STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KAUKAUNA FIREFIGHTERS ASSOCIATION LOCAL UNION NO. 1594, IAFF, AFL-CIO	:	
Complainants,	:	Case 61
	:	No. 45425 MP-2461
vs.	:	Decision No. 27027-A
CITY OF KAUKAUNA (FIRE DEPARTMENT)	:	
Respondent.	:	

Appearances:

Lawton & Cates, S.C., 214 West Mifflin Street, Madison, WI 53703 by Mr. Richard V. Graylow, Attorney at Law, appearing on behalf of the Complainant Kaukauna Firefighters Association.

Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-3101 by Mr. Mark F. Vetter, Attorney at Law, appearing on behalf of the Respondent City of Kaukauna.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner:The Kaukauna Firefighters Association, Local Union 1594, IAFF, AFL-CIO (hereinafter referred to as the Complainant or the Union) filed a complaint of prohibited practices on March 6, 1991 with the Wisconsin Employment Relations Commission (hereinafter referred to as the Commission) alleging that the City of Kaukauna (hereinafter referred to as the Respondent or the City) had violated Sections 111.70 (3) (a) 1, 4 and 5 of the Municipal Employment Relations Act (MERA) by unilaterally changing the working hours of firefighters. The Commission appointed Daniel Nielsen, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07, Wis. Stats. The City submitted an Answer to the complaint on November 9, 1991, denying that it had committed prohibited practices, and alleging that the Union had waived its right to file a complaint by failing to proceed to arbitration under the contractual grievance procedure, failing to demand bargaining over the issue in negotiations, and acquiescing in past work schedule changes. A hearing was held on November 21, 1991 in Kaukauna, Wisconsin at which time the parties were afforded full opportunity to present such evidence and arguments as were relevant. At the hearing, the Union withdrew its allegation that the City had violated Section 111.70(3)(a) 5 and that portion of the Complaint was dismissed. A transcript was made, and was received on January 10, 1992. The parties submitted briefs and reply briefs, the last of which were received on February 29, 1992,

whereupon the record was closed. The Examiner, having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Kaukauna Firefighters Association, Local 1594, IAFF, AFL-CIO, hereinafter referred to as either the Complainant or the Union, is a labor organization, maintaining its principal offices c/o Mr. Paul Hirte, President, IAFF Local 1594, 201 West Second Street, Kaukauna, WI 54130.

2. The City of Kaukauna, hereinafter referred to as either the Respondent or the City, is municipal employer providing general governmental services to the people of Kaukauna, Wisconsin, and maintaining its principal offices at the City Hall, 201 West Second Street, Kaukauna, WI 54130.

3. Among the municipal services the City provides is fire suppression and prevention through the operation of a Fire Department. The Union is the exclusive bargaining representative for members of the Fire Department, excluding the Assistant Chief and Chief. At all times relevant this dispute, the City and the Union have been parties to a collective bargaining agreement. The collective bargaining agreement for calendar years 1988 and 1989 provided as follows:

AGREEMENT

***

ARTICLE 3 - Hours of Work

A. All Fire Fighters shall be assigned to one of three Platoons of equal strength. Each Platoon shall work a different 24 hour shift, each beginning at 7:30 a.m. and ending at 7:30 a.m. the following morning. This plan, commonly referred to as the "California Plan" with an average work week of 56 hours, shall consist of 24 hour shifts scheduled in nine-day cycles as follows: First day, on duty; second day, off duty; third day, on duty; fourth day, off duty; fifth day, on duty; sixth day through ninth day, off duty.

B. A Fire Fighter of one Platoon may change his working day or part thereof with a fellow Fire Fighter on another Platoon for adequate reason, provided he has the consent of his fellow Fire Fighter and the consent of his Fire Chief of the officer in charge of his Platoon. Should the Fire Fighters who have agreed to work as a result of a change in work day as provided above be absent on said day for purposes allowed in Article 16, Sick Leave, of this Agreement, shall be charged the required amount of sick leave (ie., Employee A agrees to work for Employee B. Employee A is sick and cannot work for B on the agreed day, then only Employee A is charged

sick leave.)

C. It is understood that if and when a Fire Fighter exchanges a working day or part thereof or who leaves work during his duty day, and is replaced by a fellow Fire Fighter, the replacement Fire Fighter shall not be paid overtime as a result of such exchange or replacement.

