STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FIREFIGHTER LOCAL UNION NO. 583, IAFF AFL-CIO and VICTOR CONELY, Complainants, vs. CITY OF BELOIT (FIRE DEPARTMENT), Respondent.	Case 120 No. 49941 MP-2805 Decision No. 27961-B

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703, on behalf of Complainants.

Mr. Bruce K. Patterson, Employee Relations Consultant, P.O. Box 51048, New Berlin, Wisconsin 53151, on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Firefighters Local Union No. 583, IAFF, AFL-CIO, and Victor Conley filed a complaint with the Wisconsin Employment Relations Commission on October 6, 1993, wherein they alleged that the City of Beloit had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4, Stats. Examiner David E. Shaw of the Commission's staff was pointed as Examiner in this case and was subsequently appointed as Examiner in Case 109 involving the same parties and which had been filed previously. Hearing had been set in this case for May 12, 1994, and on March 18, 1994, over the Respondent's objection, the Commission ordered the cases consolidated for purposes of hearing.

On March 31, 1994, the Respondent filed its answer in this case denying it had committed any prohibited practices.

A hearing was held in the cases before the Examiner on May 12, 1994 in Beloit, Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs by September 2, 1994. The Examiner, having considered the evidence and the

arguments of the parties, now makes the following

FINDINGS OF FACT

1. The City of Beloit, hereinafter "Respondent", is a municipal employer and has its principal offices located at 100 State Street, Beloit, Wisconsin 53511. Respondent maintains and operates the City of Beloit Fire Department, and since September 15, 1992 and at all times material herein, Gerald Buckley has been the Fire Chief. Since September 15, 1992, Daniel Kelley has been Respondent's City Manager, and prior to that was Respondent's City Attorney. At all times material herein, Alan Tollefson has been Respondent's Personnel Director.

2. Firefighter Local Union No. 583, IAFF, AFL-CIO, hereinafter "Complainant", is a labor organization located at the City of Beloit Fire Department, 524 Pleasant Street, Beloit, Wisconsin 53511. At all times material herein, Complainant has been the exclusive collective bargaining representative for all regular full-time employes of the City of Beloit Fire Department, excluding all officers above the rank of Shift Commander, the civilian secretary, and communication operators. At all times material herein, Terry Hurm has been Complainant's President, and is employed in Respondent's Fire Department as a Firefighter/Paramedic. At all times material herein, Attorney Richard Graylow has represented Complainant in legal matters in which it is involved.

3. Respondent and Complainant are parties to a collective bargaining agreement covering the period November 15, 1991 until December 31, 1994 and said Agreement contains, in relevant part, the following provisions:

ARTICLE IV

APPLICATION AND INTERPRETATION OF WORK RULES

Section 1 For purposes of this Article, work rules are defined as and limited to:

Rules promulgated by the City within its discretion which regulate the personal conduct of employees during the hours of their employment.

Section 2 The Union recognizes the right of the City to establish reasonable work rules. Copies of newly established work rules or amendments to existing work rules will be furnished to the Union at least ten (10) days prior to the effective date of the rule.

Section 3 The City agrees that established work rules shall not conflict with any provisions of this Agreement.

Section 4 The Union reserves the right to grieve the reasonableness of a work rule. Anytime a work rule is grieved, said work rule shall be withheld until such grievance is resolved.

ARTICLE V

SUSPENSION OR DISMISSAL

Suspension or dismissal from the Fire Department shall be governed by Section 62.13 of the Wisconsin Statutes.

ARTICLE VI

GRIEVANCE PROCEDURE

Section 1 A grievance is defined as an alleged violation of a specific provision of this Agreement.

. . .

Section 2 . . .

Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party. . .

. . .

The decision of the arbitrator shall be final and binding for both parties of this Agreement.

. . .

ARTICLE XIX

WAGES AND SALARY SCHEDULE

. . .

Section 13 The probationary period for each position covered by this labor agreement is two (2) years of continuous service in the position.

4. Victor Conley was hired by Respondent on August 26, 1991 as a probationary firefighter in Respondent's Fire Department and as such was required to serve a 24-month probationary period. Sometime subsequent to his hiring, but prior to completing the initial 24-month probationary period, Conley became ill and was hospitalized for hepatitis. Due to his illness, Conley was off work for a period of four months and 18 days.

5. On or about July 24, 1992, the Respondent, through Chief Buckley, promulgated the following general order:

GENERAL ORDER 50

Subject: DRUG-FREE WORK PLACE

Date Effective: July 29, 1992

Order:

It is the policy of the City of Beloit Fire Department to maintain a drug free work place for all of it's employees. Drug use both on and off the job can have a significant impact on an employee's job performance and can threaten an employee's own personal well being and safety as well as the safety of other employees and the general public.

Employees are expected to report to work free from any substances that could inhibit their ability to perform their duties. The unlawful use, possession, distribution, dispensing or manufacture of an illegal drug while on duty, on or off City property, is absolutely prohibited.

In addition, employees are not permitted to consume alcoholic beverages immediately before or during the work day. This includes breaks and lunch periods. Consumption of alcohol, even in moderate amounts, impedes performance, causes safety risks and projects a poor image of City employees to the community.

Failure to comply with this policy will lead to disciplinary action up to and including discharge.

REPORTING OF DRUG CONVICTION

Pursuant to the Drug-Free Workplace Act of 1988, an employee who is convicted of any violation of a criminal drug statute occurring while on duty must notify the City Personnel Director no later than five days after such conviction.

PREVENTION AND REHABILITATION

The goals of this policy are prevention and rehabilitation whenever possible, rather than discipline and termination. The City of Beloit Fire Department encourages employees who have alcohol or other drug problems to seek help to deal with their problem. Employees are encouraged to use the services of the City's Employee Assistance Program (E.A.P.). Information about the E.A.P. is posted on employee bulletin boards throughout the City. Additional information is available from the Personnel Department.

PRESCRIPTION DRUGS

Employees must notify their supervisor when taking any medication which may interfere with the safe and effective performance of their duties or operation of equipment.

DRUG TESTING

When an employee is acting in an abnormal manner or appears unfit to perform his/her duties in a safe manner, and a supervisor has probable suspicion to believe the employee is using or is under the influence of alcohol or other drugs, the employee shall be taken to a properly authorized testing facility for alcohol (Beloit Police Department for breathalyzer test) or drug testing (Occupational Health and Wellness Center). Probable suspicion means suspicion based on specific personal observations that the supervisor can describe concerning the appearance, behavior, speech or breath odor

of the employee.

Refusal to comply with alcohol or drug testing will constitute a presumption of intoxication and the employee will be subject to discipline, up to and including immediate discharge.

Gerald Buckley Chief /s/

By: Gerald Buckley, Chief

This order supercedes General Order No. , dated

Respondent did not negotiate the substance or impact of General Order 50 with Complainant prior to its promulgation. Complainant did not file a grievance under the parties' Collective Bargaining Agreement, with regard to the promulgation of General Order 50.

6. The Respondent had a Code of Ethics ordinance prior to 1992 and said ordinance only covered local public officials. In September of 1991, the Wisconsin State Legislature passed certain amendments to state statute Sec. 19.59, Stats., regarding the code of ethics for local government officials, employes and candidates. Respondent's then-City Attorney, Daniel Kelley, received a copy of the amended statutes and advised Respondent's Ethics Board of the changes in the law and that it would likely be necessary to change the existing ordinance in order to comply with state law. In considering changes to the local ordinance, the Ethics Board proposed expanding the ordinance to include all of Respondent's employes. In January of 1992, Respondent's City Attorney submitted a report to the Ethics Board explaining what expansion of the Code of Ethics ordinance to all of Respondent's employes might entail.

By the following letter of April 20, 1992, Tollefson advised Complainant that expansion of Respondent's Code of Ethics to cover its employes, as well as public officials, was being considered and that public hearings would be held:

Terry Hurm
President IAFF 583
Fire Department
City of Beloit

Dear Terry:

Enclosed is a press release which will go out next week on a public hearing by the Board of Ethics of the City of Beloit. The Board is considering making a recommendation to the City Council for changes in the Local Code of Ethics following recent revisions in

State law. Among other things, the Board is considering a recommendation that the ordinance be extended to cover all City employees, not just Public Officials.

As a representative of some of our employees, I thought you might like to have advanced notice of this hearing. Also enclosed is a copy of the changes being proposed.

A copy the press release is being distributed to all employees with the paychecks on Friday, April 24.

If you have any questions about this process or the changes proposed, feel free to give me a call.

Sincerely,

Alan Tollefson /s/
Alan M. Tollefson
Personnel Director

On May 7, 1992, Respondent's Ethics Board held a public hearing on the proposed changes to its local Code of Ethics ordinance. Those present at said hearing included Complainant's President, Terry Hurm. Hurm stated at the hearing that the majority of Complainant's members opposed the proposed change in the ordinance to cover all employes and that the Respondent's Police and Fire Commission already is able to monitor employes. Hurm also stated that the proposed change is a mandatory subject of bargaining and, therefore, this is only an issue for non-represented employes and that he is "wholeheartedly against it." There then followed discussion between the members of the Ethics Board, Kelley and Tollefson regarding the matters raised in the hearing and directions to Kelley to look into the matters and make additional changes to the proposed changes.

7. On October 10, 1992, Conley was involved in an accident in the City of Madison, Wisconsin for which he was charged with a "hit and run to an attended vehicle" and "failure to notify police of an accident". At approximately 12:30 a.m. on October 10, 1992, Respondent's Fire Department received a call reporting a person who was either sick or intoxicated, and requesting the services of a paramedic. Paramedics from the Department responded to the call and found the individual, Conley, sitting in a police squad car. As is the practice in Respondent's Fire Department, a "Paramedic Medical Report" was submitted regarding the ambulance call, and said report indicated the individual for which the ambulance was called was Victor Conley and further indicated that paramedics "found P.T. sitting in squad car not complaining of any injury or any other problems. P.T. states he had too much to drink, and does not need an ambulance."

On October 11, 1992, Conley failed to report as scheduled for work at 7:00 a.m. and failed to notify the Department that he would not be reporting to work that day.

On October 14, 1992, Chief Buckley called Conley into a meeting at the Headquarters Station to discuss matters related to the ambulance call and the hit and run accident on October 10th and his absence on October 11th. Also present at that meeting were Assistant Chief Schendel and Lieutenant El-Amin, a member of Complainant's Executive Board. After questioning Conley about the matters, Chief Buckley indicated he felt there was "probable cause" to send Conley to drug testing. Chief Buckley then directed Schendel to take Conley to Occupational Health and Wellness that same day for drug testing. Sometime on October 14, 1992, following the meeting with the Chief, Conley underwent drug testing as directed. Sometime subsequent to October 14, 1992, Chief Buckley requested to the Respondent's Police and Fire Commission that Conley's probationary period be extended by a period of four months and 18 days based upon his period of absence due to illness of the same duration, and said request was approved by the Police and Fire Commission. A memorandum to that effect was placed in Conley's personnel file. No adverse action was taken against Conley as a result of the drug testing he underwent on October 14, 1992.

8. On October 20, 1992, Chief Buckley met with Conley and issued the following written discipline which required Conley to take certain steps to avoid being terminated and imposed a two-day suspension without pay for his "absence without leave" on October 11, 1992:

> DATE: OCTOBER 20, 1992
>
> TO: VICTOR CONLEY
>
> FROM: GERALD BUCKLEY, FIRE CHIEF
>
> RE: DISCIPLINE FOR FAILURE TO REPORT TO WORK
>
> Your absence from work on October 11, 1992, and your failure to call in constitutes an absence without leave. Your explanation for your actions ("personal problems") is not satisfactory.
>
> A firefighter for the City of Beloit has a responsibility to maintain the highest standard of responsibility and dependability. Your unexcused and unreported absence, your virtual disappearance on the day in question and days following, and other actions of yours on the days preceding your absence call your dependability into

considerable question.

This is your second incidence of absence without explanation. The first offense was excused on the grounds of a serious medical condition. This offense cannot be excused.

As a probationary firefighter you are expected to demonstrate your ability to satisfactorily carry out your duties and adhere to the rules and regulations of the department. This is a clear and final warning that you are not satisfactorily completing that requirement.
In order to maintain your position with the Beloit Fire Department, I require that you take the following steps:

1. There is probable cause to believe that your behavior is in some way related to the consumption of alcohol. I understood you to say upon your recovery from your previous medical problem that consumption of alcohol could lead to severe problems for you. Within 14 days, you must provide me with a statement from your medical physician concerning your ability to consume alcohol. If your doctor so advises, you will be expected to refrain from the consumption of alcohol or be terminated from the Beloit Fire Department. If you do not produce the doctor's statement as required, you will be terminated.

2. You will undergo an assessment by the City's Employee Assistance Program and follow any course of treatment prescribed by the E.A.P. You will sign a release so that the City Personnel Director and I may monitor your attendance at appointments and your progress. Failure to complete the assessment and any course of treatment prescribed will result in termination.

3. You will keep me informed of all developments related to your involvement in a hit and run accident in Madison. If you are convicted of a felony as a result of this incident, you will be terminated. If you lose your driver's license as a result of this incident, your status with the department will be re-evaluated depending on the circumstances.

Failure to comply with any of the above conditions of any other violation of the rules or regulations, will subject you to immediate termination. In addition, for your absence without leave I am suspending you for forty-eight hours without pay. This suspension will be served on Nov. 1, 1992 and Nov. 4, 1992.

If you comply with these requirements you will be able to remain a valued member of this department. I sincerely hope you will take the steps necessary to accomplish this.

Victor H. Conley /s/
Victor Conley

Robert Schendel /s/
Witness

10-20-92
Date

10/20/92
Date

Gerald Buckley /s/
Gerald Buckley, Chief

10-20-92
Date

9. On October 22, 1992, Respondent's Ethics Board held another public hearing on the proposed changes in the local Code of Ethics ordinance. At the end of said meeting, the Ethics Board approved a motion to approve the latest draft of the Code of Ethics ordinance and to pass it on to Respondent's City Council with the recommendation that it be adopted. Respondent's City Council considered the proposed changes in the ordinance at its December 7, 1992, meeting and adopted the changes at its December 21, 1992, meeting. The new Code of Ethics ordinance was published on December 29, 1992, to take effect December 30, 1992. Said changes expanded Respondent's Code of Ethics ordinance to cover its employes, including those employes represented by Complainant, as well as its public officials; however, as to police and fire employes, the Police and Fire Commission, rather than the Ethics Board, is responsible for the administration and enforcement of the Code of Ethics. Respondent's local Code of Ethics ordinance, "1.46, Code of Ethics For City Officials and Employes", is incorporated herein by reference and is attached hereto as "Appendix 'A'".

10. On August 12, 1993, Complainant's attorney, Richard Graylow, sent Chief Buckley the following letter by certified mail:

Dear Chief Buckley:

I write to you for and in behalf of Local 583 the exclusive bargaining agent for the Beloit Firefighters subject to certain exceptions not material hereto.

It has come to the attention of the Firefighters that you may be contemplating drug testing as part of your responsibilities to maintain a drug-free environment. If the foregoing is true, I wish to put you on notice that drug testing is a mandatory subject of bargaining and cannot be unilaterally implemented.

In addition, I am informed and believe that you are also considering the implementation of a Code of Ethics. Once again, this too is a mandatory subject of bargaining. Peerless Publications, 124 LRRM 1331 (1987).

Thus, if you wish to bargain these two (2) subjects with the Union, please direct your written proposals to the Union's Bargaining Committee for its consideration.

Very truly yours,

Richard V. Graylow /s/
RICHARD V. GRAYLOW

11. On August 25, 1993, Tollefson sent Hurm the following Memorandum:

Date: August 25, 1993

To: Terry Hurm, President, IAFF Local #583

From: Alan M. Tollefson, Personnel Director

Re: New Code of Ethics

As you know from attending various hearings on the matter, the City Council has adopted a new Ethics Code. Enclosed is a copy for your information. One of the changes in the new code involves the extension of coverage to all City employees.

> With the paychecks on August 27, 1993, all employees are being given a brochure which briefly describes the highlights of the Ethics Code.
>
> In a letter dated August 12, 1993, to Chief Buckley, Attorney Richard Graylow makes reference to the Code of Ethics. The City stands ready to discuss the impact of the Ethics Code with your organization. Please identify in writing what you believe to be the impact of the new Ethics Code. Following receipt of your communication, we will set a meeting on the topic.

12. On August 27, 1993, Respondent enclosed a pamphlet in the pay envelopes of its firefighters which informed the employes of the existence of the Code of Ethics, the fact that the Police and Fire Commission is responsible for enforcing the Code as it applies to police and fire officials, the composition of the Board of Ethics, when the Board meets and who to contact to obtain a copy of the Code and the names and phone numbers of the members of the Board.

13. Tollefson sent Hurm the following Memorandum dated September 2, 1993, regarding drug testing:

> DATE: September 2, 1993
>
> TO: Terry Hurm, President, IAFF Local 583
>
> FROM: Alan M. Tollefson, Personnel Director
>
> Re: Drug Free Environment
>
> In a letter dated August 12, 1993 to Gerald Buckley, attorney Richard V. Graylow raises the issue of drug testing. Enclosed with this memo is a copy of General Order #50 relating to the drug free work place. This was provided to the union on July 29, 1992.
>
> You were also provided another copy of this General Order during the attempt at conciliation of your prohibitive practice complaint related to Victor Conley. We believe you have had ample opportunity to identify what you believe to be the impact of this general order and request discussion of that impact.
>
> As far as the city is concerned, General Order #50 is properly promulgated and operative.

14. On October 6, 1993, Complainant filed the instant complaint with the Commission.

15. The Respondent unilaterally created and implemented Fire Department General Order 50 regarding a drug free work place without first negotiating or offering to negotiate its creation, substance, implementation or impact with Complainant. Complainant did not request to bargain with Respondent regarding the issue of drug testing prior to Graylow's letter of August 12, 1993, to Chief Buckley. Said General Order 50 constitutes a "work rule".

16. The Respondent unilaterally created and implemented a Code of Ethics ordinance without first negotiating, or offering to negotiate, with the Complainant regarding said Code of Ethics or its impact. Said Code of Ethics, as it relates to Respondent's employes represented by Complainant, constitutes a "work rule". Complainant has not filed a grievance regarding the creation and implementation of the Code of Ethics.

17. Victor Conley was discharged on January 4, 1994, due to his having again lost his Wisconsin driver's license for operating a vehicle while under the influence and failing to notify the Respondent's Fire Department of those facts. Conley's discharge was not related to either the Department's General Order 50, or the Respondent's Code of Ethics.

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

CONCLUSIONS OF LAW

1. By discharging firefighter Victor Conley on January 4, 1994, Respondent City of Beloit, its officers and agents, did not violate Secs. 111.70(3)(a)1 and 4, Stats.

2. The subject of the creation and implementation of work rules is addressed by Article IV, Application and Interpretation of Work Rules, in the parties' 1992-1994 Agreement, and, therefore, the Respondent City of Beloit did not have a statutory duty to bargain with Complainant Local Union No. 583, IAFF, AFL-CIO, regarding the creation and implementation of its General Order 50 relating to maintaining a drug-free workplace during the term of that Agreement. Therefore, Respondent did not violate Secs. 111.70(3)(a)1 and 4, Stats., as alleged.

3. The subject of the creation and implementation of work rules is addressed by Article IV, Application and Interpretation of Work Rules, of the parties' 1992-1994 Agreement, and,

therefore, the Respondent City of Beloit did not have a statutory duty to bargain with Complainant Local Union No. 583, IAFF, AFL-CIO, regarding the creation and implementation of its Code of Ethics during the term of that Agreement. Therefore, Respondent did not violate Secs. 111.70(3)(a)1 and 4, Stats., as alleged.

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

ORDER 2/

The complaint filed in this matter is dismissed in its entirety.

Dated at Madison, Wisconsin this 6th day of January, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

2/ 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 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

The Complainant alleges that the Respondent required one of its employes, Conley, to submit to a drug test, and that Respondent had unilaterally created and implemented a drug testing policy without first bargaining with Complainant. Further, Respondent unilaterally extended Conley's probationary period. 3/ Similarly, Complainant also alleges that Respondent unilaterally created and implemented a Code of Ethics which presently covers all of its employes, including those represented by Complainant. The creation and application of a drug testing policy and the Code of Ethics, as written and applied, are mandatory subjects of bargaining. Therefore, Respondent violated Secs. 111.70(3)(a)1 and 4, Stats., by unilaterally creating and implementing both of those matters without first bargaining over them with Complainant.

In its answer, Respondent denies it had the duty to bargain the creation of a drug testing policy and asserts it offered to bargain the impact of the policy with Complainant, but the latter has refused. With regard to the Code of Ethics, Respondent also denies it had a duty to bargain the Code of Ethics with the Complainant, and that it offered to bargain the impact and the Complainant has refused.

POSITIONS OF THE PARTIES

Complainant

The Complainant contends that the process and impact of a drug-testing program, a Code of Ethics and an extension of an employe's probationary period were not subjects covered by the parties' most recent collective bargaining agreement. Therefore, by unilaterally implementing those items, the Respondent refused to bargain within the meaning of the Municipal Employment Relations Act (MERA). MERA requires municipal employers to bargain with representative unions as to subjects relating to the wages, hours and conditions of employment. Whether an issue is a mandatory or permissive subject of bargaining depends upon its relation to wages, hours and conditions of employment. "The test is whether a matter is 'primarily related' to wages, hours, or conditions of employment, or whether it is primarily related to the formulation or management of public policy." Madison School District v. WERC, 133 Wis. 2d 462 (Wis. Ct. App. 1986); Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977).

Complainant cites precedent from the National Labor Relations Board (NLRB) and the federal courts as finding that mandatory drug testing has a definite and potentially substantial impact on an employe's continued employment, and therefore constitutes a mandatory subject of

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2/ The allegation regarding the refusal to bargain over the creation of a variable probationary period is addressed in the decision in Case 109, Decision No. 27990-B, issued this date.

bargaining. Citing, e.g., Johnson-Bateman Company, 295 NLRB 180, 131 LRRM 1393 (1989); Schlacter-Jones v. General Telephone, 936 F. 2d 435 (9th Cir., 1991). In Johnson-Bateman Company, the NLRB concluded that the employer's new drug testing policy constituted a change in the method of investigation and the character of proof on which an employe's job security might depend, and that the policy was not among the class of managerial decisions that lie at the core of entrepreneurial control. Similarly, courts have rejected the unilateral implementation or modification of other employment standards that vitally impact wages, hours and working conditions. While federal precedent is not controlling, Wisconsin courts have held that those cases can and should be used as guidance. Citing, Employment Relations Department v. WERC, 122 Wis. 2d 132 (1985).

In School District of Drummond v. WERC, 121 Wis. 2d 126 (1984), the Wisconsin Supreme Court upheld the Commission's decision that the school board had exceeded its contractual authority by unilaterally implementing a district-wide anti-nepotism policy. Similar to this case, the district argued that it did so to effectuate state statute regarding preventing conflicts of interest. The Court held that the "primarily related" standard "is basically a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake, and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. . . If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restrictions on management's prerogatives or public policy, the proposal is a mandatory subject of bargaining." The Court balanced the concern for managerial discretion over executive matters with the right of workers to collectively bargain matters that tend to influence the terms and conditions of their employment and concluded that ". . .the enactment of a resolution, despite its validity and compelling purpose, cannot remove the duty to bargain if the subject concerns the conditions of employment." 121 Wis. 2d at 137-38.

In this case, the Respondent unilaterally established programs and procedures without discussing or bargaining either the processes or the impact of such policies on the employes represented by Complainant. Since each of these matters (drug testing, Code of Ethics, variable probationary period) undeniably impact on the terms and conditions of employment, they cannot be implemented without first bargaining their content and consequences with the Complainant.

Complainant asserts that it has never waived its right to bargain over the terms and effects of the drug testing policy, the Code of Ethics or the extension of an employe's probationary period. While waiver of a statutory right may be evidenced by bargaining history, the matter at issue must have been fully discussed and consciously explored in bargaining, and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter. Citing, Johnson-Bateman Company, supra, and other decisions of the NLRB. Also, while the adoption of a management rights provision in an agreement may effectively waive all rights relating to an area of collective bargaining, such acquiescence will not be assumed to apply to all areas of the employment relationship. Citing, Suffolk Child Development Center, 277 NLRB 1345 (1985); Southern Florida Hotel Association, 245 NLRB 561, enforced in relevant part, 751 F. 2d 1571 (11th Cir., 1985).

Complainant notes Respondent's claim that the Complainant had knowledge of its plan to implement a new drug testing program and to revise its Code of Ethics, and that this somehow effectuated a valid waiver of Complainant's bargaining rights. For any waiver to bargain over mandatory subjects of bargaining to be effective, it must be explicit and must follow the issuance of due notice and an opportunity to bargain. Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983). Complainant also cites Commission decisions as holding that municipal employers have a duty to bargain collectively with a representative of its employes with respect to mandatory subjects of bargaining, "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." Racine County, Dec. No. 26288-A (1/92). See also, City of Wisconsin Rapids, Dec. No. 27466-A (5/93); City of Richland Center, Dec. No. 22912-A, B (1/86). Waiver cannot be found in this case, since Complainant never received the required notice nor an invitation to bargain the terms of such policies prior to their unilateral execution.

In its reply brief, Complainant asserts that Article IV, Section 4 of the parties' Agreement requires that Complainant be given ten days' advance notice of any proposed changes in work rules. With regard to General Order 50, the "Drug-Free Workplace" rule, that rule was unilaterally promulgated and implemented by Respondents on July 29, 1992, and at no time was Complainant offered the opportunity to review the rule or discuss it prior to its being implemented. Tollefson's letter of September 3, 1993, to Hurm was approximately 13 months after the policy was made effective. Thus, the Respondent's unilateral creation and implementation of General Order 50 without allowing Complainant to review and bargain over that matter, constitutes a direct violation of the Agreement and established labor law. Similarly, the revised "Code of Ethics" was produced and instituted on December 21, 1992, without first allowing Complainant the opportunity to discuss and/or bargain its effect. The employes represented by Complainant are considered by Respondent to be bound by these new policies and subject to penalties up to and including discharge for any violation. The creation and implementation of the Code of Ethics, as with the drug testing procedure, violated both the Agreement and applicable labor law.

Respondent

The Respondent cites Article IV, of the parties' Collective Bargaining Agreement as authorizing Respondent to establish reasonable work rules and providing that the Complainant will be furnished with a copy of the rule or changed rule 10 days prior to the rule becoming effective; that said rule must not be in conflict with the Agreement; and that Complainant may grieve the reasonableness of the rules. If Complainant invokes its right to grieve the work rule, then the rule will be held in abeyance until the grievance is resolved. The Respondent asserts that both its drug testing program, General Order 50, and its Code of Ethics were promulgated under the authority of Article IV of the Agreement. By the September 2, 1993, letter from Tollefson to Complainant's President, Hurm, Respondent invited Complainant to bargain the impact of the drug testing policy. Similarly, the Respondent promulgated the Code of Ethics pursuant to Article IV and consistent with the requirements of Sec. 19.59, Stats. By memorandum of August 25, 1993, from Tollefson to Hurm, Respondent advised Complainant of the establishment of the Code of Ethics, acknowledged the inquiry from Complainant's attorney regarding the Code, and expressed a willingness to discuss

the impact of that Code.

While Complainant alleges that Respondent has been unwilling to bargain regarding the topics of drug testing and establishment of a Code of Ethics, the record indicates that Respondent has been willing to discuss the impact of those matters with Complainant. However, Complainant instead chose to file the instant complaint of prohibited practices. Article IV of the Agreement provided the mechanism for the establishment of both the drug testing policy and the Code of Ethics and also provided certain rights for the Complainant. Therefore, Respondent did not violate its duty to bargain in those regards, rather, Complainant neglected to exercise its contractual rights.

In establishing the Code of Ethics, Respondent did nothing more than comply with the State Legislature's "public policy mandate" stated in Sec. 19.59, Stats. In establishing the new Code of Ethics, Respondent provided Complainant with notice that it was considering taking such action, held public hearings at which Complainant's President had the opportunity to participate, and did so, in the establishment of the Code of Ethics.

The Respondent concludes that it followed the contractual provision for the establishment and implementation of the "drug free environment" policy and the statutorily-mandated "Code of Ethics". The parties negotiated a mechanism for establishing and implementing such matters through Article IV of the Agreement. The rights of the employes are protected by Complainant's right to grieve such matters. Therefore, Respondent cannot be found to have committed the alleged violations.

In its reply brief, Respondent first asserts that its drug-testing policy is only a policy for testing based on "probable suspicion" and is not random testing as alleged by Complainant. The policy defines "probable suspicion" as "suspicion based on specific personal observations that the supervisor can describe concerning appearance, behavior, speech or breath odor of the employee." When the policy was applied to Conley in October of 1992, the result was negative, and he received no discipline relative to that test at any time during his employment with Respondent. Further, Conley was a probationary employe at the time and not subject to the discipline procedures under Sec. 62.13, Stats. With regard to the Code of Ethics, Respondent reasserts that it was promulgated pursuant to the legislative mandate, communicated to Complainant and that on several occasions, Respondent offered to bargain the impact of such code. At no time was Conley ever disciplined in any regard relative to the Code of Ethics. The Respondent concludes that it acted within its contractual rights and in response to legislative direction from both the state and federal government in enacting both the Code of Ethics and the drug-free workplace policy. It offered to bargain the impact of those matters, and Complainant chose instead to file the instant prohibited practices complaint.

DISCUSSION

Complainant has alleged that the Respondent has refused to bargain within the meaning of Sec. 111.70(3)(a)4, Stats., by unilaterally creating and implementing General Order 50 and the local Code of Ethics. Sec. 111.70(3)(a)4 provides, in relevant part, that it is a prohibited practice for a

municipal employer:

> "4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit"

MERA, at Sec. 111.70(1)(a), Stats., defines "collective bargaining", in relevant part, as follows:

> **(a)** "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement. . .with respect to wages, hours and conditions of employment. . .The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. . ."

The allegations in this case involve unilateral changes and a refusal to bargain during the term of an agreement. The Commission has held in that regard that:

> 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. 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. 4/

General Order 50

The record indicates that Respondent created and implemented a drug-testing policy - General Order 50, without first negotiating with the Complainant. Respondent asserts that it acted pursuant to its rights under Article IV, Application and Interpretation of Work Rules, of the parties' Agreement. That provision expressly states at Section 2, that, "The Union recognizes the right of the City to establish reasonable work rules. . ." and Section 4 expressly gives the Complainant the

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4/ City of Madison (Fire Department), Decision No. 27757-B (WERC, 10/94), citing, 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).

right to grieve the "reasonableness" of a work rule.

The Commission has held that contractual provisions which expressly or by reservation of rights authorize a municipal employer to establish work rules, such as Article IV expressly does in this case, sufficiently address the subject of work rules so as to justify a conclusion that the parties have already bargained to agreement on the matter. 5/ For example, in Brown County, the Commission held that a "management rights" clause wherein the County retained the right to direct its work force authorized the County to establish reasonable work rules. Based on that conclusion, the Commission went on to find that the parties had bargained to agreement on the subject of the County's right to establish reasonable work rules and that, therefore, the County was not required to bargain during the term of the contract over promulgation of a work rule prohibiting employes from taking their coffee break outside of the building without management's permission. In Milwaukee County, the Commission held that based upon a contractual provision that expressly authorized the County's right to establish reasonable work rules, the County was not required to bargain during the extended term of the parties' agreement regarding eliminating or changing the rights of employes as to choice of variety of tints in sunglasses the County furnished, selection of starting times based on seniority, transfer rights, selection of work location based on seniority, meeting with union representatives at an employe's work site to discuss a grievance, minimum hours for personal leave, and exercising County-wide seniority for emergency work. It is not necessary that the provision expressly address the specific issue at the heart of the parties' dispute, as long as it addresses the general subject matter. 6/

As Article IV of the parties' Agreement addresses the subject matter of "work rules", that provision establishes the parties' rights in that regard and there is no further duty on Respondent's part to negotiate as to that topic during the term of the Agreement, regardless of whether General Rule 50 contains items that are mandatory subjects of bargaining. Therefore, the Complainant's recourse if it feels a work rule is not "reasonable" or that contractual procedures have not been followed is to file a grievance, and the Examiner has, therefore, not made any findings in that regard in this proceeding. 7/

5/ Brown County (Department of Social Services), Decision No. 20623 (WERC, 5/83); Milwaukee County, Decision No. 15420-A (WERC, 6/82).

6/ School District of Cadott, Decision No. 27775-C (WERC, 6/94); Brown County, Ibid.

7/ Complainant did not timely raise any issue as to an alleged violation of the parties' Agreement, since such an allegation was made for the first time in Complainant's reply

Code of Ethics

Similar to Respondent's drug testing policy, the matter of the Code of Ethics falls within the broad ambit of the subject of "work rules" and therefore, the parties' rights and responsibilities in that regard are addressed by Article IV of the Agreement. That being the case, to the extent that the Code of Ethics might contain matters that are mandatory subjects of bargaining, there was no further duty to bargain with Complainant in that regard during the term of the parties' Agreement.

Conley's Discharge

Even assuming, arguendo, that Respondent had a duty to bargain regarding the creation and implementation of General Order 50 and the Code of Ethics, the evidence establishes that Conley's discharge was unrelated to either. Therefore, as to the allegations in this case, it has been concluded that Conley's discharge from employment with the Respondent did not constitute a violation of MERA.

Dated at Madison, Wisconsin this 6th day of January, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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brief.