STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 311, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS (IAFF), AFL-CIO, Complainant, vs. CITY OF MADISON (FIRE DEPARTMENT), Respondent.	Case 150 No. 43813 MP-2341 Decision No. 27757-A

Appearances:

Lawton & Cates, S.C., 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, by Mr. Richard V. Graylow, appearing on behalf of Complainant.

Mr. Gary A. Lebowich, Labor Relations Manager, City of Madison, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709-0001, appearing on behalf of Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On September 1, 1989, Local Union No. 311, International Association of Firefighters filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Madison (Fire Department) was violating Sec. 111.70(3)(a)1, 3, and 4, Wis. Stats., by instituting minimum job testing requirements without bargaining with the Union on the decision to test and on the composition of the test. Upon agreement of the parties, the matter was held in abeyance until July 16, 1993, when the Union filed an amended complaint, alleging that, on or about July 1, 1993, the City unilaterally determined and imposed minimum job testing requirements. On August 9, 1993, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07, Wis. Stats. Hearing on the complaint was held on October 5, 1993 in Madison, Wisconsin. The record was closed on January 4, 1994, upon receipt of the final post-hearing brief. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local Union No. 311, International Association of Firefighters, AFL-CIO, hereafter Complainant or the Union, is a labor association and has its principal office at 821 Williamson Street, Madison, Wisconsin 53703.

2. The City of Madison, hereafter Respondent or City, is a municipal employer and has its principal office at 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709.

3. At all times material to this proceeding, the Union has been the exclusive bargaining representative of all employes of the City's Fire Department who are assigned to the position classifications of Firefighter, Chief's Aide, Lieutenant, Fire Investigator, Fire Inspector, Director of Community Education, Firefighter/Paramedic, Community Educator, and Captain, excluding Division Chief, Assistant Chief, Deputy Chief and Fire Chief. The City and the Union are parties to a collective bargaining agreement, which by

its terms is effective January 1, 1992 to December 31, 1993, and contains the following provisions:

ARTICLE 5

MANAGEMENT RIGHTS:

Union recognizes the prerogative of the City and the Chief of the Fire Department to operate and manage its affairs in all respects, in accordance with its responsibilities and the powers of authority which the City has not officially abridged, delegated or modified by this Agreement and such powers or authority are retained by the City.

Those management rights include, but are not limited to the following:

A. To utilize personnel, methods, procedures, and means in the most appropriate and efficient manner possible.

B. To manage and direct the employees of the Fire Department.

C. To hire, schedule, promote, transfer, assign, train or retrain employees in positions within the Fire Department.

D. To suspend, demote, discharge, or take other appropriate disciplinary action against the employees for just cause.

E. To determine the size and composition of the work force and to lay off employees.

F. To determine the mission of the City and the methods and means necessary to efficiently fulfill the mission including: the transfer, alteration, curtailment, or discontinuance of any goods or services; the establishment of acceptable standards of job performance; the purchase and utilization of equipment for the production of goods or the performance of services; and the utilization of students, and/or temporary, limited-term, part-time, emergency, provisional or seasonal employees.

. . .

J. The City retains the right to establish reasonable work rules and rules of conduct. Any dispute with respect to these work rules shall not be subject to arbitration of any kind, but any dispute with respect to the reasonableness of the application of said rules may be subject to the grievance and arbitration procedures as set forth in this Agreement.

K. Any dispute with respect to Management Rights shall not in any way be subject to arbitration but any grievance with respect to the

reasonableness of the application of said Management Rights may be subject to the grievance procedure contained herein.

ARTICLE 7

HOURS OF WORK

. . .

C. The Chief of the Department may from time to time assign any member from the 48-hour work week to the 40-hour work week or any member from the 40-hour to the 48-hour as the good of the service warrants.

ARTICLE 22

WORK RULES

A. Existing work rules relating primarily to wages, hours, and conditions of employment are made part of this Agreement.

B. The establishment of new work rules primarily affecting wages, hours of work or conditions of employment shall be subject to negotiations and mutual agreement prior to their effective date.

. . .

ARTICLE 19

WAIVERS

. . .

B. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the City and the Union for the life of this Agreement, and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

At the time that the parties' negotiated their 1992-93 collective bargaining agreement, neither party made any demands regarding physical ability standards and testing. The 1992-93 labor agreement was executed on September 2, 1992. At the time that the parties bargained their 1992-93 labor agreement, there were existing "Rules of the Madison Fire Department" which had been established by the Police and Fire Commission. Rule 34, which had existed for many years, states that "It is the duty of each member of the Fire Department to keep himself/herself physically fit for active, efficient performance of his/her duties as a Firefighter." The Police and Fire Commission has authority to hear charges against Fire Fighters and has authority to suspend, demote and fire Firefighters. The Fire Chief has authority to refer charges to the Police and Fire Commission.

4. On or about May 17, 1991, then Union President Tom Speranza sent the following to Fire Chief Roberts:

> LOCAL 311 IS REQUESTING A MEETING WITH YOU AND THE CITY OF MADISON NEGOIATOR [sic] TO NEGOTIATE THE MINIMUN [sic] STANDARDS AND ITS IMPACT.
>
> PLEASE GIVE US A SELECTION OF DATES TO MEET WITH YOU, IN WRITING.

On or about June 18, 1991, City Labor Relations Manager Gary Lebowich sent a letter to Speranza which contained the following:

> I am writing in response to your letter to Chief Roberts dated May 17, '91.

> The City believes that it may be beneficial for the parties to meet to discuss the potential impact of minimum standards testing on members of the Local 311 bargaining unit. Please be advised that we are available to meet with you for that purpose from 1:30 p.m. to 5:00 p.m. on either July 8, or July 10, '91. Please contact me at your earliest opportunity to confirm your availability to meet on one of those dates.
> If you have any questions, do not hesitate to call me at 266-6530.

The parties did meet on at least one occasion, i.e., July 10, 1991, to discuss the issue of minimum standards. On April 15, 1993, Union Attorney Richard V. Graylow sent the following to Chief Earle Roberts:

> I once again write to you as legal counsel for Local Union 311, IAFF, AFL-CIO and the subject of minimum standards.
>
> I understand that minimum standard tests are once again being performed under direct order in the Department. I understand that certain time limits have been unilaterally imposed. It is my professional opinion that the necessity for such testing, as well as the composition of the Program, are mandatory subjects of bargaining. This, of course, includes time limits.
>
> Unless and until the time limit requirement is bargained collectively, I ask you to repudiate same.
>
> Please contact the Union's bargaining committee with your proposals, if any you have, in this regard.

On April 21, 1993, Fred Kinney, Assistant Chief Personnel, sent the following to Attorney Graylow:

> I have been assigned by Chief Roberts to respond to your letter of April 15, 1993 regarding Minimum Standards.
>
> The contract is clear on Management's rights to set acceptable standards. The time limit for successful completion of the standards is part of the standard itself.

On June 10, 1993, the City received the following letter from Union Vice-President Gary D. Westbrook:

> This letter is to inform you that Fire Fighters Local 311 will not be participating in any Labor-Management meetings until the pending vacancy for President within Local 311 is filled.
>
> Hopefully this will be done soon so we can move forward.

On June 11, 1993, Chief Roberts issued the following:

> TO: Officers and Members, Madison Fire Department

FROM: Earle G. Roberts, Fire Chief

SUBJECT: Labor-Management Meetings

I have been notified by your union officers that the Executive Board of Local 311 has suspended labor-management meetings pending the selection of your new president. On behalf of all the members of the management team, I wish you well with the selection process; we look forward to continuing the discussion of important issues as soon as union representation is available to meet.

On July 1, 1993 Assistant Chief Kinney issued the following announcement:

To: Officers and Members, Madison Fire Department

From: Assistant Chief Fred Kinney

Subject: Minimum Physical Ability Standard

Minimum physical ability standard will begin the week of July 5, 1993. All commissioned personnel through the rank of Captain will be evaluated except for those employees who have had previously approved accommodations made that bars them from suppression duty as the result of a duty incurred disability.

The standard consists of the seven evolutions described on the attached score sheet. The maximum time allowed for successful completion of minimum physical ability standard will be seven minutes and twenty seconds.