D. In the event that emergencies, vacation, sickness, or other unforeseen conditions in the judgment of the Chief require that off-duty full-time personnel be called in, such requirements shall be filled in accordance with the posted seniority lists, the qualified employee next in line on the seniority list being called first.

1. In the event that all available employees are called and such vacancy cannot be filled by assigning the same to the employees refusing same, such vacancies shall be filled by assigning the same to the employees with the least seniority. Employees who refuse overtime shall forfeit overtime for that cycle and will not be eligible again until that cycle has been completed. In cases where the contact cannot be made with an employee, he will be bypassed for that day but will again be eligible for the next vacancy or emergency.

***

ARTICLE 23 - Grievance Procedure

Both the Union and the City recognize that grievance and complaints should be settled promptly at the earliest possible stage and that the grievance process must be initiated within twelve (12) days (Saturdays, Sundays and holidays excluded) of the incident. Any grievances not reported or filed within twelve (12) days (Saturdays, Sundays and holidays excluded) shall be invalid.

A. Grievances related to this Agreement, wages, hours and conditions of employment, may be processed in accordance with the grievance procedure.

B. Nothing contained herein shall be construed to divest the Police and Fire Commission of the City of any rights, responsibilities or authority provided by Section 62.13 of the Wisconsin State Statutes.

C. Any employee may process his grievance as outlined in this Article and shall have the right to representation by the Union in conferences with the City.

***

Step 3. The grievance shall be presented in writing to the City Attorney. Within five (5) days (Saturdays, Sundays and holidays excluded) of the receipt of the grievance, the City Attorney shall hold a hearing with the concerned parties.

Within five (5) days (Saturdays, Sundays and holidays excluded) after the hearing the City Attorney shall notify the parties in writing of the determination. The aggrieved shall process his grievance as outlined in Step 3 within five (5) days (Saturdays, Sundays and holidays excluded) or the matter shall be considered resolved by all parties.

Step 3. Arbitration: The arbitrator, in arriving at his determination shall rule only on matters of application and interpretation of this Agreement. The findings of the arbitrator shall be final and binding on both parties. Arbitration may be initiated by either party serving upon the other notification in writing of intent to proceed to arbitration.

a. The party initiating the arbitration shall present in writing to the Wisconsin Employment Relations Commission the grievance for purposes of arbitration as provided in Wisconsin State Statutes. The decision of said arbitrator shall be binding on all parties, subject to judicial review.

***

ARTICLE 25 - Work Rules

a. The City may adopt rules for the operation of the department and the conduct of its employees, provided such rules currently in effect are furnished to the Union on the date of this contract. In the event that there are any changes in such rules during the term of this contract, notice of such changes shall be given in writing to the President of the Union at least thirty (30) days prior to the effective date of such change.

***

ARTICLE 26 - Waiver of Rights

Neither party to this Agreement by such act at the time hereof or subsequent hereto agrees to or does waive any rights possessed by it or them under our State and Federal laws, regulations or statutes. In the event any clause or portion of this Agreement is in conflict with the statutes of the State of Wisconsin governing municipalities or other statutes such clause or portion of the Agreement shall be declared invalid and negotiations shall be instituted to adjust the invalidated clause or portion thereof.

ARTICLE 27 - Binding Clause

It shall be inherent in this Agreement that all articles and the provisions thereof are binding on both parties to the Agreement. (Except in case where a provision may be invalidated by a law or other jurisdiction as provided in Article 26 of this Agreement.)

***

ARTICLE 30 - Rights of Employer

Subject to other provisions of this contract, it is agreed that the rights, functions and authority to manage all operations and functions are vested in the employer and include, but are not limited to the following:

A. To prescribe and administer rules and regulations essential to the accomplishment of the services desired by the City Council.
B. To manage and otherwise supervise all employees in the bargaining unit.
***
E. To maintain the efficiency and economy of the City operations entrusted to the administration.
F. To determine the methods, means and personnel by which such operations are to be conducted.

***

4. Prior to April of 1985, there was no written work schedule for firefighters. The timing of the workday, including breaks and quitting times, varied according to the daily needs of the department. On April 29, 1989, then-Fire Chief Thomas Roberts issued a written work schedule, stabilizing and formalizing the work day:

ATTENTION: ALL FIRE DEP'T. PERSONNEL

Effective immediately the following daily work schedule will go into effect.

