

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 321, INTERNATIONAL ASSOCIATION OF  
FIREFIGHTERS,

Complainant,

vs.

CITY OF RACINE,

Respondent.

Case 480

No. 53550 MP-3112

Decision No. 28673-A

Appearances:

Hanson, Gasiorkiewicz & Weber, S.C., by Mr. Robert K. Weber, P.O. Box 1875, Racine, Wisconsin 53401, appearing on behalf of Complainant.

Long & Halsey Associates, Inc., by Mr. William R. Halsey, 8338 Corporate Drive, Suite 500, Racine, Wisconsin 53406, appearing on behalf of Respondent.

FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

On December 18, 1995 Local 321, International Association of Firefighters, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Racine had violated Sections 111.70(2) and 111.70(3)(a)1 through 5, Stats. by involuntarily transferring Lieutenant Dennis Felton from the Department's central downtown station, in part because of his union activity and because of the alleged hostility of Fire Chief Jeffrey Peterson towards Local 321. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats. A hearing was held in Racine, Wisconsin on April 15, 1996. During the subsequent briefing process, Complainant filed a Motion to Reopen the Record, which Respondent opposed. Following an exchange of briefs and a determination by the Examiner that the record would be reopened provided adequate provision was made for subsequent evidence to be adduced by Respondent, Complainant withdrew the Motion. Briefs were filed by both parties and a reply brief was filed by the Complainant. The record was closed on November 12, 1996. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

No. 28673-A

## FINDINGS OF FACT

1. Complainant Local 321, International Association of Firefighters, herein referred to as Complainant or Local 321, is a labor organization within the meaning of Section 111.70(1)(h), Stats., and maintains its mailing address c/o Michael George, 4113 Five Mile Road, Racine, Wisconsin 53402.

2. Respondent City of Racine, herein referred to as Respondent or the City, is a municipal employer within the meaning of Section 111.70(1)(j), Stats., and maintains its principal office at Racine City Hall, 730 Washington Avenue, Racine, Wisconsin 53403. Jeffrey Peterson is Chief of the Fire Department of the City of Racine and is the City's agent.

3. At all times material to this proceeding, Complainant has been the exclusive bargaining representative of all regular uniformed employees of the City's Fire Department, exclusive of the Chief, Assistant Chiefs, and Chief Mechanic. The City and Local 321 have been parties to a series of collective bargaining agreements, the most recent of which expired on December 31, 1996. Said agreement contains among others the following provisions:

### Article VI - Management Rights

The City possesses the sole right to operate the Racine Fire Department and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement and the past practices within the Racine Fire Department unless the past practices are modified by this agreement, or by the City under rights conferred upon it by this agreement, or the work rules of the Racine Fire Department. These rights, which are normally exercised by the Chief of the Racine Fire Department, include, but are not limited to the following:

a. To direct all operations of the Racine Fire Department.

b. The Union acknowledges that the establishment and modification of the rules of the Racine Fire Department are within the sole authority of the City of Racine and that it may establish, modify, or repeal rules without negotiations of any type. New rules or changes in rules shall be posted in each fire station five calendar days prior to their effective date unless an emergency requires more rapid implementation of the rule. The City agrees that all rules will be reasonable with the reasonableness subject to the grievance procedure starting at the second step.

c. To hire, promote, transfer and assign employees in

positions with the Racine Fire Department. . . .

Article III

. . .

5. Union activities and discrimination: The City agrees that no employe will be discriminated against because of membership in, or activity in connection with the Union, and the City will not interfere with the rights of employes to become members. The City will not discourage membership in the Union.

4. On or about December 1, 1995, Dennis Felton, a Lieutenant in the City's Fire Department, was notified that he would be involuntarily transferred to another station as of February, 1996. Felton has been a member of Complainant's executive board for approximately twenty years, and has been active in support of Complainant. Felton had been continuously employed at the Central Downtown Station, which also serves as the Fire Department's Administration Building and headquarters, for approximately twenty-five years.

5. The record shows that relations between Local 321 and Chief Peterson have been hostile since his appointment and continuing through all material times. The record demonstrates that Local 321 has engaged in conspicuous public action including opposing the promotion of Jeffrey Peterson to Chief, and that a state of mutual hostility is admitted by the City. The record demonstrates that the reasons given by Chief Peterson for transferring Dennis Felton against his request were not corroborated by other available City witnesses, and conflict with the reasons Felton testified he had been given by other management officials.

6. The record demonstrates that the City has a well established practice of making involuntary transfers of fire fighters, including officials of Local 321. But the record also demonstrates by a clear and satisfactory preponderance of the evidence that at least a partial reason for the transfer of Dennis Felton in February, 1996 was the Chief's desire to reduce the presence of Union officials at headquarters and to limit his personal contact with them.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

The partial motive of Chief Peterson in ordering the transfer of Dennis Felton complained of herein and described in Finding of Fact 6 above is sufficient to taint an otherwise lawful and contractually approved action. Respondent therefore committed a prohibited practice within the meaning of Section 111.70(3)(a)1 and 3 by discriminating against Dennis Felton for his Union activity and by interfering with, restraining and coercing the exercise of rights protected under the Act.

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

ORDER 1/

It is ordered that the City of Racine Fire Department, its officers and agents shall immediately:

1. Cease and desist from discriminating against Dennis Felton or any other employe because of Union activity and from interfering, coercing or restraining such activity.
2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:
  - a. Offer to Dennis Felton the opportunity to return to his former position or a substantially equivalent position at Fire Station No. 1.
  - b. Notify employes by posting in conspicuous places on its premises, where notices to its employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A". Such notices shall be signed by a responsible official of the City and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said Notice is not altered, defaced, or covered by other material.
  - c. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of service of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 15th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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1/ Footnote found on following page.

By Christopher Honeyman /s/  
Christopher Honeyman, Examiner

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- 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).**

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

We will immediately cease and desist from discriminating against Dennis Felton or any other employe because of Union activity, and from interfering, restraining or coercing employes' rights under the Municipal Employment Relations Act.

Dated at Racine, Wisconsin this \_\_\_\_ of \_\_\_\_\_, 1997.

By \_\_\_\_\_  
On behalf of the City of Racine

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE

HEREOF AND MUST NOT BE ALTERED DEFACED OR COVERED BY OTHER MATERIAL.

City of Racine (Fire)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

The complaint alleges that Respondent City violated MERA by transferring Lieutenant Dennis Felton away from the main fire station. There is no dispute that Felton lost no pay, rank or benefits by this transfer; the dispute is over whether a partial motive for the transfer was anti-union animus and whether the City had plenary rights to make such a transfer under the terms of the parties' collective bargaining agreement.

Background:

Lieutenant Dennis Felton has been employed by the Racine Fire Department for twenty-eight years. For the last twenty-five he had worked in a single location at the City's main fire station, when in December of 1995 he was informed he would be transferred in February to Fire Station No. 2. There was no economic loss. Felton has been one of seven or eight executive board members of the 178-member Local 321 for approximately twenty years, and has also served as vice-president in charge of grievances, and on the Union's grievance committee for most of that period.

Felton was one of two Union officials to testify concerning Union officials being moved out of the main fire station since Jeffrey Peterson became Fire Chief. Union President Mike George testified that he, also, was transferred out of the main fire station and that, contrary to his request, Chief Peterson had the Union's office packed up and moved along with him to his new Station 7 assignment. George testified, however, that when he himself was transferred (a year ahead of Felton), he elected not to file a complaint, because he believed that his absence from the main fire station might help to improve a testy relationship between the Union and the Chief.

The hostility in that relationship is admitted by all. All parties likewise agree on the origin of the hostility, though the rights and wrongs of the matter are disputed. Briefly, a 1991 promotion testing procedure supervised by then-Assistant Chief Peterson was challenged by the Union in a grievance. A subsequent arbitrator's ruling invalidated the examination, as a result of which a number of employes were demoted from positions they believed they had won on merit. Some of those employes filed charges against the Union, and the result was a protracted series of disputes in the course of which a significant amount of time, energy and public interest was expended. During the course of these disputes, then-Fire Chief Chiapete retired, and the City's Police and Fire Commission promoted Assistant Chief Peterson to fill the post despite what George testified without contradiction was open opposition from the Union. Relations had been strained ever since.



With respect to the particular transfer action at issue herein, Felton testified that he was first warned of the potential in February of 1995. At that time Felton was assigned as driver of "car 41", a command car known as the "red car". Felton testified that Battalion Chief Dick Pederson told him that Peterson wanted him off the red car and that Dick Pederson would hold on to him as long as possible but "no guarantees". Felton was transferred off the red car onto a truck company, but remained at Station 1 for another year.

Felton testified that in November, 1995 he heard a rumor that he was to be transferred out of Station 1. Felton stated that he asked to meet with the Chief, and met with Chief Peterson on November 11, 1995. It is undisputed that Felton tape recorded this meeting without Peterson's knowledge. The Union introduced a transcript of this tape, which reads as follows:

Dennis: Hi Boss. Can I talk to you a minute?

Jeff: Sure, what's up?

Dennis: I just got the bad word. I have to ask you, I have to plead with you, I don't want to leave. I have been here 27 years, Jeff, honest to God there is no one on the job that hasn't done a little more than I have. (sic)

Jeff: I understand Denny and if you can talk Lyle into it, it beats the three guys that sit there, so. It is just the situation you know we went through. Lyle is the guy that's got it, so...

Dennis: But I don't even know what the reason would be, you know.

Jeff: I will tell you the reason right now was we try to keep people who do things. One of the things if Mike Cooper needs more time with the with the (sic) Masks. He is getting beat up on the engine. That is the reason, to put Mike on the truck so he repairs all the Masks.

Dennis: You know, I never really quit working in the garage. I still go out there and if I see something that has to be done I help.

Jeff: I understand that. I'm not saying that. I'm not saying that at all.

Dennis: I don't mean to pick...

Jeff: Denny, I'm telling you right up front it did not come from me. We sat down. Those three guys made out 99 percent of the list.

Dennis: I don't mean to pick on anyone, but what has Jim Tresider done for this...

Jeff: Like what I said, if you talk to those guys in there and straighten it out, I have no problem with it. I will be honest with you Dennis, I don't want to micro manage. Those are the guys that work on the line and they make up...

...put Tresider out here. I have no problem with it. I do not micro manage. I told those guys, "Do what you think is right."

Dennis: I will ask them and see what happens.

Jeff: Okay.

Dennis: I have only a couple of years left, and I spent my whole career here, and I would like to finish it here.

Jeff: Denny, then go tell them.

Dennis: Okay, Thank you for your time.

Jeff: Any time.

Felton testified that he subsequently talked to two of the three Battalion Chiefs who, according to Peterson, had made the decision. He stated that he went to Battalion Chief Henningfeld's office:

And I brought to his attention that the Chief said he could transfer somebody else in my place and that it was Battalion Chiefs' decision to transfer me and he said "Bullshit". And he left the room and he came back and said, "Dennis, you are leaving." 2/

Felton testified that he also called Battalion Chief Weiss and that Weiss stated that he had had nothing to do with the transfer. Felton added that he had asked Henningfeld if he had had

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2/ Tr. at p. 45.

anything to do with the transfer, and that Henningfeld had denied this and "He also stated that he did make out the transfer list and the first transfer list my name wasn't on, and the second one he was told to put it on." 3/ Felton testified that in a subsequent meeting with Union officials present, the Chief denied having said any of this.

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3/ Tr. at p. 46.

At the hearing, Chief Peterson testified that he regarded Felton's transcript as "somewhat accurate" as to the November 11 discussion, but not "totally accurate". 4/ Peterson testified that there have been 788 transfers in the past ten years, and the City introduced evidence of a long series of such transfers which support the uncontradicted testimony that Felton is one of very few officers who have remained at the same station for decades. Peterson testified that Felton was transferred rather than Mike Cooper because Cooper had a specialty of repairing masks; Union witnesses testified to the effect that there are other officers who are licensed to repair masks. There is no dispute that Jim Tresider, also a Lieutenant at Fire Station No. 1, has the same qualifications as Felton and is junior to him. The parties adduced a certain amount of testimony as to volunteer work which Felton had performed for many years for a substantial number of hours per week in the main garage attached to Fire Station 1, and it is undisputed that Felton, in the wake of hostilities between the Chief and the Union, had either ceased entirely (according to the Chief) or sharply curtailed (according to Felton) his hours devoted to this non-mandatory activity. But in either event, Peterson testified that Felton's cooling of enthusiasm for this work was not a factor in the transfer.

None of the Battalion Chiefs testified at the hearing. The record shows that Henningfeld was present.

#### Complainant's Position

Complainant contends that whether or not there were some legitimate reasons for transferring Felton, the motives established in the record include one of anti-union animus towards Felton and towards the Union Board's union activities. The Complainant contends that under long-established case law, an otherwise lawful act for which there may indeed be sound management reasons may be tainted entirely by a partial motive of retaliation or interference with union activity, citing several cases. Complainant notes that to establish a violation of Section 111.70(3)(a)1 and 3, the complaining party must prove

1. That employees have engaged in protected, concerted activities;
2. That the employer was aware of such activity;
3. That the employer was hostile to such activity;
4. That the employer's conduct was motivated, in whole or in part, by hostility toward the protected activity. 5/

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4/ Tr. at p. 63.

5/ Citing Muskego-Norway School District No. 9 vs. Wisconsin Employment Relations Board, 35 Wis.2d 540 (1967) and LaCrosse County (Hillview Nursing Home), WERC Dec.

Complainant contends that it has been visible in protecting its members and advancing its causes, including an unusual amount of high profile activity including public demonstrations and appearances before local legislative bodies. Complainant argues that the act of transferring Felton is part of a pattern of activity by the Chief, which includes his previous transfer of Union President Michael George out of the main station to a sub-station. Complainant also contends that the transfer of the Union office out of the main station, contrary to George's request, supports this view.

With respect to the reasons advanced for the transfer by the City, Complainant contends that at least two other individuals could have been transferred instead of Felton (Tresider and Cooper). While the City offered the ostensible reason of retaining Cooper because of his certification to repair breathing masks and his EMT certification, Complainant contends, none of the other trucks have EMT's assigned to them and there are other individuals certified to do mask repairs. The Union also contends that it is significant that Cooper was one of the individuals promoted and then demoted by virtue of the Union's promotion grievance. The Union contends that the Chief did not present any viable reason for the selection of Felton rather than Tresider for this transfer, and argues that the Chief's testimony that it was "to show people a different part of the City and a different piece of apparatus" made little sense in reference to an employe nearing retirement after 28 years of service, and would have made more sense as grounds for transferring Tresider. Complainant particularly stresses the Chief's testimony that the decision was a joint decision between himself and the Battalion Chiefs, and the fact that none of the Battalion Chiefs were called by the City to corroborate this claim despite Felton's contrary testimony concerning his conversations with them.

In its reply brief, Complainant contends that among the protections provided under the Act are prevention of discrimination in regard to "terms or conditions of employment", including transfers based on anti-union animus. Complainant also argues that it is clear that a high degree of hostility existed between the Union and the Chief and that the Chief admitted that he knows that the Union Board blamed him personally for the dispute over promotions.

#### The City's Position:

The City contends that there is no explanation in the record for why Chief Peterson would wait from his August 12, 1994 promotion to Chief until February of 1996 to make this transfer if it was based on Union activity, noting that twelve transfer orders were made during this time. The City contends that there is no evidence in the record to support a nexus between the transfer and the promotion issue, and no evidence that Lieutenant Felton played any notable role in the 1991 dispute other than being on the Union Executive Board at that time. The City contends that a threshold question is whether the transfer is even a subject for protection under MERA, contending that while Felton testified that he would have preferred to stay at Station 1, there was no testimony as to Station 1 being a premier or preferred assignment, and that therefore no sanction against Felton is

visible from this act. The City notes that Felton testified that many members of the Union Executive Board have been transferred throughout their careers, often at their own request. The City also notes that a Lieutenant who was hired at the same time as Lieutenant Felton has been transferred on ten occasions, while Felton's total is three.

With respect to the history of hostility between the Union and the City, the City contends that the Union is the source of much of this hostility and the cause of a great deal of it. The City notes that the testimony of hostility from members of the Executive Board toward Chief Peterson should not be treated as evidence that Peterson was hostile toward Felton. The City further notes that it is an explicit management right to transfer employees.

The City argues that Complainant has not established any impedance or interference with Felton's Union duties, and that no evidence was offered to support that assertion, noting that the Chief testified that since the transfers of Felton and George he has received no grievance concerning difficulty in performing Union duties. The City contends that a claim of unlawful interference in Union activities must be based on more than conjecture, citing District Council 48, AFSCME, AFL-CIO (Milwaukee County) 6/. The City finally contends that to decide based on this record that Chief Peterson did not have the right to implement the transfer of Lieutenant Felton would have the effect of rendering the contractual language granting the right to the City meaningless.

Discussion:

I note initially that while the parties' Agreement includes an arbitration provision as well as a clause prohibiting discrimination for union activity, neither party requested that this matter be deferred to the parties' grievance and arbitration procedure.

While this matter, as the City properly notes, involves an action of relatively minor consequence compared to an employee's discharge, the principle articulated in Muskego-Norway is clearly at the heart of the issue. An undesired transfer at no loss in pay or rank may be a matter of small moment in the larger scheme of the parties' relationship or even of Lieutenant Felton's career. Yet a transfer 7/ has classically been viewed as an action affecting working

conditions, and working conditions are clearly protected from the effects of anti-union animus on

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6/ Dec. No. 28063-B.

7/ See, for instance, Milwaukee Board of School Directors (Riley Elementary School), Dec. No. 17104-A (Greco, 7/80), aff'd by operation of law, Dec. No. 17104-B (WERC, 8/80); Milwaukee Board of School Directors, Dec. No. 26560-B (Crowley, 11/90), aff'd by operation of law, Dec. No. 26560-C (WERC, 12/90).

the face of the statute.

Muskego-Norway involved the refusal to renew the teaching contract of a teacher who may have deserved discharge, but the then-Wisconsin Employment Relations Board's conclusion that the employer's decision must be overturned was upheld by the Wisconsin Supreme Court, on the grounds that the evidence indicated that the employer's motives included one of anti-union animus. Here, a state of mutual hostility is not only palpably evident from the chain of events, but is freely admitted by all including the Chief.

That hostility does not necessarily apply particularly to Felton, but I am persuaded that Felton's testimony should be credited, because of several factors. First, Peterson did not explicitly deny the testimony Felton gave concerning their conversation on November 11, 1995. Second, the City did not rebut the material contained in Union Exhibit 9, the transcript of that conversation. Third, Felton's testimony, concerning the reactions of two of the three Battalion Chiefs when presented with the Chief's statements, stands unrebutted, even though one of the Battalion Chiefs was present at the hearing. The conclusion that, at the least, the Chief was evasive as to the motives and origins of the decision to transfer Felton is inescapable on this record.

To find that "A's" motive is not what A says it is is not automatically to concede that "B's" interpretation of A's motive is proven. But as the Complainant aptly cites, the Commission has noted that

It is well-established that the search for motive at times is very difficult, since often times, direct evidence is not available. For, as noted in a leading case of this subject, Shattuck Denn Mining Corporation vs. NLRB, 362 Fed.2d 466, 470, (9th Circuit 1966):

Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. 8/

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8/ Town of Mercer, Dec. No. 14783-A (Greco, 3/77), affirmed by Commission, Dec. No. 14783-B (4/77).

The realities of investigations of motive being what they are, I can find no persuasive explanation for the Chief's evasiveness when confronted with the issue other than that he wished to conceal his motive. There is no evidence in the record of any other motive which the Chief might wish to conceal, particularly in view of the City's otherwise admitted right under the contract to transfer employes as it deems necessary, than that the Chief's motives included that hostility toward the Union which is an element of the mutual hostility which the Chief has admitted to exist. The otherwise perhaps logical and certainly contractually permissible transfer of Lieutenant Felton is thereby tainted under Muskego-Norway by that partial motivation, and must be overturned.

Dated at Madison, Wisconsin this 15th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/  
Christopher Honeyman, Examiner