STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 311, THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS (IAFF), AFL-CIO, Complainant, vs. CITY OF MADISON, Respondent.	Case 141 No. 41858 MP-2203 Decision No. 26486-A

Appearances:
Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Local Union No. 311, The International Association of Firefighters (IAFF), AFL-CIO.
Mr. Gary A. Lebowich, Labor Relations Manager, City of Madison, City-County Building, Room 502, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710, appearing on behalf of the City of Madison.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local Union No. 311, The International Association of Firefighters (IAFF), AFL-CIO (hereinafter Complainant or Union), having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission (hereinafter Commission) on March 3, 1989, alleging that the City of Madison (hereinafter Respondent or City) has committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by refusing to process a grievance to arbitration as required by the parties' collective bargaining agreement; and the parties having agreed on June 22, 1989, to hold scheduling of the hearing concerning the aforesaid complaint of prohibited practices in abeyance pending an informal attempt to resolve said dispute; and the Complainant having advised the Commission on April 12, 1990, that it wished to proceed to hearing on the complaint; and on May 16, 1990, the Commission having appointed James W. Engmann, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Secs. 111.70(4)(a) and 111.07, Stats.; and the Respondent having filed an answer to said complaint on May 29, 1990, in which it denied that it had committed prohibited practices within the meaning of Sec. 111.70, Stats.; and a hearing on said complaint having been held on June 13, 1990, in Madison, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished; and said hearing having been transcribed and a transcription of said hearing having been received on June 22, 1990; and the parties having filed or waived the filing of briefs and reply briefs, the last of which was received on September 10, 1990; and the Examiner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local Union No. 311, The International Association of Firefighters (IAFF), AFL-CIO (hereinafter Complainant or Union), is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and maintains its offices at 821 Williamson Street, Madison, Wisconsin.

2. That the City of Madison (hereinafter Respondent or City) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its offices at the City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin.

3. That the Union and the City have been parties to a series of collective bargaining agreements dating from at least December 19, 1982; and that in the agreement between the parties for the period of December 19, 1982, to December 17, 1983, the following language appeared:

ARTICLE XXII

WORK RULES

A. Existing work rules are made part of this Agreement.

B. The establishment of new work rules affecting wages, hours of work or conditions of employment shall be subject to negotiations and mutual agreement prior to their effective date.

4. That in the labor agreement between the Union and the City for the period of December 18, 1983 to December 28, 1985, the above quoted article was changed to read as follows:

ARTICLE XXII

WORK RULES

A. Existing work rules relating primarily to wages, hours, and conditions of employment are made part of this Agreement.

B. The establishment of new work rules primarily affecting wages, hours of work or conditions of employment shall be subject to negotiations and mutual agreement prior to their effective date.

that the parties continued said language in their collective bargaining agreement for the period of December 29, 1985, to December 31, 1987; and that on December 31, 1987, the parties had not reached agreement on a successor agreement.

5. That on or about May 6, 1988, the City forwarded the following notice to the Union:

NOTICE TO I.A.F.F. LOCAL 311
FROM THE CITY OF MADISON
IN CONJUNCTION WITH
NEGOTIATIONS FOR A SUCCESSOR AGREEMENT

The Employer hereby serves notice of its intent to consider Sundays and holidays as normal work days. It shall be the intent of the Employer to schedule on Sundays and holidays, as appropriate, work activities normally scheduled on other days of the year. All practices to the contrary are hereby repudiated and all work rules to the contrary shall be amended accordingly.

This notice is served pursuant to WERC Decision No. 21590, City of Wauwatosa vs. Local 1923, I.A.F.F. and Decision No. 23967-A AFSCME Local 60 AFL-CIO vs. City of Madison.

/s/
Timothy C. Jeffery
Director of Labor Relations

6. That on August 5, 1988, the parties entered into a collective bargaining agreement for the period of January 1, 1988, to December 31, 1989; that said agreement continued unchanged the language quoted in Finding of Fact 4 above; and that said agreement also included the following:

ARTICLE V

MANAGEMENT RIGHTS:

Union recognizes the prerogative of the City and the Chief of the Fire Department to operate and manage its affairs in all respects, in accordance with its responsibilities and the powers of authority which the City has not officially abridged, delegated or modified by this Agreement and such powers or authority are retained by the City.

These management rights include, but are not limited to the following:

. . .

C. To hire, schedule, promote, transfer, assign, train or retrain employees in positions within the Fire Department.

. . .

J. The City retains the right to establish reasonable work rules and rules of conduct. Any dispute with respect to these work rules shall not be subject to arbitration of any kind, but any dispute with respect to the reasonableness of the application of said rules may be subject to the grievance and arbitration procedures as set forth in this

Agreement.

. . .

ARTICLE IX

GRIEVANCE AND ARBITRATION PROCEDURE:

A.Only matters involving interpretation, application, or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth herein.

. . .

E.. . .

STEP THREE: If the grievance is not settled at Step Two, the City and/or Union may submit the grievance to an arbitrator as hereinafter provided.

Arbitration may be resorted to only when issues arise between the parties hereto with reference to the interpretation, application, or enforcement of the provisions of this Agreement.

. . . The Arbitrator shall have initial authority to determine whether or not the dispute is arbitrable under the express terms of this Agreement. Once it is determined that the dispute is arbitrable, the arbitrator shall proceed in accordance with this Article to determine the merits of the dispute submitted to arbitration.

. . .

LIMITATIONS OF GRIEVANCE ARBITRATORS:

A.Arbitration shall be limited to:

1.An interpretation of the articles of this Agreement, and,

2.A grievance as defined herein arising out of the express terms of this Agreement.

7. That in an inter-departmental correspondence dated August 23, 1988, the City wrote to the members of the bargaining unit represented by the Union as follows:

To: Officers and Members, Madison Fire Department

From: Earle G. Roberts, Fire Chief

Subject: Work Rules

Attached are work rules that are to be incorporated into the existing Rules and Regulations of the Madison Fire Department.

Rule 3 is amended as attached.

Rule 66 is new and added as stated.

that attached to said correspondence was a revised Rule 3 as follows:

RULE 3 (8-88)

The Chief shall cause members of the department to be trained under the immediate direction of a Chief of Training. Records of attendance and of accomplishment shall be kept and shall become a part of the Chief's record of merit for each member. Attendance at training sessions is required of all members of the Department by the officer in command. Training shall be at such time as the Chief deems reasonably necessary and to most advantageously promote the best interests of the Department.

and that Rule 66 is not at issue in this proceeding.

8. That the Union filed a grievance with the City of September 6, 1988;

that said grievance alleged a violation of Article XXII, Sections A and B of the agreement; that the grievance was described as follows:

> On August 23, 1988, Madison Fire Department Administration took unilateral action to change the provisions of Rule #3 from "Rules of the Madison Fire Department." The change involves deleting language that prohibits drilling of fire department personnel on Sundays and seven named legal holidays. Rule #3 is a work rule, and therefore subject to negotiation and mutual agreement before a change can be made.

and that the grievance sought reinstatement of the language of Rule #3 to what it was before August 23, 1988.

9. That the City denied the grievance on September 14, 1988, stating as follows:

> The issue cited in this grievance is not covered by the terms of the agreement. Therefore this grievance is non-arbitrable.

that in a letter dated January 19, 1989, the Union by Grievance Chairman Lionel Spartz wrote to the City's then Director of Labor Relations Timothy C. Jeffery as follows:

> It is time we forged ahead with the grievance numbered A/P M-89-105 by the WERC. This grievance deals with the unilateral change in Rule #3 to allow the scheduling of drilling on Sundays and seven named holidays.
>
> We would like to proceed with the selection of an arbitrator, and schedule a date for a hearing. You already have a list of five arbitrators supplied by the WERC.
>
> This issue has been discussed by the City and Local 311 several times, and I understand it is your position that you do not need to submit this grievance to arbitration. If that remains your position, please so advise us in writing and we will pursue alternative action. If you have changed your position, please contact me so we can select an arbitrator.

and that in a letter dated January 30, 1989, the City by Jeffery wrote to Spartz of the Union as follows:

> Please be advised that the City considers the matter involving Rule No. 3 which is the subject of a union grievance dated September 6, 1988 to be non-arbitrable. Therefore, I must refuse to proceed with the selection of an arbitrator.

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

CONCLUSIONS OF LAW

l. That the Respondent has not been shown to have committed a prohibited practice within the meaning of Secs. 111.70(3)(a)l, 3 and 4, Stats., by its refusal to proceed to arbitration on the grievance underlying this complaint.

2. That the Respondent, by refusing to proceed to arbitration on the grievance underlying this complaint, violated the collective bargaining agreement and, therefore, Sec. 111.70(3)(a)5, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER 1/

l. IT IS HEREBY ORDERED that the portions of the complaint alleging violations of Secs. 111.70(3)(a)1, 3 and 4, Stats., are hereby dismissed.

2. IT IS FURTHER ORDERED that the City of Madison, its officers and agents, shall immediately:

(a) Cease and desist from refusing to arbitrate grievances in violation of the collective bargaining agreement and Sec. 111.70(3)(a)5, Stats.

(b) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations

Act:

(l)Immediately proceed to arbitration on the grievance underlying this complaint.

1/ Found on page 6.
(2)Notify the employes in the bargaining unit represented by the Complainant by posting in conspicuous places on its premises where notice to such employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A". That Notice shall be signed by an authorized representative of the Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

(3)Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this decision what steps it has taken to comply with the above Order.

Dated at Madison, Wisconsin this 26th day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, 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 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.

APPENDIX "A"

NOTICE TO EMPLOYES

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

1. We will not violate the collective bargaining agreement and, thereby, commit a prohibited practice by refusing to proceed to arbitration of grievances.

2. We will immediately proceed to arbitration on a grievance filed September 6, l988, involving Work Rule 3.

Dated at _____, Wisconsin, this _____ day of _____, l990.

City of Madison

By _____

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

A. Complainant

On brief, the Union argues that the City unlawfully refused to proceed to arbitration; that the Commission has previously addressed the dispositive issue, citing State of Wisconsin (University of Wisconsin-La Crosse), Dec. No. 13608-B (WERC, 3/76); that procedural defenses to arbitration are for the Arbitrator; that at bar grievances are authorized on "matters involving interpretation, application or enforcement of the terms of this Agreement"; that the Union sought and continues to seek an arbitral interpretation and/or application and/or subsequent enforcement of the City's alleged non-compliance with and of Article XXII; that the Arbitrator is empowered under Article IX to resolve "issues (which) arise between the parties hereto with reference to the interpretation, application, or enforcement of the provisions of this Agreement"; that there can be no doubt that the City's refusal to arbitrate is unlawful; and that appropriate remedial orders must be entered forthwith directing the City to arbitrate the underlying grievance in this matter.

On reply brief, the Union argues that an uninterrupted line of Commission cases provides for resolution of procedural defenses by the Arbitrator, not the City; that whether the grievance was timely filed remains an issue to be decided by the Arbitrator; that the Steelworkers Trilogy, adopted by the Wisconsin Supreme Court, requires the submission of grievances to arbitration; that the agreement at bar has only two substantive requirements before grievance arbitration is appropriate; that the Union has asked that an Arbitrator be impaneled to interpret a definite and specifically identifiable article of the agreement; that the grievance procedure was properly invoked; that the grievance as written alleged a violation of the clear language of the Agreement; and that the City must be ordered to proceed to arbitration while reserving and specifically preserving all its defenses.

B. Respondent

On brief, the City argues that the grievance filed by the Union on September 6, 1988, is not arbitrable; that the agreement between the parties provides specific limits on the arbitration of work rules; that the duty to arbitrate is wholly contractual; that a party cannot be compelled to arbitrate any dispute which the party has not agreed to submit to arbitration, citing Racine Unified School District, Dec. No. 24272-B (WERC, 3/88); that the Management Rights clause sets forth limits on arbitration of matters regarding work rules; that the dispute, as characterized by the Union, is that the City established a work rule without achieving agreement on such rule, not that the rule was unreasonably applied; that the language of the Management Rights clause is clear and unequivocal; that only those work rule issues that involve an allegation of unreasonable application may be subject to arbitration; that the City has retained the right to establish work rules and rules of conduct; and that an order holding that the City has an obligation to negotiate establishment of all work rules and requires submission of the instant dispute to arbitration would be contrary to the agreement between the parties.

The City also argues that Article IX of the agreement between the parties limits the ability of an arbitrator to consider issues that arise prior to the execution of the agreement; that during bargaining for the 1988-89 agreement, the City repudiated a specific work rule; that said repudiation was not challenged by the Union; that an analysis of the successor agreement between the parties indicates that the Union reacted in no way to the May 6 repudiation; that following the August 5, 1988, execution of the agreement, the Fire Chief issued the revised work rule No. 3; that the Chief was only performing a ministerial act since the rule was effectively changed the previous May; that only those issues arising after August 5, 1988, may be arbitrated; that since this issue arose in May 1988, it was not susceptible to resolution through the arbitration process in the 1988-89 agreement; and submission to arbitration would violate the Agreement between the parties.

Finally, the City argues that there was no obligation to bargain a revision of work rule No. 3; that is well settled that an item is a mandatory subject of bargaining if it is primarily related to wages, hours of work or conditions of employment; that items that primarily relate to the formulation or management of government or public policy are permissive subjects of bargaining; that the Employer had limited its obligation in the work rules article of the agreement to seek a mutual agreement with the Union only on those work rules which primarily affect wages, hours of work or conditions of employment; that the issue herein specifically concerns the City's ability to assign training duties to those firefighters scheduled to work on weekends and

holidays; that the agreement specifically empowered the City to assuming such duties; that the assignment of training duties on weekends and holidays is inextricably intertwined with the prerogative of the City to manage its affairs in all respects in accordance with its powers and authority to direct the governmental unit; that it has been held that such an issue must be a permissive, not mandatory, subject of bargaining; and that there remains no obligation for the City to bargain a permissive subject of bargaining.

DISCUSSION

In its complaint the Union alleges violations of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats. The evidence in this matter consisted of stipulated documents. No witnesses testified. The entire argument of the Union on both brief and reply brief goes to the alleged violation of Sec. 111.70(3)(a)5, Stats. Little if any of the evidence and none of the Union's argument goes to the alleged violations of Secs. 111.70(3)(a)1, 3 and 4, Stats. If the Union has not abandoned these claims, it certainly has not met it burden of proving these alleged violations by a preponderance of the evidence. For this reason, these allegations are dismissed.

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement . . . .

At the onset, it must be clarified as to what contract violation is before this Examiner. This is a case where the collective bargaining agreement between the parties provides for binding arbitration of unresolved grievances. The Complainant alleges that the Respondent refuses to process a grievance regarding work rules to arbitration. The Commission will assert jurisdiction in such a case to consider whether said refusal violates the collective bargaining agreement requirement to arbitrate unresolved grievances. The alleged violation of Article XXII Work Rules is not before this Examiner; instead, the Examiner will determine whether the Respondent violated Article IX Grievance and Arbitration Procedure by not processing the Work Rule grievance to arbitration.

The law governing a Commission determination of whether a particular grievance falls within the scope of a contractual arbitration clause is ultimately rooted in the Steelworkers Trilogy. 2/ In AT&T Technologies, Inc. v. Communication Workers of America 3/ the U.S. Supreme Court gleaned four guiding principles from the Steelworkers Trilogy. In AT&T the Court said:

> The principles necessary to decide this case are not new. They were set out by this court over 25 years ago in a series of cases known as the Steelworkers Trilogy . . . .
>
> The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." . . .
>
> The second rule, which follows inexorably from the first, is that the question of arbitrability--whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.
>
> The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer violated the

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2/ Steelworkers v. American Manufacturing Co., 363 U.S. 546, 46 LRRM 2412 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

3/ 475 US 643, 121 LRRM 3329 (1986).

> collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. . . .
>
> Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted the dispute. Doubts should be resolved in favor of coverage." 4/

The first principle enunciated in AT&T states that the City cannot be required to submit to arbitration any dispute which it has not agreed so to submit. The City argues that it has not only not agreed to arbitrate grievances involving the establishment of work rules but that it has specifically excluded such grievances from the arbitration process. In support the City points to the Management Rights clause, Article V Section J, which states, "Any dispute with respect to these work rules shall not be subject to arbitration of any kind. . .". Therefore, the City argues, it cannot be compelled to submit this grievance to arbitration.

But the determination of whether a party agreed to submit a dispute to arbitration is not left to the parties to decide. If it were so, any party could state at any time that it had not agreed to arbitrate a particular grievance, thus short circuiting the very system meant to resolve such grievances. AT&T is clear that such a determination is to be made by a third party. This is principle two gleaned from the Trilogy.

Such a determination is, in most instances, made by a court or, in Wisconsin, by the Commission. In reviewing the Management Rights language quoted above, the Commission by this Examiner might very well have concluded that the City had not agreed to arbitrate disputes with respect to the establishment or amendment of work rules. But other language in the collective bargaining agreement precludes the Commission from making that determination in this case. Under principle two gleaned from the Trilogy, the Commission is excluded from making the determination of arbitrability if "the parties clearly and unmistakably provide otherwise." The agreement at issue here does provide otherwise, stating in Article IX as follows: "The arbitrator shall have initial authority to determine whether or not the dispute is arbitrable under the express terms of this Agreement." Thus, the parties have reserved for the arbitrator the right to determine if a grievance is or is not arbitrable. No limits are expressed in the parties' agreement as to which grievances the arbitrator will determine arbitrability. It must therefore be read to include all grievances, including the one underlying this case.

The City raises as a defense that it had no obligation to bargain a revision of work rule 3 since it is a permissive subject of bargaining. This argument does not pertain to the City's obligation to arbitrate this grievance but, rather, goes to the merits of the grievance. Under the third principle derived by AT&T from the Trilogy, this Examiner is not to rule on the issue in the underlying grievance. That is for the arbitrator to determine, as the parties so agreed.

Finally, the fourth principle derived in AT&T from the Trilogy states that a presumption of arbitrability exists with doubts resolved in favor of arbitration. Certainly, there are some doubts in this case. The City points to language in Article V, Section J which, on its face, raises a strong doubt as to the arbitrability of the grievance in this case. Absent the language above reserving the right to determine arbitrability for the arbitrator, this language may very well have acted as a defense to the alleged prohibited practice at issue here. Indeed, the arbitrator who ultimately hears this case may read this language in that way. As for this Examiner, however, that decision has been removed by the parties language reserving the determination of arbitrability for the arbitrator.

The City also argues that the grievance is untimely. This procedural defense is certainly for the arbitrator to determine.

In sum, then, the City has raised an issue as to the arbitrability of the grievance underlying this dispute. But under the grievance procedure in the parties' own collective bargaining agreement, they have reserved that determination for the arbitrator. Therefore, by refusing to proceed to arbitration and, thereby, preventing the arbitrator from making a determination as to the arbitrability of the grievance underlying this case, the City violated Article IX and, therefore, violated Sec. 111.70(3)(a)5, Stats. For this reason, the City has been ordered to proceed to arbitration where it may raise the claims it brought here for determination by the arbitrator.

Dated at Madison, Wisconsin, this 26th day of October, 1990.

4/ AT&T, supra, 121 LRRM at 3331-3332 (citations omitted).

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, Examiner