Rule 4 Sections 18 or 19 (Sections proscribing on-duty consumption of intoxicating liquor and/or fermented malt beverages and proscribing the member from being intoxicated as a result of consumption of intoxicating liquor and/or fermented beverages while on-duty or off-duty).
>
> Positive test results shall constitute for discipline, which may result in discharge. A member's refusal to submit to a drug and/or alcohol test when ordered to do so by a supervisor shall constitute grounds for discipline, which may include discharge.
>
> The term "drug test" as used herein means the testing procedure established by the Fire and Police Commission. The term "alcohol test" as used herein means breathalyzer/blood test/urinalysis testing procedures established by the Department.

11. The Police Department has, since at least November 5, 1981, maintained Rule 4, Section 18, which was approved by the FPC and reads thus:

> Members of the Department shall not drink any kind of intoxicating liquor and/or fermented malt beverages when on duty; nor shall any member of the police force, at any time when in uniform, except in the performance of duty, enter any place in which intoxicating liquor and/or fermented malt beverages are furnished; nor shall any member of the police force when not in uniform, or any employee, at any time, frequent, patronize, or loiter in any place where intoxicating liquor and/or fermented malt beverages are illegally sold or furnished, except in the performance of duty.

The Police Department has, since at least October 1, 1980, maintained Rule 4, Section 100, which was approved by the FPC and reads thus:

> Any member of the Department may be ordered to submit to a medical examination, at any time, to determine whether or not any such is fit, physically and mentally, for the proper performance of duties.

In Order No. 9490, dated January 30, 1987, Robert J. Ziarnik, then City Police Chief, published the following amendment to Section 18 of Rule 9:

> Section 18 of Rule 9, of the Rules and Regulations is hereby amended to read as follows:
>
> SECTION 18. When a member of the Police Force is off duty and in public within the City of Milwaukee, it is declared policy that consumption of alcohol and/or other character influencing substances is not compatible with the performance of an officer's duty, and that such consumption while armed is contrary to the public good. No member of the force shall consume any intoxicating beverage or ingest other substances which could impair conduct while on duty without approval of the Chief of Police. While off duty, officers have the option to carry weapons as approved by Department Rule as set forth below. This option is to be exercised with the utmost discretion. Any officer who exercises his/her option to carry any firearm while off duty shall neither consume intoxicating beverages nor ingest other drug/chemical substances which tend to impair the control of one's conduct. For purpose of this rule, officer is defined as any sworn personnel with arrest powers.

12. The City has not chosen to modify its current drug testing practices beyond those in effect prior to the negotiation of Article 64. The February 12, 1990, memo noted in Finding of Fact 10, states a standard no broader than that in effect prior to the negotiation of Article 64. The standard, at all times relevant to this proceeding, for compelling a drug test of an individual officer whom two or more supervisors observe and believe to be acting under the influence of alcohol or a controlled substance is reasonable suspicion.

13. The Notice sought to engage police officers in bargaining individually with the City.

CONCLUSIONS OF LAW

1. The City is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

2. The MPA is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

3. The City has not, through the FPC or Arreola or in any other manner, chosen to modify its current drug testing practices beyond those in effect prior to the negotiation of Article 64. The City's compulsion of a drug test of an individual officer based on a reasonable suspicion that the officer was acting under the influence of alcohol or of illicit drugs, where that suspicion is based on the observations of two or more supervisors of the behavior of the individual officer, did not violate Article 64 or Secs. 111.70(3)(a)1, 2, 4 or 5, Stats.

4. The City, through the dissemination and the substance of the Notice, has sought to bargain directly with individual employes represented by the MPA in violation of Secs. 111.70(3)(a)1, 4, and 5, Stats. This isolated instance does not constitute interference with the administration of the MPA in

violation of Sec. 111.70(3)(a)2, Stats.

ORDER 1/

1. Those portions of the complaint, as amended, alleging that the Respondents violated Secs. 111.70(3)(a)1, 2, 4 or 5, Stats., based on the compulsion of a drug test from an individual officer who the City had a reasonable suspicion to believe, as described in Conclusion of Law 3 above, was reporting for duty acting under the influence of alcohol or illicit drugs are dismissed.

2. To remedy its violation of Secs. 111.70(3)(a)1, 4 and 5, regarding bargaining with individual employes represented by the MPA, the City, its officers and agents, and the FPC, shall immediately:

a. Cease and desist from:

(1). Distributing notices of, and conducting, FPC meetings for the purpose of collectively bargaining with individual police officers represented by the MPA.

b. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

(1). Notify police officers represented by the MPA by posting and disseminating the attached "APPENDIX A" in the manner in which the December 27, 1989, notice of the January 4, 1990, FPC meeting was posted and disseminated. Where the City posts a copy of "APPENDIX A", the City shall take reasonable steps to assure that the notice remains posted and unobstructed for a period of thirty days.

(2). Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the City has taken to comply with this Order.

Dated at Madison, Wisconsin, this 3rd day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ___________________________________
Richard B. McLaughlin, 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.

1/ Footnote 1/ found on page 15.

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.

APPENDIX A

NOTICE TO POLICE OFFICERS OF THE CITY OF MILWAUKEE REPRESENTED BY THE MILWAUKEE POLICE ASSOCIATION

As ordered by the Wisconsin Employment Relations Commission, the City of Milwaukee, the Board of Fire and Police Commissioners for the City of Milwaukee and Chief of Police Philip Arreola, notify you as follows:

1. The City of Milwaukee, the Fire and Police Commission of the City of Milwaukee, and the Chief of the City of Milwaukee Police Department will cease and desist from the distribution or communication of notices of Fire and Police Commission meetings, such as that issued in December of 1989, which seek to collectively bargain with individual police officers represented by the Milwaukee Police Association.

2. Neither the City of Milwaukee, nor the Fire and Police Commission of the City of Milwaukee, nor the Chief of the Milwaukee Police Department will seek to collectively bargain with any individual police officer represented by the Milwaukee Police Association, unless that officer has been designated by the Milwaukee Police Association as its representative.

