STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 1054, WISCONSIN RAPIDS FIRE FIGHTERS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF), AFL-CIO, Complainant, vs. CITY OF WISCONSIN RAPIDS, Respondent.	Case 109 No. 48093 MP-2647 Decision No. 27466-A

Appearances:
Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53701-2965, by Mr. Richard V. Graylow, on behalf of the Compla
Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, Wausau, Wiscon

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On September 18, 1992, Local Union No. 1054, Wisconsin Rapids Fire Fighters, I.A.F.F., AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the City of Wisconsin Rapids had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 4 and 5, of the Municipal Employment Relations Act. On November 18, 1992, the Respondent City of Wisconsin Rapids filed a motion to dismiss the alleged violation of Sec. 111.70(3)(a)5, Stats. On November 27, 1992, the Respondent City filed an answer to the complaint wherein it denied it had committed the prohibited practices alleged and raised certain affirmative defenses. The Commission appointed a member of its staff, David E. Shaw, to be the Examiner in the matter. A hearing was held before the Examiner on December 14, 1992, in Wisconsin Rapids, Wisconsin. At the hearing, the Complainant amended its complaint so as to withdraw the alleged violations of Sec. 111.70(3)(a)5, Stats. A stenographic transcript was made of the hearing and the submission of post-hearing briefs by the parties was completed by March 12, 1993. Having considered the evidence and arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The City of Wisconsin Rapids, hereinafter the Respondent, is a municipal employer and has its offices located at 444 West Grand Avenue, Wisconsin Rapids, Wisconsin. The Respondent has a mayor - common council form of government, and at all times material herein, Carl Greeneway has been the Mayor of Respondent. At all times material herein, James Jansky has been the Personnel Director for Respondent. At all times material herein, the Respondent has maintained and operated the Wisconsin Rapids Fire Department, hereinafter the Fire Department or Department, consisting of a number of station houses, and since June 4, 1990, Kenneth Huettl has been the Fire Chief in the Department.

2. Local Union No. 1054, Wisconsin Rapids Fire Fighters, I.A.F.F., AFL-CIO, hereinafter the Complainant, is a labor organization and has as its mailing address 1511 - 12th Street, Wisconsin Rapids, Wisconsin. At all times material herein, William Smith has been President of Complainant. The Complainant is, and has been at all times material herein, the exclusive collective bargaining representative of all regular full-time firefighters in the Department, excluding the Chief and Assistant Chiefs.

3. The Complainant and Respondent were party to a 1991-1992 Collective Bargaining Agreement. That Agreement contained, in relevant part, the following provisions:

> ARTICLE 3
> RESERVATION OF RIGHTS
>
> The Union recognizes the right of the City and the Chief of the Fire Department to operate and manage its affairs in all respects. The Union recognizes the exclusive right of the Chief of the Fire Department to establish reasonable departmental rules and procedures.
>
> . . .
>
> It is understood by the parties that every duty connected within the Fire Department operations, enumerated in job descriptions, is not always specifically described; and it is intended that all such duties shall be performed by the employees.
>
> The Chief of the Fire Department and the Police and Fire Commission reserve the right to discipline or discharge for cause. The City reserves the right to lay off personnel of the Department. The City and the Chief of the Fire Department shall determine work schedules consistent with this Agreement and establish methods and processes by which such work is performed. The City and the Chief of the Fire Department shall have the right to transfer employees within the Fire Department in a manner most advantageous to the City under the conditions outlined in Article 5.
>
> The City, the Chief of the Fire Department, and the Police and Fire Commission shall retain all rights and authority to which, by law, they are entitled.
>
> . . .
>
> The Union pledges cooperation in the increasing

of departmental efficiency and effectiveness. Any and all rights concerning management and direction of the Fire Department and the Firefighters shall be exclusively the right of the City and the Chief of the Fire Department, unless otherwise provided by the terms of this Agreement as permitted by law.

The powers, rights, and/or authority claimed by the City are not to be exercised in a manner that will undermine the Union, or as an attempt to evade the provisions of this Agreement, or to violate the spirit, intent, or purpose of this Agreement.

. . .

ARTICLE 5
HOURS (WORKDAYS)

. . .

The duty day for the purpose of training procedures and other regular, routine duties shall terminate at or before 4:30 p.m. Maintenance and servicing of vehicles, equipment and other Fire Department property after 5:00 p.m. shall be limited to items necessary for efficient response to alarms. Apparatus room floors shall be made reasonably safe and dry in all areas utilized by personnel in response to alarms. The balance of the tour of duty shall be to provide service in matters of responding to emergency and non-emergency calls.

. . .

ARTICLE 7
OVERTIME

Overtime is defined as time worked before or after a regularly scheduled work shift. Overtime will be paid for all hours worked over one hundred fifty-nine (159) hours in a twenty-one (21)-day work cycle. All Firefighters who are requested to attend school on off-duty time will be compensated at the overtime rate for actual hours spent in session, plus travel time. Other time spent away from home is not compensable.

. . .

ARTICLE 19
GRIEVANCE PROCEDURE

DEFINITION OF A GRIEVANCE

The procedure under this Article provides an orderly method to present and settle grievances (not involving wage rates and hours of work as such) which may arise between the Union and the City as to the meaning, application of, or compliance with, the provisions of this Agreement. It is a further purpose of this grievance procedure to assure observance of the terms and work relationship set forth in this Agreement. The grievance procedure is available to the

Union and is limited to matters covered by this Agreement.

The purpose of the grievance procedure shall be to settle all grievances between the Fire Department and the Union, the City and the Union, or any member thereof.

The steps of the procedure shall be as follows:

. . .

STEP 4. If the grievance is not settled at the third step of the grievance procedure, the Union, within ten (10) days (Saturdays, Sundays and holidays excluded) of receipt of the written determination, shall submit the grievance to an arbitrator and file a copy of same with the Employee Relations Department. The arbitrator shall be selected by the Wisconsin Employment Relations Commission. The decision shall be final and binding by all parties except for judicial review. The cost of the arbitration shall be borne equally by the City and the Union. However, expenses relating to the calling of witnesses or the obtaining of depositions or any other similar expense associated with such proceedings shall be borne by the party at whose request such witnesses or depositions are required. All filing fees and costs related thereto shall be the responsibility of the party filing the request.

. . .

ARTICLE 21
RULES AND REGULATIONS

The Rules and Regulations of the Wisconsin Rapids Fire Department are hereby made a part of this Agreement.

ARTICLE 22
AMENDMENT PROVISION

This Agreement is subject to amendment, alteration, or addition only by subsequent written agreement between, and executed by, the City and the Union where mutually agreeable. The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

. . .

ARTICLE 24
NO OTHER AGREEMENT

The City agrees not to enter into any other Agreement, written or verbal, with Firefighters, individually or collectively, which in any way conflicts with the provisions of this Agreement.

. . .

4. In the past in the Department, new firefighters were trained through an apprenticeship program and the Department had a Joint Apprenticeship Committee. In October of 1988 the Department was notified by the State Director of Apprenticeship from the Bureau of Apprenticeship Standards, Department of Industry, Labor and Human Relations (DILHR), that the Bureau was withdrawing approval of the standards of apprenticeship for the Wisconsin Rapids Fire Department on the basis that the apprenticeship program in the Department was not being operated in accordance with the approved standards and that there was not evidence of training being offered in accordance with the approved work schedules. When Huettl became Chief of the Department in 1990, he found that there was very little in the way of training records being maintained by the Department. Huettl concluded that the best way to provide the necessary training for firefighters and to establish training records in the Department was to have people from the Department certified as instructors by having them take an instructor training course from the area technical college. Once the in-house people were trained as instructors they would provide training for the new firefighters who could then become certified as Fire Fighter I and thereby meet the requirements of ILHR 30, Fire Department Health and Safety Standards, Wis. Admin. Code. In December of 1990, the Chief had the following notice posted on Department bulletin boards:

Notice Notice Notice Notice Notice Notice

Anyone interested in taking Instructor Certification course please sign up below. It is a 40 hour course, off duty people will be paid according to the contract rates. Those certified will be expected to help teach the Department training program. I would like to see three men per shift sign up. We can decide the exact

class schedule when the class is ready to start. We will start in January. If you have questions, see the Chief.

#1	#2	#3
Smith /s/	Pluke /s/	Straub /s/
Wondzell /s/	Tracy /s/	Auclair /s/
Larsen /s/	Anderson /s/	Reitz /s/
	Nash /s/	Mertz /s/

On January 9, 1991, Chief Huettl distributed the following memorandum to the members of the Department:

To: Members, Wis. Rapids Fire Dept.
From: Chief Huettl
Subject: Instructor Certification
Date: Jan. 9, 1991

The Fire Training Instructors Certification course will begin on Monday, Jan. 14th., at Station 11. The MSTC instructor will be Bernard Binning of Marshfield. There will be six 6 hour sessions, with a test upon completion. Class dates are January 14, 16, 21, 23, 28th and Feb. 6th, all beginning at 09:00.

The following personnel have indicated they will take part.

#1	#2	#3
Smith	Pluke	Straub
Wondzell	Tracy	Auclair
Larsen	Anderson	Reitz
	Nash	Mertz

It will be necessary for our Department members to be co-operative and flexible during this time, and we will do what is necessary to insure these men get the opportunity to get the full benefit of this training.

