

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
CITY OF BROOKFIELD
Requesting a Declaratory Ruling
Pursuant to Section 111.70(4)(b),
Wis. Stats., Involving a Dispute
Between Said Petitioner and
BROOKFIELD PROFESSIONAL
FIREFIGHTERS ASSOCIATION
LOCAL 2051, I.A.F.F.

Case XLVIII
No. 30818 DR(M)-280
Decision No. 20635

Appearances:

Godfrey, Trump & Hayes, Attorneys at Law, 1200 First Savings Plaza, 250 East Wisconsin Avenue, Milwaukee, WI 53202, by Mr. Tom E. Hayes, appearing on behalf of City of Brookfield.
Brendel, Flanagan, Sendik & Fahl, S.C., 6324 North Avenue, Milwaukee, Wisconsin 53213, by Mr. John K. Brendel, appearing on behalf of Brookfield Professional Firefighters Association, Local 2051, I.A.F.F.

FINDINGS OF FACT, CONCLUSION OF LAW
AND DECLARATORY RULING

City of Brookfield filed a petition with the Wisconsin Employment Relations Commission on December 15, 1982 seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Wis. Stats., as to whether a proposal submitted to the City during negotiations with the Brookfield Professional Firefighters Association, Local 2051, I.A.F.F. is a mandatory subject of bargaining. Hearing was held on February 1, 1983 in Brookfield, Wisconsin before General Counsel Peter G. Davis, a member of the Commission's staff. Post-hearing argument was submitted by the parties, the last of which was received March 9, 1983. Having considered the record and the parties' positions, the Commission makes and issues the following

FINDINGS OF FACT

1. That the City of Brookfield, hereinafter referred to as the City, is a municipal employer and has its offices at 2000 North Calhoun Road, Brookfield, Wisconsin 53005.

2. That Brookfield Professional Firefighters Association, Local 2051, I.A.F.F., hereinafter referred to as the Union, is a labor organization and has its offices at W238 N4551 Woods Edge Drive, Pewaukee, Wisconsin 53072; and that at all times material herein the Association has been, and is the exclusive collective bargaining representative of all Firefighters, Equipment Operators, Lieutenants and Inspector positions employed by the City in its Fire Department.

3. That the City operates a fire department from three stations; that the main station is always manned by a minimum of one Deputy Chief, one Lieutenant, three Equipment Operators and one Firefighter while the two small stations are each always manned by a minimum of one Lieutenant, one Equipment Operator and one Firefighter; that the main station has two active pieces of fire fighting equipment (an engine and a ladder truck) while the two smaller stations each have one engine; that each station has one reserve engine; that typically an Equipment Operator drives the fire engines to the fire scene with two Equipment Operators (a driver and a tillerman) handling the delivery of the ladder truck; that if an Equipment Operator is or becomes unable to report to work, the City either calls in an off-duty Operator or holds over or transfers an on-duty Operator to fill the vacancy; that if an Equipment Operator is unavailable, a Fire Fighter Relief Driver will drive; that Relief Drivers are employees who have passed the promotional exam given by the City for the Equipment Operator position but who have not been promoted; and that the Equipment Operator exam consists in part of a testing of the applicants' ability to handle the fire apparatus safely.

4. That the City and the Union were parties to a collective bargaining agreement covering the wages, hours and conditions of employment of the employees represented by the Union, which agreement had an expiration date of December 31, 1981; and that said agreement contained among its provisions the following material herein:

ARTICLE 2 - RECOGNITION

The City hereby recognizes the Association as the exclusive bargaining agent for all Firefighters, Equipment Operators, Lieutenants and Inspector positions in the Fire Department of the city of Brookfield.

. . .

ARTICLE 15 - SALARY SCHEDULE

15.02 An equipment operator shall be assigned for each shift to each of the first line engines at Stations 2 and 3 and to the pumper at Station 1; two additional equipment operators per shift shall be assigned to the ladder truck (driver and tiller) at Station One. An equipment operator so promoted and assigned shall be paid a monthly premium of 3% above the top firefighter's scale. In addition, the City may designate up to two relief operators per shift who have also passed the promotional procedures, who have not been assigned, to substitute for absent assigned operators.

. . .

ARTICLE 18 - PROMOTIONS

When (sic) an authorized vacancy exists in the following classifications of Inspector, Chief Inspector, Lieutenant and Equipment Operator, it shall be filled by promotion in the following manner:

1. A notice of vacancy shall be posted on the Department bulletin boards thirty (30) days prior to the last day on which applications are acceptable. The notice shall state the date, time and place of written examinations.
2. Only employees with more than three (3) years of employment on the Brookfield Fire Department can be applicants, except in the classification of inspector where all employees may be applicants. Only employees who have been on the department for more than five (5) years shall be eligible to make application for the position of Lieutenant.
3. Application forms will be provided by the Chief.
4. There shall be written examination and an oral interview and the written examination given first. The examination and interview shall include an orderly series of tests and evaluations to be applied equally and equitably to all applicants. Any eligible applicant who has made time (sic) application can take the examination.
5. Applicants who have received a grade of 75% or better on the written examination will have an oral interview. The interview will be given by a Board of not less than three (3), composed of the Chief and Staff officers.

6. The following weights shall be given to the examination interview and the prior department record of applicants:

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|---------------------|-----|
| Written Examination | 50% |
| Oral Interview | 25% |
| Department Record | 25% |

to determine final grades. The passing grade shall be 75% and applicants with a grade of 75% or better shall compose a list of qualified applicants, upon approval and certification by the Fire and Police Commission.

7. The successful applicant will be selected from the qualified list by the Chief. The appointee will be notified by letter or by word from the Chief and the name will be posted on the bulletin board. Upon the request of any applicant, he shall be shown the grades of all applicants.
8. The appointee must pass the physical examination of the Fire and Police Commission physician.

5. That during the course of negotiations between the parties on a successor to the above-noted collective bargaining agreement, the Union filed a petition with the Wisconsin Employment Relations Commission requesting that an interest arbitration proceeding be initiated, pursuant to Sec. 111.77 of the Municipal Employment Relations Act, to resolve an alleged impasse between the Union and the City in said negotiations, and during the course of the investigation of such petition by the Commission's Investigator, the parties exchanged tentative final offers; and that following such exchange the City contended that Articles 15.02 and 18, which the Union proposed be retained in the successor agreement, related to non-mandatory subjects of bargaining, and, as a result, the City on June 11, 1982, prior to the close of the investigation on the alleged impasse, filed a petition for declaratory ruling with the Commission; and that in response to the petition, the Union modified its proposals to the following:

15.02 If an equipment operator is to be assigned to any apparatus, such assignment to the specific piece of equipment shall be made within one hour of the commencement of the normal duty day. No first line engine, pumper, or truck shall be operated by any unit employee for that shift unless such assignment has been so made. A truck to be operated by unit employees shall require the assignment of an additional equipment operator daily to serve as tillerman. Equipment operators are defined as those employees who have passed the promotional procedure for such position and have received their appointment to that classification. Equipment operators already receiving, or to receive, such appointment shall be paid at a monthly rate of salary which is 3% higher than that paid in the highest step of firefighter salary.

. . .

PROMOTIONS

Article 18 Section I

Whenever an authorized vacancy exists (sic) for the classification of Motor Pump Operator, Lieutenant or Inspectors, such vacancies shall be filled at the earliest possible date from an eligibility list created in the following manner:

1. A notice of vacancy shall be posted on the department bulletin board at least 30 days prior to the last day on which applications are acceptable. The notice shall state the date, time and place of written examination, if any. It shall further state the eligibility requirements, the type and nature of the tests or test to be conducted, the written manuals or other materials, if any, which will to some extent be included, the general subject matters to be covered, the weight to be given each specific test, the grade needed to be qualified and the manner of grading to be used.
2. The promotional process as posted shall be adhered to. Those applicants found qualified, if any, shall be ranked in order of strict seniority. The top ranked qualified applicant by seniority shall thereupon be promoted to the vacant position or newly opened job classification and the balance of qualified applicants shall constitute an eligibility list in order of strict seniority which shall remain in effect for 2 years. All subsequent promotions during that period to that job classification shall be made therefrom in order ranked. The complete listing of those qualified, their respective scores per test and final scores, the amount of seniority attributed to each employee, and the ultimate ranking shall be made available to all applicants upon request.

6. That on September 29, 1982, the Commission issued a Declaratory Ruling wherein it found the Union's Article 18 and Article 15 proposals to be mandatory and permissive subjects of bargaining respectively; and that the Union subsequently modified its Article 15 proposal as follows:

Every unit employee qualified to drive an engine, ladder truck or pumper truck shall be paid a base monthly salary equal to 3% above that of the highest firefighter's scale. For purposes of this section, only an employee heretofore found to be qualified pursuant to past promotional procedures, or employees to be subsequently determined to be qualified by the promotion procedure, shall be deemed to be qualified. Unqualified employees shall not be ordered to drive such vehicles.

that during bargaining over said proposal, the City filed the instant petition for declaratory ruling asserting that it had no duty to bargain over the proposal; and that during hearing on the petition the Union modified the last sentence of its proposal to read as follows:

Unqualified employees shall not be ordered to drive such vehicles except in cases of emergency in route to, from, or at an active emergency response.

7. That the Union's modified Article 15 proposal primarily relates to wages and conditions of employment.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That the Union's modified Article 15 proposal is a mandatory subject of collective bargaining within the meaning of Sec. 111.70(1)(d), Wis. Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law the Commission makes and issues the following

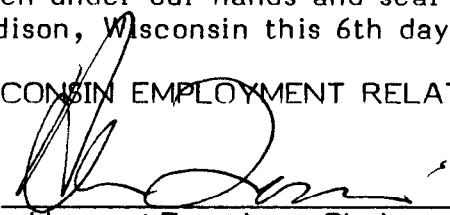
DECLARATORY RULING 1/

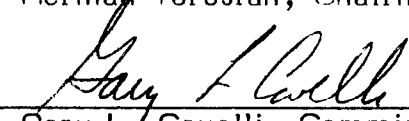
That the City of Brookfield has a duty to bargain with the Brookfield Professional Firefighters Association Local 2051, I.A.F.F. over the Article 15 proposal in dispute.

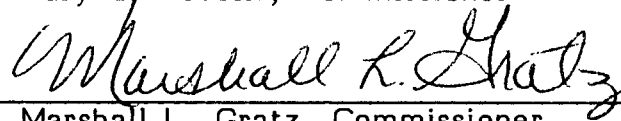
Given under our hands and seal at the City of
Madison, Wisconsin this 6th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Gary L. Covelli, Commissioner


Marshall L. Gratz, Commissioner

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- 1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(Continued on Page Six)

1/ (Continued)

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND DECLARATORY RULING

In its Petition, the City contends that the Union's proposal requires the establishment of the classification of "apparatus driver" and prohibits use of the apparatus unless a "qualified" employee operates same. It argues that these two factors prevent the City from performing its firefighting mission unless it is willing to pay a 3% premium to any employee who might conceivably be asked to operate firefighting equipment. In its post-hearing brief, the City argues that the term "qualified" as used in the Union's proposal seems to be defined as any employee who passes the equipment operator exam. Given the Union's contrary position on the proper definition of "qualified," the City asserts that the proposal is illegal or permissive because of its prohibition against use of equipment under certain circumstances. It cites Milwaukee Board of School Directors, (20093) 2/83, Issue 69, as support for said argument. Finally, the City reiterates and expands upon the position taken in its Petition asserting that the proposal is permissive because by indirection it compels the City to have classifications prescribed by the Union, with duties established by the Union, and establishes the number of employees in said classification by reference to the number of pieces of apparatus which the City owns. The City cites Crawford County, (20116) 12/82 as being supportive of its position.

The Union asserts that its proposal is only an attempt to seek additional compensation for employees who the City finds to be needed and qualified to operate complicated firefighting equipment. It contends that under the disputed proposal the City retains total discretion when determining the number of equipment operators it needs as well as the qualifications which such employees should have. The Union argues that only those employees actually promoted by the City are "qualified" within the meaning of the proposal. It asserts that the last sentence of its proposal reflects the reality of paying skilled employees more if the City expects to have complicated equipment delivered to a fire. The Union also contends that the last sentence reflects its interest in the safety of employees who operate or are passengers on the equipment. Finally, the Union contends that the proposal reflects the Union's legitimate interest in prohibiting the City from using less skilled and lesser paid employees to perform the duties in question. Believing that the proposal is primarily related to wages and working conditions, the Union asks that it be found to be mandatory.

DISCUSSION

The record reflects that the City currently utilizes employees designated as Equipment Operators to deliver firefighting equipment to the scene of a fire or emergency. Given the need for assurances that the Equipment Operator can quickly and safely deliver the equipment to the desired location, the City currently requires that employees classified as Equipment Operators pass an examination which requires knowledge of the City's geographic layout and the proper manner to handle the equipment. Not all City firefighting personnel possess these qualifications. Further, there are employees who have passed the exam and are qualified but who have not been promoted due to limited numbers of Equipment Operator vacancies.

We are confronted here with an unusual situation of interpreting what we believe the language in issue reasonably interpreted means, and what the Union claims said language to mean.

The Union urges the Commission to interpret its proposal as requiring the specified monthly compensation level to be paid only to so many of the bargaining unit members as are promoted to a classification responsible for driving and operating the Department's engine, ladder truck or pumper truck.

We find, however, that the language proposed by the Union does not permit so narrow an interpretation in view of the use of the term "qualified" in the promotion proposals of both parties. (An agreement will, of course, be interpreted when read as a whole, and bargaining history would not overcome the clear meaning of "qualified" in the instant proposal as meaning having passed the tests whether promoted or not.)

Thus, reasonably construed we understand the first portion of the Union's proposal to require payment of the specified monthly pay rate to all employees who have shown themselves qualified to drive the equipment by passing the employer's examinations in that regard. This portion of the proposal primarily relates to wages. Further, the bargaining unit's interests in their own physical safety render the wage/hour/working conditions interests at stake predominant over public policy considerations presented by the proposal's prohibition against non-emergency driving of equipment by other than qualified drivers. In that regard, we specifically reject the City's contention that the economic and administrative burdens potentially imposed by the Union proposal (as construed above) would prevent the fulfillment of the firefighting mission of the Department.

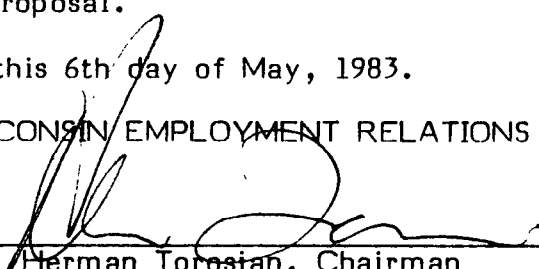
Further, we think it in the best interests of the parties, primarily to avoid another declaratory ruling petition over the same provision, to also decide the mandatory/permissive nature of the Article XV language on the basis of the Union's interpretation of said language. Thus, if we were to treat "qualified" as equivalent to "promoted" in Union proposal 15.02, we would find the proposal permissive in that it prevents the Employer from assigning non-emergency driving to qualified but non-promoted personnel; thus losing the safety rationale that we found controlling above.

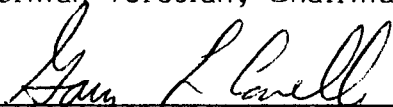
While the Union argues that it intended its proposal to in no way impede the exercise of management rights, the language of the last sentence of its proposal 15.02 clearly has that effect absent the safety consideration lost under the Union's "intended" meaning of its proposal.

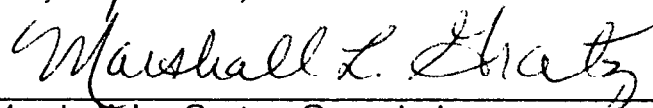
Dated at Madison, Wisconsin this 6th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Gary L. Covelli, Commissioner


Marshall L. Gratz, Commissioner