STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FIRE FIGHTERS LOCAL 2051, IAFF, AFL-CIO Complainant, v. CITY OF BROOKFIELD, Respondent.	Case X No. 16329 MP-196 Decision No. 11489-A
FIRE FIGHTERS LOCAL 2051, IAFF, AFL-CIO Complainant, v. CITY OF BROOKFIELD, Respondent.	Case XI No. 16348 MP-203 Decision No. 11500-A

Appearances:
Mr. Edward D. Durkin, International Vice President, for the Complainant.
Hayes and Hayes, Attorneys at Law, by Mr. Tom E. Hayes, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Two separate Complaints having been filed with the Wisconsin Employment Relations Commission in each of which Fire Fighters Local 2051, International Association of Fire Fighters, AFL-CIO alleged that City of Brookfield committed certain prohibited practices within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Sec. 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Sec. 111.70(4)(a) of MERA; and the Examiner having, on his own motion, consolidated the aforesaid Complaints for hearing and such consolidated hearing having been held at Milwaukee, Wisconsin on

January 15, 1973 before the Examiner; and the Examiner having considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the City of Brookfield, referred to herein as Respondent, is a municipal employer which operates, inter alia, a Fire Department.

2. That Fire Fighters Local 2051, International Association of Fire Fighters, AFL-CIO, referred to herein as Complainant, is a labor organization; and that the Complainant, at all times material hereto, has been the bargaining representative of certain employes, referred to herein as unit employes, of Respondent's Fire Department.

3. That Complainant and Respondent have, for several years, been parties to collective bargaining agreements; and that, on approximately November 30, 1971 Complainant submitted to Respondent, in order to commence collective bargaining for a 1972 collective bargaining agreement, a set of written proposals, one of which read as follows:

"Article V: The following paragraph should be added:

> Further the daily manpower of the Brookfield Fire Department shall attempt to be maintained at not less than 80% of the minimum recommended safety standards as set forth for cities of its class and published by the National Association of Firefighters. Such would presently require a total of 16 men comprised from ranks of captain and below, on duty each 24 hours. However, in the absence for any reason of a regularly scheduled employee, a minimum daily requirement under such circumstances of 15 men would be deemed sufficient."

4. That during the collective bargaining meetings between Complainant and Respondent concerning a 1972 collective bargaining agreement, Attorney John Brendel, Complainant's chief spokesman, raised for discussion the minimum manpower proposal set forth in Findings of Fact No. 3; and that the only discussion which ensued with respect to that proposal was the Respondent's spokesman's assertion that the subject matter of said proposal was not Complainant's "concern" and that ". . . it was the City's right to do as they please in those areas; that nobody was going to tell anybody how to run the Fire Department."

5. That on August 29, 1972, Complainant and Respondent executed a collective bargaining agreement the term of which was the calendar year

1972; and that said 1972 agreement did not contain a minimum daily manpower clause, a management's rights clause or a specific waiver of bargaining clause.

6. That on approximately June 30, 1972, Complainant submitted to Respondent, in order to commence collective bargaining for a 1973 collective bargaining agreement, a set of proposals, one of which read as follows:

> "1) It is requested that Article 5, entitled Hours, be so modified to include the following language:
>
> > The daily minimum manpower of the Brookfield Fire Department shall be comprised of not less than 16 men comprised from the ranks of Captain and under for a full 24 hour duty period. Such minimum daily requirement shall not, however, require the call back of an unscheduled employee in the event that a scheduled employee for any reason fails to report for duty."

7. That on October 2, 1972, representatives of the Complainant and Respondent met for the first time concerning a 1973 collective bargaining agreement; that at that meeting, Mike Sueflohn, a member of Complainant's bargaining team, read to the Respondent's bargaining representatives the minimum manpower proposal set forth in Findings of Fact No. 5; and that the Respondent's bargaining representatives replied that said proposal ". . . was something that wasn't subject to negotiations . . ." and that Complainant was ". . . wasting [its] time with it . . .".

8. That on November 13, 1972, representatives of Complainant and Respondent again met concerning the 1973 collective bargaining agreement; that at that meeting, Complainant's representatives proposed that the parties bargain about "the possibility of layoffs on the fire service"; that Respondent's representative repeatedly replied that "anything the City did in terms of layoff was an inherent right and management's prerogative" and that such subject was not Complainant's responsibility and was "nonnegotiable"; and that by so replying, Respondent, by its authorized spokesman, refused to discuss "the possibility of layoffs in the fire service" and thereby effectively refused to discuss whether it was necessary to dismiss (within the meaning of Sec. 62.13[5m], Wis. Stats.), herein referred to as lay off, unit employes.

9. That on November 14, 1972, Respondent's City Council enacted a budget that reduced the Fire Department allocation by $80,000; that

said City Council affirmed its November 14 enactment on November 28, 1972; that officers and members of Complainant were aware on or before November 14, 1972 that the City Council was contemplating a reduction in the Fire Department budget allocation; that officers and members of Complainant were present at the City Council meetings on November 14 and 18; and that at least between November 14 and November 28, 1972, officers and members of Complainant took political action in opposition to the above-mentioned Fire Department budget cut by distributing leaflets to the community, by issuing news releases to the media, and by encouraging a retired fire chief to speak against the budget cut at a meeting of the City Council.

10. That representatives of Complainant and Respondent met in a collective bargaining session on December 5, 1972; that at that meeting representatives of Complainant asked the Respondent's spokesman, Attorney Tom E. Hayes, whether there was ". . . any possibility for any type of severance [pay] for the five Firemen who were apparently going to be laid off"; that Hayes responded that the payment of severance pay ". . . didn't appear possible but that he would see the [City Council] Finance Committee and find out . . .".

11. That on or about December 8, 1972, Respondent notified the five least senior unit employes that they would be laid off effective December 31, 1973; and that while Respondent at no time gave Complainant formal notice of said layoffs, Complainant's bargaining representatives had actual notice on or before November 13, 1972 that Respondent was contemplating layoffs of unit employes.

12. That representatives of Complainant and Respondent met in a collective bargaining session on December 13, 1972; that at that meeting, Complainant's representatives asked for Respondent's reply to Complainant's December 5 request for severance pay; that Attorney Hayes replied "that there would be no unemployment [benefits] of any kind and that it wasn't [Complainant's] responsibility; it was a nonnegotiable item; it was the City's inherent right and management's prerogative; . . ."; and that at said meeting the Complainant again sought discussion concerning its manning proposal and Respondent's representative again replied that that subject was not Complainant's responsibility.

13. That effective December 31, 1972, Respondent laid off the five least senior unit employes without first bargaining collectively with Complainant about its decision to do so; and that although said layoffs

did not constitute violations of either the 1972 collective bargaining agreement between Complainant and Respondent or of Sec. 62.13(5m), Wis. Stats., nevertheless, said layoffs and Respondent's decision on or before December 8, 1972 that they were necessary directly and intimately affected the wages, hours and conditions of employment of the laid-off unit employes.

14. That on November 13, 1972, Respondent, by its authorized collective bargaining spokesman, refused to discuss "the possibility of layoffs in the fire service" and thereby effectively refused to discuss whether it was necessary to lay off unit employes.

15. That effective December 31, 1972, Respondent, without first bargaining with Complainant, reduced by two (from 15 to 13) the number of employes, captain and under, to be on duty throughout each 24-hour Fire Department shift; that no corresponding decrease in the numbers of fires to be fought by unit employes or in the amount of non-fire-extinguishing work to be performed by unit personnel as a group is anticipated by Respondent; that by reason of said reduction, two less firefighting personnel will be available to serve warning and rescue functions at the three to four fires per year that require commitment of all of Respondent's available firefighting manpower; that also by reason of said reduction, Respondent has altered the allocation of personnel and equipment assigned to respond to a first or subsequent fire calls so that the Department's aerial ladder truck, which carries safety equipment of types and in quantities not transported by other apparatus, is either delayed in its arrival at a fire scene or not dispatched at all; that the number of employes assigned to each apparatus has not, in general, been changed, but that the number of apparatuses responding to fire calls has, in many situations, been reduced; and that both the determinations proposed by Complainant and those made by Respondent, as to the number of Fire Department employes, captain and under, to be on duty throughout each 24-hour shift do <u>not</u> directly and intimately affect the conditions of employment of the unit employes who were not laid off since the concerns and interests of such employes in the conditions of employment affected by said determinations are amenable to substantial fulfillment and protection through collective bargaining over working conditions subjects more directly affected by said determinations (namely, safety equipment and procedures and workload limitations) and less restrictive of Respondent's exercise of its statutory powers and responsibilities.

16. That during the hearing in the instant case conducted on January 15, 1973, Respondent offered to bargain about its decision to lay off the five unit employes in issue and the effects of that decision upon bargaining unit personnel; that in response to said offer, the Complainant, during the same hearing, refused to enter into the negotiations proposed by the Respondent unless the Respondent was willing to reinstate and make whole the laid-off employes; and that the Respondent thereupon expressed its unwillingness to so reinstate and make whole said employes.

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

CONCLUSIONS OF LAW

1. That Respondent City of Brookfield had and has a duty to bargain collectively with Complainant as to whether it is necessary to lay off (i.e., "dismiss" within the meaning of Sec. 62.13[5m], Wis. Stats.) unit employes; that Respondent did not fulfill said duty by permitting officers and members of Complainant to distribute leaflets to the community, to issue news releases to the media and to encourage a retired fire chief to speak to its City Council, all in opposition to the contemplated reduction in the Fire Department budget, or by permitting officers and members of Complainant to attend meetings of its City Council; that Respondent has not shown by a clear and satisfactory preponderance of the evidence that Complainant bargained away or otherwise waived said duty by reason of either the existence or terms of the parties' 1972 agreement or by reason of the parties' history of bargaining; that, therefore, said Respondent committed prohibited practices in violation of Sec. 111.70(3)(a)4 by refusing on November 13, 1972, upon request, to bargain collectively with Complainant about whether it was necessary to lay off Fire Department employes represented by Complainant, and by deciding on or before December 8, 1972 to lay off the five least senior Fire Department unit employes and laying off said employes on December 31, 1972 without first bargaining with Complainant about said decision and action; and that Respondent's January 15, 1973 offer to bargain with Complainant about said decisions did not cure said prohibited practices for the reason that Respondent refused, at

of Fire Department employes, captain and under, to be on duty throughout each 24-hour shift; and that, therefore, Respondent did not commit prohibited practices in violation of Sec. 111.70(3)(a)4 of MERA by refusing, on October 2, December 5 and 13, 1972, to discuss Complainant's proposal with respect thereto or by reducing that number by two effective December 31, 1972 without first bargaining collectively with Complainant about its initial decision to make said reduction.

3. That by offering, during the hearing of the instant proceedings and in its briefs, to bargain collectively with Complainant about severance pay for laid-off employes and about safety equipment and workload and other so-called "effects" of its decisions to lay off bargaining unit employes and to reduce the number of unit employes on duty daily, Respondent City of Brookfield has sufficiently cured any prohibited practice it may have committed with regard to its duty to bargain about such subjects; and that the underlying purpose of MERA would not be served by further adjudication of Complainant's allegations of Respondent's failures to fulfill its duty to bargain about said subjects.

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

ORDER

IT IS ORDERED that Respondent City of Brookfield, its officers and agents, shall immediately:

1. Cease and desist from:

   (a) Refusing to discuss with Complainant Fire Fighters Local 2051, IAFF, AFL-CIO whether it is necessary to lay off (i.e., "dismiss" within the meaning of Sec. 62.13[5m], Wis. Stats.) employes represented by said Complainant from their employment in the City of Brookfield Fire Department;

   (b) Deciding to lay off (i.e., "dismiss" within the meaning of Sec. 62.13[5m], Wis. Stats.) employes of the City of Brookfield Fire Department represented by Complainant Fire Fighters Local 2051, IAFF, AFL-CIO without prior notice to and collective bargaining with said Complainant concerning whether any such layoff is necessary.

2. Take the following affirmative action designed to effectuate the policies of Sec. 111.70, Wis. Stats.:

(a) Offer to the five Fire Department employes laid off (i.e., "dismissed" within the meaning of Sec. 62.13[5m], Wis. Stats.) on or about December 31, 1972 immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make them whole for any loss of pay they may have suffered by reason of any of Respondent City of Brookfield's violations of Sec. 111.70(3)(a)4 of MERA cited herein, by payment to each of them the respective sum of money equivalent to that which each would have normally earned as an employe, from the date of his layoff (dismissal) to the date of the unconditional offer of reinstatement, less any earnings from employment or self-employment each may have received (which he would not otherwise have received) during said period, and in the event that each or any received Unemployment Compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amount;

(b) Notify all of its Fire Department employes by posting in a conspicuous place on its premises, where notices to all of its Fire Department employes are usually posted, copies of the Notice attached hereto and marked Appendix "A". Such copies shall be signed by the Chief of the City of Brookfield Fire Department and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for sixty (60) days.

Dated at Milwaukee, Wisconsin, this 30th day of October, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

No. 11489-A
No. 11500-A

APPENDIX "A"

NOTICE TO ALL FIRE DEPARTMENT EMPLOYES

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

WE WILL NOT refuse to bargain collectively with Fire Fighters Local 2051, IAFF, AFL-CIO by unilaterally deciding to lay off ("dismiss" within the meaning of Sec. 62.13[5m], Wis. Stats.) employes represented by said labor organization without notifying said labor organization that such layoffs are contemplated and, upon request, bargaining collectively with said labor organization concerning whether such layoff(s) are necessary.

CITY OF BROOKFIELD, WISCONSIN

By _____
Chief, Fire Department

Dated this _____ day of _____, 1973.

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

CITY OF BROOKFIELD
X and XI Decision Nos. 11489-A, 11500-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant Complaints were filed in Cases X and XI on December 20 and December 26, 1972, respectively. They were consolidated for the purposes of a hearing which was held on January 15, 1973. After transmittal of the transcript of the proceedings on April 19, 1973, the parties submitted initial and reply briefs, the last of which was received by the Examiner on June 19, 1973.

Since the legal issues and the facts in Cases X and XI are so closely interrelated, the Examiner has combined the two cases for the purposes of expressing his determinations therein.

Complainant contends that Respondent has a duty to bargain collectively about whether it is necessary to lay off (i.e., "dismiss" within the meaning of Sec. 62.13[5m], Wis. Stats.) [1/] [2/] Fire Department employes represented by Complainant [3/] and about the number of unit employes to be on duty throughout each 24-hour Fire Department shift; that on November 13, December 5 and 13, 1972 Respondent refused upon request to discuss the aforesaid subject of layoffs and that Respondent on October 2, December 5 and December 13, 1972 refused upon request to discuss the aforesaid subject of the number of unit employes to be on duty; and that effective December 31, 1972 Respondent unilaterally laid off five unit employes and unilaterally reduced the number of unit employes normally on duty throughout each 24-hour Fire Department shift, both without prior notice to or bargaining with Complainant; [4/] and

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[1/] Section references herein are to Wisconsin Statutes (1971) unless otherwise indicated. References to Secs. 111.70 - 111.77 inclusive are, more specifically, to the Municipal Employment Relations Act (MERA)

[2/] "Dismissal" within the meaning of Sec. 62.13 (5m) shall be referred to herein as "layoff".

[3/] Such employes are referred to herein as unit employes.

[4/] While neither complaint specifically cited such unilateral actions changes were alleged and the relief requested was clearly directed at

that by the aforesaid refusals to discuss unilateral decisions and actions, Respondent committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act (MERA). As remedies, Complainant requested that Respondent be ordered to cease and desist from the alleged prohibited practices, reinstate and make whole the five employes unlawfully laid off and to restore the number of unit employes normally on duty to its December 26, 1972 level.

Respondent contends that its duty to bargain under MERA with respect to layoffs and minimum manning extends only to the "effects" (severance pay, safety procedures and equipment, workload, etc.) of its decisions with respect to those subjects and not to the initial decisions themselves; that instead, such initial decisions have been reserved to the exclusive discretion of municipal employers by statute and by federal and state case law; that, in any event, Complainant has waived any duty Respondent may have had to bargain collectively with respect to layoff and manning; and that Complainant had sufficient actual notice and opportunity to present views to Respondent about layoffs and manning to satisfy Respondent's duty to bargain collectively about those subjects even if such duty were applicable to its initial decisions with respect thereto.

I. Existence of Duty

Section 111.70(3)(a)4 provides, inter alia, as follows:

> "It is a prohibited practice for a municipal employer . . . [t]o refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit."

The nature of the duty to bargain collectively thereby imposed upon municipal employers and the scope of subjects about which municipal employers are duty-bound to bargain collectively is set forth in the following Sec. 111.70(1)(d) definition:

> "'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be

> required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter."

In interpreting the foregoing statutory provisions, the Commission has previously held that it is a violation of Sec. 111.70(3)(a)4 for a municipal employer to make unilateral changes with respect to subjects about which such municipal employer has a duty to bargain collectively.[5/] It is also a violation of Sec. 111.70(3)(a)4 for a municipal employer to refuse to discuss, upon request of the representative of its employes, any subject about which it has a duty to bargain collectively, i.e., any mandatory subject of bargaining.

In the instant case, the parties are in dispute concerning whether Respondent has a duty to bargain collectively with respect to the following subjects: [6/]

[5/] City of Wisconsin Dells, Dec. No. 11646 (3/73) at 19, 39; City of Brookfield, Dec. No. 11406-A (7/73); see also, NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).

[6/] The Examiner notes that neither Complainant nor Respondent took advantage of the declaratory ruling provision set forth in Sec. 111.70(4)(b). Utilization of that procedure might well have permitted a more expeditious and less onerous resolution of the subject matter in the instant proceeding. Section 111.70(4)(b) reads as follows:

> "Failure to bargain. Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter."

1) Whether Respondent shall find it necessary to lay off unit employes.

2) Whether "some kind of severance or unemployment" compensation shall be paid by Respondent to any unit employes so laid off.

3) Whether the Respondent shall establish any minimum for the number of unit employes to be on duty throughout each 24-hour shift and, if such a minimum is to be established, what it shall be. 7/

Severance pay or its equivalent (subject "2" above) is clearly a matter of "wages" such that it constitutes a subject with respect to which a municipal employer has a duty to bargain collectively. 8/

Subjects "1" and "3" above directly involve the Respondent's exercise of functions reserved to it by statute for the management and direction of the governmental unit, the City of Brookfield. For Sec. 62.13(5m) calls for a determination as to whether it has become necessary to reduce the number of Fire Department employes, 9/ and Sec. 62.11(5) implicitly grants to Respondent's City Council the power to

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7/ The Complainant's written minimum manpower demand (set forth in Finding of Fact No. 6) calls for a minimum of not less than 16 employes, whereas the record indicates that the status quo as of December 26, 1972 (the status quo date to which Complainant requests restoration) was apparently 15 men per shift.

8/ Milwaukee County, Dec. No. 11306 (9/72) (dictum) (involving layoffs of thirteen law enforcement employes). See also, Libby, McNeill & Libby, Dec. No. 8616 (7/68), affirmed in this respect, 48 Wis. 2d 272 (1970).

9/ Section 62.13(5m) provides in part as follows:

> "DISMISSALS AND RE-EMPLOYMENT. (a) When it becomes necessary, because of need for economy, lack of work or funds, or for other just causes, to reduce the number of subordinates, the emergency, special, temporary, part-time, or provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the shortest length of service in the department, provided that, in cities where a record of service rating has been established prior to January 1, 1963, for the said subordinates, the emergency, special, temporary, part-time provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the least efficient as shown by the said service rating."

make that determination as a part of its management and control ". . . of the city . . . public service . . ." which grant ". . . shall be limited only by specific and express statutory provisions." [10] Thus, except as otherwise specifically statutorily provided, Respondent's City Council has the power to determine the degree of fire protection services to be provided to the governmental unit.

Respondent contends that since the determinations called for in "1" and "3" above constitute fundamental decisions that would determine and potentially change the degree and quality of fire protection services provided to the public at the taxpayers' expense, such decisions affect "the basic direction of the [governmental unit's] activities". Therefore, Respondent argues, Libby, McNeill & Libby v. WERC [11] would control and hold bargaining about such subjects to be nonmandatory. The Examiner finds, however, that the language of Sec. 111.70(1)(d) does not permit the same conclusion to be reached herein as was reached by the Court in Libby, supra.

The Libby Court interpreted Secs. 111.06(1)(d) and 111.02(5) of the Wisconsin Employment Peace Act (WEPA), which was and is applicable only to certain private sector employes. Section 111.06(1)(d) of WEPA contains a prohibition identical to that found in the first sentence of

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[10] Section 62.11(5) reads as follows:

> "POWERS. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

See also, Sec. 62.13(8) which reads as follows:

> "FIRE DEPARTMENT. The council may provide by ordinance for either a paid or a volunteer fire department and for the management and equipment of either insofar as not otherwise provided for by law. In the case where a combination of paid and volunteer fire department is provided for, such city shall be reimbursed by the highway commission, not to exceed $100 for any fire calls on a state trunk highway or on any highway that is a part of the national system of interstate highways and is maintained by the highway commission."

[11] 48 Wis. 2d 272 (1970).

Sec. 111.70(3)(a)4 of MERA. But, the definition of "collective bargaining" in Sec. 111.02(5) of WEPA is markedly different than that in Sec. 111.70(1)(d) of MERA. Section 111.02(5) of WEPA provides simply as follows:

> "'Collective bargaining' is the negotiating by an employer and a majority of its employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation."

Under that definition of "collective bargaining", the Libby Court concluded that the existence of a duty to bargain collectively hinges not upon whether such change affects conditions of employment, but rather upon ". . . whether the decision was one which changed the basic direction of the company's activities."

On the other hand, Sec. 111.70(1)(d) of MERA provides, in pertinent part, that

> ". . . The [municipal] employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes." (Emphasis supplied.)

The latter section was created by Chap. 124, Laws of 1971, which became effective some 13 months after Libby was decided. Consequently, it is reasonable to conclude that the legislature was aware of the Libby Court's interpretation of the language in Sec. 111.02(5) when it enacted the more specific definition of collective bargaining in MERA. Therefore, the Examiner concludes that the above-quoted portion of Sec. 111.70(1)(d) requires that the existence of a municipal employer's duty to bargain collectively with respect to any management decision (even those determining the basic direction of the governmental unit) shall depend solely upon whether such decision "affects the wages, hours and conditions of employment of the employes".

For the foregoing reasons, Respondent's citations of Libby and of Mr. Justice Stewart's concurring opinion in Fibreboard [12/] and of other decisions interpreting the National Labor Relations Act which, like WEPA, does not contain a proviso similar to that found in the

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12/ Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964).

above-quoted portion of Sec. 111.70(1)(d) are found by the Examiner to be inapposite.

The Examiner also rejects Respondent's contention that Secs. 62.11(5), 62.13(8) and 62.13(5m) must be interpreted so as to preclude the applicability of the duty to bargain collectively in MERA to the exercise of the powers granted in those chapter 62 sections. It is true that "[u]nless authorized by statute or charter, a municipal corporation, in its public character as an agent of the state, cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender of such powers." 13/ Nevertheless, Sec. 111.70(1)(d) of MERA provides, in part, that

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

Thus, Sec. 111.70(1)(d) unequivocally authorizes 14/ -- and indeed requires -- municipal employers to exercise their chapter 62 powers in a manner that is consistent with the rights of public employes under MERA, 15/ which rights include, inter alia, ". . . the right . . . to

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13/ Richards v. Board of Education, Joint School District No. 1, City of Sheboygan, 58 Wis. 2d 444 (1973); see also, Madison v. Reynolds, 48 Wis. 2d 156 (1970).

14/ See, Richards v. Board of Education, Joint School District No. 1, City of Sheboygan, 58 Wis. 2d 444, 460 (as amended, per curiam, on rehearing, June 29, 1973), wherein the Court, citing Local 1226 v. City of Rhinelander, 35 Wis. 2d 209 (1967), found that another portion of Sec. 111.70(1)(d) was sufficient to authorize a municipal employer to enter into and be bound by the conditions placed upon its exercise of statutory powers by a collective bargaining agreement grievance procedure.

15/ Since [Ashland] Board of Education v. WERC, 52 Wis. 2d 625 (1971) decided prior to the enactment of ch. 124, Laws of 1971, which initially set forth the clear statement of legislative intent quoted in the text above, the rationale in that case is inapplicable under Sec. 111.70 as amended by ch. 124. Thus, to hold in the instant case that ". . . the specific [grant of powers] statutes prevail over the general municipal employee statutes in those instances where both cannot be given effect, or where they do not harmonize" as is urged by Respondent, would be to diametrically contradict the legislative intent expressed in the quoted portion of Sec. 111.70(1)(d).

bargain collectively through representatives of their own choosing . . .". [16] That "right to bargain collectively" is reciprocal to and coextensive with the duty of municipal employers to bargain collectively as specified in Secs. 111.70(3)(a)4 and (1)(d) as those sections have been interpreted in the case law. Therefore, the Examiner concludes that the municipal employer is required to fulfill the MERA duty to bargain collectively in the exercise of its chapter 62 powers, in general, and in making the determinations referred to in "1" and "3" above, in particular. "The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession", and the municipal employer would be free to seek to achieve, through collective bargaining, unilateral control over particular subjects of concern to it. [17]

Thus, the Examiner must determine whether the manner of Respondent's exercise of its functions in making the decisions described in "1" and "3" above ". . . affects the wages, hours and conditions of employment of the employes." In doing so, however, the Examiner must construe that quoted phrase only so broadly as is necessary to fulfill the legislative policy underlying MERA. For though MERA was enacted long after Secs. 62.11(5), 62.13(8) and 62.13(5m) and is, therefore, presumed to have been enacted with a full knowledge of such pre-existing statutes, [18] "[c]onstruction of statutes should be done in a way which harmonizes the whole system of law of which they are a part, and any conflict should be reconciled if possible." [19] Whether, and to what degree a later enactment modifies pre-existing statutes, ". . . is a question of legislative policy". [20] Thus, in cases involving a possible conflict between Secs. 62.11(5), 62.13(5m) and (8) and MERA, the former statutes will be modified to the extent intended by the legislature if the terms of MERA are construed only so broadly as is necessary to

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[16] Sec. 111.70(2) of MERA.

[17] Section 111.70(1)(d). See, Village of Shorewood, Dec. No. 11716 (3/73) (involving firefighting personnel). The instant Municipal Employer's duty to bargain collectively with respect to its Fire Department employes does include, inter alia, the duty to comply with the impasse resolution procedures set forth in Sec. 111.77.

[18] Muskego-Norway Consolidated Schools v. WERB, 35 Wis. 2d 540 (1967).

[19] Id.

[20] Id.

fulfill the legislative policy underlying MERA. 21/

The legislative policy underlying Sec. 111.70 is expressed in Sec. 111.70(6) as follows:

> "DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter."

What follows, then, is a determination of whether, in the first instance, the manner of Respondent's exercise of its statutory functions of making the determinations described in "1" and "3" above ". . . affects the wages, hours and working conditions of the employes", construing that quoted phrase consistent with the foregoing analysis.

A. Layoff of Unit Employes (Subject "1" above)

The record shows that Respondent's decision to lay off 22/ the five least senior unit employes directly and intimately affected those employes' wages, hours and conditions of employment. It is, therefore, unnecessary to determine whether layoffs also affected the wages, hours and working conditions of the employes who were not laid off. The layoffs imposed by Respondent affect the wages, hours and conditions of employment of the employes laid off in the same way as would a complete termination of the employment relationship, through perhaps for a shorter

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21/ Respondent, citing certain dictum in Joint School District No. 8, City of Madison v. WERB, 37 Wis. 2d 483 (1967) contends that the term "condition of employment" must be narrowly construed herein to avoid an unconstitutional result. Respondent has, not, however, referred the Examiner to provisions of the State Constitution requiring such restraint in the instant case, and the Examiner finds none. Therefore Respondent's argument in that regard is rejected.

The Examiner also finds Respondent's reliance upon Adamczyk v. Caledonia, 52 Wis. 2d 270 (1971) to be inappropriate. For, as was noted on rehearing by the Court in Richards v. Bd. of Education, Joint School Dist. No. 1, City of Sheboygan, 58 Wis. 2d 444, 460 (1973), "Adamczyk involved a personal employment contract rather than a collective bargaining agreement enacted in accordance with Sec. 111.70, Stats: 'The Municipal Employment Relations Act.'"

22/ I.e., "dismiss" in accordance with Sec. 62.13(5m).

period of time. [23] The Commission has held that termination of an employe's employment drastically affects his "conditions of employment" and that ". . .[t]o hold otherwise would be to adopt a most untenable and myopic approach to the reality of labor relations. [24]

It would also be unrealistic to conclude that Complainant's interests in the laid-off employes' wages, hours and conditions of employment affected by the instant decision could be substantially fulfilled or protected if the bargaining were restricted to the so-called "effects" of the layoff, i.e., such subjects as severance pay, vacation pay, seniority and pensions.

Therefore, the Examiner concludes that Respondent's initial decision as to whether it is "necessary", within the meaning of Sec. 62.13(5m) to dismiss, i.e., lay off, the five least senior (or any) unit employes is a subject about which Respondent had and has a duty to bargain collectively with Complainant. [25] Again, the duty to bargain collectively does not compel the Respondent to agree to any of Complainant's proposals concerning whether there shall be layoffs of bargaining unit employes, nor does it require the Respondent to make a

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[23] Section 62.13(5m)(c) provides that "dismissed" employes have certain rights to reemployment.

[24] See, The Sewerage Commission of the City of Milwaukee, Dec. No. 11228-A (10/72).

[25] The Commission, in its Conclusions of Law in Milwaukee County, Dec. No. 11306 (9/72) suggested that it would have reached the above result in that case but for the fact that the Municipal Employer's decision therein (to lay off 13 law enforcement personnel) was made prior to the effective date of MERA.

For decisions under the National Labor Relations Act, compare NLRB v. Exchange Parts Co., 339 F2d 829,58 LRRM 2097 (CA 5, 1965), enforcing 139 NLRB 710,51 LRRM 1366 (1962) (wherein the court stated:

> "We conclude that the Board was justified in finding that such unilateral action [layoffs of employes] in the face of requests for an opportunity to discuss proposed layoffs frustrated the statutory objective of establishing working conditions through bargaining . . . . The Union was simply denied a reasonable opportunity for making a counter proposal of any type. We conclude that this conduct could properly be found by the Board to be in violation of Section 8(a)(5) of the Act.")

with Aztec Ceramics Co., 138 NLRB 1178, 51 LRRM 1226 (1962) and Southern Coach & Body Co. Inc. 141 NLRB 80, 52 LRRM 1279 (1963), reversed on

(cont'd on page 20)

concession with respect thereto. 26/ Discussion of whether Complainant waived its right to bargain about layoffs or whether Respondent fulfilled its duty to bargain collectively with respect thereto is deferred to later sections of this Memorandum.

B. Minimum Daily Manpower (Subject "3" above)

The Complainant sought to show that Respondent's decisions as to the number of unit employes to be on duty daily affect on-the-job safety and workload of the represented employes. Respondent argues that Complainant has not satisfactorily proven that relationship.

The Record evidence establishes that the Respondent has reduced the number of unit employes on duty daily by two and that, therefore, each unit employe remaining will be subjected to an increased workload in order to perform the static or increasing total amount of fire extinguishing and non-fire-extinguishing work expected to be performed by

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25/ (cont'd from page 19)
other grounds, 336 F2d 214, 57 LRRM 2102 (CA 5, 1964) (in finding unlawful refusal to bargain about procedures for selection of employes to be laid off, NLRB issued dictum to the effect that the privilege of deciding that an economic layoff is required belongs to the employer.)

Decisions on the instant issue in the public sector have reached varied results. Compare, Fire Fighters Union, Local 1186 v. City of Vallejo (Superior Ct., Solano Co., California, No. 53187, decided May 8, 1972) (Held, The number of firemen to be laid off as circumstances require was a subject within the City's duty to bargain collectively "on matters of wages, hours and working conditions, but not on matters involving the merits, necessity or organization of any service or activity provided by law" which duty was set forth in the City's charter) with, City of New Rochelle v. New Rochelle Federation of Teachers, Local 280 (Public Employment Relations Board of the State of New York, Case No. U-2049 decided July 1, 1971) (Held, under Taylor law that "[d]ecisions of a public employer with respect to the carrying out of its mission such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employes [even where, as in the New Rochelle case, such decision will result in the termination of employment of about 140 employes].")

The Examiner has given little weight to the aforesaid precedent in other jurisdictions, in that none of the statutory provisions interpreted in those cases contained a provision comparable to Sec. 111.70(1)(d) of MERA.

26/ See note 17, above.

unit employes as a group. In addition, as is noted in Complainant's brief, "[i]t is conceded by Respondents that approximately four major fires occur each year in Brookfield requiring all available fire fighters. . . . In such instance, two additional men could provide a margin of safety by warning of actual or potential hazards or assist in the rescue of fellow fire fighters when so needed."

The record also shows that following said reduction in the number of unit employes on duty daily, the Chief of the Department instituted new fire call response assignments which cause the Department's aerial ladder truck (which carries safety equipment in quantities and of types not carried on other apparatus) to respond less quickly and to fewer first calls than was the case prior to December 31, 1972. There is also evidence that one tank truck formerly available to fight multiple response fires will be inoperative at least until off-duty personnel arrive. For those reasons, Complainant asserts that the first unit employes responding to a fire will be without needed safety equipment for at least some period of time. 27/

The record also established, however, that there have been no reductions in the number of men ordinarily riding on each piece of apparatus 28/ and that each piece of apparatus is equipped with numerous items of safety equipment including at least one oxygen mask per firefighter aboard. In addition, Fire Chief Edward Schweitzer testified that he did not consider his revisions in the fire call response assignments as final but rather only "an experiment". The Chief further testified that his expectations of the work performance of each man at a fire have not changed; he formerly and presently ". . . wouldn't expect any man to do anything he wasn't capable of doing or take any chance that would hinder his life".

27/ The Complainant also introduced into evidence, Chapter 7 of a book entitled, Municipal Fire Administration, a 1967 publication written by the International City Manager's Association. The Respondent disputed the authoritativeness of the volume, but in view of the contents of Chapter 7 thereof, the Examiner finds it unnecessary to determine that question. The overall theme of the chapter is that insufficient fire department manpower and inappropriate utilization thereof has an adverse effect upon the safety and property of the community served. The standards of manning set forth therein appear to be developed around community protection and little if any emphasis is given to the effects of the number of employes on duty throughout a department upon the safety of the work force.

28/ Tr. 59. For that reason, the size of crew riding on each vehicle is not at issue herein as it was in City of Wauwatosa, Dec. No. 10670-A (12/71).

To repeat, Complainant argues that the number of unit employes on duty significantly affects working conditions (to wit, safety and workload) of nonlaid-off employes. The Examiner finds, however, that said working conditions are much more directly and intimately affected by decisions as to the types and quantities of safety equipment transported to first responses, the safety practices and procedures followed at fires, and the amount and type of non-fire-extinguishing work to be required of unit employes as a group. Moreover, the record facts do not establish that unit employes have experienced so unreasonably hazardous or unduly burdensome a workload--either before or after the number of employes normally on duty was reduced by two--that their interests and concerns in safety and workload could not be substantially fulfilled and protected without bargaining about the number of unit employes to be on duty daily. Therefore, since their interests in safety and workload seem amenable to protection and fulfillment by bargaining about the above-mentioned subjects that are more directly and intimately related thereto and since bargaining about those subjects is much less restrictive of Respondent's freedom to determine the basic scope of protective services to be provided to the public, the Examiner concludes that determinations as to the number of unit employes to be on duty daily do not directly and intimately affect the wages, hours and working conditions of nonlaid-off employes. That result both serves the public policy underlying MERA and reflects an effort to harmonize MERA with Secs. 62.11(5), 62.13(5m) and (8).

Therefore, Respondent did not and does not have a duty to bargain collectively about the number of unit employes to be on duty during each 24-hour Fire Department shift.

II. Waiver of Bargaining

Respondent argues that the existence of a collective bargaining agreement, in and of itself, establishes for its term a hiatus in a municipal employer's duty to bargain collectively (including the duty to refrain from unilateral changes in conditions of employment without prior notice and bargaining). That position is without support in the law. The duty to bargain collectively is not affected by the existence of a collective bargaining agreement except that for the duration of such agreement, the municipal employer is relieved of that duty with respect to subjects which are embodied in any of the terms of the agreement and subjects as to which the employe representative has waived

in-term bargaining by reason of the parties' history of bargaining or by specific language in the agreement. Therefore, in the absence of sufficient evidence of waiver, the fact that Respondent's conduct complies with the terms of the parties' 1972 agreement does not, in and of itself, relieve Respondent of its duty to bargain collectively concerning all mandatory subjects of bargaining.

Upon review of the record, the Examiner does not find by a clear and satisfactory preponderance of the evidence that Complainant waived its right and Respondent's reciprocal duty to bargain collectively about whether it is necessary to lay off unit personnel. The Respondent has not pointed to any language in the 1972 agreement (and the Examiner finds none) that either embodies, or specifically waives bargaining about the necessity of layoffs. Moreover, the evidence concerning the bargaining history leading up to the parties' 1972 agreement reveals only that Complainant submitted a written minimum manpower proposal that was not included in the resultant 1972 agreement and about which the parties' only "discussion" was Respondent's spokesman's assertion that it involved subject matter of no concern to Complainant and that ". . . it was the City's right to do as they please in those areas; that nobody was going to tell anybody how to run the Fire Department". [29/] Since a waiver of bargaining ought not be lightly inferred, [30/] the Examiner cannot infer a waiver of bargaining from such evidence. In any event, a waiver of bargaining (if proven) about a minimum manning proposal (held herein to be a permissive subject of bargaining) could not constitute a waiver of bargaining about whether unit employes shall be laid off (held herein to be a mandatory subject of bargaining).

III. Fulfillment of Duty

Respondent contends that the record does not establish by a clear and satisfactory preponderance of the evidence that Respondent failed to fulfill its duty to bargain collectively. The Examiner, in reaching Findings of Fact Nos. 8, 11 and 13, found otherwise. Finding of Fact No. 8 is based upon the credible and uncontroverted first-hand recollections of bargaining table occurrences related by Complainant's

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29/ Tr. 12 - 15.

30/ See City of Brookfield, Dec. No. 11406-A (7/73) and cases cited therein.

witness, Mike Sueflohn. [31] The Examiner has not, however, relied upon the notes of that meeting kept by Complainant's Secretary-Treasurer since the Examiner concludes that such notes were not taken in an objective manner. While there is some evidence indicating that Respondent's spokesman Hayes felt that his statements across the bargaining table were not being properly understood by representatives of Complainant, [32] that evidence was not satisfactorily related to the matters contained in Findings of Fact No. 8 to alter the Examiner's finding therein. It can be noted here that Respondent presented no case-in-chief; instead it relied upon cross-examination of Complainant's witnesses.

Since the Examiner found Complainant's representatives had actual notice on or before November 14, 1972 that Respondent's City Council was contemplating a substantial reduction in the Fire Department budget and, on or before November 13, that Respondent was contemplating layoffs of Fire Department employes, Respondent has not been cited for failing to give formal notice to Complainant that it was contemplating such layoffs. Nevertheless, the facts do establish that Respondent refused to discuss "the possibility of layoffs in the fire service" upon Complainant's request on November 13, 1972 and that, thereafter, Respondent unilaterally and without additional bargaining [33] with Complainant about layoffs, laid off the five least senior unit employes. By said refusal and said unilateral decision and action, Respondent violated its duty to collectively bargain and thereby committed a prohibited practice in contravention of Sec. 111.70(3)(a)4 of MERA.

Remedy

In addition to ordering Respondent to cease and desist from the specific prohibited practices found to have been committed herein, the Examiner has also ordered that Respondent reinstate and make whole the employes who were laid off in contravention of Respondent's duty to bargain collectively under MERA. It is anticipated that said affirmative action will effectuate the policies of MERA by preventing Respondent from enjoying the fruits of its prohibited practice and from gaining an

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[31] Tr. 6 - 7.

[32] Tr. 35.

[33] The political opposition (to a Fire Department budget cut) generated by members and officers of Complainant who leafletted the community, encouraged a retired Fire Chief to speak to the City Council and personally attended Council meetings did not constitute "collective bargaining" within the meaning of Sec. 111.70(1)(d).

undue advantage at the bargaining table when it ultimately, following this prohibited practice proceeding, bargains about whether to lay off unit employes.

Dated at Milwaukee, Wisconsin, this 30th day of October, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner