

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES'
UNION, LOCAL 1903, AFSCME, AFL-CIO, Complainant,**

vs.

WINNEBAGO COUNTY, Respondent

Case 403
No. 68059
MP-4433

Decision No. 32468-B

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717, appearing on behalf of the Complainant.

Attorney John A. Bodnar, Winnebago County Corporation Counsel, 448 Algoma Boulevard, Oshkosh, Wisconsin 54903-2808, appearing on behalf of the Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

On June 6, 2008, Winnebago County Highway Department Employees' Local 1903, AFSCME, AFL-CIO, filed a complaint against Winnebago County, alleging that the County violated Sec. 111.70(3)(a)4 and, derivatively, Sec. 111.70(3)(a)1, 3 & 4, Wisconsin Statutes, by failing to negotiate a last chance agreement for bargaining unit member Randy Besaw with appropriate Union representatives, requiring Besaw to sign the agreement or face termination and subsequently terminating Besaw for an alleged violation of the agreement. The Commission appointed John Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On August 1, 2008, the County filed an Answer to the Complaint. On August 6, 2008, the County filed a motion to defer the matter to grievance arbitration, which was denied on August 12, 2008. On August 15, 2008, a hearing was conducted in Oshkosh, Wisconsin. The proceedings were transcribed and the transcript was filed on August 21, 2008. The

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Complainant filed its initial brief on September 22, 2008. The Respondent filed a responsive brief on October 21, 2008. The Complainant filed a rebuttal brief on November 10, 2008. The Respondent elected not to file a rebuttal brief and the record was closed on November 24, 2008.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. Winnebago County Highway Department Employees' Local 1903, AFSCME, AFL-CIO, the Complainant herein, is a labor organization maintaining its principal place of business at W5670 Macky Drive, Appleton, Wisconsin.

2. Winnebago County, the Respondent herein, is a municipal employer maintaining its principal place of business at 448 Algoma Boulevard, Oshkosh, Wisconsin.

3. At the time of the events referenced herein, the Complainant and Respondent were parties to a collective bargaining agreement dated October 4, 2007 and covering the period January 1, 2007 to December 31, 2009.

4. Article 2 of the agreement recognizes the Union as "...the exclusive collective bargaining representative of all regular full-time and regular part-time employees of Winnebago County, employed in the Winnebago County Highway, Solid Waste, Airport, and Parks Departments, including the foreman/mechanics and the working foremen in the Highway Department, but excluding office clerical employees, seasonal employees, temporary employees, bridgetenders, the administrative assistant, shop superintendent, highway maintenance superintendents, craft employees, and all supervisors, as their representative for purposes of conferences and negotiations with the County, or its lawfully authorized representatives, on questions of wages, hours, and conditions of employment, as certified by the Wisconsin Employment Relations Board on July 20, 1966, and as stipulated in an agreement between the Union and the Winnebago County Courthouse Employees' Association effective August 1, 1983."

5. Article 8 – Discipline, of the contract states, in pertinent part:

SECTION A.

An employee may be suspended, discharged, demoted, or otherwise disciplined for just cause. The sequence of disciplinary action shall be written reprimands, suspension and discharge. Any employee receiving disciplinary action shall receive written notice of such discipline and reasons for same. The Union also shall be provided a copy of all discipline. The employee shall receive a copy of said written notice of the discipline at the end of the work day that the discipline is imposed.

SECTION B.

In the event that a discharged employee feels he has been unjustly discharged, said employee may file a complaint with his department head provided he does so within three (3) working days after the time of discharge. Said complaint shall be treated initially at Step 3 of the grievance procedure as hereinafter provided in this Agreement.

6. At all times pertinent hereto, Randy Besaw was employed by the County in the Solid Waste Department, and was a member of the bargaining unit described in Finding of Fact #4.

7. On September 11, 2007, Besaw was issued a written warning by Human Resources Labor Relations Specialist Ron Montgomery for leaving work early on September 10 without permission.

8. On the morning of September 12, 2007, Montgomery met with Besaw again to discuss an allegation that Besaw had falsified his timecard on September 10, by indicating he had worked a full eight hours when, in fact, he had not. As a result of the meeting, Besaw was issued another written warning.

9. After the meeting, Montgomery decided to terminate Besaw's employment unless he agreed to enter into a last-chance agreement. Montgomery then composed a last-chance agreement for Besaw, which he then had read and approved by Human Resources Director Karon Kraft.

10. Later on September 12, Besaw was approached by Landfill Manager Jim Morris and was directed to attend a meeting at 2:30 p.m. that afternoon in the Landfill Office. At the appointed time Besaw met with Morris and Montgomery in the Landfill Office. Montgomery advised Besaw that he had the right to Union representation at the meeting, but Besaw declined to seek representation at that point. Thereafter, Montgomery advised Besaw that he had determined to terminate his employment as a result of his leaving work early and falsifying his timecard on September 10, as well as for a safety violation that had resulted in a written warning on August 16, but that the County was willing to enter into a last chance agreement with Besaw in lieu of termination. He then presented Besaw with the proposed last chance agreement, as follows:

September 12, 2007

Mr. Randy S. Besaw
2215 Willow Way Drive
Oshkosh, WI 54904

RE: Last-Chance Agreement

Dear Mr. Besaw:

This letter details the terms of a last-chance employment agreement between you and Winnebago County. This agreement will become effective today – September 12, 2007.

Because you have received three Written Warnings regarding performance and safety issues within thirty days it has become necessary to issue this last-chance agreement to ensure you will follow all employment policies covering represented employees, and also adhere to all Winnebago County safety policies.

Separately today you received a Written Warning for entering false information on your timecard. On it, you claimed to have worked eight hours on Monday, September 10, 2007. In fact, you left work early on that day. The false entry constitutes a violation of Section 7-C, Handbook for Represented County Employees ('Falsification of Timecards shall constitute misconduct and shall subject the person responsible for any intentional falsification to disciplinary action. '), and Section 9-C ('Dishonesty or falsification of records. ') You signed for receipt of the Handbook on May 12, 2003. A copy of your signature on the front cover of the Handbook is attached to this letter.

You received a Written Warning on September 11, 2007, for leaving work early without authorization – or without even informing a supervisor or manager that you were doing so.

Prior to that, you received a Written Warning on August 16, 2007, for an extremely serious safety violation after you operated a backhoe so carelessly on June 28, 2007, that its boom came into contact with an electric power line, whipping it to the ground. Landfill Manager Jim Morris observed you a short time later **carrying the downed power line. Fortunately, but unbeknownst to you, you had grabbed the unenergized or dead end. Had you touched the live end, you could have been killed. Another employee, a customer or member of the public could have been killed by contact with the downed power line.** As a result of that incident, you were removed from operating equipment pending your completion of a Fitness-for-Duty Examination. Winnebago County was notified of your successful completion in August of 2007.

This last-chance agreement provides the conditions under which you may remain employed by Winnebago County, with the understanding that should you fail to comply with this agreement between September 12, 2007 and September 12, 2008, your employment may be terminated.

Following are the conditions of this last-chance agreement:

1. You are to ensure that all records of time you have worked are accurate and factual
2. You are to operate any equipment in/on which you are assigned to work in a safe, proper and competent manner and in accordance with all safety rules and County policies. Should you discover that such a piece of equipment is not functioning as it is intended to function, you are to immediately cease its operation and inform a designated supervisor or manager. This applies to equipment of every kind, ranging from the big garbage compactor known as "Big Blue" to the relatively tiny Polaris road vehicle.
3. You are to treat managers, supervisors and coworkers appropriately and respectfully at all times.
4. You are to strictly adhere to your assigned working hours and tasks, including the taking of lunch times and break times, and not leave an assigned task or the work site until the appropriate time or until a manager or supervisor gives you permission to leave early or to otherwise deviate from your assigned working hours or tasks.
5. You agree, as a condition of this last-chance agreement, that you will not contest, via the contractual grievance process, any suspension or termination of your employment or other disciplinary action that may result from your violation of this agreement.

Sincerely,

/s/

Ron J. Montgomery
Human Resources Specialist Labor Relations
RJM/enclosures

The following signatures signify agreement to the terms of this last-chance agreement:

Randy Besaw

For the Winnebago County Highway

James A. Morris
Landfill Manager

Merle D. Lavey
Landfill Supervisor

11. There were no negotiations beforehand between the County and Local 1903 regarding the terms of the last-chance agreement and neither the AFSCME Staff Representative, nor the officers of Local 1903, were consulted or advised that the County was proposing a last-chance agreement to Besaw prior to the meeting on September 12.

12. Montgomery told Besaw that his alternatives were to either sign the last-chance agreement or be terminated immediately. Besaw stated he did not understand and refused to sign the agreement, whereupon Montgomery called Karon Kraft and they agreed to give Besaw until 8:30 the following morning to make his decision.

13. At 8:30 a.m. on September 13, the meeting reconvened. Montgomery and Kraft were present for the County. Besaw appeared with Union Steward Ed Carpenter to represent him. Montgomery presented Carpenter and Besaw with copies of the documentation of Besaw's past discipline as well as the current incidents and the last-chance agreement. Kraft then told Carpenter and Besaw that they would be left alone to discuss the matter and that they could use the telephone in the room to call and consult with anyone else if they wished.

14. Approximately 35 minutes later, Carpenter told Kraft and Montgomery they were ready to reconvene and Kraft and Montgomery returned to the room. At that time Kraft again explained to Carpenter and Besaw that Besaw's options were to either sign the agreement or be terminated. Neither Besaw nor Carpenter asked whether there were any other alternatives or requested any changes in the agreement. Besaw and Carpenter signed the agreement as drafted and the meeting concluded.

15. Subsequent to the signing of the last-chance agreement on September 13, Besaw's employment was terminated by the County for an alleged violation of the terms of the agreement.

16. The requirement of just cause for discipline and access to the grievance procedure are rights guaranteed to bargaining unit members under Article 8 of the collective bargaining agreement.

17. Condition #5 of the last-chance agreement constituted a waiver by Besaw of the requirement that future discipline be based upon just cause, as well as his right to grieve any future discipline based upon a violation of the agreement.

18. The County's action in presenting the last-chance agreement to Besaw as a "take it or leave it" alternative to termination, without first informing the designated representative of Local 1903, had a tendency to interfere with, coerce, or restrain him in the exercise of his protected rights.

19. The County's action in drafting and imposing a last-chance agreement upon Besaw without first negotiating the terms of the agreement with the representatives of Local 1903 constituted a failure to bargain with the Union over a change in the terms of the collective bargaining agreement.

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

CONCLUSIONS OF LAW

1. The Complainant, Winnebago County Highway Department Employees' Local 1903, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

2. The Respondent, Winnebago County, is a municipal employer, within the meaning of Section 111.70(1)(j), MERA.

3. Randy Besaw is a municipal employee within the meaning of Section 111.70(1)(i), MERA.

3. The County's failure to bargain with the Local 1903 over the terms of the last-chance agreement imposed upon Randy Besaw constitutes a prohibited practice, contrary to Sec. 111.70(3)(a)1 and 4, Wis. Stats.

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

ORDER

Winnebago County, its officers and agents shall immediately take the following actions consistent with the Findings of fact and Conclusions of Law set forth above:

- 1) Cease and Desist from modifying the terms and conditions of its collective bargaining agreement with Local 1903 without negotiating any said modifications with the designated representatives of Local 1903:
- 2) Cease and Desist from bargaining individually with members of Local 1903 over their wages, hours and working conditions:
- 3) Post the notice attached hereto as "Appendix A" in conspicuous places in the County's buildings where notices to employees represented by Local 1903 are posted. The Notice shall be signed by a representative of the County and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

- 4) Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Fond du Lac, Wisconsin, this 10th day of February, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

APPENDIX

**NOTICE TO ALL EMPLOYEES REPRESENTED BY
WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES'
LOCAL 1903, AFSCME, AFL-CIO**

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 represented by Winnebago County Highway Department Employees' Local 1903 that:

WE WILL NOT violate Section 111.70(3)(a)1 & 4 of the Municipal Employment Relations Act by refusing to bargain collectively with the designated representatives of Local 1903 over the wages, hours and conditions of employment of its bargaining unit members.

WE WILL NOT violate Section 111.70(3)(a)1 & 4 of the Municipal Employment Relations Act by bargaining individually with members of the bargaining unit represented by Local 1903 over their wages, hours and conditions of employment.

ON BEHALF OF WINNEBAGO COUNTY

Date

WINNEBAGO COUNTY (HIGHWAY DEPARTMENT)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

BACKGROUND

The factual basis for this complaint grows out of events that occurred in August and September 2007, resulting in multiple impositions of discipline on Randy Besaw, an employee of the Winnebago County Landfill and a member of Winnebago County Highway Department Employees' Local 1903. As a result of multiple disciplinary events in a relatively short period of time, the County made the decision to terminate Besaw's employment unless he would agree to enter into a last-chance agreement. The decision to deal with Besaw in this manner was made by the County's Human Resources Director, Karon Kraft, and Human Resources Labor Relations Specialist, Ron Montgomery. At the time of the events herein, however, Kraft had been employed for less than a week and so, although she was kept informed of events and attended the final meeting between the parties, she appears to have largely deferred to Montgomery in the handling of the matter.

On the morning of September 12, Montgomery met with Besaw regarding an allegation that Besaw had falsified his timecard on September 10. Besaw apparently did not deny the charge and Montgomery issued him a written warning, which was the third written warning Besaw had received in the previous thirty days. After this meeting, Montgomery made the decision to terminate Besaw, or, in the alternative, offer him a last-chance agreement. To that end, he drafted a proposed last-chance agreement, which Kraft read and approved, and directed Landfill Manager Jim Morris to summon Besaw to a meeting later that afternoon. Neither Montgomery nor Kraft notified or sought to bargain with the representatives of Local 1903 beforehand over the terms of the last-chance agreement.

At 2:30 on September 12, Montgomery and Morris met with Besaw, at which time Montgomery informed Besaw that this was a disciplinary meeting and advised him that he was entitled to Union representation. Besaw declined to have a Union representative present at the meeting. Then Montgomery explained to Besaw that he was prepared to terminate him due to the number of disciplines he had received recently, but that Besaw could keep his employment if he was willing to enter into a last-chance agreement, at which point he presented Besaw with the proposed agreement and explained to him that the terms of the agreement were non-negotiable and that his choices were either to sign it or be terminated. The document itself detailed Besaw's disciplinary history and set forth the conditions under which Besaw would remain employed. It further stated that further discipline as a result of future violations of the terms of the agreement would not be subject to the grievance procedure. Besaw stated that he did not fully understand and that he was unwilling to sign the agreement at that time, whereupon Montgomery called Kraft and they agreed to adjourn the meeting until 8:30 the next morning, at which time Besaw would have to make his decision. Montgomery again told Besaw that he could have a Union representative with him at the meeting.

At 8:30 a.m. on September 13, Besaw met again with Montgomery and had Union Steward Ed Carpenter with him. Kraft was also in attendance at this meeting. At the outset, Montgomery provided Besaw and Carpenter with copies of the proposed agreement, as well as supporting documentation for the underlying discipline and advised them again that Besaw's options were to either sign the agreement or be terminated. Carpenter indicated he wished to discuss the matter with Besaw privately, at which time Montgomery and Kraft withdrew. There was a telephone in the conference room and Kraft told Carpenter and Besaw that they were free to use it if they wished. After approximately 30-45 minutes, Carpenter informed Montgomery and Kraft that they were ready to resume the meeting. The meeting reconvened in the conference room and Carpenter and Besaw signed the agreement.

Subsequent to the signing of the agreement, Besaw was terminated for an alleged violation of its terms. The Union filed a grievance on Besaw's behalf, challenging the discharge, and also filed this proceeding alleging statutory violations in the process of the County's obtaining Besaw's acquiescence to the last-chance agreement. Prior to the hearing herein, the Respondent filed a motion to defer these proceedings to arbitration, inasmuch as the discharge grievance was still pending. The motion was denied, however, inasmuch as the pleadings herein raised statutory issues that would not likely be addressed in grievance arbitration. At hearing, the parties agreed to address only the issues surrounding the last-chance agreement and to take up the issue of the discharge in a separate grievance arbitration. Hence, the remedy awarded herein does not address the merits of the discharge or the associated issues of reinstatement and backpay.

POSITIONS OF THE PARTIES

The Complainant

The Complainant Union asserts that the Respondent's "take it or leave it" offer to Besaw was a form of "Boulwarism" and was a prohibited practice in that it reflected a refusal to bargain over the last-chance agreement, in violation of Secs. 11.70(3)(a)1 & 4, Stats. The Complainant asserts, further, that the Respondent's failure to notify the Union Representatives who are authorized to negotiate on behalf of Local 1903 was an additional violation of Secs. 11.70(3)(a)1 & 4. The Complainant asserts that notice to the Union representatives is the duty of the employer and cannot be imputed to either the employee or the Union Steward. Finally, the Complainant notes that the last-chance agreement required the employee to, in effect, modify the terms of the collective bargaining agreement by waiving the just cause provision and his right to grieve future discipline. Employees do not have authority to waive provisions of the labor contract and to include this provision in the agreement was an act of individual bargaining and an additional prohibited practice.

The Respondent

The Respondent asserts that to prevail the Complainant must prove, by a clear and satisfactory preponderance of the evidence, that the employer's conduct contained either a

threat of reprisal or a promise of benefit that would tend to interfere with the employee's rights under Sec. 111.70(2), Stats. The Respondent asserts that the Complainant has failed to meet this burden.

The County had determined to terminate Besaw, but offered him the last-chance agreement as a means of saving his job. The County representatives urged Besaw to seek Union representation and adjourned the meeting on September 12 so that he could do so. On September 13, Besaw brought Union Steward Ed Carpenter to the meeting to represent him. Carpenter was given as much time as he wanted to meet with Besaw and the opportunity to contact other Union officials.

It should be noted that the contract does not specify who in the Union must be contacted or present with reference to a last-chance agreement. Further, the County was under no obligation to offer Besaw such an agreement, but could have terminated him outright. The County contends, therefore, that its actions did not interfere with Besaw's rights under Sec. 111.70(2) and that the Complainant has failed to meet its burden.

There is also no evidence that the County failed to bargain over the terms of the last-chance agreement. Assuming *arguendo* that the County had such an obligation, the Union waived its right to negotiate by its inaction. At no time did the Union raise any objection to the terms of the agreement or request to bargain over them. The County is unaware of any presumption that a Union Steward is incompetent to make such determinations or any requirement that the County insist that the Steward take action with respect to demanding bargaining or contacting his superiors. Besaw and Carpenter signed the agreement freely and without coercion and the County cannot be held responsible for their failure to assert any right to bargain.

The Complainant in Reply

The Complainant asserts that the County has a duty to negotiate over mandatory subjects of bargaining. The last-chance agreement involved waiver of contract coverage, waiver of the right to present grievances, and bargaining individually with an employee and Union Steward, rather than the Union Representative and Local Bargaining Committee.

The employer has a right to discipline employees for just cause and had the Respondent terminated Besaw on September 12 or 13, that would not have been a *per se* violation of statute. Giving the employee a choice between termination and signing the agreement was a violation, however, because it involved a waiver of rights to protected activity.

The Complainant rebuts specific arguments of the Respondent as to the fact that the contract is silent as to how disciplinary matters are to be handled. Further, it is irrelevant to this matter whether Besaw had been disciplined before or the basis for the discipline on September 12. It is further incredible that Besaw and Carpenter were "not concerned" as contended by the County. It would not be possible for them to not be concerned under the

circumstances. The LCA not only tended to interfere, but, in fact interfered with Besaw's protected rights. Further, it is not argument that Besaw did not wish representation. The Union's rights to administer the contract are exclusive of the rights of employees to be represented in disciplinary matters. By bargaining individually with Besaw, the Respondent crossed the line. It is further no argument to attempt to shift responsibility to Carpenter for notifying the Union representatives. Neither Besaw nor Carpenter had authority to modify the contract and it was the County's responsibility to notify the appropriate bargaining agents. Further, whether or not the County could have disciplined Besaw or was required to give him a last chance is beside the point. The County had no right to negotiate such an agreement with Besaw in the absence of the appropriate Union officials and by doing so it violated the statute.