Chief Huettl

Of the eleven firefighters who signed up for the instructor's course, all but Larsen completed the Instructors Certification course. The classes for the instructor course were held at Station No. 2 and the firefighters who attended the classes attended either during their duty hours or if they were not on duty, they were paid overtime for the hours in attendance. The costs and expenses of attending the instructor's course were paid for the by Respondent. The classes were six hour sessions held on January 14, 16, 21, 23 and 28, and February 6th, 1991. Those firefighters who took the Instructors Certification course understood that they would be teaching other members of the Department under the Fire Fighter I training program.

5. Respondent and Complainant met on January 2, and again on January 15, 1991 for the purpose of bargaining a 1991-1992 collective bargaining agreement. Sometime after the January 15, 1991 bargaining session, the Complainant petitioned for municipal interest-arbitration (MIA) and an informal investigation session was held with the parties by an investigator from the Commission on March 13, 1991.

6. On March 25, 1991, Chief Huettl caused the following notice to be posted:

> NOTICENOTICENOTICENOTICENOTICE
>
> THERE WILL BE A MEETING OF ALL WISCONSIN RAPIDS FIRE DEPARTMENT INSTRUCTORS AT STATION 2 ON THURSDAY, MARCH 28TH, AT 0800 AM HOURS. WE WILL DISCUSS THE FIREFIGHTER I TRAINING PROGRAM. HOPEFULLY WE CAN GET STARTED EARLY IN APRIL. BRING ALL OF YOUR SUGGESTIONS AND QUESTIONS!!!!
>
> Chief Huettl, 3-25-91

A meeting was held on March 28, 1991 between the Chief and those firefighters who had gone through the Instructors Certification course to discuss how the Fire Fighter I Training Program would be implemented. The training program was implemented in April of 1991. On May 6, 1991, the Union filed a grievance at Step I alleging that violations had occurred on April 16, 23 and 26, 1991. The following set forth the basis of the grievance:

> **DETAILS OF GRIEVANCE:** Two (2) Lieutenants and eight (8) Motor Pump Operators are now preparing and instructing other Fire Department personnel, including Assistant Chiefs.
>
> In the past, the Assistant Chiefs scheduled and led all drills, and when they were on vacation or Holiday, the Lieutenant took over this responsibility. When the Lieutenant assumed this responsibility, he also received the difference between his regular pay and that of Assistant Chief.
>
> **ACTION REQUESTED BY THE UNION:** We realize that the State of Wisconsin adopted IHLER 30 (Safety Standards) and put it into effect April 1, 1991. Because of this the Wisconsin Rapids Fire Department and the City are mandated to follow certain standards, including training.
>
> We feel that because the Fire Department will be receiving compensation through Mid-State Technical College for us doing the instruction, we should be compensated also.

7. At no time during the bargaining sessions on January 2 or January 15, 1991, nor at the March 13, 1991 investigation session, did the Complainant ever make any request to bargain or any proposal to the City for compensation for the instructors for performing training functions. Sometime subsequent to the March 13, 1991 investigation session, the Complainant and Respondent reached agreement on a 1991-1992 collective bargaining agreement which was ratified and eventually signed on May 23 and 24, 1991. In the course of processing the grievance on the instructors, the Complainant proposed as a way of settling the grievance, that the Respondent pay the instructors $20.00 per month. That request was made at the various steps in the grievance procedure and was made to both the Respondent's Personnel Director, Jansky, and to the Respondent's Personnel Committee. The Complainant's request for the additional compensation was discussed, but the parties never came to agreement on it, and the grievance was put on hold for some time. While the grievance was on hold, Jansky at times met with Complainant's representatives to discuss ways in which the matter could be resolved. The Respondent opposed paying an additional $20.00 per month to those who had received the instructor training.

8. On January 31, 1992, Jansky sent the following response to Smith regarding the instructor training grievance:

> January 31, 1992
>
> Mr. William Smith
> President, Local 1054 I.A.F.F.
> 1151 - 22nd Street North
> Wisconsin Rapids, WI 54494
>
> RE: Grievance 4/16/91
> Instructor Training
>
> Dear Bill:
>
> Training is now and has always been an essential part of professional firefighting. It has been a standard practice both within our department and universally that senior firefighters train junior firefighters. The training presently being conducted and which is a matter of this grievance is that of the most basis (sic) and elementary principles of firefighting. The only difference between the present training and past training is that the present training is more formalized in that a standard guideline is being followed and a training record is kept for each firefighter.
>
> The City is not required to provide basic Firefighter I Certification training under ILHR 30. All of our firefighters were grandfathered under the new law. The decision to offer Firefighter I training was made due to the laxity of the department in maintaining training records. The past lack of concern for maintaining records should be a concern on the part of all firefighters in establishing their professional qualifications. In other words, those to benefit by the establishment of a formal and documented training program are those firefighters who cannot now produce evidence that they have Firefighter I credentials.
>
> Those persons who are doing the instruction volunteered to attend the instructor training course. They knew up front the reason for the instructor training and that they would be called upon to train members of the department. The City did not offer or give anyone any indication they would receive any special compensation for instructing. The City has invested a considerable amount of money in training the instructors.
>
> Contrary to the Union's claim the City will not receive any financial windfall from this training. To date, the City has spent approximately $5,600.00 in training instructors. When both parts of the Firefighter I course is completed for all 30 department members, the City will receive reimbursement of $2,010.00.
>
> Troublesome to us is that the instructor's certification was completed in February 1991 and now, almost a year later, no one has completed the

Firefighter I certification. In fact, we are told no one has completed the first part of the program! This training is taking the same form as other programs and activities, to include one for which special pay was attached, and all the City received was the rhetorical excuses as to why it hadn't or couldn't be done.

The Personnel Committee is not in agreement to pay a $20.00 per month bonus to the ten firefighters who have completed the instructor certification course. As previously stated, we feel the training is part of the ongoing duties and responsibilities of all members of the department. The present training, what little has been done, does not require advanced or specialized knowledge or skills, nor is it different than what has been done in the past. The instruction is performed during the firefighter's normal tour of duty, with the instructor being relieved of other duties, and for which the firefighter is already paid. The matter of record keeping is not an onerous duty, nor more difficult than other record keeping responsibilities that exist as part of each firefighter's normal duties.

The City rejects the Union's proposed settlement.

Sincerely yours,

James Jansky /s/
James R. Jansky
Director
JRJ: kv

9. On February 11, 1992, on behalf of the Complainant, Smith sent a request to the Commission to initiate grievance arbitration asking for the appointment of an arbitrator. An arbitration hearing was scheduled in the matter, however, the grievance was subsequently withdrawn. During the fall of 1992, the parties were engaged in negotiations for a 1993 collective bargaining agreement and both parties made proposals regarding compensation for the training instructors, however, agreement was reached on a 1993 contract without the inclusion of a provision for compensation for instructors, the proposals having been dropped in the parties' efforts to settle the contract. On September 14, 1992, Chief Huettl issued the following memorandum:

TO: All Department Personnel

FROM: Chief Huettl

SUBJECT: Firefighter I Training

DATE: September 14, 1992

Effective this date all on-duty personnel are required to participate in Firefighter I training sessions. These training sessions will be conducted starting at 9:00 a.m. and ending at 4:00 p.m. Monday through Friday, and 9:00 a.m. to 11:30 a.m. on Saturday. Such training will be conducted daily until completed. The normal 15-minute rest break in the A.M. and P.M. will be recognized, as well as the normal lunch period. All non-essential duties are cancelled until training is

completed.

Those Firefighters who already hold Firefighter I Certification will be the first to be assigned emergency response calls during hours of training. Other Firefighters who are required to respond to emergencies will be limited to those activities which are in compliance with ILHR Chapter 30.

All Firefighters, regardless of rank, except those who are already certified as Firefighter I, will be required to write the certification examination.

Effective immediately and until all Firefighters have received certification, call ins will be limited to those with certification. A list of those employees with current Firefighter I Certification is attached.

When necessary, personnel from Station #2 will be transferred to Station #1 and Station #2 will be closed.

Attachment

The instant complaint alleging the refusal to bargain on this matter was received by the Commission on September 18, 1992.

10. The Complainant did not demand to bargain with Respondent with regard to the subject of compensation for instructors providing the Fire Fighter I training prior to Respondent implementing the training program and while it had the opportunity to do so during negotiations on the 1991-1992 Agreement. Complainant and Respondent did bargain with regard to compensation for instructors during their negotiations on a successor agreement.

11. The following are the job descriptions for Motor Pump Operator and Lieutenant, respectively, in the Department:

MOTOR PUMP OPERATOR

Definition of Class

This is responsible, general duty firefighting work in the protection of life and property through combating, extinguishing and preventing fires, and operating firefighting apparatus.

Work involves responsibility for the operation of an assigned piece of firefighting equipment, either a pumper or aerial ladder truck. Work involves response to alarms with assigned equipment, and operation of pump and other power units at the direction of an immediate supervisor. Work may also involve use of other firefighting equipment in order to perform extinguishment at an emergency scene. A large part of duty time is spent in inspecting and maintaining the equipment, in training new members of the department in the use of equipment, in attending supervised company drills and training sessions, and in maintaining quarters. Work is usually performed under close supervision in accordance with well-defined procedures, or upon assignment received from departmental superiors, both at fires and at the station although the employee is expected to apply

judgment based on experience with apparatus operation. Employee exercises no supervision and work is supervised directly by a company officer through observation.

Examples of Work Performed

Responds to fire alarms with a company, operates pumper or aerial ladder in accordance with instructions from superior officers.

Removes persons from danger, administers first aid to injured persons, performs salvage operations such as throwing salvage covers, pumping water and removing debris; performs all work of Firefighter as required.

Participates in fire drills and attends classes in firefighting, first aid and related subjects.

Performs general maintenance work in the upkeep of fire department property, cleans and washes walls and floors, makes minor repairs, washes and dries hose, paints and otherwise maintains quarters.

Drives pumper or aerial truck, operates pump and auxiliary fire apparatus.

Responsible for maintenance and cleaning of equipment and apparatus.

Performs related work as required.

Knowledges, Skills and Abilities

Thorough working knowledge of the street system and physical layout of the City of Wausau (sic), and surrounding communities.

Thorough working knowledge of the proper operating procedures for fire department pumpers and aerial ladder trucks.

Ability to operate pump and related equipment safely and efficiently in accordance with instructions from a superior officer.

Ability to drive fire apparatus safely and efficiently, while maintaining due regard for the safety of others.

Ability to operate emergency communications equipment when assigned by superior officer.

Minimum Requirements of Training and Experience

Graduation from a standard senior high school supplemented by successful completion of a department training program or apprentice operator, and three years' experience as a Firefighter.

Necessary Special Qualifications

Possession of a valid motor vehicle operator's license issued by the State of Wisconsin.

. . .

DEPARTMENT: Fire
POSITION: Lieutenant

General Function and Responsibility

Under supervision of Ass't. Chief during an assigned shift to provide necessary fire department activities for the prevention, control and inspection of fires and emergency life saving practice.

During the absence of the Ass't. Chief he is charged with his duties.

Type of work performed

1. Supervises the operation of the stations and on the fire scene in the absence of the Ass't. Chief and the Fire Chief.
2. Prepare and conduct training sessions in fire fighting and life saving practices.
3. Maintain equipment inventory records and any other records related to the operation of the station.
4. Conduct tours of the fire department facilities and cooperate with civic groups and schools in fire prevention activities.
5. Perform other related work as required.

Education, Training and Experience Requirements

Graduation from high school supplemented by training in modern fire prevention and control methods and emergency life saving methods. Knowledge of the municipal ordinances and state laws related to fire prevention and control. Ability to provide technical training to a small group of men and supervise their activities.

A minimum of six years of experience in fire prevention and control, at least five of which have been in the rank of a firefighter.

The training of other firefighters is fairly within the scope of employment of Motor Pump Operators and Lieutenants in the Department.

12. On January 10, 1992, Respondent's Mayor, The Honorable Carl Greeneway, sent the following Memorandum to Respondent's aldermen:

> TO: All Aldermen
>
> FROM: Mayor Greeneway
>
> SUBJECT: New City Policies
>
> DATE: January 10, 1992
>
> Enclosed is a list of policies that I have referred to the Legislative Committee for discussion. I feel there is a need to correct some past practices supposedly that have taken place in the past.
>
> I have been put on notice that the firefighters are prepared to lobby long and hard against item #3. I have a strong feeling that City policies should pertain to all departments and all individuals.
>
> If you have any questions about these policies, please call me or come in for discussion.
>
> CGG /s/
> CGG: kv
>
> Enclosure

Attached to said Memorandum was a draft of the Mayor's policies which included, in relevant part, the following:

> 3. No City buildings or facilities will be used by any City employees for cleaning or maintenance of their personal property, such as cars, trucks, etc.

The parties stipulated that on or about January 16, 1992 the Mayor issued a directive regarding the aforesaid policy regarding use of City facilities. At hearing, the parties stipulated that for at least 20 years prior to that time, the firefighters in the Department had been allowed to clean, wash and oil their personal vehicles, boats, and recreational vehicles during their off-duty time during that part of their on-duty day when they were not actively working while at the station to which they were assigned.

13. On February 7, Jansky issued the following memorandum to the President of the AFSCME Local 1075, the bargaining representative for the Respondent's street, park and wastewater employes:

> TO: Dave Bodette, President, Local 1075
> Paul Dachel, Secretary, Local 1075
> All Street, Park, Wastewater Employees
> All Bulletin Boards
>
> FROM: James R. Jansky
>
> SUBJECT: Use of City Equipment and Buildings
>
> DATE: February 7, 1992

> Effective Monday, February 17, 1992, the City will enforce Article 20, Subsection N, of the Labor Agreement which reads:
>
> > "No employee shall be allowed to use the facilities of the City Garage, nor tools owned by the City, for personal business at any time."
>
> This includes all City buildings and all City equipment. It also prohibits employees from parking their own vehicles in City-owned buildings.
>
> JRJ /s/
> JRJ: kv

Shortly thereafter, a meeting was held between the Mayor, Jansky, Chief Huettl and members of the Complainant's bargaining committee for the purpose of discussing the implementation of the directive discontinuing the use of City facilities by employes for washing, etc., their personal vehicles, boats and RV's. At that meeting, the Complainant's representatives raised a number of items that they wished to have clarified or desired to continue regarding the use of City facilities. Those matters were discussed, item by item, and certain clarifications were made in the policy regarding those items. Respondent's representatives at the meeting took the position that the Mayor and the Chief had the authority to implement such a policy pursuant to state statutes and the parties' Collective Bargaining Agreement. As a result of that meeting, Chief Huettl issued the following notice of the policies with the modifications and clarifications made at the meeting:

DRAFT OF POLICIES

. . .

3. No City buildings or facilities will be used by any City employees for cleaning or maintenance of their personal property, such as cars, trucks, etc.

. . .

This policy is not intended to curtail all activities. Common sense should prevail.

Projects where injury is probable should not be allowed.

Cars, trucks, boats, RV's may not be washed or worked on city property.

Example --- Toy project, Wheelchairs, Walkers, crutches, paper work, fishing gear would be allowed. Also, if an employee's vehicle doesn't start, they may use an extension cord and battery charger to start it.

If individuals have doubts, check with shift Officer and Assistant Chief, If doubt remains, ask Chief, If doubt still remains, we will check with city hall.

14. On February 10, 1992, the Mayor ordered the Chief to implement the new policies and the Complainant filed a grievance regarding the implementation of the new policy prohibiting the use of City facilities to wash employe's vehicles, etc. The basis for the Mayor's new policy in that regard was the discovery that a member of the Respondent's street department had utilized blasting caps that were the property of Respondent in his private business and the Mayor wanted to avoid similar uses of other City property as well as to avoid potential injuries on the job for non-job-related activities.

15. The Department Rules and Regulations contain the following provision:

RULES AND REGULATIONS
FOR THE
FIRE DEPARTMENT
OF THE
CITY OF WISCONSIN RAPIDS, WISCONSIN

FORWARD

. . .

3. When necessary, special instructions and general orders will be issued applying as required for the proper operation of this department.

. . .

DEFINITIONS

5. The word "department" shall mean the full-time paid Fire Department of the City of Wisconsin Rapids. The word "Rules" shall mean the rules and regulations of the Fire Department of the City of Wisconsin Rapids. The word "Officer" shall apply to any and every person who has regular and permanent control of Firefighters and the supervision of their work. The word "Headquarters" shall mean the office of the Fire Chief of the Fire Department. The term "Fire Force" shall mean all members employed as Firefighters under the direction of the Fire Chief of the Department. The term "Report" means a report made to headquarters in writing. The word "Notify" shall mean oral notification, usually by telephone or in person or in writing.

6. The Chief of the Fire Department shall be duly authorized and appointed by the Board of Police and Fire Commissioners.

Other officers, when so authorized and appointed by the Chief, shall have titles and rank in the order of the following listings:

Assistant Fire Chief
Assistant Fire Chief - Inspector
Lieutenant

The terms "Officer in Charge" shall include the Assistant Chief or Lieutenant in charge of station shifts or a fireman acting temporarily in the capacity of shift commander by the Authority of the Fire Chief. The term "Immediate Superior" shall mean the company commander wherein it applies to the supervising of the department. The term "through the proper channels" shall mean that a matter, where practicable, is first brought to the attention of the immediate superior who, shall in turn, bring the matter to the attention of the next higher ranking officer and so on until the matter is brought to the attention of the Fire Chief of the Department. (<u>if it is necessary</u>).

16. On February 17, 1992, the Complainant filed a grievance regarding the policy prohibiting the use of City facilities for the washing of personal vehicles, etc. The grievance was not resolved at Step 1 or Step 2 in discussions with the Chief. On February 21, 1992, the Complainant's legal counsel, Richard V. Graylow, sent the following letter to the Mayor:

Dear Mayor Greeneway:

I have received and reviewed the report of the Legislative Committee reflecting its activities of February 6, 1992 as reported to the Council on February 11, 1992. More specifically, I refer you to Item No. 3 which I reproduce in its entirety hereafter.

> 3. A suggest (sic) from the mayor on a policy for use/purchase of city equipment and supplies.
>
> Mayor Greeneway informed the committee that policies are in place already and is informing the alderman of his actions. Gary Nelson explained the liability to the city for employees using city facilities/equipment on there (sic) own time. Chief Huettl explained the policy of letting firefighters use the station for cleaning cars. Jim Jansky explained the contract aspects of this item. Various members of the audience asked questions. Curt Pluke made some statements on what was said and written in public about this item. Chuck Peeters asked the mayor questions about community service projects. Ray Heath made some comments in favor of leaving things as they are. (See Attachment **B)**

I represent the Wisconsin Rapids Fire Fighters and write to you for and in its behalf. I urge you to immediately rescind the action taken as explained in the immediately preceding paragraph.

If in fact you wish to collectively bargain this and related issues, I invite you to do so by having your City Labor Negotiator Mr. Jansky prepare demands while submitting them to the Union.

Thereafter if and when the Union wishes to bargain the subject, it will contact Mr. Jansky directly.

If you wish to respond to this letter, I urge you to do so within the next ten (10) days.

