STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 645, MILWAUKEE DISTRICT COUNCIL 48,
AFSCME, AFL-CIO, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 552
No. 63709
MP-4063

Decision No. 31394-A

Appearances:

Mr. Gene Holt, Law Offices of Mark A. Sweet, 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217, appearing on behalf of the Complainant.

Mr. Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 645, Milwaukee District Council 48, AFSCME, AFL-CIO filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on May 28, 2004, alleging that Milwaukee County violated Sections 111.70(3)(a)1, 3, 4, & 5, Wis. Stats., in the manner in which it handled the interrogation of employee Julie Summers. The Commission appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5), Wis. Stats. A hearing was held in Milwaukee, Wisconsin on December 8, 2005. The parties completed filing briefs on March 3, 2006.

Having considered the arguments and the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Local 645, Milwaukee District Council 48, AFSCME, AFL-CIO, herein called the Union, is a labor organization with a mailing address of 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217.

2. Respondent Milwaukee County, herein called the County, is a municipal employer with a mailing address of 901 North Ninth Street, Milwaukee, Wisconsin 53233.

3. The parties' collective bargaining agreement states in Section 4.07 the following:

> (1) At meetings called for the purpose of considering the imposition of discipline upon employes, the employe shall be entitled to Union representation but only at the administrative level at which suspension may be imposed or effectively recommended, that is, at the level of the appointing authority or his/her designee for such purposes.
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> (2) It is understood and agreed that such right is conditioned upon the following:
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> (a) At the hearing before the appointing authority or his/her designee for disciplinary purposes, the employe may be represented by Union officials equal to the number of management officials present at such hearing.
>
> (b) The meeting at which the Union official is permitted to be present shall not be an adversarial proceeding. The Union official may bring to the attention of the appointing authority or his/her designee any facts which he/she considers relevant to the issues and may recommend to the appointing authority on behalf of the employe what he/she considers to be the appropriate disposition of the matter. The employe shall not be entitled to have witnesses appear on his/her behalf nor shall the supervisory personnel present at such hearing be subject to cross-examination or harassment.
>
> These restrictions recognize that the purpose of Union representation at such hearings is to provide the employe with a spokesman to enable him/her to put his/her case before the appointing authority and, further, to apprise the Union of the facts upon which the decision of the appointing authority or his/her designee is made. These restrictions are in recognition of the further fact that, in accordance with other terms and conditions of this Agreement, the employe has recourse from the decision of the appointing authority or his/her designee to the permanent umpire where the employe is entitled to a full measure of due process.

. . .

On April 25, 1980, Umpire Marshall Gratz issued a letter to the Union and County that resolved a grievance and stated:

> Upon request the County shall allow an employe to have Union representation whenever a supervisor or managerial employe asks a bargaining unit employe to be present at an investigatory interview, if the employe reasonably believes that disciplinary action might result against the employe being asked to be present at the investigatory interview. The supervisor or managerial employe shall inform the bargaining unit employe of the specific purpose of any investigatory interview, and the employe shall, upon request, inform the supervisor or managerial employe why he or she believes, if he or she does, that a Union representative should be present. Such statement by the bargaining unit employe shall not operate to deny the employe of any rights he or she may otherwise have under the collective agreement, the law, or this agreement.
>
> This agreement applies to all employes of Milwaukee County represented by District Council 48.
>
> The County agrees to post notices in the Division of Administrative Services informing employes of their above rights.
>
> It is the parties' understanding that the foregoing agreement has been entered into, in part, because of the decision of the United States Supreme Court in NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959.

4. The Union represents over 400 employees in the Department of Human Services and the department of Aging at the County. It also represents about 15 to 20 psychiatric social workers who work at the Sheriff's Department. Julie Summers is one of those psychiatric social workers assigned to the jail run by the County. Captain Mark Strachota of the Internal Affairs Division of the Sheriff's Department notified her by telephone that she was to attend an interview to be held on March 31, 2004 to determine whether disciplinary action was warranted for an incident occurring on March 21, 2004. Summers was given a notice of the date and time of the meeting with the following information:

> Investigators conducting the interview shall inform the member under investigation of the following:
>
> (1) The purpose of the interview is to solicit responses that will assist in determining whether disciplinary action is warranted, and the answers furnished may be used in disciplinary proceedings that could result in administrative action against you, including dismissal.
>
> (2) All questions relating to the performance of official duties must be answered fully and truthfully, and disciplinary action, including dismissal, may be undertaken if you refuse to answer fully and truthfully.
>
> (a) Criminal Law 5th Amendment Rights are not applicable to internal

investigations.

(3) No answers given nor any information gained by reason of such statements may, as a matter of constitutional law, be admissible against you in any criminal proceedings.

(4) At your request you may be represented by a representative of your choice with whom you may consult with at all reasonable times during the interview.

5. A separate notice to Summers stated the following:

THIS IS A DIRECT ORDER. YOU ARE NOT TO DISCUSS ANYTHING PERTAINING TO THIS INVESTIGATION WITH ANYONE OTHER THAN YOUR CHOSEN REPRESENTATIVE. ANY DEVIATION FROM THIS ORDER SHALL RESULT IN DISCIPLINARY ACTION UP TO AND INCLUDING TERMINATION.

6. John English is a Staff Representative of District Council 48. He received a call from the President of Local 645, Cecile Marie Purdy, telling him that Summers was being called in for an interrogation by the Internal Affairs Division. English and Purdy met with Summers and Strachota, and Strachota told him that the union representatives would be allowed to observe the interview, but that they were not to interrupt or interject or provide responses on behalf of Summers. Strachota put a tape recorder in plain view and told Summers that he would tape record the interview and it would also be on a hard drive. At the end of the hearing, Strachota asked if there was anything else to be added, and English thought that remark was directed to Summers and he said nothing. Summers did not ask for his counsel or ask to stop the interrogation for a caucus or meeting with English.

7. When Strachota finished the interview, his secretary typed it up and he reviewed the written document of the interview. When he finished his investigation, he wrote up an investigative summary and gave it to Inspector Kevin Carr, who is second in command after the Sheriff. After Carr reviewed it, the summary went to Michael Kalonick, the program director of the Detention Services Bureau and Summers' supervisor, for a meeting for the imposition of discipline. Summers and the Union were given a notice. The Union had an opportunity to tell its side of the story at the meeting with Kalonick. Kalonick could overturn the investigative summary or recommend that discipline be imposed by the Sheriff or Carr. Summers was given a reprimand, which was grieved and resolved during the steps of the grievance procedure. English signed the approval of the resolution of the grievance.

8. District Council 48 Staff Representative William Mollenhauer was responsible for providing Union representation to Local 645 between 1993 and 2003. Mollenhauer was aware of two cases of investigatory interviews of Local 645 members by the Internal Affairs Division during that time, both of them occurring in 2003. Mollenhauer and the Chief Steward, John Kropp, both intended to attend the interviews but were told that only one of them could attend, so Kropp attended. A captain in the Sheriff's Department, Brian Mascari, told Kropp that he could not interrupt the proceedings and could not speak on behalf of the individuals being investigated. The interviews were tape recorded. The Union did not file any complaints about

those two cases. Both individuals left the County and the Union did not file a grievance.

9. The Sheriff's Office has an Internal Affairs Manual that deals with investigations into alleged rule violations. It states, under "Interviews," that members under investigation have the option of having a representative present during the interview, and representatives cannot ask questions or otherwise interfere in the investigative process. Employees being interviewed are allowed to talk to their representatives and may take a break in the interview to talk to their representatives. The interruptions to consult with representatives are to be "reasonable," which is discretionary with the person conducting the interview. Unions have been provided with copies of transcribed interviews in the past. The Internal Affairs Division has used the same procedures to conduct interviews for at least 25 years and applied it to both represented and nonrepresented employees, as well as civilian employees and sworn officers.

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

CONCLUSIONS OF LAW

1. Respondent violated Sec. 111.70(3)(a)1, Stats., by telling union representatives that they could not interrupt or speak on behalf of employee Julie Summers during an interview conducted by the Internal Affairs Division of the Sheriff's Department, which was investigating allegations about her conduct that eventually led to discipline.

2. Respondent has not violated Sec. 111.70(3)(a)4, Stats., by tape recording interviews with employees in investigations by the Internal Affairs Division of the Sheriff's Department.

3. The Commission will not assert its jurisdiction to determine whether the Respondent has violated Sec. 111.70(3)(a)5, Stats.

On the basis of the above Findings of Fact and Conclusions of law, the Examiner makes and issues the following

ORDER

Milwaukee County and the Internal Affairs Division of the Sheriff's Department should immediately take the following action which will effectuate the purposes of the Municipal Employment Relations Act:

1. Cease and desist from telling union representatives who are representing employees in interviews with the Employer that they may not interrupt or interject or provide responses on behalf of employees during said interviews.

2. Post the Notice attached hereto as Appendix "A" in conspicuous places in the workplace. The notice shall be signed by a representative from the County of Milwaukee and shall remain posted for a period of 30 days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

3. Notify the Wisconsin Employment Relations Commission within 20 days of this Order what steps have been taken to comply herewith.

Dated at Elkhorn, Wisconsin this 1st day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By: Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

> WE WILL cease and desist from interfering with the rights of any of our employees by telling union representatives present at interviews that may lead to discipline that they may not interrupt or speak on behalf of such employees.
>
> WE WLL allow union representatives to offer reasonable input or to interrupt or speak on behalf of employees in interviews that may lead to discipline.

Dated at Milwaukee, Wisconsin, this 1st day of March, 2007.

By ________________________________

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Union

The Union argues that restricting the role of union representatives restricts employees' rights under the law and the contract, and that Summers was denied her WEINGARTEN rights. She had a reasonable belief that discipline was a possible outcome of the interrogation and was entitled to union representation. The role of the union representative during an investigatory interview is to assist the employee. The employer may not impose a passive role on the union representative during the interrogation. Employees are under stress in interrogations and may not be able to articulate the incident being investigated or raise extenuating factors. A knowledgeable union representative can help determine facts that will help the employee. The fact that the County prohibited Summers' union representative from actively participating in the interrogation violates Sec. 111.70(3)(a)1. The remedy for such a violation is to prohibit the employer from using the information gleaned at this interrogation, which would lead to the removal of the discipline from the employee's personnel file. Furthermore, the Union asserts that the County's restriction on the role of the union representative breached the labor agreement and therefore violated Sec. 111.70(3)(a)5.

The County is also restricting concerted activity when it forbids employees from discussing matters relating to wages, hours or conditions of employment, the Union contends. The order in the notice of the Internal Affairs investigation stated that Summers was not to discuss anything pertaining to the investigation with anyone other than her representative. The law does not permit an employer to limit an employee's exercise of labor rights exclusively through her union representative. The employee must be free to engage in lawful concerted activity.

The Union claims that the County did not bargain for the ability to force employees into interrogations and then tape record those interrogations. Modifying the past practice between the parties violates Sec. 111.70(3)(a)4, Stats. A unilateral change in the status quo of wages, hours or conditions of employment during the hiatus period between collective bargaining agreements is a per se violation of the duty to bargain. The tape recording is used exclusively for determining whether to initiate discipline against an employee, and as such, the act of tape recording is a mandatory subject of bargaining which carries with it an obligation to bargain. The past practice involves the traditional investigatory interview, with the full right of union representation, without the use of tape recorders. The County's use of interrogation through Internal Affairs and the tape recording thereof represent a change to the status quo and violate

the statute.

The Union asks for the removal of all disciplinary action taken against Summers and other similarly situated employees, an order directing the County to cease and desist its illegal activities, a posted notice to apprise bargaining unit members of their rights, and that the Union be reimbursed for all expenses including attorney fees and costs.

The County

The County notes that when allegations of Summers' misconduct were raised, the long-standing Internal Affairs process of the Sheriff's Department kicked in. Summers was treated just as every employee who is similarly situated. She chose a union representative to represent her. Captain Strachota testified that the very same procedures are used for all employees, sworn or civilian, represented or not, irrespective of rank. Those procedures have been in place for several decades and have been applied to employees represented by the Complainant previously. Summers does not appear to have been severely put upon, and did not even appear to testify in her own complaint case. There was no showing that the Sheriff's motivation at all implicated any animus as proscribed by Sec. 111.70, Stats. Given the equal application of the Internal Affairs policy, there can be no claim that Summers was treated differently because she was in a represented position. The Sheriff's Department had a compelling interest in determining whether an employee had violated departmental work rules and County civil service rules.

At the close of the proceedings, the Union attempted to amend the complaint, but it was never reduced to writing. The County objected. The effort is untimely. The one-year statute of limitations would bar a new charge based upon the time frames contained in the hearing record. The County asks that the allegation be made more definite and certain, and it wants the opportunity to address the issue if it is at all dispositive.

The County asserts that the Union used the grievance process of the collective bargaining agreement, and that process resulted in the Union's agreement that discipline was warranted. Now the Union seeks to undo that to which it originally agreed. Summers was not threatened. She was advised that it was essential for her to be truthful. This is a civil service rule in the County and those rules are subsumed into the terms of the labor contract. The Internal Affairs policy and procedure is a departmental work rule, and work rules are also governed by the contract. If the Union objected to the rule, it should have used the grievance process, and it ought not now be rewarded by being allowed to amend the contract without bargaining.

The County contends that Summers and the Union are foreclosed from objecting where they did not take the matter to arbitration. They advanced the discipline, which was a reprimand, to Labor Relations, and the Union concurred that the discipline was warranted. Either the discipline and the Union's concurrence were valid, or the Union's concurrence was a sham. The Union could have gone to arbitration, but it initiated these proceedings. That conduct deprives the County of the benefit of its bargain under the contract and is, of itself, a

prohibited employment practice.

In Reply, the Union

The Union responds by noting that while Internal Affairs procedures may have been in place for a quarter of a century, there is no evidence that the procedure was used against Local 645 members other than Summers, Siegworth and Scott. The Union did not challenge the Siegworth or Scott cases because the individuals either transferred out of the department or quit the County.

The County is not reasonable when it contends that the union representative did not ask for the opportunity to be heard or counsel Summers. The evidence shows that Strachota issued a directive to English. That order by Strachota is the issue, as it illegally restrained the Union in its right to represent Summers during the investigation, depriving her of her right to representation.

The amendment to the complaint is timely. Sec. 111.07(2) provides that complaints may be amended in the discretion of the Commission at any time prior to the issuance of a final order based hereon. The "continuing violation" doctrine provides an equitable means to reach back to remedy unlawful activity that began prior to the one-year period. Complaints may also be amended after the expiration of the one-year filing period if the additional allegations arise out of the same transaction, occurrence or event set forth in the original pleading. Allowing the complaint to be amended is a matter of judicial economy.

The Union asserts that the resolution of the grievance does not affect the complaint. The grievance was limited to a question of whether there was just cause for discipline. The complaint challenges how the evidence was gathered. The Union seeks a remedy by which the discipline would be removed from the employee's record.

Finally, the Union contends that the Internal Affairs methodology did not apply to Local 645 members until recently. The County argued that the Internal Affairs policy and procedure was a departmental work rule not previously challenged by the Union. However, Mollenhauer serviced Local 645 for 10 years and was not provided with a copy of the policy and procedure documents.

In Reply, the County

The County responds by stating that no WEINGARTEN rights were violated, and that Summers was given both her WEINGARTEN and GARRITY rights. Neither Summers nor her Union representative objected to the proceeding. English, who is not a County employee, is not likely to be cowed into acting so docile as to imperil Summers' representation. When given the opportunity to be heard, English remained silent. He never asked to counsel Summers or take a break. The Union even noted in its brief that Strachota said that the employee could stop the meeting at any time and confer with the Union for as long as they

wanted. English and retired Union officer Kropp participated in an earlier and similar

interview which was run in the identical fashion. The Union alleges there is no past practice. History and the testimony of Kropp, Union staff representatives and Strachota show a practice in place for decades. Further, the Union has acquiesced in the policy that has been in place for decades. The Union never challenged the reasonableness of the rule under its own contract and grievance procedure.

The WERC recently visited the WEINGARTEN issue in MCCORISON V. DEPT OF TRANSPORTATION, DEC. NO. 31052-A. The WEINGARTEN Court observed that the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action, that the right arises only in situations where the employee requests representation; and the exercise of the right may not interfere with legitimate employer prerogatives. To constitute a violation, the County's behavior during the interview must manifest conduct likely to interfere with, restrain or coerce the Complainant's rights. Summers requested and was granted Union representation at the interview. Neither Summers nor the Union ever made a request for more. There is no persuasive factual basis to conclude that the County conducted the interview in a manner that violates WEINGARTEN rights.

For the first time in brief, the Union claims that the County violated the bargaining agreement. The Commission will not decide whether an employee has violated a collective bargaining agreement unless a complainant first establishes that he tried to use the contractual arbitration process but was unable to do so because the union unlawfully failed to represent him. In this case, the Union did advance a grievance on Summers' behalf, which was resolved when the Union agreed to the disposition and signed off on it.

The County further asserts that the Union is also bound by the bargaining agreement. The Sheriff's rule and policy has existed for several decades and the Union has never challenged is reasonableness. The labor agreement requires that all disputes arising under the terms of the contract are to be resolved by final and binding arbitration. The County should not be denied the benefit of its bargain under the contract as to how disputes are to be resolved.

DISCUSSION

In NLRB V. WEINGARTEN, INC., 420 U.S 251 (1975), the U.S. Supreme Court held that an employee has the right under the NLRA to refuse to submit to an investigatory interview without union representation which the employee reasonably believes may result in disciplinary action. It held that "reasonable" was measured by objective standards, and not the subjective motivations of the employee. The Commission has adopted and applied the basic standards of WEINGARTEN in its cases. See, for example, CITY OF MILWAUKEE, DEC. NOS. 14873-B, 14875-B AND 14899-B (WERC, 8/80); WAUKESHA COUNTY, DEC. NO. 14662-A (GRATZ, 1/78) AFF'D, DEC. NO. 14662-B (WERC, 3/78). The WAUKESHA COUNTY decision

established that whether a right to representation exists depends on the purpose of the employer-employee interaction and whether protected rights could reasonably be impaired by denying representation in such circumstances. This differs from WEINGARTEN to the extent that it is not limited to simply investigatory interviews. The Commission held that there is no statutory right to representation if an employee is under no compulsion to appear before the employer (CITY OF MILWAUKEE, DEC. NO. 17117-A (DAVIS, 1/80) AFF'D BY OPERATION OF LAW, DEC. NO. 17117-B (WERC, 2/80), or if there is no reasonable cause to believe that an employer-employee meeting may result in discipline (CITY OF MADISON (POLICE DEPARTMENT), DEC. NO. 17645 (DAVIS, 3/80), AFF'D BY OPERATION OF LAW, DEC. NO. 17645-A (WERC, 4/80), or if the meeting is to impose discipline that has already been decided on (WAUKESHA COUNTY, DEC. NO. 18402-C (CROWLEY, 1/82), AFF'D, DEC. NO. 18402-D (WERC, 9/82). Conversely, the Commission has held that an employer's refusal to permit representation is considered interference with protected employee rights if an employee has requested representation and the scheduled interaction could reasonably affect a decision to discharge or discipline (CITY OF MILWAUKEE, DEC. NOS. 14873-B, 14875-B, 14899-B (WERC, 8/80), or if the meeting's purpose is to determine whether an employee should be retained (BOSCOBEL AREA SCHOOL DISTRICT, DEC. NO. 18891-B (WERC, 12/83).

There is no question in this case that the employee, Summers, was entitled to union representation, and two union representatives, English and Purdy, sat in on the interview with the County's representative, Strachota. Summers was given a notice before the interview that she could consult with the representative of her choice at all reasonable times during the interview. However, despite the notice that she could consult with the union representative, Strachota told English and Purdy that the union representatives would be allowed to observe the interrogation, but that they were not to interrupt or interject or provide responses on behalf of Summers. It is that statement by Strachota which is at the heart of the issue in this case.

There is a similar case in Wisconsin – SIPEN V. DAVIS ET. AL., DEC. NO. 27135-A (GRECO, 7/92) AFF'D BY OPERATON OF LAW, DEC. NO. 27135-B (WERC, 7/92). In that case, Appleton Fire Chief Davis told a union representative (Vanderwyst) that he was there as a courtesy to the employee (Sipen) and that he would not be allowed to interrupt the proceeding. Davis also told Vanderwyst that if he interrupted the proceedings in any way, he would be removed from the room. Examiner Greco stated:

> Davis thereby violated Sipen's right to be assisted by effective union representation, as it is well-recognized that union representatives at such investigatory meetings have the right to actively participate in order to provide employes with the concerted protection to which they are entitled. Davis prevented that from happening by in effect telling Vanderwyst that he would be kicked out of the room if he spoke.
>
> To be sure, and as the City correctly notes, Vanderwyst did ask one or two questions without suffering any adverse consequences. That, though, is hardly the kind of active participation that Vanderwyst was entitled to give and which Sipen was entitled to receive. Hence, Davis violated Section 111.70(3)(a)1 of the Municipal Employment Relations Act by curtailing Vanderwyst's involvement at the October 28, 1991, meeting.

It would seem to follow that once the union has a right to be present at a meeting or interview, it has the further right to participate fully in that interview to the extent necessary to represent an employee. Otherwise, the union's presence is merely perfunctory. While the County argues that English was not likely to be cowed by Strachota, it appears that English was indeed intimidated and understood that he was to say nothing at all. Even when Strachota asked if there was anything else at the end of the interview, English thought the remark was meant only for Summers. While Strachota testified that he would have allowed reasonable interruptions for Summers to consult with English if she had asked for them, this is contrary to his statement to English and Purdy at the start of the interview where he told them that there were to be no interruptions. In effect, Summers received no true union representation other than having union representatives there as observers. As in the case before Examiner Greco, this was not the kind of active participation that she was entitled to, and accordingly, the County violated Sec. 111.70(3)(a)1, Stats. by curtailing union participation in the interview.

The remedy for this violation is a cease and desist order, which is sufficient to effectuate the purposes of the Municipal Employment Relations Act. The violation does not appear to have affected the outcome of the interview, and two union representatives were present for the interview. As Examiner Jones stated in MONROE WATER DEPARTMENT, DEC. NO. 27015-A (JONES, 10/92), "….such remedies are designed to cure, not to punish. These remedies are not intended to place the affected employe in a better position than what they were in prior to the employer's unlawful conduct." Strachota did not rely solely on the interview for his investigation but interviewed other people as well. A reading of the translated tape shows that Summers was not prejudiced by Strachota's admonition to English and Purdy, and she was articulate in explaining her position of her conduct to him. The record further shows that the Union agreed to resolve the grievance by accepting the written reprimand as the ultimate disposition of the case.

The Union has argued that the County's restriction on the role of the union representatives also violates the collective bargaining agreement and therefore violates Sec. 111.70(3)(a)5. Generally, the Commission will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides for final and binding arbitration. See JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY, ET AL., DEC. NO. 16753-A & B (WERC, 12/79); BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. NO. 15825-B (WERC, 6/79); OOSTBURG JOINT SCHOOL DISTRICT, DEC. NO. 11196-A & B (WERC, 12/79). The parties' collective bargaining agreement has a provision for binding arbitration, and the parties must live with their bargain. The Commission's policy is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. Therefore, the Examiner will not exercise the Commission's jurisdiction over the contract dispute and the allegation of a violation of Sec. 111.70(3)(a)5, Stats., has been dismissed.

The Union has also alleged that the use of the tape recorder for the interviews of employees violates Sec. 111.70(3)(a)4, Stats., by changing the status quo. The Union asserts that the tape recording is used to determine whether to initiate discipline against an employee, and therefore, the act of tape recording is a mandatory subject of bargaining which carries with it an obligation to bargain. Sec. 111.70(3)(a)4, Stats., makes it unlawful for a municipal

employer to refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Absent a valid defense, a unilateral change in existing wages, hours, or conditions of employment violates the statute's duty to bargain. See SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85).

There are two problems with the allegation that the use of tape recorders violates the law. First, the Examiner is not convinced that the use of tape recorders is a mandatory subject of bargaining. Secondly, it is not true that the status quo was unilaterally changed. The Union looks at the bulk of its Local 645 members who work in different departments where tape recorders have not been used during interviews with employees who are being investigated for possible misconduct. However, the employees who work in the Sheriff's Department and are represented by Local 645 have always been subjected to the use of tape recorders when Internal Affairs conducts investigations. Thus, the status quo for the Sheriff's Department has not been changed in at least 25 years. Moreover, the record lacks evidence that the tape recorders are a mandatory subject of bargaining. The fact that they are used in a process that could lead to discipline does not make them a mandatory subject of bargaining. The Sheriff's Department has a preference for a full record as opposed to taking notes during interviews. If Internal Affairs stopped tape recording interviews and chose to use hand written notes instead, this would not create a unilateral change triggering a duty to bargain either. Either procedure is nothing more than a choice of how to gather information and record it for later use. The allegation of a violation of Sec. 111.70(3)(a)4, Stats., has been dismissed.

Finally, the Union attempted to amend its complaint during the hearing in this matter to add an allegation regarding the language in the notice as shown in Finding of Fact #5, claiming that this notice was also a violation of Sec. 111.70(3)(a)1. The County objects as being untimely and past the statute of limitations. The Examiner made no ruling during the hearing on the matter. The County asks that the allegation be made more definite and certain and that it have the opportunity to address the issue if necessary. The Union believes that allowing the complaint to be amended would be a matter of judicial economy, and that the County is not prejudiced. However, the Examiner believes that the County is prejudiced by not having an opportunity to respond to this last minute allegation. The allegation was not developed at hearing, there was no testimony about it, and the parties have not developed it well in their briefs. Sec. 111.07(2)a allows the amendment of a complaint in the <u>discretion</u> of the commission at any time prior to the issuance of a final order based thereon. The Examiner believes that in this case, the discretion is better exercised by not allowing the late amendment of the complaint where the County has not had the opportunity to dispute it. Judicial economy must give way to fairness.

Dated at Elkhorn, Wisconsin this 1st day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

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31394-A