The Respondent in Reply

The Respondent declined to file a reply brief.

DISCUSSION

The essence of the complaint is that the Respondent violated Secs. 111.70(3)(a)1 & 4, Wis. Stats. when it drafted a last-chance agreement and offered it to bargaining unit member Randy Besaw in lieu of termination without negotiating its terms with the Complainant Union or even informing the Complainant beforehand that it was doing so. Of particular concern was a provision in the agreement wherein Besaw agreed to waive the contractual requirement for just cause and access to the grievance procedure in the event of discipline for a future violation of the agreement.

Sec. 111.70(3)(a)1 makes it a prohibited labor practice for a municipal employer to interfere with, restrain or coerce employees in the exercise of their protected rights under Sec. 111.70(2), which include the rights to join and participate in labor organizations and to bargain collectively through representatives of their own choosing over their wages, hours and other conditions of employment. Sec. 111.70(3)(a)4 makes it a prohibited practice for a municipal employer to refuse to bargain collectively with the designated representative of an appropriate bargaining unit.

It has been held that "(i)n order to prevail upon the allegation that an employer has violated Sec. 111.70(3)(a)1, Stats., the complaining party must demonstrate, by a clear and satisfactory preponderance of the evidence, that an employer has engaged in conduct which has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. A violation may be found where the employer did not intend to interfere and an employee did not feel coerced or was not, in fact, deterred from exercising Sec. 111.70(2) rights." ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (Burns, 1/93), citing CITY OF EVANSVILLE, DEC. NO. 9440-C (WERC, 3/71); BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77)

Here, the Respondent prepared a last-chance agreement and presented it to Besaw with the clear understanding that the terms of the agreement were not negotiable and that if he did not sign the agreement he would be summarily terminated. This is made clear from the following testimony of Labor Relations Specialist Ron Montgomery regarding the initial meeting with Besaw on the afternoon of September 12:

Q Right, above your signature. Mr. Besaw did not have the prerogative to change or modify any of the terms of the Last-Chance Agreement?

A No, he did not.

Q All right. So it was strictly accept it as written or be terminated?

A That's correct.

Tr., p.18

The same remained true on September 13, when Union Steward Ed Carpenter accompanied Besaw to the reconvened meeting:

Q Now, the same questions as I asked before: Were the terms on the 13th of this Last-Chance Agreement negotiable?

A No.

Tr., P. 20

Montgomery went on to state that neither Besaw nor Carpenter raised the issue of negotiability, but his testimony clearly reveals that Besaw was not being offered an opportunity to negotiate the terms of the agreement, but was being presented with an ultimatum. Likewise, as Montgomery also made clear, Carpenter was not there to bargain over the terms of the agreement, but was merely there to explain the alternatives and their implications to Besaw and thereby help him to make his decision:

Q Okay. And it wouldn't be your expectation that Mr. Carpenter, even in this instance, would have negotiated on behalf of Local 1903; is that correct?

A That's correct.

Q All right. And as far as you know, Mr. Carpenter's presence on September 13th was restricted to his duties as the local Union Steward; is that correct?

A Yes.

Tr., P. 23

In my view, the actions of the Respondent in drafting a proposed agreement that included provisions waiving significant rights under the labor contract and presenting it to him without advance notice to the Respondent would have had a tendency to interfere with, coerce, or restrain Besaw with respect to the exercise of his rights under Sec. 111.70(2). Besaw was told that his options were to accept the agreement, and thereby waive the applicability of the just cause standard, as well as his ability to grieve future discipline, or face immediate termination. In effect, he was being asked to divest himself of rights to which he was entitled under the labor contract as a member of the bargaining unit. It is hard to conceive that, with the prospect of losing his employment, and the implication that negotiation was not an option, Besaw would not have been influenced to accept the terms of the agreement and sign away his contractual rights.

Further, I do not find that the Respondent's advice to Besaw, that he seek Union representation, is an adequate curative under the circumstances. Whereas Union representation may be optional at the employee's preference at a disciplinary meeting, it is not optional where an employee is, in effect, being asked to cede important contractual protections in order to save his job. As the Respondent noted in its brief, the employer had the right to terminate Besaw without offering a last-chance agreement and, had it done so, Besaw could then have grieved the discharge and challenged it under the just cause standard. The approach taken here, however, left it in the discretion of the employee to decide whether to have representation in a situation where he may have been unaware of the significance of the concessions he was making and where he was faced with termination as an alternative. If he signed, he might protect his job for the present, but at the cost of any reasonable ability to do so in the future, should the employer, in its discretion, determine that he has violated the agreement. In my view, therefore, the Respondent had an affirmative obligation, in the first instance, to notify the Union's designated representative that it was considering a last-chance agreement in lieu of termination. By not doing so, and dealing with Besaw directly, it placed him in an untenable position and impermissibly interfered with his rights under Sec. 111.70(3)(a)1.

I also find that the Respondent's conduct constituted a violation of Sec. 111.70(3)(a)4. The collective bargaining agreement is a contract between Winnebago County and Local 1903. Article 2 of the contract recognizes the Union as the exclusive collective bargaining representative of all employees in the bargaining unit, of which Besaw was one. Thus, though Besaw, as a member of the bargaining unit, was subject to the terms and conditions of the agreement, he was not in privity with the County as to the agreement and had no authority to negotiate with the County on his own behalf to alter the terms and conditions of the contract either as to himself or others. This is particularly so where the matters in issue are mandatory subjects of bargaining. Under Sec. 111.70(1)(a), mandatory subjects of bargaining include wages, hours and conditions of employment. The parties cite no authority on the question of whether a last-chance agreement, such as is in issue here, constitutes a mandatory subject of bargaining. To my mind, however, there is no question that the subject of conditions of employment includes the circumstances under which an employee may be disciplined and his ability to grieve alleged violations of his contractual rights. Where, therefore, the employer seeks to alter the terms of an agreement as to a mandatory subject of bargaining, whether as to

the bargaining unit as a whole or just as to one employee, it must do so through the designated representative of the Union. The failure to do so is a violation of Sec. 111.70(3)(a)4.

The Respondent notes that it urged Besaw to seek Union representation, but this argument assumes that it was within Besaw's discretion to decide whether to involve the Union. He had no such discretion and the Respondent's advice to seek Union representation does not substitute for notice to the Union that the County was seeking to alter Besaw's contract rights. The Respondent further asserts that it had a right to assume that the Union Steward who appeared at the meeting on September 13 was a competent representative of the Union who had authority to negotiate on behalf of the Union and that his failure to object to the terms of the agreement or to demand bargaining over it was, in effect, a waiver of any objections to the agreement that the Union might have. I disagree. Union Stewards are not the bargaining representatives of the Union for the purposes of negotiating or modifying collective bargaining agreements. Those are the functions of the locals' professional Union representatives and their elected bargaining committees. More to the point, however, the argument fails to recognize that it was the Respondent's obligation, before presenting Besaw with the agreement, to contact the Union and initiate negotiations over its terms. Further, Union Steward Carpenter attended the meeting at Besaw's request, but, again, it is the Union's prerogative, not the employee's to decide who it wishes to participate in negotiations over modifications in the contract. Whether or not Carpenter had a responsibility to contact the Union representative to seek direction is irrelevant to whether the County met its obligation to properly notify the Union of its intentions. Carpenter's presence and actions on September 13, therefore, did not, in my view, cure the Respondent's failure to initiate negotiations over the terms of the agreement with the Union's properly designated representatives.

Dated at Fond du Lac, Wisconsin, this 10th day of February, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

JRE/gjc
32468-B