Very truly yours,

Richard V. Graylow /s/
RICHARD V. GRAYLOW

On February 25, 1992, the Mayor responded to Attorney Graylow with the following letter:

Dear Mr. Graylow:

In response to your letter of February 21, 1992, please be advised Local 1054 IAFF has filed a grievance

regarding my policy on use of City equipment and facilities. The grievance is being processed in accordance with the collective bargaining agreement. A meeting on this matter has been scheduled with the Common Council's Personnel Committee.

Sincerely,

Carl G. Greeneway /s/
Carl G. Greeneway
Mayor

17. On March 3, 1992, Complainant met with the Respondent's Personnel Committee for the purpose of discussing the grievance regarding the use of City facilities for the washing of employe's cars, etc. On March 5, 1992, Jansky sent the following letter to Complainant's President, William Smith, regarding the grievance:

RE: Grievance 2/10/92
Use of City Facilities

Dear Bill:

The City feels it has statutory rights to control activities which take place within its facilities. The City believes its directive to regulate the servicing/repair of personal vehicles to include automobiles, trucks, recreational vehicles, boats and motors, etc., are within its rights. The same applies to use of City-owned machinery, equipment, tools, etc.

As discussed in the meeting of March 3, 1992, the policy statement issued does not apply to the recreational, hobby and community service type projects and other personal activities carried on by firefighters during certain portions of their tour of duty.

I am returning your grievance form without any action being taken.

You may proceed to the next step of the grievance procedure if you do not agree with this reply.

Sincerely yours,

James R. Jansky /s/
James R. Jansky
Director

18. Subsequent to Jansky's March 5, 1992 response to the grievance on the use of City facilities, the parties proceeded to final and binding arbitration of the grievance pursuant to the grievance and arbitration procedures in their 1991-1992 Collective Bargaining Agreement. In the arbitration, the parties stipulated that the issues to be decided were:

1. Whether the City violated the labor agreement

> when it issued a directive prohibiting employees from using City facilities and equipment for employee personal use and personal activities?
>
> 2. If so, what is the appropriate remedy?

On September 23, 1992, Arbitrator Dennis P. McGilligan issued his Award in the grievance (attached hereto as Appendix "A", and incorporated by reference herein) wherein he found that the contract language at Article III clearly gives the Chief the right to establish reasonable departmental rules and procedures. He went on to find that the rule was reasonable and made the following findings:

> ". . .the answer to the stipulated issue is NO, the City did not violate the labor agreement when it issued a directive prohibiting employees from using City facilities and equipment for employees personal use and personal activities."

The Arbitrator then held the grievance to be denied.

19. The matter of issuing and implementing work rules is expressly covered in Article 3, Reservation of Rights, of the parties' 1991-1992 Agreement and it gives the Chief the right to unilaterally issue and implement work rules subject to Complainant's right to grieve the reasonableness of such rules.

20. In the fall of 1992, the parties entered into negotiations for a 1993 collective bargaining agreement. In the course of those negotiations, the Complainant made a proposal that its members be allowed to wash their private autos in the fire stations on weekends. In discussing that proposal, Jansky explained that if Respondent's Personnel Committee agreed to such a proposal, the contract settlement would go before the Respondent's Common Council for ratification, and that although the Mayor could veto the settlement, the Council could override the veto. Jansky then indicated that if the Complainant made certain concessions regarding the work day, it was possible the Personnel Committee could sell Complainant's proposal on washing personal cars to the Council. Ultimately, the parties reached agreement on a 1993 collective bargaining agreement and said agreement did not include any provision regarding allowing firefighters to wash their private vehicles in Respondent's facilities.

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

CONCLUSIONS OF LAW

1. Respondent City of Wisconsin Rapids, its officers and agents, had no duty to bargain collectively with Complainant within the meaning of Sec. 111.70(1)(d), Stats., with respect to the imposition of training duties, or with respect to the impact thereof, and to the extent Respondent would have a duty to bargain the impact of its decision, Complainant waived its right to bargain. Therefore, Respondent did not commit a prohibited practice within the meaning of Secs. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

2. Respondent City of Wisconsin Rapids, its officers and agents, had no duty to bargain collectively with Complainant within the meaning of

Sec. 111.70(1)(d), Stats., with regard to the issuance and implementation of the work rule set forth in Finding of Fact 13, as Article 3, Reservation of Rights, in the parties' 1991-1992 Agreement expressly gives the Fire Chief the right to unilaterally establish work rules and therefore, Respondent did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

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

ORDER 1/

That the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 11th day of May, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, 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 the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

CITY OF WISCONSIN RAPIDS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

The Complainant takes the position that the Respondent violated Sections 111.70(3)(a)1 and 4, Stats., by unilaterally implementing the policy prohibiting the washing of employes' personal vehicles in City facilities on City property, and requiring employes to train other employes in the Department

without compensation without first bargaining with the Complainant and by refusing to bargain after Complainant had demanded bargaining.

With regard to any argument that the Complainant has waived its right to bargain by contract language, Complainant asserts that there is a stringent test to be applied in determining whether a union has waived the statutory right by agreeing to contract language. Citing, Metropolitan Edison Company v. N.L.R.B., 460 U.S. 693, 708 (1983); C & P Telephone Company v. N.L.R.B., 687 F.2d 633, 636 (2nd Cir., 1982); International Union, U.A.W. v. N.L.R.B., 802 F.2d 969, 973 (7th Cir., 1986) and cases cited therein. Citing additional federal case law, the Complainant asserts that the employer bears the burden of proving that the waiver is "clear and unmistakable". To support a claim of waiver by contract language, the language must be explicit and it will not be inferred from general language. Where the management rights clause is relied upon to show waiver, the clause must specifically address the subject matter at issue. Citing, Southwest Airlines, 842 F.2d at 801 and N.L.R.B. cases. Because contractual waiver is a question of the parties' intent, evidence indicating intent may be considered in interpreting the contract. Citing, Local Union 1395, I.B.E.W. v. N.L.R.B., 797 F.2d 1027 (D.C. Cir., 1986) (hereinafter Indianapolis Power and Light); I.B.E.W. Local 803 v. N.L.R.B., 826 F.2d 1283, 1294 (3rd Cir., 1987). Such evidence would include bargaining history, the parties' interpretation of the contract, conduct of the parties and the legal context in which the contract was negotiated. Citing, O.C.A.W. Local 1-547 v. N.L.R.B., 842 F.2d 1141, 1144 (9th Cir., 1988). To find a contractual waiver where it is not unequivocally expressed in the language of the contract, the extrinsic evidence must be "clear and unmistakable". Citing, Metropolitan Edison, 460 U.S. at 708-709, where the Court held that two unfavorable arbitration awards in conjunction with general contract language were not sufficient to allow the Union's silence during negotiations following the awards to create a binding, contractual waiver. Absent precise contract language, there is waiver by the agreement only if "the history of prior contract negotiations suggest that the parties discussed the subject and the Union 'consciously yielded.'" Southwest Airlines, 842 F.2d at 801. Even where the language of the contract is clear and unambiguous, the waiver defense can be defeated where extrinsic evidence indicates an intent not to waive any statutory rights. Citing, Indianapolis Power and Light, 797 F.2d at 1036; I.B.E.W. Local 803, 826 F.2d at 1294; O.C.A.W. Local 1-547, 842 F.2d at 1144.

Complainant contends that while the analysis and the federal case law is not binding on the Commission, it provides guidance and Complainant asserts that the Wisconsin experience is in accordance with that of the federal. Waiver is not inferred from a broad management rights clause or a zipper clause. Citing, Wisconsin Federation of Teachers v. State, Dec. 13017-D (WERC, 5/77). In this case, the contract at bar does not contain either an express or an implied waiver of the duty/obligation to bargain and the duty to bargain was not waived or otherwise compromised by the Complainant. Complainant desired to bargain, requested to bargain, and Respondent implemented and then refused to bargain and continues to do so.

Factually, Complainant asserts that the Mayor's proclamation was implemented prior to any bargaining and the evidence is clear that when asked to rescind the proclamation, Respondent refused. Respondent should have restored the status quo ante as requested by Complainant's attorney in his letter of February 21, 1992, and then bargained the matter with Complainant. Respondent has refused to do so.

Complainant asserts that is also true with regard to the teaching duties which were assigned to firefighters with no compensation. The parties' Collective Bargaining Agreement does not give Respondent the right to proceed unilaterally in this area. Respondent implemented its decision to have them trained and the Complainant made a demand to bargain the compensation through the grievance process. Respondent refused to bargain, apparently feeling that

the employes already had teaching duties based on their job descriptions.

In its reply brief, Complainant asserts that there was a binding past practice allowing firefighters to wash, repair, etc., their private vehicles at the stations, which practice had ripened into a condition of employment. The evidence clearly indicates that the Respondent was well aware of the practice, that the practice occurred repeatedly over a very long period of time, and that the practice was mutually accepted in the past by the parties. Chief Huettl testified that after the policy was issued, firefighters were subject to discipline for washing personal vehicles at the station, contrary to the past practice.

In response to the Respondent's arguments that it had the right to effect such a change, Complainant asserts that those arguments are not persuasive. Complainant reiterates its argument that waiver through the language of the collective bargaining agreement cannot be found. A municipal employer's duty to bargain continues during the term of a collective bargaining agreement with respect to all mandatory subjects of bargaining, except those which are embodied in the terms of the agreement or those with respect to which the employees' bargaining representative has waived interim bargaining through bargaining history or specific contractual language. There must be clear and unmistakable evidence to establish waiver. Citing, Madison Metropolitan School District, Dec. No. 15629-A (WERC, 5/78).

