STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION and CEDRIC JACKSON, Complainants, vs. THE CITY OF MILWAUKEE, a Municipal Corporation, PHILIP ARREOLA, Chief of Police of the City of Milwaukee, ARTHUR JONES, Deputy Inspector of Police of the City of Milwaukee, RONALD QUACKENBUSH, Lieutenant of Police of the City of Milwaukee, and MARK ZAREMBA, Police Sergeant of the City of Milwaukee, Respondents.	Case 415 No. 51094 MP-2900 Decision No. 28185-A

Appearances:

Adelman, Adelman & Murray, S.C., Attorneys at Law, by Ms. Laurie A. Eggert, 1840 North Farwell Avenue, Suite 403, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainants.

Mr. Vincent D. Moschella, Attorney at Law, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Milwaukee Police Association and Cedric Jackson filed a complaint with the Wisconsin Employment Relations Commission on June 3, 1994, alleging that the City of Milwaukee, et al. had committed prohibited practices in violation of Sec. 111.70(3)(a)1, Stats. by refusing to allow Jackson to consult with his Association representative prior to filing a written report and refusing to have an Association representative present while Respondents questioned Jackson about an assignment Jackson had been involved in on an earlier date. On October 4, 1994, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to

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make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on November 16, 1994, in Milwaukee, Wisconsin. The parties filed briefs which were exchanged on January 5, 1995. The parties reserved the right to file reply briefs but neither party did and the record was closed on January 16, 1995. The Examiner, having considered the evidence and the arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Milwaukee Police Association, hereinafter referred to as the MPA, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the certified exclusive collective bargaining representative of certain non-supervisory employes of the Milwaukee Police Department. Its offices are located at 1840 North Farwell Avenue, Suite 400, Milwaukee, Wisconsin 53202. Cedric Jackson, hereinafter referred to as Jackson, is employed as a police officer by the City of Milwaukee and is a member of the MPA.

2. The City of Milwaukee, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202. Philip Arreola is the City's Chief of Police; Arthur Jones, hereinafter Jones, is employed by the City as a Deputy Inspector of Police; Ronald Quackenbush, hereinafter Quackenbush, is a Lieutenant in the City's Police Department; and Mark Zaremba, hereinafter Zaremba, is a Police Sergeant in the City's Police Department and they have acted on behalf of the City.

3. On April 19, 1994, Jackson was assigned to routine patrol duties along with his partner, Frank Herrera. During their shift, they were dispatched to back up a unit in the area of the library on 9th and Wisconsin. When they arrived, officers Dave Stouff and Brian Schneider, who were the first squad on the scene and had requested backup, had a suspect in the alley area across from the library. The suspect was very combative and made threats to the officers. All four officers tried to reason with the suspect but to no avail and the suspect made a statement that if they came near him or touched him, he would do something to them. The confrontation grew and officer Stouff sprayed the suspect with oleo-resin capiscum, OC, commonly known as pepper spray, and the suspect was then handcuffed and shackled. A medical unit was called to flush the suspect's eyes but he was combative and uncooperative and the medical personnel would not treat him, so he was conveyed to the City Jail, where he was still combative and he was then transferred to the County Jail.

4. The City's Police Department has issued Order No. 10733 dated May 13, 1993, which requires a supervisory officer to file a "Use of Force Report" whenever a police officer does certain things; such as, discharges a firearm, uses OC, uses a baton in the line of duty or uses force which results in an injury to a citizen. Zaremba was the immediate supervisor of Stouff as well as Jackson on April 19, 1994. Zaremba was required to complete the "Use of Force Report". On

April 19, 1994, Zaremba was called by Stouff and Stouff explained what happened. Stouff also filed a report of the incident in a document referred to as "In the Matter Of:" Zaremba also interviewed the suspect. Zaremba concluded that the use of the OC was appropriate. Zaremba was required to list in his report officers who were present but did not use force in the witness section of the report. Zaremba was required to interview all witnesses so the report would be thorough and above-board.

5. On April 20, 1994, at approximately 11:50 p.m., Zaremba saw Jackson and asked him to step into the computer room and told Jackson that he, Zaremba, needed to ask him some questions about the use of OC by Stouff. Jackson responded that he was present at the incident and Zaremba said he had to ask a few questions to verify some of the facts. Zaremba testified that Jackson was not the target of any investigation. Jackson asked Zaremba whether this could lead to disciplinary action against him and Zaremba stated, "no" and this was no big deal. Jackson asked for Union representation and Zaremba stated that Jackson had nothing to worry about but Jackson stated he would not answer any questions. Zaremba then ordered Jackson to stay in the Planning and Operations Room.

6. Zaremba proceeded to Quackenbush's office to determine how he should proceed. Quackenbush called Jones and the three met to decide what to do. At around midnight, Jackson knocked on Quackenbush's door and asked if he was on overtime or not as his shift ended. Quackenbush stated he was on overtime and Jackson was told to have a seat and wait until he was called in. After conferring for about 10 minutes, Jackson was called in and was given a direct order by Zaremba to write a "In the Matter Of:" report concerning the incident of April 19, 1994. Jackson again asked for Union representation. Jackson was assured he was not the target of the investigation. Jones reassured Jackson that his report could only lead to discipline if Jackson was not truthful. Jackson was directed to the Assembly Room to write the report. Shortly thereafter, Zaremba checked the Assembly Room and Jackson was not there. Zaremba, Quackenbush and Jones went to look for him and observed him by a phone booth. Jones waved off the others, and Jones told Jackson to write the report or he would be charged with failing to obey a direct order. Jackson then wrote the report, turned it in and checked out.

7. William Ward is a Police Liaison Officer and a trustee of the MPA and provides Union representation to members of the Association. Ward received a call around 1:10 a.m. on April 21, 1994, that Jackson needed to consult with a Union representative. Ward attempted to contact Jackson by calling the station and was not allowed to talk to him and he then spoke to Quackenbush who told Ward that Jackson was on overtime and Ward could not speak to him while Jackson was on City overtime and that Jackson had been ordered to answer questions. Jackson was not disciplined for any of the events on April 19, 20 or 21, 1994.

8. On April 20 and 21, 1994, there was no reasonable basis to believe that Jackson would be subject to discipline for answering Zaremba's questions or writing the report related to the incident on April 19, 1994.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

The Respondents did not interfere with, restrain or coerce Jackson in the exercise of rights guaranteed in Sec. 111.70(2), Stats., by their refusing to allow Jackson to consult with the MPA prior to writing a report on the April 19, 1994, incident, or to have an MPA representative present while Respondents questioned him about said incident, and therefore, Respondents did not commit any prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the Complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 1st day of March, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

(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 MILWAUKEE (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, Complainants, MPA and Jackson, alleged that the Respondents committed prohibited practices by denying Jackson the right to representation by the MPA. The Respondents deny that they committed any prohibited practices.

Complainants' Position

The MPA contends that Jackson reasonably believed that the report he wrote could lead to his discipline. It submits that the purpose of the Use of Force Report is to determine whether the officers involved should be disciplined. It alleges that the City's Police Department disciplines officers who use too much force as well as officers who observe the use of excessive force and fail to report it. It argues that when an officer is required to write a report as part of an investigation whose purpose is to determine whether he or she should be disciplined, the officer has an objectively reasonable basis to believe the report could lead to his/her discipline. It asserts the assurances made to Jackson that he was not a target and would not be disciplined do not render his belief any less reasonable. It claims that only the Chief can guarantee that there will be no discipline, and Jackson had previously been suspended by the Chief after an assurance of no discipline by a Sergeant, and therefore, the inability to rely on any assurance not given by the Chief is an objective fact. It further points out that even if Jackson was not a target, he could be disciplined on the basis of statements in the record according to the testimony of Jones and an investigation can be initiated after a supervisor "informally" obtains information from an officer. It concludes that Jackson's belief that discipline could result was objectively reasonable.

Contrary to the Respondent's assertions that providing representation would result in gridlock, MPA maintains that a telephone call to consult the Union would not create any deadlock. Citing NLRB v. Weingarten, Inc., 95 S.Ct. 949 (1975), the MPA claims that the same advantages of in-person representation at an interview exist in representation via telephone. It points out that the Commission rejected the argument that an "immediate response to direct orders is an absolute necessity", finding that representation via telephone protected the employes' rights without jeopardizing the City's responsibilities in City of Milwaukee, Dec. No. 14873-B, 14875-B, 14899-B (WERC, 8/80).

The MPA concludes that Jackson reasonably believed that his report could lead to discipline, and he was therefore entitled to representation before submitting the report. It requests a cease and desist order as well as an order prohibiting the use of the report against Jackson in any future discipline.

Respondent's Position

The City submits that the applicable law is set forth in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), which provides that an employe may refuse to submit to an interview without union representation when he reasonably believes that it may result in his discipline. It notes that the standard of reasonableness is an objective standard, and not the employe's subjective view of the situation. It points out that Weingarten was codified in Ch. 164, Stats., and the Commission adopted Weingarten in City of Milwaukee, Dec. Nos. 14873-B, 14875-B and 14899-B (WERC, 8/80). It also notes that the City's Police Department has internalized the law of Weingarten in its Form PI-21 which is given to an employe anytime he or she is thought to be the subject of an investigation.

The City argues that Jackson could not reasonably believe that he was the subject of an investigation and that he was not entitled to Union representation. It points out that Jackson was given verbal assurance that he was not the subject of the investigation on more than one occasion and Jackson admitted in his testimony, as well as in his "In the Matter Of:" report, that he was told that no charges, criminal or departmental, could occur in this matter if he was truthful. Additionally, the City alleges that Jackson did not receive a PI-21 form and reasonable officers know that they are protected by the Law Enforcement Officer's Bill of Rights.

The City argues that the admission that assurances were given is fatal to the complaint because the assurances of a supervisor that no discipline will result is objective evidence to a reasonable officer that this is in fact the case. Failure to rely on such assurances, according to the City, could cause absolute mayhem in the daily operations of a paramilitary organization. It maintains that there was no evidence that Jackson could not reasonably rely on the assurances of his superiors and there was no evidence he had been lied to or suffered from a misrepresentation by Zaremba, Quackenbush or Jones. It insists that prior experiences by Jackson with other supervisors is irrelevant.

The City rejects the anticipated MPA argument that Jackson was aware of the rule requiring him to report any wrongdoing and because he hadn't, he was entitled to believe he was being investigated. It argues that this is his subjective evaluation. It submits that he is required to follow the orders of a superior and to cooperate in an investigation of the use of force. The City asserts that an attempt to label "reasonable" the making of a phone call to a Union representative anytime a question arises would wreak havoc upon departmental discipline and allow an officer to question almost any order of a superior and such a request is absurd on its face.

The City asserts that the facts of this case show that the situation was made abnormal by Jackson's refusal to follow a reasonable order. Zaremba was contemplating a simple question and answer session and only after Jackson refused to speak to Zaremba was Jackson ordered to file a written report. It states that Jackson made the matter into more than it needed to be and his

superiors reminded him about truthfulness well after the situation began and in a context that a reasonable officer could not conclude implied a concern about wrongdoing. It further suggests that merely placing Jackson on overtime to write the report is not out of the ordinary and does not indicate that he was involved in an abnormal situation. It also asserts that nothing is wrong with off-the-record consultations between officers and their superiors as conversations in the ordinary course of business do not come under the rule requiring Union representation. It concludes that Jackson's actions are not those of a reasonable police officer. It claims that a reasonable police officer, when presented with the same facts, could only make one conclusion -that he is not going to be the subject of discipline. It argues that the attempt to hide the inappropriateness of his response with this complaint should be seen for the smoke screen that it is. It requests that the complaint be dismissed in its entirety.

DISCUSSION

There is no dispute with respect to the law or the facts presented in this case. The parties have relied on NLRB v. Weingarten, Inc., 88 LRRM 2689 (1975), wherein the U.S. Supreme Court held that an employe has the right under the NLRA to refuse to submit to an investigatory interview without Union representation which the employe reasonably believes may result in disciplinary action. It held that "reasonable" was measured by objective standards, and not the subjective motivations of the employe. The Commission has adopted and applied Weingarten to the Respondent City in City of Milwaukee, Dec. Nos. 14873-B, 14875-B and 14899-B (WERC, 8/80). Thus, the law is not in dispute. The facts of the instant case are also undisputed and have been set forth in the Findings of Fact and need not be repeated herein. The only issue presented here is whether Jackson had an objectively reasonable basis to believe that answering Zaremba's questions or writing the report could lead to his discipline. The undersigned concludes that, viewed objectively, there was no reasonable basis to believe discipline would result.

Jackson has been a police officer for six years, and performs routine patrol duties, traffic enforcement and other duties. He writes reports on a routine basis including arrest reports and incident reports. 2/ On April 19, 1994, Jackson observed another officer use OC on a suspect. In short, he was a witness. Jackson testified at the hearing clearly and concisely what occurred on April 19, 1994. 3/ It would seem pretty routine to have Jackson write an incident report as to what he observed. On April 20, 1994, Zaremba asked Jackson if he was present when the incident happened. 4/ Jackson stated he was and Zaremba said he wanted to ask him some questions about it. Jackson asked if these questions could lead to departmental or criminal charges. 5/ Zaremba

2/ Tr. 8.

3/ Tr. 10-12.

4/ Tr. 13.

5/ Tr. 13.

told him that it wouldn't. 6/ Given that Jackson was merely a witness, and Zaremba was merely questioning him about the incident and was not asking about Jackson's personal conduct, it is difficult to understand how his report of the facts would lead to his discipline. Additionally, he was told that it would not by Zaremba. Furthermore, he was assured by two other superior officers, Quackenbush and Jones, that he would not be disciplined and he confirmed that he was told that no charges would be filed against him in his written report. 7/ Police officers are asked to write reports all the time. Had Zaremba simply told Jackson to file a routine report to complete his "Use of Force Report", this could not be reasonably construed as an investigatory interview. In short, there is no objective evidence to support a conclusion that an officer under these circumstances could reasonably believe that the questions or report could result in discipline of the officer.

6/ Tr. 50-51.

7/ Tr. 68-69, Ex. 4.

The claim that a failure of an officer to report any wrongdoing and to always tell the truth to his superiors establish an objectively reasonable belief that he could be disciplined is not persuasive. These same rules apply to every report or facet of a police officer's duties. A police officer is obligated to enforce all the laws and ordinances, and any wrongdoing must be reported as that is part of the officer's sworn obligation. Additionally, a police officer must be truthful because if he is not, what credibility would he be given in any legal proceeding? The broad sweep of these claims would require the presence of a Union representative whenever the police officer made a report or observed wrongdoing. These arguments simply fail. Under the circumstances present here, Jackson had no objectively reasonable basis to believe that his answers to questions or writing the "In the Matter Of:" might result in his discipline. 8/ Thus, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 1st day of March, 1995.

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By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

8/ See, Waukesha County, Dec. No. 14662-A (Gratz, 1/78), aff'd Dec. No. 14662-B (WERC, 3/78), at pp. 27 and 28, where an employe was not allowed to call a union steward by a supervisor who was seeking information for administrative purposes and the employe had no reasonable basis to believe she would be disciplined.