

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1801, INTERNATIONAL ASSOCIATION	:	
OF FIREFIGHTERS AFL-CIO,	:	
	:	Case XXXIV
Complainant,	:	No. 26626 MP-1138
vs.	:	Decision No. 17990-B
	:	
CITY OF CUDAHY,	:	
	:	
Respondent.	:	

CITY OF CUDAHY,	:	Case XXXVI
	:	No. 27407 MP-1188
Complainant,	:	Decision No. 18417-A
vs.	:	
	:	
LOCAL 1801, INTERNATIONAL ASSOCIATION	:	
OF FIREFIGHTERS AFL-CIO,	:	
	:	
Respondent.	:	

Appearances:
 Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow,
 110 East Main Street, Madison, Wisconsin 53703, for the Association.
 Mulcahy & Wherry, S.C. by Mr. Robert W. Mulcahy, 815 East Mason
 Street, Suite 1600, Milwaukee, Wisconsin 53202, for the City of
 Cudahy.

FINDINGS OF FACT, CONCLUSIONS OF LAW
 AND ORDER

Cudahy Fire Fighters, Local 1801, International Association of Firefighters AFL-CIO (hereinafter referred to as the "Complainant") filed a complaint on August 5, 1980 with the Wisconsin Employment Relations Commission (hereinafter referred to as the "Commission") alleging that the City of Cudahy (hereinafter referred to as the "Respondent") committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act. By its Order dated August 7, 1980, the Commission appointed Timothy E. Hawks as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders as set forth in Section 111.07(5) of the Wisconsin Statutes. Examiner Hawks subsequently became unavailable and the Commission, by its Order dated October 27, 1980, substituted Stuart S. Mukamal as Examiner in the matter. Hearing was held in the matter on January 14, 1981, in Cudahy, Wisconsin, during which the parties were afforded full opportunity to present evidence and argument pertinent thereto.

On January 23, 1981, the Respondent filed a complaint with the Commission alleging that the Complainant had committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act. By its Order dated February 2, 1981, the Commission appointed Stuart S. Mukamal as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders in said matter as set forth in Section 111.07(5) of the

Wisconsin Statutes. The Examiner indicated by letters to the parties dated February 19, 1981 and February 23, 1981 that the matters raised by the Respondent's complaint were heard during the hearing held on January 14, 1981 concerning the Complainant's complaint, that no further hearing regarding the Respondent's complaint would be necessary and that both complaints would be consolidated for purposes of decision. No objection thereto was made by any of the parties.

Following the hearing held in these matters, the Complainant filed a letter in lieu of a brief and the Respondent filed a brief and a letter in lieu of a reply brief, the last of which was received on March 30, 1981. Based upon a consideration of the entire records of both of the above-captioned matters, the Examiner hereby issues the following

FINDINGS OF FACT

1. The Complainant is a labor organization having its offices at 4626 South Packard Avenue, Cudahy, Wisconsin 53110.

2. The Respondent is a municipal employer having its offices at 5050 South Lake Drive, Cudahy, Wisconsin 53110. The Respondent operates a Fire Department in order to provide fire protection services to its inhabitants. At all times pertinent hereto, John Zawikowski and John Goss, Jr. were employees employed by the Respondent's Fire Department holding the rank of Motor Pump Operator.

3. At all times pertinent hereto, the Complainant has acted as the exclusive representative for purposes of collective bargaining of certain firefighting employees employed by the Respondent's Fire Department. Messrs. Zawikowski and Goss were at all pertinent times members of the collective bargaining unit so represented by the Complainant.

4. The Complainant and the Respondent have been parties to a series of collective bargaining agreements including an agreement effective from January 1, 1980 up through and including December 31, 1981 (hereinafter referred to as the "Agreement"). Said Agreement provides, in pertinent part, as follows:

12. GRIEVANCE PROCEDURE:

- A. Definition of Grievance: A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute of any employee or group of employees concerning this contract. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinance and rules which are matters processed under existing procedures.
- B. Discipline, Suspension and Dismissals: Grievances involving discipline, suspensions and dismissals shall be processed in accordance with Section 62.13, Wisconsin Statutes.

. . .

- I. Interpretation of the Contract: For all grievances involving an interpretation of the terms and conditions of this contract, the Grievance Initiation Form shall be presented to the Chief. The Chief shall be required

to consult with the Labor Negotiator concerning the grievance. He shall then, within fourteen (14) calendar days, inform the employee and the Association in writing of his decision on the grievance. The decision made by the Chief shall be final and binding upon the City, however, the Association shall have the right to submit the grievance to arbitration.

. . .

13. ARBITRATION PROCEDURE:

- A. Time Limit: If a satisfactory settlement of a grievance is not reached in paragraph 1 of the Grievance Procedure, the grievant and the Grievance Committee of the Association must notify the City within fourteen (14) calendar days that they intend to process the grievance in arbitration.
- B. Arbitration Board: Any grievance which cannot be settled through the above procedures must be submitted to an arbitration board, comprised of three (3) persons, to be selected as follows: The City and the Association shall each select one (1) member of the Arbitration Board, and the two members selected by the parties shall use their best efforts to select a mutually agreeable chairman of the Arbitration Board. If the City and the Union appointed arbitrators are unable to agree on a Chairman within thirty (30) calendar days, each party may request the Wisconsin Employment Relations Commission to appoint the Chairman of the Arbitration Board.
- C. Hearing Procedure: The Arbitration Board shall use its best efforts to mediate the grievance before the final arbitration hearing. The parties shall agree in advance upon procedures to be used at the hearing, and the hearing shall follow a quasijudicial format. The Arbitration Board appointed shall meet with the parties as soon as a mutually agreeable date can be set to review the evidence and hear testimony relative to the grievance. Either party may provide a tape recorder or court reporter at this hearing. Upon completion of this review and hearing, the Arbitration Board shall render a written decision as soon as possible to both the City and the Association which shall be final and binding on both parties.
- D. Jurisdiction of Arbitration Board: The Arbitration Board shall only have jurisdiction and authority to determine compliance with the provisions (sic) of this agreement and whether or not the dispute is arbitrable. On grievances where the subject matter raises a question of arbitrability, the Arbitration Board shall first hear and decide the question of arbitrability unless mutually agreed otherwise. The Arbitration Board shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this agreement and shall not make any award, which, in effect, would grant the Association or the City any matters which were not obtained in the negotiating process.

- E. Costs: Each party shall share equally in the costs of the Chairman. Each party, however, shall bear its own costs for the board member selected by it, their witnesses and all other out-of-pocket expenses including their attorney's fees. Testimony or other participation of employees during arbitration proceedings shall take place outside of normal working hours, if possible.

. . .

38. TRADING TOURS OF DUTY:

- A. Trading tours of duty shall be permitted with the consent and approval of the immediate officer in charge of the employee requesting the trade. Such consent and approval shall not be unreasonably withheld. There shall be no limit on the number of times or the amount of hours that an employee may trade tours of duty except as hereinafter enumerated.
1. An employee must give written notice twelve (12) hours preceding the trade date to the officer in charge of the employees in the trade time.
 2. Trade time must be repaid within the current calendar year.
 3. It shall be the responsibility of the employee who is scheduled to work, as indicated on the trade form, to be on duty that day.
 4. Officers above the rank of MPO shall be limited in trading with MPO's to eight (8) twenty-four (24) hour work day trades up to a maximum of one hundred and ninety-two (192) hours in any calendar year.
 5. All officers above the rank of MPO may have unlimited trade of tours of duty with officers above the rank of MPO.
- B. All officers above the rank of MPO shall make every attempt to trade tours of duty with officers above the rank of MPO before soliciting any trades with MPO's.

39. RULES FOR COMPENSATORY TIME:

A. Pager Compensation:

The employee who is assigned to carry the paging unit for a twenty-four (24) hour period shall be compensated with a minimum of two (2) hours compensatory time. If a bargaining unit member reaches the twenty-three (23) hour maximum for compensatory time, the officer in charge of the Department shall have the option to pay the appropriate overtime rate.

. . .

3. There will be no transfers of compensatory time between Department members. This time is only to be utilized by those who earn it.

5. On April 3, 1980, Motor Pump Operators Zawikowski and Goss received written reprimands from the Respondent's Fire Chief, Norbert Olson, for allegedly having transferred compensatory time in violation of the Agreement and for alleged dishonesty. Said written reprimands read as follows:

(to Motor Pump Operator Goss):

On March 31, 1980 you left your post without proper authority. You accepted John Zawikowski's compensatory time to leave the station for three hours from 1000 to 1300 hours. You had no accumulated compensatory time on the books.

This is a flagrant violation of the present contract provisions, article 39, subsection A, paragraph 3, which states: (There will be no transfers of compensatory time between department members. This time is only to be utilized by those who earn it.) I consider this to be a serious violation because you are well aware of the provisions of the present contract. Any future violations of these provisions will lead to further disciplinary action up to and including suspension or discharge.

(to Motor Pump Operator Zawikowski):

On March 31, 1980 you allowed fellow employee John Goss, to use your accumulated compensatory time, to be off duty from 1000 to 1300 hours. This is a flagrant violation of article 39, subsection A, paragraph 3, which states: (There will be no transfers of compensatory time between department members. This time is only to be utilized by those who earn it.)

I consider this a serious violation because you are very well aware of the provisions of the present contract. Any future violations of these provisions will lead to further disciplinary action, up to and including suspension or discharge.

6. On April 11, 1980 and following verbal discussions with Chief Olson concerning the matter, Messrs. Zawikowski and Goss filed written grievances contesting the written reprimand issued by Chief Olson and set forth in Finding of Fact Number 5 hereinabove.

7. On April 21, 1980, Chief Olson issued a written answer to the grievances filed by Messrs. Zawikowski and Goss, denying said grievances and reaffirming the written reprimands issued on April 3, 1980 and set forth in Finding of Fact Number 5 hereinabove.

8. On April 29, 1980, the Fire and Police Commission of the City of Cudahy met and during the course of said meeting and among other matters considered and affirmed the written reprimands issued by Chief Olson to Messrs. Zawikowski and Goss, as referred to hereinabove. Neither Mr. Zawikowski nor Mr. Goss appeared at said meeting of the Fire and Police Commission, either in person or through representatives, and no evidentiary hearing was conducted with respect to the written reprimands issued to them.

9. Following the issuance of Chief Olson's written denial of the Zawikowski and Goss grievances referred to in Finding of Fact Number 7 hereinabove, the Complainant attempted to appeal said grievances to a Board of Arbitration as provided by Article 13 of the Agreement.

10. The Respondent has declined to agree to the submission of the Zawikowski and Goss grievances to arbitration on the grounds that said grievances concern disciplinary matters that are properly heard pursuant to Article 12B of the Agreement by the Fire and Police Commission of the City of Cudahy and not by a Board of Arbitration.

11. The Complainant contends that the Zawikowski and Goss grievances concern the interpretation of the Agreement and more particularly, of Article 38 and 39 thereof, that said grievances do not relate to disciplinary matters within the purview of Article 12B of the Agreement, that said grievances should properly be heard by a Board of Arbitration and the Respondent's failure to agree to submit said grievances to arbitration is in violation of the Agreement and of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

12. The Respondent contends that the Agreement requires the Complainant to submit the Zawikowski and Goss grievances to a hearing before the Fire and Police Commission of the City of Cudahy and by failing to so submit said grievances, the Complainant committed a violation of Section 111.70(3)(b)4 of the Municipal Employment Relations Act.

13. The complaint filed by the Complainant in this matter involves a question of substantive arbitrability in that it concerns the issue of whether or not the Zawikowski and Goss grievances are disciplinary within the purview of Article 12B of the Agreement and therefore properly referable to the Fire and Police Commission of the City of Cudahy or whether they concern matters of contract interpretation outside the purview of Article 12B and are therefore properly referable to a Board of Arbitration pursuant to Article 13 of the Agreement.