Complainant cites the arbitration award wherein Arbitrator McGilligan concluded that if a past practice did exist, it was not incorporated into the parties' Agreement. Hence, the first element above does not apply. Similarly, bargaining history does not establish waiver of the Complainant's right to bargain. To the contrary, Complainant's actions indicated a clear intent not to waive its right to bargain. With respect to the car washing policy, the demand to bargain was plainly made in Attorney Graylow's letter of February 21, 1992. The Mayor responded with his letter of February 25, wherein he indicated he was referring it to the grievance process. Complainant asserts that was in effect a refusal to bargain over the matter, and that Respondent has continued to refuse to bargain. Even prior to the February 21 letter, Complainant had offered two proposals in contract negotiations which would have memorialized current binding practices. While those proposals were not incorporated into the parties' Agreement, they do not establish waiver. Only if Complainant had failed to pursue the matter after the first rebuff by Respondent could waiver be found, and in any event, withdrawal of a proposal from negotiations does not equate to waiver of the right to bargain on a proposal. Citing, Professional Policeman's Protective Association of Milwaukee v. City of Milwaukee, Dec. No. 14873-B, 14875-B, 14899-B (WERC, 12/81) at page 38.

Complainant also disputes Respondent's claim that the meeting with the Mayor, the Chief and the Personnel Director regarding the car washing policy constituted bargaining when the Complainant discussed the matter with those individuals. Discussion does not equate to bargaining anymore than a "offer to discuss" equates to "an offer to engage in collective bargaining." Citing, City of Brookfield, Dec. No. 11489-B (WERC, 4/75). There must be a meeting of the minds for an enforceable bargain to be struck. In this case, the testimony of Smith and Nash clearly indicate that no bargaining was intended, or in fact occurred at the meeting. Hence, it is clear Complainant did not waive its right to bargain over the past practice, rather, it demanded to bargain after Respondent's unilateral change and the Respondent refused to bargain, taking the position that it had no duty to do so. Complainant cites Green County (Pleasant View Nursing Home), Dec. No. 20030-D (WERC, 10/83) as holding that "where the Union has not waived its right to bargain or the matter is not addressed in the contract, it is only after bargaining to impasse that the Employer may unilaterally implement a mandatory subject of bargaining and that unilateral change must be consistent with the Employer's final proposal to the Union." (At page 8). Since no bargaining occurred in this case, impasse was

not reached. Thus, the Respondent's unilateral change in the binding condition of employment must be reversed, and the status quo ante restored. Citing, Brown County, Dec. No. 19314-A (WERC, 6/82).

The Complainant also disputes Respondent's assertion that Arbitrator McGilligan's award constitutes res judicata on this issue. The Commission has held the following regarding the application of the principle of res judicata to arbitration awards:

> The principle of res judicata is applicable to arbitration awards. An arbitration award will be found to govern a subsequent dispute in those instances where the dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought share an identity of parties, issue and remedy. In addition, no material discrepancy of fact may exist between the dispute governed by the award and the subsequent dispute.

State of Wisconsin, Dec. No. 20200-A (WERC, 8/83).

Thus, to find res judicata, there must be an identity of parties, issue, fact and remedy. In this case, there are material discrepancies between the situation underlying the McGilligan Award and Complainant's present claim of prohibited practices. The issue in the Award was whether the Respondent had violated the contract when it issued the directive prohibiting employes from using City facilities and equipment for personal use and personal activities. This dispute regarding the past practice involves the issue of whether the Respondent, by its unilateral actions, violated Section 111.70, Stats. Thus, there is a difference of issue. The existence of a past practice and the issue of a statutory violation were not decided by the award.

With regard to claimed waiver by contractual language, Complainant asserts that a review of the relevant collective bargaining agreements reveals there is absolutely no specific contract language that clearly and unmistakably evinces a waiver by Complainant of its right to bargain over the past practice. Respondent relies on the Management Rights clause in the agreement. However, to constitute a waiver, the Management Rights clause must specifically address the subject matter at issue, i.e., the past practice of washing and cleaning personal vehicles at the fire station. Respondent concedes in its brief that the Agreement is devoid of any provision addressing that matter in any manner whatsoever. Thus, Complainant has never bargained away its right to adhere to the past practice, nor has it waived its right to bargain over the past practice. The management rights clause is also not as broad as the Respondent would like to believe. The clause limits the Respondent only to those rights and authority to which it is entitled by law, and the law does not allow the Respondent to change a binding past practice unless it has bargained to impasse. Further, Section 62.09(8), Stats., does not grant the Mayor the authority to violate the collective bargaining process.

As to Respondent's argument that the Commission should uphold its unilateral change and the practice on the basis of "reasonableness", Complainant asserts that until Respondent bargains over the change, the reasonableness of the position cannot be determined. To accept Respondent's argument would result in collective bargaining becoming a meaningless exercise. Respondent's subjective perception of what is "reasonable" would be the ultimate criterion in the implementation of unilateral changes affecting binding working conditions and would open the door to management abuse of the bargaining relationship under the guise of management rights. That result would be neither reasonable nor lawful. Complainant also questions Respondent's seriousness about its claim that Worker's Compensation claims and related casualty claims are the basis for the change. It asserts that regardless of whether the effect of the change is minimal or significant, the change must be bargained if it alters binding conditions.

With respect to the new training policy, the Complainant disputes Respondent's reliance on a broad reading of the management rights clause in the parties' Agreement. Instead of exercising contractual rights, Respondent exceeded its rights by assigning the training and teaching duties to certain firefighters. Complainant asserts that its arguments above regarding past practice apply equally here. The management rights clause does not grant Respondent authority to change and increase job duties without increasing pay unless it is the product of mutual agreement of the parties. The assignment of training duties is a mandatory subject of bargaining since it is related to wages, hours and conditions of employment. Citing, Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 259 N.W. 724 (1977); Madison Metropolitan School District, supra., at page 17. Further, Respondent's interest in complying with the State's administrative code does not predominate over Complainant's right to agree to new and increased duties for its members. The Complainant had the right to bargain for additional compensation based on the new and increased duties. Respondent's argument that the training policy was not new, but rather constituted a past practice, is "patently simplistic".

Chief Huettl testified that traditionally firefighters who understand the various situations best have been used to train the rest of the firefighters, and trainers were not formally designated as such. After the new training policy was implemented, specifically-designated trainers were expected to teach the Fire Fighter I training program to the rest of the Department, and the training program was now a formal arrangement as opposed to the informal training under the past practice. Thus, the new training policy was a departure from past practice, as well as a mandatory subject of bargaining, and Respondent was prohibited from implementing the new policy without first bargaining. Citing, Prairie Home Cemetery, Dec. No. 22598-A (WERC, 5/86); City of Menasha, Dec. No. 13196-A (WERC, 3/77).

Regarding Respondent's argument that the Complainant waived its right to bargain on the training policy, Complainant reiterates its arguments regarding the requirement that waiver must be clear and unmistakable. It also asserts that waiver cannot be found here based on specific contract language addressing the issue. There is no provision in the Agreement specifically addressing the training policy, including Article 3, Reservation of Rights. Further, Complainant did demand to bargain on the issue and the actions of Complainant indicates that it has not acquiesced to the new policy. The grievance was filed on the policy in late April of 1991, and while the grievance was eventually dropped, it was not due to acquiescence. Rather, Complainant chose to pursue the matter in another forum.

Finally, Complainant disputes Respondent's alternative argument that it in fact bargained the matters in dispute. If they were bargained, why were there no changes in the parties' agreement? When Respondent negotiated the car washing issue with the AFSCME local, the resolution was reduced to writing and included in those parties' agreement. Complainant asserts that to the contrary, Respondent tried to extract that concession from the Complainant in bargaining, but failed. It withdrew, as did the Complainant, all of the existing proposals on the table when the parties reached tentative agreement on a new contract. Thus, if any party waived anything, it was Respondent, and not Complainant.

Respondent

The Respondent takes the position that it did not commit a prohibited practice by issuing a work rule prohibiting firefighters from performing certain personal activities while on duty or by requiring certain firefighters to train other firefighters in firefighting techniques. Complainant has alleged that Respondent violated Sections 111.70(3)(a)1 and 4, Stats. The Respondent asserts that there is no evidence in the record to support a finding that it has interfered with the firefighters' rights under the Municipal Employment Relations Act in violation of 111.70(3)(a)1, Stats. Thus, Respondent focuses on the Complainant's allegation that the Respondent violated Sec. 111.70(3)(a)4, Stats., by refusing to bargain with regard to the new work rule and training requirement.

Respondent contends that the application of relevant case law demonstrates that the Complainant has waived its right to bargain with respect to both the new work rule and the training requirements. The duty to bargain collectively during the term of an agreement does not extend to mandatory subjects of bargaining already addressed by the agreement or to matters upon which the Union has waived its right to bargain. Citing, City of Richland, Dec. No. 22912-B (8/86); Green County, Dec. No. 20030-D (WERC, 10/83). The Commission held in Racine Unified School District:

> Generally, a municipal employer has a duty to bargain collectively with a representative of its employes with respect to mandatory subjects of bargaining during the

> term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or (as to those matters on which) bargaining (has) been clearly and unmistakably waived.

Decision No. 18848-A (6/82) (at page 14.)

In accord with that principle, the Commission has held in numerous cases that if an employer is vested with the contractual right under a labor agreement, it is not required to bargain with a union when the employer exercises that right. Citing, Washington County (Social Services Department), Dec. No. 23770-B (WERC, 3/87); City of Milwaukee, Dec. No. 13495 (WERC, 4/75); Janesville Board of Education, Dec. No. 15590-A (Davis, 1/78); Waupaca County (Highway Department), Dec. No. 24764-B (WERC, 1/91); and Barron County, Dec. No. 23391-A (Burns, 7/87). With regard to work rules, the Commission has consistently held that where the agreement grants the employer the right to establish work rules, the employer has no duty to bargain over the implementation of new work rules, even though the rules may relate to mandatory subjects of bargaining. Citing, Brown County (Social Services Department), Dec. No. 20620, 20623 (WERC, 5/83); Milwaukee County, Dec. No. 15420-A (WERC, 6/82); Milwaukee County, Dec. No. 12739-A, B (WERC, 2/75). In this case, the evidence clearly establishes that under the terms of the parties' Agreement, Respondent was vested with the contractual right to issue a new work rule regarding firefighters performing work on personal vehicles while on duty and was also vested with the contractual right to implement the new training requirements. Hence, Respondent's actions did not constitute prohibited practice.

Regarding its asserted contractual right to issue and implement the work rule regarding firefighters performing personal work on their vehicles while on duty, Respondent cites Article 3, Reservation of Rights, of the parties' Agreement:

> ARTICLE 3
> RESERVATION OF RIGHTS
>
> The Union recognizes the right of the City and the Chief of the Fire Department to operate and manage its affairs in all respects. The Union recognizes the exclusive right of the Chief of the Fire Department to establish reasonable departmental rules and procedures.
>
> . . .
>
> The City, the Chief of the Fire Department, and the Police and Fire Commission shall retain all rights and authority to which, by law, they are entitled.
>
> . . .
>
> The Union pledges cooperation in the increasing of departmental efficiency and effectiveness. Any and all rights concerning management and direction of the Fire Department and the Firefighters shall be exclusively the right of the City and the Chief of the Fire Department, unless otherwise provided by the terms of this Agreement as permitted by law. (Jt. Exh. 1, pp. 1-2). (Emphasis added).

The language of Article 3 is broad, and vests the Respondent and the Chief with the exclusive right to operate, direct and manage the affairs of the Department and to issue "reasonable departmental rules" and procedures. The only limitation is that if the matter is addressed otherwise by "the terms of this Agreement." The Agreement is devoid of any provision addressing in any manner a firefighter's right to perform personal activities on City time and property. Further, under the terms of Article 21, Rules and Regulations, of the Agreement, the new work rule became part of the parties' Agreement. Respondent's actions was also specifically in accord with the second provision of Article 3, providing that Respondent is to retain "all rights and authority to which, by law, it is entitled. The Mayor's action in prohibiting personal activities on City work time and on City property was in accord with his statutory authority as "head of the Fire Department," pursuant to Sec. 62.09(8)(d), Stats. Further, the action of the Mayor and of the Chief, who promulgated the clarification of the work rule, was completely consistent with the language of Article 3. Thus, the issuance of the work rule was within contractual rights.

Respondent notes that Article 3 requires that a new work rule be "reasonable". In that regard, Respondent points out that the rule did not prohibit all activities, but only activities involving the use of City buildings or facilities for cleaning, repairing, or performing maintenance on personal vehicles. Other more minor activities, where personal injury was less likely, were not prohibited. Given the Respondent's concern that performance of certain personal activities on City property involving a high risk of personal injury, increased the risk of Worker's Compensation and general liability claims, that distinction was reasonable. Besides costs associated with the Worker's Compensation claims, Respondent could also suffer the loss of a trained and experienced firefighter, constituting a loss of fire protection for the public. Regarding additional exposure to general liability claims, Respondent could be held liable if a Department vehicle struck a personal vehicle while the firefighter was cleaning or repairing the vehicle on City property, or if there was an accidental fire explosion of a personal vehicle, firefighter personnel or visitors to the department could be injured from such events. Hence, public safety is also implicated. Respondent also cites a number of arbitration awards where arbitrators have previously found such reasons and actions to be reasonable. The reasonableness of the rule in this case is even more evident when one considers the minimal impact on the firefighters. Firefighters work in platoons and normally work a 24 shift followed by 48 hours off. If a firefighter wishes to service his personal vehicle, he could surely do so during his 48 hours off. That would be in accord with the rationale, presented by Complainant in the 1989 negotiations in support of its proposal on work hours where they argued that firefighters should preserve their strength after the end of the normal active duty day to ensure that they can quickly and adequately respond to emergencies. Thus, Respondent concludes that it was vested with the contractual right to issue reasonable work rules such as its rule in this case prohibiting on-duty firefighters from cleaning, repairing or servicing their personal vehicles on City time and property with City facilities. Thus, there was no violation of 111.70(3)(a)1 or 4, Stats.

Respondent also asserts that Arbitrator McGilligan's prior arbitration award wherein he concluded that the Respondent was within its contractual rights in issuing the new work rule is res judicata in that respect. The doctrine of res judicata is applicable to arbitration awards. Citing, Dehnert v. Waukesha Brewing Company, 21 Wis. 2d 583 (1963). Under the doctrine of res judicata, a final judgment rendered by a tribunal on the merits is conclusive as to the rights of the parties and their privies and as to them it constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. The doctrine of collateral estoppel precludes the relitigation of an issue of ultimate fact previously determined by a valid

final judgment in an action between the same parties. Citing, Kichefski v. American Family Mutual Insurance, 132 Wis. 2d 74, 78, 390 N.W. 2d 76 (Court of Appeals, 1986). The Commission has also consistently applied the res judicata doctrine and has held that if a dispute involves the same conduct and factual circumstances as a previous dispute, the doctrine will bar the parties from initiating a second proceeding. Citing, WSEU v. State of Wisconsin, Dec. No. 20145-A (Burns, 5/83); Frank v. State of Wisconsin, Dec. No. 20830-A, B (WERC, 1985). Applying the doctrines of res judicata/collateral estoppel to Arbitrator McGilligan's award, it is clear that no prohibited practice occurred. Arbitrator McGilligan held that Respondent's issuance of the new work rule was within its contractual rights and that the rule was reasonable:

> The contract herein is not silent or ambiguous. The City clearly has the exclusive right to establish reasonable departmental rules and procedures pursuant to Article 3. It also has the exclusive right to operate, manage and direct the affairs of the Fire Department. The only limitation in regard to this authority is if a matter is addressed otherwise "by the terms of this Agreement." The Union is unable to point to any other provision of the Agreement which protects and preserves the disputed practice (i.e., to perform maintenance work on personal vehicles while on duty). To the contrary, the Union tried several times unsuccessfully to bargain a "maintenance of standards" provision. Id. at p. 18. (City Exh. 4).

The parties in the arbitration and those involved in this proceeding are the same. The issue in dispute in the arbitration was whether the Respondent had violated the terms of the parties' Agreement by issuing a work rule prohibiting firefighters from performing certain personal activities while on duty. The issue was fully litigated before the Arbitrator and there is no evidence that the proceeding before the Arbitrator was in some manner unfair. The Arbitrator concluded, based on the evidence, that Respondent was vested with the contractual right to issue the new work rule and that the rule was reasonable, and therefore had not violated the terms of the Agreement. That ruling should be given res judicata/collateral estoppel effect and if it is, it is clear that the Respondent did not commit a prohibited practice by issuing the new work rule, since an employer is not required to bargain with a union with respect to exercise of rights it already possesses under a labor agreement.

Respondent also asserts that it was vested with the contractual right to implement the training requirement. In that regard, Respondent cites Article 3, Reservation of Rights, which provides, in relevant part:

> ARTICLE 3
> RESERVATION OF RIGHTS
>
> The Union recognizes the right of the City and the Chief of the Fire Department to operate and manage its affairs in all respects. The Union recognizes the exclusive right of the Chief of the Fire Department to establish reasonable departmental rules and procedures.
>
> . . .
>
> It is understood by the parties that every duty connected within the Fire Department operations, enumerated in job descriptions, is not always specifically described; and it is intended that all such duties shall be performed by the employees.

> . . .The City and the Chief of the Fire Department shall determine work schedules consistent with this agreement and establish methods and processes by which such work is performed.
>
> The City, the Chief of the Fire Department, and the Police and Fire Commission shall retain all rights and authority to which, by law, they are entitled.
>
> . . .
>
> The Union pledges cooperation in the increasing of departmental efficiency and effectiveness. Any and all rights concerning management and direction of the Fire Department and the Firefighters shall be exclusively the right of the City and the Chief of the Fire Department, unless otherwise provided by the terms of this agreement as permitted by law. (Jt. Exh. 1). (Emphasis added).

In accord with the terms of those above provisions, the Respondent is clearly vested with the contractual authority to determine firefighter job duties as it falls within the Respondent's right to establish reasonable departmental procedures, methods and processes by which work is to be performed and to determine the management and direction of the Department. It is also in accord with the parties' recognition that "every duty" connected with the Department's operations is not specifically enumerated in job descriptions. There is no contract provision which specifies a firefighter's job duties or places a limitation on Respondent's contractual right to determine those duties. Respondent was simply exercising its contractual rights by assigning training duties to certain firefighters. Those firefighters had volunteered to undergo the necessary instruction to perform the training. While training other firefighters, the instructors receive their normal pay if on duty, and if off duty, overtime pay, and therefore were paid in accord with the terms of the Agreement. As the Respondent was only exercising its contractual rights in implementing the training requirements, it committed no prohibited practice.

