STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY FIRE FIGHTERS LOCAL 141, Complainant, vs. CITY OF GREEN BAY, Respondent.	Case XLIII No. 17559 MP-317 Decision No. 12411-A

Appearances:

Mr. Edward Durkin, Fifth District Vice President, International Association of Fire Fighters, appearing on behalf of Green Bay Fire Fighters Local 141.

Mr. Richard Greenwood, City Attorney, appearing on behalf of the City of Green Bay.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Green Bay Fire Fighters Local 141, having on January 14, 1974, filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that the City of Green Bay had committed a prohibited practice within the meaning of the Municipal Employment Relations Act; and the Commission having appointed staff member Amedeo Greco 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 Green Bay, Wisconsin, on January 30, 1974, at which time the parties were accorded an opportunity to present witnesses and to adduce evidence; and the parties thereafter having filed briefs; and the Examiner having considered the evidence and arguments, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Green Bay Fire Fighters Local 141, herein Complainant, is a labor organization; that Richard Katers is President of said Complainant; and that at all times material hereto, Charles Ault and Jim Walk were members of Complainant's collective bargaining committee.

2. That the City of Green Bay, Wisconsin, herein Respondent, is a Municipal Employer having its principal offices at City Hall, Green Bay, Wisconsin; that among other municipal services, Respondent maintains and operates a fire department; that Gerald Selissen is employed by Respondent as the Chief of the Green Bay Fire Department; that Donald Vander Kelen is employed by the Respondent as its labor negotiator; and that Thomas Atkinson is the Mayor of the City of Green Bay.

3. That Respondent has recognized Complainant as the collective bargaining representative for certain of Respondent's firefighting personnel; that the parties executed a collective bargaining agreement, apparently effective from January 1 through December 31, 1973; and that, as noted in greater detail below, the parties conducted collective bargaining negotiations throughout the fall of 1973 1/ for the purpose

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1/ Unless otherwise noted, all dates hereinafter refer to 1973.

of agreeing to a new collective bargaining agreement for the following year.

4. That Respondent learned in mid 1973 that its municipal budget would have to comply within certain budgetary limits established by the State of Wisconsin; that in order to comply with these limitations, Respondent, through Mayor Atkinson, decided in late summer that there would have to be personnel reductions in some of Respondent's municipal departments, including its Fire Department; that Atkinson told Chief Selissen on or about September 18 or 19 of the foregoing budgetary problems and stated that because of these problems, six firefighters would have to be laid off in order to realize a cost savings in the Fire Department; that Selissen responded that the Fire Department would shortly have two vacancies through attrition and that, therefore, only four firefighters would have to be laid off; that Mayor Atkinson was agreeable to this procedure; that immediately thereafter, Selissen orally advised the Department's four least senior firefighters that they would be laid off in the future; that Selissen did not advise Complainant of these proposed layoffs; that Respondent adopted its municipal budget in late November and that said budget contained four less firefighter positions than the previous budget.

5. That the parties met in September and October regarding negotiations for a new collective bargaining agreement; that Respondent there mentioned that there was a possibility that some municipal employes (without specifying which ones) might have to be laid off in the future; and that Respondent at those meetings gave no specifics regarding any possible layoffs.

6. That Respondent and Complainant also met on or about November 14 for the purpose of engaging in collective bargaining negotiations for a new contract; that Complainant's bargaining team there consisted of President Katers and firefighters Ault and Walk; that attending for Respondent were labor negotiator Vander Kelen, Administrative Assistant Desmond McCullagh, and, for part of the time, Mayor Atkinson; that during said negotiations, a Complainant representative stated that he had heard that four firefighters would be laid off and that he wanted to discuss that matter with Respondent; that Vander Kelen replied that the parties were in a bargaining session and that if Complainant wanted to discuss the layoffs, the parties would "have to stop bargaining and do this informally," that, pursuant to Vander Kelen's demand, the parties did so; that Vander Kelen then told Complainant that the layoffs were necessitated by the budget; that the Complainant responded that it wanted to file a grievance over the matter, to which Vander Kelen replied that the contract did not cover layoffs; that one of Complainant's representatives stated that there was an excess in the budget of approximately $200,000 and that, therefore, there was no need to lay off the four men involved; that Vander Kelen, in effect, disputed that such an excess existed and informed Complainant that "we couldn't bargain the budget of course"; and that at no time during this meeting did Vander Kelen ever inform Complainant that Respondent would be willing to bargain with the Union regarding the layoffs.

