STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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FIRE FIGHTERS LOCAL 2051,
IAFF, AFL-CIO,

Complainant,

v.

CITY OF BROOKFIELD,

Respondent.

Case X
No. 16329 MP-196
Decision No. 11489-B

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FIRE FIGHTERS LOCAL 2051,
IAFF, AFL-CIO,

Complainant,

v.

CITY OF BROOKFIELD,

Respondent.

Case XI
No. 16348 MP-203
Decision No. 11500-B

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ORDER ENLARGING EXAMINER'S FINDINGS OF FACT, AND AMENDING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

Examiner Marshall L. Gratz having on October 30, 1973 issued Findings of Fact, Conclusions of Law and Order in the above-entitled matters, and the Respondent having, pursuant to Section 111.07 of the Wisconsin Statutes, timely filed a petition for review of the Examiner's Findings of Fact, Conclusions of Law and Order, and the Commission, having reviewed the entire record, said Findings of Fact, Conclusions of Law and Order, being fully advised in the premises, makes and files the following Enlarged Findings of Fact, Amended Conclusions of Law and Order.

ENLARGED 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:

"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 Fire Fighters. 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; that said 1972 agreement did not contain a minimum daily manpower clause, a management's rights clause or a specific waiver of bargaining clause, nor a provision relating to layoffs of unit employes.

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 callback 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 bargain collectively with respect to the possibility of layoffs in the fire service.

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 28; 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, 1972; 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 said 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 the Respondent laid off the five least senior fire fighters; that said layoffs and the impact thereof affected the wages, hours and working conditions of the fire fighters so laid off; that such layoffs resulted from a reduction in the budget of the Fire Department and were not motivated by any anti-union animus on behalf of the Respondent; and that, however, on November 13, 1972 and at other times prior to the layoffs the Respondent, after being requested to do so by the Complainant, refused to bargain collectively with the Complainant on the decision made by the Respondent as to the layoffs, the actual layoffs, and the impact thereof upon the fire fighters so laid off.

14. 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 not 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.

15. That during the hearing in the instant case conducted on January 15, 1973, Respondent offered to "discuss" 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, at the same hearing, refused said offer by the Respondent unless the Respondent was willing to reinstate and make whole the laid-off fire fighters; and that the Respondent thereupon expressed its unwillingness to so reinstate and make whole said employes.

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

## AMENDED CONCLUSIONS OF LAW

1. That matters primarily relating to, that is directly and intimately affecting, wages, hours and conditions of employment are not reserved to the management and direction of the City of Brookfield in the operation of its Fire Department within the meaning of Section 111.70(4)(d) of the Municipal Employment Relations Act, and therefore Fire Fighters Local 2051, IAFF, AFL-CIO has the right to bargain, and the City of Brookfield has the duty to bargain, within the meaning of Section 111.70(1)(d) and (2) of the Municipal Employment Relations Act, with respect to the decision of the City of Brookfield to layoff fire fighters in its employ, as well as with respect to the impact of the implementation of such decision on the wages, hours and conditions of employment of the fire fighters so laid off.

2. 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 Section 111.70(3)(a)(1) and (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

[illegible] Modification and Decision and Post Hearing Brief dated January 25, 1974 [illegible] Complainant's Brief in Opposition to Motion [illegible] Prohibited Practices [illegible] Respondent's Motion [illegible] Status Quo Ante December 20, 1973 and to [illegible] Employes affected by said Prohibited Practices

d. That, since the decision of the City of Brookfield to reduce by two the number of fire fighting personnel to be on duty throughout each 24-hour shift, and the implementation thereof on December 31, 1973, did not directly and intimately affect the working conditions of the fire fighting personnel remaining on each shift, the City of Brookfield had no duty to bargain the matter of said decision, or the impact thereof, with Fire Fighters, Local 2051, IAFF, AFL-CIO, and therefore, in said regard, the City of Brookfield did not commit any prohibited practices within the meaning of Section 111.70(3)(a)(1) and (4) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Enlarged Findings of Fact and Amended Conclusions of Law, the Commission makes and issues the following

## AMENDED ORDER

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

1. Cease and desist from refusing to engage in collective bargaining with Complainant Fire Fighters Local 2051, IAFF, AFL-CIO as to whether it is necessary to lay off (i.e., "dismiss" within the meaning of Section 62.13(5m), Wis. Stats.) employes represented by said Complainant from their employment in the City of Brookfield Fire Department) and over the impact of such layoffs upon such employes.

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

(a) Offer to the five Fire Department employes laid off (i.e., "dismissed" within the meaning of Section 62.13(5m), Wis. Stats.) on or about December 31, 1973 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 Section 111.70(3)(a)(1) and (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 (and which they 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) In the absence of provisions pertaining to layoffs of fire fighting personnel in a collective bargaining agreement existing between the City of Brookfield and Fire Fighters Local 2051, IAFF, AFL-CIO, in connection



No. 11[illegible]
No. 10[illegible]

Layoffs of Fire Fighter personnel immediately notify Fire Fighters Local 2051, IAFF, AFL-CIO thereof, and upon the request of the latter organization bargain with Fire Fighters Local 2051, IAFF, AFL-CIO with respect to the anticipated layoffs and the impact thereof on wages, hours and working conditions of the fire fighters contemplated to be laid off.

(d) 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.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner

I concur in part and dissent in part.

Morris Slavney
Morris Slavney, Chairman



No. 11489-B
No. 11500-B

## NOTICE TO ALL FIRE DEPARTMENT EMPLOYES

Pursuant to an Order 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:

In the absence of provisions pertaining to layoffs in an existing collective bargaining agreement, 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 Section 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 and the impact thereof on wages, hours and working conditions of the employes contemplated to be laid off.

CITY OF BROOKFIELD, WISCONSIN

By _____
Chief, Fire Department

Dated this _____ day of _____, 1975.

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



No. [illegible]-B
No. 11500-B

MEMORANDUM ACCOMPANYING ENLARGED FINDINGS OF FACT, AMENDED CONCLUSIONS OF LAW AND ORDER

On October 30, 1973, Examiner Marshall L. Gratz issued Findings of Fact, Conclusions of Law and Order in the above-entitled proceedings, wherein he found, inter alia,:

(1) That the Respondent had a duty to bargain with the Complainant as to whether it was necessary to lay off fire fighter personnel in the employ of the Respondent;

(2) That the Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act by refusing, upon request, to bargain with the Complainant as to whether it was necessary to lay off such fire fighter personnel, and by unilaterally laying off such personnel on December 31, 1972;

(3) That the Respondent's offer, made during the hearing before the Examiner on January 15, 1973, to bargain on the lay-off decision did not cure such prohibited practice since the Respondent, at such time, refused to recall the fire fighters who were laid off and also refused to make them whole for their period of layoff, as requested by the Complainant;

(4) That the Respondent had no duty to bargain with respect to its decision as to the number of fire fighter personnel to be on duty throughout each 24-hour shift, and that in said regard the Respondent did not commit any prohibited practice within the meaning of Section 111.70(3)(a)4 of MERA, by refusing to bargain with respect to Complainant's "manning" proposal, or by reducing the number of fire fighters by two on each 24-hour shift, without first bargaining with Respondent with regard to said decision; and

(5) That the Respondent, by offering to bargain, during the hearing before the Examiner on January 15, 1973, on such matters as severance pay, safety equipment and workload resulting from the layoffs of December 31, 1972 and the reduction of the number of unit employes on duty daily, sufficiently cured any prohibited practice with regard to the impact of its decisions concerning layoffs and manning.

The Examiner ordered that the Respondent cease and desist from the prohibited practices found to have been committed and to take certain affirmative action, including reinstatement of those fire fighters who were laid off on December 31, 1972 and make them whole.

The Respondent timely filed with the Commission a Petition for Review of the Examiner's decision, as well as an Amended Petition for Review, wherein it contended that it had no legal duty to bargain with Complainant with respect to the decision respecting the layoffs of December 31, 1972, and that, therefore, the Respondent did not commit a prohibited practice in said regard.

The Examiner's Findings of Fact, Conclusions of Law and Order were accompanied by a Memorandum setting forth his rationale in support thereof. Since the Commission has enlarged the Findings of Fact and has revised the Examiner's Conclusions of Law and Order, it necessarily

follows that we must also revise portions of his Memorandum. Our Memorandum includes a significant portion of the Examiner's Memorandum.

