STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GERALD ATHERTON, Complainant, vs. LOCAL 1793 of INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, Respondent.	Case III No. 19088 MP-460 Decision No. 13603-A

Appearances:
Coe, Dalrymple & Heathman, Attorneys at Law, by Mr. Edward J. Coe, appearing on behalf of the Complainant.
Mr. Ed Durkin, Vice President, International Association of Fire Fighters, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Gerald Atherton, hereinafter the Complainant, having filed a complaint on April 22, 1975, with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that Local 1793 of the International Association of Fire Fighters, hereinafter the Respondent, has committed prohibited practices within the meaning of Section 111.70(3)(a)3, 111.70(3)(b)1 and 111.70(3)(c) of the Municipal Employment Relations Act (MERA); and the Commission having appointed Sherwood Malamud, a member of its staff to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Section 111.70(4)(a) of MERA; and hearing on said complaint having been held at Barron, Wisconsin on June 24, 1975; the parties having exchanged briefs through the Examiner on September 12, 1975; and the Examiner having considered the evidence, arguments, and briefs of the parties 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 Complainant Gerald Atherton is an individual, and that he has been employed by the City of Rice Lake, Wisconsin Fire Department as a firefighter for a period of eight years; that prior to 1974 Complainant was a member of Local 1793 of the International Association of Fire Fighters. However, in 1974 Complainant resigned his membership in said labor organization, and since that time Complainant has refrained from joining Respondent.

2. That Respondent Local 1793 of the International Association of Fire Fighters is the voluntarily recognized exclusive collective bargaining representative of firefighters employed by the City of Rice Lake, Wisconsin; that said labor organization is also known as the Rice Lake Paid Fire Fighters Association; that Allen Whitney is the President of Respondent.

3. That during the Summer of 1974 Respondent was engaged in negotiations with the City of Rice Lake, Wisconsin hereinafter the Employer, and its negotiating committee for a successor agreement for calendar year 1975; that during 1974 and in prior years, there existed an unwritten practice permitting firefighters to exchange shifts after receiving the Chief's approval; that on August 22, 1974, Respondent, by its negotiating committee, submitted the following proposal to be included in such successor agreement:

"ARTICLE XXV

SHIFT EXCHANGE

I. Union members may exchange work days between themselves upon notification to the Chief. The City shall not be liable for overtime which accrues solely to the exchange of work hours."

that Respondent copied both the concept for and the wording of its proposal from the collective bargaining agreement between the City of Superior and its firefighters; that the major thrust of the proposal was to eliminate the Chief's approval of shift exchanges; and that on August 22, 1974, immediately after it was proposed, the Employer rejected said proposal on the ground that it would provide said benefit to Union members only, and because said proposal permitted firefighters to exchange shifts without receiving the approval of the Chief of the Rice Lake Fire Department, H. N. Chartier; that by submitting said proposal, Respondent was not motivated by animus towards Complainant or towards non-members of Respondent, nor did it intend to deny said benefit to Complainant or non-members of Respondent if such proposal were ultimately incorporated in the collective bargaining agreement between the Employer and Respondent.

4. That from August 22, 1974 to December 31, 1974, the shift exchange proposal was not discussed by the parties; that on or about November 19, 1974, the parties had achieved agreement on all but two issues which remained in dispute; that the parties were at impasse over Respondent's proposals concerning fair share and a grievance and arbitration procedure; that shortly thereafter, the parties, pursuant to Section 111.77 of MERA, were certified to proceed to municipal interest arbitration by the Commission; that the parties proceeded before an arbitrator and a decision was rendered by said arbitrator in the Spring of 1975 on the two unresolved issues, fair share and a grievance and arbitration procedure; that the shift exchange proposal was not pursued by Respondent to impasse; and it was not an issue before the interest arbitrator.

5. That on December 31, 1974 the Chief of the Rice Lake Fire Department amended the Department's Standard Operating Procedure by including therein a specific directive terminating the practice of permitting firefighters to exchange shifts even with his prior approval.

6. That as a result of the regulation issued on December 31, 1974, Respondent's negotiating committee requested a meeting with the Employer's Public Safety Committee; that, on February 19, 1975, they met, and Respondent submitted the same shift exchange proposal that it had submitted to the Employer's negotiating committee on August 22, 1974; (said proposal is more fully set forth in paragraph 3 above); that the members of the Employer's Public Safety Committee renewed the same objections presented by its negotiating committee on August 22, 1974; they objected to the wording of the proposal and to its apparent limitation of the shift exchange benefit to Respondent's members, and furthermore, they objected to the ability of a firefighter under the proposal, to exchange his shift without receiving the prior approval of the Chief; that, thereupon Respondent's bargaining committee offered to delete the phrase "union members" from said proposal and to amend the proposal in a manner in which the shift exchange benefit would clearly be available

to all members of the bargaining unit; however, Respondent maintained its position that firefighters be permitted to exchange shifts without receiving the prior approval of the Chief.

7. That on February 20, 1975, while Complainant was discussing the progress of negotiations with the Vice-President of Respondent, he discovered that Respondent had submitted the shift exchange proposal recited in paragraph 3 above.

8. That on February 24, 1975, Whitney, the President of Respondent, directed a letter to Chief Chartier which in material part provides as follows:

> "In reference to the meeting of February 19, 1975 with the Rice Lake Safety Committee, Local 1793 was advised to change the enclosed amendment to read 'Rice Lake Fire Department members' in stead [sic] of 'Union members'. We were also advised to present it to you before getting the needed signatures on the amendment.
>
> Would you please sign below to show that we have brought this before you.
>
> Sincerely,
>
> Allen Whitney, President
> Local 1793 IAFF
>
> I have read and understand the changes made in the enclosed amendment.
>
> _____
> Harold N. Chartier, Fire Chief
> Rice Lake Fire Department"

that attached to the above letter Respondent included its amended proposal which in material part stated as follows:

> "The following is an amendment to the Working Agreement between the City of Rice Lake and the Rice Lake Paid Fire Fighters.
>
> ARTICLE XXIV
>
> SHIFT EXCHANGE
>
> Rice Lake Fire Department members may exchange work days between themselves upon notification to the Chief. The City shall not be liable for overtime which accrues solely to the exchange of work hours. In the Chief's absence notification to the officer in charge at the Fire Station shall be sufficient." (Emphasis added.)

that to the date of the hearing, the Chief has not responded to said request.

9. That, on February 25, 1975, the Public Safety Committee of the Employer promulgated the following change in the Fire Department's Standard Operating Procedure:

"Shift Exchange

Rice Lake Fire Department members may exchange work days between themselves with the authorization of the Chief. The City shall not be liable for overtime which accures solely to the exchange of work hours. In the Chief's absence, authorization shall be obtained from the Senior officer in command of the department."

10. That the 1974 collective bargaining agreement together with changes agreed to in the course of negotiations and the amendments appended thereto as a result of the interest arbitration award issued in the Spring of 1975 constituted the 1975 collective bargaining agreement; that said agreement was executed by the Employer and Respondent on May 13, 1975; that it contains several provisions awarding benefits to members of the Rice Lake Paid Fire Fighters Association; brief excerpts from the 1974-1975 agreement follow:

"ARTICLE VI

PAID HOLIDAYS

There shall be given to the members of the Rice Lake Paid Firefighters, eight (8) days off per calendar year.

. . .

ARTICLE VIII

INSURANCE

. . .

The City agrees to pay the full premium of a $2,000.00 life insurance policy for each member of the Rice Lake Paid Firefighters Association.

. . .

ARTICLE X

LONGEVITY

Longevity of five dollars ($5.00) per month increase for every four (4) years of service up to twenty years shall be paid all members of the Rice Lake Paid Firefighters.

. . .

ARTICLE XV

PAY DAY SCHEDULE

The members of the Rice Lake Paid Firefighters shall be paid on the 26 pay day schedule.

. . .

ARTICLE XIX

SAVINGS CLAUSE

. . .

All privileges, benefits and rights enjoyed by the members of the Rice Lake Paid Fire Fighters Association which are not specifically provided for or abridged in this Agreement are hereby protected by this agreement."

that Respondent's August 22, 1974 proposal on shift exchange was drafted to conform to the same style of draftsmanship employed in the 1974 and 1975 collective bargaining agreements.

11. That in June, 1975, Complainant exchanged shifts with a fellow firefighter; that this exchange of shifts was made in conformance with and pursuant to the regulation promulgated by the Rice Lake Public Safety Committee on February 25, 1975 and included in its Standard Operating Procedure; and that there is no evidence in the record that Respondent administered the collective bargaining agreement or requested the Employer to administer the collective bargaining agreement in a manner in which benefits were granted to members of Respondent but denied to non-members.

12. That there is no evidence in the record that Respondent bore any animus towards Complainant or that Respondent engaged in a course of conduct to deny Complainant or any non-member of Respondent of benefits and rights to which they are entitled under the collective bargaining agreement or which are guaranteed them by statute.

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

CONCLUSIONS OF LAW

1. That Local 1793 of the International Association of Fire Fighters, which is also known as the Rice Lake Paid Fire Fighters Association, is a labor organization as that term is defined by Section 111.70(1)(j) of the Municipal Employment Relations Act (MERA).

2. That the City of Rice Lake (Fire Department) is a Municipal Employer as that term is defined by Section 111.70(1)(a) of MERA.

3. That Complainant failed to prove by a clear and satisfactory preponderance of the evidence:

a) that Respondent bore any animus towards Complainant or towards any non-members of Respondent labor organization; and

b) that Respondent submitted the shift exchange proposal to induce the Employer to discriminate against Complainant or non-members of Respondent;

c) and that Respondent induced the Employer to violate Section 111.70(3)(a)3 of MERA.

Consequently the Examiner concludes that Respondent did not violate Sections 111.70(3)(b)2 or Section 111.70(3)(c) of the Municipal Employment Relations Act, by submitting the shift exchange proposal for negotiations.

4. That by submitting the shift exchange proposal as set forth in Finding of Fact number 3, Respondent's purpose was not to coerce and intimidate Complainant, and thereby Respondent did not violate Section 111.70(3)(b)1 of MERA.

5. That by submitting the shift exchange proposal Respondent did not refuse to bargain in good faith in violation of Section 111.70(3)(b)3 of MERA.

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

ORDER

That the complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 30th day of September, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant Gerald Atherton alleges that Respondent violated Section 111.70(3)(b)1, 3 and Section 111.70(3)(a)3 and 111.70(3)(c) by submitting a proposal which would have restricted the use of the privilege of exchanging shifts to union members. Complainant did not name the Employer in the complaint or charge the Employer with any activity violative of the Municipal Employment Relations Act.

Respondent claims that in submitting its shift exchange proposal it intended the application of same to all employes in the unit; that eventually a shift exchange policy was incorporated in the Fire Department's Standard Operating Procedure which is applicable to all unit employes; and finally, that Complainant availed himself of that policy in June, 1975.

The pleadings and evidence present several issues for the Examiner's consideration.

Discrimination

Complainant charges Respondent with violating Section 111.70(3)(c) by submitting a proposal which on its face discriminates against Complainant and would violate 111.70(3)(a)3 if agreed to by the Municipal Employer. 1/ To prevail, Complainant must prove by a "clear and satisfactory preponderance of the evidence" that Respondent submitted its proposal to encourage Complainant to join Respondent by depriving him of the benefits of the shift exchange proposal. If the Employer were charged with discrimination by agreeing to and implementing the shift exchange proposal, Complainant would have to prove that, at least in part, the Employer's action was based on anti or pro-Union considerations. 2/ Similarly, Complainant must demonstrate that, in part, it was Respondent's intent, to deprive Complainant or non-members of Respondent of the shift exchange benefit in order to encourage their membership in Respondent.

Complainant proved (a) that Respondent submitted a proposal which on its face limits the benefit of said proposal to "Union members."; (b) that

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1/ In his discussion of this charge, the Examiner has conformed the evidence to the proof. The gravamen of the complaint and of the issue litigated before the Examiner concerns Respondent's alleged attempt to induce the Employer to discriminate against non-members of Respondent. Such conduct contravenes Section 111.70(3)(b)2 of MERA which provides that:

> "It is a prohibited practice for a municipal employe, individually or in concert with others:
>
> . . .
>
> 2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub. (2) or to engage in any practice with regard to its employes which would constitute a prohibited practice if undertaken by him on his own initiative."

2/ Muskego-Norway School District No. 9 (7247) 8/75, aff'd 35 Wis. 2d 540 (1967); City of Wisconsin Dells (11646) 3/73.

the Employer on August 22, 1974, objected to the proposal on the grounds that it deprived non-union members of the benefit of shift exchanges; and (c) that despite the Employer's objection on August 22, 1974, Respondent submitted said proposal again on February 19, 1975 with the union member limitation.

The proposal which Respondent submitted states that:

> "Union members may exchange work days between themselves upon notification to the Chief. The City shall not be liable for overtime which accrues solely to the exchange of work hours."

The wording of the proposal clearly limits this benefit to union members. In the absence of any evidence to the contrary, the proposal would raise an inference that its purpose was to deny non-members of this benefit. The natural consequence of such a course of conduct would be to coerce employes to join Respondent.

However, there is evidence in the record which demonstrates that Respondent's motive in submitting the shift exchange proposal was not discriminatory. This evidence is discussed below.

The phrase "union members" was used by both Respondent and the Employer prior to the negotiations for a 1975 contract. Both Respondent and the Employer failed to distinguish between unit members and union members, in their contracts. As a result, the 1974 and 1975 collective bargaining agreements are replete with clauses which provide benefits such as paid holidays, insurance, longevity, etc. to members of the Rice Lake Paid Fire Fighters, Respondent herein. The shift exchange proposal follows this same style. In August, 1974, when the Employer objected to the proposal's "union members" limitation, the Respondent deleted the offending language, albeit, after an extended delay.

The delay itself was not related to Respondent's insistence on its "union member" language. The proposal was submitted on August 22, 1974. After the Employer raised its objection, nothing further was said on this proposal at that meeting. The shift exchange proposal did not come up at any other negotiation sessions. In fact, the only issues presented to the interest arbitrator were fair share and the grievance procedure. The shift exchange proposal was revived only when the Chief on December 31, 1974 terminated the shift exchange practice. Then, on February 19, 1974, Respondent submitted its original proposal to the Employer's Public Safety Committee. 3/ When the Employer again objected to the "union member" language, it was deleted from Respondent's proposal. Respondent did not press this issue to impasse.

Furthermore, the real issue separating the Employer and Respondent on the shift exchange proposal was whether a firefighter could exchange shifts without prior approval from the Fire Chief. For, even after Respondent withdrew its "union member" language the parties could not and did not reach agreement. Ultimately, the regulation incorporated in the Employer's S.O.P., reflected the Employer's position rather than the proposal submitted by Respondent. Thus, the thrust of Respondent's proposal concerned the removal of the requirement of the Chief's approval and not the limitation of the benefit to union members.

On the basis of the above evidence, the Examiner concludes that Respondent was not motivated by a discriminatory intent when it formulated and submitted its shift exchange proposal.

3/ Transcript. p. 26.

There is one other factor which buttresses the above conclusion. The record is devoid of any evidence that Respondent had any animus towards Complainant or any other non-member of Respondent. There was no evidence that Respondent harrassed or threatened Complainant. For that matter, there is no evidence that Respondent even attempted to have Complainant reactivate his membership in Respondent. There is no evidence in the record indicating that Complainant was denied any benefits established by the agreement since his withdrawal from Respondent in January, 1974. There is no evidence of unlawful intent by Respondent in submitting the shift exchange proposal. At most, Respondent was guilty of confusing the terms union and unit members. In the absence of evidence of animus directed towards Complainant or any other non-members of Respondent, his charge of discrimination must fail.

Coercion and Intimidation

Now turning to Complainant's charge that Respondent violated Section 111.70(3)(b)1, some discussion of the nature of the charge is necessary.

Under Section 111.70(3)(b)1, it is a prohibited practice for a municipal employe:

> "To coerce or intimidate a municipal employe in the enjoyment of his legal rights, including those guaranteed in sub. (2)."

Sections 111.70(3)(b)2 and Section 111.70(3)(b)1 of MERA are parallel in nature. Section 111.70(3)(b)2 seeks to protect municipal employes from coercion or intimidation by employes in concert from inducing an employer to interfere with those rights guaranteed under Section 111.70(2) of MERA. Section 111.70(3)(b)1 seeks to protect municipal employes from coercion or intimidation from other employes individually or acting in concert with others from interfering with those rights guaranteed under Section 111.70(2) of MERA.

To prevail, on a charge of a violation of Section 111.70(3)(b)1, Complainant must demonstrate, by a "clear and satisfactory preponderance of the evidence," that Respondent's conduct is likely to coerce or intimidate a municipal employe, in the exercise of statutory rights.

Complainant's charge of coercion is based upon the same shift exchange proposal discussed above. The Examiner concludes that Respondent's conduct was not likely to coerce Complainant for two reasons. First, by submitting the shift exchange proposal, Respondent was only guilty of poor draftsmanship in confusing the term union and unit members. 4/ Respondent's purpose was not to create a contract with benefits for union members only. Secondly, there is no evidence that Respondent engaged in any tactics to harrass or intimidate Complainant or other non-members of Respondent to join said labor organization. Based on the foregoing, the Examiner concludes that Respondent's submission of the shift exchange proposal would not and was not likely to coerce or intimidate Complainant.

Refusal to Bargain

Finally, Complainant charged that by submitting its August 22, 1974 proposal to the Employer, Respondent failed to bargain in good faith

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4/ See discussion above.

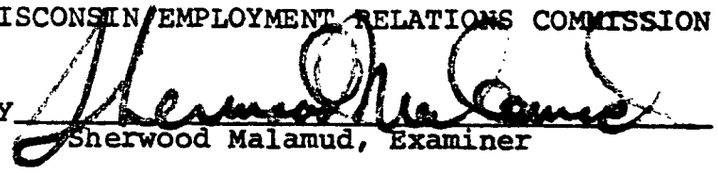
in violation of Section 111.70(3)(b)3. Complainant's theory on this issue is encapsuled in the following paragraph from its brief:

> "Good faith bargaining, by definition, requires bargaining by both parties in an earnest effort to reach an agreement in accordance with the law. Bargaining for a provision which, if adopted, would constitute a prohibited practice and is therefore unlawful, cannot constitute good faith bargaining. Good faith by definition requires it to be honest, sincere and in accordance with law. When the Union bargained for improper privilege for it's [sic] membership, it was refusing to bargain in good faith. It thereby committed a prohibited practice."

Complainant's charge raises the question as to whether Respondent breached its duty of fair representation by submitting an illegal proposal during contract negotiations. The Commission has determined that a breach of this duty may violate both Sections 111.70(3)(b)1 and 3 of MERA. 5/ Nonetheless, Complainant's argument, in this regard is based on the assumption that the proposal itself is illegal. Complainant assumes that the adoption of the proposal would constitute a prohibited practice. The Examiner found, however, there was no unlawful intent by Respondent in submitting its proposal and that similar "union member" language already in the agreement was administered fairly for members and non-members alike. Thus, the Examiner concludes that Respondent did not breach its duty to fairly represent Complainant or other non-members of Respondent. Therefore, Complainant's charge of failure to bargain in good faith must fail, as well.

Dated at Madison, Wisconsin this 30th day of September, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Sherwood Malamud, Examiner

5/ Racine Policemen's Professional and Benevolent Corporation (12637), (12637-A), 4/74.