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-B

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.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AFFIRMING AND MODIFYING EXAMINER'S CONCLUSIONS OF LAW, AND AFFIRMING EXAMINER'S ORDER

On March 4, 1994, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondent City of Madison had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4, or 5, Stats., by establishing and implementing a Minimum Physical Ability Standard program on July 1, 1993 for certain fire fighting employes represented by Complainant Local Union No. 311, International Association of Fire Fighters, AFL-CIO.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support and in opposition to the petition, the last of which was received on July 6, 1994.

Having considered the matter and being fully advised of the premises, the Commission makes and issues the following

ORDER 1/

A. The Examiner's Findings of Fact are affirmed.

B. Examiner's Conclusions of Law 1-4 are affirmed.

C. Examiner's Conclusion of Law 5 is set aside.

D. Examiner's Conclusion of Law 6 is renumbered and modified to read:

> 5. Because the parties' 1992-1993 collective bargaining agreement addresses the issues of employe physical fitness for efficient performance, discipline, assignment of employes from a 48-hour to a 40-hour work week, establishing acceptable standards of job performance, and establishment of reasonable work rules, and because the Minimum Physical Ability Standard is not a "new" work rule, Respondent City of Madison did not have a statutory or contractual duty to bargain with Complainant Local Union No. 311 regarding the establishment and implementation of the Minimum Physical Ability Standards program during the term of that agreement and therefore did not violate Sec. 111.70(3)(a)4, or 5, Stats.

E. Examiner's Conclusion of Law 7 is set aside.

F. Examiner's Conclusion of Law 8 is renumbered and modified to read:

> 6. Because the 1992-1993 bargaining agreement between Complainant and Respondent contains a provision for final and binding arbitration of alleged violations of the agreement, the Wisconsin Employment Relations Commission will not exercise its jurisdiction over the allegation that the Respondent City of Madison violated

the terms of the 1992-1993 agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., except as reflected by Conclusion of Law 5.

G. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of October, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

William K. Strycker /s/
William K. Strycker, Commissioner

Commissioner Herman Torosian did not participate.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified

(footnote 1 continued on page 4)

(footnote 1 continued from page 3)

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in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of

the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AFFIRMING AND MODIFYING EXAMINER'S CONCLUSIONS OF LAW, AND AFFIRMING EXAMINER'S ORDER

The Pleadings

On September 1, 1989, the Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent was violating Secs. 111.70(3)(a)1, 3, and 4, Stats., by instituting minimum fitness requirements. The parties thereafter agreed to hold the matter in abeyance. On July 16, 1993, Complainant filed and amended complaint alleging that on or about July 1, 1993, Respondent unilaterally imposed minimum fitness requirements. At hearing, Complainant alleged that the Respondent had thereby violated Secs. 111.70(3)(a)1, 3, 4, and 5, Stats. The City denies that it has committed any prohibited practices.

The Examiner's Decision

The Examiner concluded that the Respondent did not breach its duty to bargain when it unilaterally established and implemented a Minimum Physical Ability Standard program on July 1, 1993. She reasoned as follows:

> 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.
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> 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.
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> 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 his/her duties as a Firefighter." 6/

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

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

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> 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)
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> 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.

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 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.

The Examiner also rejected allegations that the City had violated Secs. 111.70(3)(a)1, 3 or 5, Stats.

POSITIONS OF THE PARTIES

The Complainant

Complainant asserts the Examiner erred when she concluded that Respondent had the ability under the 1992-1993 contract to unilaterally devise and implement minimum physical fitness requirements for fire fighting employes. Complainant concedes that there is an existing work rule incorporated into the collective bargaining agreement which states "It is the duty of each member of the Firefighter Department to keep himself/herself physically fit for active, efficient performance of his/her duties as a Firefighter." However, Complainant asserts that this work rule does not allow management to create and administer a physical fitness monitoring program which substantially affects conditions of employment. Even when read in conjunction with that portion of the management's rights clause which acknowledges the City's right to establish acceptable standards of job performance, Complainant contends that it has a right to bargain over the disputed fitness program.

Complainant argues that the fitness program should be viewed as a "new work rule" which the contract provides is subject to "negotiations and mutual agreement" prior to taking effect. Complainant asserts that for years employes have been subject to a generic, self-monitoring fitness program, with no precise standards or known penalties. Where, as here, there is now a detailed procedure for measuring and securing compliance with the generic fitness obligation, the Complainant clearly has a right to bargain over these matters even during the term of a contract.

Complainant contends that the Examiner erroneously concluded that Complainant had clearly and unmistakably waived its right to bargain. In this regard, Complainant notes that during the bargaining of the 1992-1993 agreement it is undisputed that neither party raised issues regarding Respondent's ability or right to implement minimum fitness standards. Thus, Complainant argues that it cannot reasonably be found to have waived its bargaining rights as to the matters contained in Respondent's fitness program.

Given all the foregoing, Complainant asks that the Commission reverse the Examiner.

The Respondent

Respondent asserts that the Examiner correctly dismissed the complaint and that the Commission should affirm the Examiner's decision. Respondent

contends the Examiner rightly concluded that it had the contractual authority to implement minimum fitness standards for its employes. It asserts the fitness standards do not constitute a new work rule but rather the administration of an existing rule. Respondent contends that the presence of an existing rule distinguishes the facts of this case from the facts in cases cited by Complainant in support of its position.

Given all the foregoing, Respondent asks that the Examiner be affirmed.

DISCUSSION

A municipal employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. 2/ Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck.

Here, the parties agree their 1992-1993 contract contained a provision (through incorporation of a work rule) which states that "It is the duty of each member of the Fire Department to keep himself/herself physically fit for active,

2/ School District of Cadott, Dec. No. 27775-C (WERC, 6/94); City of Richland Center, Dec. No. 22912-B (WERC, 8/86); Brown County, Dec. No. 20623 (WERC, 5/83); Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

efficient performance of his/her duties as a Firefighter." The contract also contains provisions relating to discipline (Article 5), to establishing acceptable standards of job performance (Article 5), to assigning employes from a 48-hour work week to a 40-hour work week (Article 7), to establishing reasonable work rules (Article 5), and to establishing new work rules (Article 22). The contract also provides that the parties are not obligated to bargain over subjects "referred to or covered in" the agreement (Article 19). Within the context of these contract provisions, it is clear to us that the parties have already addressed their respective rights and obligations as to establishment and implementation of minimum fitness standards. 3/ Thus, to whatever extent the various components of Respondent's July 1, 1993 Minimum Physical Ability Standard are mandatory subjects of bargaining, Respondent had no statutory duty to bargain over same during the term of the 1992-1993 agreement.

However, Article 22 of the 1992-1993 agreement states:

> 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.

Thus, through Article 22, the parties have created a contractual duty of the City to bargain to mutual agreement with Complainant before "new" work rules affecting mandatory subjects of bargaining can become effective. Although this contractual duty to bargain is enforceable through the parties' contractual grievance arbitration procedure, the parties litigated the merits of this contractual issue before the Examiner. Under such circumstances, it is appropriate to exercise our jurisdiction over Complainant's Sec. 111.70(3)(a)5, Stats., allegation and we will proceed to consider this contractual issue.

The threshold question is whether the City has established a "new" work rule. We conclude it has not.

Existing Rule 34 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." We are satisfied that the Minimum Physical Ability Standard is not a "new" work rule, but rather the City's interpretation of an existing one, more specifically the term "physically fit" contained within it. Thus, we conclude the City did not have a contractual duty to bargain with the Complainant over the Minimum Physical Ability Standard.

3/ The record establishes that since at least 1989, these parties have been at odds over minimum physical ability testing and its impact on employes. Despite the presence of this issue, both parties elected not to make any specific proposals about physical ability standards when they bargained their 1992-1993 agreement. Each side apparently decided to rely on their existing contract rights to resolve any dispute which might arise.

Our decision does not leave the Complainant without potential recourse to challenge the Minimum Physical Ability Standard program. Article 9 of the 1992-1993 contract generally provides Complainant with a grievance and arbitration procedure by which the scope of the parties' respective rights can be determined. Article 5 specifically acknowledges the Complainant's right to challenge the "reasonableness of the application of" work rules as well as the "reasonableness of the application of . . . . Management Rights." 4/ Contrary to the Examiner, we express no view on the merits of any such claim particularly in light of the parties' specific contractual agreement in Article 5 to use their contractual mechanism to resolve such issues. 5/

We have modified the Examiner's Conclusions of Law to better reflect our rationale. We have affirmed her Findings of Fact and her ultimate determination that the establishment and implementation of the Minimum Physical Ability Standard program did not violate Secs. 111.70(3)(a)1, 3, 4 or 5, Stats.

Dated at Madison, Wisconsin this 14th day of October, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

William K. Strycker /s/
William K. Strycker, Commissioner

Commissioner Herman Torosian did not participate.

4/ Article 5, Section J and K state:

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 procedures contained herein.

5/ See Cadott and Brown County, supra, footnote 2, for a similar result.