STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FIREFIGHTER LOCAL 484, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS (IAFF), AFL-CIO, Complainant, vs. CITY OF STEVENS POINT, Respondent.	Case 36 No. 33169 MP-1588 Decision No. 21646-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, with Mr. James W. Freeman, on the brief, 408 Third Street, P. O. Box 1004, Wausau, Wisconsin 54401, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Firefighter Local 484, International Association of Firefighters (IAFF), AFL-CIO, having filed a complaint on April 9, 1984, with the Wisconsin Employment Relations Commission alleging that the City of Stevens Point has committed unfair labor practices within the meaning of Secs. 111.70(3)(a)1, 3, 4 and 5 of the Municipal Employment Relations Act; and the Commission having appointed Carol L. Rubin, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter; and hearing on said complaint having been held at Stevens Point on May 24, 1984; and the parties having filed briefs and reply briefs by September 27, 1984; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Firefighter Local 484, International Association of Firefighters (IAFF), AFL-CIO, hereinafter referred to as the Union or the Complainant, is a labor organization which functions as the exclusive bargaining representative of the following bargaining unit: Employes of the Fire Department, including captains, lieutenants, mechanics, motor pump operators, ambulance personnel and firefighters, and that the Union's offices are at 1905 Rainbow Drive, Stevens Point, Wisconsin 54481.

2. That the Respondent City of Stevens Point, hereinafter referred to as the City or the Respondent, is a municipal employer with offices at 1515 Strongs Avenue, Stevens Point, Wisconsin 54481; that among its various functions the City operates a fire department; since 1981 the City's personnel department was headed by Personnel Director, Mr. Paul F. Jadin.

3. That the Union and the City have entered into a series of collective bargaining agreements; that the current collective bargaining agreement between the parties has a duration from January 1, 1983 through December 31, 1984; that said agreement has no provision for grievance filing or processing or for arbitration of grievances; that said agreement contains the following provisions:

ARTICLE 4 - SENIORITY

> A. Seniority is the length of service from date of hire. . . . In case of promotions, other than appointments to positions outside the bargaining unit, the Chief, in making his recommendations to the Police and Fire Commission, shall take into consideration the following factors: seniority, skill, competence, efficiency, merit, training, physical fitness, initiative, and leadership qualities. No person shall be considered for promotion with less than five (5) years of service in the Fire Department.

. . .

ARTICLE 17 - EXISTING RIGHTS

> The rights of all members of the Union and the City existing at the time of the execution of this contract shall in no way be modified or abrogated and all privileges, benefits, and rights enjoyed by the Union and the Employer which are not specifically mentioned or abridged in this agreement, are automatically a part of this agreement.

That the above provisions also existed in the prior contract that dated from January 1, 1981 through December 31, 1982, and, in essential respects, in a number of previous collective bargaining agreements as well.

4. That for at least the last twenty years, all promotions within the bargaining unit have been based solely on seniority; that the promotion of Steve Koback from Firefighter to Motor Pump Operator in April of 1983, was based solely on seniority; that in 1981 or 1982, a manpower study of the City's Fire Department was performed, and that study recommended, inter alia, that the Police and Fire Commission adopt objective evaluation methods to measure performance of fire personnel on a regular basis, design a promotional system, and establish a Board to evaluate candidates for promotion.

5. That in October of 1982, during negotiations for a successor collective bargaining agreement, the City made the following initial proposal relating to promotion:

> Promotions - In case of promotions, other than appointments to positions outside of the bargaining unit, the Chief, in making his recommendations to the Police and Fire Commission, shall consider the following factors: job performance, physical fitness, seniority and job knowledge (may be determined by administering a test to interested candidates). The Chief shall determine the weight given to each of these factors at the time the position becomes vacant and shall include this information in the job posting. No employe shall be considered for promotion without three (3) years of experience.

That in response the Union indicated that unless seniority was put ahead of job performance for promotions they wished to retain status quo; that during negotiations the parties continued to discuss the promotion proposal of the City; that in November the Union stated that it could accept the four promotional criteria desired by the City so long as seniority was weighted one hundred percent; that the City modified its proposal to suggest that seniority be weighted ten percent, a written test weighted thirty percent, job performance weighted thirty percent and an oral interview weighted thirty percent; that on November 30, 1982, the Union made a counter-proposal in which seniority was weighted sixty-six percent, a written exam was weighted twenty-three percent and an oral interview would be weighted eleven percent; that the City then responded with a proposal that seniority be weighted twenty percent, a written test, twenty-five percent, oral interview, twenty-five percent and job performance, thirty percent; that at that point the Union responded that no voluntary settlement was possible on the entire agreement unless seniority counted for at least two-thirds of the weight in promotions; that the City then made one more proposal on promotion in which seniority was weighted thirty percent, a written test was weighted twenty-five

percent, an oral interview twenty-five percent and past performance twenty percent; that on December 15, 1982, Mr. Paul Jadin, the Personnel Director and Chief Negotiator for the City, stated that he would remove the promotion proposal from the table but that the City would simply implement a proposal which was in keeping with the existing contract language which contained nine different criteria and that the past practice of promoting solely on the basis of seniority would no longer be in effect; that on December 15, 1982, the parties agreed that the existing promotion language in Article 4D would remain the same; that on that same day the parties settled all other items in dispute and tentatively agreed on a two-year successor collective bargaining agreement with a wage reopener for 1984; that on December 28, 1982, the agreement was ratified and signed.

6. That in October of 1983, in negotiations resulting from a limited reopener on wages, the City again raised the issue of promotion procedure several times during negotiations and offered to bargain about it, but the Union refused; that according to the bargaining notes kept by Mr. Jadin, the City proposal in 1983 was that promotions would be made according to contract, i.e., consideration would be given to seniority, skill, competence, efficiency, merit, training, physical fitness, initiative and leadership qualities and that the City would incorporate these factors into their promotional procedure for 1984.

7. That in March of 1984 the Police and Fire Commission of the City of Stevens Point adopted the following promotional procedure for promotions to the positions of Lieutenant and Captain:

> Promotion to Lieutenant and Captain will be made on the basis of a scoring system which takes into consideration past performance, results of a written examination, results of an oral interview and seniority. The weights given to these areas of consideration shall be:
>
> | | |
> |---|---|
> | Seniority | 20% |
> | Interview | 25% |
> | Written Examination | 25% |
> | Performance Evaluation | 30% |
> | | 100% |
>
> The rating system will be applied in this manner:
>
> Seniority
>
> Five points will be allowed for each year of service up to twenty points and the 20% weight will be applied to give the applicant's score. An applicant with fifteen years of service would get a score of 15 points (15 times 5 times 20%). An applicant with 6 years of service would get a score of 6 points.
>
> Interview
>
> Interviews will be conducted by a three person panel, made up of a Fire Department Officer (Chief, Assistant Chief, or Deputy Chief), a Department officer from outside the City, and an outside management person. This third party might be a City Department Head, Commission Member, or other experienced management person outside the fire service. The interviewers will grade each candidate in each of ten categories with an overall possible maximum score of 100. The scores of the interviewers will be averaged and the 25% weight applied. An applicant who received interview scores of 80, 70, and 60 would have an average of 70. This score would be 17.5 (70 times 25%).
>
> Written Examination
>
> In order to have the written examination results given equal weight with the other selection criteria, they will first be adjusted to a base of 100. If the range of examination scores are (sic) from 125 to 105, for instance, they would be

converted to a range of 100 to 84. The applicant with the examination result of 125 would receive a score of 25 (100 times 25%) and the applicant with the examination result of 84 would receive a score of 21 (84 times 25%).

Performance Evaluations

The Chief and Assistant Chief will evaluate all candidates. The Deputy Chiefs will evaluate the candidates in their respective platoons.

Evaluations will be done using a uniform evaluation format to assist the evaluator in ranking the applicants.

Each evaluator will give each applicant a single final score with a brief narrative of a paragraph or two summarizing his evaluation.

Maximum scores possible shall be:

Chief	15 points
Assistant Chief	10 points
Deputy Chief	5 points

The total possible score is 30 points and is added directly to the scores from the other selection elements.

In the event that one of the Chiefs does not participate in the performance evaluation process, the points for that position will be split between the remaining Chiefs, one-half of the points to each participating Chief.

8. That in a letter dated March 13, 1984, the Union requested that the City void the action taken and submit its proposed language on promotion to the Union for collective bargaining; that the City promptly responded with a letter to the Union which included the following statements:

. . .

Please understand that the City acknowledges a past practice of promoting within the bargaining unit based on seniority. However, the City objected to the continuation of this practice during negotiations of a successor to the 1981-82 labor agreement with your Association and, because the practice was not written into the 1983-84 agreement, it can no longer be considered binding.

With this in mind, the Police and Fire Commission has chosen to implement the proposal it made at approximately 2:00 p.m. on November 30, 1982. This policy is in compliance with Article 4 paragraph A of your labor agreement . . .

If you or the Association would like to have further input into this promotional process, I would be happy to approach the Commission on your behalf. Please contact me if you have any questions or would like clarification of the City's position.

That on April 9, 1984, the Union filed the instant complaint alleging that through its actions the City had violated Secs. 111.70(3)(a)1, 3, 4 and 5 of MERA, Wis. Stats.

9. That Article 17, entitled Existing Rights, is not applicable to promotions because the topic of promotions is specifically addressed in Article 4, Seniority.

10. That the past practice of promoting solely on the basis of seniority was inconsistent with the contractual language in Article 4 which governs promotions.

11. That the City gave adequate and appropriate notice to the Union during negotiations for a successor contract of its intent to discontinue the past practice and to adhere to the existing contract language.

12. That the City's new promotional policy, as described in Finding of Fact 7, is consistent with the contractual language in Article 4 of the parties' 1983-84 collective bargaining agreement which governs promotions.

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

CONCLUSIONS OF LAW

1. That in establishing the promotional procedure cited in Finding of Fact 7, the City has not violated the parties' collective bargaining agreement and therefore has not violated Sec. 111.70(3)(a)5, Stats.

2. That in its conduct during negotiations and in establishing the promotional procedure cited in Finding of Fact 7, the City has not refused to bargain collectively, and therefore has not violated Sec. 111.70(3)(a)1, 3 or 4, Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER 1/

That the complaint filed in this matter be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 2nd day of January, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Carol L. Rubin
Carol L. Rubin, Examiner

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

Section 111.07(5), Stats.

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

CITY OF STEVENS POINT (FIRE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF THE UNION

The Union contends that the City violated the labor agreement by acting to promote within the bargaining unit based upon a procedure unilaterally adopted by the Police and Fire Commission. By acting in a unilateral manner, the City violated its duty to bargain in good faith. A fortiorari its actions restrained, interfered and coerced the employes in the bargaining unit.

The Union contends that there is a very long and well-established past practice with no exceptions of promoting solely and exclusively on the basis of seniority. Article 17 of the labor agreement incorporates all existing ". . . privileges, benefits and rights . . . " not specifically mentioned or abridged by the new agreement. Thus, argues the Union, this article preserves the Union's right to seniority-based promotions since that right existed at the time the successor agreement was entered into and that right is not specifically abridged therein. The Union recognized the value of Article 17 in preserving past practices and successfully bargained for its retention in the 1983-84 agreement despite the City's proposal to drop that article.

The Union further argues that even if Article 17 were not applicable, the City cannot unilaterally modify its promotional policy. The City's claim that the language of Article 4 is explicit in allowing it to consider ten different factors 2/ and that past practice may not therefore supersede the language contravenes both its actions of nearly thirty years and generally accepted labor law. Arbitrators seldom repudiate a well-established, long-standing past practice simply because it may conflict with contract language. In fact, this past practice is so well established that it has been incorporated into the agreement. The Union also contends that the City cannot rely on any general management right to promote since that right has been limited by many years of past practice. The City cannot ignore the fact that it attempted to bargain a new promotional policy in 1982 and then dropped its proposal and agreed to maintain the status quo. Any attempt by the City to repudiate its past policy was inadequate since Article 17 provides that existing rights can only be modified expressly through writing contained in the agreement.

In addition to the alleged contract violation, the Union contends that the City also violated Secs. 111.70(3)(a)1, 111.70(3)(a)3 and 111.70(3)(a)4 of MERA when it unilaterally changed the weight of seniority in promotional decisions since promotional policies are mandatory subjects of bargaining. The fact that the City attempted to negotiate a new policy and was unsuccessful does not allow the City to then unilaterally implement it. The City's oral repudiation of its past practice was inadequate because it was not in writing.

As relief, the Union requests that the City be ordered to abide by its practice of promoting solely on the basis of seniority, to cease and desist from its unlawful activity, to rescind its recently adopted promotional policy, and to pay the Union's costs, disbursements and attorneys' fees.

POSITION OF THE CITY

The City denies that it committed any prohibited practice when it implemented the promotion procedure for Lieutenant and Captain ranks within the Fire Department for the following reasons. First, the City argues that the contract language in Article 4, which expressly establishes ten different criteria for consideration in promotion selection, is clear and unambiguous, and therefore it is inappropriate to permit any past practice to supersede the language. Secondly, the City argues that the establishment of a testing and interviewing procedure is

---

2/ While the City and Union both refer to ten criteria, the contractual language at issue actually lists nine criteria.

merely an extension of the existing contract language. The contract language does not restrict the City in how it will make determinations pursuant to the contractual selection criteria. Since no such restriction is evident in the agreement, then the right to establish such a procedure exists as a matter of management prerogative. The only restrictions articulated within the agreement are those which require the City to consider ten different promotion criteria. Third, the City argues that Article 17, entitled Existing Rights, is simply not applicable to the present dispute. Article 17 guarantees the continuation of all rights and benefits "which are not specifically mentioned or abridged by this agreement." Since a promotion policy is expressly mentioned in Article 4, it is incorrect for the Union to argue that a promotion policy is covered by Article 17.

The City also contends that assuming, for the sake of argument, that past practice would have otherwise applied to interpret the promotion procedure, the City acted properly to discontinue the past practice and to adhere to the contract language as drafted. The City refers to several commentaries on past practice which state that a practice which is not subject to unilateral termination during the term of the collective agreement is subject to termination at the end of said term by giving due notice of intent not to carry the practice over to the next agreement; after being so notified, the other party must have the practice written into the agreement to prevent its discontinuance. The City contends that the record shows that during bargaining, the City clearly indicated its intent to discontinue the past practice and to implement a proposal which it felt was in keeping with the existing contract language in 1983. Further, during negotiations for the 1983 contract the City made repeated attempts with the Union to negotiate about a promotion procedure. Therefore, it became the obligation of the Union as the party supporting the past practice to negotiate that practice into the written agreement when it became clear that the City would no longer acquiesce in the past practice. This the Union failed to do.

The City also argues that there is no evidence that the City refused to bargain the promotion procedure. Throughout the negotiations for the 1983 bargaining agreement the City made repeated attempts to bargain with the Union regarding the issue of promotion procedure. Even after it disavowed the past promotion practice, the City gave the Union one more opportunity to bargain the modification of the promotion procedure during the reopener negotiations for the 1984 contract year. Finally, the City did not implement a new proposal but only implemented one of its earlier proposals which was designed to give effect to the actual language of Article 4.

Finally, the City contends that the Union has failed to establish, by any evidence whatsoever, a violation of Secs. 111.70(3)(a)1 or 3, Stats. The City requests dismissal of the prohibited practice complaint in its entirety.

DISCUSSION

I. Sec. 111.70(3)(a)5 Allegation:

The pleadings establish that the parties' collective bargaining agreement does not provide for grievance filing, processing, or arbitration. Therefore, the WERC's jurisdiction is properly asserted with regard to the Sec. 111.70(3)(a)5 allegation of breach of contract.

An essential feature of the present case is that there is no dispute concerning the existence of an unequivocal, well-established past practice accepted by both parties. The Chief of the Fire Department testified that in his experience as Fire Chief since 1965, promotions, whether to Motor Pump Operator, Lieutenant, or Captain, have been based exclusively on seniority. Further, in its written communications to the Union, the City "acknowledges a past practice of promoting within the bargaining unit based on seniority." 3/ The City argues, however, that the past practice was in conflict with the existing contract language, that it properly repudiated any past practice, and that it implemented a promotional procedure consistent with the existing contract language.

3/ City Exhibit 16.

The Union's first contention in support of its allegation of a Sec. 111.70(3)(a)5 (breach of contract) violation is that the City is prohibited from modifying its past promotion policy by Article 17 of the labor agreement, entitled Existing Rights. The Union reads this article as preserving its right to seniority-based promotions since that right existed at the time the successor agreement was entered into and that right is not specifically abridged by the agreement. This argument is not persuasive. A provision of this type is generally intended to preserve certain rights and benefits which may be a practice between the parties but which are not specifically addressed anywhere in the labor agreement. Article 17 not only fits this general type of provision, but it also contains express limiting language: ". . . all privileges, benefits and rights enjoyed by the Union and the Employer <u>which are not specifically mentioned or abridged</u> in this Agreement" (emphasis added). The topic of promotion and the criteria for promotion are specifically mentioned in Article 4 of the agreement. Therefore, Article 17 does not govern in this instance. Article 17 is a general provision which should not be allowed to subsume the specific contractual provision (and the past practice and bargaining history related to that provision) in which the parties <u>expressly</u> deal with promotion criteria. 4/

The allegation of breach of contract must then turn on an analysis of Article 4. The Examiner rejects the City's argument that the contractual language in Article 4 is so clear and unambiguous that it would be inappropriate to consider any past practice in interpreting the language. The language provides that in making recommendations for promotion, the Chief shall "take into consideration" nine different factors. Such phrasing is not clear and unambiguous. For example, the language does not provide for a specific method or procedure of "consideration", nor does it spell out the relative weight to be given each factor. The provision as a whole contains enough ambiguity so that it would usually be appropriate to consider past practice in ascertaining the intent of the parties in formulating and applying the contract language in question. If this case involved a mid-term modification of past practice, such past practice would be relevant and possibly controlling.

The City has argued, in the alternative, that even if past practice would have otherwise applied to interpret the promotion procedure, the City acted properly to discontinue that practice and to adhere to the actual contract language. The Examiner concludes that the key issue here is what weight should be given the past practice in light of the existing contract language and the City's attempts to repudiate that past practice.

The parties have argued extensively about the role past practice should play in this fact situation and have cited numerous cases as well as published commentaries on past practice. 5/ However, the parties' arguments sometimes blur the distinctions which the original authors or arbitrators made in their discussions. The variables which must be kept in mind include the following: 1) whether the past practice was terminated mid-term or at the expiration of the contract period; 2) whether the past practice allegedly a) provides the basis of rules governing matters <u>not covered</u> in the written labor agreement, or b) indicates the proper interpretation of ambiguous contract language, or c) supports a claim that otherwise clear language of the written contract has been amended by mutual agreement. Each of these factors is relevant in determining how and when a past practice can be modified or terminated.

The record shows that the City did not attempt to modify the past practice during the term of the agreement. Rather, in October and November of 1982, during negotiations for a successor agreement, the City proposed that promotion be based upon a consideration of job performance, physical fitness, job knowledge and seniority, and that the first three factors be evaluated through a written exam,

---

4/ The Examiner notes that Article 17 also contains general language which preserves the <u>City's</u> rights as well as the Union's.

5/ For example, Arbitrator Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements" in <u>Arbitration and Public Policy</u>, Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators (BNA, 1961); Elkouri and Elkouri, <u>How Arbitration Works</u> (BNA, 3rd Ed., 1973).

an oral interview, and a performance evaluation. It was the City's position that these four factors were inclusive of the nine criteria listed in the contract, and that the promotional procedure proposed was consistent with the contract language. After considerable initial resistance, the Union eventually offered a counter-proposal which repeated the four criteria of job performance, physical fitness, seniority and job knowledge, but which provided that seniority be weighted at 66% (i.e., seniority would continue to be the dominant factor). The parties continued to negotiate about this matter, until the Union indicated that no overall agreement would be reached unless the City stopped pressing the issue of promotion. The record clearly establishes that although the City removed its proposal from the table, it put the Union on notice that the past practice would no longer be in effect and that it would implement some promotional procedure in keeping with the actual contractual language contained in the past contract. 6/ A voluntary agreement on the remaining items was eventually reached. No promotions to Lieutenant or Captain were made in early 1983. 7/ When the parties began negotiations in October of 1983 via a limited reopener, the City again suggested that the parties agree to negotiate the matter of promotions. The Union refused, pointing out that the reopener negotiations were limited to economic items only.

The record shows that the Union was put on notice that the City believed that the past practice of promoting based only on seniority was in conflict with the actual contract language on promotions, and that the City would no longer abide by that practice. Further, (as discussed below) the City made a good faith attempt to negotiate with the Union about what exact promotion method would best implement the previously existing contract language. The Union maintained that the City was obliged to adhere to past practice. Therefore, the real question is which party had the burden of obtaining new negotiated contract language supporting its position.

A reading of the various cases and commentaries indicates that many arbitrators have concluded that a well-established past practice <u>which does not have any basis in the written agreement</u> is not subject to unilateral termination during the term of the agreement, but is subject to termination at the end of the term by giving due notice of intent not to continue the practice to the other party; after such a "timely repudiation" of the practice by one party, the other party must have the practice written into the agreement to prevent its discontinuance. 8/ On the other hand, many arbitrators also agree that if the past practice is one which <u>clarifies existing ambiguous contractual language</u>, the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant; this kind of practice can only be terminated by mutual agreement, i.e., by the parties rewriting the ambiguous provision to supersede the practice. 9/

The present situation falls somewhere between these two guidelines. Because the topic of promotion is addressed in the agreement, this fact situation does not exactly fit within the first generalization. Since the Examiner has found that

---

6/ In its brief, the Union characterizes the City's actions on December 15, 1982, as "agreeing to maintain the status quo." However, the testimony of the Personnel Director, corroborated by the President of the Police and Fire Commission, establishes that though the City made no more attempts to clarify the existing contractual language and agreed to retain the existing contract language, it clearly gave notice that the past practice would be terminated, and that the withdrawal of its proposal was not a forfeiture of its right to implement a promotional procedure different from the past practice.

7/ The Union has argued that there was one promotion in this period, that of Steve Koback, and that the City followed the old promotion policy in this case, i.e. seniority only. However, the Examiner notes that Koback's promotion was from Firefighter to Motor Pump Operator. The City's position is that its new promotion policy applies only to promotions to Lieutenant and Captain. Therefore, the method of Koback's promotion is not in contradiction to the City's position regarding other promotions.

8/ Mittenthal, <u>supra</u>, p. 56; Elkouri and Elkouri, <u>supra</u>, p. 400-403.

9/ <u>Ibid</u>.

the contractual language governing promotion is ambiguous, it would usually be the City's burden to change that language to supersede the past practice. If the Union's interpretation of Article 4 was a possible interpretation of the ambiguous contractual language, the City would have had the burden of changing that language. However the Union's interpretation of the pertinent language, even if reinforced by past practice, is simply not a plausable interpretation; there is no way to logically argue that all nine criteria listed, one of which is seniority, can be subsumed under the single criterion of seniority. Thus, the present situation is more analogous to a situation in which past practice is in conflict with contractual language, and a timely repudiation suffices to discontinue the past practice. Here, the City gave adequate notice of its intent to terminate the past practice, the City attempted in good faith to negotiate a method that would reasonably implement the existing language, and the City's proposed promotional procedure is consistent with the existing contractual language (see the discussion in the next paragraph). Under these circumstances, the Union bore the burden of modifying the contractual language so it would correspond to past practice which conflicted with the existing language.

There is no evidence that the proposed promotion procedure eventually passed by the Police and Fire Commission 10/ is not consistent with the contract language found in Article 4. The language of Article 4 requires that nine different factors be given consideration by the Chief in recommending promotions in the bargaining unit. Each of these factors is arguably addressed through the weighted rating system devised by the City. Article 4 does not contain any express restrictions on how to measure each criterion or how much weight to give each criterion. Therefore, the Examiner concludes that the City's proposed promotion procedure is consistent with Article 4 of the collective bargaining agreement.

II. Sec. 111.70(3)(a)4 Allegation.

The Examiner has already found that the City's actions in taking steps to implement a new promotion policy was not in violation of the labor agreement, but was a legitimate exercise of its express contractual rights under Article 4. Thus, there is no basis for the allegation of unilateral implementation. Further, the record shows that during negotiations for the 1983 bargaining agreement, the City made repeated attempts to bargain with the Union regarding the promotion issue. The City also offered to bargain the promotion procedure again during the reopener negotiation for the 1984 contract year, but the Union did not wish to include it. There is no evidence that the City refused to bargain in good faith on this issue and the Sec. 111.70(3)(a)4 allegation is dismissed.

III. Sec. 111.70(3)(a)1 and Sec. 111.70(3)(a)3 Allegation

The Union has offered no independent evidence to support either of these allegations and they are dismissed.

Dated at Madison, Wisconsin this 2nd day of January, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Carol L. Rubin
Carol L. Rubin, Examiner

10/ See Finding of Fact 7.