THE CITY OF MILWAUKEE

By ______________________________ ______________________________
Name Title

By ______________________________ ______________________________
Philip Arreola Chief of Police

THE MILWAUKEE FIRE AND POLICE COMMISSION

By ______________________________ ______________________________
James F. Blumenberg Executive Director

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The original complaint, as amended and as clarified by the MPA's briefs seeks the rescission of discipline imposed on Officer Glover; a cease and desist order precluding the City from "taking further steps to implement a drug testing policy without prior collective bargaining with the MPA"; and a cease and desist order precluding the City from interfering in the relationship between the MPA and its members. The MPA alleges that City violations of Secs. 111.70(3)(a)1, 2, 4 and 5, Stats., ground the provision of such relief. The conduct alleged by the MPA to constitute the alleged violations varied somewhat from pleading to proof. Essentially, the MPA focuses on two areas of conduct. The first is a two-fold expansion, by the City, of its drug testing policy regarding incumbent officers. The first expansion directly impacts Officer Glover, and focuses on an alleged change from a policy based on probable cause to one based on reasonable suspicion. The second expansion is from testing based on probable cause to random testing. The second area of conduct focused on by the MPA is the City's solicitation of direct input on a random drug testing policy from MPA represented employes. Because the City functions as the representative of the FPC for collective bargaining purposes, and because the FPC and the City share their views on collective bargaining strategies, the discussion below treats the FPC and the City as a single entity.

THE PARTIES' POSITIONS

The MPA's Initial Brief

The MPA asserts that, in violation of Secs. 111.70(3)(a)1, 4 and 5, Stats., the City "implemented a drug testing program without prior bargaining". More specifically, the MPA contends that Article 64 can not be read to have codified a standard of reasonable suspicion drug testing. A review of the record establishes, according to the MPA, that the "City has no facts" to support such a contention. More specifically, the MPA urges that Arreola's February 12, 1990, memo was "the first time the MPD has informed MPA members that they are subject to such testing." The substance of that memo was, according to the MPA, based on hearsay and an erroneous application by the FPC of Rule 4, Section 18. After a review of the record, the MPA concludes: "there was no drug testing practice for the MPD either when Article 64 was tentatively agreed to . . . or on the effective date of the contract."

Nor will bargaining history support a reasonable suspicion standard, according to the MPA. While acknowledging the City test of three officers, the MPA urges that none of these officers was asked to submit to a test prior to "the date that Article 64 was tentatively agreed to." That the City had tested prospective hires can be of no relevance, according to the MPA, because "the MPA had no standing to engage in any collective bargaining regarding such drug testing". Asserting that the MPA made it known through a mediator that it would not agree to reasonable suspicion testing, the MPA concludes that bargaining history establishes that "'current practices' for drug testing . . . was the same for police officers as for all other citizens." The MPA concludes that the parties' agreement on Article 64 "put the drug testing issue on hold until a later date" and, at most, "gave the City a chance to arbitrate a single issue where an arbitrator could force the MPA to 'do the right thing' without a quid pro quo."

The MPA's next major line of argument is that the City violated Secs. 111.70(3)(a)1, 2 and 4, Stats., "by officiously interjecting themselves between the MPA and its members regarding drug testing issues which are mandatory subjects of bargaining". The MPA notes that the December, 1989, notice was sent to individual officers, representatives of the League of Martin and was read at roll call. The subsequent meeting sought to involve individuals directly with the City. All of this was, according to the MPA, done over its objection, and with the intent of bargaining directly with individuals, to circumvent the MPA. This violates the law, the MPA asserts, for the City was obligated to "go through the union rather than around it." The notice and the meeting were directed at mandatory subjects of bargaining, and the City, according to the MPA, has "an obligation to bargain with the MPA about these matters and cannot bypass the union to go directly to the members".

The MPA concludes by requesting that the City be ordered to:

> 1. Rescind the discipline imposed upon Williams, Landrum and Glover;
>
> 2. Cease and desist from taking further steps to implement a drug testing policy without prior collective bargaining with the MPA;
>
> 3. Cease and desist from interfering in the relationship between the MPA and its members on matters subject to the collective bargaining process.

The City's Reply Brief

After a brief review of the MPA's brief, the City notes that the essential issue is "(w)hether the Respondents violated Article 64 of the relevant Agreement between the parties", and asserts that "(t)his case begins and ends with the proper reading and interpretation of the relevant contract provision of the Agreement." Threshold to this interpretation is "whether the Agreement contains a provision specifically dealing with drug testing." The City asserts that Article 64 is that provision, and that it "acts to protect existing drug testing practices from any further negotiations." More specifically, the City contends that the then-existent current practice permitted the drug testing of "entry level applicants" and the "reasonable suspicion drug testing of incumbent police officers". Since the City needed no contractual right to test new hires,

it follows, according to the City, that the sole purpose of Article 64 was to preserve the City's right to reasonable suspicion testing of incumbent officers.

As preface to its examination of the record, the City contends that it "defies logic" to conclude that the City would agree to Article 64 knowing it did no more than "maintain the status quo of having no drug testing program in place" when the City could accomplish the same result by "doing nothing". Nor can the MPA's assertion of no written policies be accepted, according to the City, which posits Rule 4, Section 100, and Rule 9, Section 18, as "two long standing departmental rules dealing with fitness for duty." The City argues that these rules do not "illustrate the MPD's use of reasonable suspicion drug testing" but do "provide the basis for the Respondents' use of reasonable suspicion drug testing which they used each and every time a drug testing situation arose." That the MPA knew Williams and Landrum had been subjected to such testing before the execution of the 1987-88 collective bargaining agreement establishes, according to the City, that the "MPA had fair warning and prior knowledge of the past practices involving the City's use of reasonable suspicion drug testing", and was obligated to "raise the issue" prior to the execution of the agreement.

That the MPA chose not to assert a prohibited practice complaint until well after the Sec. 111.07(14), Stats., timeline underscores, the City argues, the length of the past practice involved as well as the MPA's delay in contesting the matter.

The City also challenges the MPA assertion that the existing practice was no more than probable cause testing. Inspector Franklin's testimony, standing alone, is enough, the City contends, to refute that assertion.

The City concludes that "(t)he inescapable conclusion is that reasonable suspicion drug testing was the standard 'current drug testing policy' at the time of the execution of the Agreement on December 21, 1988". The City concludes that the MPA did not object to such testing at that time and are "statutorily barred from raising it now as it relates to Williams and Landrum." The sole remaining source of contention would be the Glover testing, and that test was within the scope of Article 64, according to the City. It follows, the City asserts, that the complaint must be dismissed.

The MPA's Reply Brief

The MPA disputes the City's contention that it defies logic that the City would agree to a less stringent standard for drug testing in Article 64 than it would have by not agreeing to anything. The MPA asserts that "both sides had something to gain from agreeing to Article 64." More specifically, the MPA contends that the City gained "the right to try to negotiate reasonable suspicion drug testing during the contract and to force the MPA to arbitration on a single issue." The MPA then contends that it "preserved the status quo of no reasonable suspicion drug testing and guaranteed that the City could not unilaterally impose such testing after brief bargaining during the contract period."

The MPA's next major line of argument is that "Rule 4, Section 100 and Rule 9, Section 18 do not demonstrate that 'current practices' within the meaning of Article 64 includes a reasonable suspicion drug testing program." More specifically, the MPA notes that Rule 9, Section 18, was "implemented after the effective date of the 1987-88 contract." More significant, to the MPA, is that "the existence of these two rules begs the question", which the MPA views to be "what is the level of suspicion needed to force an employee to take a test to determine if he is fit . . . and what . . . tests will be used

to make those determinations." To accept the City's rationale would imply, the MPA asserts, that it could unilaterally implement a random drug testing program.

The MPA's next major line of argument is that "(t)he record regarding an alleged drug test in August of 1987 is insufficient to support a finding that reasonable suspicion drug testing existed when Article 64 was tentatively agreed to." In support of this contention, the MPA urges that the alleged test may not even have been administered to a unit member; that even if a unit member was involved, one instance can not constitute a "practice" under Article 64; and that since the effective date of the contract, no drug tests have been administered.

The MPA then asserts that neither party can be considered to have been under an obligation to "ask for clarification of Article 64 prior to execution of the contract." The MPA had strenuously objected to such tests, and the City was aware of this, the MPA contends.

The MPA urges the complaint is based on the refusal of the FPC to dismiss the results of drug tests; its suspension of Glover for refusing a test; and the City's attempt to avoid bargaining with the MPA on mandatory subjects of bargaining. Each of the acts, the MPA concludes, falls within the one year limitations period.

The MPA's final major line of argument is that "(c)ompelling an employee to take an illegal drug test without prior bargaining with the Union does not constitute a 'practice' within the meaning of Article 64."

The MPA concludes that its request for relief should be granted except that it "withdraws its demand that the MPD and FPC rescind the discipline imposed on Williams because the FPC has already done so."

The Argument Submitted In Response To The November 12, 1991, Letter

The MPA argues initially that "neither Article 64 or Article 5 constitute a waiver of the Milwaukee Police Association's right to bargain drug testing." This conclusion is necessary, the MPA contends, because the City has not reserved the contractual right to "unilaterally implement any drug testing language"; because the City has acknowledged numerous aspects of any drug testing program are mandatory subjects of bargaining; because the management rights clause is too broad to constitute a waiver of bargaining on this point; and because Article 64 "does not provide for reasonable suspicion drug testing." The MPA then argues that MPA represented employes have property and liberty interests in drug-based discipline. Such interests, the MPA asserts, require notice before a loss of employment based on reasonable suspicion drug testing can occur. Because these rights are legal and constitutional in nature, the MPA concludes that unilateral implementation of reasonable suspicion testing "violates (MPA represented employes') rights to due process of law, regardless of the content of Article 5 or Article 64." Beyond this, the MPA contends "(t)he record in this case does not establish that the drug testing procedure carries sufficient safeguards so as to be reliable or objective" in violation of due process rights. The MPA then argues that Sec. 343.305, Stats., read in conjunction with Schmerber v. California, 384 U.S. 757 (1966), requires "probable cause" before an involuntary blood or alcohol test can be administered. Concluding that this case "involves significant constitutional rights of police officers as both citizens and employees", the MPA concludes the complaint must be found meritorious. 2/

2/ The MPA notes at the close of its brief that "the parties have agreed

The City prefaces its argument by noting "general reservations with respect to supplementing the record." More specifically, the City argues that a hearing examiner has no authority "to adduce a complete record." Given the statutory burden of proof, the City argues that it "is under no obligation to provide additional information or to otherwise "complete" the record". The burden of proof in this matter, according to the City, must be shouldered by the MPA. Noting that the legality of drug testing has been addressed by several City Attorney positions, the City "(r)ather than restate those opinions", attached them to its brief, together with a relevant discussion paper. These documents establish, according to the City, that it is not limited to probable cause in testing its employes. Beyond this, the City asserts Articles 5 and 64 reserve the right to test on reasonable suspicion. The City concludes that it is under no duty to bargain with the MPA until it modifies its reasonable suspicion standard for testing. Noting that it always been willing to meet this duty, the City concludes that the complaint is without merit.

In further correspondence filed with the Commission on March 6, 1992, the City asserts that the MPA's brief constituted "a reply brief to the City's February 21, 1992 submission", which relied on a prior review of the City's submission, especially concerning City Attorney opinions. The City concludes from this that a further response on its part is necessary. More specifically, the City contends that the reliability or objectivity of its drug testing program is not in issue in this matter. The City contends that "the only question properly before the examiner is whether the City had reasonable suspicion drug testing in place at the time that Article 64 was negotiated." The burden of proof on this point, according to the City, falls squarely on the MPA. Whether the Commission finds the City's drug testing policy "good, bad or otherwise" can not be posed on the present record, according to the City, which restates its claim that the MPA has failed to meet its burden of proving any MERA violation by the City.

In subsequent correspondence, the parties mutually agreed that the MPA had not entered its argument based on a prior review of the City's initial submission, but had relied solely on exhibits previously entered into the evidentiary record.

DISCUSSION

Application of the law alleged to have been violated by the MPA to the two areas of conduct noted above requires some prefatory discussion.

The Alleged Expansion Of The City's Drug Testing Practices

The MPA alleges that the City has expanded its drug testing of incumbent officers from a probable cause to a reasonable suspicion standard, and that it intends to implement a random drug testing program. The MPA contends that in the absence of prior bargaining, each violates law and contract.

The record developed in this case does not pose either the legal or the contractual propriety of the creation of a random drug testing program. The legal and contractual propriety of any expansion of the City's drug testing

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that the record can be supplemented with the fact that both Landrum and Williams have been reinstated to their jobs as police officers . . . As a result, complainants withdraw that portion of the requested relief which asks the WERC to reinstate them.

program are not separate issues on this record. Article 64 mandates bargaining on any aspect of a modification of the City's "current drug testing practices", which constitutes a mandatory subject of bargaining, i.e. one "primarily related to wages, hours and conditions of employment." The contract thus parallels the law. 3/ Establishing a violation of either law or contract would require meeting three elements of proof: first, that the City modified "its current drug testing practices"; second, that at least some aspect of the modification constituted a mandatory subject of bargaining; and third, that the City refused to bargain regarding that aspect of the modification.

The present record can not provide a basis for any reliable conclusion on any of the three elements of proof. It can be noted that the City has never had a policy providing for the random drug testing of Police Officers. Any implementation of such testing would, then, modify the City's practices. However, the MPA has not demonstrated any specific action by the City to implement such a plan. The City has conducted legal research on the point, has researched other jurisdiction's programs and has looked into testing protocols. This background effort has not, however, been translated into action to implement such a plan. That Arreola or any other City official has discussed the wisdom of such a plan does not establish any modification of the existing "non-policy". In addition, it can be noted that the record does not unequivocally establish that the City will undertake such a program. Blumenberg has specifically counseled the FPC not to "unilaterally impose a drug testing policy". 4/ Thus, any assertion that the City has expanded its testing policy to incorporate random drug testing is speculative. 5/ Beyond this, there is no argument or authority cited by the MPA to isolate which, if any, aspect of even a contemplated expansion of the policy would constitute a mandatory subject of bargaining. Finally, there is no clear showing that the City has refused to bargain the point. At most, the record establishes that each party is willing to bargain the point on its own terms. In sum, the record affords no basis to address whether an expansion of the City's practices regarding drug testing to include random testing of incumbent officers violates the law or the parties' labor agreement.

From this, it follows that the dispute posed here is whether, as the MPA alleges, the City has violated the law or the contract by expanding its drug testing practice from one based on probable cause to one based on reasonable suspicion.

This dispute poses no legal issue beyond the application of Sec. 111.70(3)(a)5, Stats. As noted above, Article 64 incorporates the statutory duty to bargain otherwise enforced by Sec. 111.70(3)(a)4, Stats. Because the duty to bargain regarding mandatory subjects of bargaining during the term of an existing agreement is waived as to matters covered by the agreement, 6/ it follows that the application of the terms of Article 64 fully addresses any issue regarding the City's duty to bargain the alleged expansion of the testing policy.

3/ The "primarily related" standard has been discussed extensively by the Wisconsin Supreme Court. See, for example,

4/ Complainant Exhibit 17.

5/ See <u>WERB v. Allis-Chalmers Workers Union Local 248, UAWA-CIO</u>, 252 Wis. 436, 440-441 (1948), regarding moot issues.

6/ See <u>City of Richland Center</u>, Dec. No. 22912-B (WERC, 8/86); <u>Racine Unified School District</u>, Dec. No. 18848-A (WERC, 6/82).

Nor can the record be viewed to pose any dispute regarding an independent violation of Sec. 111.70(3)(a)1, Stats. To establish an independent violation of Sec. 111.70(3)(a)1, Stats., it is necessary to prove that the City's conduct had a reasonable tendency to interfere with the rights granted employes by Sec. 111.70(2), Stats. 7/ The record demonstrates the City acted, in ordering the drug tests questioned by the MPA, in the good-faith belief that it possessed that right under law and contract. Sec. 111.70(1)(a), Stats., defines "collective bargaining" to include "the reduction of any agreement reached to a written and signed document." The MERA provides enforcement mechanisms for such agreements at Sec. 111.70(3)(a)5, Stats., Sec. 111.70(3)(b)4, Stats., Sec. 111.70(4)(c)2, Stats., and 111.70(4)(cm)4, Stats. It is apparent the law encourages the creation of such agreements as a means to assure labor peace. Against this background, it is inconceivable that one party's good-faith assertion of a perceived contractual right could be collaterally attacked through an alleged violation of Sec. 111.70(3)(a)1, Stats., as having a reasonable tendency to interfere with protected rights. Doing so would undermine the enforcement of the agreements the MERA seeks to put into place.

That intent is not a necessary element of proof to establishing an independent violation of Sec. 111.70(3)(a)1, Stats., 8/ is irrelevant to this point. The conclusion stated above establishes only that the good-faith assertion of the contractual right at issue here does not have a reasonable tendency to interfere with rights protected by the MERA. That a violation of Sec. 111.70(3)(a)5, Stats., may be considered a derivative violation of Sec. 111.70(3)(a)1, Stats., can also be granted. Doing so only underscores that the issue posed here is whether or not the City has violated Article 64. That the violation of a contract may have a derivative tendency to interfere with the exercise of protected rights can not persuasively ground a conclusion that the good-faith litigation of a dispute, standing alone, has any such tendency.

The record poses no issue regarding the application of Sec. 111.70(3)(a)2, Stats. That section "assumes interference of a magnitude which threatens the independence of a labor organization as the representative of employe interests." 9/ No persuasive evidence of such domination has been posed here. The record regarding this area of conduct poses only the assertion of two conflicting views of a contractual provision. If this conduct was considered to rise to the level of conduct contemplated by Sec. 111.70(3)(a)2, Stats., the contract enforcement mechanisms noted above would be undermined.

While the propriety, under the MERA, of conduct either taken or approved by the FPC is posed here, it must be stressed that this case poses no issue regarding the direct review of conclusions made by the FPC in disciplinary actions litigated before it. The MPA has, in its complaint, questioned the denial, by the FPC, of "motions to suppress the results of drug tests" regarding Williams and Landrum. The parties have mutually acknowledged that appeal of the discipline meted to those employes is governed not by grievance arbitration under the labor agreement but by Sec. 62.50, Stats. Under Sec. 62.50(20), Stats., appeal of an FPC decision is to Circuit Court, not to the

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7/ See City of Beaver Dam, Dec. No. 20283-B (WERC, 5/84).

8/ Ibid.

9/ Columbia County, Dec. 22683-B (WERC, 1/87) at 13.

Commission. The MPA cites, and I can find, no authority granting the Commission appellate authority to review a conclusion of the FPC. If, as the MPA asserts, the City lacked the authority to require the challenged drug tests, then the result here may contradict and overturn conclusions reached by the FPC. Any such conclusion would have to flow from the application of the MERA, and not from an independent review of the decision of the FPC.

The issue posed regarding the alleged expansion of the City's drug testing policy from one based on probable cause to one based on reasonable suspicion, focuses, then, exclusively on the interpretation of Article 64.

As preface to the interpretation of Article 64, it is necessary to note that the Commission will normally not exercise its jurisdiction under Sec. 111.70(3)(a)5, Stats., where, as here, the labor agreement contains a provision for final and binding arbitration. 10/ The Commission has, however, recognized that the parties may waive the application of this doctrine. 11/ In this case, the waiver is express, for the parties have mutually sought the interpretation, through Sec. 111.70(3)(a)5, Stats., of Article 64.

It is apparent the MPA seeks the application of Article 64 to an alleged expansion of the City's drug testing practices. The MPA points to the compulsion of tests for Officers Landrum and Williams in 1988 and for Officer Glover in 1990 as evidence of this change. The MPA seeks to use these tests as more than evidence of a change in policy, however, since it seeks, at a minimum, the rescission of the discipline meted to Glover.

This two-fold use of tests poses the use of incidents falling outside the one year period preceding the filing of the complaint on February 12, 1990. Secs. 111.70(4)(a) and 111.07(14), Stats., govern the Commission's jurisdiction over complaints of prohibited practice. Read together, those sections provide:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or prohibited practice alleged.

This provision is jurisdictional, and must be applied before consideration of the merits of the complaint.

It is apparent that two of the three complained of tests occurred outside of the one year limitations period, and that the MPA has sought to use those tests as more than background evidence of the establishment of a change in policy. The timeliness of this type of allegation is governed by the principles of <u>Bryan Manufacturing Co.</u> 12/ The Court posited the two principles relevant here thus:

> . . . The first is one where occurrences within the limitations period in and of themselves may constitute,

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10/ See <u>City of Appleton</u>, Dec. No. 14615-C (WERC, 1/78).

11/ See <u>City of Evansville</u>, Dec. No. 24246-A (Jones, 3/88), <u>aff'd.</u>, Dec. No. 24246-B (WERC, 9/88).

12/ <u>Local Lodge No. 1424 v. National Labor Relations Board (Bryan Mfg. Co., 362 US 411, 45 LRRM 3212 (1960).</u> The principles of this case were adopted by the Commission in <u>Moraine Park Technical College</u>, Dec. No. 25747-D (WERC, 1/90).

> as a substantive matter, unfair labor practices. There earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 13/

Glover was compelled to submit to a drug test in January of 1990, clearly within one year of the filing of the complaint. The MPA's use of the Landrum and Williams tests as evidence of the origins of the change in practice challenged by the MPA regarding Glover constitutes the use of "earlier events . . . to shed light on the true character of matters occurring within the limitations period". Under Bryan, this is no more than the submission of admissible evidence.

However, to the extent the MPA has not fully waived such a request, its original attempt to rescind, through the complaint, the discipline meted to Landrum or Williams based on a test administered in September and October of 1988 is more than an evidentiary use of the 1988 tests. The MPA seeks to use the January 22, 1990, FPC denial of a motion to suppress evidence as a basis to bring the allegedly improper tests into the one-year limitations period. This is unpersuasive under Bryan. As noted above, the Commission has no appellate jurisdiction over decisions of the FPC. The MPA presumably contends that the evidence should be suppressed because the City lacked the contractual and legal authority to compel either test. This squarely poses the issue here, but does so by focusing on the test, not on the denial of the motion. The denial of the motion, standing alone, is not a prohibited practice. It can become one only by reference to the allegedly improper compulsion of the test in September and October of 1988. This reliance on time-barred conduct to render non-time-barred conduct illegal is improper under Bryan. This is not to say the FPC denial of the motion was appropriate. Rather, this underscores that the propriety or impropriety of the denial of the motion, as an appellate matter, is for a court and not for the Commission.

Thus, the sole issue regarding the alleged change of practice which is remediable here is the test compelled of Glover. 14/ It should be stressed

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13/ Ibid., 45 LRRM at 3214-3215.

14/ The parties' labor agreement contains timelines governing the processing of grievances. Compliance with such timelines is required by the Commission, absent waiver, as a condition of its exercise of jurisdiction under Sec. 111.70(3)(a)5, Stats. See Winter Joint School District No. 1, Dec. No. 17867-C (WERC, 5/81). Because the parties raise no issue regarding compliance with the timelines of the grievance procedure, no such issue is considered above.

that the sole issue posed here is whether the practice referred to by Article 64 is one of probable cause or of reasonable suspicion. The facts of Glover's situation have not been directly litigated, and whether the test he was ordered to submit to was warranted under either, neither or both of the standards argued by the parties is not addressable here. Nor is the specific definition of either standard at issue here. The parties mutually acknowledge that the standards are distinguishable and that the reasonable suspicion standard is less onerous for the City to meet than a probable cause standard. The issue posed here is solely which standard Article 64 incorporates.

The record demonstrates that, as a matter of contract and of law, the standard incorporated by Article 64 is one of reasonable suspicion, not probable cause. Before discussing this point, it is important to stress that this conclusion extends only to cases in which, based on objective standards rooted in the observations of two or more supervisors of the conduct of an individual officer, a reasonable suspicion exists that the individual officer is acting under the influence of drugs and is unfit for duty. This is the practice defined by Arreola's February 12, 1990, memo.

