STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 311, THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF), AFL-CIO, Complainant, vs. CITY OF MADISON, Respondent.	Case 165 No. 48353 MP-2661 Decision No. 27595-A

Appearances:

Mr. Richard V. Graylow, and Mr. John C. Talis, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P. O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Local Union No. 311, the International Association of Fire Fighters (IAFF), AFL-CIO, referred to below as the Union.

Mr. Gary A. Lebowich, Labor Relations Manager, City of Madison, City-County Building, Room 502, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709-0001, referred to below as the City.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 20, 1992, the Union filed a complaint of prohibited practices alleging that the City had violated Secs. 111.70(3)(a)1 and 3, Stats., by transferring certain employes represented by the Union into positions not within the bargaining unit represented by the Union. After informal attempts to resolve the matter informally proved unsuccessful, the Commission informally designated Richard B. McLaughlin, a member of its staff, to act as Examiner. This informal designation was confirmed in the formal appointment of Examiner issued by the Commission on March 17, 1993. Due to the difficulty in securing hearing dates from the City, on March 17, 1993, hearing was set by the Examiner for March 30, 1993. The March 17, 1993 Notice of Hearing set March 23, 1993 as the due date for the City's answer to the complaint. The City filed its answer on March 30, 1993. The City requested, and the Union agreed, to convert the March 30, 1993 hearing into a pre-hearing conference, due to confusion regarding the complaint posed here and other litigation involving the same parties. I summarized the pre-hearing conference in a letter to the parties dated April 7, 1993, which states:

> I write to summarize the major points touched upon in the pre-hearing conference of March 30, 1993.
>
> I have attached to this letter a Notice of Hearing for May 13, 1993.
>
> Initially, I will note that I anticipate receiving an amended complaint which, among other points, will update the list of challenged transfers which appear at paragraph 5 of the complaint. The complaint should also be amended to allege a Sec. 111.70(3)(a)4, Stats., violation if the Complainant seeks bargaining over the transfers. It is my understanding that complaint will be amended to clarify that inter-departmental transfers are at issue.
>
> It is also my understanding that the City will file, by April 19, 1993, an amended answer specifying any affirmative defense the City wishes to assert.
>
> Since it appears that the City will allege that the collective bargaining agreement authorizes the disputed transfers, I need a statement from each of you regarding the propriety of an Examiner interpreting the contract. If there is a pending grievance on the matter, each of you should form and state your position on the effect that grievance should have on the processing of the complaint.
>
> If you have any questions, please let me know.

On April 7, 1993, the Union filed an amended complaint which amended Paragraph 5 of the original complaint and which added Sec. 111.70(3)(a)4, Stats., to the allegations of the original complaint.

In a letter to the City dated April 26, 1993, I stated:

> It was my understanding that the City would file an amended answer specifying any affirmative defense the City wishes to assert, and would do so by April 19, 1993.
>
> I have not received any response from the City. Please file your amended answer as soon as possible.

In a letter to the City dated May 5, 1993, I stated:

> The City has not yet filed an amended answer. Failure to do so can result in the waiver of any affirmative defense. If you wish to assert any affirmative defense, file an amended answer as soon as possible.

On May 5, 1993, the City filed its amended answer.

Hearing was conducted on May 13, 1993, in Madison, Wisconsin. Among the points discussed at the hearing was the pendency of grievance arbitration concerning matters covered by the complaint. In a letter to the parties dated May 14, 1993, I summarized the status of those discussions thus:

> I write to note the status of the above-noted matter. Mr. Graylow is to check with his client regarding the status of the grievance arbitration requests noted in Respondent Exhibit 7. He is to have this done by May 27, 1993.
>
> After the two of you have discussed the results of his discussion with his client, please advise me on when you wish to enter closing arguments or on whether I will need to make any rulings before those arguments can be entered.

In a letter to the parties dated July 1, 1993, I stated:

> Please advise me of the status of the above-noted matter. I enclose a copy of my May 14, 1993 letter which is the last statement on the status of the case I am aware of.

In a letter filed with the Commission on July 7, 1993, the Union requested "that a status conference be convened in Madison, Wisconsin in due course." In a letter filed with the Commission on July 19, 1993, the Union made a request "for reissuance of the panel of Arbitrators previously provided by the WERC." In a letter to the parties dated August 16, 1993, I supplied the Union with the

original panel of arbitrators originally provided to the parties on March 24, 1992. Also in that letter, I summarized the status of the complaint thus:

> Mr. Graylow has informed me, by phone and in writing, that the Union is willing to arbitrate the grievance underlying the above-noted complaint and hold further processing of the complaint in abeyance pending the completion of the arbitration process.
>
> I have been unable, by phone, to obtain the City's position on this point.
>
> Accordingly, I attach the arbitration panel originally issued by the Commission on March 24, 1992.
>
> If Mr. Lebowich believes the processing of the complaint precludes, or should preclude, this result, he should so notify me in writing. If this is not the City's position, then the arbitration should be processed.
>
> If either of you have any questions, please let me know.

In a letter to the City dated September 3, 1993, I stated:

> You called me, last week I believe, in response to my letter of August 16, 1993. You questioned the second paragraph of my letter and indicated you would respond in writing. I stand by the accuracy of the second paragraph of the August 16, 1993 letter and have yet to receive your written response to it.
>
> Please respond to the August 16, 1993 letter in writing. If you would prefer to respond in a conference call, please let me know when your are available, and I will arrange it.

On September 8, 1993, the City filed the following response:

> . . .
>
> The City of Madison believes that the processing of the referenced complaint precludes the result that it should be held in abeyance pending completion of an arbitration process proposed by Mr. Graylow. This matter has been pending all too long and any

> delay that would be due to arbitration can only exacerbate the underlying situation. I need not remind you that the Union was not aware of the demand for arbitration and/or did not intend to pursue the case in a timely manner, but instead filed a prohibited practice charge on the same issue. Further, processing of the arbitration demand at this late date would require a waiver of procedural arbitrability issues to which the City is not will (sic) to agree.
>
> Processing of the instant complaint should continue and its completion should also include resolution of the grievance the Union now desires to arbitrate.

In a letter to the parties dated September 17, 1993, I stated:

> I write to confirm the status of this matter. I have received Mr. Lebowich's statement of the City's position on deferring this matter to grievance arbitration. I believe Mr. Graylow has referred the matter to his client.
>
> I will suggest that when Mr. Graylow's client has taken a position, he should so advise me and I will set up a conference call to address the point.

In a letter to the Union's representative dated October 11, 1993, I again asked what the status of the matter was.

On October 18, 1993, the Union filed a letter indicating it was attempting "to pick an Arbitrator," but had not been able to reach City representatives to do so. Attached to that letter was a letter from the Union's representative to the City's, which noted, among other points, the following:

> You indicated you would not proceed to arbitration . . . By copy of this letter, I advise Examiner Mr. Richard B. McLaughlin of the foregoing. I also indicate to Mr. McLaughlin my intention to amend the Complaint, in light of the foregoing, to allege a violation of Sec. 111.70(3)(a)5, Wis. Stats. (1991-92).
>
> Perhaps a status conference before the Commission is

> required. I am ready, will (sic) and able to participate upon the call of either yourself or Mr. McLaughlin.

I initiated a conference call which was held on October 21, 1993. In a letter to the parties dated October 22, 1993, I summarized the status of the matter thus:

> . . .
>
> It is my understanding that Mr. Graylow's amendment seeks not to have grievance arbitration compelled, but to have the Commission interpret the labor agreement. It is further my understanding that Mr. Lebowich is willing to have the Commission interpret the labor agreement. The City's refusal to select arbitrators reflected, then, its unwillingness to have the dispute heard in two forums.
>
> I have informed the reporter she should issue a transcript of the May 13, 19932 hearing. After receiving the transcript, I will call each of you to determine if further hearing is necessary. If not, the matter will be decided on the record developed and the May 13, 1993 hearing.
>
> I should note I consider the complaint amended to allege a violation of Sec. 111.70(3)(a)5, Stats., consistent with the points noted above.
>
> . . .

In a letter to the parties dated November 2, 1993, I noted my receipt of the transcript on October 26, 1992, and asked the parties to advise me if further hearing was necessary. The Union responded in a letter filed on November 5, 1993, which states:

> Responding to your letter of November 2, 1993, no further hearing is required, at this point, from the Union's side of the table. Needless to say, I state the foregoing conditionally depending upon the City's position.
>
> However, I would add the Collective Bargaining Agreement between the City and Local No. 60 to the Exhibits.

I would also add the following stipulation:

> Tommy Anderson and the constituency of Firefighter Local 311 have complied with and are in conformity with WAC ILHR 30. See particularly WAC ILHR 30.07 and 30.08.
>
> The employees represented by Local Union No. 60 have not complied with nor are they expected to comply with WAC IHLR 30.

In a letter to the City dated November 15, 1993, I sought a response to the Union's letter of November 5, 1993. In a letter to the City dated December 10, 1993, I stated:

. . .

> Please respond to my letter of November 15, 1993, by December 30, 1993. If you do not respond by that date, I will assume the record will be complete with the addition of the material noted in Mr. Graylow's letter of November 5, 1993. Based on that assumption, I will set a briefing schedule.

In a letter to the Union dated January 7, 1994, I stated:

> Mr. Lebowich informed me on the phone on December 30, 1993, that he would put the City's position on supplementing the record in the above-noted matter in writing. I anticipate he will send a letter to you soon.

In a letter filed with the Commission on February 1, 1994, the City stated:

> I am writing in response to Mr. Graylow's letter of November 5, 1993. Please be advised that the City does not concur with the additional Stipulation proposed by Mr. Graylow in his letter of that date. Therefore we leave counsel for the union to his proofs on his proposed Stipulation.
>
> The City concurs with the union that no further hearing is required at

> this point. Of course, the foregoing is conditioned upon the union's position on the above rejected stipulation.

I initiated a conference call on February 11, 1994, and summarized that call in a letter to the parties dated February 14, 1994, which states:

> . . . The above-noted matter will be briefed thus:
>
> The Union will submit an initial brief postmarked within 30 days of receipt of this letter.
>
> The City will submit a reply brief postmarked within 30 days of receipt of the Union's initial brief.
>
> The Union will submit a reply brief postmarked within 10 days of receipt of the City's brief.
>
> Each party reserves the right to request evidentiary hearing if issues of fact are posed by the briefs. I would ask that you exchange briefs directly, mailing me a copy.

The parties mutually agreed to modify the briefing schedule, and the Union filed its initial brief on April 18, 1994. In a letter filed with the Commission on May 3, 1994, the City asserted, among other points, that the Union's brief "does pose serious issues of fact that do require further evidentiary hearing." The City requested that the briefing schedule be suspended and that I "convene such hearing at the earliest mutually convenient date."

With the consent of the parties, hearing was set for December 1, 1994. A responsive briefing schedule was established at the close of that hearing. The transcript of that hearing was filed with the Commission on December 6, 1994. The Union, in a letter filed with the Commission on January 5, 1995, noted that it would "rely and will continue to rely" on the brief it filed on April 18, 1994. The Union also noted that "(o)nce the Employer's Brief-in-Chief has been received and analyzed, a more definitive, in-depth Union Reply Brief will be filed."

In a letter filed with the Commission on January 31, 1995, the Union noted that it had not received the City's brief, and requested "that the record be closed and this matter be decided on the merits."

In a letter to the City dated February 1, 1995, I stated: "If you believe the record should not be closed as Mr. Graylow requests, please file a response to his letter by February 10, 1995." The

City responded in a fax filed with the Commission on February 10, 1995, which stated:

. . .

> To date the respondent has not received the initial brief referred to in the hearing of December 1, 1994. Therefore, the respondent is in somewhat of a quandary as to how the rest of this matter is to proceed. Please advise at your convenience.

I responded in a letter dated February 10, 1995, which states:

> . . . I enclose a copy of a letter received from the Union on January 5, 1995. In that letter the Union notes it would rely on its April 18, 1994 brief. The January 5, 1995 letter lists you as receiving a copy of the letter. I did not mail a copy of this letter to you because the Union already had. I enclose a copy of that letter if you have not received it. I also enclose a copy of the Union's April 18, 1994 brief with its accompanying cover letter. I do not know which, if any, of these documents you have received.
>
> File your brief not later than thirty days from receipt of this letter.

In a letter to the City dated March 17, 1995, I stated:

> I have received no brief from you in response to my letter of February 10, 1995. I can see no option but to close the record. If you have received an extension of the filing deadline from Mr. Graylow, or have some other valid reason to object to the closing of the record, notify me immediately.

The City responded in a letter dated March 21, 1995, which states:

> This is to confirm that by agreement on March 21, 1995 the employer's brief for the above-referenced matter is due on or before March 27, 1995 . . .

This deadline was extended, with the Union taking no position on the extension, until April 10, 1995. The City filed its brief on April 13, 1995. The Union's brief was filed, with the consent of the City, on May 22, 1995.

In a letter to the parties dated August 7, 1995, I stated:

> I have completed my review of the record in the above-noted matter. I have noted that Mr. Graylow's reply brief raises provisions of the labor agreement not posed in his initial brief. More specifically, at page 5 of the reply brief, he addresses the application of Section C of the Preamble, and Article 5, Section C. Because of the responsive briefing schedule, the City has not been able to address the impact, if any, of these provisions.
>
> My review of the record convinces me that these provisions are at least relevant, and arguably significant in resolving the issues posed by the complaint. Thus, I believe it is necessary to afford Mr. Lebowich the opportunity, if he wishes, to address that portion of the Union's arguments. Any such argument must be postmarked not later than September 1, 1995. I will also note I enclose for Mr. Lebowich a copy of an arbitration award cited by Mr. Graylow in his reply brief. It does not apply directly to the points raised above, but is not available through standard commercial sources.
>
> . . . I do not, at this point anticipate argument beyond that allowed above. If, however, Complainant wishes to address any point raised by this letter, I welcome the response.
>
> I apologize for bringing this matter to your attention at this late date, but I believe whatever delay this prompts is a necessary price to pay to have your positions fully developed.

The Union, in a letter filed on August 8, 1995 stated its desire to "reserve the right to respond to Mr. Lebowich's submission of September 1, 1995." In a letter to the City dated September 18, 1995, I stated:

> I have received no written argument in response to my letter of August 7, 1995. I did receive a voice-mail message from you regarding extending the time limit stated in that letter. I left a call-

> back message at your office and have received no response.
>
> I would prefer the record include your position on the point noted in my August 7, 1995 letter. I do not, however, think the record can be held open indefinitely. I will extend the deadline for filing until September 29, 1995. This will be the last extension unless Mr. Talis agrees otherwise.

No additional argument was filed. In a letter to the City dated October 5, 1995, I confirmed "that the record in the above noted matter is closed, as set forth in my letter of September 18, 1995.

FINDINGS OF FACT

1. The Union is a labor organization which maintains its principal offices at 821 Williamson Street, Madison, Wisconsin 53703.

2. The City is a municipal employer which maintains its principal offices in the City-County Building, 210 Martin Luther King Jr. Boulevard, Madison, Wisconsin 53709.

3. The City and the Union have been parties to a series of collective bargaining agreements, including one which, by its terms, was in effect from January 1, 1992 to December 31, 1993. Among the provisions of that agreement are the following:

> CONTRACT
>
> CITY OF MADISON AND FIREFIGHTERS LOCAL 311
>
> THIS AGREEMENT, made and entered into at Madison, Wisconsin according to the provisions of Section 111.70, Wisconsin Statutes, by and between the City of Madison, A Municipal Employer, hereinafter called the "City", and Local 311 of the International Association of Firefighters AFL-CIO hereinafter called the "Union", WITNESSETH:
>
> . . .
>
> C. Conflicting Ordinances and Resolutions: The terms and conditions of this Agreement shall supersede ordinances and resolutions wherein there is a conflict with this Agreement.

D. Existing Benefits: The Employer intends to continue other authorized existing employee benefits primarily affecting wages, hours and conditions of employment not specifically referred to or modified by this Agreement . . .

ARTICLE 1

RECOGNITION

Pursuant to the provisions of Chapter 111.70 of the Wisconsin Statutes, the City recognizes the Union as the exclusive Bargaining Agent for all employees assigned to the position classifications of Firefighter, Chief's Aide, Lieutenant, Fire Investigator, Fire Inspector, Director of Community Education, Firefighter/ Paramedic, Community Educator, and Captain. Specifically excluded from the bargaining unit shall be the classifications of Division Chief, Assistant Chief, Deputy Chief and Fire Chief. The aforementioned job titles may be subject to change but such changes shall not affect the composition of the bargaining unit . . .

ARTICLE 5

MANAGEMENT RIGHTS:

Union recognizes the prerogative of the City and the Chief of the Fire Department to operate and manage its affairs in all respects, in accordance with its responsibilities and the powers or authority which the City has not officially abridged, delegated or modified by this Agreement and such powers or authority are retained by the City. These management rights include, but are not limited to the following:

. . .

C. To hire, schedule promote, transfer, assign, train or retrain employees in positions within the Fire Department.

. . .

ARTICLE 6

NON-DISCRIMINATION

The City and its agents and the Union and its members shall not

discriminate against any employee with regard to the hiring of any employee, tenure in the department, or termination, transfers, promotions, exchanges, duty or work assignments, on the basis of . . . disability . . . in compliance with the Madison Equal Opportunities Ordinance, Wisconsin Statutes, Title VII of the Civil Rights Act of 1964, and the terms of this Agreement . . .

ARTICLE 7

HOURS OF WORK

. . .

ARTICLE 11

PAY POLICY

. . .

ARTICLE 14

WORKER'S COMPENSATION

A. In the event any employee covered by the terms of this Contract is entitled to receive compensation of temporary disability in accordance with the provisions of Chapter 102, Wisconsin Statutes, said employee shall continue to be paid by the City at ninety percent (90%) of the same rate on the same basis as he/she was prior to such injury, provided that no employee shall receive less than the same net regular rate of pay as he/she was paid prior to such injury. Said pay shall include his/her Worker's Compensation benefit and shall continue for a period not to exceed one-hundred-eighty (180) working days or thirty-six (36) working weeks and during such period the employee is receiving pay under the provisions of this paragraph, said employee shall continue to accrue sick leave and vacation in accordance with the provisions of this Contract, provided that no employee by reason of this paragraph shall receive pay for more than fifty-two (52) weeks in any calendar year. Payment provided herein shall include the first three (3) days said employee is absent from work.

ARTICLE 15

LIFE INSURANCE AND PENSION PLAN

. . .

ARTICLE 17

NO OTHER AGREEMENT

> The City agrees not to enter into any other Agreement, written or verbal, with Bargaining Unit personnel, individually or collectively, which in any way conflicts with the provisions of this Agreement, or usurps the Union's representative function.

4. The City has, for no less than seven years, maintained a policy of returning employes injured on the job to the work force as soon as possible, consistent with their physical ability to do so. That policy was revised in Administrative Procedure Memorandum (APM) No. 2-17, dated January 21, 1986, which was issued to "All Department/Division Heads." APM 2-17 reads thus:

> SUBJECT: TEMPORARY MODIFIED DUTY (T.M.D.) PROGRAM (FOR EMPLOYEES ON WORKER'S COMPENSATION
>
> POLICY STATEMENT:
>
> The City of Madison provides benefits to eligible employees who sustain a work related injury or illness, in accordance with Chapter 102 State Statutes.
>
> The objective of the T.M.D. Program is to make all reasonable efforts to reintegrate injured employees as early as possible into contributing and productive work during the recovery period following an injury or illness.
>
> . . .
>
> The T.M.D. Program should be recognized as an important part of the recovery or rehabilitation process following the acute phase of an injury or illness. Participation in this Program shall place emphasis on the employee's ability to satisfactorily perform limited yet productive work in an effort to enhance the rehabilitation process.
>
> A team . . . will actively work together to achieve a release to return to work allowing participation in the T.M.D. Program. Every

effort will be made to medically identify the abilities of the recovering employee.

Employees returning to work to participate in the T.M.D. Program will receive medically permissible-job assignments.

While participating in the T.M.D. Program, the employee's regular hourly rate of pay will be maintained.

The progress of an injured employee shall be monitored . . .

(T)his program is intended to be of a temporary nature and should the work restrictions placed on an injured employee become permanent . . . (APM) 2-27 . . . shall apply.

Participation by an injured employee in the T.M.D. Program, when medically authorized, is mandatory. Refusal to report for work to participate in the T.M.D. Program, without a physician's statement authorizing such absence, will result in suspension of benefits pursuant to the Worker's Compensation Act.

The version of APM 2-17 modified by this memorandum was dated January 15, 1971.

5. The City, in its implementation of APM 2-17, prefers to keep Fire Fighters who are injured on duty (IOD), and temporarily unable to function in fire suppression duties, on light-duty assignments within the Fire Department. The Fire Department maintains the following policy regarding light duty assignments:

1. Limited duty employees will report to the Assistant Chief, Personnel and Training for assignment to a specific supervisor; others having work to do will check with the assigned supervisor.

2. The uniform is the appropriate dress uniform, without tie.

3. The work week is Monday through Friday, 0800-1630.

. . .

6. The employee must schedule activities, including vacation

> days and time off for duty incurred injury physician visits/therapy sessions, on the calendar in the Fire Prevention Office.
>
> . . .

6. Tommy Anderson has, at all times relevant here, been a Fire Fighter represented by the Union. In October of 1991, Anderson injured his knee while on duty. In January of 1992, Anderson was assigned to clerical functions within the Community Education Unit of the Fire Department. He was assigned duties consistent with his then-required work restrictions.

7. On February 4, 1992, Fire Chief Earle G. Roberts issued the following memo to the City's Workers Compensation Department:

> We have exhausted all opportunities for people to perform non-suppression job assignments in our Department; therefore, we can no longer accommodate employees who cannot staff fire apparatus. Please make other arrangements for any employees who are released by their physicians to return to work with any limitations that prevent their full participation on a firefighting crew.

Anderson was, effective February 17, 1993, assigned to perform clerical duties within the office of the City Comptroller. The Union, on Anderson's behalf, filed a grievance regarding the February 17, 1992 assignment.

8. At all times relevant here, employes within the Community Education Unit of the Fire Department report to the Captain of Community Education, who in turn reports to the Assistant Chief/Fire Marshal, who in turn reports to the Fire Chief. The Fire Department and the office of the City Comptroller are separate departments within the City's administrative structure.

9. During March of 1992, the City assigned Wendy Barton to perform various clerical duties for the Community Education Unit. Barton is a member of a pool of clerical employes represented by Local 60 of the American Federation of State, County and Municipal Employes (AFSCME), AFL-CIO. Barton performed, during this period, data entry work of the type formerly performed by Anderson. Barton and other employes from the clerical pool also perform such duties for the Comptroller's office.

10. Local 60 and the Union represent employes within the Fire Department. Employes represented by Local 60 in the Fire Department perform clerical duties. The City, in making IOD light-duty assignments, typically assigns Fire Fighters to duties of a clerical nature, such as those performed by employes represented by Local 60. When the City assigns employes represented by

the Union to light-duty assignments, those employes remain represented by the Union, and suffer no loss in the wages or benefits set forth in the labor agreement between the Union and the City. Anderson was the first Union-represented employe assigned to IOD light-duty work outside of the Fire Department.

11. The City was aware, at the time it assigned Anderson to the Comptroller's Office, that Anderson was an officer of the Union and active in local Union politics. Anderson's assignment to the Comptroller's office did not, however, reflect any hostility on the part of the City toward Anderson's exercise of rights protected by the Municipal Employment Relations Act (MERA).

CONCLUSIONS OF LAW

1. Anderson is a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

2. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

3. The City is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. The City's assignment of Anderson, or other members of the bargaining unit represented by the Union, to light duty in positions outside of the Fire Department does not violate Secs. 111.70(3)(a)3 or 4, Stats.

5. The City's assignment of Anderson, or other members of the bargaining unit represented by the Union, to light duty in positions outside of the Fire Department violates Article 5, Section C and the Preamble, Section C of the collective bargaining agreement noted in Finding of Fact 3. This violation of the collective bargaining agreement violates Sec. 111.70(3)(a)5 and 1, Stats.

ORDER 1/

1. Those portions of the Union's complaint, as amended, alleging violations of Secs. 111.70(3)(a)3 and 4, Stats., are dismissed.

2. To remedy its violation of Secs. 111.70(3)(a)5 and 1, Stats., the City, through its officers and agents, shall immediately:

a. Cease and desist from:

(1) Assigning members of the bargaining unit represented by the Union to light duty in positions outside of the Fire Department.

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

1/ See footnote on page 18.

(1) Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the City has taken to comply with this Order.

Dated at Madison, Wisconsin, this 12th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date

appearing immediately above the Examiner's signature).

CITY OF MADISON

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The procedural background is set forth in detail above. The complaint and amended complaint point to several "transfers" outside of the Fire Department, but the parties' arguments focus on Anderson's as the focus of the allegations. Examination of the parties' dispute reflects this focus.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the factual background, the Union notes that it has no objection to the City's light-duty program "as long as all transfers/reassignments of personnel are with-in the 'friendly confines' of the Madison Fire Department (MFD)."

The Union notes that extra-department reassignments violate the labor agreement. Noting that Anderson's assignment typifies the dispute, that his position in "Community Education" fell within the scope of Article I, and that his reassignment to the Comptroller's office took him outside the scope of Article I, the Union concludes "(t)he recognition clause prohibits this interchange of personnel and work from personnel in the unit to others." Arbitral precedent, the Union argues, establishes that the recognition clause establishes the Union as the exclusive representative for certain positions. The transfer of Barton into the position formerly occupied by Anderson undermines this exclusivity in violation of Article I.

Noting that Anderson's transfer was the first extra-departmental transfer, the Union concludes that it violates the labor agreement's Preamble, at Section D. Beyond this, the Union argues that the transfer violates Article 6 by prefacing Anderson's transfer on his job-related disability. Noting that virtually all of the agreement's provisions "are specific to Fire Fighters; not to civilians," the Union concludes that the transfer violates these articles. Since the transfer reduced Anderson to "civilian status," the Union concludes that it violated, among other provisions, Articles 7, 11 and 15. Supreme Court precedent, according to the Union, underscores this point. 2/

2/ Citing Local Union No. 487 v. Eau Claire, 141 Wis.2d 437 (1987); and Local Union No. 487 v. Eau Claire, 147 Wis.2d 519 (1989).

If the City secured the permission of Barton to effect the transfer, then it necessarily follows, the Union argues, that the City has violated Article 17. To the extent any of these provisions can be considered ambiguous, the Union contends that established past practice mandates that light-duty assignments be intra-departmental.

The same principles underlying the violation of contract also, according to the Union, establish that the City has violated the law. Apart from the improper combining of "the jobs of Fire Fighter with that of Clerk Typist," the Union asserts the City's action violates the seniority provisions of Sec. 62.13, Stats., and the provisions of the MERA.

The Union concludes that "(a)ppropriate remedial orders must be entered forthwith."

The City's Reply

After a review of the procedural and factual background to the complaint, the City notes that "(b)oth parties . . . concur that returning IOD employees to duty within their work restrictions is a proper way to integrate them back into the workplace." The dispute, the City notes, arises when the return to work puts a Fire Fighter outside of the department. Contending that "provision of alternate work is an employer-wide responsibility," the City concludes "there is no proper restriction on its obligation to assign any Madison Fire Department employee, whether in Local 311 or Local 60, AFSCME, to such work anywhere in the City." IND 80.47, according to the City, underscores this by noting that a return to work on light duty can be "furnished by the employer or some other employer . . ."

The City contends that the labor agreement has not been violated because Anderson was not replaced and any work he did within the department on light duty "was not that reserved exclusively to commissioned personnel."

More specifically, the City argues that Article 1 has not been violated since Barton was not assigned to fire suppression duties and since Anderson "retained his firefighter commission and all salary and benefits that go with it." That the Community Education function falls within the departmental organizational chart is, the City contends, of no significance to this matter. The clerical duties performed by Anderson within the Community Education function do not fall within the scope of positions represented by the Union. Rather, those clerical duties, like those performed by Anderson in the Comptroller's office, resemble those of positions represented by Local 60. Since this is not a case of a supervisor performing unit work, the City concludes that the arbitral precedent cited by the Union is inapposite, and does not establish a violation of Article 1.

Nor, according to the City, has the Preamble been violated. To the extent any benefit falling within Section D exists, that benefit, the City argues, is rooted in City policy and the administrative

code. Neither source of the policy recognizes "any guarantee of choice of IOD work assignment." Noting that there was no Union objection to the work assignment policy until the City was unable to assign intra-departmental work, and that the City has consistently applied its own policies, the City concludes that the benefit the Union attempts to assert under Section D has never existed, and cannot be created here.

The City then argues that the Union has failed to prove any violation of Article 6. Noting Anderson "was afforded all the rights of any other City employee with respect to Workers Compensation benefits and opportunities to participate in the Temporary Modified Duty Program," the City concludes that no violation of Article 6 can be found.

Acknowledging that the labor agreement creates duties and benefits unique to Fire Fighters, the City asserts that any conclusion that Anderson became a civilian requires "some unfathomable leap" of logic. The evidence establishes, according to the City, that "Anderson never lost or gave up his commissioned status."

The City then rejects the assertion it violated state law by co-mingling a commissioned with a clerical position. As the City puts it, "Anderson remained at all times a firefighter and Ms. Barton remained at all times a clerical pool employee."

Sec. 62.13, Stats., has no relevance to this matter, according to the City, because "Anderson remained under the control of the Madison Fire Department . . . and did not lose any seniority or any other statutory rights by virtue of being assigned to clerical duties . . ."

Nor has the Union demonstrated any City violation of MERA. The City contends that the authority cited by the Union is irrelevant, since Anderson has never been removed from the unit represented by the Union. The City concludes that the complaint must be dismissed.

The Union's Reply

The Union argues that Anderson's transfer to the Comptroller's office involved a transfer of personnel. The Comptroller's office and the Fire Department are, the Union asserts, distinguishable entities under the contract, state statute and governing case law.

The Union then contends that the agreement's Preamble conflicts with the policies advanced by the City as the source of the light-duty program. Section C of the Preamble establishes, the Union notes, that the agreement prevails over Ordinances and Resolutions where they "conflict with this agreement." Under Article 5, Section C, the City may only "transfer" employes "in positions within the Fire Department." The Union concludes this provision conflicts with, and must supersede, the policies cited by the City. Beyond this, the Union contends that the benefit preserved by Section D of the Preamble is the right to remain within the department.

Even if no conflict is found between the labor agreement and APM 2-17, the Union argues that the policy does not create the extra-departmental transfer right the City asserts here. The Union argues that the policy requires limited duty employes to report to Departmental supervisors whose authority is exercisable only within the department.

Citing arbitral and Commission precedent, the Union concludes that the City's contentions must be rejected and that "(a)ppropriate remedial orders supporting this Union's position must be entered forthwith."

DISCUSSION

As preface to the application of the evidence to the MERA allegations, it is necessary to touch on the Union's assertions that the transfers violate extra-MERA law. The Union has not clarified how such allegations come within the Commission's jurisdiction. This jurisdiction cannot be assumed. 3/ Even if jurisdiction to apply the law cited by the Union exists, it is not apparent how the evidence triggers it. The City has not combined a clerical with a fire-fighting position. Rather, Anderson was assigned civilian duties during a short-term disability. His status as a fire fighter was not modified in any substantive sense. Rather, his duty assignment reflected the impossibility of assigning fire suppression duties. The comparison to Eau Claire is, then, tenuous. Even if the transfer the Union complains of is granted legal significance, it remains unclear why the combination of clerical duties with a fire fighting position was appropriate in the Community Education Unit, but not in the Comptroller's Office.

Nor is there solid evidence that Anderson lost, during any portion of his assignment to clerical duties, any benefit granted him by Sec. 62.13, Stats. The validity of the allegations must be rooted in MERA.

General Legal Standards

Sec. 111.70(3)(a)1, Stats. makes it a prohibited practice for a municipal employer "(t)o interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Sec. 111.70(2), Stats. describes the rights protected by Sec. 111.70(3)(a)1 Stats., thus:

3/ See Moraine Park Technical College et al., Dec. No. 25747-B (McLaughlin, 3/89), aff'd Dec. No. 25747-D (WERC, 1/90).

> Municipal employes shall have the right . . . to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

An independent violation of Sec. 111.70(3)(a)1, Stats. occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 4/ If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere with those rights. 5/

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Union must, by a clear and satisfactory preponderance of the evidence, 6/ establish that: (1) Anderson was engaged in activity protected by Sec. 111.70(2), Stats.; (2) the City was aware of this activity; (3) the City was hostile to the activity; and (4) the City acted, at least in part, based upon its hostility to Anderson's exercise of protected activity. 7/

Sec. 111.70(3)(a)4, Stats., enforces a municipal employer's duty to bargain in good faith. The duty is broad, and the standards which define it are fact-driven. This makes it impossible to state a standard before examining a specific allegation. It can, however, be noted that bargaining during the effective term of a collective bargaining agreement is waived as to matters covered by the agreement. 8/

Sec. 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties . . ." The Commission will not typically assert its jurisdiction to interpret labor agreements where the labor agreement provides for the final and binding arbitration of grievances. The parties may, however,

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4/ WERC v. Evansville, 69 Wis.2d 140 (1975).

5/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).

6/ See Sec. 111.07(3), Stats., made applicable by the operation of Sec. 111.70(4)(a), Stats.

7/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967) and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

8/ School District of Cadott Community, Dec. No. 27775-C (WERC, 6/94).

waive the application of the contractual grievance procedure to a particular dispute. Such a waiver may be based on a joint submission of evidence and argument on an issue of contract interpretation. 9/

Application of the General Legal Standards to the Facts

Any violation of Sec. 111.70(3)(a)1, Stats., is derivative in nature. If Anderson's assignment was authorized by contract or law, it is not apparent how it could have had a reasonable tendency to interfere in any unit member's exercise of activity protected by Sec. 111.70(2), Stats. No independent violation of Sec. 111.70(3)(a)1, Stats., can be found on this record.

As noted above, collective bargaining is waived as to matters covered by contract. Workers Compensation is specifically addressed by Article 14. Any intra-departmental limitation on the City's right to assign Anderson is covered by the Preamble or by Article 5. Beyond these provisions, which expressly extend to the subject areas of the dispute, the Union contends that agreement provisions as a whole establish the right it asserts. It is apparent that the parties' agreement covers this dispute and thus that bargaining on the issue of extra-departmental assignments has been waived. No violation of Sec. 111.70(3)(a)4, Stats., can be found on this record.

Even assuming that Anderson's role in Union politics establishes the exercise of concerted activity protected by Sec. 111.70(3)(a)3, Stats., there is no evidence indicating the City bore any hostility toward it. The record establishes only that the City has acted to implement its view of APM 2-17. In the absence of evidence linking Anderson's extra-departmental assignment to hostility on the City's part toward his role in the Union there can be no violation of Sec. 111.70(3)(a)3, Stats., found on this record. The focus of the parties' dispute thus becomes the interpretation of the labor agreement.

The parties have mutually waived the application of grievance arbitration to this dispute. Thus, application of Sec. 111.70(3)(a)5, Stats., is appropriate.

Of the various agreement provisions cited by the Union, only the Preamble and Article 5 pose significant issues of interpretation. Article 1 makes the Union Anderson's exclusive bargaining agent, but has no demonstrated relationship to the issues posed by the complaint. It refers to "position classifications" not to a department. There is no evidence Anderson lost his "position classification" during any portion of his intra or extra-departmental assignment to clerical duties. Nor can an amalgam of agreement provisions establish the right the Union asserts here. Even if those provisions could be read to preclude the assignment of clerical duties to a unit

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9/ See City of Madison, Dec. No. 27757-B (WERC, 10/94) and Columbia County, Dec. No. 22683-B (WERC, 1/87).

member, the Union has not demonstrated how those provisions can be read to permit the assignment of such duties to a unit member only if they are performed within the department.

Nor has the Union shown how Article 6 can be meaningfully applied to this record. The assignment of clerical duties to Anderson was based on his temporary disability. This assignment cannot, however, be considered the source of any violation of Article 6 because the Union accepts the propriety of the assignment on an intra-departmental basis. The Union has not shown how the extra-departmental assignment of clerical duties can be distinguished, under Article 6, from an intra-departmental assignment. The Union assumes Barton transferred into a position held by Anderson, but the evidence fails to establish this point. There appears to have been a time lag between when Anderson left the Community Education Unit and when Barton arrived. Even if Barton's arrival is treated as a transfer, it is not clear how Anderson's disability entitled him to the intra-departmental work. Whatever bar there may be to the assignment of extra-departmental duties turns on something other than his temporary disability. If his assignment to the Comptroller's Office violated the labor agreement, that violation rests on other agreement provisions.

Section D of the Preamble is not a persuasive basis for the right asserted by the Union. The source of IOD light-duty assignments precedes Anderson's transfer by many years. The record shows no source for such assignments other than APM 2-17. Prior to Anderson's reassignment to the Comptroller's Office, each of these assignments had been intra-departmental. At a minimum, it is evident that intra-departmental assignments cannot be considered a past practice. The essence of past practice, as an instrument of contract interpretation, is the agreement manifested by the bargaining parties' conduct. 10/ The record shows that the City prefers to keep such assignments intra-departmental, and that until Anderson's reassignment, had been able to effect this preference. Whatever is said of the City's failure to make IOD light duty assignments outside of the Fire Department, it cannot, standing alone, be interpreted as an agreement on their part not to do so.

The Union's contention does not, however, require a finding that intra-departmental IOD light duty assignments constitute a binding past practice. The Union asserts the City's failure to make other than intra-departmental assignments constitutes an "existing employee benefit" within the meaning of Section D. The source of this benefit is, however, less than apparent. APM 2-17 states no clear ban against the assignment of IOD light duty outside the employe's "home" department, and that policy is the only demonstrated source for the assignments. The policy offers, then, no basis for the "existing benefit" the Union asserts.

Nor is any other basis apparent in the record for the asserted benefit. Even ignoring the difficulty in construing light duty assignments as a benefit to the unit, it is unpersuasive to read the

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10/ See, generally, Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, Proceedings of the 14th annual meeting of the NAA (BNA, 1961); and Elkouri & Elkouri, How Arbitration Works, (BNA, 1989) at chapter 12.

City's past conduct, standing alone, as anything other than a reflection of the availability of light duty work within the department. Whatever is said of the City's past assignments, they offer no guidance on how the City should act when no light-duty work is available within the Fire Department. It can be noted that the record is less than clear on whether there was light-duty work available in the Community Education Unit between February 17, 1992 and March, when Barton was observed doing the type of work Anderson had performed. The lack of clarity on this point cannot, however, be held against the City. 11/

The final, and determinative, basis for the right asserted by the Union is Article 5, read with Section C of the Preamble. The City notes that the employer-wide assignment rights it asserts are rooted in APM 2-17, and cannot be overturned by "some unwritten policy."

Whether APM 2-17 constitutes an "ordinance" or a "resolution" within the meaning of Section C of the Preamble does not pose an interpretive issue. It can have no greater effect than an ordinance or a resolution of the City, and Section C mandates that the terms of the labor agreement "shall supersede ordinances and resolutions" in the case of conflict. It follows that if there is a conflict between APM 2-17 and the agreement, the provisions of the agreement must be honored.

The interpretive issue thus posed is whether the extra-departmental light duty assignments authorized under APM 2-17 conflict with any agreement provision. The Union cites Article 5, Section C, which authorizes the City to "assign . . . employees in positions within the Fire Department."

The Union's assertion of an irreconcilable conflict between Article 5, Section C and APM 2-17 is persuasive. Article 5, Section C links the City's right to assign to "positions within the Fire Department." This reference is arguably clear and unambiguous. Even if considered ambiguous, the Union's reading of the section is persuasive. There is no evidence of past practice or bargaining history to clarify the ambiguity, but the structure of Article 5 supports the Union's view. The initial paragraph of Article 5 states the City's management rights in a sweeping fashion by noting "the City and the Chief of the Fire Department" have the "prerogative . . . to operate and manage its affairs in all respects . . ." The final sentence of the paragraph underscores the breadth of the authorization by noting the management rights specified at Sections A through K "include" but do not exclusively state the City's authority.

Against this background, the limitation on the City's right to assign is noteworthy. The reference to "in positions within the Fire Department" must be taken to address the scope of the right to assign. Without that reference, the right to assign "employees" would be unrestricted. Article 1 defines the positions covered by the agreement, and there is thus no reason to conclude the reference to "in positions within the Fire Department" was necessary to specify the employes subject to the City's right to assign.

11/ See footnote 6/ above.

It is arguable that the reference was not negotiated to address the City's right to assign injured employes outside of the department. Even if, in the absence of bargaining history, this is granted, it is not apparent what meaning the reference can have other than what the Union asserts. It may indicate fire fighting personnel are not, on a routine basis, to be assigned outside of the department. If so, it is not apparent how the reference can be restricted to routine assignments. The contract language states no such restriction and it is not apparent what evidence would dictate the implication of such a restriction. Anderson was the first unit member assigned outside of the Department. There is not, then, a past practice. What evidence there is on the point undercuts the City's position. The Department's internal policy on the assignment of light duty work presumes that the work is assigned by departmental supervisors and subject to departmental rules.

Against this background, Article 5, Section C and APM 2-17 are conflicting provisions. To conclude otherwise renders the reference to "in positions within the Fire Department" meaningless. I can discern, and the City offers, no basis to interpret Article 5, Section C in a manner which does not conflict with APM 2-17.

Because the provisions of APM 2-17 conflict with those of Article 5, Section C, the latter must prevail under Section C of the Preamble. The City's assignment of Anderson outside the Fire Department thus breached the labor agreement in violation of Sec. 111.70(3)(a)5, Stats., and derivatively, of Sec. 111.70(3)(a)1, Stats. It should be stressed that this conclusion has no bearing on the policies underlying APM 2-17. The issue posed is not what constitutes sound policy regarding light duty assignments, but how the parties' labor agreement impacts such assignments.

The remedy appropriate to this conclusion does not require extensive discussion. The complaint seeks a determination of the dispute coupled with a cease and desist order. Each request has been granted. The complaint also seeks make-whole relief, but there is no persuasive evidence that any of the affected employes suffered any economic loss. Against this background, there is no basis to afford any make-whole relief. The Complaint also seeks an award of fees and costs. The Commission has noted an award of fees and costs may be appropriate where defenses raised to a complaint are "frivolous" as opposed to "debatable." 12/ The City's defenses were, with one exception, persuasive. There is, then, no basis for the award of fees or costs. The Commission has also referred to the requisite standard as one of "extraordinary bad faith." 13/ The delay apparent in the processing of this matter must be acknowledged as a source of concern. That delay was not, however, solely traceable to the City and does not manifest "extraordinary bad faith."

Dated at Madison, Wisconsin, this 12th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

12/ See Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) at 9-10.

13/ Ladysmith-Hawkins School District and Northwest United Educators, Dec. No. 27614-C (WERC, 6/94) at 12.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner