STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 311, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS (IAFF), AFL-CIO, Complainant, vs. CITY OF MADISON (FIRE DEPARTMENT), Respondent.	Case 162 No. 47889 MP-2635 Decision No. 27442-A

Appearances:

Lawton & Cates, S.C., 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, by Mr. Richard V. Graylow, appearing on behalf of Complainant.

Mr. Gary A. Lebowich, Labor Relations Manager, City of Madison, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709-0001, appearing on behalf of Respondent.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

On August 5, 1992, Local Union No. 311, International Association of Firefighters filed a complaint with the Wisconsin Employment Relations Commission, alleging that the City of Madison Fire Department was violating Section 111.70(3)(a)1, 3, 4 and 5, Wis. Stats., by refusing to arbitrate the discipline grievances of fighter/paramedics Joe Conway, Jr. and Stephen Roisum. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07, Wis. Stats. A hearing scheduled for December 2, 1992, was indefinitely postponed after the parties agreed to pursue a stipulation of facts. On April 20, 1993, the Examiner held a status conference, at which time the parties finalized an agreement on the order of proceeding. The stipulation of facts was received July 30, 1993; and the parties thereafter filed briefs, the last of which was received on October 15, 1993. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Local Union No. 311, International Association of Firefighters, AFL-CIO is a labor association within the meaning of Section 111.70(1)(h), Wis. Stats., and has its principal office c/o Mr. Jack Deering, President, Local 311, 821 Williamson Street, Madison, Wisconsin 53703.

2. The City of Madison is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats., and has its principal office at 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709.

3. At all times material to this proceeding, Complainant Union has been the exclusive bargaining representative of all employes of the Fire Department who are assigned to the position classifications of Firefighter, Chief's Aide, Lieutenant, Fire Investigator, Fire Inspector, Director of Community Education, Firefighter/paramedic, Community Educator, and Captain,

excluding Division Chief, Assistant Chief, Deputy Chief and Fire Chief.

4. The parties stipulated to the following facts:

. . .

> 3. At various time (sic) material hereto the parties were signatories to certain Collective Bargaining Agreements. More particularly a certain Collective Bargaining Agreement covered the parties for the two (2) year period beginning January 1, 1990, through and including December 31, 1991. A true and correct (sic) of same is attached hereto, made a part hereof and incorporated by reference as Parties Joint Exhibit No. One (1).
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> 4. During the month of September, 1992, the parties reached an agreement and ratified a Collective Bargaining Agreement for the period January 1, 1992 through and including December 31, 1993. A true and correct copy of said 1992-1993 Collective Bargaining Agreement is attached hereto, made a part hereof and incorporated by reference as Parties Joint Exhibit No. Two (2).
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> 5. The most recent Collective Bargaining Agreement provides for grievance and ultimately grievance arbitration of various disputes. See for example Article 9 of said Labor Agreement.
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> 6. In addition, said Labor Agreement contains a management rights clause which, among other things, allows the City to discipline employees for "just cause."
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> 7. On or before July 1, 1992, the City, according to the Union, "disciplined" Firefighters/Paramedics Joe Conway, Jr. and Stephen Rosium.
>
> 8a. The City maintains and continues to maintain that neither Conway, Jr. or Rosium were disciplined. The City further maintains that the Medical Director of the Madison Fire Department refused to sign a certain paramedic license for both Conway, Jr. and Rosium. The City maintains further that it therefore was forced to dock the pay of both Conway, Jr. and Rosium because, according to the City, both individuals failed to comply with licensure requirement.
>
> 8b. The City maintains and continues to maintain that neither Conway, Jr. or Rosium were disciplined. The City further maintains that the Medical Director of the Madison Fire Department refused to sanction paramedic practice for both Conway, Jr. and Rosium. The City maintains further that it therefore was forced to doc the pay of both Conway, Jr. and Rosium because, according to the City, both individuals failed to comply with licensure requirements.

9. On or before July 1, 1992, this Union filed certain contractual grievances challenging the action of the City as described in the immediately preceding paragraph(s).

10. A true and correct copy of the grievances referred to in the immediately preceding paragraph are attached hereto, made a part hereof and incorporated as Union Exhibit Nos. 3a, 3b, 3c, 3d, 3e and 3f.

11. On and after July 1, 1992, the City refused, refuses and continues to refuse to process said grievances through and including arbitration.

12. The City did, however, process said grievances through step 2 of the grievance procedure.

13. The Union removed and withdrew its Proposal dated February 25, 1992 from the table, Joint Exhibit 4, because, according to the Union, sufficient contractual language existed.

. . .

5. The parties' 1990-91 collective bargaining agreement contained among its provisions the following:

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.

. . .

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.

No item or issue may be subject to arbitration, unless such arbitration is formally requested within thirty (30) days following the filing of the written response required by Step Two of the grievance procedure or the due date therefor. This provision is one of limitation, and no award of any arbitrator may be retroactive for a period greater than thirty (30) days prior to presentation of the grievance in Step One as herein provided or the date of occurrence whichever is later, but in no event shall it be retroactive for any period prior to the execution of this Agreement.

Final and binding arbitration may be initiated by either party serving upon the other party a notice in writing of the intent to proceed to arbitration. Said notice shall identify the Agreement provision, the grievance or grievances, the department, and the employees involved. Unless the parties can, within

five (5) working days following the receipt of such written notice, agree upon the selection of an arbitrator, either party may, in writing, request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators to both parties. Either party may within five (5) working days of receipt of said list, notify the other party and the Wisconsin Employment Relations Commission of its intent to reject the entire list submitted by the Wisconsin Employment Relations Commission. The Wisconsin Employment Relations Commission shall submit a new list which shall not duplicate in any way the original list upon receipt of such notice. The option to reject the list may only be exercised by each party once per grievance.

. . .

LIMITATIONS ON 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.

. . .

No issue whatsoever shall be arbitrated or subject to arbitration unless such issue results from an action or occurrence which takes place following the execution of this Agreement, and no arbitration, determination, or award shall be made by an arbitrator, which grants any right or relief for any period of time whatsoever prior to the execution date of this Agreement or following the termination of this Agreement.

In the event that this Agreement is terminated for any reason, rights to arbitration thereupon cease. This provision, however, shall not affect any arbitration proceedings which were properly commenced prior to arbitration or termination of this Agreement.

. . .

ARTICLE XXVII

DURATION OF AGREEMENT

A. This Agreement shall be effective as of January 1, 1990 and shall remain in full force and effect until its expiration date of December 31, 1991.

B. On or before June 30, 1991, either party hereto may notify the other party in writing of its desire to negotiate the terms and provisions of a successor Agreement. The parties shall simultaneously exchange initial bargaining proposals at the first scheduled bargaining

session. It is agreed that should a successor Agreement be delayed past the above referenced expiration date, the terms and conditions as set forth in this Agreement will continue until a successor Agreement is reached. Said continuance, however, shall not be interpreted as a bar to wages and/or fringe benefits being retroactive. This provision shall not be construed as a limitation of the Employer's rights under Sections 111.70 and 111.77, Wis. Stats.

C. If neither party gives notice to the other party of its desire to negotiate a successor Agreement prior to the expiration date of this Agreement as above provided, this Agreement shall automatically be renewed for successive one (1) year terms thereafter.

6. On or about November 8, 1991, the City presented its initial bargaining proposals for the successor bargaining agreement. With these proposals, the City presented a cover letter including the following:

> The Employer hereby states its objection to arbitration of grievances which may arise following the expiration of the 1990-1991 collective bargaining agreement. . .

The record does not reflect that the Union made any direct response at that time.

7. On or about February 25, 1992, the Union made the following proposal in the negotiations over the successor agreement:

> Local 311 hereby drops its request for changes to the grievance procedure and that the grievance language in the 1990-91 agreement remain intact. In light of this, Local 311 requests the following agreement:
>
> It is agreed and understood that any and all contractual grievances filed for, by, or in behalf of Firefighters' Local 311 from 12-31-91 through and including ____________ shall be arbitrated as per the provisions of Article IX of the 1990-91 collective bargaining agreement at the request of the Union.

Signature lines were provided for both parties, but there is no evidence that such an agreement was signed.

8. The 1992-93 collective bargaining agreement which succeeded the 1990-91 collective bargaining agreement is effective by its terms from January 1, 1992 through and including December 31, 1993. Said agreement contains language identical to that cited above in Finding of Fact 5.

9. Neither the 1990-91 nor the 1992-93 collective bargaining agreement contains any language explicitly stating that a hiatus occurs after

December 31, 1991 until the new agreement is executed. The 1990-91 agreement does, however, contain certain ambiguities. It refers in Article XXVII, Section A to "its expiration date of December 31, 1991". In Section B of the same article, it states that ". . . It is agreed that should a successor agreement be delayed past the above-referenced expiration date, the terms and conditions as set forth in this agreement will continue until a successor agreement is reached." In the same clause, it proceeds to say ". . . This provision shall not be construed as a limitation of the Employer's rights under Sections 111.70 and 111.77, Wis. Stats." On their face the first two sections of language cited above specify that all articles of the agreement continue in force following December 31, 1991 until the September, 1992 execution of the successor agreement. On its face the third sentence cited above permits the possibility that the Employer may insist upon refusal to arbitrate grievances arising after December 31, 1991. And in the same agreement's Article IX, "Grievance and Arbitration Procedure," under "Limitations on Grievance Arbitrators" on page 8 of said agreement, appears the following:

> No issue whatsoever shall be arbitrated or subject to arbitration unless such issue results from an action or occurrence which takes place following the execution of this agreement, and no arbitration, determination, or award shall be made by an arbitrator, which grants any right or relief for any period of time whatsoever prior to the execution date of this agreement or following the termination of this agreement.
>
> In the event that this agreement is terminated for any reason, rights to arbitration thereupon cease.

On its face the Article IX language cited above supports the Employer's interpretation of the last cited section of Article XXVII. With respect to the grievances at issue herein, the conflicting language of Articles IX and XXVII therefore creates an ambiguity which can only be determined by an interpretation of contract. The grievance clause is therefore susceptible of an interpretation which covers the grievances filed by Joe Conway, Jr. and Stephen Roisum.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

The City of Madison violated Sec. 111.70(3)(a)1 and 5, Wis. Stats., when it refused to arbitrate the Joe Conway, Jr. and Stephen Roisum grievances alleged to be discipline grievances, because said grievances allege violations of a term of the 1990-91 collective bargaining agreement and it cannot be said with positive assurance that said agreement either does not cover the asserted violations or refuse the Union the right to demand arbitration.

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

ORDER 1/

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

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

a. Cease and desist from refusing to submit the grievances identified in Finding of Fact 9 aobve to final and binding arbitration.

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

1. Comply with the arbitration provision of the 1990-91 collective bargaining agreement between Respondent and Local Union No. 311, International Association of Firefighters, (IAFF), AFL-CIO, with respect to the grievances identified in Finding of Fact 9 above.

2. Notify Local 311, IAFF, AFL-CIO that it will proceed to arbitration on said grievances.

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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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

3. Participate with Local 311, IAFF, AFL-CIO, in final and binding arbitration proceedings concerning the grievances identified in Finding of Fact 9 above, as set forth in the parties' 1990-91 collective bargaining agreement.

4. Notify all employes of its Fire Department, by posting in conspicuous places where said employes are employed, copies of the Notice atytached hereto and marked "Appendix A." Said notice shall be signed by a duly authorized officer or agent of Respondent, shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty days thereafter. Respondent shall take reasonable steps to insure that said notices are not altered, defaced, or covered by other material.

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

Dated at Madison, Wisconsin this 15th day of December, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________________

Christopher Honeyman, Examiner

APPENDIX "A"

NOTICE TO ALL 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 immediately cease and desist from declining to submit the Joe Conway, Jr. and Stephen Roisum grievances to arbitration.

2. We will comply with the arbitration provisions of the collective bargaining ageeement with Local 311, IAFF, AFL-CIO.

3. We will participate with Local 311, IAFF, AFL-CIO in final and binding arbitration proceedings concernint the grievances referred to above as set forth in the parties' collective bargaining agreement.

CITY OF MADISON

By ____

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

CITY OF MADISON

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

BACKGROUND:

The Complaint alleges that the City violated Secs. 111.70(3)(a)1, 3, 4, 1and 5, Wis. Stats., by refusing to process to arbitration two grievances alleged to concern discipline. The facts were stipulated, are contained in the Findings, and need not be repeated here. I note, however, that no evidence was adduced to the effect that any violation of Sections 111.70(3)(a)3 or 4 are involved, and the Order above does not include those statutory sections.

DISCUSSION:

The standard applicable in Wisconsin to whether a grievance should be processed to arbitration is that specified by the Wisconsin Supreme Court in Joint School District No. 10 vs. Jefferson Education Association. 2/

> An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. 3/

The City makes, in essence, three contentions. The first is that a hiatus occurred between the 1990-91 and 1992-93 collective bargaining agreements. The City argues that its November 8, 1991 reservation, objecting to arbitration of grievances, would have no meaning if the Complainant's contention that there was no expiration was upheld. Further, the City argues that the Union's February 25, 1992 proposal that grievances arising in the interim could be arbitrated would have no need for its execution if the Union's theory as to the language of the collective bargaining agreement is upheld. Based on this, the City arhgues that the Union unilaterally withdrew whatever requests it had made to modify the grievance language, and that because the City did not agree to arbitrate the "any and all grievances" arising after December 31, 1991, there was no qiod pro quo and the Union thereby demonstrated that the underlying collective bargaining agreement language should not be interpreted in the terms for which it now argues. The Employer dismisses as self-serving the Union's statement cited at Section 13 of the Stipulation that it felt that sufficient contractual language existed.

I find that the most that can be made of the language and events cited by the Employer in this context is that these contractual and negotiation items raise a doubt as to whether the collective bargaining agreement can fairly be interpreted as providing for arbitration of these grievances. That doubt is, as the City argues, supported by the duration article's reference that it "not be construed as a limitation of the Employer's rights under Secs. 111.70 and 111.77, Wis. Stats." It is true that each of the items cited by the Employer, standing alone, would tend to support the Employer's claim that it need not arbitrate these grievances. At the same time, however, the Union is correct in

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2/ 78 Wis. 2d 94, 253 NW 2d 536 (1977), p. 112.

3/ The Wisconsin Supreme Court cited United Steelworkers of America vs. Warrior and Gulf Navigation Co., 363, U.S. 574, 582, 583 (1960).

its argument that these pieces of language exist in parallel with other collective bargaining agreement language which support the Union's claim to arbitrate these grievances. Thus, on its face, other language in the duration clause supports the contention that the 1990-91 collective bargaining agreement did not, in fact, expire on its original expiration date, and that these "discipline" grievances are therefore entitled to be arbitrated under a pending collective bargaining agreement.

There is a reference to statutory sections in the language cited by the Employer. This would support an inference that a dispute over the interpretation of an arbitrability question might properly be decided by an Examiner, and in turn the Commission. I note, however, that this language is by far the least specific of any of the language in dispute. In specifying that the Employer retains rights under Secs. 111.70 and 111.77, this language allows for a "shotgun" approach to arguing any case, which convinces me that it is likely to be found less persuasive than more specific rights and obligations outlined in the collective bargaining agreement, if in fact a conflict is determined to exist between any two such provisions. As noted in Finding of Fact 9, I conclude that such a conflict does, in fact, exist, in several dimensions. That conflict, however, cannot be most readily addressed within the statutory framework of Sec. 111.70 and 111.77. It is first and foremost a matter of conflict between contractual sections. These sections are precisely what the parties have bargained for arbitration to resolve. Accordingly, I find that there are "doubts" which "should be resolved in favor of coverage" under Jefferson.

The City's second argument is that if the Union is correct in contending that the collective bargaining agreement did not expire on December 31, 1991, the contract contained no expiration date at all, as a result of which it could exist in perpetuity "even if the parties desired to negotiate terms for another agreement. Of course, that circumstance is violative of Sec. 111.70(4)(cm)8m, Wis. Stats., which limits collective bargaining agreements' durations to a maximum of three years."

This argument would have considerable weight if in fact the successor collective bargaining agreement remained unresolved for two years following December 31, 1991. It is not necessary here to draw upon the statutory three-year maximum of collective bargaining agreements, however, because there is nothing in the statute to prevent the parties from engaging in a collective bargaining agreement that is extendable up to that length. In this instance, the successor agreement was settled by September, 1992. The conflict between contract and statute therefore does not arise on the facts of this case, and general considerations of "harmonization" dictate that such a potential conflict should not be put in front of other considerations when the facts do not directly trigger the conflict.

The City's third substantive argument is that the Article IX language stating that "no arbitration . . . shall be made . . . which grants right or relief for any period of time whatsoever prior to the execution date of this agreement or following the termination of this agreement" would be rendered a nullity by acceptance of Complainant's contention that there was no hiatus. I find it possible, however, to find a meaning for this clause which could have effect even if the Union is found correct in its assertion. A grievance might be filed, which purported either to cover a period of time either before the execution of the agreement or to be a continuing grievance which demanded a remedy extending onwards indefinitely. Arguably, the language in question could be interpreted as a limitation on an arbitrator's ability to grant such relief once a new contract had been executed, even if the process of arbitration had delayed the hearing or award until after that date. While this is not necessarily the only interpretation of this language, it is sufficient

to suggest that there is no nullity necessarily created. Furthermore, the Employer's argument is fundamentally an argument of contract interpretation. This, as the Union argues, is properly an argument to be set before an arbitrator, for all of the reasons expressed in Jefferson and in the underlying "Steelworkers Trilogy" cases.

Two other minor matters need to be noted. One is that the City's citation of Greenfield Education Association vs. School Board, School District No. 6, City of Greenfield 4/ serves to do no more than to remind me that the duty to arbitrate is indeed contractual. Since I find that the issues presented for legal resolution here are in fact contractual issues, Greenfield does not serve the Employer's cause. And I note that while a review of the stipulations and the underlying exhibits may leave unanswered the question of whether the Conway and Roisum grievances relate to discipline or to something else, the City does not argue that the "just cause" requirement for discipline is not at least susceptible of an interpretation which covers the Conway and Roisum grievances.

Dated at Madison, Wisconsin this 15th day of December, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ____
Christopher Honeyman, Examiner

4/ Decision No. 14026-B.