Personnel failing the minimum physical ability standard will be immediately removed from line duty and ordered to report to Fire Administration for assignment to non-emergency activities.

An appointment will be made with ProHealth for a fitness assessment. If the staff at ProHealth deems it necessary, the assessment will include a medical examination. As part of the assessment, ProHealth will provide an estimation of "rehab" time following which the employee should be able to successfully complete minimum physical ability standard if the exercise prescription is followed. The results of the assessment, will not be shared with Fire Administration; however, the estimated rehab time and the prescribed workout period will be.

If ProHealth advises that the employee is unfit for duty and/or cannot be rehabilitated, he/she will be referred to the Police and Fire Commission and charged with a violation of Rule 34 of the Rules of the Madison Fire Department which states, "It is the duty of each member of the Fire Department to keep himself/herself physically fit for active, efficient performance of his/her duties as a Firefighter."

Failure of minimum physical ability standard following the prescribed rehabilitation period will result in

> similar charges being filed with the Police and Fire Commission.

This document had three attachments, i.e., "MINIMUM STANDARDS PHYSICAL ABILITY SCORE SHEET", "MINIMUM PHYSICAL ABILITY STANDARDS GUIDELINES", and a chart, which have been attached to this decision as Appendix I, II, and III, respectively. On July 5, 1993 Lionel Spartz, President of the Union, sent the following to Chief Roberts:

> This letter is a response from IAFF Local 311 to the Madison Fire Department Administration's announcement on July 1, 1993, of the Department's unilateral decision to begin minimum physical ability testing the week of July 5th.
>
> Local 311 supports the concept of a performance evaluation for all able department employees, but we must object to your "minimum physical ability standard".
>
> Our objections are numerous. First, the concept of a performance evaluation, as described in NFPA standards, is a three-part program. The performance evaluation is tied in with periodic medical reviews (the frequence of which depends on the age of the participant), along with an ongoing physical fitness program. To our knowledge, these second and third parts are not included in the MFD "minimum physical ability standard".
>
> Secondly, our interpretation of NFPA standards is that it is an evaluation, not a testing procedure. The goal, taken together with the fitness program and medical review, is to strengthen weaknesses, not to set employees up for failure.
>
> Next, we question the validity of this "minimum physical ability standard" as an accurate reflection of fireground activity. Two specific activities that are questionable are standing to one side of a hydrant to open it; and moving an I-beam between one's legs with hammer blows.
>
> In addition, the requirement for completion in seven minutes and twenty seconds appears to be an arbitrary standard.
>
> Local 311's most important objection to the unilateral imposition of this "minimum physical ability standard" by Fire Administration is the statement that members of Local 311 will be brought up on charges before the Police and Fire Commission if they fail to meet this arbitrary standard. Such an impact is a mandatory subject of bargaining. Local 311 has not agreed to the "minimum physical ability standard" as outlined in Chief Kinney's July 1 memo. Nor has Local 311 agreed to the procedure for those persons who may fail to meet the demands of that unilaterally promulgated standard.
>
> That being the case, should Fire Administration attempt to bring charges against any Local 311 member due to this "minimum physical ability standard", Local 311

> will take appropriate legal actions to oppose such action.
>
> Local 311 endorses a performance evaluation, but one that Labor and Management can mutually agree on. This is especially true given the impact that Fire Administration proposes. The department's suggested standard could be used as a testing ground rather than as a test. We could seek outside consultation to validate individual standard components, or to modify those that are invalid. We can discuss how the evaluation can be included in a more complete fitness program. We can decide what the purpose of such an evaluation should be. And we must reach an agreement on impact to avoid the extended litigation which will be the outcome without such agreement.
>
> It is in the interest of Local 311 to work together with Fire Administration to solve problems of mutual interest. We request that the start of these standards be delayed until such time as we have reached mutual agreement on the issues raised above.

NFPA is the acronym for National Fire Protection Association. NFPA standards are recognized as national standards by which Fire Departments may be measured, but have not been adopted as rules of the Madison Fire Department. On July 6, 1993, Attorney Graylow sent the following to Chief Roberts:

> I once again write to you as legal counsel for Local Union 311, IAFF, AFL-CIO and the subject of minimum standards.
>
> I understand that minimum standard tests are once again being performed under direct order in the Department. I understand that certain time limits have been unilaterally imposed. I understand further that employees not passing are subject to discipline. Please see your July 1, 1993 Order.
>
> It is my professional opinion that the necessity for such testing, as well as the composition of the Program, are mandatory subjects of bargaining. This, of course, includes time limits and other impact subjects.
>
> Unless and until the time limit is bargained collectively, I ask you to repudiate same.
>
> Please contact the Union's bargaining committee with your proposals, if any you have, in this regard.

Following Kinney's announcement of July 1, 1993, the City implemented its Minimum Physical Ability Standard program.

5. Assistant Chief Phillip Vorlander has been with the City Fire Department for over twenty-four years. Since January of 1993, Vorlander has been responsible for the Operations and Training Divisions of the Department. Prior to January, 1993, Vorlander was responsible for Personnel, including training and labor contract administration. The Department's most recent testing of applicants for employment was completed in late summer of 1993, although the majority of this testing was completed in the summer of 1992. The Police and Fire Commission approved the process used to test the most recent

group of applicants for employment as Firefighters. The applicant testing was similar to the testing of the Union's bargaining unit employes. The two testing procedures differed in that the portions of the applicant test which were subjective were eliminated in the testing of the Union's bargaining unit members, e.g., in the hose drag, recruits were disqualified if the hose movement stopped at any time during the progression, but this automatic disqualifier was eliminated for Local 311 bargaining unit members; recruit applicants who tripped, or stopped moving, during the bag drag were disqualified, but the requirement for continuous bag movement was eliminated for Local 311 bargaining unit members; recruit applicants who lost control of the ladder were eliminated, but Local 311 bargaining unit members were not eliminated if they lost control of the ladder.

6. There are approximately 243 members in the bargaining unit represented by the Union. At the time of hearing, on October 5, 1993, three members of the Union's collective bargaining unit had not been tested and, of those tested, four members had not successfully completed the Minimum Physical Ability Standard test. The four who were unsuccessful were line personnel, i.e., involved in fire suppression and on the 48 hour shift. Initially, all four were put in 40 hour per week positions. At the time of hearing, two of the four remained in the 40 hour week positions, one was on IOD (Injured on Duty) status, and the fourth person had retired. The two who remained in the 40 hour per week positions were sent to ProHealth for an assessment and given a prescription for rehabilitation to enable each to successfully retake the minimum standards physical ability test. No Local 311 bargaining unit member has been charged with failure to be physically fit as a result of the Minimum Physical Ability Standard testing. Lionel Spartz became an Officer of Local 311 on June 30th, 1993. Spartz' predecessor, Jack Deering, resigned from the Presidency of Local 311, effective June 30, 1993.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. Complainant Local Union No. 311, International Association of Firefighters (IAFF), AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent City of Madison (Fire Department) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and, at all times material hereto, Assistant Chief Kinney has been an agent of the Respondent.

3. Complainant has failed to demonstrate by a clear and satisfactory preponderance of the evidence that Respondent has interfered with, restrained or coerced employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats., and therefore, has not established an independent violation of Sec. 111.70(3)(a)1, Stats.

4. Complainant has failed to demonstrate by a clear and satisfactory preponderance of the evidence that the establishment and implementation of the Minimum Physical Ability Standard program set forth in Assistant Chief Kinney's announcement of July 1, 1993 was motivated, in whole or in part, by Union animus or hostility towards the concerted protected activities of employes, and, therefore, has not established a violation of Sec. 111.70(3)(a)3, Stats.

5. Respondent's decision to pursue charges against an employe before the Police and Fire Commission relates primarily to the formulation and management of public policy and, thus, the Respondent does not have a statutory duty to bargain with the Complainant on such a decision.

6. The parties' 1992-93 collective bargaining agreement provides the

City with the contractual right to establish and implement the Minimum Physical Ability Standard program set forth in Assistant Chief Kinney's announcement of July 1, 1993 and, therefore, there has been a waiver by contract language of any statutory duty/right to bargain on this Minimum Physical Ability Standard program.

7. Complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that Respondent has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.

8. Complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that Respondent has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

The complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 4th day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

On September 1, 1989, the Union filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Madison (Fire Department) was violating Section 111.70(3)(a)1, 3, and 4, Wis. Stats., by instituting minimum job testing requirements without bargaining with the Union on the decision to test and on the composition of the test. Upon agreement of the parties, the matter was held in abeyance until July 16, 1993, when the Union filed an amended complaint, alleging that, on or about July 1, 1993, the City unilaterally determined and imposed minimum job testing requirements. At hearing, the Union alleged that the City has violated Sec. 111.70(3)(a)1, 3, 4, and 5, Wis. Stats. The City denies that it has committed any prohibited practice in violation of the Municipal Employment Relations Act.

POSITIONS OF THE PARTIES

Complainant

In 1989, the Union was informed by the City that sometime in September of 1989, minimum job testing requirements would be unilaterally determined by the City and that testing would begin shortly thereafter. At that time, the Union made a timely demand to bargain the decision to test, the composition of such test, and all impact items.

The City, for reasons known only to the City, decided not to proceed with the testing program until July 1, 1993. On that date, the City informed the Union that minimum job testing requirements would be unilaterally determined and imposed by the City. On or about July 1, 1993, the Union demanded that the City cease and desist, bargain, and restore the status quo.

The City has a statutory duty to bargain with the Union on matters primarily related to the wages, hours and working conditions of employes represented by the Union. The program unilaterally devised and implemented by the City contains a number of mandatory subjects of bargaining.

As demonstrated by Law Enforcement Labor Services, Inc. v. City of Luverne, 463 N.W.2d 546 (Minn. App. 1990), a mandatory physical examination policy is a matter materially affecting the terms and conditions of employment. The Local Government Employee-Management Relations Board, in a case involving the City of Henderson, Nevada, determined that the physical agility testing of Police Officers is a mandatory subject of negotiation. (cites omitted)

The National Labor Relations Board has concluded that "obligatory tests, which may reasonably lead to discipline, including discharge, are plainly germane to the employe's working conditions and, therefore, are presumptively mandatory subjects of bargaining". Under this framework, drug testing has been deemed a mandatory subject of bargaining. (Cites omitted). Also deemed mandatory subjects of bargaining are psychological testing and residency requirements (Cites omitted).

Waiver of a statutory right to bargain must be "clear and unmistakable". Waiver will not be inferred from silence, from a broadly-worded management rights clause or from a "zipper clause". Complainant has not waived any right to bargain on the matter of the physical ability test.

The City's reliance on the "zipper clause" is misplaced. A "zipper clause" is nothing more than the "labor law equivalent of an integration

clause" and is interpreted only to maintain the status quo of a contract. (cites omitted). A "zipper clause" is not to be used to allow an employer to make unilateral changes in working conditions without bargaining.

The minimum standards physical ability program is not referenced in the collective bargaining agreement, directly or indirectly, and was never discussed by the parties at the table, let alone bargained. The status quo in this case is that no program has been bargained.

Rule 34 does not call for physicals, for dismissal, for discipline, and/or rehabilitation. Only the newly-devised and implemented program covers these subjects. Under Commission law, new applications to old work rules are bargainable.

Contrary to the argument of the City, it does not have a management right to determine and implement the minimum testing requirements. Article XXII of the collective bargaining agreement provides, in part, as follows:

> The establishment of new work rules primarily affecting wages, hours of work or conditions of employment shall be subject to negotiations and mutual agreement prior to their effective date.

In the present case, there were no negotiations and there was no mutual agreement to the new work rules.

Respondent

Representatives of the Complainant and the Respondent have engaged in a long and sometimes contentious series of discussions regarding the administration of minimum standards of physical ability tests. Respondent began to initiate standards testing in September of 1989 but, in response to Complainant's requests for discussions, delayed testing for almost three years. The parties met most recently on the issue in 1991.