7:30 AM (on or before)	Report for duty and shift personnel change.
7:30 AM - 8:AM.	Idle time - (T.V. permissable until 8:00 AM.)
8:00 AM - 8:30 AM.	Housekeeping Chores
8:30 AM - 9:15 AM	Maintenance checks of all trucks and equipment. (First of the month maintenance may take longer.) Officer discretion
9:15 AM - 9:30 AM	Coffee break

9:30 AM - 11:30 AM	Training-Pre-planning, etc., and odd jobs in the dep't. (Criteria explored will be at the discretion of the officer in charge)
11:30 AM - 1:00 PM	Lunch Hour (T.V. permissable only from 12:00 Noon until 1:00 PM)
1:00 PM - 1:15 PM	Scheduling and planning of the afternoon criteria.
1:15 PM - 3:30 PM	Training-Pre-planning, etc., and odd jobs in the dep't. (Criteria explored will be at the discretion of the officer in charge)
3:30 PM - 4:30 PM	Cleaning of all vehicles used on runs for that day. If there were no runs that day consequently no cleaning of vehicles. Therefore activity during this period of time will be up to the discretion of the officer in charge, but all line personnel must be kept busy.
4:30 PM - and after	Idle Time (T.V. permissable only after 4:30 PM)

***

This schedule was issued without prior negotiations or consultations with the Union. No demand was made to bargain over the schedule, and no grievance was filed over the issuance of the schedule.

5. In 1988, Thomas Jansen became the Fire Chief. On January 12, 1989, Jansen issued a revised work schedule for firefighters:

ATTENTION: ALL FIRE DEP'T. PERSONNEL

SUBJECT: DAILY WORK SCHEDULE

7:30 AM (on or before)	Report for duty and shift personnel change.
7:30 AM - 8:AM.	Idle time - (T.V. permissable until 8:00 AM.)
8:00 AM - 9:15 AM.	Housekeeping Chores, plus truck room floor will be swept and mopped, Monday thru Friday. Maintenance checks of all trucks and equipment. (First of the month maintenance may take longer.)
	Officer discretion
9:15 AM - 9:30 AM	Coffee break
9:30 AM - 11:30 AM	Training, pre-planning, etc., and odd jobs in the dep't. (Criteria explored will be at the discretion of the officer in charge)

11:30 AM - 1:00 PM	Lunch Hour (T.V. permissable only from 12:00 Noon until 1:00 PM)
1:00 PM - 4:00 PM	Training, pre-planning, etc., and odd jobs in the dep't. (Criteria explored will be at the discretion of the officer in charge)
4:00 PM - 4:30 PM	Break time.
4:30 PM - and after	Idle Time (T.V. permissable only after 4:30 PM)

The primary effect of this schedule change was to reduce working time by 30 minutes, by scheduling a break from 4:00 p.m. to 4:30 p.m. This schedule was issued without prior negotiations or consultations with the Union. No demand was made to bargain over the schedule, and no grievance was filed over the issuance of the schedule.

6. In 1990, the City and Union were engaged in negotiations over a successor to the 1988-89 collective bargaining agreement. From the commencement of negotiations through June 27, 1990, neither party presented any proposals concerning hours of work or work schedules. The parties were scheduled for mediation with a staff member of the Wisconsin Employment Relations Commission on June 28, 1990.

7. For many years the City had employed an Assistant Chief/Fire Inspector. With this officer's retirement in 1990, the Chief decided to replace the position with a full-time training officer and to transfer fire inspection duties to the rank and file firefighters. In order to make more time available for training and inspections, Chief Jansen issued a new work schedule for firefighters on June 18, 1990:

ATTENTION: ALL DEPARTMENT PERSONNEL

FROM: THOMAS K. JANSEN, FIRE CHIEF

Re: DAILY WORK SCHEDULE

Effective August 1, 1990, the following revised work schedule shall be implemented:

07:30 AM……	Report for Duty/Shift Change.
07:30 - 07:45…….	Idle time - (Information Exchange, etc.)
07:45-08:15…….	Housekeeping Assignments in living quarters, i.e., vacuuming, drymopping, lavatory.
08:15-09:00……	Apparatus check and maintenance work.
09:00-09:15……	Coffee break
09:15-11:45……	Assigned work/training schedule for the day. May include hose testing, training classes, fire inspections, public education courses, etc.

11:45-13:00……	Lunch.
13:00-15:15……	Continue with assigned work/training schedule.
15:15-15:30……	Coffee Break.
15:30-16:30……	Clean apparatus room, vehicles, etc.
16:30--- ……	Idle time.

This schedule was issued without prior negotiations or consultations with the Union. The effect of this schedule was (1) to reduce "Idle time" beginning at 7:30 a.m. from 30 minutes to 15 minutes; (2) reduce the Lunch Hour from 90 minutes beginning at 11:30 a.m. to 75 minutes beginning at 11:45 a.m.; and (3) to change the afternoon break from 30 minutes (4:00-4:30 p.m.) to 15 minutes (3:15-3:30 p.m.), thus increasing actual work time by 45 minutes per day.

8. On June 28th, the parties met with WERC mediator William Houlihan to continue their negotiations over the 1990-91 contract. Neither party made any proposal regarding work schedules or hours of work, nor was any deman d for bargaining over the proposed work schedule made by the Union. A tentative agreement was reached during the June 28th mediation, leaving the portions of the contract set forth in Finding of Fact #3 unchanged. The tentative agreement was ratified by the Union on July 23, 1990 and by the City Council on August 7, 1990. The new contract was signed on August 10, 1990.

9. A grievance was filed on August 8, 1990 challenging the City's right to unilaterally changed the work schedule:

> STATEMENT OF GRIEVANCE:
>
> (CIRCUMSTANCES OF FACTS): According to a memorandum from chief Jansen, implemented August 1, 1990, our daily working time was increased by 45 minutes.
>
> CONTENTION: The memorandum, implemented August 1, 1990, was a unilateral change in out daily working hours by the Chief without any explanation or input from Local 1594.
>
> SETTLEMENT OR CORRECTIVE ACTION DESIRED: Return to the original daily schedule of working hours.

The Chief responded to the grievance on that same day, stating that the change was intended to provide more time for training and fire inspections, and was not in violation of the contract. On August 23rd, the Union requested a second step hearing before the City Attorney. The hearing was held on September 27th, and the City Attorney issued a written decision the next day, denying the grievance. The City Attorney's decision reasoned that there was no provision of the contract setting forth a daily work schedule, but that the management rights clause gave the City the right to change the work schedule, so long as the Chief complied with the notice provisions of Article 25. He dismissed the Union's claim that there was any past practice established by the existence of the former work schedule, instead concluding that the

past practice had been to establish work schedules without prior consultation with the Union.

10. James G. Kiffe, the Secretary-Treasurer of the Union, wrote to the Fire Chief on October 5th:

> Dear Chief,
>
> This letter is notification of Local 1594's intent to proceed to arbitration or whatever course is required to resolve our disagreement with the recent increase in our daily working time.

11. After the Union sent its notice of intent to arbitrate, Robert Nack, the President of the Union in 1990, consulted with Charles Buss, a Vice-President of the Professional Firefighters of Wisconsin regarding the change in work schedules. He told Buss the City Attorney had advised the Union that there was no basis for a grievance in the contract language. Buss advised him that the Union could also proceed with a complaint of prohibited practices. The Union thereafter dropped its efforts to arbitrate the dispute, and filed the instant complaint on March 6, 1991.

12. The work schedule announced by Fire Chief Jansen on June 18, 1990 and implemented on August 1, 1990 alters the the timing and duration of breaks during the work day.and primarily relates to wages, hours and conditions of employment.

13. The provisions of the collective bargaining agreement, specifically Articles 3, 25 and 30, do not clearly and unequivocally address the establishment or the content of the daily work schedule and the timing and duration of breaks during the work day.

14. The Union was given clear and unequivocal notice of the City's intent to change the work schedule, effective August 1, 1990, when the Fire Chief posted a memo to that effect in the Fire Department on or about June 18, 1990.

15. The Union made no demand for bargaining over the decision to implement the new work schedule, nor did it demand bargaining over any impact of that decision. Moreover the Union made no proposal regarding hours of work in the contract negotiations held on June 28, 1990, ten days after receiving the clear and unequivocal notice of the City's intention to change the Fire Department work schedule.

16. The Union did not waive bargaining over the establishment or the content of the daily work schedule and the timing and duration of breaks during the work day by agreeing to Articles 3, 25 and/or 30 of the collective bargaining agreement.

17. By its inaction as described in Finding of Fact #15, the Union has waived bargaining over the change in work schedule implemented by the City on August 1, 1990.

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

CONCLUSIONS OF LAW

1. The work schedule for firefighters in the City of Kaukauna is a mandatory subject of bargaining within the meaning of Section 111.70(1)(a) and (3)(a)4 of MERA.

2. The City of Kaukauna did not violate Section 111.70(3)(a) 1 or 4 MERA by unilaterally implementing a new work schedule in the Fire Department on August 1, 1990 because the Union waived bargaining over the issue when it failed to make any timely demand for bargaining over the change or proposal on the subject in contract negotiations.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the instant complaint be, and the same hereby is, dismissed in its entirety. 1/

Dated at Racine, Wisconsin this 15th day of August, 1992:

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By_____
Daniel Nielsen, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in section 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 orders 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 in 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 new 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 an exceptional delay in receipt of a copy of any findings or order it may extend the time for another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER DISMISSING COMPLAINT

Background:

There is no dispute over the facts leading to this complaint. The City and the Union are parties to a collective bargaining relationship. Prior to 1985, there was no written work schedule for firefighters. In April of that year, the Fire Chief issued a memo establishing a daily schedule of duties and breaks. This was done without prior consultation with the Union, and without subsequent protest. The schedule was unilaterally changed in 1989, again without bargaining or protest.

The Fire Chief unilaterally changed the work schedule for firefighters via memo in the summer of 1990, increasing the amount of work time by 45 minutes through the shortening of scheduled breaks and idle time. Union members were notified of the change on June 18th. The memo said the change in schedule would be effective on August 1st. At the time of the memo, the parties had not yet reached agreement on a 1990-91 labor agreement. They were scheduled for mediation with William Houlihan on June 28th.

The City and the Union met with Houlihan on the 28th. Up to that point in negotiations, hours of work had not been an issue and no proposals had been made on the subject. During the mediation, agreement was reached on the outstanding issues. Neither the Union nor the City made any proposal on hours of work, and no demand for bargaining was made regarding the announced change in work schedules. The Union ratified the new contract in late July and the City on August 7th. The next day, the Union filed a grievance over the change in work schedules. The 1990-91 contract was signed on the 10th.

The City denied the grievance, and the Union gave notice of its intention to "proceed to arbitration or whatever course is required" to resolve the dispute. On the advice of an official of the state union, the grievance was not submitted to arbitration, and the instant complaint was filed, alleging interference with protected rights, a refusal to bargain and violation of the collective bargaining agreement. The latter claim was dismissed at the parties' request during the course of the hearing.

The Arguments of The Parties:

The Union takes the position that the changes in work schedule ordered by the Fire Chief in the summer of 1990 are mandatory topics of bargaining, and should have been bargained with the Union. The City does not deny the mandatory nature of the work schedule, but alleges that the schedule constitutes a work rule, and that the collective bargaining agreement sets forth a specific procedure for changing work rules. Article 25 requires only that 30 days notice be given to the Union of any proposed change. This

having been accomplished, the City had no obligation to bargain over the change in work schedules.

Assuming that the new schedule was subject to mandatory bargaining, the City asserts that the Union waived its right to bargain. Under Wisconsin law, a party which has notice of a change in working conditions but fails to demand bargaining waives the right to bargain. Here the Union knew of the change on June 18th. The parties were still in negotiations over their contract, and had a mediation session set for 10 days after the notice was given. The Union never demanded to bargain, and settled and ratified the contract without addressing the work schedule issue. No objection was made to the proposed new schedule for seven weeks, until the grievance was filed one week after it had gone into effect.

The City also asserts waiver of the right to bargain over the implementation of new work rules by bargaining to agreement over the subject. The collective bargaining agreement contains, at Articles 3, 25 and 30, provisions which clearly vest in management the right to adopt and change work rules. This is buttressed by the fact that the City has twice before unilaterally implemented work schedules in the Fire Department, without any objection by the Union. This acquiescence demonstrates the Union's understanding that the City possessed the contractual right to change the work schedule.

Finally, the City asserts that the Union waived its right to file a prohibited practice charge by filing a grievance over the matter, and allowing it to be settled through inaction after the second step. The grievance procedure provides that:

> The aggrieved shall process his grievance as outlined in Step 3 [Arbitration] within five (5) days (Saturdays, Sundays and holidays excluded) or the matter shall be considered resolved by all parties. [Emphasis added]

The Union failed to proceed to arbitration after the grievance was denied at the second step. By the terms of the contract, the complaint must be considered resolved in favor of the City's position.

The Union disputes the existence of any waiver. Waiver is not to be lightly inferred, and the employer must prove a clear and unmistakable waiver. Silence in the contract, or general language in a a management rights clause will not suffice, and in the absence of clear contract language waiving a right, the extrinsic evidence offered to show an intent to waive statutory rights must itself be clear and unmistakable. The contract here is utterly silent about the work schedule, other than to establish a twenty four hour rotation, and the parties conceded that no bargaining had ever been done on the subject since at least 1980.

The Union dismisses any suggestion that the failure to object to past work schedules constituted acquiescence in management's right to issue them. The testimony demonstrated that the lack of objection flowed from the fact that these schedule changes improved the

working conditions of unit employees, and thus there was no reason for the Union to exercise its right to object.

The Union asserts that the decision not to arbitrate the grievance and instead proceed with a prohibited practice complaint was premised upon the City Attorney's assertion that there was no basis for a grievance in the contract. The City cannot through its agent represent that the grievance is without merit, and then argue that the grievance should have been pursued. In any event, the grievance was not dropped after the second step. The Union's statement at the time reserved its rights:

> Dear Chief,
>
> This letter is notification of Local 1594's intent to proceed to arbitration or whatever course is required to resolve our disagreement with the recent increase in our daily working time. [Emphasis added]

Finally, the Union argues that a formal demand to bargain would have been futile. The City unilaterally implemented its new schedule, and when the Union protested via a grievance, the Chief immediately responded that he was "staying with the time change."

Discussion:

The question in this case is whether the Union waived its right to bargain over daily work schedules and the timing and duration of breaks during the work day by (1) entering into a collective bargaining agreement with the City that addresses those issues; (2) failing to pursue to arbitration a grievance over the institution of a new work schedule; or (3) failing to make a timely demand for bargaining over the change in work schedules after receiving notice of the change form the Fire Chief.

A waiver of bargaining must be established by clear and unmistakable evidence. 2/ In this case, the City's contention that the Union waived bargaining by embodying the subject of work schedules in the collective bargaining agreement and/or by declining to pursue its grievance over the matter to arbitration, is found to be unpersuasive. Unlike cases such as Washington County (Dept, of Social Services) 3/ where the Union had bargained to agreement over the County's right to assign overtime and compensation for working outside the normal day, but later wished to bargain additional impact items related to the subject, neither the contract language nor

---

2/ City of Milwaukee (Police Dept.), Dec. Nos. 14873-B, 14875-B and 14899-B (WERC, 8/80) at page 38.

3/ Dec. No. 23770-B (Crowley, 3/87); See also Racine County (Sheriff's Dept.) Dec. No. 26288-A (Shaw, 1/92)

the bargaining history in this case clearly demonstrates an agreement to vest in the City the unilateral right to alter the timing and duration of breaks during the work day. This is not to say that the contract prohibits such changes by the City. The undersigned finds nothing in the contract language to prevent a change in daily work schedules. Silence, however, does not constitute a waiver of bargaining absent some evidence that the parties expressly considered the subject and intended by their silence to acknowledge the employer's right. 4/ Here the undisputed history of bargaining over work schedules is that there has been none, at least since 1980.

As to the claim that the Union settled the matter in favor of the City's position by failing to take its grievance to arbitration, the undersigned agrees that the failure to process the grievance after October 5th may have extinguished the Union's contractual claim. 5/ The grievance procedure calls for resolution of the grievance in favor of the City if it is not processed to the next step within five days. As noted above, however, the lack of any contractual right to challenge the work schedule does not necessarily bear upon the statutory right to bargain. The parties have agreed at Article 26 of their Agreement that statutory rights are unaffected by the execution of the contract:

> Neither party to this Agreement by such act at the time hereof or subsequent hereto agrees to or does waive any rights possessed by it or them under our State and Federal laws, regulations or statutes.

This does not foreclose a waiver by contract if the bargaining subject is plainly addressed in the Agreement. However, contractual rights are not identical to statutory rights, and if the contract provided no basis for the grievance claim in the first place, the resolution of that claim in favor of the City cannot extinguish the instant complaint.

While the record does not establish any waiver by contract language or by failure to pursue the grievance, the evidence is clear that the Union failed to take any action whatsoever to compel bargaining during the seven weeks between the unequivocal notice by the Chief on June 18th that he would change the daily schedule as of August 1st, and the institution of the grievance 6/ on August 8th. The duty to bargain arises upon a demand for such, and the failure

---

4/ Southern Cal. Edison Co., 248 NLRB No. 142, 126 LRRM 1324 (1987).

5/ The Examiner notes, however, that there is no time limit in the Agreement for advancing the grievance to the WERC once notice of intent to arbitrate has been given, and that both parties have the contractual right to submit the case to the WERC. The effect of the Union's failure to submit the case to arbitration is not completely clear under this language, and the Examiner does not purport by his comments to offer a definitive interpretation of the clause.

6/ This assumes, for the sake of argument, that the grievance constitutes a demand for

to make a timely demand constitutes a waiver by inaction. 7/ The Examiner concludes that just such a waiver by inaction occurred in this case. Not only did the Union allow the City to implement the new work schedule prior to making any protest, it reached agreement on a new labor contract during the period after notice was received and before the schedule was to be implemented. 8/ Thus the Union not only had the right to demand mid-term bargaining over the schedule, it could have invoked the provisions of §111.77 Wis. Stats. to assist it in securing a resolution of any dispute arising in negotiations. By remaining silent for seven weeks, during which a new labor contract was settled and ratified, and the schedule implemented, the Union failed to make a timely demand for bargaining and thus legitimized the City's unilateral decision to change the timing and duration of breaks during the work day.

The Union asserts in its reply brief that a formal demand for bargaining would have been a vain and futile act, because the Chief had made up his mind not to hold to the old work schedule. It is well settled that a Union is not required to engage in futile demands for bargaining in order to protect itself from a claim of waiver:

> Waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, including alleged unilateral changes in mandatory subject, except where either the unilateral change amounts to a fait accompli or the circumstance otherwise indicate that the request to bargain would have been a futile gesture. 9/

In this case, contrary to the Union's claim, there is no evidence that demanding to bargain over the new schedule would have been futile. The Chief 's denial of the grievance reflected at most his understanding of the terms of the then-existing, freshly ratified contract. It cannot be interpreted as an indication of what the City's attitude would have been had a demand for bargaining been made prior to implementation of the schedule. As a practical matter, a demand

---

bargaining. However, see City of Antigo, Dec. No. 27108-A (Honeyman, 5/92) at pages 8-9.

7/ See Walworth County, Dec. Nos. 15429-A, 15430-A (Gratz, 12/78) at page 9; City of Appleton, Dec. No. 18451-A (Davis, 9/81) at page 5; City of Stevens Point, Dec. No. 21646-B (WERC, 8/85) at page 8; City of Antigo, supra.

8/ It is possible that the Union's decision not to break its silence on the work schedule until August 8th was in some way connected with the scheduling of the City Council ratification vote on the new contract for August 7th. The fact that there might have been sound tactical reasons for delaying any protest does not excuse the failure to demand bargaining.

9/ Walworth County, supra,, at pages 10-11 (citations omitted); Intersystems Design & Technology Corp., 278 NLRB 759, 121 LRRM 1229 (1986).

to bargain over the timing and duration of breaks in the work day after the notice was received and before contract negotiations were concluded would have been impossible for the City to ignore, given the provisions of §111.77 and the impasse procedures contained therein.

In summary, the Union had notice of the City's intent to change the work schedule at the point in time where it could most effectively have pursued bargaining on the matter. By failing to make any demand for bargaining, the Union waived its right to negotiate the change. Thus, the Examiner has concluded that the City did not violate any of the provisions of MERA, and has dismissed the complaint in its entirety.

Dated at Racine, Wisconsin this 15th day of August, 1992:

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By_____
Daniel Nielsen, Examiner