Next, Respondent asserts that the parties' bargaining history establishes that the Complainant has waived its right to bargain with respect to the new work rule and the new training requirements. The Commission has concluded that a waiver may be inferred from the parties' bargaining history. Citing, City of Appleton (Police Department), Dec. No. 14615-C (WERC, 1/78); City of Brookfield, Dec. No. 11489-B (WERC, 4/75); and Nicolet Joint High School District No. 1, Dec. No. 12073-B, C (WERC, 10/75). The Respondent cites the Commission's decision in Drummond Integrated School District, Dec. No. 15909-A (WERC, 3/78) where the Commission held:

> Where the complainant labor organization, despite a long-standing awareness of the liquidated damages clause in individual teacher contracts, never demanded that the school district bargain about the clause, complainant, by its failure to demand bargaining, clearly and unmistakenly waived its right to bargain about the unilateral establishment of a liquidated damages clause. (Emphasis added).

Respondent also cites numerous Commission and Examiner decisions where it was held that the union had waived its right to bargain where it had failed to demand to bargain after having been put on notice of the employer's intent to implement a change in a mandatory subject of bargaining or where the union had failed to take the opportunity to bargain the change after having been put on notice.

With regard to the work rule pertaining to the washing or maintenance of personal vehicles on City property and on City work time, Respondent asserts that during negotiations for a successor 1988 labor agreement, and in response to Complainant's proposal that the new agreement contain a "Maintenance of Standards" clause, Respondent's Personnel Director, Jansky, advised Complainant that Respondent wished to have any and all oral, verbal or written agreements which Complainant believed to exist, and which they wished to continue, incorporated into the new agreement. Complainant had also proposed in regard to then Article XXII, Rules and Regulations, to revise that provision and incorporate a provision within the Agreement which stated that present rules and regulations were to be attached to the Agreement. Respondent opposed Complainant's 1988 proposals and ultimately those proposals were "dropped". Similarly, in negotiations for a successor 1989 agreement, Complainant proposed another, albeit differently worded, "Maintenance of Standards" clause and also proposed a provision which, if accepted by Respondent, would have granted Complainant the right to grieve the reasonableness of the work rule. As in the prior negotiations, Respondent opposed those proposals and ultimately, they were dropped.

On February 10, 1992, Chief Huettl issued the Memorandum advising firefighters of the new work rule. Complainant did not demand to bargain with respect to that issue at the time, rather, it filed a grievance. Respondent also asserts that the February 21, 1992 letter to the Mayor from Complainant's attorney did not constitute a demand to bargain. Rather, the Mayor was advised that:

> [i]f in fact you wish to collectively bargain this and related issues, I invite you to do so by having your City Labor Negotiator Mr. Jansky prepare demands while submitting them to the Union.
>
> Thereafter if and when the Union wishes to bargain the subject, it will contact Mr. Jansky directly.
>
> If you wish to respond to this letter, I urge you to do so within the next ten (10) days. (Un. Exh. 1). (Emphasis added).

Following receipt of the Mayor's response to that letter, Complainant has to date made no demand to bargain with respect to the new work rule. Rather, Complainant proceeded with the grievance. Even though, after the Award was issued, Respondent and Complainant officials met in November of 1992 and discussed the parameters of the new rule, there has never been a demand to bargain. And even though Complainant has never made a demand to bargain, the Respondent and Complainant did meet to discuss the terms of the new work rule at the time it was implemented. The result of that meeting was the clarifications attached to the new work rule which were issued by Chief Huettl on February 10, 1992. Those clarifications were made at the request of the Complainant and represent the result of the discussions. In effect then, Complainant and Respondent did negotiate over the impact of implementing the work rule and thus, the Respondent met its statutory obligation.

Respondent also asserts that Complainant has waived, by its actions and inactions, the right to bargain in regard to the new training requirements. In December of 1990, the Chief posted the notice requesting that firefighters interested in taking the Fire Training Instructors Certification Course "sign up". The notice specifically advised those signing up that following completion of the course they would "help teach the Department Training Program." Ten individuals signed up to take the course, however, Complainant made no demand to negotiate with respect to firefighters taking the course or in regard to their instruction of untrained firefighters following completion

of the course. While the firefighters were completing that course, Respondent and Complainant were negotiating a 1991-1992 labor agreement. However, Complainant did not submit any proposal during those negotiations nor in the investigation session on March 13, 1991 with regard to the firefighter instructors. That was true even though Complainant's president, William Smith, was enrolled in the course at the time and fully aware that upon completion, he would be expected to instruct other firefighters. A meeting of the instructors and the Chief was held on March 28, 1991 during which the discussion was had as to how to proceed with the training of the untrained firefighters. No demand was made by Complainant with regard to negotiating additional compensation for those instructors at the time. Rather, on May 6, 1991, three of the firefighter instructors filed a grievance seeking additional compensation. After the grievance was filed, the parties ultimately reached agreement on a successor labor agreement which was executed on or about May 23-24, 1991. The grievance was processed until it eventually was withdrawn by the Complainant in June of 1992. In September of 1992, Respondent was cited by DILHR for the lack of certification of its firefighters, and on September 14, 1992, Chief Huettl issued the Memorandum advising firefighters that those without Firefighter I certification would be required to participate in a joint training program. On September 18, 1992, Complainant filed the instant prohibited practice, obviously prompted by the Chief's Memorandum. However, Complainant has, to date, never demanded to negotiate with respect to the firefighter instructor program. Consequently, Complainant has waived its right to bargain with respect to this issue.

Lastly, Respondent asserts that its implementation of the training requirement was in accord with past practice and that, therefore, it was not under any obligation to bargain with Complainant regarding that requirement. The Commission has held that if an employer's actions are consistent with past practice in regard to a particular subject, there is no requirement that the employer bargain with the union regarding that subject. Citing, Prairie Home Cemetery, Dec. No. 22958-A (Ford, 5/86); City of Menasha, Dec. No. 13196-A (McCormick, 3/77). Respondent asserts that traditionally, the Department has utilized better trained and more skilled firefighters to train less skilled firefighters. That is undisputed in the record. Therefore, in implementing the training requirements, Respondent was acting as it had always acted in the past with respect to training less skilled firefighters and was not required to bargain with Complainant with regard to that issue. The only change was that the training firefighters had received some formal training on how and what to train the other firefighters. That was done to comply with the training requirements of ILHR 30, Wis. Admin. Code, otherwise, the training was as it had been in the past.

In its reply brief, Respondent asserts that the federal case law cited by Complainant is only marginally relevant to this dispute, as the instant case involves a public sector employer and provisions of the Municipal Employment Relations Act. Thus, the legal principles most relevant to this dispute are those developed by the Commission under MERA and not those developed by federal courts and agencies under federal laws. Respondent reiterates its arguments that the duty to bargain during the term of an agreement does not extend to mandatory subjects of bargaining already addressed by a labor agreement or to matters upon which the union has waived its right to bargain. Specifically, the Commission has repeatedly held that where the agreement grants an employer the right to establish work rules, the employer has no duty to bargain over the implementation of new work rules even if the rules relate to mandatory subjects of bargaining. Further, a union's waiver of the right to bargain on mandatory subjects of bargaining may be inferred from the parties' bargaining history, or by past practice. It is those principles, and not private sector decisions issued by the National Labor Relations Board (NLRB) or federal courts, that apply in this case. Respondent disputes Complainant's assertion that Respondent claimed the "inherent right to take the actions in dispute." Respondent's position has been that it has the "contractual right" to prohibit

certain personal activities on its property and to require firefighters, during their normal duty day, to instruct lesser-trained firefighters, relying on the language of Article 3 of the parties' Agreement.

Respondent also takes issue with Complainant's argument that the filing of a grievance regarding the training duties and its proposed remedy for resolving the grievance, constituted a request to bargain with regard to the new training requirements. A grievance pertains to an alleged violation of the terms of a labor agreement and the request for additional pay was simply a proposed means of resolving the grievance. It was not a request to "bargain" on the matter. If it is deemed to be a "request", then Respondent's response to the grievance must be deemed its response to Complainant's demands and, hence, the parties did negotiate the item.

Respondent agrees with Complainant's assertion that the claim of a contractual waiver must be supported by explicit language in the contract. However, it asserts that the agreement at issue explicitly grants the Respondent the contractual right to take the actions that it did. Article 3 of the Agreement, vests the Respondent with the contractual right to issue reasonable work rules as held by Arbitrator McGilligan in his award. Regarding the training requirements, the parties expressly recognized in Article 3 that "every duty connected within the Fire Department operations, enumerated in job descriptions, is not always specifically described."

Respondent also agrees that bargaining history may be considered in determining whether there is contractual waiver. The bargaining history here demonstrates that Complainant waived its right to bargain with respect to the new work rule. Bargaining history demonstrates that Complainant recognized that under the language of the agreement, Respondent had the right to issue reasonable departmental rules, and had broad authority with respect to the issuance of those rules. That bargaining history further demonstrated that by various proposals, Complainant had attempted in the past, and failed, to limit that authority. Regarding the new training requirements, the bargaining history and past practice demonstrates that Complainant was aware that Respondent had the contractual right to implement those requirements. Thus, Respondent concludes that it was vested with the contractual right to take the actions in dispute and that, moreover, Complainant had waived its right to bargain with respect to those issues.

DISCUSSION

The Complainant has alleged that the Respondent has violated Secs. 111.70(3)(a)1 and 4, Stats., by failing or refusing to bargain collectively with Complainant and unilaterally implementing the training duties for the Fire Fighter I Training Program and the policy prohibiting firefighters from washing or maintaining their personal vehicles, RV's, boats, etc., in City facilities, on City property.

Training Duties

Specifically, the Complainant asserts that the Respondent has refused to bargain collectively with Complainant in violation of Sec. 111.70(3)(a)4, Stats., by unilaterally ordering certain firefighters to train other members of the Department without additional compensation. Complainant contends that both the assignment of training duties and the impact on the workload of those employes assigned training duties are mandatory subjects of bargaining about which Respondent is required to bargain.

In determining whether the assignment of new or additional duties requires bargaining, i.e., is primarily related to the management of the Department, or is primarily related to wages, hours and conditions of employment, the Commission has consistently held that:

> . . .the legislative purpose requires the commission to determine whether said duty ordinarily is regarded as fairly within the scope of responsibilities applicable to the kind of work performed by the employes involved. If a particular duty is fairly within that scope, the employer unilaterally may impose such assignment. If the particular duty is not fairly within that scope, the decision to assign that duty is a mandatory subject of bargaining. 2/

In this case, the fire fighters assigned the training duties were either Lieutenants or Motor Pump Operators. The job descriptions for those positions, as set forth in Finding of Fact 11, reference training as part of the duties to be performed, i.e., under "Type of Work Performed" for Lieutenant it lists "2. Prepare and conduct training sessions in fire fighting and life saving practices"; under "Definition of Class" for Motor Pump Operator, it states, "A large part of duty time is spent in inspecting and maintaining the equipment, in training new members of the department in the use of equipment, . . ." Further, Chief Huettl's unrebutted testimony is that traditionally those firefighters who best understand the various types of situations with which firefighters are faced train the rest of the firefighters in the department. Based on the foregoing, it is concluded that the training duties assigned to the ten individuals are within the scope of their employment. 3/ Therefore, the Chief had the right to assign those duties without Respondent first bargaining with the Complainant.

The Complainant also asserts that the Respondent had the duty to bargain the impact of those training duties being assigned to the ten firefighters. Assuming arguendo there was an impact about which Respondent would have been required to bargain, Complainant waived whatever right it had to bargain over such impact. The initial notice posted in December of 1990 by the Chief asking for volunteers to take the Instructors Course stated, in relevant part:

> Notice Notice Notice Notice Notice Notice
>
> Anyone interested in taking Instructor Certification course please sign up below. It is a 40 hour course, off duty people will be paid according to the contract rates. Those certified will be expected to help teach the Department training program. (Emphasis added)

Of the ten individuals who signed up to take the course, two, Smith and Nash, were on Complainant's bargaining team. Smith, Complainant's president, testified, on cross-examination, that the parties were engaged in negotiations for a 1991-1992 agreement during the time they were taking the course. Smith

---

2/ City of Wauwatosa (Fire Department), Dec. No. 15917 (WERC, 11/77) at page 13. See also, Sewerage Commission of the City of Milwaukee, Dec. No. 17302 (WERC, 9/79); City of Wauwatosa, Dec. No. 13109-A (WERC, 6/75); City of Milwaukee (Police Department), Dec. No. 16602-A (Greco, 5/79), aff'd Dec. No. 16602-B (WERC, 1/80).

3/ It is also noted that Article 3, Reservation of Rights, in the parties' 1991-1992 Agreement provides:

> It is understood by the parties that every duty connected within the Fire Department operations, enumerated in the job descriptions, is not always specifically described; and it is intended that all such duties shall be performed by the employees.

also conceded that in the bargaining sessions on January 2 and 15, 1991, and at an informal investigation session on March 13, 1991, the Complainant did not raise any issue with regard to the training duties or make any request to bargain in that regard, even though it was aware those taking the Instructors Course would be required to train the other members of the Department. (Tr. pp. 20-21). Further, Complainant filed a grievance on May 6, 1991 based on the training duties assigned to those who had taken the Instructors Course and the parties engaged in discussions in the steps of the grievance procedure regarding Complainant's requested remedy of $20.00 per month additional compensation for instructors. However, the parties ultimately reached agreement on a 1991-1992 Collective Bargaining Agreement which they ratified and signed in late May of 1991, and that Agreement contained no provision for additional compensation for instructors.

The Complainant correctly notes that a waiver of bargaining must be established by clear and unmistakable evidence. 4/ In this case, the Examiner finds waiver by inaction based upon Complainant's failure to either demand to bargain over the impact of the training duties or to make any proposal in that regard during the negotiations for the 1991-1992 Agreement, and then reaching agreement on and ratifying a 1991-1992 Agreement after having been put on notice as early as December of 1990 of the City's intent to assign those duties. 5/ Thus, no violation of Sec. 111.70(3)(a)4, Stats. has been found regarding the assignment of training duties.

Work Rule

Complainant alleges a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats., by Respondent's unilateral implementation of the Mayor's policy, as amended by the Mayor and Chief Huettl, which, in relevant part, prohibits firefighters from washing or maintaining their personal vehicles, RV's, boats, etc., on City property in City facilities. Complainant advances its claim of a prohibited practice despite the fact that the parties proceeded to final and binding arbitration on the issue of whether Respondent had the authority under the parties' 1991-1992 Agreement to issue such a work rule.

Complainant notes the existence of a past practice of permitting firefighters to wash/repair their personal vehicles, etc., at the stations after their active duty hours and essentially argues that the Respondent's duty to bargain regarding the termination of that practice was not addressed or decided by Arbitrator McGilligan's Award. Complainant's argument is not persuasive. The Commission has consistently held that:

> Generally speaking, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which

4/ City of Richland Center, Dec. No. 22912-B (WERC, 8/86) and the cases cited therein.

5/ City of Stevens Point, Dec. No. 21646-B (WERC, 8/85); City of Kaukauna (Fire Department), Dec. No. 27028-A (Nielsen, 8/92); City of Antigo, Dec. No. 27108-A (Honeyman, 5/92), aff'd by operation of law, (WERC, 6/92) Dec. No. 27108-B. Similar to Examiner Honeyman's conclusion in City of Antigo, this Examiner concludes that the filing of the grievance on May 6, 1991, did not constitute a demand to bargain under the circumstances, since negotiations on a successor agreement were still open at the time and agreement was reached on that successor agreement without any provision regarding instructor pay.

> are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakably waived. (City of Richland Center, Dec. Nos. 22912-A, B (Schiavoni, 1/86) (WERC, 8/86)). Where a collective bargaining agreement exists which expressly addresses a subject, it determines the rights of the parties' and consequences of certain actions, (Racine Unified School District, Dec. No. 18848-A (WERC, 6/82); Janesville School District, Dec. No. 15590-A (Davis, 1/78); and City of Richland Center, supra.) but determinations as to whether or not a waiver exists are made on a case-by-case basis. (Racine Unified School District, Dec. No. 13957-C (WERC, 1/83); City of Richland Center, ibid.)

In this case, the parties have a final and binding arbitration award that specifically concludes that Respondent "clearly has the exclusive right to establish reasonable departmental rules and procedures pursuant to Article 3. . ." (McGilligan Award, at page 18.) Contrary to Complainant's assertion, the Arbitrator considered the past practice, but essentially found it to be irrelevant, based upon the clear contract language in Article 3, the existence of a strong "zipper clause" in the Agreement and Complainant's unsuccessful attempts in the past to include a "Maintenance of Standards" clause in the parties' Agreement. (McGilligan Award, at pages 18-19.) 6/ The Examiner further notes that the Commission has held contract language similar to that in Article 3 7/ to constitute a waiver by contract of a collective bargaining representative's right to bargain before an employer unilaterally issued a work rule involving a mandatory subject of bargaining. 8/

6/ Thus, Complainant's reliance upon Wisconsin Federation of Teachers v. State of Wisconsin, Dec. No. 13017-D (WERC, 5/77) is misplaced, as the Commission held in that case that the matter in issue was not covered by the contract. (At page 6.) Also, the Examiner reads the decision as simply requiring that waiver be "clear and unmistakable".

7/ The parties' 1991-1992 Agreement at Article 3, Reservation of Rights, provides, in relevant part:

> The Union recognizes the exclusive right of the Chief of the Fire Department to establish reasonable departmental rules and procedures.

8/ Milwaukee County, Dec. No. 15420-A (WERC, 6/82); Milwaukee County, Dec. No. 12739-A (Greco, 1/75). The Examiner notes that Complainant relies on the U.S. Supreme Court's decision in Metropolitan Edison, supra., for the proposition that general language, even accompanied by two prior arbitration awards adverse to the union, is not sufficient to establish a clear and unmistakable waiver of a statutory right. However, the language in Article 3 of the parties' Agreement, is specific as to the Chief's exclusive right to establish work rules.

Thus, contrary to Complainant's contention, the parties' 1991-1992 Agreement at Article 3, expressly covers the matter of work rules and under prior case law interpreting MERA, Article 3, constitutes a waiver by contract regarding the right/duty to bargain during the term of the Agreement regarding the issuance of a work rule such as that issued and implemented by Respondent and set forth in Finding of Fact 13. 9/ Therefore, Respondent had no duty under Sec. 111.70(1)(d), Stats., to bargain with Complainant before implementing the work rule. Therefore, the Examiner finds no violation of Sec. 111.70(3)(a)4, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats., by Respondent's actions.

Dated at Madison, Wisconsin this 11th day of May, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

9/ As Respondent asserts, Complainant is estopped by the McGilligan Award from litigating the issue of whether the rule was "reasonable", as that matter was fully litigated by the parties in the arbitration and decided by the Arbitrator. State ex. rel. Flowers v. Department of Health and Social Services, 81 Wis. 2d 376, 387 (1978); Kichefski v. American Family Mutual Insurance, 132 Wis. 2d 74, 78-79 (Ct. of App. 1986).