

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FIREFIGHTER LOCAL UNION NO. 583,
IAFF AFL-CIO and VICTOR CONLEY,

Complainants,

vs.

CITY OF БЕЛОIT (FIRE DEPARTMENT),

Respondent.

Case 109

No. 48694 MP-2685

Decision No. 27990-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 January 25, 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., by denying Victor Conley of union representation at a disciplinary meeting on October 20, 1992, by failing to provide Complainant with prior notice of the discipline and by bargaining individually with Victor Conley. On July 2, 1993, Complainants filed an amended complaint wherein it was alleged that Respondent denied Victor Conley union representation at a prediscipline investigatory meeting on October 14, 1992. The parties engaged in attempts to resolve their dispute, but were unsuccessful. On April 7, 1994, the Respondent filed its answer denying it had committed any prohibited practices.

Complainants had also filed another complaint with the Commission on October 6, 1993, alleging that the Respondent had committed prohibited practices within the meaning of

No. 27990-B

Secs. 111.70(3)(a)1 and 4, Stats. (Case 120). David E. Shaw of the Commission's staff was appointed as Examiner in Case 120 and was subsequently appointed in this case as well. Hearing in Case 120 had been set for May 12, 1994, and the Examiner solicited the positions of the parties as to whether the cases should be consolidated for purposes of hearing. The Complainants subsequently responded indicating the matters should be consolidated and Respondent indicated it opposed consolidation. The Commission reviewed the complaints in Case 109 and Case 120 and on March 18, 1994, issued an order consolidating the cases for purpose of hearing.

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. 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, Lieutenant Rashad El-Amin has been a member of Complainant's Executive Board, and an officer in Respondent's Fire Department.

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 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.

...

Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days of the date of the City decision in Step Two, or the grievance will be considered ineligible for appeal to arbitration.

...

...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 October 10, 1992, Conley was involved in a hit and run accident in the City of Madison, Wisconsin for which he was charged for "hit and run to an attended vehicle" and also for "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. Lieutenant Lochowicz called Shift Commander John Foster at approximately 7:05 a.m. the morning of October 11 to inform him that Conley had not reported for work at Station 3. A woman had called Lieutenant Lochowicz at approximately 6:50 a.m. that morning, asking for Conley and had been informed that he had not arrived at work at that time. There then ensued a number of phone conversations between Lieutenant Lochowicz and the woman, but Conley never appeared for work on his shift on October 11, 1992. Shift Commander Foster filed a "report to chief" on the matter, indicating that Conley had not appeared for work and of the conversations between Lieutenant Lochowicz and the woman who had called for Conley.

On or about October 11 or 12, 1992, Chief Buckley informed Hurm that he would be calling Conley in on October 14, 1992, to talk to him about what had transpired. On the morning of October 14, 1992, Chief Buckley called Conley to meet with him at the Headquarters Station to discuss certain matters regarding his absence on October 11, the ambulance call on October 10 and the hit and run accident in Madison. At that time, Conley requested that he have union representation and specifically requested that Hurm be present to represent him. At that time, Hurm was on an ambulance call which turned out to be back-to-back ambulance calls requiring him to be away for approximately three hours that morning. In response to Conley's request that Hurm represent him, Chief Buckley advised Conley that Hurm was on an ambulance run and not available. Chief Buckley advised Conley that there was a member of Complainant's Executive Board available, Lieutenant Rashad El-Amin, and that he could represent Conley in the meeting. Also present in the Headquarters Station at the time was William Hoefer, a Union officer. Conley wanted Hurm to represent him because he had previous discussions with Hurm about his situation and because Hurm was the President. Present at the meeting were Chief Buckley, Assistant Chief Schendel, Conley and Lieutenant Rashad El-Amin. Lieutenant El-Amin had spoken with Conley and noted that Conley had requested that Hurm be present and asked that they wait for him to return. Chief Buckley asked Lieutenant El-Amin if he was on the Complainant's Executive Board and when he responded that he was, Chief Buckley denied the request to wait for Hurm and proceeded with the meeting. The parties agreed at hearing that the following minutes of the meeting of October 14, 1992 essentially are accurate as to what transpired at that meeting:

DATE: OCTOBER 14, 1992

Chief Buckley called for a meeting with Victor Conley
Meeting started at 0753

Victor requested union representation
Persons present: Chief Buckley, Assistant Chief Schendel, Victor Conley, and Lt. Rashad El-Amin, as union representative.

El-Amin stated Victor wanted Hurm in meeting but he was on an ambulance run. Rashad requested waiting - Chief Buckley asked if Rashad was on the Executive Board, Rashad stated yes, Chief Buckley denied waiting and that the meeting would begin.

Chief asked Conley "Why didn't you come to work or call?"

Conley stated "personal problem"

Chief Buckley asked "would you like to elaborate"?

Conley stated "no"

Chief Buckley stated "if you have a problem, you have sick time available to use".

Conley stated "I thought I had no sick time, you (Chief) said to me a long time ago that if I had another problem that my job could be in jeopardy, and I could be terminated".

Chief stated "I didn't say that you would be terminated".

Conley stated "that is the way I understood you to say"

Chief Buckley stated "would you like to speak about the ambulance request on Friday night"?

Conley stated "no I don't want to".

Chief Buckley asked "Do you want to speak on your car being involved in a hit and run accident in Madison"?

Conley stated "no I don't want to".

Rashad asked if he could speak with Victor, Chief said yes, Rashad and Victor left the room at 0803 and returned at 0807.

Victor stated "I would like to go over the first few questions, again if I can"

Chief asked "why didn't you come to work, or call in?"

Conley stated "personal problem"

Chief Buckley stated "thats all"

Conley stated "yes"

Chief "What do you want to say about the ambulance run"?

Conley stated "I was out drinking with some friends and was riding my bike. I fell off my bike, I didn't need an ambulance, I just wanted a ride home".

Chief "Did the Police take you home"?

Conley "yes"

Chief "What do you want to say about the hit and run accident in Madison?"

Conley "that is pending right now. I have been trying to get in contact with Trooper Sands, he has been off duty and is to be back on duty tomorrow (Thursday) at 5:00 p.m. He has a message to contact me".

Chief "Were you involved in the hit and run"?

Conley "I don't know, but my car was".

Chief "You were in Rockford Saturday night and had a wake up call for Sunday morning at 5:00 a.m.

Conley "yes"

Chief "Was your car with you?"

Conley "yes"

Conley "I would like to add in the first question, it was a personal problem and that I had no sick time coming. I was under the impression that my job would be terminated. I felt I was physically unable to do my job, so I didn't come to work".

Schendel stated "you keep saying that you have no sick time coming, who told you that, or what makes you think that?"

Conley "the sheet that is put out showed nothing coming".

Schendel stated "the date of that paper is January of 1992, if you hadn't noticed. We do not put out a new sheet all the time. From when you came back to work, whenever that was, you earned 1 day a month according to the union contract, so you did in fact have sick time coming".

Conley no comment

Chief "the paper that was read to you and you signed (after employment) states that you were explained the call in policy and the labor agreement which explains about earning sick time. You should have remembered or been aware of the contract language."

Chief "I feel due to the circumstances surrounding this incident that I have probable cause to send you to drug testing"

Conley "ok"

Chief "there will be some type of disciplinary action taken, but at this time I don't know exactly what, or when it will be. It will depend upon the results of the testing process and reports to me from Fire Department Personnel". "Schendel will you schedule the test and take Victor to Occupational Health and Wellness today, as soon as possible"?

Chief "Victor you will probably be late for EMT, but you will be going".

Chief "Rashad do you have anything to say or any questions"?

Rashad asked "what type of disciplinary action will be taken"?

Chief "that is uncertain at this time"

Chief "Victor, I want you to understand that you were docked 24 hours pay for the day that you did not report for work"

Conley "ok"

Chief "Bob will you take Victor to Occupational Health & Wellness Center"

Meeting over at 0825.

6. Conley was given a drug test on October 14, 1992, following the meeting on that date. There is no evidence of any adverse action being taken against Conley as a result of that test. 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 and said request was approved by the Police and Fire Commission. A memorandum to that effect was placed in Conley's personnel file. Complainant was not consulted regarding an extension of Conley's probationary period nor advised of the extension.

7. 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

cc: Personnel
P & F Commission
File
Bruce Browning, E.A.P.

8. The Complainant was aware of the pending discipline against Conley due to the statements made by Chief Buckley at the October 14, 1992, meeting at which Conley and Lieutenant El-Amin were present. Said written discipline of October 20, 1992, was not negotiated, but rather was unilaterally imposed by Chief Buckley on Conley and said discipline does not constitute a collective bargaining agreement. The meeting on October 20, 1992, was for the purpose of advising Conley of the discipline that had been decided upon by Chief Buckley.

9. By refusing to postpone the investigatory meeting with Conley on October 14, 1992, until Hurm returned from the ambulance calls, and instead having Lieutenant El-Amin serve as Conley's union representative in the meeting, the Respondent did not deny Conley effective union representation at said meeting.

10. The subject matter of the length of an employee's probationary period had been bargained by the parties and is covered by Article XIX, Section 13, of their 1991-1994 Collective Bargaining Agreement.

11. Conley began his employment in Respondent's Fire Department as a probationary firefighter on August 26, 1991, was subsequently absent for a period of four months and 18 days due to illness and was terminated from employment in Respondent's Fire Department on January 4, 1994 for losing his driver's license and failing to notify the Department of that fact.

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

CONCLUSIONS OF LAW

1. By refusing to delay or reschedule the meeting of October 14, 1992 in order to accommodate Conley's desire to have a particular union officer represent him in the meeting, and instead designating another union officer, Lieutenant El-Amin, to represent Conley in the meeting, the Respondent, its officers and agents, did not deny Conley union representation at a prediscipline investigatory meeting, and therefore, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)1, Stats.

2. Since the purpose of the October 20, 1992, meeting between Chief Buckley and Conley was to advise Conley of the discipline that had already been determined, Conley was not entitled under MERA to union representation at said meeting.

3. The subject matter of the duration of a probationary period is addressed by the parties' 1992-1994 Collective Bargaining Agreement, and therefore Respondent City of Beloit had no statutory duty to bargain with Complainant Local No. 503, IAFF, AFL-CIO, regarding that subject during the term of that Agreement. Therefore, Respondent, its officers and agents, did not violate Secs. 111.70(3)(a) 1 and 4, Stats., as alleged.

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

ORDER 2/

The complaint and amended complaint in this case are dismissed in their 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/ (Footnote 1/ appears on the next page.)

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

Section 111.07(5), Stats.

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

CITY OF BELOIT (FIRE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant's allegations in this case consist of charges that Respondent denied Conley his right to union representation at the October 14, 1992, prediscipline investigatory meeting by refusing to delay or reschedule the meeting so that Union President Terry Hurm could be present to represent Conley as the latter wished, and instead, designating another union officer, Lieutenant Rashad El-Amin, to represent Conley at said meeting; by failing to advise or notify Complainant prior to October 20, 1992, that it was imposing discipline on Conley; by denying Conley's request for union representation at the meeting on October 20, 1992 at which discipline was imposed on Conley or, in the alternative, by advising Conley that union representation was not needed and that he would have to sign the disciplinary letter or be terminated; and by negotiating unilaterally with an individual employe (Conley) with regard to the October 20, 1992 disciplinary letter which constituted a form of a collective bargaining agreement without the knowledge, permission, acquiescence or agreement of Complainant, and by unilaterally extending the probationary period of Conley without consulting or negotiating with Complainant. At hearing, the Complainant orally amended its complaint to include the allegation that Conley was unlawfully discharged on the basis that it was pursuant to a unilaterally-extended probationary period. Complainant asserts that the foregoing actions constituted unlawful conduct within the meaning of Sections 111.70(3)(a)1, 3 and 4 of the Municipal Employment Relations Act, and requests as a remedy that the Respondent be ordered to cease and desist from such unlawful actions, that the discipline imposed on Conley be rescinded, and that he be absolved of any and all disciplinary action and that Complainant be awarded costs and attorney's fees.

Respondent in its answer to the complaint and amended complaint, has denied that it has engaged in any unlawful actions within the meaning of the Municipal Employment Relations Act.

Complainant

Complainant notes that MERA requires municipal employers to negotiate with representative unions over subjects relating to wages, hours and conditions of employment. Whether a subject is a mandatory or permissive subject of collective bargaining depends on its relation to wages, hours and conditions of employment and 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". Citing, Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 102 (1977); and Madison School District v. WERC, 133 Wis. 2d 462, 466 (Wis. Ct. of App. 1986). In this case, the Respondent unilaterally established a variable probationary period without discussing or bargaining that matter with Complainant. Since establishment of a variable probationary period undeniably impacts on the terms and conditions of unit employment it cannot be implemented without first negotiating with the employe's designated

union representative. The subject of a variable probationary period was never made subject to the parties' most recent collective bargaining agreement and therefore its unilateral creation and implementation was unlawful.

Complainant also asserts that it did not waive its right to bargain over the terms and effects of any work rule allowing management to lengthen an employee's probationary period. Citing federal precedent, Complainant asserts that "waiver of a statutory right may be evidenced by bargaining history, but the matter must have been fully discussed and consciously explored during negotiations, and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter." Citing, Johnson-Bateman Company, 295 NLRB 180, 131 LRRM 1393 (1989), and other decisions of the National Labor Relations Board. While a management rights provision and a collective bargaining agreement may be held to effectively waive all rights in one 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) and other federal precedent. The law requires that any waiver of mandatorily bargainable subjects be accomplished in an explicit manner following the issuance of due notice and an opportunity to bargain. Citing, City of Wisconsin Rapids, Dec. No. 27466-A (5/93); Racine County, Dec. No. 26288-A (1/92). In this case, Complainant did not receive the required notice of the change, nor an invitation to bargain the terms of a variable probationary period.

Complainant also asserts that Respondent violated MERA by failing to accommodate Conley's request for union representation during a predisciplinary interview. It is well-established under state and federal law that bargaining unit employees have a statutory right to request, and be allowed to have present, a union representative during investigatory interviews likely to result in disciplinary action. NLRB v. Weingarten, Inc., 420 U.S. 251 (1975); Schmidt v. City of Milwaukee, Dec. No. 13558-A, B, C (5/76); City of Madison, Dec. No. 17645 (3/80); City of Monroe, Dec. No. 27015-B (4/93). The right to union representation at such a time is inextricably intertwined with an employee's right to associate with his/her peers and act in concert to secure reasonable terms and conditions of employment. To deny a request for assistance in such situations violates employee's legally guaranteed collective bargaining rights, regardless of whether such rights are explicitly included in a collective bargaining agreement. Complainant cites NLRB v. Illinois Bell Telephone Company, 674 F.2d 618, 622 (7th Cir., 1982), as holding that the employer committed an unfair labor practice by rejecting a unit member's request to have a specific co-employee present during an investigatory interview. In this case, it is undisputed that Conley was summoned by the Chief on October 14, 1992 for what he could reasonably believe to be an investigatory, pre-disciplinary interview. Conley repeatedly requested that Complainant's President, Terry Hurm, accompany him during the interview. Conley's requests were summarily denied by the Chief, and over Conley's protestations he was assigned another union representative who was entirely unfamiliar with the circumstances surrounding the meeting. Hence, Conley was deprived of his rights as a member of the collective bargaining unit as set forth in the previously mentioned decisions in the state and federal cases.

Respondent

With regard to the allegation that Conley was denied union representation at the disciplinary meeting of October 14, 1992, Respondent asserts that there is no evidence to support that charge. Conley was afforded representation by the presence of Lieutenant El-Amin, a member of Complainant's Executive Board. There is nothing in the parties' collective bargaining agreement providing that employees may select specific representation at such meetings and there is no requirement in the collective bargaining agreement relative to matters of discipline other than Article V - Suspension or Dismissal, which simply indicates discipline shall be in accord with Section 62.13, Stats. That provision is not applicable here as Conley was a probationary employe throughout the term of his employment with the City of Beloit. Thus, Complainant's allegations that Conley was denied union representation at the October 14, 1992 meeting is without foundation. Further, the allegation that Complainant was not notified regarding the discipline is contrary to the evidence. Lieutenant El-Amin was present at the October 14, 1992 meeting at which possible discipline was discussed. Further, the evidence indicates that Hurm was engaged in work activity and therefore unavailable at the time the meeting was held on October 14. The discipline imposed on Conley via the memorandum of October 20, 1992, set forth performance criteria for Conley in order to provide clear direction to correct unacceptable behavior. Such discipline is appropriate, especially when dealing with a probationary employe.

With regard to Complainant's oral amendment of its complaint at hearing to add the allegation that Conley's discharge on January 4, 1994, was unlawful, the Chief has the authority under Section 62.13 to discharge a probationary employe. Conley's probationary period was extended by the action of Respondent's Police and Fire Commission, consistent with its statutory and contractual authority. The extension was necessitated due to Conley's absence of four months and 18 days due to medical conditions. The parties' Collective Bargaining Agreement contains a provision requiring 24 consecutive months of probation for probationary employes, Article XIX of the Agreement. Extending the probationary period by four months and 18 days simply reestablished the 24 month probationary period in this case. Such an extension was within the authority granted by Section 62.13, Stats. to the Chief and the Police and Fire Commission and within the authority established under the Agreement relative to probationary periods.

In its reply brief, Respondent notes that Complainant's reply brief only addressed Case 120, a case that was consolidated with the instant case for purposes of hearing only. The City reiterates its position that Lieutenant El-Amin constituted appropriate union representation for Conley at the October 14th meeting. With regard to the allegation that Conley was discharged based on a random drug test, Respondent asserts that the drug testing policy provides for testing only on the basis of "probable suspicion", on the part of a supervisor. Conley was tested on that basis and the test proved negative. He was not disciplined in any form due to the suspected drug incident and was not dismissed for the incident in which he was tested for drugs in October of 1992. Conley was disciplined the first time on October 20, 1992 for his failure to report to work or notify the

Department he would not be to work, and was dismissed on January 4, 1994 because of his failure to have a valid driver's license and his failure to notify the Department that he did not have such a license on that date. Conley's dismissal occurred 14 months after he was tested and found not to have any illegal drugs in his system. Further, there is no evidence in the record to support Complainant's allegation that Conley's dismissal was related to Respondent's Code of Ethics.

DISCUSSION

Right to Representation

The Commission has held that a municipal employer interferes with a municipal employe's rights under Sec. 111.70(2), Stats., 3/ when it compels a municipal employe to appear at a pre-discipline investigatory meeting, which the employe reasonably believes could result in his being disciplined, without union representation where the employe has expressly requested such representation at the meeting. 4/

The relevant facts are not in dispute with regard to the meeting on October 14, 1992. The meeting was for the purpose of questioning Conley about his absence on October 11 and the events of October 10, 1992 and Conley reasonably believed the meeting could result in his being disciplined. Conley made known to Chief Buckley his desire to have union representation in the meeting, specifically requesting that Complainant's President, Terry Hurm, be present. Hurm was out on back-to-back ambulance calls at the time. However, Lt. El-Amin, a member of Complainant's Executive Board, and William Hoefler, Complainant's Treasurer, were present in the Headquarters Station at the time and Chief Buckley told Conley Lt. El-Amin could represent him. Lt. El-Amin was summoned and, after talking to Conley, reiterated that Conley wanted Hurm to represent him at the meeting and asked that they wait for Hurm to return from the ambulance run. Chief Buckley denied the request to wait for Hurm and began the meeting with Lt. El-Amin representing Conley.

The essence of the dispute regarding the October 14th meeting is whether the Respondent was required to postpone the meeting until Hurm returned or to give Conley the option of not meeting with Chief Buckley, rather than compelling him to appear at the meeting with a different representative as it did. The basis of the right to representation at pre-disciplinary investigatory meetings is the wording of Sec. 111.70(2) of MERA, giving municipal employes the right to engage in lawful, concerted activity for mutual aid or protection. The Commission has noted the wording is similar to that of Sec. 7 of the National Labor Relations Act (NLRA) and has taken

2/ "[T]o engage in lawful, concerted activities for the purpose of . . . mutual aid or protection. . ."

4/ City of Milwaukee, Dec. No. 14873-B, 14875-B, 14899-B (WERC, 8/80); Waukesha County, Dec. No. 14662-A (Gratz, 1/78), aff'd Dec. No. 14662-B (WERC, 3/78).

some guidance from the National Labor Relations Board's (NLRB) and the courts' interpretation of that provision. In its decision in City of Milwaukee, the Commission cited with approval the examiner's discussion in Waukesha County of the balancing of interests analysis that is to be applied in determining whether there is "interference" with the rights provided under Sec. 111.70(2) of MERA in these types of cases:

Rather, the traditional mode of analyzing whether a violation of those quoted terms. . . [whether in MERA or in the National Labor Relations Act] has occurred has involved a balancing of the interests at stake of the affected municipal employees and of the municipal employer to determine whether, under the circumstances, application of the protections of the interference and restraint prohibitions would serve the underlying purposes of the act. . ." [Citations omitted.]

It is the balancing analysis described above that must be applied on a case-by-case and issue-by-issue basis to determine whether, in any given set of circumstances, the municipal employer conduct involved interferes with or restrains employees in the exercise of their MERA rights. 5/

In its analysis in City of Milwaukee, the Commission, as had the examiner in Waukesha County, relied on the U.S. Supreme Court's decision in NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975) for guidance in this area. In applying Weingarten, the NLRB has held that as long as another union representative is available, an employer is not required, under Weingarten, to postpone the interview because the specific representative the employee requested is not available. 6/ However, if the representative the employee requested is available, the employer must accede to the request if it wishes to proceed with the interview. 7/ Similarly, in its decision in City of Milwaukee, supra, the Commission specifically noted that in one of the fact situations being discussed, it was not the right to consult with a particular association representative that was being claimed. (At p. 48).

5/ City of Milwaukee, Ibid.

6/ Pacific Gas & Electric Co., 253 NLRB 1143, 106 LRRM 1077 (1981); Coca-Cola Bottling Co., 227 NLRB 1276, 94 LRRM 1200 (1977).

7/ Consolidation Coal Co., 307 NLRB No. 152, 140 LRRM 1248 (1992); NLRB v. Illinois Bell Telephone Co., 674 F.2d 618, 109 LRRM 3244 (7th Cir., 1982).

In this case, it is undisputed that Hurm was not available, as he was on back-to-back ambulance calls at the time the interview was scheduled. It was not known how long Hurm would be gone and it appears from the record that it was several hours before he returned. Since Hurm was not available at the time of the meeting and there were two other Union officers present in the Headquarters Station, it was not unreasonable for the Chief to insist that Conley select one of the latter to represent him, rather than postpone the meeting. There is no indication in the record that Conley was somehow negatively affected by having Lt. El-Amin represent him in the meeting instead of Hurm. Therefore, the Examiner has found no violation with regard to the October 14th meeting.

As to the October 20, 1992, meeting, it is clear from the record that this meeting was for the purpose of notifying Conley of the discipline that the Chief had decided to impose and the conditions he would be required to meet in order to continue his employment in the Department. In other words, it was not a pre-discipline investigatory meeting to which the right to representation under MERA would attach. 8/ As noted in the Findings of Fact, the disciplinary notice issued to Conley on October 20th was not negotiated but was unilaterally imposed by the Chief and did not constitute an agreement. Therefore, to the extent Complainant maintained that the notice constituted individual bargaining, there is no merit to that claim.

Probationary Period

Complainant asserts that the Respondent refused to bargain within the meaning of Sec. 111.70(3)(a)4, Stats., by unilaterally implementing a "variable probationary period", i.e., by extending Conley's probationary period.

The Commission has 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

8/ Waukesha County, supra, Note 3 (at 27). See also, Baton Rouge Water Works Co., 246 NLRB 995, 103 LRRM 1056 (1979); Barnet of Indiana, 284 NLRB 1024, 125 LRRM 1338 (1987).

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.
9/

9/ 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); 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).

As noted in the Findings of Fact, the parties' Agreement contains a provision addressing the subject of a probationary period at Article XIX, Section 13. That provision determines the parties' respective rights with regard to the duration of probationary periods. It is not a matter of waiver in this case; rather, Respondent had no duty to bargain over the subject because the parties had already done so. 10/

Therefore, as to the allegations in this case, the evidence does not support the Complainant's claim that Conley's discharge was unlawful. For the reasons discussed above, the complaint has been 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

10/ Whether Respondent's action in extending Conley's probationary period was authorized by the contract provision is not an issue before the Examiner.