As noted above, the threshold issue regarding Article 64 is whether the City chose "to modify its current drug testing practices". This issue poses an interpretive and a factual issue. The interpretive issue focuses on the nature of the practices referred to. The language clearly and unambiguously states that the "practices" at issue are not consensually defined past practices, 15/ but the City's practices. The singular reference to "its . . . practices" (emphasis added) unambiguously establishes this point. The factual issue is whether the City had established a testing program based on reasonable suspicion.

The relevant practice regarding Article 64 is not a policy based system of drug screening, but the City's response to those individual situations when an officer was suspected to be medically unfit for duty. As detailed in the Findings of Fact, the City has a practice, of over thirty years' duration, of requiring officers believed to be intoxicated to submit to a urinalysis. In August of 1987, this test was first applied to an officer believed to be under the influence of a controlled substance. Further tests were ordered in September and October of 1988, and ultimately, in January of 1990. The same test was employed under the same standard as in the past. The City did change the form of the test, but there is no evidence this posed any point of controversy between the parties. Instead, the City continued to apply the test based on the same standard. In sum, the City had an established practice of testing officers who were perceived to be medically unfit for duty based on the presence of drugs in their system. The drug of choice has changed over time, but the City's response has not.

The MPA focuses on the absence of any formal rule or policy to assert that the City cannot possess the right it asserted against Williams, Landrum and Glover. This point is persuasive regarding the establishment of a policy based system of drug screening for officers as a group. It is not, however, applicable to the individual testing of an officer believed, on an objective basis, by two or more supervisors, to be medically unfit for duty due to the

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15/ For a general discussion on past practice as the consensual creation of bargaining parties' conduct, see How Arbitration Works, Elkouri & Elkouri (BNA, 1985 & 1991 Supplement) at chapter 12; or Mittenthal, "Past Practice And The Administration Of Collective Bargaining Agreements", from Arbitration and Public Policy, Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators, (BNA, 1961).

influence of drugs. Regarding this point, it is significant that the City has no specific rule or policy on reasonable suspicion testing or on a testing protocol for suspected alcohol abuse. Rule 4, Section 18, no more addresses these points regarding alcohol than regarding illegal drugs. This absence of a rule has not stopped the thirty plus years of testing for that form of drug, based on reasonable suspicion. More to the point, Rule 4, Section 100, is as applicable to illegal drugs as to alcohol. 16/ Beyond this, the City had, by its January 30, 1987, amendment of Rule 9, Section 18, alerted the MPA that it regarded alcohol or illegal drug use as equally actionable.

The record supports the MPA's assertion that Article 64 froze the status quo regarding drug testing. The record will not, however, support the MPA's assertion that the status quo precluded the testing of an officer reasonably suspected of being unfit for duty. The MPA's argument unpersuasively reads Article 64 to confer greater rights on an officer who reports for duty under the influence of an illegal drug than on an officer who reports for duty under the influence of alcohol. Under the MPA's reading of Article 64, the former officer could be tested based on reasonable suspicion, while the latter could be tested based only on probable cause. Neither the language of Article 64, nor any bargaining history or practice supports this assertion.

Nor will the record support the MPA's assertion that the status quo ever incorporated a standard of probable cause. The MPA asserts that this standard "was the same for police officers as for all other citizens" and was traceable to that "mandated by statute (for) possession or operating a motor vehicle while under the influence."

The MPA's use of outside law is unpersuasively narrow. The parties' agreement contemplates a broader scope of outside law than the motor vehicle statues. Article 5 of the labor agreement recognizes the City's "right . . . to operate . . . (its) affairs in all respects in accordance with the laws of Wisconsin . . . (and) Constitution of the United States".

Under federal law applicable at any time relevant to this matter, the City had the legal authority to test an officer if the City had a reasonable suspicion that the officer was medically unfit for duty due to the effect of illegal drugs.

The relevant federal law is the Fourth Amendment to the United States Constitution, 17/ which is applicable to municipal police through the operation of the Due Process Clause of the Fourteenth Amendment. 18/ It is, at present, settled law that a compelled urinalysis to test for the presence of illegal drugs is a search within the meaning of the Fourth Amendment. 19/ It is also

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16/ See, for example, Strachan v. Union Oil Co., 768 F.2d 703, 1 IER Cases 1844 (5th Cir. 1985), regarding the contractual authority of an employer to test medical fitness for work.

17/ The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

18/ See Mapp v. Ohio, 367 U.S. 643 (1961).

19/ National Treasury Employees Union v. Von Raab, 489 U.S. 656, 4 IER Cases

settled law that a public employer's "searches conducted pursuant to an investigation of work-related employee misconduct" 20/ are governed by the Fourth Amendment. 21/

The Court has not required a warrant for every Fourth Amendment search, but has recognized that searches "ordinarily must be based on probable cause." 22/ The Court has also noted, however, that the probable cause standard "is peculiarly related to criminal investigations". 23/ For a considerable period, the Court has developed a doctrine distinguishing criminal searches from administrative searches, with the latter category not requiring probable cause if, in the particular search involved, the Government's interests in the search outweigh the individual's legitimate privacy expectations. 24/ In Ortega, the Court expressly declined to apply a probable cause standard to employer "investigations of work related misconduct", and applied "the standard of reasonableness under all the circumstances" to "both the inception and the scope of the intrusion." 25/

In Von Raab, the Court upheld, as a reasonable search under the Fourth Amendment, a United States Customs Service requirement that employes transferring or being promoted to certain positions pass a drug test. The Court upheld this requirement, in the absence of any individualized suspicion of any of the affected employes, reasoning thus:

> We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test . . . Much the same is true of employees who are required to carry firearms . . . While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling

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246 (1989); Skinner v. Railway Labor Executives Association, 489 U.S. 602, 4 IER Cases 224 (1989).

20/ O'Connor v. Ortega, 480 U.S. 709, 724, 1 IER Cases 1617, 1622 (1987).

21/ The MPA has argued certain property interests are posed in this case. Since the validity of the discipline meted to the three officers noted in the complaint is not posed here, no separate discussion of this point is necessary. The discussion of the validity of the tests as a search addresses the issue of notice posed by the MPA.

22/ Von Raab, 4 IER Cases at 252.

23/ Ibid.

24/ This line of cases extends back at least as far as Camara v. Municipal Court, 387 U.S. 523 (1967). The balancing test has been variously stated, but continues in Von Raab and Skinner. Significantly, the Court has also applied a "reasonableness" standard to quasi-criminal searches, see Terry v. Ohio, 392 U.S. 1 (1968).

25/ O'Connor v. Ortega, cited at footnote 20/ above, 480 US at 725-726, 1 IER Cases at 1623.

> interests in the safety and in the integrity of our borders. 26/

It is untenable to conclude that the Court, which did not require probable cause for a drug test of employes for whom the employer demonstrated no individualized suspicion of drug use, would require probable cause of an employer which could demonstrate a reasonable suspicion that an individual officer had reported for duty under the influence of drugs. 27/

It can be argued that the bulk of the law discussed above is of recent vintage, and is irrelevant to the state of the law preceding the creation of Article 64. The law has not, however, changed from that time to the present in any fashion significant to this case. In an opinion issued September 30, 1987, well before even a tentative agreement on Article 64, the Wisconsin Attorney General summarized the state of the law thus:

> The courts have generally held that a current employe may be subject to urinalysis only if the employer has a reasonable, individualized suspicion that the employe was using illegal drugs . . . 28/

As authority for this, the Attorney General cited Lovvorn v. City of Chattanooga, Tenn., 647 F. Supp. 875 (E.D.Tenn. 1986). The Lovvorn court stated the prevailing standard thus:

> All courts which have ruled upon the validity of urine tests for public employees, including police officers and firemen, have required as a prerequisite some articulable basis for suspecting that the employee was using illegal drugs, usually framed as "reasonable suspicion." 29/

At the time of the Attorney General's opinion, the Third and the Eighth Circuit had upheld random drug testing of certain groups of employes without any reasonable, individualized suspicion. 30/ The Seventh Circuit, in 1976, applied a "reasonableness" standard in upholding the constitutionality of work rules governing bus drivers in the Chicago Transit Authority. The work rules at issue compelled "blood and urine tests when (a driver is) involved in 'any serious accident,' or suspected of being intoxicated or under the influence of narcotics." 31/ In that case, the Seventh Circuit also found probable cause

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26/ Ibid., 4 IER Cases at 253.

27/ It should be stressed that the record does not indicate the City required the drug test of employes with a view toward criminal prosecution. The discussion above is premised on this fact.

28/ 76 OAG 257, 259 (9/30/87), citations omitted.

29/ 647 F. Supp at 881.

30/ See Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986); McDonell v. Hunter, 809 F.2d 1308 (8th Cir. 1985).

31/ Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1266 (7th Cir. 1976).

existed for the tests called for by the work rules. 32/ However, for an administrative search, the law then applicable pointed to a reasonable suspicion standard, not a probable cause standard. 33/

The MPA's citation of Wisconsin traffic statutes as the source for a probable cause standard is, then, selective and incomplete. The law applicable then and now granted the City the authority to compel a drug test based on reasonable suspicion, not on probable cause.

Article I, Section 11 of the Wisconsin Constitution parallels the Fourth Amendment. Because the Wisconsin Supreme Court "has consistently and routinely conformed the law of search and seizure under the state constitution to that developed by the United States Supreme Court under the fourth amendment", 34/ there would appear to be no reason to conclude the City was under greater constraint as a matter of Wisconsin law than as a matter of federal law. It should be stressed that this conclusion is limited to the testing of an officer where individualized suspicion of drug use exists. Whether the Wisconsin Court should or will follow the lead of the United States Supreme Court regarding policy based drug testing in the absence of individualized suspicion is a point neither briefed nor posed on this record. 35/

In sum, the MPA's assertion that Article 64 froze the status quo is persuasive. The further assertion that the status quo thus frozen was testing only on probable cause is, however, unpersuasive as a matter of contract and of law. The practice recognized by Article 64 concerns the City's compulsion of a drug test to determine the medical fitness for work of individual officers reasonably suspected of reporting for duty under the influence of drugs, as based on objective considerations shared by two or more supervisors. This practice predates the negotiation of the Article 64, and the effective date of the first contract to incorporate it. Thus, it is irrelevant whether the effective date of Article 64 is viewed as January 1, 1987 or not. The standard

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32/ To the extent Suscy is considered to leave whether a reasonable suspicion or a probable cause standard is appropriate, later cases have clarified that reasonable suspicion is the appropriate standard. See Dimeo v. Griffin, 721 F. Supp. 958 (N.D.Ill. 1989), reviewed at 924 F.2d 664 (7th Cir. 1991).

33/ See, in addition to the cases noted above, McDonnell v. Hunter, 612 F. Supp 1122 (S.D.Iowa 1985); and Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986). In each case, the court struck down systems of drug testing not based on individualized suspicion. Each court spoke of a reasonable suspicion standard. The result in McDonnell was modified on appeal, see footnote 30/ above.

34/ State v. Fry, 131 Wis. 2d 153, 172 (1986). See also State v. Paszek, 50 Wis. 2d 619, 624 (1971). Note also that the Attorney General's opinion cited above (see footnote 24/) reflects this by not separately analyzing the issues under the State and the Federal Constitutions.

35/ Cf. State v. Fry, 131 Wis. 2d at 174: "It is always conceivable that the Supreme Court could interpret the fourth amendment in a way that undermines the protection Wisconsin citizens have from unreasonable searches and seizures under art. I, sec. 11, Wisconsin Constitution. This would necessitate that we require greater protection to be afforded under the state constitution than is recognized under the fourth amendment."

recognized by Article 64 is, then, reasonable suspicion. It follows that the tests ordered by the City under that standard did not violate Article 64. The City committed, then, no violation of Sec. 111.70(3)(a)5, Stats., and those portions of the complaint, as amended, alleging such a violation have been dismissed.

The December 27, 1989, Notice Of The January 4, 1990, Meeting

The second major area of conduct questioned by the MPA concerns the City's solicitation of direct employe input regarding a random drug testing program.

This area of conduct centers on the circumstances surrounding the December 27, 1989, notice (referred to below as the Notice) of the January 4, 1990, FPC meeting.

As with the first area of conduct, the MPA alleges that this conduct violates Secs. 111.70(3)(a)1, 2, 4 and 5, Stats. The application of the legal framework to this area of conduct is slightly different than with the first area of conduct.

Sec. 111.70(3)(a)2, Stats., is not applicable here. While the circumvention of an established majority representative could constitute "interference of a magnitude which threatens the independence of a labor organization as the representative of employe interests", no such magnitude of interference has been proven. The individual bargaining alleged by the MPA is an isolated instance, unconnected to any pattern of conduct. The alleged individual bargaining flowed from a fundamental difference between the parties on the City's duty to bargain regarding the implementation of a random drug testing program. The scope of that duty has not been directly addressed by the Commission. Thus, the proven conduct concerns an isolated instance of individual bargaining involving an uncertain area of the law. This conduct does not rise to the level of interference contemplated by Sec. 111.70(3)(a)2, Stats.

The remaining allegations focus directly on whether the City's conduct in disseminating the Notice and in arranging the underlying meeting constitute individual bargaining. If so, the conduct is violative of Sec. 111.70(3)(a)4, Stats., which makes it a prohibited practice for a municipal employer "(t)o refuse to bargain collectively with a representative of a majority of its employes". Bargaining with individual employes has been found to constitute such a refusal. 36/ Such conduct, if proven, would also establish a derivative violation of Sec. 111.70(3)(a)1, Stats.

Individual bargaining also constitutes the core of any possible violation of Sec. 111.70(3)(a)5, Stats. Because the City has yet to actually modify "its current drug testing practices", Article 64 is not the governing provision here. As noted above, however, Article 5 of the labor agreement requires the City to "operate and manage their affairs in all respects in accordance with the laws of Wisconsin . . . and Section 111.70 of the Wisconsin Statutes." The individual bargaining proscribed by Section 111.70(3)(a)4, Stats., is thus also proscribed by the parties' labor agreement.

As preface to the examination of the alleged individual bargaining, it is necessary to note that this case does not involve the First Amendment rights of a police officer to speak at a public meeting. 37/ Nor does the case involve the City's First Amendment rights to communicate its views directly to MPA represented employes. 38/ Such a communication would have to involve the

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36/ See Greenfield Schools, Dec. No. 14026-B (WERC, 11/77).

37/ Cf. City of Madison Joint School District No. 8 et. al. v. Wisconsin Employment Relations Commission et. al., 429 U.S. 167, 93 LRRM 2970 (1976).

38/ Cf. Ashwaubenon Schools, Dec. No. 14774-A (WERC, 10/77) at 7-8, which recognizes an employer's "protected right of free speech in public sector collective bargaining", but cautions that such speech "must not constitute bargaining with the employes rather than their majority collective bargaining representative."

City's protected "right to tell their employes what they have offered to their union in the course of collective bargaining." 39/ This case focuses not on an attempt to communicate the results of bargaining, but on whether the City sought to bargain directly with individual employes.

Both the content of the Notice and the context in which it was disseminated establish that the FPC sought to bargain directly with individual officers. As background to the context, it must be noted that general distribution of the substance of FPC meetings is not common. In this case, the Notice was read directly to individual officers at roll call, was distributed to the League of Martin, which does not function as a collective bargaining representative, and was posted on departmental bulletin boards. The Notice was read by supervisory officers at roll call during work time. It is apparent that the City actively sought to directly involve as many individual officers as possible in the January 4, 1990, meeting. That the Notice was read by supervisory officers to regular officers during work time underscores emphatically that an employer/employe, not government/citizen relationship was involved. That the notice was posted on departmental bulletin boards underscores that the January 4, 1990, meeting was something more than a "town meeting" conducted by a governmental entity seeking the individual views of its citizenry.

The content of the Notice underscores that the City did more than provide a public forum on a matter of public concern. The purpose of the meeting itself was an active search for "input from all interested . . . persons concerning expansion of the substance abuse testing program to provide for random testing of employees." The Notice expressly addresses "interested persons", a class clearly including, if not restricted to, individual police officers. It is apparent from the context of the Notice that the City took an active role in drawing out the views of individual officers. The "expansion" of the "substance abuse testing program" referred to in the Notice is precisely the sort of modification Article 64 compels bargaining on "regarding those aspects of the modification which are primarily related to wages, hours and conditions of employment." The Notice goes so far as to solicit the presentation of "recommendations on a program to be developed and implemented." The solicitation of such recommendations is unrestricted, extending to both the need for such a program, as well as the means by which such a program would be effected. In collective bargaining parlance, the Notice sought proposals on both the decision to test randomly and on the impact of that decision.

It is impossible to characterize the Notice and the following meeting as anything other than individual bargaining.

It should be stressed that whether or not the decision to implement a random drug testing program and its impact are mandatory subjects of bargaining is irrelevant to this conclusion. That the Notice may have addressed permissive subjects of bargaining establishes only that the City could not be legally compelled to bargain such subjects. That a subject is permissive does not act as a license for the City to circumvent the MPA as the majority representative of police officers for collective bargaining purposes.

39/ Ibid.

Nor will the record support a conclusion that the MPA waived its right to bargain such subjects. Bargaining may be waived by conduct or by contract. 40/ Such a waiver must be clear and unmistakable. 41/ Whatever may be said of the scope of Article 64, it must be interpreted as mandating, not waiving, bargaining on any proposed expansion of drug testing falling within its scope. Nor can it be said the MPA has, by conduct, waived its right to bargain regarding the substance of the Notice. The record does indicate the MPA refused to bargain an expansion of the drug testing program during the term of the 1989-90 labor agreement. The time of such a refusal is not, however, apparent on the record. Nor is any relationship of such a refusal to the issuance of the Notice apparent. Thus, there is no clear and unmistakable evidence of a waiver by the MPA of the right to bargain the subjects encompassed by the Notice. Finally, it must be stressed that such a waiver, even if present, would not establish that the City had acquired the right to bargain with individual employes instead of their majority representative.

The remedy entered above uses traditional means to address the effects of the individual bargaining, and does not require extensive discussion. To directly address the effects of the City's circumvention of the MPA, the Order entered above requires the City to disseminate Appendix A in the same fashion as it disseminated the Notice itself.

Dated at Madison, Wisconsin, this 3rd day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________________
Richard B. McLaughlin, Examiner

40/ Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

41/ Ibid.