Negotiations for the current agreement began in the fall of 1991 and concluded the following spring. The record does not demonstrate, that the Complainant, during these negotiations, attempted to bargain any consideration regarding the administration of the standards. The Union, however, did propose and secure what is commonly known as a "zipper clause". The clause enables the Union to refuse to bargain on anything, including the administration of standards. Moreover, occurrences within the control of the Complainant prohibited the parties from meeting, even if bargaining were required.

The Employer was not required to bargain regarding the administration of the standards. The rules of the Department specify the authority of the Department and the rules are incorporated by reference in Article XXII of the collective bargaining agreement. Aside from the general rules that, among other things, give the Chief the sole and absolute control and command over all members of the Fire Department, there are specific rules that apply to members of the Department not fit for duty.

Rule 34 requires each member to be physically fit for duty as a Firefighter. Firefighters who are found to be physically unfit may, after a period of time, be dismissed or suspended. The Complainant's position, that the Department cannot administer physical fitness standards, effectively negates the authority vested in Department management. In the absence of standards, Rule 34 would be rendered a nullity.

The test used in the administration of the physical ability standard was substantially related to the test of applicants for employment with the Department. The former test, however, was easier. Wisconsin Statute

62.13(4)(c) provides that the Police and Fire Commission may adopt rules for physical testing of applicants.

To prohibit administration of the standards would interfere with the exercise of City obligations to act on matters primarily related to the formulation or management of public policy. The Luverne decision can be distinguished from the instant matter in that it relates to requiring physical examinations, not the administration of standards. There is no indication in the Luverne decision that rules implemented by the City had already been negotiated by the parties. The City has never claimed that the Complainant waived its right to bargain over the administration of standards.

The Henderson, Nevada case regarding physical agility testing for police officers can also be distinguished from the instant matter. First, there has been no proof that passing the standards is in any way, a condition of continued employment, as determined by the Nevada board. Second, the agility tests in the Henderson case were administered for the purpose of pinpointing any problems which may require special attention in physical examinations, which was not the stated purpose of standards testing conducted by the City. Third, the City has not claimed that the administration of standards was a safety consideration. Thus, Complainant's reliance on safety standards being mandatory subjects of bargaining is misplaced. Fourth, unlike the Henderson case, no member of Complainant's bargaining unit was denied internal promotions, special assignments, or threatened with termination if the standards were not passed.

Complainant relies on two non-Wisconsin decisions to prove its contentions. Wisconsin case law, however, leads to an opposite determination in this matter. Issues that are primarily related to the formulation or management of government or public policy are permissive, not mandatory, subjects of bargaining. The rules of the Fire Department were formulated as a matter of public policy by the Police and Fire Commission.

Complainant's reliance on Article XXII is misplaced. No new work rules were established. The administration of standards simply implemented the existing rules and the public policy of the Police and Fire Commission.

Complainant has not shown that the administration of standards has had any effect on matters primarily related to wages, hours of work, or conditions of employment. Even if it were determined that some issues of the administration of the standards were primarily related to conditions of employment, it is well-established that where permissive and "mandatory" subjects are inextricably intertwined, such matters are permissive. The complaint should be dismissed in all respects.

DISCUSSION

The Union's arguments focus upon the allegation that the City violated its statutory duty to bargain by unilaterally determining and implementing the Minimum Physical Ability Standard program set forth in Assistant Chief Kinney's announcement of July 1, 1993. Sec. 111.70(3)(a)4, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others:

> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding

> concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

Under Wisconsin law, a matter which is primarily related to wages, hours and conditions of employment is a mandatory subject of bargaining, while a matter which is primarily related to the formulation and management of public policy is a permissive subject of bargaining. 2/ A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively violates Sec. 111.70(3)(a)1, Stats. 3/

On September 2, 1992, the parties executed a collective bargaining agreement which, by its terms, was effective January 1, 1992 to December 31, 1993. Neither party made any proposals regarding physical ability standards and testing when they negotiated their 1992-93 collective bargaining agreement. 4/

On April 15, 1993, Union Attorney Richard Graylow sent a letter to Fire Chief Roberts informing Roberts that Graylow understood that minimum standard tests were again being performed under direct order in the Department and advising Roberts that "the necessity for such testing, as well as the composition of the Program, are mandatory subjects of bargaining. This, of course, includes time limits." Graylow further stated that "Unless and until the time limit requirement is bargained collectively, I ask you to repudiate same" and requested Roberts to present any proposals to the Union's bargaining committee.

In a letter dated April 21, 1993, Assistant Chief Kinney advised Graylow that "The contract is clear on Management's rights to set acceptable standards. The time limit for successful completion of the standards is part of the standard itself." There is no evidence of any further correspondence or discussions between the parties regarding the standards issue until July 1,

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2/ City of Brookfield v. WERC, 87 Wis.2d 819 (1979); Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977); Beloit Education Association v. WERC, 73 Wis.2d 43 (1976).

3/ Green County, Dec. No. 20308-B (WERC, 11/84)

4/ It is evident that, in 1991, the Union requested to negotiate on the issue of standards and the impact of standards. It is further evident that, on at least one occasion in 1991, the parties did meet to discuss the issue of standards. The record, however, does not reveal the nature of any discussion on the standards in 1991, or in any prior year.

1993, when Kinney issued his announcement on the Minimum Physical Ability Standard program.

At the time that Kinney issued his announcement of July 1, 1993 and the City began the standards testing, the parties were subject to the terms of their 1992-93 labor contract. As Examiner Shaw stated in City of Wisconsin Rapids: 5/

> 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 are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakably waived. 9/ Where a collective bargaining agreement exists which expressly addresses a subject, it determines the rights of the parties' and consequences of certain actions, 10/ but determinations as to whether or not a waiver exists are made on a case-by-case basis. 11/
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> 9/ City of Richland Center, Dec. Nos. 22912-A, B (Schiavoni, 1/86) (WERC, 8/86)).
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> 10/ 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.
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> 11/ Racine Unified School District, Dec. No. 13957-C (WERC, 1/83); City of Richland Center, Ibid.

The City, contrary to the Union, argues that it has the contractual right to implement the Minimum Physical Ability Standard set forth in Kinney's announcement of July 1, 1993. Specifically, the City argues that Article 22 incorporates by reference the "Rules of the Madison Fire Department", including Rule 34, which states that "It is the duty of each member of the Fire Department to keep himself/herself physically fit for active, efficient performance of his/her duties as a Firefighter." The City further argues that the Minimum Physical Ability Standard program is a reasonable exercise of the City's management right to administer Rule 34.

The Union does not dispute the City's assertion that Rule 34 is incorporated into the labor agreement by Article 22 (A). Rather, the Union argues that the Minimum Physical Ability Standard is a new work rule, which, under the terms of Article 22 (B) cannot be implemented without negotiations and the mutual agreement of the parties. In the alternative, the Union argues that a new interpretation of an old work rule is bargainable under Commission law.

The Examiner is persuaded that the Minimum Physical Ability Standard is not a new work rule, but rather, involves the administration of an existing work rule, i.e., Rule 34. Rule 34 does not define "physically fit", nor does it define the procedure by which "physical fitness" is measured. Thus, by virtue of Article 5, Management Rights, the City has the contractual authority to establish and implement a procedure for determining whether or not a member of the Fire Department is "physically fit for active, efficient performance of

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5/ Dec. No. 27466-A (5/93).

his/her duties as a Firefighter." 6/

In his letter of July 5, 1993, Union President Lionel Spartz questioned the validity of the Minimum Physical Ability Standard testing procedure. However, the record presented at hearing does not establish that the Minimum Physical Ability Standard, consisting of the seven evolutions; the time period for the completion of the standard, i.e., seven minutes and twenty seconds; or the ProHealth Assessment procedure do not provide a reasonable basis for determining a bargaining unit member's physical fitness "for active, efficient performance of his/her duties as a Firefighter." Assuming arguendo, that the Minimum Physical Ability Standard, consisting of the seven evolutions; the time period for the completion of the standard, i.e., seven minutes and twenty seconds; and the ProHealth fitness assessment, including a physical examination as needed, are mandatory subjects of bargaining, the undersigned is persuaded that there has been a waiver by contract language of the right/duty to bargain on these matters during the term of the contract.

Consistent with Paragraph Three of Kinney's announcement of July 1, 1993, members of the bargaining unit who have failed the Minimum Physical Ability

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6/ Article 5 provides that the "Union recognizes the prerogative of the City and the Chief of the Fire Department to operate and manage its affairs in all respects, in accordance with its responsibilities and the powers of authority which the City has not officially abridged, delegated or modified by this Agreement and such powers or authority are retained by the City."
The management rights expressly enumerated in Article 5 include the following:

. . .

B. To manage and direct the employees of the Fire Department.

. . .

F. To determine the mission of the City and the methods and means necessary to efficiently fulfill the mission including: the transfer, alteration, curtailment, or discontinuance of any goods or services; the establishment of acceptable standards of job performance; the purchase and utilization of equipment for the production of goods or the performance of services; and the utilization of students, and/or temporary, limited-term, part-time, emergency, provisional or seasonal employees. (Emphasis supplied)

. . .

J. The City retains the right to establish reasonable work rules and rules of conduct. Any dispute with respect to these work rules shall not be subject to arbitration of any kind, but any dispute with respect to the reasonableness of the application of said rules may be subject to the grievance and arbitration procedures as set forth in this Agreement.

Standard test have been removed from 48 hour work week fire suppression duties to a 40 hour work week. Inasmuch as Article 7 (C) states that "The Chief of the Department may from time to time assign any member from the 48-hour work week to the 40-hour work week or any member from the 40-hour to the 48-hour as the good of the service warrants", the Examiner is satisfied that there has been a waiver by contract language of any right/duty to bargain on the reassignment of the personnel who fail the Minimum Physical Ability Standard test.

While bargaining unit members have failed the Minimum Physical Ability Standard test, no bargaining unit member has been charged with a failure to be physically fit. However, the July 1, 1993 announcement from Assistant Chief Kinney does state that "If ProHealth advises that the employee is unfit for duty and/or cannot be rehabilitated, he/she will be referred to the Police and Fire Commission and charged with a violation of Rule 34 of the Rules of the Madison Fire Department." The announcement further states that "Failure of minimum physical ability standard following the prescribed rehabilitation period will result in similar charges being filed with the Police and Fire Commission."

The Examiner is persuaded that a decision to refer charges to the Police and Fire Commission relates primarily to the formulation and management of public policy and, thus, is not a mandatory subject of bargaining. Despite the Union's arguments to the contrary, the City does not have a statutory duty to bargain with the Union on the issue of whether or not the City will file charges with the Police and Fire Commission for an employe's failure of the Minimum Physical Ability Standard test, or for any other reason.

Members of the Union's collective bargaining unit who have failed the Minimum Physical Ability Standard have been provided with a prescription for rehabilitation to enable the employe to successfully complete the Minimum Physical Ability Standard testing. It is not evident, however, that the City requires the employe to follow the rehabilitation program prescribed by ProHealth. Thus, the Examiner is not persuaded that the prescription for rehabilitation, per se, has any impact upon the wages, hours, or working conditions of the Union's bargaining unit members.

In arguing that a new interpretation of an old work rule is bargainable, the Union relies upon City of Madison, Dec. No. 15095 (WERC, 12/76). In that case, the Commission found that the City of Madison had violated Sec. 111.70(3)(a)4 and 1, Stats. "By imposing a changed meaning of the residency requirement on the association and the employes it represents without offering to bargain the change, the respondent in making a unilateral change in conditions of employment and by refusing to bargain on the subject of residency as requested by the association." This case is distinguishable on the facts. Specifically, the instant record does not establish that the City has altered the manner in which it administers Rule 34. Rather, it appears that, for the first time, the City is administering Rule 34. The failure of the City to previously exercise a right does not serve to waive the future exercise of that right.

Conclusion

As discussed supra, the Union's arguments focus on the allegation that the City violated its statutory duty to bargain when it established and implemented the Minimum Physical Ability Standard as set forth in Kinney's announcement of July 1, 1993. For the reasons discussed, the Examiner has rejected these arguments of the Union. Complainant has not established that the City has committed any prohibited practice. Accordingly, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 4th day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner