STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FIREFIGHTER LOCAL UNION NO. 583, IAFF, AFL-CIO and VICTOR CONLEY, Complainants, vs. CITY OF BELOIT (FIRE DEPARTMENT), Respondent.	Case 109 No. 48694 MP-2685 Decision No. 27990-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, 3 or 4, Stats., by engaging in certain conduct related to employe Victor Conley who was 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 16th 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

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 page 3)

(footnote 1 continued from page 2)

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

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

. . .

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

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

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

The Complaint and Answer

In his decision, the Examiner accurately summarized the pleadings in the matter before him as follows:

> 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.

The Examiner's Decision

The Examiner resolved the issues before him as follows:

Right to Representation

The Commission has held that a municipal employer interferes with a municipal employe's rights under Sec. 111.70(2), Stats., 2/ 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. 3/

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 Hoefer, 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.

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

3/ 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).

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 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 employes 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 employes in the exercise of their MERA rights. 4/

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

4/ City of Milwaukee, Ibid.

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 employe requested is not available. 5/ However, if the representative the employe requested is available, the employer must accede to the request if it wishes to proceed with the interview. 6/ 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).

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.

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

6/ 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).

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. 7/ 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:

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

> 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. 8/

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. 9/

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.

Positions of the Parties on Review

Complainants

Complainants argue the Examiner erred when he concluded that the extension of Conley's probationary period did not violate the City's duty to bargain. Complainants contend the City's

---

8/ 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).

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

action constituted the unilateral creation of a variable probationary period and thus was a unilateral change in a mandatory subject of bargaining. The Complainants dispute the City's assertion that the extension was within the statutory and contractual authority of the Chief and the Beloit Police and Fire Commission. Complainants argue that the parties' contract establishes a 24 month probationary period which cannot be extended.

Complainants also argue that the Examiner erred when concluding that the City did not violate Secs. 111.70(3)(a)1 and 4, Stats., by failing to allow Conley to be represented by the individual of his choice during a pre-disciplinary interview. Complainants contend that an employe has the right to a representative of his/her choice in such an interview. Complainants argue that Terry Hurm, Union President, was the only person who could have completely and effectively represented Conley's interests because Hurm had knowledge of Conley's circumstances from prior discussions. Complainants assert that Conley was forced to accept Union representation from an individual who knew little or nothing about the specific circumstances in question. Complainants therefore argue that Conley's rights under the Municipal Employment Relations Act were improperly compromised.

Given all the foregoing, Complainants ask that the Examiner be reversed and that appropriate remedial orders be entered.

Respondent City

The City urges the Commission to affirm the Examiner. The City argues that Conley's probationary period was extended in a manner which was consistent with the City's statutory and contractual authority. It asserts that the contractual probationary period consists of 24 consecutive months of service and that Conley's illness and resultant absence from work provided a valid basis for the extension of his probationary period.

The City contends that the Examiner properly concluded that the representation provided Conley during his meeting with Chief Buckley was consistent with the Municipal Employment Relations Act. The City points out that Conley's choice for representation was unavailable at the time of the meeting and that the Union representative present during the meeting was a member of the Union's Executive Board and therefore someone who was knowledgeable as to the disciplinary process.

Given all the foregoing, the City asks the Commission to affirm the Examiner.

DISCUSSION

Looking first at the question of whether the City violated its duty to bargain with Complainant Local Union No. 583 by extending Conley's probation period, we affirm the Examiner's conclusion that no violation occurred.

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. 2/

2/ 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).

The parties' agreement contains a provision addressing the issue of probationary periods. That contract provision determines the parties' respective rights as to that issue for the duration of the contract and neither party is obligated to bargain with the other over that issue for the term of the contract. Each party is entitled to rely on whatever bargain they have struck.

As properly noted by the Examiner, the issue of whether Respondent's extension of Conley's probationary period was consistent with or violated the probationary period contract provision is not the issue presented by the complaint. 2/ Rather, the question is whether the actions of the City violated the City's duty to bargain with Local 583. We conclude no such violation occurred because the parties had a bargain regarding probationary periods.

Turning to the City's refusal to postpone the investigatory interview so that Conley could be represented by the Union President Hurm rather than a member of the Union Executive Board, we affirm the Examiner conclusion that the City did not thereby violate the Municipal Employment Relations Act.

Determining the scope of an employe's right under the Municipal Employment Relations Act (MERA) to representation in meetings with his/her employer involves balancing statutory interests and rights. Section 111.70(2), Stats. provides:

> "Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection..."

However, Sec. 111.70(1)(a), Stats., acknowledges that when creating various employe rights through the MERA,

> "...the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter."

Thus, in City of Milwaukee, Dec. Nos. 14873-B, 14875-B, 14899-B (WERC, 8/80), we held that when we determine the scope of an employe's right to representation, we seek to balance:

2/ The parties' 1992-1994 contract contains a grievance/arbitration provision through which

disputes over alleged violations of the contract are to be resolved.

> ...the underlying legislative purposes of the Municipal Employment Relations Act by providing a lawful and concerted means of achieving mutual aid and protection of legitimate employe interests in a manner giving appropriate weight to the Respondents' interests in efficiency of operations and effectiveness of discipline.

In City of Milwaukee, supra, we noted that the right to representation by a **specific** individual was not being asserted and went on to hold that with that "limitation," (and others), representation rights existed under the facts posited. Thus, City of Milwaukee suggests but does not hold that a right to the specific representative of the employe's choice generally exceeds the representational rights available under the Municipal Employment Relations Act.

Here, the issue of the right to a specific representative is squarely posed. When we consider the applicable above-noted MERA rights and interests in the context of this case, we are persuaded Conley did not have a MERA right to be represented by Hurm. Hurm was unavailable due to back-to-back ambulance calls. His time of return to the station was unknown. Obviously, there was the additional potential for other ambulance calls to occur which could have taken Hurm away from the station indefinitely. Thus, concluding Conley had a right to Hurm as his representative would significantly interfere with the Respondent City's interest in efficiency of operations and effectiveness of discipline. It is also important to acknowledge that the representational role to be served within the facts at hand was not one of spokesperson but rather of observer and consultant. 3/ Particularly in that context, there is no evidence to suggest that Conley's interests were adversely affected by having Union Executive Board Member El-Amin represent him instead of Hurm. It is also noted that Conley's prior consultations with Hurm (upon which Complainants rely to assert Hurm was best equipped to represent Conley) had already given Conley the benefit of Hurm's advice prior to the interview.

Given all the foregoing, the Examiner was correct when he concluded that the City's refusal to postpone the meeting did not violate Conley's right to representation under the Municipal Employment Relations Act.

Thus, we have affirmed the Examiner.

Dated at Madison, Wisconsin, this 16th 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

3/ In City of Milwaukee, supra, at footnote 50 on page 50, we noted that a spokesperson role for the representative is not warranted where the employe is being called upon only for answers, not for examination and cross examination of witnesses, etc.