STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHARLES R. MERKLE, Complainant, vs. RALPH A. McGRAW, Chief of Madison Fire Department, and CITY OF MADISON, a municipal corporation, Respondents.	Case XIII No. 13654 MP-83 Decision No. 9582-B

Appearances:
Pasch and Cassidy, Attorneys at Law, by Mr. Maurice B. Pasch, for the Complainant.
Mr. Edwin C. Conrad, City Attorney, by Mr. William A. Jansen, Principal City Attorney and Mr. Frederick W. Fischer, Assistant City Attorney, for the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed Howard S. Bellman, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders, as provided in Section 111.07(5), Wisconsin Statutes, and hearing on such complaint having been held at Madison, Wisconsin, on May 1, 1970, and September 16, 1970, before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Charles R. Merkle, referred to herein as the Complainant, is an individual residing at 842 Woodrow Street, Madison, Wisconsin, employed as a lieutenant in the Fire Department of the City of Madison, and, at all times material herein, the President of Fire Fighters Local No. 311, International Association of Fire Fighters.

2. That the City of Madison, referred to herein as the Respondent City, is a municipal employer duly incorporated under the laws of the State of Wisconsin, which operates, inter alia, a fire department.

3. That Ralph A. McGraw, an individual residing at 3422 Marcy Rd., Madison, Wisconsin, and referred to herein as Respondent McGraw, is the Chief of the aforementioned Fire Department of the Respondent City and the agent of the Respondent City.

4. That Local No. 311, International Asssociation of Fire Fighters, hereinafter referred to as the Union, is a labor organization having offices in Madison, Wisconsin, and at all times material herein has been

the recognized bargaining representative of certain employes of the Fire Department of the Respondent City, including the Complainant.

5. That commencing on approximately February 21, 1970 the Complainant, in his capacity as an official of the Union, represented a certain fire fighter, William Clapp, with regard to a dispute with the Respondent City over the desire of said Clapp to receive a promotion to the position of Lieutenant assigned to the Division of Fire Suppression of the aforesaid Fire Department; that with regard to said dispute the Union at a meeting of its Executive Board held on February 28, 1970 directed the Complainant to issue to the newspapers of the City of Madison a press release which read as follows:

"NEWS RELEASE FROM FIREFIGHTERS LOCAL 311"

Dear Sir:

Friday Feb. 27, Fire Chief McGraw has again used his promotional powers in a dictatoial (sic) and discriminatory manner in the case of firefighter Bill Clapp, a veteran of 23 years as a firefighter.

The men of the fire department are dismayed and discouraged by the constant refusal of the Police and Fire Commission to honor thier (sic) agreement in 1966 to be the watchdog of the fire chief's promotional practices.

The degrading treatment given Bill Clapp by trying to force him into the inspection division after 23 years in the firefighting division, which he at first refused then later reconsidered, but was told, he had his chance and that another man had already been promoted; when in fact there was no official word sent out to the fire department, the two men involved, or the press, until nine days after Bill Clapp was told it was too late to change his mind. He not only was bypassed on the panel but also removed from the panel! So then the chief takes this next man on the panel and promotes him into the firefighting division, when all that was opened to Bill Clapp was the inspection division!

This is another typical example of the callous manner Chief McGraw handles his men! Firefighters Local 311 requested the Police and Fire Commission for a hearing on behalf of Bill Clapp and was refused and told by one Commissioner, "take it to the newspapers you probably will anyhow!"

In view of the above facts and the continued harrassment and incompetence of the fire chief and the rubber stamping of the Police and Fire Commission, we must ask the City Council to compose an Ad Hoc Committee to investigate the Fire Department and the Police and Fire Commission; with the results of thier (sic) report to be submitted to the City Council within 120 days!

Charles R. Merkle /s/
Charles R. Merkle President
Firefighters Local 311"

that said press release was issued on approximately March 2, 1970; and that two newspapers of the City of Madison subsequently reported on and quoted from said press release.

6. That on March 18, 1970, Respondent McGraw, motivated by the Complainant's role in the issuance of the aforesaid news release, issued

the following letter and suspension of the Complainant, which suspension the Complainant subsequently served:

"Lieutenant Charles R. Merkle
842 Woodrow Street
Madison, Wisconsin 53711

In a news release made recently by you to the Madison newspapers you violated certain established rules of the Madison Fire Department. Rule 52 states '...They shall treat their superiors with respect. In their demeanor to their associates on the force they shall be courteous and considerate, guarding themselves against envy, jealousy, or other unfriendly feeling. They shall refrain from all communication to their discredit, except to their superior officers...'.

Rule 100 states that 'Officers and members shall at all times conduct themselves so as not to bring the department in disrepute.'

Rule 111 states that 'Complaints against superior officers may be made by members of the department personally or by letter, to the Chief or Commission.'

Your violation of these rules have been discussed with you by myself on Sunday, March 15, 1970, at which time I offered you an opportunity to retract your statements. You refused to do so after I had informed you that such actions would not be condoned.

State Statutes provide that you may be suspended from duty pending the filing of charges before the Police and Fire Commission or that you may be suspended from duty as a penalty with such suspension being without salary.

I choose to exercise the latter perogative and I am therefore suspending you from duty for a period of 144 work hours effective as of 7:00 A.M., Friday, March 20, 1970, to 7:00 A.M., Friday, April 3, 1970, with such suspension being without pay.

Ralph A. McGraw /s/
Ralph A. McGraw
Chief"

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

CONCLUSIONS OF LAW

1. That the authority granted Police and Fire Departments by Section 62.13, Wisconsin Statutes, does not deprive the Wisconsin Employment Relations Commission of its jurisdiction to determine whether or not prohibited practices have been committed under Section 111.70, Wisconsin Statutes.

2. That the City of Madison, and its agent, Ralph A. McGraw, Chief of its Fire Department, by suspending Charles R. Merkle, as described above, because he had engaged in the aforesaid activities on behalf of

Local 311, International Association of Fire Fighters, interfered, restrained and coerced Charles D. Merkle in the exercise of his rights as set forth in Section 111.70(2), Wisconsin Statutes, and acted so as to discourage membership in and activities on behalf of a labor organization by discriminating in regard to terms and conditions of employment, and thereby did engage in, and is engaging in, prohibited practices within the meaning of Sections 111.70(3)(a)1 and 2 of the Wisconsin Statutes.

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

ORDER

IT IS ORDERED that the City of Madison and Ralph A. McGraw, their officers and agents, shall immediately

1. Cease and desist from:

   (a) Suspending or otherwise disciplining their employes or in any other manner discriminating against them in regard to hiring, tenure or other terms or conditions of employment to discourage their membership in or activities on behalf of Local 311, International Association of Fire Fighters, or any other labor organization.

   (b) In any manner, interfering with, restraining or coercing their employes in the exercise of their rights to self-organization, to affiliate with labor organizations of their own choosing, and to be represented by labor organizations of their own choice in conferences and negotiations on questions of wages, hours and conditions of employment, or to refrain from any and all such activities.

2. Take the following affirmative actions which the Examiner finds will effectuate the policies of Section 111.70, Wisconsin Statutes:

   (a) Immediately make Charles D. Merkle whole for any loss of pay which he suffered by reason of the commission of the aforementioned prohibited practices by the Respondents, by making payment to him of a sum of money equal to that which he would have earned had such prohibited practices not been committed.

   (b) Notify all of its employes by posting in conspicuous places in its facilities where all employes may observe them, copies of the notice hereto attached and marked Appendix "A". A copy of such notice shall be signed by the Chief of the Fire Department of the City of Madison, and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter and reasonable steps shall be taken by the Respondents to insure that said notice is not altered, defaced or covered by any other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 29th day of June, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to the Order of an Examiner of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of Section 111.70, Wisconsin Statutes, we hereby notify our employes that:

WE WILL NOT suspend, or otherwise discipline, our employes, or in any other manner discriminate against them in regard to hiring, tenure of other terms or conditions of employment to discourage their membership in or activities on behalf of Local 311, International Association of Fire Fighters, or any other labor organization.

WE WILL NOT, in any manner, interfere with, restrain or coerce our employes in the exercise of their rights to self-organization, to affiliate with labor organizations of their own choosing, and to be represented by labor organizations of their own choice in conferences and negotiations on questions of wages, hours and conditions of employment, or to refrain from any and all such activities.

CITY OF MADISON, FIRE DEPARTMENT

By_____
Chief

Dated_____

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

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHARLES R. ZITKLE, Complainant, vs. RALPH A. McGRAW, Chief of Madison Fire Department, and CITY OF MADISON, a municipal corporation, Respondents.	Case XXII No. 13654 MP-83 Decision No. 9582-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant complaint was filed on March 31, 1970, and by a notice dated April 6, 1970, hearing was scheduled for May 1. On April 13, 1970, the Respondents filed a motion to make the complaint more definite and certain, which motion was denied by an Order of April 15. An answer was filed on April 30, 1970.

The hearing commenced on the date indicated above, but several postponements were granted with regard to its second session which was finally held on September 16, 1970. Following the hearings close, and more postponements, briefs were exchanged on December 1, 1970.

The aforesaid answer asserts, inter alia, two "affirmative defenses". The second, that Complainant is a supervisor and therefore "lacks standing to maintain this action" was withdrawn by the Respondents at the opening of the second hearing session pursuant to a Resolution of the Common Council of the City of Madison. The first "affirmative defense" states as follows:

> "The Wisconsin Employment Relations Commission lacks jurisdiction in this matter, brought under Section 111.70, Wisconsin Statutes, because it is based upon a disciplinary proceeding involving a City of Madison Firefighter and is within the exclusive jurisdiction of the Police and Fire Commission of the City of Madison, as set forth in Section 62.13, Wisconsin Statutes."

The statute referred to, at Sec. 62.13(5)(b), which was enacted in its present form prior to the enactment of Section 111.70, provides that "The board or the chief may suspend a subordinate for cause," and sets forth a review procedure for such actions.

The Commission has held that such statutes are affected by the subsequent enactment of Sec. 111.70, to the extent that employe rights provided by Sec. 111.70 may not be violated by exercises of the authority which the earlier statutes grant. [Muskego-Norway v. WERB, Wis. 2d 540 (1967); City of Oshkosh, Dec. No. 8381-D, 10/68; City of Milwaukee, Dec. No. 8420, 2/68.] Furthermore, although the Supreme Court's decision in Muskego-Norway, supra, favors the harmonization of such older statutes with Sec. 111.70, this does not require that an aggrieved party seek review

under the provisions of the prior contract, rather than under Sec. 111 as the Respondents contend herein.

Likewise, the Respondents would have the Examiner consider the standards for discipline provided in the collective bargaining agreemen between the City and the Union and that that agreement apparently requi an employe to complain of disciplinary actions either under Sec. 62.13 under the contractual grievance procedure. It is contended thereupon that the agreement restricted the Complainant from access to the WERC's prohibited practices jurisdiction. This is rejected because collective bargaining agreements may not operate so as to deny employes such statutory protection. There may be circumstances under which this Commission should defer to another forum, provided by contract or otherwise, but even such deference should be on the basis of the Commission's retention of its jurisdiction to rule on the matter if it is dissatisfied with the disposition by the other forum. The possible abuses of the employe rights provided by Sec. 111.70 which could go unchecked if bargaining agreements were allowed to limit access to this Commission are obviously not to be permitted.

William Clapp, a firefighter employed by the City and member of the bargaining unit represented by the Union, contacted Complainant Merkle on February 21, 1970 with regard to his dissatisfaction with the handling by Chief McGraw of Clapp's efforts to achieve a certain promot Merkle was asked, as an official of the Union, to attempt to rectify the situation for Clapp. In response to this request Merkle discussed Clapp's case with various members of the Police and Fire Commission, bu without the desired result. In at least one of these conversations Merkle stated that, unless the matter was resolved in a manner satis-factory to Clapp, it would be aired through the newspapers.

On February 28, 1970 the Executive Board of the Union, including Merkle, met to consider the case and determined to issue a news release The content of the release was subject to some discussion among the var members in attendance, and Merkle, as well as others, contributed to it final form which Merkle signed, and which is set forth in the Findings Fact.

Merkle's testimony, which is unrefuted, indicates that the release reflected, not only the Union's position with regard to the Clapp case, but also regarding a prior episode referred to as the "Mifflin Street incident"; the suspension case of one Captain Durkin; two "general orders" of June, 1969 by the Chief which (1) prohibited the conduct of Union business by on-duty employes or in certain city-owned buildings, and the use of the Fire Department's facilities, other than certain bulletin boards, for Union communications, and (2) declared that certai employes were prohibited from holding Union office; a strike by the Union and the amnesty arrangement that followed; and an August, 1969 resolution of the Union that "incompetency charges" should be filed against the Chief.

The actual release of the document was on March 2, 1970, and it was reported in two Madison newspapers on the same day, and the follow day, respectively.

On March 11, 1970 Merkle was called to a meeting in the Chief's office with the Chief and members of the Police and Fire Commission

Chief might handle the case as a breach of discipline; and if the Chief chose not to do so, the Commission should consider filing charges against Merkle.

The record discloses that, at this meeting, Merkle indicated that some of the wording of the release - of which he was to some extent the author - may have been too strong, but maintained that it was a Union statement which he could not retract at his own discretion, even if he were inclined to do so.

At any rate, the meeting apparently adjourned following Becker's three suggestions, stated above.

The Chief and Merkle met again in the Chief's office on March 15, 1970. Again a retraction was requested and refused. The Chief then predicted he would soon commence to prepare charges against Merkle. Merkle told the Chief that his only suggestion for resolving the morale problem which Merkle believed to underlie the news release and the Union's August, 1969 resolution to charge the Chief with incompetency, was that the Chief retire. According to the Chief, he decided a few days later to suspend Merkle "as a penalty" for the issuance of the release.

At a Police and Fire Commission meeting of March 18, 1970 the suspension of Merkle was announced by the Chief. On the same date the suspension letter quoted in the Findings of Fact was also issued.

This Commission held in Board of Education of West Bend [Dec. No. 7938-A, 4/68] that "municipal employes, in their concerted activity, have the right to disagree with the policies of the municipal employer which affect the public interest and to communicate their views through the normal means of communication. . .and such right is protected by Section 111.70, Wisconsin Statutes." This holding, in the Examiner's opinion, covers the instant case perfectly.

On the other hand, all public statements that relate to employment relations and concerted activity are not protected simply by virtue of that relation. [Board of Education of Janesville, Dec. No. 8791-A, 3/69] In this regard, the Examiner, has referred to the test set forth by the United States Supreme Court in NLRB v. Electrical Workers [33 LRRM 2183 (1953) at 2186]. Therein it was declared that although "there is no more elemental cause" for disciplinary action against an employe than disloyalty to his employer, particularly as manifest by disparaging public statements, and that the justice of such discipline was not affected by statutory protection of concerted activity; the employes' right to engage in such activity may allow such statements when they are an integral part of a controversy over the subjects of collective bargaining, and the public statements refer to the dispute and relate to the dispute's components.

It is the Examiner's conclusion that the instant public statement should be protected concerted activity not only because its contents alerted its recipients to its context as part of an employment relations dispute, but also because of the public nature of the enterprise involved. Thus, whereas in the private sector a disparaging reference to an employer's product or service still may be unprotected concerted activity even though obviously made as part of a labor controversy [Patterson-Sargent Co., NLRB, 38 LRRM 1134, 1956.], the public and noncompetitive nature of a municipal employer's enterprise, and the status as public officials of its agents, should allow more latitude for criticism than might be appropriate in cases of private individuals and enter-

prises. Furthermore, it would be grossly artifical to equate employe criticism in both sectors because criticism of governmental bodies and officials is, in every respect, and for obvious reasons, not to be restricted except in the extreme.

A public employe does not by virtue of such status lose his right to engage in such criticism, even where his particular employment is in a paramilitary operation such as a police force or fire department. The Respondents' present argument would allow them to censor any criticism by the Union which, in the Respondents' opinion, adversely affected morale and, thereby, efficiency. Unchallengable government or management may seem the most efficient, but it is absolutely incompatible with collective bargaining.

The Respondents contend that the news release should not be protected because the Complainant has failed to prove the truth of the allegations therein. [At the hearing, the Respondents indicated that they were going to prove the falsity thereof.] The release alleges that the Chief, the City's agent, is dictatorial, discriminates; is callous and incompetent, and harassing; that the Police and Fire Commission is dismaying and discouraging in its failure to adhere to an alleged agreement; and that Clapp was degraded by certain treatment.

The statement was indeed belligerent, and aggresive. It indicates a disposition toward engagement in hostilities, rather than conciliation. But it is essentially - at least in its most abrasive aspects - a reflection of the Union's subjective perception. It is a particularly exaggerated example of the kind of verbage often seen on picket signs. Picketing is not unprotected unless the union responsible proves that its signs' allegations that the employer is unfair are accurate. Likewise, the Union herein reflected in public its opinions about the manner in which this employer treats its employes and does not need to prove the validity of its opinions - assuming that were possible - to enjoy protection of its ability to express itself in that manner. [See NLRB v National Furniture Mfg. Co., CA7, 52 LRRM 245, 1963; and Gustin-Bacon Mfg. Co., NLRB, 69 LRRM 1485, 1968]

It is also urged by the Respondents that the Complainant's activities in question were not such activities as are protected by Sec. 111.70 because Merkle acted alone rather than in concert with other employes as a labor organization in issuing the press release. This is rejected as totally contrary to the record herein which discloses that the release was decided upon and composed at a Union meeting at which Merkle was only one participant, albeit the most important one, and that his role thereafter was as a Union officer.

It is the Respondents' position also that the complaint should be dismissed because the record does not indicate that Merkle's aforesaid union activities were the primary motivation for his suspension. It is the finding of the Examiner, however, that such was indeed the case, but it is also recognized that under the holding of the Supreme Court in Muskego-Norway, supra, if illegal discrimination is even an element of such motivation, the action against the employe is a prohibited practice. [Therefore, it is unnecessary to rule upon the validity of the rules cited by the Chief in the suspension letter, which rules the Respondents allege were the basis for the suspension and the Complainant claims were a pretext brought forth by the Respondents for its purposes in this incident.

The Respondents contended that whether or not the Chief was illegally motivated requires that the Examiner "gain insite (sic) to the motivation within the mind of the Chief" and that only the Chief's testimony, which denies such motivation, is evidence of this.

However, the Examiner is satisfied that inasmuch as the press release admittedly motivated the Respondents to suspend Merkle; the press release was a concerted activity; and the press release was such a concerted activity as is protected by Section 111.70; no further insights upon which to base an inference of illegal motivation are required.

Finally, the Respondents seem to argue that no prohibited practice has been proven herein because none of the Complainant's rights under Section 111.70(2) were violated. That subsection provides municipal employes with the rights of self-organization, affiliation with and representation by labor organizations of their own choosing, and the right to refrain from such activities. Subsection (3)(a)2 provides that it is a prohibited practice, i.e. a violation of such rights, to discriminate against an employe with regard to his terms or conditions of employment because he has engaged in such activities, or refrained from doing so. This is exactly what the Respondents have done to Merkle. They, as a response to his union activities, affected his employment terms and conditions by suspending him. Very few cases are clearer because it is admitted herein that the Respondents' motive was to respond to the press release. Furthermore, any violation of subsection (3)(a)2 is also a prohibited practice under (3)(a)1, because such an act of discrimination also tends to interfere with, restrain and coerce employes in the exercise of the aforementioned rights.

Dated at Madison, Wisconsin, this 29th day of June, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner