

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FIREFIGHTERS LOCAL 1801,	:	
	:	
Complainant,	:	
	:	Case XV
vs.	:	No. 18655 MP-416
	:	Decision No. 13246-A
CITY OF CUDAHY,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Edward Durkin, Vice President, IAFF, appearing on behalf of Firefighters Local 1801.
Mulcahy & Wherry, Attorneys at Law, by Mr. John F. Maloney, and Mr. Steven H. Schweppe, appearing on behalf of the City of Cudahy.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Firefighters Local 1801 having filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that the City of Cudahy has committed certain prohibited practices within the meaning of Section 111.70(3)(a)1 of the Wisconsin Statutes; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(3) of the Wisconsin Statutes; and hearing on said complaint having been held at Milwaukee, Wisconsin, on February 20, 1975, before the Examiner; and the parties having thereafter filed briefs; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Firefighters Local 1801, herein Complainant, is a labor organization and at all times material herein was the exclusive bargaining representative of certain firefighters employed by the City of Cudahy.

2. That the City of Cudahy, herein Respondent, is a Municipal Employer within the meaning of Section 111.70(1)(2) of the Wisconsin Statutes; that Respondent is engaged in providing fire protection services and maintains a Fire Department; and that said Fire Department consists of two separate fire stations, designated as Station No. 1 and Station No. 2.

3. That at all times material herein, Joseph Marko and Carl Miller have been respectively employed by Respondent as Acting Fire Chief and Captain; that Marko was appointed to his position sometime in 1974; ^{1/} and that both Marko and Miller are supervisory employees who are not in the collective bargaining unit.

4. That Complainant and Respondent were privy to a collective bargaining agreement which ran from January 1, 1973 to December 31,

^{1/} Unless otherwise noted, all dates hereinafter refer to 1974.

1974; that the parties began negotiations for a new contract in about September; that the parties thereafter had several bargaining sessions, that the parties subsequently reached an impasse in their negotiations and met with a mediator on December 12; that one of the items then in dispute centered on Respondent's proposal that employees verify their sickness with a doctor's certification; that the parties were unable to resolve their differences at this December 12 mediation session; and that as of the instant hearing, the parties had not agreed on a new collective bargaining contract.

5. That on December 13, Respondent, through Acting Fire Chief Marko, announced to the firefighters that substantially all of the members of the Fire Department would be temporarily transferred near the end of the month for training purposes; that at that time, about 15 firefighters were stationed at Station No. 1 and 13 were stationed at Station No. 2; that under Marko's plan, almost all of the firefighters would be interchanged between the two stations; that the only firefighters excluded from such transfers were Marko, two garage mechanics, and one motor pump operator (MPO); and that the transfers subsequently were implemented by the first week of January, 1975.

6. That at that time, the existing collective bargaining agreement accorded Respondent the right to transfer employees by providing in Article 4, entitled "Management Rights" that:

"4. MANAGEMENT RIGHTS: The City possesses the sole right to operate City government and all management rights shall be vested in it, but such rights must be exercised consistently with the other provisions of this contract. These rights which are normally exercised by the Fire Chief include but are not limited to, the following:

. . .

B. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge, and take other disciplinary action against employees pursuant to the reasonable rules and regulations of the Cudahy Fire and Police Commission and the Cudahy Fire Department." (Emphasis Added)

7. That prior to the December 13 announcement, Marko in May or June had contacted another fire department to ascertain how firefighters could be transferred most efficiently; that shortly thereafter, Marko spoke to Captain Miller regarding the feasibility of transferring the approximately four lieutenants in the Fire Department (who are in the unit) from one fire station to another; that Marko there also discussed transferring other unit employes, without indicating the precise number he had in mind; that Miller objected to any immediate transfer of firefighters because of vacation scheduling and forthcoming holidays; and that Marko agreed that it would be inappropriate to effectuate the transfers at that time.

8. That in November, Marko met with Miller and the four lieutenants in the Fire Department; that Marko there stated that he would be shortly transferring all of the officers (except himself); that Marko also mentioned that he would be transferring other firefighters "eventually"; that Marko did not specifically state that he would be transferring almost all of the firefighters; that it was not until December 13 that anyone, including Miller, first learned that almost all of the firefighters would be so transferred; that prior to December 13, Marko had never advised any unit employe of the impending transfers; and that transfers within the Fire Department in the past had usually been made in December.

9. That following the January, 1975 transfers, some of the firefighters have had to travel longer distances to reach their designated fire stations; that some firefighters are no longer able to walk to work because of these increased distances; and that some firefighters have missed alarm calls because they have been unable to respond to off-duty calls within the designated time.

10. That following Marko's December 13 announcement, Complainant conducted a Union meeting on December 16, where the impending transfers were discussed; that Complainant's membership there decided to ask for an informational meeting over the transfers with Marko and the Cudahy Fire and Police Commission; and that the members there selected Clarence Bejma, Complainant's Vice President and a member of its bargaining team, and R. Spies to be their spokesmen over this matter.

11. That on December 16, Marko found on his desk a note dated December 16 and which read:

"We, the Officers and men, of the Cudahy Fire Dept., request a meeting with you and the members of the Fire and Police Commission in regards to your recent order involving personnel and shift changes. We would appreciate this meet-[sic] be held at your convenience as soon as possible."

12. That upon its receipt, Marko on the same day posted a copy of said note on a bulletin board and wrote on it: "Does this include all officers and men? I would like the names of men involved."

13. That Marko also arranged for the Police and Fire Commission to meet with the Complainant on January 9, 1975, the earliest date that the members of the Police and Fire Commission could meet.

14. That Bejma on December 20 telephoned Marko at one of the fire stations to learn whether Marko and the Police and Fire Commission would meet with the Complainant's representatives over the then pending transfers; that Bejma told Marko that he had been appointed as the spokesman for the men and asked Marko whether he had read the December 16 note which requested a meeting; that Marko replied "So you are the [expletive deleted] that put this letter on this desk and you are not man enough to sign it"; that Bejma advised Marko "First of all, I am not a [expletive deleted]; secondly, I did not place the letter on the desk, the letter was placed on the desk by the secretary, and, third, this letter was signed, it was signed by the officers and men of the Cudahy Fire Department"; that Marko said that he had spoken to the Fire and Police Commission members and that they would meet on January 9, 1975; that Bejma told Marko the meeting would have to be held before January 1, 1975 to be effective; that Marko answered "Just [expletive deleted]"; that Bejma told Marko "as long as we cannot meet with the Fire and Police Commission before January 1st, that - if the men could have permission to go to the Mayor"; that Marko said "Definitely not. The first man who steps foot in the Mayor's office will be dismissed immediately"; that Bejma told Marko, "if we cannot see the Fire and Police Commissioners, we cannot be with the Mayor, then probably the Local will have to hold a meeting and vote to go to the newspaper, perhaps the Milwaukee Journal [sic]"; that Marko said words to the effect.

"Anybody who goes to the Milwaukee Journal [sic] or newspaper will be discharged immediately. I am also giving you an order over the phone - this is an order - anybody who goes to the Fire and Police Commission without a letter of request or to the Mayor or the newspaper, especially the Milwaukee Journal, [sic] will be dismissed immediately. I am holding you totally responsible

for anything that happens pertaining to the transfer of personnel and if anything does happen, you will be disciplined. Just tell me who the [expletive deleted] are that are complaining. I talked to most of the men in the Department, and these men seemed to okay the transfer. Give me the [expletive deleted] who are complaining. Now you have received an order over the phone and this order - if it is disobeyed, you will be disciplined. As far as I am concerned you are nothing but a [expletive deleted] and this is my - the end of my discussion. I don't want to discuss it any longer";

and that this marked the end of the conversation.

15. That shortly thereafter, Captain Miller telephonically requested Bejma to report to Marko's office at 4:30 p.m. that day; that Bejma subsequently did so; that also present at that time were Complainant's President, Ronald Bukowski, as well as Marko and Miller; that Marko then informed Bejma that he was being suspended for five days and explained Bejma's right to appeal that suspension; that Marko gave Bejma a disciplinary notice which stated that Bejma had been guilty of insubordination and which read, inter alia:

"On December 20, 1974, MPO Clarence Bejma called me on the telephone at Fire Station #2 at about 11:20 A.M., asking if I had arranged a meeting with the Fire and Police Commission to discuss the recent transfers of men within the Fire Department to take place in the near future. I told him that I had asked the Fire and Police Commission, last night, December 19, 1974 and at that time I was told that a special meeting could not be arranged but the men may attend the regular meeting in January of next year. At this point, Clarence Bejma threatened [sic] to take this complaint to Mayor Kelly and if he received no satisfaction from him then he and the men involved would take their complaint to the Milwaukee Journal [sic]. I informed him that the normal procedures must be followed as set down in the rules and regulations of the Fire Department and the procedures set down in the union contract. He again threatened [sic] to go to Mayor Kelly and the Milwaukee Journal [sic]. At this point, I refused to discuss the matter further and felt that he would be doing the Fire Department and the city of Cudahy irreparable [sic] harm. I feel that his conduct is serious enough to warrant a suspension without pay."

16. That Bejma and Bukowski attempted to question Marko regarding the suspension and that Bejma attempted to point out that some of the facts alleged in the notice were inaccurate; that Marko refused to discuss the matter any further; and that the meeting broke up.

17. That by letter dated January 2, 1975, Marko advised Bejma that:

"Please be advised that your suspension will take effect on January 4, 1975 or the first day you are scheduled to return to work on your normal work day and shall continue for five work days. You will not attend fires during this period.

You may attend any scheduled union meetings or negotiations held on Fire Department property during this period, if you so desire."

18. That Bejma thereafter served a five-day suspension, during which time it appears that Respondent did not deduct any of his pay because Respondent was awaiting the outcome of the instant proceeding.

19. That as of the instant hearing, Bejma has neither contacted nor attempted to contact either the Police and Fire Commission, the Mayor of the City of Cudahy, or the Milwaukee Journal regarding the transfers herein.

20. That Rule 300.06 of the Police and Fire Commission Rules and Regulations, entitled "Insubordination", apparently provides "Failure or deliberate refusal of any officer or member to obey an order given by a superior shall be insubordination. Ridiculing a superior officer's order in or out of his presence is also insubordination"; that Rule 300.12 of the same rules state that "Officers and members shall not publicly criticize instructions or orders they have received"; that firefighters in the past have contacted the Mayor of the City of Cudahy regarding personnel matters; and that Respondent, at that time, neither disciplined nor threatened to discipline any of the firefighters who did so.

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

CONCLUSIONS OF LAW

1. That Respondent's transfer of almost all bargaining unit personnel between the two fire stations was not based on any anti-union considerations and was not violative of Section 111.70(3)(a)1 of the Municipal Employment Relations Act, herein MERA.

2. That Bejma was engaged in concerted, protected activity when he telephonically spoke to Marko on December 20, regarding the then pending transfers, and that Respondent's five-day suspension of Bejma for engaging in such activity violated Section 111.70(3)(a)1 of the MERA.

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

ORDER

1. IT IS ORDERED that the complaint allegation relating to the transfer of bargaining unit personnel be, and the same hereby is, dismissed.

2. IT IS FURTHER ORDERED that Respondent City of Cudahy, its officers and agents, shall immediately:

a. Cease and desist from:

1. Suspending or in any other manner disciplining Clarence Bejma for engaging in concerted, protected activity on behalf of Firefighters Local 1801.
2. In any other or related manner interfering with the rights of their employes, pursuant to the provisions of the Municipal Employment Relations Act.

b. Take the following affirmative action which the undersigned finds will effectuate the purposes of the MERA:

1. Immediately rescind and expunge from Clarence Bejma's personnel file, and any other places where such records are kept, all references to the December 20, 1974, disciplinary suspension and further, make Clarence Bejma whole for any money which may have been deducted from his salary because of that suspension.
2. 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.
3. 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 July, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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 employees that.

1. WE WILL immediately rescind and expunge from Clarence Bejma's personnel file, and any other places where such records are kept, all references to Bejma's December 20, 1974 disciplinary suspension, and we shall make Bejma whole for any money which may have been deducted from his salary because of that suspension.
2. WE WILL NOT in any other or related manner interfere with the rights of our employees, pursuant to the provisions of the Municipal Employment Relations Act.

By _____
City of Judany

Dated this _____ day of _____, 1975.

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,
CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent engaged in prohibited practices by: (1) transferring the firefighters because of their Union activities, and (2) disciplining Bejma for engaging in concerted protected activity. These complaint allegations are discussed separately.

In resolving these two primary issues, it should be noted that 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 should 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.

1. The Transfers

This issue basically centers on Complainant's allegation that Marko was angry over Complainant's refusal to accept Respondent's sick leave proposal on December 12, that in retaliation, Marko on December 13 announced the wholesale transfer of bargaining unit personnel, and that Marko subsequently effectuated the transfers because of his displeasure with Complainant's bargaining stance. Respondent, on the other hand, maintains that the transfers were based on legitimate business considerations - the need to better train the firefighters in all aspects of the Fire Department's operations - and that the transfers were wholly unrelated to the collective bargaining negotiations then taking place.

In agreement with Complainant, the undersigned finds that there are a number of factors which raise questions over Marko's motivation in announcing and effectuating the transfers in the manner in which he did. For example, although Marko discussed the possibility of some transfers of bargaining unit personnel with others before December 13, the record fails to clearly establish that Marko ever told anyone that he was contemplating transferring almost all of the firefighters. ^{2/} Further, although a few transfers usually occurred about the same time every year, it is undisputed that the transfers herein were the first of their magnitude. Additionally, Complainant points out that Marko failed to adequately substantiate some of the reasons he gave for making the transfers. Thus, while first testifying that the transfers were partly based on a need to familiarize all of the firefighters with the alarm room contained in Station No. 1, cross-examination of Marko revealed that only one or two firefighters did not have previous experience in the alarm room. Additionally, whereas Marko first stated on direct examination that the transfers were partly based on the need to better familiarize the firefighters with the equipment at the two stations, Marko on cross-examination, acknowledged that 90 to 95 percent of the equipment at the two stations was the same, thereby casting doubt on whether there was any need for further training on this equipment. It is also significant that the transfers caused more firefighters to be further away from their assigned fire stations

^{2/} Although Marko testified that he made such intentions known to the Police and Fire Commission sometime earlier in 1974, Respondent failed to introduce any evidence to substantiate this claim. Accordingly, this claim has been given little weight.

in cases of major fires than was previously the case. Since speed in firefighting at times literally can be a matter of life and death, any reorganization which lessens such speed must be looked upon with great concern.

However, the foregoing factors do not stand alone, but rather, are counterbalanced by others which support Respondent's position. Thus, Bejma himself acknowledged that in his new assignment at Station No. 1 (he was formerly assigned to Station No. 2) he, in his words, sometimes has to "stop to consider these direct routes and reorganize myself when I pull out of the station, to make sure that we are taking the most direct route and we are going in the right direction to the fire scene." This statement corroborates Marko's view that the transfers would serve to refresh the memory of firefighters so that they could have a better knowledge of all city streets and all routes. Further, there are differences in some of the fire apparatus (such as different transmissions which require different gear shifting) and some pieces (such as the large areal truck) could not be interchanged between the two stations. As a result, the only practical way in which firefighters would be knowledgeable about all of the apparatus would be for them to be transferred to the fire station where such apparatus is normally maintained. Additionally, because the training tower is adjacent to Station No. 2, and since it was previously somewhat difficult to schedule all of the firefighters at Station No. 1 to practice at the tower, the transfers have resulted in more convenient use of the training tower for the transferred firefighters. Based upon these latter factors, the record therefore shows that the transfers were not totally devoid of any legitimate business considerations.

Similarly, as to the question of timing, there are some indications that the transfers may have been planned before December 13. For example, Marko did speak to Miller in the summer regarding the possible transfer of officers and firefighters. Further, Marko subsequently advised the officers in November that other firefighters would be transferred "eventually". ^{3/} Again, while Marko did not indicate the precise number of such transfers, his announcement nonetheless signified that other transfers would follow. Since these remarks preceded the December 12 mediation session which allegedly triggered Marko's ire, this evidence indicates that Marko at that time was contemplating a transfer program which was larger than any other previously carried out within the department by any of his predecessors. In this connection, it is important to note that Marko was first appointed to his position in 1974. As a result, this marked the first time that Marko had an opportunity to effectuate the transfers. Accordingly, and because of Marko's earlier interest in this issue, as first expressed to Miller in the summer, it is not surprising that the transfers came when they did.

Furthermore, contrary to Complainant's assertion, there is no direct evidence that Marko bore any anti-Union animus against Complainant because of Complainant's refusal on December 12 to accept Respondent's sick leave proposal. The only possible indirect evidence to support such a conclusion is the fact that, as noted in greater detail

^{3/} This finding is based on the composite credited testimony of both Marko and Miller. While Complainant's President Lukowski testified that Marko never made such a statement, the totality of the evidence establishes that Lukowski was not present at the November meeting where this issue was discussed.

below, Marko on December 20 became extremely angry over any attempt on the part of the firefighters to go over his head and to discuss the transfer issue with others. This anger may have been based on Marko's fear that he would be overruled by his superiors over the transfer issue, just as he had been overruled by them earlier in the year over another issue. Whatever the reason, there is no evidence that Marko bore similar animus over Complainant's bargaining stance. Accordingly, Marko's subsequent actions on December 20 cannot be given much weight in considering the transfers which were announced one week earlier.

In light of these latter considerations, the undersigned finds that Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that the transfers herein were in retribution against Complainant's collective bargaining stance. Thus, while there may be some grounds for questioning the transfers, the record nonetheless reveals that some legitimate business considerations were achieved because of the transfers and, further, that there is some evidence to indicate that the transfers may have been planned before December 13. In light of these factors, and in the absence of any union animus on Marko's part over this issue, there is insufficient evidence to warrant finding that the transfers were based on anti-union considerations. Accordingly, this complaint allegation will be dismissed. 4/

2. Bejma's Suspension

In agreement with Complainant, and for the reasons noted below, the record establishes that Bejma was engaged in concerted protected activity when he telephoned Marko on December 20 regarding Complainant's request for a meeting with the Police and Fire Commission, and that Marko's imposition of a five-day suspension on Bejma for engaging in such activity was violative of Section 111.70(3)(a)1 of MERA.

Thus, it is undisputed that Complainant's membership at a December 16 Union meeting selected Bejma to be its co-spokesman in its request that the firefighters meet with the Police and Fire Commission over the then pending transfers. Bejma subsequently telephoned Marko on December 20 regarding this requested meeting and there specifically advised Marko that the men had appointed him as their spokesman. At that point, then, Bejma was acting on behalf of the membership over a Union-related matter and, therefore, his activity constituted concerted, protected activity.

Respondent, however, claims that such activity was unprotected because Bejma threatened to go outside the chain of command over the transfer issue, that such a threat was an attempt to undermine Marko's authority and therefore constituted an act of insubordination, and that such an act was so disloyal to warrant the removal of the "protective umbrella" to which Bejma would otherwise be entitled for

4/ A finding of anti-union animus is not necessary to establish a violation of Section 111.70(3)(a)1. See Dane County (11622-A) 10/73 and Village of Shorewood (13024) 9/74. But here, Complainant does not contend that the transfers would be unlawful in the absence of any such claimed animus. Additionally, Respondent is expressly accorded the right to so transfer employees under the contractual managements rights clause, reprinted in paragraph six of the Findings of Fact. As a result, there is no basis for finding that the transfers constituted either interference, restraint or coercion under Section 111.70(3)(a)1 of MERA.

engaging in concerted activity. In support of this view, Respondent has cited a number of decisions arising under the National Labor Relations Act, as amended, herein NLRA, for the proposition that "an attitude of defiance towards established complaint procedures and towards a superior is grounds for disciplining an employe for insubordination." Further, Respondent asserts that a prior Commission case, City of Madison (Fire Department) (9582-D) 7/71, is not controlling because here, unlike there, Bejma was accorded an opportunity to publicly air his complaint to the Police and Fire Commission.

Since both parties have cited the Commission's decision in City of Madison, supra, to support their respective positions, an analysis of that case is warranted. There, a firefighter who was the president of the union attacked the Police Chief in a news release. More particularly, the release claimed, *inter alia*, that the Chief had used his promotional powers in "a dictatorial [sic] and discriminatory manner" and complained of "the continued harrassment and incompetence of the fire chief . . ." Thereafter, the union's president was accused of "insubordination" and subsequently suspended for issuing the news release. In ruling on the legality of that suspension, the Commission cited its decision in Board of Education of West Bend (7938-A) 6/68, wherein it noted that:

"Municipal employes in their concerted activity, have the right to disagree with the policies of their municipal employer which affect the public interest and to communicate their views through the normal means of communication . . . and such right is protected by Section 111.70, Wisconsin Statutes."

Going on, the Commission, adopting the examiner's decision, found in City of Madison, supra, that:

". . . the instant public statement should be protected concerted activity not only because its contents alerted its recipients to its context as part of an employment relations dispute, but also because of the public nature of the enterprise involved. Thus, whereas in the private sector a disparaging reference to an employer's product or service still may be unprotected concerted activity even though obviously made as part of a labor controversy [Patterson-Sargent Co., NLRB, 38 LRRM 1134, 1956.], the public and noncompetitive nature of a municipal employer's enterprise, and the status as public officials of its agents, should allow more latitude for criticism than might be appropriate in cases of private individuals and enterprises. Furthermore, it would be grossly artificial to equate employe criticism in both sectors because criticism of governmental bodies and officials is, in every respect, and for obvious reasons, not to be restricted except in the extreme.

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

Accordingly, the Commission ruled that the issuance of the news release constituted concerted protected activity and that Respondent's imposition of a disciplinary suspension for engaging in such activity was violative of Section 111.70(3)(a)1 and 2 of WERA.

absent in that decision, was any indication by the Commission that its holding was based on the mere fact that the employee there was not accorded an opportunity to present his views to the Police and Fire Commission. It appears, therefore, that the Commission gave that fact little, if any weight. As a result, there is no merit to Respondent's claim that the Commission's decision in City of Madison, supra, is inapposite to the instant facts solely because Bejma was accorded the right to present his views to the Police and Fire Commission. 5/

Here, of course, Bejma never issued any public statement which attacked Marko. Indeed, the record shows, via Bejma's testimony which is credited in its entirety 6/, that Bejma specifically asked Marko for permission to contact the Police and Fire Commission and the Mayor. It is not true, therefore, that Bejma threatened to take such action on his own. When Marko replied that Bejma could not contact the Mayor, Bejma at that point said that the Union will have a meeting and probably vote to contact the Milwaukee Journal over the transfer issue. While this statement can be construed as indicating possible future action by the Union membership, it does not expressly show that Bejma himself would personally engage in such activity. In any event, even allowing for some ambiguity, Marko nonetheless served to counteract any such future action by specifically telling Bejma that "anybody who goes to the Fire and Police Commission without a letter of request or to the Mayor or the newspaper, especially the Milwaukee Journal [sic] will be dismissed immediately" and that "you have received an order over the phone and this order - if it is disobeyed - you will be disciplined." Since Bejma thereafter never contacted either the Police and Fire Commission, the Mayor, or the media, it is clear that he never disobeyed that directive. That being so, there is no merit to Respondent's assertion that Bejma was guilty of insubordination, as charged. 7/

Furthermore, there is no question but that Marko became very angry over the firefighters' request to meet with the Police and Fire Commission or the Mayor, and that this anger was a, if not the, motivating factor in Marko's decision to suspend Bejma. Thus, at the outset of their December 20 telephone conversation, Bejma asked Marko whether he had read the December 16 note by the firefighters which had requested such a meeting. Marko angrily replied: "So you are the [expletive deleted] that put this letter on this desk and you are not man enough to sign it. When Bejma next indicated that the firefighters wanted to meet with the Police and Fire Commission before the scheduled January 9, 1975 meeting, Marko again displayed this anger by replying "Just [expletive deleted]". Since Marko's remarks preceded Bejma's reference to the Mayor or the Milwaukee Journal it is obvious that Marko, by that time, was already extremely angry solely because the firefighters had requested to meet with the Police and Fire Commission. Marko's vehement hostility to

5/ For the reasons quoted in City of Madison, supra, Respondent's reliance on private sector law arising under the NLRA is also misplaced

6/ Marko testified that Bejma never requested permission to contact either the Mayor or the Police and Fire Commission. For the reasons noted above, Marko's entire testimony regarding his December 20 telephone conversation with Bejma is discredited.

7/ Since Bejma was charged only for insubordination, which is covered in Rule 300.06, it is unnecessary to pass upon whether Bejma violated Rule 300.12 which provides that firefighters shall not publicly criticize instructions or orders. As a result, it is unnecessary to consider the legality of Rule 300.12 as it applies to matters affecting labor relations.

having the transfer issue aired with anyone other than himself is also reflected in his subsequent statement to Bejma "Just tell me who the [expletive deleted] are that are complaining. I talked to most of the men in the Department, and these men seemed to okay the transfer. Give the [expletive deleted] who is complaining." Considered together, the foregoing statements clearly establish that Marko had a strong animus 8/ against the firefighters because of their attempt to bring a work-related problem - the then pending transfers - to the attention of others, and that this animus was unrelated to anything that Bejma said in their conversation.

In such circumstances, and because Bejma in fact never committed any act of insubordination, it can be inferred, and I so find, that Marko imposed the five-day suspension on Bejma solely because he resented the concerted activities of the firefighters in again attempting to bring a Union-related matter to Marko's superiors, and that Marko seized upon Bejma's December 20 remarks as a justification for inhibiting such activity. Furthermore, even if, contrary to the facts, that was not Marko's motivation, 9/ it is nonetheless apparent that his suspension of Bejma effectively served to interfere, restrain and coerce Bejma while he was engaged in concerted, protected activity. Accordingly, based upon the foregoing considerations, the undersigned finds that Bejma was engaged in concerted, protected activity when he telephoned Marko on December 20 and that Marko's imposition of a five-day suspension on Bejma for engaging in such activity was violative of Section 111.70(3)(a)1 of MERA.

To rectify that conduct, Respondent is hereby required to undertake the action noted above. In this connection, the record indicates that Respondent has not withheld Bejma's pay following his serving of the five-day suspension. If that is still the case, no back pay need be paid. On the other hand, if such payment has been withheld, back pay is required.

Dated at Madison, Wisconsin this 25th day of July, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

8/ During Marko's brief tenure as Acting Fire Chief, Complainant had once before brought a Union-related problem to the Mayor who, in turn, resolved the problem by overruling Marko's prior initial determination. Based upon the facts herein, it appears that Marko was absolutely determined to avoid any future situation where he would again be overruled by his superiors. This resolve was apparently the basis of Marko's animus. Indeed, in this connection, it is noteworthy that Marko's anger on December 20 was so intense that he originally planned on firing Bejma outright.

9/ As noted above in footnote four, a finding of anti-union animus is not a necessary prerequisite for establishing a violation of Section 111.70(3)(a)1 of MERA.