STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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, P. O. Box 1004, Wausau, WI 54401-1004, appearing on behalf of the Respondent.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

Examiner Carol L. Rubin having on January 2, 1985, issued her Findings of Fact, Conclusions of Law and Order in the above-entitled matter, wherein she concluded that the above-named Respondent, City of Stevens Point, did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)1, 3, 4, or 5, Stats., by implementing a procedure for promotions to Lieutenant and Captain and, therefore, dismissed the Complaint of prohibited practices against Respondent; and the Complainant, Firefighter Local 484, International Association of Firefighters (IAFF), AFL-CIO, having, on January 15, 1985, timely filed with the Commission a Petition for Review of the Examiner's decision; and the parties having, by March 27, 1985, submitted briefs on the Petition; and the Commission having reviewed the record, and being satisfied that the Examiner's Findings of Fact should be modified and that the Examiner's Conclusions of Law and Order should be affirmed;

NOW, THEREFORE, it is

ORDERED 1/

A. That the Examiner's Findings of Fact 1-11, are hereby affirmed and adopted as the Commission's Findings of Fact 1-11.

B. That the Examiner's Finding of Fact 12 is modified and supplemented to read as follows and adopted as the Commission's:

> 12. That the Union has not established by a clear and satisfactory preponderance of the evidence that the City's new promotional policy, as described in Finding of Fact 7, either on its face or as applied to date, is inconsistent with the language in Article 4 of the parties' 1983-84 collective bargaining agreement.

C. That the Examiner's Conclusions of Law are hereby affirmed and adopted as the Commission's.

1/ See Footnote 1 on Page Two

D. That the Examiner's Order is hereby affirmed and adopted as the Commission's.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of August, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

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.

(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.

1/ Footnote 1 Continued.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CITY OF STEVENS POINT

MEMORANDUM ACCOMPANYING ORDER
MODIFYING EXAMINER'S FINDINGS OF FACT AND
AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

PLEADINGS

Complainant initiated this proceeding by filing a complaint wherein it alleged that Respondent had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, 3, 4, and 5, Stats., by unilaterally adopting a promotional policy inconsistent with the parties past practice and the language of the parties' collective bargaining agreement. The Examiner concluded that Respondent had not committed the alleged prohibited practices and dismissed the Complaint. Complainant thereupon filed a timely Petition for Review. Respondent denies that there has been any Examiner error and asks that the Examiner's Findings of Fact, Conclusions of Law and Order be affirmed without modification.

FACTS

The facts of the case, which are generally undisputed, are sufficiently set forth in the Examiner's Findings of Fact and Memorandum. To briefly summarize, the parties' 1981-82 collective bargaining agreement, as well as a number of predecessor agreements, contained, in essential respects, the following language:

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 services in the Fire Department.
>
> . . .

The above language coexisted with a well established practice of basing promotions to the positions of Motor Pump Operator, Lieutenant and Captain solely on seniority.

During negotiations for the 1983-84 contract, the City proposed that promotions be based upon a consideration of job performance, physical fitness, job knowledge and seniority, and further, that the first three factors be evaluated through a written exam, an oral interview, and a performance evaluation. The Union countered with a proposal which contained the four criteria of job performance, physical fitness, job knowledge, and seniority, but which afforded primary weight to seniority. After further negotiations, the parties entered into a 1983-84 agreement which contained the same language on promotions as had existed in the 1982 contract. Prior to reaching agreement, however, the City notified the Union that the City intended to implement a promotional policy consistent with the existing contract language and, further, that the practice of promoting solely upon the basis of seniority would no longer be given effect.

In October of 1983, when the parties were negotiating via a limited re-opener clause, the City again sought to bargain a promotional procedure. The Union, asserting that the issue was outside the scope of the re-opener, refused to bargain promotional procedure. Thereafter, in March of 1984, the City 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 of 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 a 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.

Thereupon, Complainant requested Respondent to withdraw the policy and bargain the issue of promotional procedure. The City responded with a letter to the Union which stated, inter alia, as follows:

> . . .
>
> 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 futher 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.

Thereafter, Complainant filed the instant Complaint.

EXAMINER'S DECISION

In summary, the Examiner concluded that the past practice of promoting solely on the basis of seniority, relied upon by the Complainant, was not binding upon the parties in that (1) the City effectively repudiated the past practice during the 1983-84 contract negotiations and (2) that the practice was inconsistent with the language of Article 4, which states that seniority is but one of nine criteria which the Chief is contractually required to take into consideration when determining promotions. Further, the Examiner found the promotional policy implemented by the City to be consistent with the parties' contract language. Finding no violation of Sec. 111.70(3)(a)1, 3, 4 and/or 5, Stats., the Examiner dismissed the complaint.

DISCUSSION

The Union takes issue with the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

> 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.

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.

EFFECT OF PAST PRACTICE

The Union asserts that during the 1983-84 contract negotiations, the parties agreed both to maintain the status quo and to leave the language of Article 4 unchanged. The Union further notes that the only promotion to a bargaining unit position occurring since the execution of the 1983-84 agreement was to a Motor Pump Operator position in April, 1983, and that the selection for that promotion was based solely on seniority. On those bases, the Union asserts that the language of Article 4 must be construed in accordance with the parties' uniform practice before and after the execution of the 1983-84 agreement, i.e., promotions to be made solely on the basis of seniority.

As the Union argues, the parties did agree to leave the language of Article 4 unchanged. We do not find merit, however, in the Union's further assertion that the parties' conduct amounted to an agreement to maintain the status quo practice regarding promotions. On the contrary, as the Examiner properly found, the City expressly repudiated the past practice by notifying the Union of its intent to change the past practice by promoting in accordance with the existing contract language, wherein seniority would be but one of nine factors that the Chief was required to consider in making his promotion decisions.

For reasons stated by the Examiner, we share the Examiner's conclusion that past practice does not bind the City in the instant circumstances to basing selections of Lieutenants and Captains solely on the criterion of seniority. While the language of Article 4 does not definitively deal with all aspects of the promotion selection process (it does not, for example specify relative weighting of the specified criteria), it does clearly require consideration by the Chief of nine specified criteria. Hence, as the Examiner noted, the language cannot support the Union's proposed interpretation whereby only one criterion, seniority, would be considered. We therefore agree with the Examiner that after the City's above-noted notification to the Union during bargaining that it intended to conform its future conduct to the letter of the contract language, the burden was on the Union to modify the language to conform to the prior practice or to its preference for a heavy or exclusive consideration of seniority.

While the City's basing the April, 1983 promotion to Motor Pump Operator solely on seniority was seemingly inconsistent with the City's above-noted notification to the Union as regards that classification, it is not controlling on the outcome of this case. For, the policy at issue herein expressly deals only with promotions to Lieutenant and Captain positions. Neither the policy nor our decision addresses the parties rights and obligations as regards promotions to Motor Pump Operator.

The Union further contends that the practice of promoting solely on the basis of seniority is ensured by Article 17, entitled Existing Rights, which states as follows:

> 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.

This argument was advanced before the Examiner and rejected as nonpersuasive. We agree with the Examiner. As the Examiner correctly concluded, Article 17 is intended to preserve rights not specifically preserved or abridged elsewhere in the parties' contract. As discussed supra, the right

advanced by the Union, i.e., the past practice of basing promotions solely on seniority, is inconsistent with the provisions of Article 4. We are persuaded, therefore, that the practice is abridged by the language of the agreement and, pursuant to Article 17, does not control herein.

REFUSAL TO BARGAIN

According to the Union, the City's implementation of the promotional policy was a unilateral change in mandatory terms and conditions of employment in violation of Sec. 111.70(3)(a)(4), Stats. The Examiner, however, found the implementation of the policy to be a legitimate exercise of a contractual right, i.e., one bargained and agreed upon. As a result, the Examiner rejected the Union's assertion that the implementation of the policy violated Sec. 111.70(3)(a)(4), Stats.

While the Union is correct that various aspects of the promotional policy are primarily related to terms and conditions of employment such that they would be mandatory subjects of bargaining, in the instant circumstances, the parties' existing agreement (in Article 4) deals specifically with the subject of promotions and the limitations on the Chief's exercise of his statutory authority regarding same. The Union had opportunities to bargain collectively with the City about the details of the policy when the City notified the Union of its intentions concerning promotion policy during the bargaining leading up to the 1983-84 contract and again when it offered to bargain about the details of promotion procedure in October, 1983. The Union's failure to take advantage of those opportunities constituted a waiver of bargaining concerning the details of promotional procedures otherwise consistent with the terms of Article 4. While the details of a promotion procedure consistent with the terms of Article 4 was not a subject within the agreed-upon reopener, it was nonetheless a matter on which the City was entitled to take unilateral action, at least once it had offered to bargain about the subject and the Union refused. In other words, assuming arguendo, that the City had a duty to bargain the details of a promotional policy consistent with the parties specific contract language on that subject, the duty was fulfilled when the City offered, and the Union refused, to bargain about such details in October of 1983.

Violation of Contract

The Union also argues, however, that the promotional policy adopted by the City is inconsistent with the language of Article 4 because it does not expressly indicate that consideration will be given to each of the criteria identified in the contract and because it does not limit eligibility for promotion to employes with at least five years of service in the Fire Department. On that point, the Examiner's Finding of Fact 12 states affirmatively and unequivocally that "the City's new promotional policy is consistent with the contractual langauge in Article 4. . . ."

We agree with the Examiner's outcome, because the language of the policy does not necessarily conflict with any aspect of Article 4, because the City's establishment of the policy was expressly described in writing by the City as intended to be consistent with the requirements of the collective bargaining agreement, and because there is no evidence that the City has applied the policy in a manner that is inconsistent with the agreement. However, because the policy does not expressly limit promotions to those employes with at least five years of service in the Fire Department and does not include specific mention of all of the criteria listed in Article 4, we have reformulated Finding of Fact 12 in terms of the burden of proof, rather than the unequivocal and affirmative language used by the Examiner. In that regard, we would emphasize that an application of the policy that treats as eligible for promotion employes with fewer than five years of service in the Fire Department or that fails to give consideration to each of the criteria listed in the agreement would be violative of the language of Article 4.

Accordingly we have affirmed the Examiner's conclusion that neither the duty to bargain nor the contract have been shown to be violated herein.

Section 111.70(3)(a)(1) and 3(a)(3) Allegations

Finally, we agree with the Examiner that the record does not warrant findings or conclusions to the effect that either Sec. 111.70(3)(a)(3), Stats., discrimination or an independent violation of Sec. 111.70(3)(a)1, Stats, has been proven herein.

Dated at Madison, Wisconsin this 13th day of August, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner