STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL NO. 74, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, Complainant, vs. CITY OF SUPERIOR, Respondent.	Case XX No. 16417 MP-209 Decision No. 11560-B

Appearances:
Mr. Edward D. Durkin, 5th District Vice President, International Association of Fire Fighters, appearing on behalf of the Complainant.
Mr. William A. Hammann, City Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local No. 74, International Association of Fire Fighters, having, on January 11, 1973, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that the City of Superior, Wisconsin had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Superior, Wisconsin, on February 21, 1973; and, prior to any further action by the Examiner, the above named Complainant having moved to amend its complaint, alleging that the Respondent had committed additional similar prohibited practices subsequent to the close of the hearing in the instant matter; and the Examiner having, on May 24, 1973, issued an Order granting said motion to amend the complaint and re-opening the hearing in the matter; 1/ and hearing on said amended complaint having been held at Superior, Wisconsin on July 10, 1973; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local No. 74, International Association of Fire Fighters, hereinafter referred to as the Complainant, is a labor organization having its offices at 912 Central Avenue, Superior, Wisconsin; that Leonard T. Rouse is President of the Complainant; and that Arthur Morgan is Chairman of the Executive Board of the Complainant.

2. That the City of Superior, Wisconsin, referred to herein as the Respondent, is a municipal employer having its principal offices at City Hall, Superior, Wisconsin; that, among other municipal services, the Respondent maintains and operates a fire department; that Michael Kongevick is employed by the Respondent as the Chief of the Superior Fire Department; that Charles Ackerman is employed by the

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1/ Decision No. 11560-A

Respondent as its labor negotiator; and that Charles C. Denewith is the Mayor and Personnel Director of the Respondent.

3. That, at all times pertinent hereto, the Respondent has recognized the Complainant as the exclusive collective bargaining representative for all firefighting personnel employed by the Respondent; that the line personnel employed in said bargaining unit are assigned to ranks; that the rank of Pipeman is the lowest rank in the order of ranks; that the rank of Driver is a promotional rank above the rank of Pipeman; and that the rank of Captain is a promotional rank above the rank of Driver.

4. That, prior to any of the other events pertinent to the instant case, promotions from the rank of Pipeman to the rank of Driver, and from the rank of Driver to the rank of Captain, were made on the basis of competitive examination; that, during the period that such promotional practices were in effect, Morgan was promoted from the rank of Pipeman to the rank of Driver; that, thereafter, the Complainant and the Respondent negotiated changes in the promotional practices, whereby promotions from the rank of Pipeman to the rank of Driver were to be made on the basis of seniority and ability; and that, thereafter, promotions from the rank of Pipeman to the rank of Driver have been made on the basis of seniority and ability.

5. That, since at least the year 1969, Kongevick and Denewith have had discussions concerning the possibility of a reduction in the work force in the Superior Fire Department; that, during the year 1969, Denewith obtained information concerning fire department manpower practices from Kongevick and from officials of the Respondent's neighboring city, Duluth, Minnesota, for the purpose of making comparisons thereof; that, during the year 1971, Denewith conducted a survey among 14 municipalities, including the Respondent, for the purpose of making comparisons of manpower levels in various municipal services, including fire fighting service; and that the results of said survey indicated that the Respondent had greater fire fighting manpower per capita of population than the average of the cities surveyed.

6. That, for at least the years 1970 and 1971, the results of collective bargaining between the Complainant and the Respondent were incorporated into ordinances of the Respondent; that Ordinance No. 1798 for the year 1970 and Ordinance No. 1843 for the year 1971 specified that the work force of the Superior Fire Department consist of not more than 79 persons, including officers of any and all ranks; and that said Ordinances specified the number of employes to be assigned to each rank in said Department.

7. That the Complainant and the Respondent entered into negotiations concerning the wages, hours and conditions of employment of fire fighting personnel employed by the Respondent for the year 1972; that representatives of the Complainant and representatives of the Respondent met on approximately nine occasions prior to May 12, 1972 for the purposes of collective bargaining for the year 1972; that certain additional meetings were held in the presence of a mediator; that, during the course of a meeting held in or about December, 1971, Ackerman, acting on behalf of the Respondent, caused information to be communciated to the Complainant that an offer made by the Complainant for a wage increase of $32.00 per month would be looked upon favorably by the Respondent; that the Complainant declined to make such an offer and continued to assert a demand for a wage

increase of greater than $32.00 per month; and that the Respondent did not raise, at any time during the negotiations between the parties, the possibility that layoffs of members of the bargaining unit might result from or be related to the size of the wage increase negotiated between the parties.

8. That, on May 12, 1972, the Complainant directed a letter to the Wisconsin Employment Relations Commission, wherein it requested the Commission to initiate final and binding arbitration between the parties, pursuant to Section 111.77, Wisconsin Statutes, 2/ for the purpose of resolving the dispute existing between the parties with respect to collective bargaining for the year 1972.

9. That, on May 31, 1972, Kongevick, acting on orders issued to him on the same day by Denewith, directed letters to the six least senior employes in the bargaining unit, informing them that their employment with the Respondent was to be terminated effective July 1, 1972.

10. That, upon being advised of the letters referred to in paragraph 9, hereof, representatives of the Complainant approached Kongevick concerning the reasons for such terminations; that Kongevick referred the representatives of the Complainant to Denewith; that, thereafter, representatives of the Complainant approached Denewith concerning the termination notices referred to in paragraph 9, hereof; and that Denewith advised the Complainant that the termination of employes could be avoided if the pending negotiations and interest arbitration concerning the year 1972 could be settled between the Complainant and Ackerman on terms satisfactory to the Respondent.

11. That representatives of the Complainant held further meetings with Ackerman concerning collective bargaining for the year 1972; and that, on June 5, 1972, the Complainant gave Ackerman its written acceptance of a settlement for the year 1972 providing for a wage increase of $20.00 per month and the addition of one-half day to the annual list of paid holidays.

12. That, on June 6, 1972, the City Council of the Respondent enacted Ordinance No. 1884 establishing the salaries of members of the Superior Fire Department for the year 1972, in conformity with the agreement reached between representatives of the parties on June 5, 1972; that said Ordinance specified that the work force of the Superior Fire Department consist of not more than 79 persons, including officers of any and all ranks; that said Ordinance contained no specification of the number of employes to be assigned to each rank in said Department; and that, on the same date, Denewith directed a letter to Kongevick ordering the cancellation of the terminations previously announced by Kongevick and referred to in paragraph 9, hereof.

13. That, on June 7, 1972, Kongevick directed letters to the six least senior employes in the bargaining unit, informing them that their employment would not be terminated as indicated in the letters previously directed to those employes on May 31, 1972.

14. That, on May 16, 1972, Kongevick directed a letter to the Police and Fire Commission of the Respondent, wherein he advised said Commission of the promotion of Howard Matheson to the rank of Captain, subject to a one year probationary period prior to confirmation; and that, on July 11, 1972, Kongevick directed a letter to the Police

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2/ Section 111.77, Wisconsin Statutes, which provides for final and binding arbitration of "interest" disputes concerning law enforcement and fire fighting personnel was enacted by Chapter 247, Laws of 1971, effective April 21, 1972.

and Fire Commission wherein he advised said Commission of the promotion of Arthur Morgan and James Mooney to the rank of Captain, subject to a one year probationary period prior to confirmation.

15. That, during the month of August, 1972 or during the month of September, 1972, Kongevick prepared and submitted a proposed budget for the Superior Fire Department for the year 1973, wherein Kongevick proposed continuation of the 79 positions authorized for the Superior Fire Department for 1972 and prior years; that, as a result of deaths, retirements and resignations occurring during 1972, vacancies existed in the Fire Department at that time which had not been filled; and that Kongevick's proposed budget for the year 1973 acknowledged the existence of such vacancies.

16. That the Complainant made a demand on the Respondent for the preparation and execution of a written collective bargaining agreement between the parties, incorporating the previous agreement between the parties on the wages, hours and conditions of employment for the year 1972; that the parties entered into negotiations on the preparation of such an agreement; that a collective bargaining agreement was ratified and executed by the parties; that said agreement generally reflects the provisions of Ordinance No. 1884, referred to in paragraph 12, hereof; and that, as a result of specific negotiations thereon, said collective bargaining agreement makes no reference to the size or distribution of the work force of the Fire Department.

17. That, on December 5, 1972, the City Council of the Respondent held its annual public budget meeting; that, during the course of said meeting, Kongevick's proposed budget for the Fire Department was taken up and considered; and that the City Council took action to reduce the budget for the Fire Department by the elimination of the eight vacant positions then existing within said Department from the authorized work force of said Department.

18. That, on an unspecified date prior to December 14, 1972, the Complainant and the Respondent entered into negotiations for a collective bargaining agreement between the parties for the year 1973; that the parties were unable to resolve their differences; and that, on December 14, 1972, the Complainant filed a petition with the Wisconsin Employment Relations Commission, wherein it requested the Commission to initiate final and binding arbitration between the parties pursuant to Section 111.77, Wisconsin Statutes, for the purpose of resolving the dispute then existing between the parties with respect to collective bargaining for the year 1973.

19. That, on December 15, 1972, Denewith directed a letter to Kongevick, as follows:

> "On January 1, 1972, the Fire Department personnel consisted of 79 employees. During the course of the year (through death, resignation and retirements) your force was reduced by 8 employees leaving your Department with a balance of 71.
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> "In connection with the above, the Common Council in their budget studies took into consideration your total force of 71 employees and at the public hearing provided a budget in accordance therewith for the year 1973.
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> "Bearing in mind that we must not only complement the needs of the service as well as provide an efficient operation, I

hereby respectfully request that the following force re-allignment (sic) be made effective January 1, 1973.

"Number in Effect-1972		Reallignment (sic) for 1973
1	Chief	1
3	Assistant Chief	3
1	Master Mechanic	1
1	Desk Captain	1
15	Captains	15
1	Industrial Inspector	1
1	Fire Limits Inspector	1
3	Assistant Mechanic-Drivers	3
21	Drivers	12
2	Dispatchers	3
30	Pipemen	30
79		71

"With regard to the above, it is my understanding that your 1972 force provided for:

(a) 5 Engine Crews manned by 4 and on occasion 5-men.

(b) That Drivers were being furnished to the Assistant Chiefs.

"Because of the reduction in personnel, your 1973 Force will provide for:

(a) 5 Engine Crews manned by 4 men (1 Captain - 1 Driver and 2 Pipemen)

(b) The Drivers will no longer be furnished to the Assistant Chiefs.

(c) The Dispatcher force will be increased by 1 to provide more positive assurances to the public on fire calls.

"Please note that the 12 Drivers plus the 3 Assistant Mechanics who will also be Drivers when needed provides the actual number of Drivers required. As noted above, kindly place this reallignment into effect on January 1, 1973";

that, on December 28, 1972, Kongevick directed letters to nine employes in the bargaining unit, then holding the rank of Driver, informing them that they would be demoted to the rank of Pipeman, effective January 1, 1973; and that no prior notice of such realignment and demotions was given to the Complainant.

20. That, prior to January 1, 1973, three members of the bargaining unit holding the rank of Driver were assigned to act as chauffeur to the Assistant Chief on duty; and that, on and after January 1, 1973, the Assistant Chiefs were required to drive their vehicle themselves, and no employe of the Respondent was assigned to act as chauffeur to the Assistant Chiefs.

21. That, prior to January 1, 1973, three members of the bargaining unit holding the rank of Driver were assigned to drive a snorkel equipped fire truck housed at the Respondent's 6th Street fire hall.

22. That, prior to January 1, 1973, three members of the bargaining unit holding the rank of Assistant Mechanic were assigned to duty at the Respondent's 6th Street fire hall; that the rank of Assistant Mechanic is classified above the rank of Pipeman and is compensated at a rate of pay greater than that of the rank of Pipeman; that employes holding the rank of Assistant Mechanic are assigned to assist the Master Mechanic in making repairs to fire apparatus; and that, on and after January 1, 1973, the Assistant Mechanics were assigned the additional duty of driving the snorkel equipped fire truck housed at the Respondent's 6th Street fire hall.

23. That, prior to January 1, 1973, three other members of the bargaining unit holding the rank of Driver were assigned to duty at the Respondent's 6th Street fire hall; that said employes were compensated at the rate applicable to the rank of Driver for all work performed in the employ of the Respondent; that said employes were assigned to drive a tank truck or a grass fire truck whenever either of those units was dispatched on a fire call; that said employes were also assigned to drive a snow plow whenever snow plowing service was necessary at the fire halls operated by the Respondent; that, in the event that the snorkel equipped fire truck was dispatched on a fire call to which neither the tank truck nor the grass fire truck was dispatched, said employes were assigned to work as a Pipeman in the crew of the snorkel truck; and that, on and after January 1, 1973, said employes continued to perform the same job assignment and duties as were performed by them prior to January 1, 1973, but were compensated at the rate applicable to the rank of Driver only for days on which they actually drove equipment in the course of their duties.

24. That, on January 24, 1973, representatives of the Complainant met with Kongevick for the purpose of discussing rumors then current having to do with the possibility of additional force reductions in the bargaining unit; and that, during the course of said discussion, Kongevick confirmed the possibility that if the settlement between the parties for the year 1973 should exceed the budget then in effect, one fire truck might be taken out of service, resulting in the elimination of 12 or 13 positions in the bargaining unit.

25. That, on February 7, 1973, Kongevick announced that competitive examinations leading to the establishment of a new eligibility list for promotion to the rank of Captain would be given during the month of April, 1973.

26. That, on February 26, 1973, the Complainant directed a letter to Kongevick requesting negotiations concerning a change of Department policy concerning examinations for promotion to the rank of Captain; that the same subject had previously been the subject of negotiations between the Complainant and Kongevick, at which times the Complainant had urged the adoption of a "seniority and ability" system for promotion to the rank of Captain similar to that already in effect for promotions to the rank of Driver; and that Kongevick refused to meet with representatives of the Complainant for the purposes of collective bargaining on said subject.

27. That no employe in the aforementioned bargaining unit made application to take the examination for promotion to the rank of Captain; that such action constituted concerted activity among the members of the bargaining unit; that the absence of applications was discussed at the April, 1973 meeting of the Police and Fire

Commission of the Respondent; and that, on April 13, 1973, the "News Tribune" and "Evening Telegram" newspapers published in the Superior community published news stories concerning "an apparent boycott" of the promotional examination, which stories contained purported quotations from Rouse, Morgan and Kongevick.

28. That, shortly after the publication of the newspaper stories referred to in paragraph 27, hereof, Kongevick called Morgan into an office where, in the presence of another supervisor, he confronted Morgan with copies of said newspaper stories and demanded from Morgan an acknowledgement or denial of the statements attributed to Morgan therein; that Morgan acknowledged making the statements attributed to him; and that Kongevick advised Morgan that Morgan would be hearing from the Police and Fire Commission of the Respondent concerning the matter.

29. That, on May 3, 1973, representatives of the Complainant met with the Police and Fire Commission of the Respondent, at which time promotional procedures in the Fire Department were discussed; and that during the course of said discussions the representatives of the Respondent did not raise or mention the possibility of any demotions of employes holding the rank of Captain or of any other re-alignment of the work force in the Fire Department.

30. That, on May 4, 1973, Kongevick, acting on orders issued to him on the same day by Denewith, directed a letter to the Police and Fire Commission of the Respondent, informing that Commission that the promotions of Matheson, Morgan and Mooney to the rank of Captain were being withdrawn effective May 7, 1973, thereby eliminating the need for confirmation of those employes to the rank of Captain following their probationary period; that carbon copies of said letter were directed to Matheson, Morgan and Mooney; that the reason given for such action was re-alignment of the work force in the Fire Department; that Matheson and Mooney were demoted from the rank of Captain to the rank of Driver; that Morgan was demoted from the rank of Captain to the rank of Pipeman; that the reason given for the demotion of Morgan by two ranks was that twelve employes having more Department seniority than Morgan then occupied all of the positions available for the rank of Driver; and that no prior notice of such re-alignment and demotions was given to the Complainant.

31. That, on and after May 7, 1973, the work force in the Superior Fire Department continued to consist of 71 persons including officers of any and all ranks.

32. That, on or about May 4, 1973, Kongevick initiated personnel change notice forms concerning the demotions of Matheson, Morgan and Mooney; that, in the space provided on said forms for remarks, Kongevick inserted the statement: "Members reduction in rank is due to re-alignment within the Department effective May 7, 1973."; that Kongevick forwarded said change notices to Denewith for approval; that, thereafter, copies of said change notices were returned to Kongevick bearing the signature of Denewith in the space provided for approval and containing the following additional statement in the space provided on said change notices for remarks: "Caused by refusal of department employees to apply for captain vacancies."

33. That the reasons assigned by the Respondent for the elimination of three positions in the rank of Captain and for the demotions of Matheson, Morgan and Mooney were pretexts designed to

conceal the true nature and motivation of the Respondent's actions in that regard; that said positions were eliminated and said employes were demoted in reprisal for protected concerted activity in, on behalf of and by the Complainant; and that, by such re-alignment and demotions, the Respondent intended to, and in fact did, interfere with, restrain, coerce and discriminate against Matheson, Morgan and Mooney in the exercise of their right to engage in concerted activity.

34. That by Respondent's acts of interference, restraint, coercion and discrimination, as found heretofore, and by Respondent's unilateral changes of wages, hours and working conditions made without notice to or consultation with the Complainant, Respondent has refused, and continues to refuse, to bargain in good faith with the Complainant.

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

CONCLUSIONS OF LAW

1. That the City of Superior, Wisconsin is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act; and that, at all times material herein, Charles C. Denewith, Michael Kongevick and Charles Ackerman were agents of said municipal employer, acting within the scope of their authority.

2. That a unit of all firefighting personnel employed by the City of Superior, excluding supervisors, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Sections 111.70(1)(e) and 111.70(4)(d)(2)(a) of the Municipal Employment Relations Act; and that, at all times material herein, Local No. 74, International Association of Fire Fighters, has been, and is, the exclusive representative of the employes in said unit, for the purposes of collective bargaining within the meaning of Sections 111.70(1)(d) and 111.70(4)(d)(1) of the Municipal Employment Relations Act.

3. That the City of Superior, by issuing notices of termination to six members of the above described bargaining unit on May 31, 1972, interfered with, restrained and coerced municipal employes in the exercise of their right to engage in concerted activity within the meaning of Section 111.70(2) of the Municipal Employment Relations Act, and has engaged in, and is engaging in, prohibited practices within the meaning of Section 111.70(3)(a)(1) of the Municipal Employment Relations Act.

4. That the City of Superior, by discontinuing the provision of chauffeur service for Assistant Chiefs of the Superior Fire Department, and by eliminating three positions in the rank of Driver formerly assigned to such service, has acted within the authority reserved to it in Section 111.70(1)(d) of the Municipal Employment Relations Act and within the contemplation of the collective bargaining agreement existing between the parties, and has not, by such action, refused to bargain with Local No. 74, International Association of Fire Fighters, and has not committed prohibited practices within the meaning of Section 111.70(3)(a)(4) of the Municipal Employment Relations Act.

5. That the City of Superior, by merging the duties of the position of Assistant Mechanic with the position of Driver, and thereby eliminating three positions in the rank of Driver, has acted within the authority reserved to it in Section 111.70(1)(d) of the Municipal Employment Relations Act and within the contemplation of the collective bargaining agreement existing between the parties, and has not, by such action, refused to bargain with Local No. 74, International Association of Fire Fighters, and has not committed prohibited practices within the meaning of Section 111.70(3)(a)(4) of the Municipal Employment Relations Act; but that, by unilaterally expanding the job assignment of employes holding the rank of Assistant Mechanic, without notice to or consultation with Local No. 74, International Association of Fire Fighters, concerning the effects thereof, the City of Superior has refused to bargain with said Complainant and has committed, and is committing, prohibited practices within the meaning of Section 111.70(3)(a)(4) of the Municipal Employment Relations Act.

6. That the City of Superior, by eliminating three positions in the rank of Driver which formerly had been assigned to the tank truck and grass fire truck, and by unilaterally reducing the wages of employes without notice to or consultation with Local No. 74, International Association of Fire Fighters, has refused, and continues to refuse, to bargain with said Complainant and has committed, and is committing, prohibited practices within the meaning of Section 111.70(3)(a)(4) of the Municipal Employment Relations Act.

7. That the City of Superior, by discriminating against Howard Matheson, Arthur Morgan and James Mooney, by demoting them to discourage, and in reprisal for, the exercise of the right of municipal employes to engage in concerted activity in and on behalf of Local No. 74, International Association of Fire Fighters, has engaged in and is engaging in, prohibited practices within the meaning of Sections 111.70(3)(a)(3) and (1) of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the City of Superior, its officers and agents, shall immediately:

1. Cease and desist from:

(a) Threatening employes in the Superior Fire Department with loss of employment, for the purpose of discouraging their activities in and on behalf of Local No. 74, International Association of Fire Fighters, or any other labor organization.

(b) Unilaterally changing wages, hours or other terms or conditions of employment of employes in the Superior Fire Department, without prior consultation with Local No. 74, International Association of Fire Fighters, or any other labor organization the employes may select as their exclusive collective bargaining representative.

(c) Discouraging membership and activity of employes in and on behalf of the Complainant, Local No. 74, International Association of Fire Fighters, or any other labor organization, by demoting or otherwise discriminating against any employe in regard to hiring, tenure of employment or in regard to any term or condition of employment.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(a) Reinstate three positions in the rank of Driver assigned to the tank truck and grass fire truck, and make employes whole for any loss they may have suffered by reason of the Respondent's prohibited practices, by payment to each of them of the sum of money which such employe would have received as the difference between the salary rate appropriate for the rank of Driver and the salary such employe actually received in the rank of Pipeman, for the period that such employe would have held one of said three positions during the period beginning on January 1, 1973 and ending on the date said positions are reinstated pursuant to this Order.

(b) Reinstate three positions in the rank of Captain, reinstate Howard Matheson, Arthur Morgan and James Mooney to the rank of Captain, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of them of the sum of money which such employes would have received as the difference between the salary rate appropriate for the rank of Captain and the salary such employe actually received, for the period from the date of their demotion to the date of the reinstatement made pursuant to this Order.

(c) Upon request, bargain collectively with Local No. 74, International Association of Fire Fighters, as the exclusive representative of all employes in the aforesaid appropriate unit, with respect to rates of pay for employes holding the merged position of Assistant Mechanic - Driver, with respect to the effects of the elimination of six other positions in the rank of Driver, and with respect to all other wages, hours and conditions of employment.

(d) Notify all employes, by posting in a conspicuous place in each of the fire halls operated by the City of Superior, a copy of the notice attached hereto and marked "Appendix A". Such notices shall be signed by Charles C. Denewith

as Mayor and Personnel Director and shall be posted immediately upon receipt of a copy of this Order. Such notices shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

(e) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 25th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

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

1. WE WILL reinstate three positions in the rank of Driver (assigned to the tank truck and the grass fire truck), and we will make employes whole for any loss they may have suffered by reason of the prohibited practice engaged in by the City of Superior with respect to the elimination of those positions.

2. WE WILL reinstate three positions in the rank of Captain, we will reinstate Howard Matheson, Arthur Morgan and James Mooney to the rank of Captain, and we will make them whole for any loss they may have suffered by reason of the discriminatory demotion of those employes.

3. WE WILL NOT threaten employes with loss of employment or benefits previously enjoyed by them, to discourage activity in and on behalf of Local No. 74, International Association of Fire Fighters, or any other labor organization.

4. WE WILL NOT discourage membership in or activity on behalf of Local No. 74, International Association of Fire Fighters, or any other labor organization, by discharging, laying off, demoting, suspending or otherwise discriminating against any employe with regard to hiring, tenure of employment or any term or condition of employment.

5. WE WILL NOT make unilateral changes of wages, hours or other terms or conditions of employment without notice to and prior consultation with Local No. 74, International Association of Fire Fighters, or any other labor organization the employes may select as their exclusive representative.

6. WE WILL, upon request, bargain collectively with Local No. 74, International Association of Fire Fighters, as the exclusive representative of all firefighting personnel employed by the City of Superior, excluding supervisors, with respect to wages, hours and other conditions of employment.

All employes of the City of Superior are free to become, remain, or refrain from becoming, members of Local No. 74, International Association of Fire Fighters, or any other labor organization.

City of Superior

By ______________________________
Charles C. Denewith, Mayor and
Personnel Director

Dated this day of , 1974.

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND PROCEDURE

In its complaint filed on January 11, 1973, the Union alleged that 9 drivers were summarily demoted on December 28, 1972, without cause and without prior negotiations between the City and the Union. The Union alleged, further, that the demotions were made by the City to discourage the Union from using the final and binding arbitration process, and that a similar interference had occurred in May of 1972 when the City moved to terminate 6 employes following the filing of an arbitration request by the Union. The City filed an answer on February 1, 1973, wherein it denied all of the material allegations of the complaint. A hearing was held at Superior, Wisconsin on February 21, 1973. Both parties filed written closing arguments, the last of which was received on March 22, 1973. On May 21, 1973, the Union filed a motion to amend its complaint, alleging additional incidents of interference and refusal to bargain engaged in by the City to discourage the Union from the use of the final and binding arbitration and the prohibited practice provisions of the MERA. Included among those allegations was the claim that three Captains had been summarily demoted without cause and without prior negotiations with the Union. On May 23, 1973 the Examiner received a letter from the City, wherein it opposed amendment of the complaint on the basis that the incidents alleged in the amended complaint occurred after the close of the hearing on the original complaint. Overruling the City's opposition thereto, the Examiner issued an Order on May 24, 1973 granting the motion to amend the complaint, setting a date for the filing of an answer, reopening the hearing and setting a hearing date. The City filed an answer to the amended complaint on June 6, 1973, wherein it denied any violation and alleged that no permanently appointed Captains were demoted. A hearing was held at Superior, Wisconsin on July 10, 1973. The transcripts of the hearings were completed and mailed to the parties on December 12, 1973. Additional briefs were requested by the Examiner, and both parties filed briefs, the last of which was received on January 31, 1974.

During the course of the hearings the City objected to testimony concerning two matters not alleged in either the complaint or the amended complaint. The Union made offers to adduce evidence concerning a dispute which had arisen between the parties in July, 1972 concerning the assignment of firefighting personnel to paint certain of the City's fire halls, and concerning a dispute which had arisen between the parties some time later concerning the assignment of an employe named Archambeault to work as a Dispatcher. In neither case was the issue framed in the pleadings, and in both cases the Examiner sustained the objections of the City to the expansion of the allegations against it. Neither incident is considered in the decision in this case.

COLLECTIVE BARGAINING RELATIONSHIP AND UNIT

By a specific denial in its answer to the original complaint, the City raised an issue as to whether the Union is the "duly authorized collective bargaining representative" for fire fighting personnel employed by the City. The Union adduced evidence of a recognition statement contained in the Rule Book published by the City for the

Fire Department, of previous negotiations between the parties wherein the City has bargained with the Union as the representative of the fire fighters, and of previous litigation between the parties. The status of the Union as the exclusive collective bargaining representative of firefighting personnel employed by the City was the subject of a specific allegation in a complaint of prohibited practices filed by the City against the Union in a case which was pending at the time of the first hearing in this case, and of a specific finding of fact in the decision of that case. See: City of Superior, Case XVIII, Decision Nos. 11446-B and 11446-C (2/73). The City apparently intended to call attention to the fact that the Union has never been Certified as the representative of the employes following a representation election conducted by the Commission. However, the fact that the collective bargaining relationship originated from a volutary recognition of the Union by the City does not in any way diminish the capacity of the Union to assert rights under the statute, nor does it diminish the obligations imposed on the municipal employer.

No issue is raised concerning the propriety of the collective bargaining unit in which the Union claims to be the exclusive representative. That, too, has previously been the subject of a specific finding by the Commission, in City of Superior, Case XIX, Decision No. 16314 (3/73), where the Commission certified an impasse in bargaining between these parties in this bargaining unit.

ALLEGATIONS RELATING TO LAYOFF OF 6 EMPLOYES

Amendments to the Municipal Employment Relations Act (MERA) were enacted in April of 1972 providing, for the first time, for the resolution of collective bargaining disputes concerning fire fighting personnel through final and binding arbitration. Section 111.77(5) mandates that an arbitrator appointed under those procedures is limited to the selection of the final offer of one party or the other, unless the parties have specifically agreed to grant the arbitrator authority to make separate determinations on individual issues. These provisions had been on the statute books for less than a month when the Union invoked final and binding arbitration to resolve the ongoing dispute between the parties for 1972. The Union's "petition" was directed to the Commission in the form of a letter which related a history of 9 negotiation meetings and 2 mediation sessions without success.

At the time it invoked the arbitration process, the Union was demanding an economic package valued at $44.00 per month. At one point during the negotiations and mediation, the City conveyed the message that an economic package valued at $32.00 per month would be looked upon favorably, but the City had not included any money in its 1972 budget to provide for a pay raise for firefighters and was apparently relying on savings through attrition of the work force to cover any wage settlement. There is no indication of an agreement between the parties to permit the arbitrator to choose any figure other than the final offer of one party or the other.

The City did not seek to negotiate further with the Union or to advise the Union of the possible impact of an arbitration award in favor of the Union. Instead, acting under what it deemed to be a "managerial prerogative", the City sent notices on May 31, 1972 informing the 6 employes at the bottom of the Fire Department seniority list that they would be terminated on July 1, 1972. The Union learned of the notices from the employes and initiated further bargaining with an eye towards saving those jobs. Within a week the City's negotiator and the Union met and came to an agreement on an economic

package that was satisfactory to the City. Since the value of an additional 1/2 day per year holiday eligibility is not established in this record, the Examiner is unable to calculate the exact value of the economic package eventually agreed upon, but it appears likely that the value was less than the $32.00 per month previously indicated to the Union. Immediately after the settlement was reached, Mayor Denewith ordered the Fire Chief to rescind the terminations. There can be little doubt about the nature and motivation of the response made by the City to the Union's move for arbitration, and the following excerpt from the testimony of Mayor Denewith on direct examination by the City Attorney reveals that intent:

> "Q I show you a letter marked Exhibit No. 8. 1/ This letter would refer to the abolishment of six positions in the Fire Department and it was rescinded. It was rescinding the abolishment of six positions. Can you tell me why you sent this letter?
>
> A Yes, this was after an agreement was reached with Firefighters' Local No. 74 where, again, a wage increase was granted, I believe in the amount of $20 per month per employe and a fringe benefit of an additional half holiday. The reason for the original request to abolish six positions was because of the unknown factor of a delay of arbitration that was going on that would subsequently go on with regard to wage requests made by the Fire Department. I concluded, as Personnel Director and as Mayor that in order to sustain the salary accounts in full that in the Fire Department budget I would have to make sure that the final determination reached would not provide an excess of dollars in that budget and so I would have to, then, layoff people in October or, perhaps, November because we couldn't meet payroll. After the agreement was reached, however, for the wage increase and half holiday, I concluded that we could possibly meet payroll through the end of the year."

The Union contends that the layoffs were timed to coerce and intimidate the Union membership, and to restrain them from the exercise of their statutory rights. The City would justify its actions in this regard because of its budgetary constraints, and contends that no prohibited practice has been committed.

The Examiner finds in this situation a serious breakdown in communications which has resulted in legitimate information and concerns being conveyed to the Union and to the employes in a highly inappropriate manner. It would not be uncommon for an employer in the private sector and the union representing its employes to face a situation in which a wage increase for employes working in a marginal or money losing plant, operation or product line might precipitate the termination of operations and the layoff of employes. The private employer is generally free to raise prices at any time, but is under practical constraints of market conditions. The collective bargaining process is well-served if such situations are discussed openly at the bargaining table, so that the union and the employes might consider the impact of their present demands on their future employment. The

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1/ Exhibit 8, which was marked and received in evidence, is a copy of Denewith's letter to Kongevick ordering that the 6 terminations be rescinded.

situation in municipal employment is different, but comparable. Thus, while a municipal employer may theoretically possess almost unlimited authority to obtain revenue through taxation, practical political considerations weigh against any such use of authority and statutory budget procedures impose constraints on mid-year changes. The private employer's desire to remain in business generates concerns similar to those of a municipal employer faced with the necessity for continuity of municipal services such as fire fighting. The concerns expressed by Mayor Denewith on the witness stand in this proceeding could easily have been communicated to the Union either before or after the filing of the petition for final and binding arbitration. There is no indication that these 6 layoffs were related in any way to overall plans for reduction of the size of the work force. On the contrary, they were directly and intimately related to the size of the wage settlement between the parties for 1972. If informed of the City's concerns in this regard, the Union, as the designated bargaining representative of the employes, would then have had an opportunity to re-evaluate its position, to suggest alternatives, or to compromise the underlying dispute. It is interesting to note that when a rumor arose in January of 1973 concerning further layoffs, a discussion occurred between representatives of the Union and the Fire Chief and, while the Union may not have been happy with the information it obtained, that discussion did serve to communicate the possible ramifications of the then-current wage negotiations. In the latter situation the Union conveyed the message to the employes, who undoubtedly evaluated the possibility of 12 or 13 layoffs in making their decision on further proceedings. Their resolve was apparently unshaken, as the Commission's records indicate that the Union did proceed to final and binding arbitration, where it obtained an Award in its favor.

The termination notices directed to 6 members of the bargaining unit on May 31, 1972 had the effect of depriving the Union of opportunity for consideration of its position, and can only be viewed as coercive. The affected individuals went to their Union for help, and the matter was eventually moved back to the bargaining table. Although the matter was later settled at the bargaining table and the notices of termination were rescinded, those facts do not excuse the City's actions, which are found to be in violation of Section 111.70(3)(a)(1) of the MERA.

ALLEGATIONS RELATING TO DEMOTIONS OF DRIVERS

The Union asserts that the demotion of 9 Drivers and the elimination of their positions was also timed and motivated to interfere with the Union's use of the final and binding arbitration provisions of the statutes. The Union points particularly to the fact that Mayor Denewith's letter ordering re-alignment of the Department was sent to the Fire Chief one day after the Union's petition for final and binding arbitration for 1973 was filed with the Commission. The Union also asserts that the announcement of the demotions was timed so as to frustrate any attempt to bargain over the matter.

The City defends its re-alignment of the Fire Department on several grounds, the first of which is that the re-alignment had been under discussion for some time and that the actions taken in December of 1972 carried out an established plan. The City adduced evidence of earlier moves towards the re-alignment. The City asserts that re-organization is a managerial prerogative, but contends that

it won the consent of the Union for the changes in the 1972 collective bargaining agreement between the parties. Finally, the City contends that any failure on its part is excused by a failure of the Union to request bargaining.

Agreeing with the City and contrary to the Union, the Examiner finds that the preponderance of the evidence demonstrates that the re-alignment of the Fire Department which occurred in December of 1972 was the culmination of a lengthy program of study and implementation and was not related to the Union's action to invoke final and binding arbitration for 1973. The re-alignment process was set in motion as early as 1969, when Denewith made comparisons between fire truck crews in Superior and fire truck crews in Duluth, and when Denewith and Kongevick first discussed the possibility of a reduction in the size of the work force. Further studies conducted by Denewith in 1971 indicated to him that the Superior Fire Department was larger than the average of the 14 cities surveyed. Throughout these years, the City's ordinances specified a maximum work force of 79 in the Fire Department, and any discussions of or consideration for a reduction in the size of the work force was internal to the City management. When the City's negotiator and the Union came to agreement for 1972, the City immediately incorporated the terms of that agreement into an ordinance for 1972. However, the 1972 ordinance was different from its predecessors, in that it omitted any numeric distribution of the Fire Department work force into the various ranks or titles within the Department. The municipal labor law in effect prior to November 11, 1971 did not obligate a party to execute a collective bargaining agreement, and the results of collective bargaining between these parties for 1971 and prior years were reflected only in these City ordinances. The Union was, or should have been, aware of the contents of those ordinances.

The unilateral re-alignment program became a matter of bilateral negotiations late in 1972, when the Union exercised the right secured to it in the MERA and demanded that the City execute a collective bargaining agreement for 1972. Both parties looked to the City's ordinance for 1972 as a pattern for their agreement, and Denewith's testimony concerning the negotiations which occurred at that time is unrefuted. The collective bargaining agreement omitted both the maximum work force figure and the numeric distribution of employes to ranks, and the conclusion is inescapable that the Union bargained away any guarantees that a 79 member work force and a 21 member Driver rank would be continued. All of these events occurred well in advance of the impasse in bargaining for 1973 and the filing of the petition for final and binding arbitration.

Previous moves towards implementation of the reduction of work force and re-alignment of the Department are disclosed in the evidence, and are considered by the Examiner to be significant. In May of 1972, when bargaining for 1972 came to a climax, a small number of vacant positions existed in the Fire Department. Those positions remained unfilled, and by August or September of 1972, when the Fire Chief prepared his budget for 1973, additional vacancies existed, so that the proposed budget indicated 73 members in the work force and 6 vacant positions. By December of 1972, when the City Council acted on the budget request, a total of 8 positions were vacant. The City Council acted at a public hearing to cut the budget for the Fire Department for 1973 to reflect a maximum authorized work force of 71. The Union was, or should have been, aware of the existence of these vacant positions and the pattern of attrition. This situation was clearly within the contemplation of the 1972 collective bargaining agreement between the parties.

The line firefighting personnel employed by the City are divided into 3 platoons, with 1 employe from each platoon covering each work assignment established in the daily routine. Since none of the five regular "companies" operated by the City were to be taken out of service, it was predictable that a reduction in the size of the work force from 79 to 71 would require some re-alignments of schedules and assignments. At that time, each regular company was under the leadership of a Captain. The 15 Captains then employed filled all positions, so that neither a surplus nor a vacancy existed in the rank of Captain. Other positions, such as Master Mechanic and Assistant Mechanic, involve special skills and assignments. Due to promotions to the rank of Driver, all 8 of the vacancies existing in the Fire Department at the end of 1972 were in the rank of Pipeman. The creation of an additional position in the Dispatcher classification resulted in a total of 9 vacancies in the rank of Pipeman. The Union asserts that the re-alignment was inordinately aimed at employes holding the rank of Driver, and that the City had a duty to bargain with the Union before making any changes. The City contends that it had a right to re-align its work force unilaterally and that, in any case, the Union never sought to bargain on these matters. Because of the different circumstances relating to each of the 3 assignments eliminated from the daily routine in the Fire Department, the City's duty to bargain concerning the changes varies from case to case.

Chauffeurs for Assistant Chief

Three of the Driver positions eliminated in the December, 1972 re-alignment of the Fire Department were routinely assigned as chauffeurs for the Assistant Chiefs. The Assistant Chiefs are provided with a station wagon and cover the entire city. The employes assigned as Drivers drove the station wagon on responses to fire alarms and on whatever other trips the Assistant Chief made during the course of his work. When the City re-aligned the Fire Department it chose to entirely discontinue the provision of chauffeur service for the Assistant Chiefs.

The Examiner is aware of the Examiner decision in City of Brookfield (11489-A and 11500-A) 10/73, presently pending before the Commission on a petition for review, and of the discussion therein of the duty to bargain under the MERA in light of Libby, McNeill & Libby v. W.E.R.C., 48 Wis.2d 272 (1970). The Examiner in the instant case does not entirely agree with the analysis in Brookfield, where the Examiner attempted to develop language distinctions between the MERA and the Wisconsin Employment Peace Act, as, upon review of those provisions, the undersigned does not find evidence of a statutory purpose to establish a system of collective bargaining in the municipal sector different from that which had existed in the private sector for more than 30 years. Nevertheless, in Brookfield,the Examiner found that certain subjects "directly involve the Respondent's exercise of functions reserved to it by statute for the management and direction of the governmental unit," and recognized that a "City Council has the power to determine the degree of fire protection services to be provided to the governmental unit." The positions of chauffuer for the Assistant Chiefs would appear to be of a type vulnerable to extinction in the face of a force reduction such as that contemplated by the parties during 1972. The Examiner concludes that, in the instant case, the City had the right to unilaterally discontinue these Driver assignments, and that its duty to bargain was limited to the effects of that decision.

Merger of Positions of Driver and Assistant Mechanic

An employe holding the classification of Assistant Mechanic is assigned to each of the platoons in the Fire Department. These employes receive greater compensation than Pipemen and are called upon to assist the Master Mechanic when such assistance is needed. Prior to the December, 1972 re-alignment of the Department, the Assistant Mechanics responded to fire calls in the capacity of a Pipeman in one of the City's regular fire companies. Another employe assigned to the same fire company was designated and paid as the Driver for that company. On and after January 1, 1973, the Driver and Assistant Mechanic positions were merged, the former Drivers were reassigned or demoted, and the Assistant Mechanics thereafter acted as the Driver for their assigned company. Nothing in the record indicates that the City changed the rate of compensation for the merged position or bargained with the Union concerning such a change.

The 1972 collective bargaining agreement between the parties contemplated that there would be changes in the Fire Department as a result of attrition and the elimination of the specific numeric distribution of employes to positions. While the parties did not specifically bargain over the decision to merge these two positions, the Union clearly conceded considerable flexibility to the City for re-alignment purposes. Nothing in the collective bargaining agreement is called to the attention of the Examiner which would deprive the City of authority to direct and assign the work force, and indeed, determinations concerning the number and function of ranks would appear to be management function in this situation. Therefore, the Examiner concludes that the City had the right to merge the positions in question and to eliminate the 3 Driver positions.

The merger of the two assignments clearly had the effect of increasing the work load of employes holding the merged Assistant Mechanic/Driver positions. The City clearly had and has a duty to bargain with the Union concerning the effects of the merger of positions, and particularly concerning the effects of the increase in work load for the occupants of the merged positions. The City did not notify the Union of the impending re-alignment of the Fire Department, even though plans for that re-alignment were finalized in Denewith's letter of December 15, 1972 to Kongevick. The City offered no explanation for this lack of notice. Kongevick waited until December 28, 1972 to notify the affected employes of the merger and demotions, and the Union first learned of the re-alignment of the Fire Department when only three full days remained prior to the effective date of the re-alignment. Under these circumstances, any failure on the part of the Union to request bargaining is excused by the failure of the City to provide the Union with proper prior notice of its actions. The City is therefore ordered to bargain with the Union concerning the effects of the merger of positions on the employes holding the merged positions on and after January 1, 1973.

Drivers Assigned to Tank Truck and Grass Fire Truck

Three of the Driver positions eliminated in the December, 1972 re-alignment of the Fire Department were routinely assigned to the City's main fire hall, where the duties varied depending on the type of calls received or work required on a particular day. These employes respond to most calls in the capacity of a Pipeman in one

of the City's regular fire companies. When the Fire Department's grass fire truck is needed, these employes drive that apparatus. Should an alarm be turned in from an area not served by fire hydrants, a tank truck is dispatched to supply water for the regular fire companies, and these employes drive that truck. One of the Fire Department's vehicles (presumably the same unit referred to elsewhere as the grass fire truck) can be equipped with a snow plow and, when snow plowing service is needed, these employes drive the snow plow.

Mayor Denewith's December 15, 1972 letter to Chief Kongevick does not specifically mention the positions involved here. The Mayor only made specific reference to "5 Engine Crews", and his re-alignment order made no provisions for drivers for any of the Driver functions which these employes perform. The facts are, however, that the City continued to operate the tank truck, the grass fire truck and the snow plow on and after January 1, 1973, and that the same employes continued to operate the equipment. It is the uncontroverted testimony of one of those employes that his duties were not changed by the re-alignment of the Department. The re-alignment of the Fire Department is found to be, in the case of this assignment, a change in name only in which the City made no material change in the assignment or duties of the employes. The demotion of three Drivers who might otherwise have been assigned to this work has resulted in a change of pay rate for such employes. It is well established that a municipal employer may not make unilateral changes on wages and other subjects of collective bargaining unless it has fulfilled its duty to bargain with the Union representing the employes.2/ The City did not notify the Union of any proposal to change the rate for these employes, and has not fulfilled its bargaining obligation. The remedy in such a situation is to make the affected employes whole for the loss of pay they have suffered during the period of the City's prohibited practice, to reinstate the positions to the status existing prior to January 1, 1973, and to Order the City to negotiate any change with the Union prior to its implementation.

DUTY TO BARGAIN CONCERNING PROMOTIONAL PROCEDURES

The facts which form the background to the present dispute indicate that the parties have, from time to time, engaged in collective bargaining concerning procedures for promotions within the bargaining unit. At one time, the City made all promotions on the basis of competitive examinations. During that period Arthur Morgan scored high on a promotional examination and received promotion to the rank of Driver, thereby obtaining that rank ahead of several more senior employes in the bargaining unit. Subsequent to Morgan's promotion to the Driver rank, but prior to the onset of the present dispute, collective bargaining between these parties did result in an agreement that promotions made thereafter to the rank of Driver would be made on the basis of "seniority and ability". The record made here indicates that the Union has subsequently made attempts to negotiate a similar "seniority and ability" standard for promotions to the rank of Captain. Fire Chief Kongevick has met with the Union on this issue, although he is otherwise excluded from collective bargaining between the City and the Union. Kongevick has also met with the Union concerning the content of promotional examinations, and has acceded to a Union request that such exams be

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2/ City of Wisconsin Dells, (11646) 3/73.

based on the Fire Department's own training manual. Relations between the Union and the Chief deteriorated, so that in the early part of 1973 personalities were in conflict and the parties were questioning one another's veracity. Shortly after the Chief announced that new examinations would be conducted for promotion to the rank of Captain, the Union requested further negotiations on the proposal to have promotions to Captain made on the basis of seniority. At this point the Chief refused to meet with the Union to bargain on the issue. The Union later met with the City's Police and Fire Commission on the issue. The Union has not specifically alleged that Chief Kongevick's refusal to discuss the subject of promotions was a refusal to bargain within the meaning of the statute, and this discussion is not included for the purpose of a finding of a violation. Rather, these facts are reviewed here because they clearly demonstrate that the subject of promotion was a subject of collective bargaining between these parties. Although the Union officers made statements to the press disavowing Union responsibility for the boycott of the promotional examination, other evidence of record indicates that the boycott was the result of concerted activity among the employes. In view of the fact that the promotional examinations were themselves a subject of collective bargaining between the parties, and nothing is indicated which would make such a boycott illegal, the Examiner concludes that the employes were engaging in protected concerted activity when they refused to participate in the examination for promotion to the rank of Captain.

DEMOTIONS OF PROBATIONARY CAPTAINS

Captains Matheson, Morgan and Mooney were "promoted" by Chief Kongevick in letters addressed to the City's Police and Fire Commission on May 16, 1972 and July 11, 1972. These promotions were made subject to the usual one year probationary period, and none of these employes have been "confirmed" in the rank of Captain by the Police and Fire Commission. Little is known about the Union activity of Matheson and Mooney, but the record reveals that Morgan is the Chairman of the Union's Executive Board. In his capacity as a Union leader, Morgan has been a vigorous advocate on behalf of the Union's position, particularly as to the adoption of a seniority preference for promotion to the rank of Captain. Morgan made statements to representatives of the press following the April, 1973 meeting of the Police and Fire Commission, and Chief Kongevick took umbrage with the contents of the published reports. In the encounter which followed, Kongevick made a statement which can easily be interpreted as a threat and which was taken by Morgan as a threat to his rank or employment. Union representatives met with the Police and Fire Commission again on May 3, 1973, and on the following day Kongevick demoted Matheson, Morgan and Mooney. The Union contends that the demotions of these employes were made in reprisal for activity on behalf of the Union and to discourage the Union from the exercise of its rights under the prohibited practice provisions and the final and binding arbitration provisions of the MERA. (The parties were preparing to proceed to hearing before an arbitrator appointed to determine the interest dispute between the parties for 1973 in the proceeding initiated by the Union on December 14, 1972.) The City alleges that the appointment and confirmation of employes to the rank of Captain is strictly within the jurisdiction of the Police and Fire Commission. The City also contends that elimination of

positions in the rank of Captain was within the scope of the re-alignment contemplated in previous bargaining between the parties, and that the Union never made a timely demand to bargain concerning these matters.

As an initial proposition, the Examiner finds that the probationary status of an employe is irrevelant in determining whether action against that employe was motivated by a desire to discourage lawful concerted activity. See Green County (10166-B, C) 7/71, where the discriminatory discharge of a probationary employe was found to be in violation of the comparable prohibited practice provisions of the statute which preceeded the MERA. A parallel is found in public school situations where, outside of Milwaukee County, public school teachers generally have no employment security from year to year except such as is provided in a collective bargaining agreement. Nevertheless, the proposition is well established that a school board may not deny a teacher employment for a subsequent year for reasons which discriminate against the exercise of lawful concerted activity. Muskego-Norway Jt. School Dist., (7247) 8/65; affirmed 35 Wis.2d 540 (1967). In Chief Kongevick's own words, Matheson, Morgan and Mooney were promoted during mid-1972. They functioned as Captains and received compensation from the City as Captains from the dates of their promotions through May 6, 1973. They were subject to confirmation in the rank of Captain following a probationary period, but it is also established that a Police and Fire Commission must act consistently with the rights and obligations established by the MERA. See City of Sun Prairie (11703) 9/73. Whether it is termed a demotion or something else, the action taken by the City concerning these employes on May 4, 1973 clearly had an adverse effect on their employment situation. If any part of the City's motivation for those changes was an anti-union animus, then those changes violated the prohibited practice provisions of the MERA.3/

The Examiner is completely satisfied that the evidence of record in this case demonstrates that the reasons given by the City for the demotions of Matheson, Morgan and Mooney were pretexts and that those demotions were actually calculated to discourage the membership of the Union from exercising the rights secured by the MERA. The City has not offered any evidence of poor work or misconduct on the part of any of the probationary Captains which would constitute "cause" for their demotion or the denial of their confirmation in the rank of Captain. The principal defense asserted by the City is that these changes were a part of a continuing re-alignment of the Fire Department, but that contention is found to be inconsistent with the facts.

To be sure, a reduction in the size of the work force did occur in 1972 through attrition, and the City's budget for 1973 provided for only 71 positions in the Fire Department. However, Mayor Denewith's letter of December 15, 1972 ordering re-alignment of the Fire Department to accommodate the 71 member work force provided for "5 Engine Crews manned by 4 men (1 Captain - 1 Driver and 2 Pipemen)", and the 71 member work force remained in effect on and after May 7, 1973 when the Captain demotions became effective. All 15 positions for line Captains were occupied in February, 1973, when Kongevick announced that promotional examinations would be conducted in April of 1973. The City has had a practice of maintaining

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3/ City of Wisconsin Dells, supra.

eligibility lists for only 2 years following the examination, and the existing list was due to expire in June of 1973. However, if further re-alignment of the Fire Department and the elimination of Captain positions had been under consideration in February, 1973, there would have been little or no reason for the City to push forward with the creation of a new eligibility list. The Examiner is persuaded that the demotions of Matheson, Morgan and Mooney were the result of an isolated action which was not a part of any overall plan or program of re-alignment such as that engaged in by the City between 1969 and 1972.

Morgan had been a Union activist for some time, and relations between Morgan and the Chief were somewhat strained. The collective bargaining relationship between these parties has been marked by considerable litigation, and the relationship between Morgan and the Chief would appear to reflect the relationship between the Union and the City. Chief Kongevick testified in this proceeding that he had considered taking up Morgan's activities with the Police and Fire Commission for possible disciplinary action, and that such considerations were the motivation for his statements to Morgan when he called Morgan in and confronted him with the newspaper stories. Kongevick later consulted with his own attorney and was advised against taking action against Morgan or the Union. No action was taken, but the incident reveals Kongevick's attitude towards Morgan and the Union. The record also indicates that Chief Kongevick was upset about the boycott of the promotional examination, and this too points to the existence of an anti-union motivation for his subsequent conduct.

Morgan's high scores on previous promotional examinations had permitted him to attain the rank of Captain ahead of several more senior employes. If Morgan alone had been demoted, he would have had sufficient seniority to bump a junior employe from the Driver rank. Obviously, action directed only at Morgan would have strongly inferred discrimination for union activity, while demotion of other employes at the same time appears, at least superficially, to conceal such a motivation. If Mooney had been demoted with Morgan, both would have had sufficient seniority to bump into positions in the Driver rank. However, when all three probationary Captains were demoted, only Matheson and Mooney had sufficient seniority to bump into positions in the Driver rank, and Morgan was therefore given a double demotion to the rank of Pipeman. Were the demotions otherwise proper, the double demotion of Morgan would comply with the seniority and ability system for promotion previously negotiated by the parties. However, with the other evidence of record taken into consideration, it appears that the demotion of 3 employes was made particularly to obtain a more severe result in the case of the Union activist.

If it was not clear from the foregoing that the City had engaged in a prohibited practice, the change notices on file for the demotions in question here should serve to convince even the most skeptical observer. As filled out and submitted by Kongevick, those notices appear innocent enough. However, the notices came back to Kongevick from Denewith with Denewith's signature and the additional statement: "Caused by refusal of department employees to apply for captain vacancies." It is difficult, in the first place, to find any logic for the proposition that the refusal of one class of employes to apply for promotion should result in the demotion of another class

of employes who had previously applied for, qualified for and been promoted to the promotional position. Beyond the illogic of the statement, it reveals clearly that the action taken against Matheson, Morgan and Mooney was taken in reprisal for protected concerted activity among employes in the bargaining unit. The City does not deny the existence of these statements in its personnel records, nor does it offer any alternative explanation or interpretation. The Examiner has therefore concluded that the demotions were calculated to discourage the exercise of rights of municipal employes, and such conduct is clearly prohibited by Sections 111.70(3)(a)(3) and (1) of the MERA. The remedy for such a violation of the statute is reinstatement of the affected employes and a make-whole order.

Dated at Madison, Wisconsin this 25th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner