STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| FIREFIGHTER LOCAL UNION NO. 583, IAFF AFL-CIO and VICTOR CONLEY,<br><br>Complainants,<br><br>vs.<br><br>CITY OF BELOIT (FIRE DEPARTMENT),<br><br>Respondent. | Case 120<br>No. 49941 MP-2805<br>Decision No. 27961-C |

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.

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

On January 6, 1995, Examiner David E. Shaw issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he determined that the City of Beloit had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 or 4, Stats., by creating and implementing a drug testing policy and a code of ethics which applied to employes represented for the purposes of collective bargaining by Firefighter Local Union No. 583, IAFF, AFL-CIO. The Examiner therefore dismissed the complaint.

On January 20, 1995, Complainants timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received April 21, 1995.

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

ORDER 1/

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of July, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

> (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.
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> (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.
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> . . .
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> (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 by the Court and placement in the mail to the Commission.

CITY OF BELOIT (FIRE DEPARTMENT)

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

The Pleadings

In the complaint, Complainants argue Respondent violated Secs. 111.70(3)(a)1 and 4, Stats., by unilaterally creating and implementing a drug testing policy and a code of ethics, both of which apply to employes represented by Complainant Union.

In its answer, Respondent denied it had the duty to bargain over the creation of the drug testing policy and the Code of Ethics. Respondent also affirmatively asserted that it offered to bargain the impact of both matters and that Complainant refused that offer. Therefore, Respondent denied that it had committed any prohibited practices within the meaning of Secs. 111.70(3)(a)1 or 4, Stats.

At hearing, Complainants amended the complaint to include an allegation that the discharge of Complainant Conley constituted an independent prohibited practice. Respondent denies any illegal conduct as to Conley's discharge.

The Examiner's Decision

As to the drug testing policy, the Examiner concluded that Respondent had not violated its duty to bargain with Complainant Union. The Examiner reasoned:

> General Order 50
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> 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 right to grieve the "reasonableness" of a work rule.
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> 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. 2/ 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. 3/

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. 4/

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

3/ School District of Cadott, Decision No. 27775-C (WERC,

6/94); Brown County, Ibid.

4/ 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 brief.

The Examiner also found that Respondent had not violated its duty to bargain as to the Code of Ethics. He analyzed that issue as follows:

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.

As to Conley's discharge, the Examiner found no violation of the Municipal Employment Relations Act and held as follows:

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.

POSITIONS OF THE PARTIES

Complainants

Complainants urge the Commission to reverse the Examiner's determination that Respondent had no duty to bargain with Complainant Union over the drug testing policy and the Code of Ethics. Complainants assert that the Examiner incorrectly concluded that both matters constituted "work rules" under the parties' contract. Complainants contend that Respondents' discretion to establish work rules does not extend to mandatory subjects of bargaining and is limited

to matters affecting employe conduct during work hours. Here, Complainants assert that because the two matters in question are both mandatory subjects of bargaining and affect employe conduct when not at work, neither matter is a "work rule" within the meaning of the parties' collective bargaining agreement. Therefore, Complainants argue that the parties' existing bargain regarding "work rules" is inapplicable to the drug testing policy and Code of Ethics and further that Respondent's unilateral promulgation and implementation of these policies thus clearly violated Respondent's duty to bargain with Complainant. As to the drug testing policy, Complainants argue that the National Labor Relations Board has rejected an argument that the employer's ability to establish "work rules" eliminates the employer's duty to bargain over this subject with the union representing its employes.

Complainants contend that under the National Labor Relations Act, it is clear that both the drug testing policy and the Code of Ethics are mandatory subjects of bargaining given their close relationship to conditions of employment. Complainants note that violations of the policy and Code in question jeopardize an employe's job security and, in the case of the Code of Ethics, subject employes to civil forfeiture. Therefore, Complainants argue that under the Municipal Employment Relations Act, it should be clear that both matters primarily relate to wages, hours and conditions of employment, and thus, are matters as to which Respondent must bargain.

Given the foregoing, Complainants ask the Commission to reverse the Examiner and to enter appropriate remedial orders.

Respondent City

Respondent City urges the Commission to affirm the Examiner. Respondent argues that the Examiner properly analyzed the legal issues before him and correctly found that Respondent City had expressed a willingness to bargain the impact of the drug testing policy and Code of Ethics on employes represented by Complainant Union. Respondent City asserts that rather than bargain the impact, Complainant Union chose to file a complaint with the Wisconsin Employment Relations Commission. The Respondent City contends that it gave the Complainant Union the appropriate opportunity to address the two disputed matters and that the Complainant Union declined that opportunity. Respondent City also asserts that the Examiner properly concluded that Conley's discharge was not related to the drug testing policy or Code of Ethics, but rather was based upon his loss of a driver's license.

Given the foregoing, Respondent City asks that the Commission affirm the Examiner's dismissal of the complaint.

DISCUSSION

We have reviewed this matter and conclude that the Examiner properly applied existing Commission precedent to the facts at hand and we therefore affirm his determination that no

prohibited practices were committed by Respondent City herein.

In his decision, the Examiner relied in part upon our decision in Brown County, Dec. No. 20623 (WERC, 5/83). In that case, the employer unilaterally implemented a work rule during the term of the contract which restricted the rights of employes to take coffee breaks outside of their workplace. We concluded that the work rule was a mandatory subject of bargaining, but that, because the parties' contract addressed the issue of work rules, the employer therein had no duty to bargain over the matter. We noted that the contract itself gave the union rights to challenge the work rule if they found it to be unreasonable. Here, assuming arguendo that Complainants have correctly identified a drug testing policy and the Code of Ethics as mandatory subjects of bargaining, there nonetheless is no duty to bargain over these matters during the term of the contract because the parties have already bargained a work rule provision which gives them each certain rights and responsibilities. 2/ Applying Brown County, Complainants have no right to bargain over these matters during the contract term but do have the right to exercise their contractually acquired ability to challenge the work rules through the grievance/arbitration process. To the extent Complainants have correctly identified these matters as mandatory subjects of bargaining, they also clearly have the right to bargain over these matters during negotiations for successor contract agreements.

Complainants have argued that Respondent City has overstepped its rights under the contract to promulgate "work rules" 3/ because the "work rules" govern off-duty conduct (and are

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2/ We have consistently held 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.
> City of Madison, Dec. No. 27757-B (WERC, 10/94) at p. 10. Citing, School District of Cadott, Dec. No. 27775-C (WERC, 6/94) aff'd Cadott Education Ass'n v. WERC, 197 Wis. 2d 46 (1995); 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).

3/ The contract language relied on by the Complainants states:

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

thus unreasonable) and (2) the work rules relate to non-discretionary mandatory subjects of bargaining and are thus beyond the City's contractual "discretion" to promulgate. We express no comment on the merits of these arguments because they relate to the question of whether the City violated the parties' collective bargaining agreement, not whether Respondent City breached its duty to bargain.

To the extent our conclusions herein differ from those reached by the National Labor Relations Board in Johnson-Bateman Company, 295 NLRB 180 (1989) we would only comment that we have reviewed the Board's approach to the issue and find our Brown County precedent to be more persuasive.

Lastly, we affirm the Examiner's findings and conclusions as to Complainant Conley's discharge. As found by the Examiner, Conley's discharge was premised upon his loss of a driver's license for operating a vehicle while under the influence of alcohol and failing to notify his employer of those facts. Conley's discharge was not related to the drug testing policy or Code of Ethics and, in any event, did not violate the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 17th day of July, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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