STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CALEDONIA FIREFIGHTERS PROTECTIVE ASSOCIATION,		
Complainant,		Case III No. 22770 MP-835 Decision No. 16237-A
vs.		
TOWN OF CALEDONIA (FIRE DEPARTMENT),		Case IV No. 22775 MP-836 Decision No. 16238-A
Respondent.		

Appearances:
Schwartz, Weber & Tofte, Attorneys at Law, by Mr. Jay Schwartz, on behalf of the Complainant.
Thompson & Coates, Attorneys at Law, by Mr. Jerold Breitenbach, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Caledonia Firefighters Protective Association, herein the Association, filed the instant complaints on March 9, 1978 with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that the Town of Caledonia, herein the Employer or Respondent, had committed certain prohibited practices. The Commission on March 16, 1978, thereafter appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07(5) of the Wisconsin Statutes. Hearing on said complaints was held in Caledonia, Wisconsin on April 14, 1978.

At the conclusion of the hearing, the Examiner established a briefing schedule under which briefs by both parties would be due within two weeks after the parties received copies of the transcript. On May 30, 1978, the court reporter mailed a copy of the transcript to both parties, and then advised the parties of the briefing schedule. On June 20, 1978, Respondent's attorney filed its brief with the Examiner and on the same day mailed a copy of his brief to Mr. Schwartz. Mr. Schwartz, however, did not file a brief with the Examiner by said date. In addition, Mr. Schwartz failed to advise the Examiner as to when he would file his brief. Accordingly, the Examiner by letter dated July 5, 1978, advised Mr. Schwartz that he had not received a copy of Mr. Schwartz' brief, that Mr. Schwartz should advise the Examiner by July 11, 1978 as to whether he intended to file a brief, and that if the Examiner did not hear from Mr. Schwartz by said date, that he would proceed to decide this matter without his brief. Mr. Schwartz thereafter telephonically advised the Examiner that he would not file a brief. By letter dated July 20, 1978, the Examiner confirmed to the parties that Mr. Schwartz would not file a brief and that he would decide the matter without Mr. Schwartz's brief.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Association is a labor organization which seeks to represent all full-time and part-time firefighting personnel employed by the Employer, excluding the Fire Chief and Assistant Fire Chief.

2. The Employer, a municipal employer, operates and maintains a fire department in Caledonia, Wisconsin. The department is headed by a Fire Chief and Assistant Fire Chief, both of whom are supervisors and who are agents of the Employer.

3. The Employer for a number of years has engaged in collective bargaining negotiations with its firefighters for a unit of all full and part-time firefighters, 1/ and it has thereafter reduced the agreements reached with said firefighters to contract form. The firefighters throughout that time were not represented by any named labor organization. Instead, the firefighters met on an informal basis with the Employer for the purpose of reaching agreement on their wages, hours and conditions of employment, and the Employer voluntarily agreed to bargain with the firefighters over said subjects.

4. In the three agreements negotiated between 1970 and 1973, the parties agreed to contract provisions relating to hours, call-in time, holiday pay, vacation, sick leave, pension insurance, wages, uniform allowance, longevity, injury in the line of duty, funeral leave, leaves, and duration. Said agreements did not contain any recognition clauses and they did not refer to any named labor organization. The signatory page of each contract provided that the contract had been approved by the Town Board of Caledonia, and, under the phrase "Fire Department," it was signed by numerous employes of the Fire Department.

5. Between 1973 and 1976, the Employer and the firefighters agreed to two two-year contracts. These contracts differed from prior agreements in that both contained recognition clauses which stated:

> "WHEREAS, the employees of the Fire Department of the Town of Caledonia (hereinafter referred to as the 'Employees' and the 'Department', respectively), have exercised their right of self-organization and have heretofore chosen representatives to bargain collectively with the Town of Caledonia, (hereinafter referred to as the 'Town'), with respect to a contract for the year . . . and
>
> WHEREAS, the employee bargaining representatives have heretofore met with the bargaining representatives of the Town Board of the Town and have negotiated certain agreements and understandings concerning the wages, hours and conditions of employment of the Employees.
>
> NOW, THEREFORE, the parties herewith, to wit: the Town of Caledonia and employees of the Fire Department of the Town of Caledonia, exclusive of supervisory employees, do hereby agree as follows:
>
> . . ."

Said agreements also contained provisions relating to hours, wages, unemployment compensation, uniform allowance, longevity, educational benefits, holiday pay, call-in time, vacations, sick leave, injury in the line of duty, funeral leave, pension insurance, and duration. The signatory page of the 1973-1974 contract stated in part:

> "IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this agreement on the 2nd day of April, 1973."

1/ As of the time of the hearing, there were approximately sixteen full-time firefighters and approximately fifteen part-time firefighters.

The Chairman and Clerk thereafter signed the agreement on behalf of the Town of Caledonia. Under the phrase "Caledonia Fire Department" two individuals, John Smith and Robert Helding, signed said contract as the "Authorized Bargaining Representatives."

The 1974-1976 agreement, in turn, provided on its signatory page:

> "IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this Agreement on the 8th day of April, 1974."

The Chairman and Clerk thereafter signed the agreement on behalf of the Town of Caledonia. Under the phrase "Caledonia Fire Department" two individuals, Robert Helding and John Smith, signed the agreement as "Authorized Bargaining Representatives."

6. By letter apparently dated April 2, 1976, the firefighters prepared certain contract changes to the Employer for a successor agreement which involved such items as wages, a cost of living clause, pay differential for lieutenants, call-in time, uniform allowance, longevity, vacation benefits, dental insurance, health insurance, and a proposal to study "retirement health" insurance. The parties thereafter met to consider those proposals. Following those meetings, the Employer and the firefighters agreed to a 1976-1978 agreement, which provided for the same recognition clause which had been in the prior two contracts noted in Paragraph 5 above. Said agreement also contained provisions relating to hours, wages, unemployment compensation, uniform allowance, longevity, educational benefits, holiday pay, call-in, vacations, sick leave, injury in the line of duty, funeral leave, pension insurance, dental insurance, minimum manpower, pay for on-call personnel, and a duration clause. Said duration clause provided that the contract would be effective from April 1, 1976 to April 1, 1978, and that the contract would thereafter be extended for a maximum of sixty (60) days thereafter if the parties were then engaged in collective bargaining negotiations. The 1976-1978 agreement did not contain a management rights clause, a past practice clause, or any provision relating to a grievance-arbitration procedure. The agreement was signed by the Chairman and Clerk for the Town of Caledonia. On behalf of the "Caledonia Fire Department," two firefighters, Richard Helding and James Strike, signed said contract as "Authorized Bargaining Representatives." Said agreement, like all other agreements noted above, did not refer to any named labor organization.

7. The 1976-1978 agreement contained no express reference to any requirement under which the Employer would furnish firefighters with rubber wear or turnout gear. The only reference to uniforms was contained in Article 5 therein, which provided:

> "5. UNIFORM ALLOWANCE: A yearly uniform allowance of $200.00 shall be paid to all full time firemen by May 1."

8. Said contract also provided in Article 3, entitled "WAGES", for the yearly wages to be paid to employes, as well as a provision which read:

> "There shall be twenty-six (26) bi-weekly pay periods a year. . . ."

9. The Employer for at least the last five years before 1978 purchased rubber wear or turnout gear for its full and part-time firefighters. Such equipment consisted of helmets, coats, boots, gloves and eye protection. If such equipment had to be replaced, firefighters verbally asked the Fire Chief for a replacement. In addition, the Employer, pursuant to the pertinent contractual provisions for the past few years, also gave each full-time firefighter a $200.00 yearly clothing allowance 2/ for the purchase of

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2/ Said clothing allowance was not given to part-time firefighters.

station and dress uniforms. This yearly allowance was given irrespective of whether all of it was thereafter spent on uniforms. As a result, it was possible for firefighters to retain that part of the uniform allowance which they did not spend. Moreover, firefighters were not expected to spend part of their unspent uniform allowance on turnout gear, as the purchase of the latter was unrelated to the purchase of the former.

In the latter part of 1977 or early 1978, the exact date of which is uncertain, firefighter James Strike advised the Fire Chief that he needed a new pair of boots. The Chief, in turn, advised Strike that the Employer's Town Board had refused to buy such rubber gear. It also appears that other firefighters made similar requests for such replacement equipment and that they, too, were turned down.

10. Prior to January 1, 1978, the full-time firefighters herein received bi-weekly pay checks which covered the 112 hours which they normally worked during a two-week period. Under that system, the Employer did not hold back any of their pay and, instead, paid them on a current basis. In January, 1978, however, the Employer altered its mode of payment so that it thereafter held back one week's pay from the firefighters. As a result, Strike, for example, received one pay check which represented one week's less pay than he normally received. As of the time of the instant hearing, it appears that the Employer has continued to hold back one week's pay from the full-time firefighters.

11. With the exception of one or two individuals who were absent, the firefighters herein apparently met at the end of 1977 or the beginning of 1978 for the purpose of formulating contract proposals for a successor agreement. Said meeting was in accord with the past practice of the firefighters in past years under which they met for the purposes of formulating contract proposals. At this meeting, the firefighters voted on the proposals which were to be submitted to the Employer. At the same time, the firefighters voted to include a contract proposal which stated that the Employer would thereafter recognize the Caledonia Firefighters Protective Association (Association) as the bargaining agent for the firefighters. It appears that the firefighters chose that name in an attempt to bring them somewhat closer together as a group. The Association is not affiliated with any other organization and its membership is limited to firefighters employed by the Employer. The Association has a slate of officers. The Association is the successor to the formerly unnamed employe group which had bargained with the Employer.

12. In January, 1978, the firefighters met with the Employer's Town Board and there presented the Town Board with a 17-page contract proposal to replace the 1976-1978 agreement which was due to expire on April 1, 1978. The opening part of said proposal stated:

> "This agreement entered into effective this 1st day of April, 1978 by and between the Township of Caledonia, herein referred to as 'Town' and the Caledonia Firefighters Protective Association, herein referred to as 'C.F.P.A';,
>
> Witnesseth that: For and in consideration of mutual promises to the other, herein acknowledged, do hereby enter into this agreement, which is binding and acknowledged as such as provided by Section 111.70, Wisconsin Statutes."

Article 3 of said proposal, entitled "C.F.P.A. - Recognition," provided in part that:

> "1. The Town recognizes the C.F.P.A. as the exclusive bargaining agent for all uniformed employees of the Towns Fire Department, exclusive of the Chief and Assistant Chief.

2. The C.F.P.A. shall remain as exclusive bargaining agent for uniformed employees of the Town Fire Department until such time the C.F.P.A. is deemed by it's members as subservient no longer. The status of the C.F.P.A. at any future date shall in no way change, alter, cancel or be cause to negate any portion of this agreement."

The above noted provisions marked the first time the Employer was requested to recognize the Association as the exclusive collective bargaining representative of its firefighters. It appears that the Employer at said meeting did not ask any questions regarding the proposed recognition of the Association.

13. The Town of Caledonia thereafter refused to recognize the Association as the representative of its employes. Thus, by letter dated February 10, 1978, Jerold W. Breitenbach, the Employer's attorney, advised the Association President:

> "The Supervisors of the Town of Caledonia are in receipt of a proposed employment contract wherein your Association seeks recognition of itself as 'exclusive bargaining agent for all uniformed employees' of the Town of Caledonia Fire Department.
>
> At this time the Town Board has determined not to voluntarily recognize your Association as bargaining agent for any appropriate unit that may be contained within the Fire Department. Also, there appears to be more than one of such collective bargaining units that would be appropriate under the terms of your proposed contract.
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> The undersigned and the firm of Thompson & Coates, Ltd., as attorneys for the Town, have been specifically authorized to inform your organization of the municipal employer's decision and make demand upon your Association to petition the Wisconsin Employment Relations Commission if you wish certification."

14. Thereafter, the Association on February 22, 1978 filed a representation petition with the Commission, Case II, No. 22695, ME-1518, 3/ wherein it requested that a representation election be conducted among a unit of employes consisting of "all uniformed employees of the Caledonia Fire Department, excluding the Chief of the Department, and the Assistant Chief of the Department." 4/

15. After said matter had been scheduled for hearing before Examiner Stephen Pieroni, a member of the Commission's staff, Breitenbach advised Mr. Pieroni by letter dated March 6, 1978 that:

> "The law firm of Thompson & Coates, Ltd. has been retained as the attorneys for the Town of Caledonia in the above-referenced matter. Enclosed you will find the waiver of transcript of record as you have requested.
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> A hearing will be required in this matter to determine the appropriate composition of the bargaining unit. It is our position at this time that there are certain occasional employees who should

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3/ Said petition was filed by the Association only because the Employer had earlier indicated that it would not recognize the Association without a Commission issued certification.

4/ The Examiner has taken administrative notice of said representation election proceeding, as well as the subsequent representation proceeding noted below.

be excluded from the bargaining unit. A hearing in this matter would not be necessary if under paragraph 2 of the petition was made to read 'association would represent all full-time uniformed employees of the Caledonia Fire Department excluding the chief of the department and the assistant chief of the department.

Thank you for your anticipated cooperation."

16. Thereafter, Mr. Schwartz, on behalf of the Association, telephonically advised Examiner Pieroni that he would file a prohibited practice complaint in this matter and therefore requested that the scheduled representation petition be held in abeyance. Examiner Pieroni, by letter dated March 9, 1978, acceded to Mr. Schwartz's wishes and indefinitely postponed the scheduled representation hearing. 5/

17. On March 9, 1978, Mr. Schwartz filed the instant prohibited practice complaints.

18. Thereafter, the Employer on March 29, 1978, filed a representation petition with the Commission in Case V, No. 22828, ME-1531, wherein it requested that a representation election be conducted among a unit of "all full-time firefighters." Said matter has been held in abeyance, pending disposition of the instant matters.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Employer violated Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act, herein MERA, by refusing to recognize the Caledonia Firefighters Protective Association as the collective bargaining representative of its full-time and part-time firefighters, excluding the Fire Chief and Assistant Fire Chief, during the time that the 1976-1978 collective bargaining agreement was in effect.

2. The Employer violated Sections 111.70(3)(a)1 and 4 of MERA by failing to bargain with the authorized collective bargaining representative herein over its changed mode of payment under which it now withholds one week's pay from its full-time firefighters.

3. The Employer violated Sections 111.70(3)(a)1 and 4 of MERA by failing to bargain with the authorized collective bargaining representative over its unilateral refusal to pay for rubber wear or turnout gear.

4. The Employer did not violate Sections 111.70(3)(a)1 and 4 of MERA by refusing to recognize the Association as the bargaining representative of its full-time and part-time firefighters at the expiration of the 1976-1978 agreement.

5. The Employer's refusal to pay for rubber wear or turnout gear and its unilateral change in paying employes were not violative of Sections 111.70(3)(a)1 and 5 of MERA.

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

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5/ In that same letter, Mr. Pieroni advised the parties that a hearing on a representation petition involving the Employer's police department employes would be conducted, as scheduled. Thereafter, an election was conducted among said employes and the union therein was subsequently certified to represent them on April 24, 1978.

ORDER

IT IS ORDERED that that part of the complaint which charges that the Employer at the termination of the 1976-1978 agreement unlawfully refused to bargain with the Association as the representative of its firefighters is hereby dismissed.

IT IS FURTHER ORDERED that the complaint allegations relating to the Employer's alleged breach of contract are hereby dismissed.

IT IS FURTHER ORDERED that the Employer, its officers and agents, shall immediately:

1. Cease and desist from:

   a. Refusing to recognize the Association as the bargaining representative of the firefighters herein for the duration of the 1976-1978 agreement.

   b. Failing to bargain with the authorized collective bargaining agent herein over the Employer's altered mode of payment under which it now holds back one week's pay.

   c. Failing to bargain with the authorized bargaining representative herein over its refusal to pay for rubber wear or turnout gear.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of MERA:

   a. Immediately revert back to its prior mode of payment under which firefighters were paid on a current bi-weekly basis and pay to all affected firefighters the one week's pay which has been withheld from them since approximately January, 1978. The Employer shall maintain its prior mode of payment at least until the underlying representation matters have been resolved and/or until the Employer first bargains over said matter with the authorized collective bargaining agent herein.

   b. Immediately re-establish its prior practice of purchasing rubber wear or turnout gear at no charge to its full-time firefighters and purchase such equipment for all said firefighters who have requested same. The Employer shall retain said policy at least until the underlying representation matters have been resolved and/or until the Employer first bargains over said matter with the authorized collective bargaining agent herein.

   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 the Employer 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 Employer 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 21st day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
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 revert back to our prior mode of payment which we followed before 1978, under which firefighters were paid on a current bi-weekly basis and, at the same time, we shall pay to all affected firefighters one week's pay which we have withheld from them since January, 1978.

2. WE WILL re-establish our prior practice of purchasing rubber wear or turnout gear at no charge to full-time firefighters, and we will purchase said equipment for all said firefighters who have requested it.

3. WE WILL NOT refuse to recognize and bargain with the Association as the collective bargaining representative for our firefighters during the duration of the 1976-1978 agreement.

4. WE WILL NOT unilaterally alter our prior method of paying firefighters, under which they were paid on a current bi-weekly basis, until at least such time that the representation matters herein have been resolved and/or until we first bargain over said matter with the authorized collective bargaining representative.

5. WE WILL NOT unilaterally discontinue our policy of buying rubber wear or turnout gear for full-time firefighters, until at least such time that the representation matters herein have been resolved and/or until we first bargain over said matter with the authorized collective bargaining representative.

TOWN OF CALEDONIA (FIRE DEPARTMENT)

By_____

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint which Mr. Schwartz filed in Case III, No. 22770, MP-835, reads in part:

> "3. That Complainant has negotiated over ten contracts over the last twelve years.
>
> 4. That on or about 2/10/78 the employer refused, and continues to refuse to negotiate pursuant to Section 111.70 (3)4. [sic] The [sic] wages, hours and working conditions of the units [sic] employment."

Said complaint did not contain any request for relief.

The second complaint which Mr. Schwartz filed in Case IV, No. 22775, MP-836, reads in part:

> "3. That in violation of contract, past practice and Section 111.70(3). [sic]
>
> 4. That the employer has wrongfully withheld pay, changed the method of pay, and denied turnout gear to employees."

Said complaint, like the first one, did not contain any request for relief.

At the hearing, the Examiner noted that Mr. Schwartz had not requested any remedy for the alleged prohibited practices in issue and there asked him what remedy the Association was seeking. Mr. Schwartz replied that the Employer should recognize and bargain with the Association, that the Employer should revert back to its former mode of payment and pay employes the funds which have been held back, and that the Employer should reinstate its prior policy of supplying turnout gear.

In response, the Employer primarily asserts that it was not required to recongize and bargain with the Association absent a representation election, and that, moreover, it was free to unilaterally alter the mode of paying its employes and to also refuse to pay for turnout gear.

With reference to Complainant's first allegation, the Examiner has construed Complainant's complaint to allege a violation of Sections 111.70(3)(a)1 and 4 of MERA, despite the fact that the complaint itself did not refer to the precise statutory provision in question. As to the second complaint, which again does not correctly identify the pertinent statutory provisions, the Examiner has construed that complaint to allege violations of Sections 111.70(3)(a)1, 4 and 5 of MERA, as such sections refer to the generalized complaint allegations, i.e., the Employer's alleged refusal to bargain and alleged breach of contract. In making such clarifications, the Examiner notes that all such matters have been fully litigated and that the Employer did not question the particulars of the complaint prior to the hearing.

Turning to the merits of those allegations, it is undisputed that the Employer on February 10, 1978, via Attorney Breitenbach's letter of that date, advised the Association's President that "the Town Board has determined not to voluntarily recognize your Association as bargaining agent for any appropriate unit that may be contained within the Fire Department." In support of that position, the Employer's brief cites several cases for the proposition it need not recognize the Association unless the Association is first selected to represent the employes herein in a representation election. The Employer's reliance on these cases is misplaced, however, as neither case dealt with the kind of situation found herein, i.e., one in which an employer

has voluntarily recognized and bargained with its employes over a substantial period of time and where those employes subsequently adopt a given name to represent them as their designated collective bargaining representative.

On this latter point, it has been held that employes can alter the designation of their collective bargaining representative under certain circumstances. Thus, in Milbrew, Inc., 6/ an employer was required to recognize a local union which had merged with the local which had formerly represented the employer's employes, as the new local was the successor to the former local. More recently, the Commission has reaffirmed this principal when it ruled that formerly independent locals could merge together into a larger joint labor organization. 7/ In so finding, the Commission there noted:

> "Successorship should be determined by: (1) considering the degrees of continuity between the predecessor organization, and (2) recognizing and giving effect to the desire of the employes which is determined by a procedure which safeguards the free and unfettered choice of said employes." 8/

Here, there is no question but that there is a high degree of continuity between the Association and the formerly unnamed employe group. Thus, according to Strike's undisputed testimony, the employes themselves at a membership meeting formed the Association in an attempt to bring them closer together. The employes then discussed what contract proposals the Association should make to the Employer on their behalf. The employes have also selected Association officers to represent them, one of those officers being Strike, who was one of the two "Authorized Bargaining Representatives" who signed the 1976-1978 agreement on behalf of the firefighters.

The facts also show that the employes herein desire to be represented by the Association, as they voted on this matter at a membership meeting where almost all of the firefighters were present. While it is unclear as to whether such vote was by secret ballot, the Employer has made no claim that said election procedures were improper. Accordingly, there is no basis for finding that the employes did not freely choose the Association to represent them.

Moreover, this case is somewhat similar to New England Foundry Corp. 9/ wherein the National Labor Relations Board found that a voluntarily recognized collective bargaining representative was free to merge with an international union and that the employer therein unlawfully refused to bargain with the merged union. In so finding, the Board affirmed the Trial Examiner's reliance on a prior case, Cochrane Co., Inc., 10/ wherein it was noted that:

6/ Decision No. 8926-A (8/69).

7/ Hamilton Joint School District No. 16, et al., Decision Nos. 15765, 15766, 15767, 15768, (8/77).

8/ Ibid. In Hamilton, the Commission noted that there was possible evidence of opposition to the mergers in some of the locals and, as a result, found that some of the employers' duty to bargain was contingent upon the outcome of representation matters which were pending in some of the affected locals. Here, there is no evidence that the employes object to the Association, as the record shows that the Association itself filed a representation petition only because it originally believed that the Employer would not recognize it without a representation election. Since the Employer, for the reasons noted below, was obligated to recognize the Association during the duration of the 1976-1978 contract, said petition is immaterial to the ultimate disposition herein.

9/ 192 NLRB 785.

10/ 112 NLRB 1400.

"The question here is whether the union is the same organization with only external changes in appearance or whether it is a new organization. If the employees' own organization remains the same, change in name only is immaterial." (emphasis added.)

Since the only change herein does involve the adoption of a name by the firefighters, and as the Association is the successor to the formerly unnamed firefighter group, the Employer was thereby required to recognize the Association as the collective bargaining representative of the employes covered by the collective bargaining agreement for the duration of that agreement. 11/ Its refusal to recognize the Association on February 10, 1978 as the representative of such employes, at a time when the 1976-1978 agreement was still in effect, was therefore violative of Sections 111.70(3)(a)1 and 4 of MERA.

By the same token, the Employer also violated Sections 111.70(3)(a)1 and 4 of MERA when it unilaterally altered its former mode of paying firefighters on a current bi-weekly basis and by also unilaterally refusing to honor its prior practice of supplying rubber wear or turnout gear to its full-time firefighters. 12/

Thus, with respect to the rubber wear or turnout gear, the Employer for at least the last five years has followed a policy of providing such equipment to its full-time firefighters upon their request, irrespective of whether said firefighters had utilized all of their contractually mandated uniform allowance. Accordingly, the furnishing of such equipment constituted a condition of employment, one which could not be unilaterally abolished unless the Employer first bargained about such a proposed change with the collective bargaining representative of the employes. 13/ Here, the Employer failed to engage in such bargaining and it unilaterally refused to provide such equipment upon request, thereby violating its duty to bargain in good faith provided for in Sections 111.70(3)(a)1 and 4 of MERA. To rectify such conduct, the Employer shall immediately supply such equipment upon request and it

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11/ As the Employer for the last several years had bargainined with the part-time firefighters, and as the subsequent agreements reached contain provisions relating to said part-time firefighters, the record establishes that the Employer voluntarily agreed to bargain with them. Accordingly, the Employer was required to recognize the Association as the representative of such part-time and full-time firefighters for the duration of the 1976-1978 contract, since the Association, as the lawful successor to the previously unnamed employe group, assumed all of the rights and responsibilities of that group which were covered by the 1976-1978 agreement, including the right to represent the part-time firefighters.

12/ As noted above, the Association also claims that the Employer violated the contract and past practice by engaging in such conduct. However, as the contract does not contain any past practice clause, and since the contract does not refer to the supplying of rubber wear or turnout gear, and since it likewise does not specify whether firefighters should be paid on a current basis, these alleged breach of contract allegations are dismissed.

13/ The fact that the agreement did not refer to either the supplying of such equipment or the mode of payment is immaterial, as a condition of employment is one which need not necessarily be reflected in a collective bargaining agreement. City of Wisconsin Dells (11646) 3/73, and City of Brookfield (11406-A, B). See also NLRB v. Jacobs Mfg. Co., 2196 F. 2d. 680, 30 LRRM 2098, CA2, 1952, wherein the National Labor Relations Board reached a similar conclusion.

shall not unilaterally alter this condition of employment pending disposition of the matters herein. 14/

Turning to the Employer's altered method of payment, under which it no longer pays its firefighters on a current bi-weekly basis, it is also established that the method of paying employes constitutes a condition of employment and that, as such, it cannot be unilaterally altered unless an employer first bargains about such a change with the collective bargaining representative of its employes. 15/ Here, by failing to first bargain over said change, the Employer again violated the bargaining duty proscribed in Sections 111.70(3)(a)1 and 4 of MERA. As a remedy, the Employer shall restore the status quo ante by reverting back to its prior method of payment, by paying employes the one week's pay which it has held back from them, and by not altering said method of payment pending disposition of the matters herein. 16/

The above shows, then, that the Employer unlawfully refused to bargain by making certain unilateral changes in wages and working conditions and by refusing to recognize the Association on February 10, 1978 for the duration of the 1976-1978 agreement. The latter issue, however, i.e., the fact that the Employer was obligated to recognize the Association as the collective bargaining representative of all full-time and part-time employes covered by the 1976-1978 agreement for the duration of that agreement, is a different issue from the question of whether the Employer was also required to recognize and bargain with the Association for all said employes, once that agreement expired.

Thus, Mr. Breitenbach's March 6, 1978 letter to Mr. Pieroni in the companion representation matter stated that "occasional employees" should be excluded from the bargaining unit. The Employer in effect reiterated this position in its March 29, 1978 representation petition wherein it requested a representation election only for its full-time firefighters, thereby calling into question the appropriateness of including part-time firefighters in the unit. At the instant hearing, the Employer again stated that the part-time firefighters are casual employes who do not have a sufficient regularity of employment to be included in a bargaining unit consisting of full-time firefighters. In such circumstances, it is clear that the Employer was thereby questioning the appropriateness of the Association's claimed-for full-time and part-time firefighter unit. Since there are

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14/ Since the underlying representation matter herein is still pending, the Employer cannot alter any conditions of employment which would not normally be altered absent the pendency of said matter. Dane County (11622-A) 10/73. By the same token, if the Association ultimately becomes the representative of all of the employes herein, the Employer cannot unilaterally alter said conditions of employment until it first bargains over said subjects.

15/ See, for example, Central Distributing Co., 187 NLRB, No. 121; Bachrodt Chevrolet Co., 186 NLRB, 1035; General Motors Corp., 59 NLRB, 1143.

16/ Here, it is unclear as to whether the Employer's two unilateral changes herein preceded or followed the Association's request to the Employer that it be recognized as the collective bargaining representative of the firefighters. Such timing is immaterial, however, as the Employer was precluded from making such unilateral changes without first bargaining over said subjects with the firefighters' collective bargaining representative at that time, irrespective of the identity of that party. Since the Association is the lawful successor to the formerly unnamed employe group, the Association can enforce the bargaining duty which the Employer owed to that group. See, for example, Milbrew, Inc. supra.

approximately sixteen full-time firefighters and fifteen part-time firefighters, there is obviously a very substantial difference of opinion between the parties as to what constitutes the appropriate unit.

If the part-time firefighters are casual employes who either work at their own convenience or who have no regularity of employment, it appears that they cannot be included in the unit. Village of Niagara (12466) 1/74. On the other hand, if they are regularly employed, they may be included in the unit. Manitowoc County (10899) 3/72; City of Edgerton (11340) 10/72.

Here, at the outset of the hearing, the Examiner asked Mr. Schwartz what would constitute regularity of employment for the part-time firefighter Mr. Schwartz refused to answer this question and stated that "[T]he Commission could come back here and hold a hearing on that issue" at a later time (Transcript, p. 5-6). As a result, the instant record is totally barren of evidence pertaining to the regularity of employment, if any, of the part-time firefighters. Accordingly, since there is absolutely no basis in the present record for finding that the part-timers should be included in the appropriate unit, it is entirely possible that all, or some, of the firefighters do not share a sufficient regularity of employment to be included in said unit. As a result, there is a possibility that there may be a very substantial variance between the Association's requested unit and the unit which is ultimately found to be appropriate. If such a substantial variance does exist, the Employer would then be free to reject the Association's demand that the Employer recognize the Association at the termination of the contract as the representative of the full and part-time firefighters, as the Association's claimed-for unit would constitute an inappropriate unit. 17/

The Employer's continuing obligation to recognize the Association, therefore, rests on the question of whether the part-time firefighters should be included in the unit. On this issue, it is the Association which has the burden of proving its complaint allegations, including the allegation that the Employer has unlawfully refused to recognize the Association as the representative of an appropriate bargaining unit. 18/ Since there is no evidence that the part-time firefighters should be included in the unit, there is no basis for finding that a combined full-time and part-time firefighter unit constitutes an appropriate unit. Accordingly, and because the variance between the Association's requested unit and the correct unit may be so

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17/ See United Foods, Inc., 188 NLRB, 117, wherein the National Labor Relations Board ruled that an employer did not unlawfully refuse to bargain with a union which sought to represent an inappropriate certified unit in which there was a very substantial variance between the certified unit and the unit which was ultimately found to be appropriate. Since an employer can lawfully refuse to bargain over an inappropriate certified unit, an employer has the similar right to refuse to bargain over

substantial 19/, it follows that the Employer was not required to recognize the Association for such a combined unit. 20/ Furthermore, as the Association here has never requested recognition as the representative of only the full-time firefighters, the Employer has not unlawfully refused to recognize the Association as the representative of said full-time firefighters. Accordingly, although the Employer unlawfully refused to recognize the Association during the 1976-1978 agreement, the Association has failed to meet its burden of proving that the Employer's refusal to recognize the Association at the termination of the contract was likewise unlawful. The Examiner has therefore dismissed this part of the complaint and has not required the Employer to recognize the Association after the termination of the contract.

Dated at Madison, Wisconsin this 28th day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

19/ In so finding, it should be noted that an employer has a continuing duty to recognize a voluntarily recognized bargaining representative at the termination of a contract, absent unusual circumstances. Here, however, since there is a good faith dispute over the continued appropriateness of the agreed-to unit, and as that dispute involves approximately one half of the employes in said unit, the Employer herein could properly refuse to bargain over said unit. Furthermore, it should be emphasized that this finding rests on the fact that such a substantial variance may exist and that an employer is not entitled to withhold such recognition if there is a dispute over an insubstantial number of employes.

20/ United Foods, supra. See also Bender Ship Repair Company, 188 NLRB 615, wherein the National Labor Relations Board ruled that an employer need not continue to recognize a contractually established unit in part because, in the Board's words, "we view the 1967 agreement as failing to define a unit with sufficient clarity to warrant a finding that a presumption of majority should attach to it."