14. The complaint filed by the Respondent in this matter involves a question of contract interpretation in that it concerns whether or not the Complainant was under any obligation stemming from the terms of the Agreement to present the Zawikowski and Goss grievances to the Fire and Police Commission of the City of Cudahy for review and disposition.

15. The Agreement, and more particularly, Article 13 thereof, provides for final and binding arbitration of grievances arising thereunder by a Board of Arbitration, including disputes concerning questions of arbitrability, as set forth by Article 13D of the Agreement.

On the basis of the foregoing Findings of Fact the Examiner issues the following

CONCLUSIONS OF LAW

1. That since the question of whether the Zawikowski and Goss grievances are properly referable to the Fire and Police Commission of the City of Cudahy or to a Board of Arbitration involves a question of substantive arbitrability which, by the express direction of the Agreement is properly submitted to and within the jurisdiction of a Board of Arbitration, the Respondent by declining to permit the submission of said grievances to arbitration has committed, and continues to commit, a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

2. That since the issue raised by the Respondent's complaint filed in this matter concerns the proper interpretation of the Agreement, which should be properly submitted to, and which is within the jurisdiction of, a Board of Arbitration, the Commission shall not assert its jurisdiction herein to determine the merits of said complaint.

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

ORDER

1. That the Respondent, the City of Cudahy and its officers and agents shall immediately:

a. Cease and desist from declining to submit the grievances filed by Motor Pump Operators John Zawikowski and John Goss, Jr. and referred to hereinabove to arbitration by a Board of Arbitration as to their substantive arbitrability and, if appropriate, as to the merits of said grievances.

b. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.70 of the Municipal Employment Relations Act:

1. Comply with the arbitration provisions of the 1980-1981 collective bargaining agreement existing between it and Local 1801, International Association of Firefighters AFL-CIO with respect to the Zawikowski and Goss grievances.

2. Notify Local 1801, International Association of Firefighters AFL-CIO that it will proceed to arbitration on said grievances, as to their substantive arbitrability and, if appropriate, as to the merits of said grievances.

3. Participate with Local 1801, International Association of Firefighters AFL-CIO in arbitration proceedings concerning the Zawikowski and Goss grievances before a Board of Arbitration as set forth by the parties' 1980-1981 collective bargaining agreement.

4. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

2. That the complaint filed in this matter by the Respondent, City of Cudahy, is hereby dismissed.

Dated at Milwaukee, Wisconsin this 18th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S. Mukamal
Stuart S. Mukamal, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

This matter concerns the disposition of two complaints of prohibited practices, one filed by the Complainant against the Respondent and one filed by the Respondent against the Complainant, both relating to the appeal of two grievances filed by firefighters in the employ of the Respondent's Fire Department. These grievances were filed in writing by Motor Pump Operators John Zawikowski and John Goss, Jr. on April 11, 1980, as an appeal from the issuance of written reprimands on April 3, 1980 to each of them by the Respondent's Fire Chief, Norbert Olson. These reprimands alleged that Messrs. Zawikowski and Goss had acted dishonestly and in violation of the 1980-1981 collective bargaining Agreement entered into between the Complainant and the Respondent (more particularly, in violation of Article 39 subsection A paragraph 3 thereof) by having traded compensatory time between themselves. The facts underlying the grievances at issue herein and their processing are set forth more fully in Findings of Fact Number 5 through 10 hereinabove.

The matters presented by the two complaints filed herein do not concern the merits of the Zawikowski and Goss grievances, but instead deal solely with the selection of the proper forum for the hearing and disposition of those grievances. Following the Fire Chief's written answer of April 21, 1980 denying both grievances, the Complainant attempted to appeal said grievances to a Board of Arbitration as provided by Article 13 of the Agreement. The Respondent refused to concur in such an appeal, contending that the Zawikowski and Goss grievances involved disciplinary matters and were therefore properly appealable only to the Fire and Police Commission of the City of Cudahy pursuant to Article 12B of the Agreement. Said provision of the Agreement provides that "grievances involving discipline, suspensions and dismissals shall be processed in accordance with Section 62.13 Wisconsin Statutes". Section 62.13 provides for the hearing of disciplinary actions against subordinate firefighters and police officers by boards of police and fire commissioners and reads in pertinent part as follows:

62.13 Police and fire departments. (1)
COMMISSIONERS. Each city shall have a board of police and fire commissioners consisting of 5 citizens, 3 of whom shall constitute a quorum. The mayor shall annually, between the last Monday of April and the first Monday of May, appoint in writing to be filed with the secretary of the board, one member for a term of 5 years. No appointment shall be made which will result in more than 3 members of the board belonging to the same political party. The board shall keep a record of its proceedings.

. . .

(5) DISCIPLINARY ACTIONS AGAINST SUBORDINATES.

(a) A subordinate may be suspended as hereinafter provided as a penalty. He may also be suspended by the commission pending the disposition of charges filed against him.

(b) Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

(c) A subordinate may be suspended for cause by the chief or the board as a penalty. The chief shall file a report of such suspension with the commission immediately upon issuing the suspension. No hearing on such suspension shall be held unless requested by the suspended subordinate. If the subordinate suspended by the chief requests a hearing before the board, the chief shall be required to file charges with the board upon which such suspension was based.

(d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges shall be public, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas which shall be issued by the president of the board on request and be served as are subpoenas under ch. 885.

(e) If the board determines that the charges are not sustained, the accused, if he has been suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

(f) Findings and determinations hereunder and orders of suspension, reduction, suspension and reduction, or removal, shall be in writing and, if they follow a hearing, shall be filed within 3 days thereof with the secretary of the board.

(g) Further rules for the administration of this subsection may be made by the board.

(h) No person shall be deprived of compensation while suspended pending disposition of charges.

(i) Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice thereof on the secretary of the board within 10 days after the order is filed. Within 5 days thereafter the board shall certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes. The action shall then be at issue and shall have precedence over any other cause of a different nature pending in said court, which shall always be open to the trial thereof. The court shall upon application of the accused or of the board fix a date of trial, which shall not be later than 15 days after such application except by agreement. The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence by the board. The question to be determined by the court shall be: Upon the evidence was the order of

board reasonable? No costs shall be allowed either party and the clerk's fees shall be paid by the city. If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to his pay as though in continuous service. If the order of the board is sustained it shall be final and conclusive.

. . .

The Complainant presented the following arguments in support of its contention that the Zawikowski and Goss grievances are properly appealable to a Board of Arbitration:

- (1) That these grievances are most properly characterized as questions of contract interpretation, i.e. did the grievants violate Article 39 subsection A paragraph 3 of the Agreement, as alleged by Chief Olson on the face of the written reprimands at issue by allegedly having traded compensatory time as they did? Issues concerning interpretation of the Agreement are specifically reserved by the terms of the Agreement, to a Board of Arbitration.
- (2) If any questions concerning the arbitrability of the Zawikowski and Goss grievances do remain, the determination of such questions are reserved to a Board of Arbitration as well, both by long-standing and well-established commission policy and by Article 13D of the Agreement.
- (3) The Fire and Police Commission of the City of Cudahy lacks jurisdiction over the subject matter of the Zawikowski and Goss grievances because:
 - (a) Section 62.13 Wisconsin Statutes does not empower boards of police and fire commissioners to consider lesser disciplinary matters such as written reprimands. It only empowers such boards to consider more serious matters involving suspension, reduction in rank, or discharge.
 - (b) The Fire and Police Commission has no authority to rule on questions of contract interpretation, nor do the laws of the State of Wisconsin, the ordinances of the City of Cudahy or the rules of that Commission or of the Fire Department of the City of Cudahy contain any provisions relating to the matters underlying the Zawikowski and Goss grievances.
 - (c) The parties hereto cannot by law confer subject matter jurisdiction over the Zawikowski and Goss grievances upon the Fire and Police Commission, just as such jurisdiction cannot be conferred upon courts of record or upon administrative agencies.

The Respondent made the following arguments in support of its view that the Zawikowski and Goss grievances are properly appealable only to the Fire and Police Commission of the City of Cudahy.

- (1) The Zawikowski and Goss grievances involved appeals from disciplinary reprimands issued by Chief Olson, are properly characterized as "disciplinary" grievances within the purview of Article 12B of the Agreement and thus must be processed in accordance with Section 62.13 Wisconsin Statutes.
- (2) Article 12B of the Agreement sets forth the parties' express desire that matters of discipline such as those presented herein be heard by the Fire and Police Commission and that they be excluded from the arbitration procedures applicable to other types of grievances arising under the Agreement.
- (3) The applicable rules of the Fire Department of the City of Cudahy and the statutory provisions referred to be Article 12B of the Agreement clearly specify that disciplinary matters be heard by the Fire and Police Commission and not by a board of Arbitration. All past disciplinary matters involving the Fire Department of the City of Cudahy have accordingly been handled by the Fire and Police Commission.
- (4) The policy of the Wisconsin Employment Relations Commission concerning reservation of matters of arbitrability to an arbitration is subject to exceptions, especially in the event that the parties agree to waive or forfeit their right to insist on submitting such matters to arbitration. The Complainant has in fact waived its right in that regard by virtue of Article 12B of the Agreement which incorporates a specific "disciplinary" grievance procedure into the Agreement. Thus, the Complainant has expressly agreed to have disciplinary matters heard by the Fire and Police Commission of the City of Cudahy and such agreement must be given full force and effect.
- (5) A Board of Arbitration would not have jurisdiction to consider the Zawikowski and Goss grievances because to assert such jurisdiction would be in effect to "ignore" Article 12B of the Agreement in violation of that portion of Article 13D of the Agreement which states that "The Arbitration Board shall not have jurisdiction or authority to add to, amend, modify or ignore in any way the provisions of this agreement".
- (6) The dispute concerning the identity of the proper tribunal to hear the Zawikowski and Goss grievances represents a breakdown of the parties' procedures for settling disputes, a situation in which the Wisconsin Employment Relations Commission, and not a Board of Arbitration is the proper authority to dispose of said jurisdictional issue. 1/

1/ In this regard, the Respondent cites the decision rendered in West Allis- West Milwaukee School District (14856-A) 11/76.

- (7) The Fire and Police Commission of the City of Cudahy does have the power under Section 62.13 of the Wisconsin Statutes to hear disciplinary matters of the sort presented herein. This authority is easily "implied from the four corners of the Statute under which it (the Fire and Police Commission) operates". Article 12B of the Agreement expressly places lesser disciplinary grievances easily included by implication from the terms of Section 62.13 within the jurisdiction of the Police and Fire Commission.

The Respondent's complaint stems directly from the matters underlying the Complainant's complaint, and in fact could be considered to be the converse thereof. It states that the Complainant violated the Agreement (and more particularly, Article 12B thereof) by refusing to process the Zawikowski and Goss grievances before the Fire and Police Commission of the City of Cudahy in accordance with Section 62.13 Wisconsin Statutes, thereby committing a prohibited practice pursuant to Section 111.70(3)(b)4 of the Municipal Employment Relations Act.

DISCUSSION:

A. The Complainant's Complaint

The heart of the dispute underlying this dispute concerns the designation of a proper forum to determine the Zawikowski and Goss grievances, and nothing more.

The matter involved in this proceeding involves a question of substantive arbitrability in that the applicability of Article 12B of the Agreement thereto has been disputed. The Complainant and the Respondent disagree as to whether the Zawikowski and Goss grievances are properly considered to be "disciplinary" grievances or "contract interpretation" grievances. The Agreement provides that all grievances, excepting only "disciplinary" grievances (including those involving suspensions and dismissals) are to be subject to the arbitration provisions set forth therein. Thus, the characterization of those grievances as either involving "discipline" or "contract interpretation" will determine the proper choice of forum for their disposition. If they are in fact "disciplinary" in nature, the Respondent's assertion that the Agreement's arbitration provisions do not apply to said grievances is correct. If they primarily involve issues of contract interpretation rather than issues of discipline, the Complainant's assertion that they must be submitted to arbitration is correct. Therein lies the issue of substantive arbitrability presented. An examination of these grievances reveals that this question of characterization is indeed substantial. Both grievances do involve appeals from written reprimands - certainly a disciplinary action on the part of the Respondent's Fire Chief - and both seek removal of those written reprimands as the relief requested. However, those disciplinary actions were themselves based at least in part upon alleged contractual violations committed by the two grievants in question - in particular, violations of Article 39 subsection A paragraph 3 relating to trades of compensatory time. Thus, the question of whether those disciplinary actions were warranted depends upon a proper construction of that provision of the Agreement.

It has been a well-established policy on the part of the Wisconsin Employment Relations Commission not to assert its jurisdiction to determine matters involving alleged violations of collective bargaining agreements when said agreements provide for final and binding arbitration

of disputes arising thereunder. 2/ It is also settled that objections to the arbitrability of grievances, such as an objection that a grievance was not filed in a timely fashion or that it was not processed in accordance with the contractual grievance procedure are in and of themselves questions of contract interpretation that are properly within the jurisdiction of an arbitrator, the forum selected by the parties for the resolution of such issues. 3/

Under the usual circumstances, therefore, the policy of the Commission might be to decline to assert its jurisdiction to determine the issue of the substantive arbitrability of the Zawikowski and Goss grievances in favor of submitting those issues to a Board of Arbitration. In view of Article 13D of the Agreement, however, such a course becomes an express requirement and not merely a matter of Commission policy. The second sentence of that paragraph states that "on grievances where the subject matter raises a question of arbitrability, the Arbitration Board shall first hear and decide the question of arbitrability unless mutually agreed otherwise". This sentence is the key to the entire disposition of this matter and its import could not be clearer. The substantive arbitrability of the Zawikowski and Goss grievances (and thus the question of the proper forum to which those grievances ought to be submitted) must, by the express direction of the parties, be submitted to a Board of Arbitration for determination. The Respondent's contention that the Commission must determine this issue is therefore incorrect, since the parties have in effect forbidden the Commission from doing so by virtue of Article 13D of the Agreement.

The remaining contentions of the Respondent, while well-taken, have no applicability to the situation presented herein and must therefore be rejected. Thus, it may well be that the Commission's policy of reserving matters concerning arbitrability for arbitral determination is subject to exception in situations involving a breakdown of the parties' dispute resolution procedure or in situations where a party waives or forfeits its right to submit such issues to arbitration. However, no breakdown of any agreed upon dispute resolution procedure occurred in this instance. To the contrary, the applicable dispute resolution procedure is set forth clearly and unmistakably by the applicable collective bargaining agreement, and the Respondent has simply refused to accede to the Complainant's attempt to invoke that mutually agreed upon procedure. Similarly, there was no waiver or forfeiture by the Complainant of its right to submit the issue of the arbitrability of the Zawikowski and Goss grievances to arbitration. Again, to the contrary, this entire proceeding involves the Complainant's insistence upon the exercise of that right. The Respondent's view that such a waiver or forfeiture may have occurred is premised upon the existence of Article 12B of the Agreement and its alleged applicability to the Zawikowski and Goss grievances. The applicability of Article 12B is, as already noted, a matter in dispute and properly determinable only by a Board of Arbitration, and thus the Respondent's contention is based upon an unfounded assumption.

2/ See, for a small sample of the numerous decisions of the Commission on this point, Milwaukee County (18216-B) 2/81; City of Racine (Police Dept.) (17605-B) 2/81; Milwaukee Board of School Directors (15825-B) 6/79; Chippewa County (17328-B) 5/80.

3/ See e.g. City of Racine (17348) 10/79; Milwaukee County (16448-B) 4/79; Sauk Prairie School District (15282-B) 7/78. See also Elkouri and Elkouri, How Arbitration Works (3d ed., 1973) pp. 173-176.

The Respondent's remaining arguments, when closely examined, also fail because they are premised upon the same unfounded assumption - i.e. that the Zawikowski and Goss grievances are in fact "disciplinary" and thus properly appealed only pursuant to Article 12B. As noted, the proper characterization of those grievances - and thus the applicability of Article 12B thereto - is not only quite unclear, but the resolution of that issue - including by definition, the applicability of Article 12B - is specifically reserved to arbitration by Article 13D of the Agreement. Thus, while the Respondent's view of the Zawikowski and Goss grievances as "disciplinary" and subject to Article 12B may well be correct, the only proper forum to test that view would be before a Board of Arbitration. By refusing to permit the submission of this issue to arbitration, the Respondent clearly committed, and continues to commit, a prohibited practice pursuant to Section 111.70(3)(a)5 of the Municipal Employment Relations Act. An order directing submission of the arbitrability of the Zawikowski and Goss grievances to a Board of Arbitration has therefore been issued. If those grievances are indeed arbitrable, the Board of Arbitration may consider the merits of those grievances in due course.

The Complainant's remaining contentions do not affect the foregoing result, but are worthy of some comment inasmuch as they raise additional potential issues concerning the arbitrability of the Zawikowski and Goss grievances. The issue concerning the jurisdiction of the Fire and Police Commission under Section 62.13 Wisconsin Statutes to determine "lesser" disciplinary grievances not involving suspensions, reductions in rank, or dismissals may impinge on the arbitrability of these grievances, and in any event, cannot be considered until the Board of Arbitration first determines whether or not these grievances are "disciplinary" in nature. Furthermore, an additional question arises if it is found that the Fire and Police Commission does, in fact, lack such jurisdiction, as to whether these grievances would then be arbitrable or whether the exclusion of all "disciplinary" grievances from arbitration pursuant to Article 12B of the Agreement leaves the Complainant without a contractual remedy for the resolution of these grievances. These issues are properly submitted to a Board of Arbitration and may not be determined at this time and in this proceeding.

B. The Respondent's Complaint

The Respondent's complaint, filed following the conclusion of the hearing on the Complainant's complaint, raised no new factual issues. Indeed, it alleges the obverse of the Complainant's complaint, i.e. that the Complainant violated the Agreement by refusing to appeal the Zawikowski and Goss grievances to the Fire and Police Commission of the City of Cudahy, and thereby committed prohibited practices pursuant to Section 111.70(3)(b)4 of the Municipal Employment Relations Act. This complaint is unfounded for two reasons. First, it again assumes the resolution of the unresolved issue discussed hereinabove in the Respondent's favor - that the Zawikowski and Goss grievances are "disciplinary" and therefore properly heard only by the Fire and Police Commission. This result is, as noted, not certain and the underlying issue must first be considered and determined by a Board of Arbitration. Second, even if the result urged by the Respondent on this issue is ultimately upheld in arbitration, the merits of the Respondent's complaint, i.e. whether the issue of whether the Complainant has any obligation stemming from the Agreement to affirmatively present the Zawikowski and Goss grievances to the Fire and Police Commission or to take any other form of direct action with regard to the presentation of those grievances, are clearly within the ambit of the applicable contractual arbitration procedure. This is an issue requiring a proper interpretation of the Agreement which is reserved to the determination of a Board of

Arbitration pursuant to Article 13 of the Agreement. Under such circumstances, the Commission will not assert its jurisdiction to determine the merits of the Respondent's complaint, even if the Respondent's contention that the Zawikowski and Goss grievances fall within Article 12B of the Agreement is proved correct. 4/ Said complaint must therefore be dismissed.

Dated at Milwaukee, Wisconsin this 18th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S. Mukamal
Stuart S. Mukamal, Examiner

4/ See fn. 2 supra.