The parties are in dispute concerning whether Respondent has a duty to bargain collectively with respect to the following issues:

(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. 1/

POSITION OF THE PARTIES:

Complainant contends that Respondent has a duty to bargain collectively about whether it is necessary to lay off 2/ Fire Department employes represented by Complainant 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; 3/ and that by the aforesaid refusals to discuss unilateral decisions and actions, Respondent committed prohibited practices within the meaning of Section 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 who were laid off and to restore the number of unit employes normally on duty to its December 26, 1972 level.

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1/ The Complainant's written minimum manpower demand (set forth in Findings 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.

2/ "Dismissal" within the meaning of Section 62.13(5m) is referred to herein as "layoff".

3/ While neither complaint specifically cited such unilateral actions as a violation of Section 111.70(3)(a)4, the facts of the unilateral changes were alleged and the relief requested was clearly directed at remedying such acts. Moreover, viewing the pleadings, transcript and briefs in these cases as a whole, it cannot be said that Respondent ". . . could well have been justified in believing that such matter was not in issue." See, General Electric Co. v. WERB, 3 Wis. 2d 227 (1957) ("fair play doctrine" to be applied to proceedings conducted under Section 111.07.)

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 taxpayer's expense, such decisions affect "the basic direction of the [governmental unit's] activities". Therefore, Respondent argues, Libby, McNeill & Libby v. WERC 4/ would control and hold bargaining about such subjects to be nonmandatory.

Respondent also 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.

PERTINENT STATUTORY PROVISIONS:

The pertinent provisions of the Wisconsin Statutes relating to the powers of cities and the operation of the fire departments therein are as follows:

Section 62.11(5)

"(5) 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."

Section 62.13(5m)

"(5m) 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, 1933, 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."

4/ 48 Wis. 2d 272 (1970).

Section 62.13(8):

"(8) 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."

The pertinent provisions of the Wisconsin Employment Peace Act (WEPA) are as follows:

Section 111.02(5):

"(5) 'Collective bargaining' is the negotiating by an employer and a majority of his 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."

Section 111.06(1):

"(1) It shall be an unfair labor practice for an employer individually or in concert with others:

(d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit; provided, however, that where an employer files with the commission a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the commission."

The pertinent provisions of MERA are as follows:

Section 111.70(1)(d):

"(d) '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."

"(a) It is a prohibited practice for a municipal employer, individually or in concert with others:

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit."

Section 111.77(6), 5/

"(6) In reaching a decision the arbitrator shall give weight to the following factors:

(d) Comparison of the wages, hours and conditions of employment of the employes involved in the arbitration proceeding with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally:

1. In public employment in comparable communities.

2. In private employment in comparable communities.

(f) The overall compensation presently received by the employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received. 6/

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment."

DISCUSSION:

The issues raised herein require the Commission to consider the applicability of the statutory provisions noted above to determine whether the Respondent has a mandatory duty to bargain with respect to its decision to lay off the fire fighters involved and the impact of such layoffs, as well as the "manning" issue.

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5/ Relating to police and fire fighter final and binding "interest arbitration."

6/ Emphasis added.

It is well established that the provisions of MERA apply to the authority of municipal governing bodies. 7/ For MERA was enacted long after Sections 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. 8/ However, "[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." 9/ Whether, and to what degree a later enactment modifies pre-existing statutes, "... is a question of legislative policy". 10/ Thus, in cases involving a possible conflict between Sections 62.11(5), 62.13(5m) and (8) and MERA, the former statutes will be modified to the extent intended by the legislature as the terms of MERA are construed only so broadly as is necessary to fulfill the legislative policy underlying MERA.

Therefore, it follows that the actions of the Respondent herein are not governed solely by the pertinent provisions of Section 62, Wisconsin Statutes, noted above.

In response to the Respondent's contention that the matters of layoffs and manning are not mandatory subjects of bargaining, in light of the Court's decision in the Libby case, the Examiner concluded that the definition of the term "collective bargaining" as set forth in the Wisconsin Employment Peace Act is "markedly different" than the definition of the same term in MERA, the latter Act being effective some 13 months after the issuance of the Libby decision. The Examiner then concluded as follows:

> "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'."

The fact that the definition of the term "collective bargaining" is not identical in WEPA and MERA does not in our view, create the difference concluded by the Examiner. We reject the Examiner's conclusion that under MERA "any management decision (even those determining the basic direction of the governmental unit) shall depend on whether such decision affects the wages, hours and conditions of employment of the employes.", and we have interpreted Section 111.70(1)(d) of MERA as not requiring a municipal employer to bargain on the management of any of its agencies and the supervision of its employes, where the matters involved do not significantly affect wages, hours and conditions of employment, and to the effect that such matters are reserved to the management and direction of the municipal employer. Therefore, in said regard, the municipal employer may unilaterally implement such

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7/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis. 2d 540 (6/67).

8/ Ibid.

9/ Ibid.

10/ Ibid.

managerial decision, but must, however, bargain on the impact thereof when such impact affects wages, hours and working conditions of the employes involved. 11/ However, where the matter involved primarily relates to wages, hours and working conditions, such matters are not reserved to the management and direction of the municipal employer and, therefore, the municipal employer is required to engage in collective bargaining on such matters, as well as the impact thereof with respect to the employes involved. 12/

The action of the Respondent in laying off the fire fighters involved did not result from a change in the basic direction of the Fire Department. It continued to provide fire fighter protection, but with five less personnel. Therefore, it is obvious to the Commission that the rule in Libby is not applicable in the instant matter. Thus, the Commission must determine whether the layoffs involved herein did or did not significantly affect wages, hours or working conditions.

Layoff of Unit Employes

The record establishes that Respondent's decision to lay off 13/ the five least senior unit employes primarily related to wages, hours and conditions of employment of the employes subject to layoff. The layoffs imposed by Respondent directly and significantly affected 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, though perhaps for a shorter period of time. 14/ 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." 15/

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 impact of the layoffs, i.e., such subjects as severance pay, vacation pay, seniority and pensions.

Therefore, we conclude that Respondent's decision as to whether it was "necessary", within the meaning of Section 62.13(5m) to dismiss, i.e., lay off the five least senior (or any) unit employes, and the impact of such decision are subjects about which Respondent had and has a duty to bargain collectively with Complainant. 16/ The duty

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11/ City of Beloit (11831-C) 9/74; Oak Creek-Franklin Joint School Dist. No. 1 (11827-D) 9/74.

12/ Ibid.

13/ I.e., "dismiss" in accordance with Section 62.13(5m).

14/ Section 62.13(5m)(c) provides that "dismissed" employes have certain rights to re-employment.

15/ See The Sewerage Commission of the City of Milwaukee (11228-A) 10/72.

16/ The Commission, in its Conclusions of Law in Milwaukee County (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.

[illegible] collectively do 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 any concession with respect thereto. (However, it does require the Respondent to give the Complainant an opportunity to present proposals, some of which may provide alternatives to layoff as a response to the need for economies.) Discussion of whether Complainant waived its right to bargain concerning the layoffs or whether Respondent fulfilled its duty to bargain collectively with respect thereto is deferred to later sections of this Memorandum.

Minimum Daily Manpower

The Complainant sought to show that Respondent's decisions as to the number of unit employes to be on duty daily affect the 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 unit employes as a group. In addition, as 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 caused 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.

The record also established, however, that there have been no reductions in the number of men ordinarily riding on each piece of apparatus 17/ and that each piece of apparatus is equipped with numerous items of safety equipment including at least one oxygen mask per fire fighter 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."

To repeat, Complainant argues that the number of unit employes on duty significantly affects working conditions (to wit, safety and workload) for nonfield-off employes. The Commission 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 fire responses, the safety practices and procedures followed at

17/ 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 (10670-A) 12/71.

required of unit employes as a group. Moreover, the record facts do not establish that unit employes have experienced unreasonably hazardous or unduly burdensome 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 Commission concludes, as did the Examiner, 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 Sections 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.

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 the terms of the agreement and subjects as to which the employe representative has waived interim 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 does not violate any provision 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 Commission agrees with the Examiner's conclusion that the clear and satisfactory preponderance of the evidence does not establish that Complainant waived its right, and Respondent's reciprocal duty, to bargain collectively as to the lay off of unit personnel. The Respondent has not pointed to any language in the 1972 agreement (and the Examiner found none) that either embodies, or specifically waives bargaining on the matter 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." Since a waiver of bargaining ought not be lightly inferred, the Examiner concluded, and we agree, that no waiver of bargaining could be inferred 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

mandatory subject of bargaining.

Alleged Refusal to Bargain

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 witness, Mike Sueflohn. The Examiner did not, however, rely upon the notes of that meeting kept by the Complainant's Secretary-Treasurer since the Examiner concluded 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, 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 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 18/, either as to the lay off decision or the impact thereof, 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 Section 111.70(3)(a)(1) and (4) of MERA. 19/

As found in paragraph 15 of the Findings of Fact, on January 15, 1973, during the hearing in the instant matter, the Respondent offered to "discuss" its lay off decision and the impact thereof, and the Complainant refused to engage in such discussions unless the Respondent reinstated the employes laid off and made them whole for the period of their lay off. Such condition was unacceptable to the Respondent and as a result no bargaining occurred with respect to said matters.

The Examiner concluded that the Respondent, by its aforesaid offer to discuss during the hearing, "cured" its prohibited practice regarding collective bargaining on the "impact" of the lay-offs. Chairman Slavney concludes that by said offer the Respondent fulfilled its statutory duty respecting bargaining on impact and the underlying decision to layoff.

18/ 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 Section 111.70(1)(d).

19/ Unlike the Examiner, we have found violation of Section 111.70(3)(a)(1) in all instances of (4) violations. The (1) violations are derivative of, not independent of the (4) violations.

The undersigned Commissioners, on the contrary, conclude that an offer to "discuss" is not necessarily tantamount to an offer to engage in collective bargaining, as defined in the MERA, and that therefore the Respondent's offer does not affect our Conclusions of Law or Order. "Collective bargaining" is a term of art with a technical and complex connotation, as well as a statutory definition. "Discussion" is not such a term and has no particular legal significance, in our view.

Furthermore, and independently of the foregoing consideration of the term "discuss", the undersigned Commissioners believe that the appropriate remedy in this case is, and was at the time of the hearing, that which we have ordered herein, including full reinstatement. Thus, the Complainant was on sound ground in insisting upon reinstatement, even if the Respondent was offering collective bargaining. We find this remedy appropriate especially because the MERA, unlike the statutes that govern employment relations in the private sector, provides that employes may not strike in protest of employer refusals to bargain collectively, and therefore depends upon employer good faith, and the remedies provided by this Commission and the Courts for inhibition of such refusals. Of course, refusals to engage in collective bargaining defeat an essential intention of the statutory scheme.

Also, we believe that only with reinstatement of the employes, which restores as much as is possible the status quo ante, will future bargaining even approximate that which should have occurred. We recognize that the Respondent's prohibited conduct was not based upon animus, but was based upon economic considerations. However, animus is not necessary to the prohibited practices found. Neither is a mistake as to the law a defense herein, or, in our view, a factor in mitigation of the remedy.

Finally, we disagree with the Examiner to the extent that he held that an offer to engage in collective bargaining, over impact (when there is such an offer) cures a refusal to so bargain, where there is a continuing prohibited refusal to bargain over the basic decision to layoff. In our view, that analysis precludes effective remedy of the violation of refusing to bargain on the underlying decision. We cannot restore the status quo ante where the duty to bargain on impact is extinguished.

Finally, the Examiner's description of the Respondent's offer (p. 3, transcript) also implies that the Respondent conditioned its willingness to "discuss" upon the withdrawal of the instant complaints, which condition the Complainant rejected. The effectuation of the MERA would indeed be imperiled were such conditions precedent supported by the Commission.

Dated at Madison, Wisconsin this 16th day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner

MEMORANDUM OF DISSENT IN PART

I disagree with the conclusion of my colleagues that the Respondent's offer, made at the outset of the hearing, to discuss the decision to lay off the fire fighter personnel and the impact thereof was "not necessarily tantamount to an offer to engage in collective bargaining" with the Complainant.

In its complaint with respect to the layoffs (Case X), the Complainant alleged in material part, as follows:

"8. That on December 5, 1972, the Union attempted to discuss the effects of the pending $80,000.00 on the number of fire fighters employed by the City of Brookfield Fire Department. The City Negotiator refused to discuss this item.

9. That on December 8, 1972 the city notified five fire fighters that they were terminated as of December 31, 1972.

10. That on December 13, 1972 the Union and City met again in negotiations. The City reiterated its position of refusing to discuss the termination of five fire fighters as of December 31, 1972.

11. That on November 13, 1972, December 5, 1972, and December 13, 1972, the City of Brookfield engaged in a prohibited practice in violation of Chapter 111.70(3)(a)4, refusal to bargain collectively over conditions of employment."

I would affirm paragraph 16 of the Examiner's Findings of Fact, stated as follows:

"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." 20/

The Examiner's Finding in this regard was based on an off-the-record discussion held at the outset of the hearing, and placed in the record as follows:

"I think the record should also show that the City indicated a willingness to discuss the items that were raised as subjects of bargaining in the Complaint; and the Complainant indicated that, notwithstanding the City's willingness, the Complainant would not, upon that basis, withdraw the Complaint unless reinstatement of the five terminated Fire Fighters were undertaken by the City."

20/ Neither party filed any exceptions to said Finding of Fact by the Examiner.

Therefore, from the pleadings, the statement of the Examiner, placed in the record with respect to the off-the-record discussion, and the non-excepted findings of fact, reflected in paragraph 16 of the Examiner's findings, I conclude that the Respondent did, in fact, during the hearing, offer to bargain collectively with the Complainant with respect to the layoffs and the impact thereof.

My colleagues have ordered the Respondent to reinstate the employes laid off and to make them whole for any loss of pay from the date of their layoff to the date of an unconditional offer of reinstatement by the Respondent, with the usual possible deductions from the amount of back pay. In support of this broad order my colleagues state as follows:

> "We find this remedy appropriate especially because the MERA, unlike the statutes that govern employment relations in the private sector, provides that employes may not strike in protest of employer refusals to bargain collectively, and therefore depends upon employer good faith, and the remedies provided by this Commission and the Courts for inhibition of such refusals. Of course, refusals to engage in collective bargaining defeat an essential intention of the statutory scheme."

I do not agree that the distinction between the rights of private employes and municipal employes should have any effect on the remedy, since under our Employment Peace Act, governing labor relations in the private sector, as well as under the National Labor Relations Act, governing labor relations affecting employes employed by employers whose volume of business meets the jurisdictional standards of the National Labor Relations Board, there is also a statutory duty to bargain in good faith, and in said statutes, there are procedures to remedy such unfair labor practices other than by resorting to self-help in the form of a strike.

My collegues state in the Memorandum that there was "a continuing prohibited refusal to bargain over the basic decision to lay-off." The record does not support such a conclusion. On the contrary, as noted earlier in this dissent, during the course of the hearing the Respondent offered to bargain on the lay-off decision and the impact thereof. What it did not do, was to accept the condition laid down by the Complainant, namely, to immediately reinstate the laid-off employes. There is no doubt in my mind that the primary effort of the Complainant was to accomplish the reinstatement of the laid-off fire fighters and then to bargain collectively with respect to the decision to the future layoff and the impact thereof, and not necessarily to continue litigation initiated by the filing of the complaint.

I believe that the appropriate remedy herein should be tempered by the practical facts and the situation involved, namely, (1) the absence of any anti-union animus, (2) the economic motivation for the layoffs and the awareness thereof by the Complainant, (3) the fact that the layoffs were in inverse order of seniority, (4) the willingness of the Respondent, expressed during the hearing, to bargain on the layoff decision and its impact, and (5) the refusal of the Complainant to engage in such bargaining until the laid-off employes were returned to active employment.

Therefore, under all the circumstances involved in this proceeding, it is the conclusion of the undersigned that the appropriate remedy herein must be tempered by the condition laid down by the Complainant during the hearing following the offer to bargain by the Respondent, namely, that the laid-off employes be reinstated. The policies set

[illegible] Wisconsin this 15th day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney, Chairman