7. That the parties thereafter met again on or about December 11, for the purpose of negotiating a new labor contract; the details of which are not clear.

8. That the parties similarly met on December 19; that attending the December 19 meeting were Katers, Ault and Union representative Durkin for Complainant, Vander Kelen and McCullagh for Respondent, and a mediator from the Commission's staff; that Complainant at the time attempted to bargain over the layoffs in issue; that in response thereto Vander Kelen testified that he said:

> "Well, we said immediately in an opening statement that we weren't in a position to bargain the effects of it. The reason being the state budget. There was never any question about it after that."

9. That Complainant on December 19 also protested the fact that it had not yet received official notice from Respondent regarding the proposed layoffs; that, thereafter, by letter dated December 20, Chief Selissen advised each of the four firefighters slated for layoff that:

> "This is to inform you of termination of your employment with the Green Bay Fire Department as of December 31, 1973.
> You will be placed back on the eligible list and recalled when openings occur."

10. That in response, Katers advised Respondent by letter dated December 22 that:

> "This is to put you on official notice that if the City of Green Bay terminates the employment of four members Jack Ollman, Michael Lison, Roger Truckey and Gerald Scheller that Local 141 will have no other alternative but to file a prohibitive practice against the city for that action.
> We are sure you gentlemen know that the matter of these men being laid off is a subject of the current negotiations of the parties. This problem could be better cleared up at the bargaining table rather than forcing the city to pay lost wages to the men who are to be laid off."

11. That by letter dated December 27, Vander Kelen informed the Union that:

> "We are in receipt of your letter of December 22, 1973 wherein you made certain statements which do not represent the facts as we know them. This letter has been referred to the undersigned.
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> We have, and continue to be willing to, discuss the reasons for the necessity of city wide layoffs in view of the rigid State of Wisconsin Budget requirements.
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> As we understand present negotiations you have asked for manning limitations and an attrition procedure, subjects which are now into compulsory arbitration proceedings.
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> The city is always willing to bargain in good faith on all subjects required by the law, and as you know has historically met and conferred on many subjects. We would hope that enthusiasm for some particular issue would not destroy this relationship."

12. That Respondent thereafter laid off employes Jack Ollman, Michael Lison, Roger Truckey and Gerald Scheller on January 1, 1974.

13. That at all times material herein, Respondent has refused to bargain with Complainant regarding its decision to lay off the above-mentioned firefighters.

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

CONCLUSION OF LAW

That Respondent has refused, and is refusing, to bargain with Complainant over its decision to lay off certain firefighters and that, therefore, Respondent has committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act, herein MERA.

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

ORDER

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

1. Cease and desist from:

   (a) Refusing to bargain with Complainant regarding its decision to lay off firefighters within the collective bargaining unit.

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

   (a) Offer to reinstate laid-off employes Jack Ollman, Michael Lison, Roger Tuckey and Gerald Scheller to their former or substantially similar 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 Respondent's prohibited practice, by payment to each of them of a sum of money, including all benefits, which they would have received from the time of their termination to the date of an unconditional offer of reinstatement, less any amount of money that they earned or received that they otherwise would not have earned. Backpay, if any, shall be computed on a quarterly basis in the manner described below.

   (b) Upon request, bargain collectively with Complainant regarding any proposed decisions to lay off bargaining unit personnel.

   (c) Notify all employes, by posting in conspicuous places in its offices where employes are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

   (d) 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 27th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Amedeo Greco, Examiner

APPENDIX A

Notice to All 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:

1. WE WILL immediately offer to reinstate employes Jack Ollman, Michael Lison, Roger Truckey, and Gerald Scheller to their former or substantially equivalent positions and we will make them whole for any loss of pay they suffered as a result of their layoffs.

2. WE WILL, upon request, bargain with Green Bay Fire Fighters Local 141 about any proposed decision to lay off bargaining unit personnel.

3. WE WILL NOT in any other or related matter interfere with the rights of our employes, pursuant to the provisions of the Wisconsin Employment Relations Act.

CITY OF GREEN BAY

By_____
Thomas Atkinson, Mayor

Dated this_____day of_____, 1974.

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The primary issue herein is whether Respondent unlawfully refused to bargain with Complainant regarding its decision to lay off four firefighters. Complainant alleges that Respondent refused to bargain with it about that decision and that Respondent's refusal to do so constituted an unlawful refusal to bargain under Section 111.70(3)(a)4 of MERA. Respondent, on the other hand, denies any such impropriety and affirmatively maintains that it did bargain with Complainant over this matter and that, as a result, the complaint should be dismissed. 2/

Inasmuch as the parties disagree as to whether bargaining in fact occurred, and as a resolution of that factual issue is a prerequisite for deciding the legal issue herein, it is necessary to first consider whether Respondent bargained with Complainant regarding its decision to lay off the four firefighters.

In resolving this factual issue, the undersigned has been presented with some conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings based in part on such factors as the demeanor of the witnesses, material inconsistencies, and inherent probability of testimony, as well as the totality of the evidence. In this regard, it whould be noted that any failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered: it has. Accordingly, to the extent that such credibility conflicts exist, and based upon the foregoing factors, the facts hereinafter noted reflect the undersigned's resolution of those conflicts.

As noted above in the Findings of Fact, Respondent laid off its four least senior firefighters on January 1, 1974. Prior thereto, Respondent, through Chief Selissen, had advised those four firefighters in September that they would definitely be laid off. Despite this early September communication to the affected employes, Respondent admittedly did not formally advise Complainant in writing of the layoffs until December 20.

With respect to verbal communications between the parties throughout that four-month span, the record establishes that the subject of the layoffs did arise in the collective bargaining negotiations for a new contract which took place in that period between the parties. The record further establishes, however, that although this issue did arise in that context, Respondent steadfastly refused to bargain about its decision to lay off the firefighters.

Thus, testifying as to when Respondent informed Complainant that the layoffs were definite, Respondent's labor negotiator Vander Kelen

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2/ Respondent makes no claim that the issue herein must be deferred to the contractually established grievance-arbitration procedure. Indeed, Respondent has insisted that the layoffs herein are not subject to the greivance-arbitration procedure because, in Vander Kelen's words, "There is nothing in the labor agreement for any grievance procedure on layoffs . . . the labor agreement is absolutely silent on layoffs." Accordingly, and inasmuch as both parties have indicated that they desire to have the issue herein decided in the instant forum, and because the Union does not claim that any contractual provision has been violated, the undersigned finds that deferral to arbitration in any event would be inappropriate.

stated that "I don't know because I wouldn't tell them that in negotiations. When the Union knew about the definite layoffs would have to come from the Chief." Going on, Vander Kelen said that "as a negotiator, I don't handle any administrative functions." For his part, Chief Selissen at first indicated that this subject arose in an early September bargaining meeting for a new contract when, in his words, Vander Kelen "hinted" at a layoff of municipal employes "in an around and about way he usually tells you what is going on in the City." Later, however, Selissen modified this testimony by stating that the early September meeting had only involved mention of a general layoff of municipal employes and that he, Selissen, did not actually know about the specific firefighter layoffs until September 18 or 19, when he was so advised by Mayor Atkinson. Selissen made no claim in his testimony that he thereafter advised Complainant of this crucial fact. Accordingly, and as the record does not show otherwise, it appears that Respondent did not advise Complainant of the specific details of the layoff until its December 20 letter to that effect.

In addition to failing to so inform Complainant, the record further establishes that Respondent misled Complainant about this matter. Thus, commenting on the oral discussions he had with Complainant throughout this period, Vander Kelen stated that he advised Complainant of the "possibility" of layoffs and that at one time he used the word "probability". However, inasmuch as Respondent knew by September 18 or 19, at the latest, that the four firefighters would definitely be laid off, and since Respondent then immediately took steps to implement this decision, it is obvious that Vander Kelen's admitted use of the word "possibility" in subsequent meetings was an inaccurate description of Respondent's true intentions and actions, which at that point had in fact become finalized.

It is within this framework that at all times material hereto Respondent refused to bargain with Complainant regarding the layoffs in issue. It did so primarily on the ground that the layoffs constituted a non-mandatory subject of bargaining. This refusal to bargain is most evident at the November 14 meeting between the parties which entered on collective bargaining negotiations for a new contract.

There, during the course of those negotiations, an unidentified Complainant negotiator stated that he had heard that some firefighters were going to be laid off and that Complainant wanted to discuss the layoffs. According to Chief Selissen, Vander Kelen then replied "If you want to discuss the layoffs, we'll have to stop the bargaining and do this informally." Pursuant to Vander Kelen's demand, the parties thereafter closed their bargaining session and informally discussed the layoffs. There, Vander Kelen stated in essence that the layoffs were necessitated by the budget, that the contract did not cover layoffs, and that Complainant could not bargain over the budget. Throughout that meeting, Vander Kelen refused to give any indication at all that Respondent was willing to bargain about its lay-off decision.

The record further establishes that Respondent thereafter continued 3/ its refusal to bargain over the layoffs at a subsequent December 19 meeting which again centered on negotiations for a new collective bargaining agreement. Vander Kelen acknowledged that Union representative

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3/ Although the parties also met on or about December 11, the record fails to establish the exact contents of that meeting. Accordingly, it is not discussed herein.

Durkin at that meeting indicated that he wanted to bargain over the layoffs in issue. As of the December 19 meeting, however, Respondent admittedly had placed itself in a position where it was unable to bargain about those layoffs. For it appears that by formally adopting its municipal budget in November, prior to the time that Respondent asserts it bargained with Complainant in the subsequent December meeting, Respondent had little, if any, flexibility toward the bargainability of the layoffs. Whatever the reason, it is undisputed that, in response to Durkin's request that Respondent bargain over the layoffs, Vander Kelen informed Durkin on December 19 that:

> "Well, we said immediately in an opening statement that we weren't in a position to bargain the effects of it. The reason being the state budget. There was never any question about it after that."

In light of this admission, plus the aforementioned considerations, the record establishes, and I so find, that Respondent as a factual matter refused to bargain with Complainant at all times material herein regarding its decision to lay off the four firefighters in question. That being so, it is therefore necessary to determine whether that factual refusal to bargain was violative of the duty to bargain requirement contained in Section 111.70(3)(a)4 of MERA.

On this point, Respondent asserts that it was entitled to effectuate the layoffs herein by virtue of the management rights clause in the 1973 contract which provides:

> "Article 3 -- Management Rights
>
> (A) The City retains all rights, powers or authority that it has prior to this contract as modified by this contract.
>
> (B) The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent of purposes of this Agreement."

In considering this claim, the undersigned notes that management rights clause plainly refers only to the contractual rights and obligations which both parties possess as a result of their collective bargaining agreement. Thus, for Respondent, the clause speaks of "all rights, powers or authority that it has prior to this contract as modified by this contract." (Emphasis added.) Similarly, with respect to Complainant, the clause provides that Respondent will not "undermine the Union or . . . attempt to evade the provisions of this agreement or to violate the spirit, intent, or purpose of this agreement." (Emphasis added).

Couched in those terms, then, the management rights clause in its entirety contains no language which reasonably can be construed to constitute a waiver of Complainant's independent statutory rights which are set forth in MERA. In the absence of such a waiver, and because Complainant here is alleging a breach of a statutory - not contractual-right, the undersigned finds that the above-noted contractual language does not support Respondent's claim that Complainant has waived whatever statutory right it may have to bargain over the layoffs. 4/

4/ See City of Brookfield (11406-A, B) 9/73. aff. Waukesha Co. Cir. Ct. 6/74.

In the absence of such a contractual waiver, it is necessary to determine whether a municipal employer is required under Section 111.70(3)(a)4 of MERA to bargain with a labor organization regarding its decision to lay off bargaining unit personnel.

With respect to that issue, it appears that the Commission has recently ruled under similar facts that such a duty does exist. Thus, in City of Beloit 5/ the bargaining representative there proposed contractual language covering layoffs which provided:

> "If necessary to decrease the number of teachers by reason of a substantial decrease of pupil population within the school district, the governing body of the school system or school may lay off the necessary number of teachers, but only in the inverse order of the appointment of such teachers. No teacher may be prevented from securing other employment during the period he is laid off under this subsection. Such teacher shall be reinstated in inverse order of their being laid off, if qualified to fill the vancancies (sic). Such reinstatement shall not result in a loss of credit for previous years of service. No new or substitute appointments may be made while there are laid off teachers available who are qualified to fill the vacancies." (Emphasis added).

The first part of this proposal, underlined above, provided, then, that layoffs could be effectuated only in certain circumstances, i.e., when there was a "substantial decrease of pupil population within the school district . . ." Commenting on that particular proposal, the Commission in Beloit, supra, found that it provided the "basis for layoffs" and elsewhere ruled that that specific layoff proposal, as well as the other proposals concerning layoffs and recall, primarily "relate to wages, hours and working conditions . . ." Going on, the Commission held that "matters primarily relating to wages and conditions of employment . . . are not reserved to the management and direction of the [municipal employer] . . . within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act, and therefore [the municipal employer] . . . [is] required to engage in collective bargaining, as defined in said section of the Act, on such matters . . . ." In sum, therefore, it appears that the Commission has ruled that a municipal employer does have a duty to bargain with a union over its proposed decision to lay off bargaining unit personnel.

This ruling that layoffs are subject to collective bargaining is consistent with the Commission's prior determination in the Sewerage Commission of Milwaukee 6/ . There, prior to enactment of the duty to bargain requirement contained in MERA, the employer proposed to lay off certain employes without first bargaining with the union regarding those layoffs. The Commission dismissed the refusal to bargain allegation filed by the union on the grounds that there was no evidence to indicate that the employer had refused to bargain over the layoffs after November 11, 1971, the operative date that the duty to bargain requirement first became effective in MERA. However, in so ruling, the Commission nonetheless specifically noted that the employer's decision to lay off "affected [the] wages, hours, and working conditions . . ." of bargaining unit personnel. Coupled with its ruling in Beloit, supra, this finding by the Commission indicates that municipal employer are required to bargain over layoffs under the duty-to-bargain proviso contained in Section 111.70(3)(a)4 of MERA.

5/ Decision No. (11831-C) 9/74.

6/ Decision No. (11228-A) 10/72.

Accordingly, and because layoffs do manifestly affect "wages, hours and conditions of employment "under Section 111.70(1)(d) of MERA, and as such constitute a mandatory subject of bargaining, the undersigned finds that Respondent herein violated Section 111.70(3)(a)4 of MERA when it steadfastly refused to bargain with Complainant regarding its decision to lay off the four firefighters in question.

To remedy that conduct, the undersigned further finds that the laid-off employes should be offered reinstatement to their former or substantially equivalent positions and that they should be awarded backpay for any loss of pay they may have suffered as a result of Respondent's refusal to bargain. That remedy is needed herein to restore the status quo ante which preceded Respondent's refusal to bargain and to fully compensate the employes affected by Respondent's unlawful conduct. Such a remedy is consistent with the Commission's recent ruling in United School District No. 1 of Racine County, 7/ wherein the Commission ordered similar backpay to remedy an employer's unlawful refusal to bargain over its decision to subcontract out unit work which had formerly been performed by unit personnel. As there is no meaningful distinction between the refusal to bargain over subcontracting found in United School District No. 1, supra, and the instant refusal to bargain over layoffs, the undersigned concludes that the same remedy is appropriate in both cases.

In such cases where backpay is ordered, there is usually no provision as to how that backpay is to be determined. This is so because it is normally assumed that the parties themselves will be able at some future time to jointly agree on the precise backpay figure owed. Such private agreements, when reached, are certainly to be encouraged inasmuch as they reflect a voluntary resolution of a matter arising out of a collective bargaining relationship. That possible salutary effect aside, the fact nonetheless remains that there are considerable problems in such a voluntary approach.

Thus, it is entirely possible that in some instances the parties may have a very substantial difference of opinion as to the amount of backpay owed and that, as a result, they may be unable to reach any agreement at all. Moreover, even if an agreement is ultimately reached, the lack of precise guidelines as to how backpay should be computed may have a deleterious effect because of the delay involved in resolving that issue. Additionally, the uncertainty as to the figure owed in and of itself is a major problem for the parties, particularly the affected employes who have no assurance as to how much backpay will be forthcoming. This uncertainty on the part of such employes, is particularly disturbing in light of the observation of the United States Supreme Court to the effect that workers in situations such as the one herein are "not likely to have sufficient resources" to sustain the "minimum standard of living necessary for health, efficiency and general well-being" during the time that they have been displaced from employment. 8/ That being so, there is no need why such workers should also be burdened with the additional factor of uncertainty regarding their economic plight.

Accordingly, and to obviate these latter factors, the undersigned finds that some formula for computing possible backpay is appropriate in the instant case.

7/ Decision No. (12055-B) 10/74.

8/ Phelps Dodge Corp. v. N.L.R.B., 313 US 177, 195.

In considering such a formula, the undersigned notes that the National Labor Relations Board, (NLRB) for a number of years computed backpay on an annual basis regarding cases arising under the National Labor Relations Act, as amended (NLRA). In F. W. Woolworth Company, 9/ however, the NLRB reconsidered its prior policy because:

> "We have noted in numerous cases that employees, after having been unemployed for a lengthy period following their discriminatory discharges, have succeeded in obtaining employment at higher wages than they would have earned in their original employments. This, under the Board's previous form of backpay order, resulted in the progressive reduction or complete liquidation of back pay due.
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> The deleterious effect upon the companion remedy of reinstatement has been twofold. Some employers, on the one hand, have deliberately refrained from offering reinstatement, knowing that the greater the delay, the greater would be the reduction in backpay liability. . . . Employees, on the other hand, faced with the prospect of steadily diminishing back pay, have frequently countered by waiving their right to reinstatement in order to toll the running of back pay and preserve the amount then owing."

To remedy those effects, the NLRB ruled that it would thereafter compute backpay on a quarterly basis during the period from the unfair labor practice in issue to the date of a proper offer of reinstatement. In establishing that formula, the NLRB stated that:

> "We find that this will constitute an appropriate, fair, and practicable method of computation. The liability for each quarter may be determined by reference to factors then current, and not subject to subsequent fluctation. Thus, both employee and employer will be in a position to know with some precision the amount that will be due at the end of each 3-month period, if discrimination should ultimately be found."

Although the problems arising under the NLRA may in some instances be different from those arising under MERA, the Examiner nonetheless finds that, on balance, the above-quoted policy considerations are most persuasive and that they have a similar bearing on the administration and enforcement of MERA. Thus, for example, the need for "precision" noted by the NLRB is likewise needed in computing backpay under MERA. Additionally, unless backpay is computed on a quarterly basis, it is entirely possible that a backpay award under MERA can result in the "progressive reduction or complete liquidation of backpay due" noted in F. W. Woolworth, supra. This latter result is obviously unfair since it results in the total absence of any meaningful remedy to rectify an employer's unlawful conduct, conduct which by its very nature can easily lead to substantial economic hardship.

Accordingly, and based upon the above mentioned considerations, the undersigned finds that the loss of pay, if any, in the instant case should be computed on the basis of each separate calendar quarter or portion thereof from the date of the layoffs, January 1, 1974, to the date of a proper offer of reinstatement. The quarterly periods, shall begin with the first day of January, April, July and October. Loss of pay, if any, shall be computed by deducting interim net earnings from a sum equal to that which each of the four firefighters would normally

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9/ 90 NLRB 289.

have earned for each quarter or portion thereof. Fringe benefits shall be computed in determining interim net earnings and the sum that the employes would otherwise have earned on the job, but for their layoffs. Earnings for each quarter shall have no effect upon the backpay for any other quarter.

Dated at Madison, Wisconsin, this 24th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Amedeo Greco, Examiner