STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| CITY OF RACINE,<br><br>Complainant,<br><br>vs.<br><br>INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 321,<br><br>Respondent. | Case 435<br>No. 51106 MP-2904<br>Decision No. 28128-A |
| INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 321,<br><br>Complainant,<br><br>vs.<br><br>CITY OF RACINE,<br><br>Respondent. | Case 436<br>No. 51194 MP-2908<br>Decision No. 28129-A |

Appearances:

Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, by Mr. Robert K. Weber, 514 Wisconsin Avenue, Racine, Wisconsin 53403, appearing on behalf of the International Association of Firefighters, Local 321.

Long & Halsey Associates, Inc., by Mr. William R. Halsey, 8338 Corporate Drive, Suite 500, Racine, Wisconsin 53406, appearing on behalf of the City of Racine.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

City of Racine filed a complaint with the Wisconsin Employment Relations Commission on

June 8, 1994, alleging that the International Association of Firefighters, Local 321 had committed prohibited practices in violation of Sec. 111.70(3)(b)4, Stats., by filing and processing a grievance contrary to a final and binding arbitration decision. International Association of Firefighters, Local 321 filed a complaint with the Wisconsin Employment Relations Commission on July 5, 1994, alleging that the City of Racine had committed prohibited practices in violation of Secs. 111.70(3)(a)4 and 5, Stats., by refusing to arbitrate a grievance pursuant to the grievance arbitration procedures of the parties' collective bargaining agreement. On July 27, 1994, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner in the two complaints and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing was held on said complaints on September 21, 1994, in Racine, Wisconsin. The parties filed briefs in the matters which were exchanged on December 22, 1994. The Examiner, having considered the evidence and the arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

## FINDINGS OF FACT

1. The City of Racine, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal offices are located at 730 Washington Avenue, Racine, Wisconsin 53403.

2. International Association of Firefighters, Local 321, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the duly certified exclusive collective bargaining representative of all regular non-management uniformed employes of the City's Fire Department. Its offices are: c/o President Michael George, 4213 Five Mile Road, Racine, Wisconsin 53402.

3. At all times material hereto, the City and the Union have been parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The agreement also provides, in pertinent part, as follows:

**ARTICLE VI**
**Management Rights**

. . .

> These rights shall be exercised in a reasonable manner, consistent with the traditional manner in which they have been exercised prior to the execution of this Agreement. The exercise of these rights shall be subject to the grievance procedure.

. . .

**ARTICLE XIX**
**Promotional Procedure**

. . .

> 2. Promotional Examination: The Chief shall select a recognized testing agency to prepare the promotional examination. The materials from which the test is prepared shall be available at least three (3) months prior to the date of the examination. The test grade of each individual candidate shall be sent simultaneously to the Employer and the home address of the individual candidate by the testing agency.

The City administered promotional exams in 1991 and the Union challenged the validity of these exams based on the grounds that materials from which the exam questions were taken were not furnished promotional candidates pursuant to Article XIX, Section 2 set out above.

4. Arbitrator Milo Flaten conducted hearings on the grievance in 1991. On February 17, 1992, the Fire Chief announced promotions and transfers which were subject to approval of the Police and Fire Commission, as well as the pending decision of Arbitrator Flaten. On March 10, 1992, Arbitrator Flaten issued an Award directing that the results of the January, 1991 test be discarded and a new examination be offered with the successful applicants of the January, 1991 exam being allowed to use the highest score of either the old or new test.

5. On March 16, 1992, Attorney Weber, on behalf of the Union, sent a letter to the Fire Chief, which stated, in part, as follows:

> I am also authorized by Local 321, IAFF to advise you that the Union expects that the individuals who have been erroneously promoted may continue in those positions until the new exams are prepared and results certified -- provided this is done in a timely manner. Further, I am to advise you that the Union will not seek out-of-grade assignment backpay for the individuals who later turn out to be the successful candidates, and who therefore should have been promoted, if the City in turn, red-circles the pay of the individuals who were in fact promoted, until such time as they are promoted

again or their pay in their lower job classification passes their current promotional salaries.

6. The parties met on March 27, 1992, to discuss the Arbitrator's Award. The City made demands that the Union wouldn't file future grievances for lost WOOG pay. The Union responded that it would not give up the right for the eight persons to file a grievance over the red circle issue.

7. On or about April 1, 1992, William Halsey, on behalf of the City, sent the Union's President a letter with the following attachment:

**IMPLEMENTATION AGREEMENT**

Re: Arbitrator's Award WERC No. A/P M-91-288

The union and the city have met regarding implementation of Arbitrator Flaten's award granting the relief sought by the union and have agreed as follows:

1. The union will file a joint request with the arbitrator requesting clarification of the award as it relates to the Captains exam administered in August of 1991. The union had previously amended the original grievance to include this exam but the award is silent on this issue.

2. As requested by the union on March 16th, the city will leave those individuals who were temporarily assigned to the positions arising from the January 1991 exam in the positions until the new promotional procedure is completed.

3. The individuals who are ultimately promoted by action of the Police and Fire Commission will receive back pay to the date of the original temporary promotions.

4. The union will not process any grievances from members of the bargaining unit claiming entitlement to out of grade pay as a result of Arbitrator Flaten's award or any clarification of the award that may be issued.

5. This agreement shall have no precedential value for any other dispute that may arise between the parties.

Date:____

_____ _____
Local 321, IAFF City of Racine

8. Six of the test takers filed suit in Racine County Circuit Court apparently claiming that the Union breached its duty to fairly represent them by failing to notify them of the arbitration proceedings. The Court vacated Arbitrator Flaten's Award of March 10, 1992, and remanded the matter to the arbitrator for a de novo hearing on the merits. Arbitrator Flaten conducted a second hearing in 1993 and issued an Award on February 27, 1994, ordering the test results be discarded and new examinations be prepared and offered to candidates wishing to avail themselves of them.

9. On May 4, 1994, the Union filed a grievance which stated as follows:

> Consistent with its demand of March 16, 1992, the Union grieves the City's failure to maintain the rates of pay for all individuals who were promoted (albeit in violation of the contract requirements) until such time as said individuals are promoted again or their pay in the lower job classifications to which they have been assigned matches the salary they had during the time such individuals held their promotional positions.
>
> It would be an unreasonable exercise of the City's Article VI management rights to unilaterally discontinue the benefits that said employees have come to rely on, particularly in view of the city's numerous assurances that the original exams and promotions were not violative of Article XIX of the collective bargaining agreement. The City's conduct should estop it from witholding (sic) the salary and attendant benefits from its employees.
>
> We feel this violates the Collective Bargaining Agreement Between City of Racine and I.A.F.F. Local 321, AFL-CIO 1990-1991.

On May 24, 1994, the Union informed the City of its intent to arbitrate this grievance. The City refused and responded by filing the instant prohibited practice complaint. Thereafter, the Union filed its prohibited practice complaint alleging that the City refused to arbitrate its grievance. 1/

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

## CONCLUSIONS OF LAW

1. The City of Racine, by its refusal to arbitrate the May 4, 1994 grievance has not violated the terms of the parties' collective bargaining agreement, and therefore, has not violated Sec. 111.70(3)(a)4 or 5, Stats.

2. Inasmuch as the City stipulated that the Union's complaint was controlling in this matter, the dismissal of the Union's complaint renders the City's complaint moot.

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

## ORDER 2/

IT IS ORDERED that the complaint filed by International Association of Firefighters, Local 321 be, and the same hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the complaint filed by the City of Racine is moot and the same hereby is dismissed in its entirety.

Dated at Madison, Wisconsin, this 30th day of January, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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1/ The City stipulated at the hearing that the Union's prohibited practice controlled the dispute and if the City was obligated to arbitrate the grievance, the City's prohibited practice would be moot. (TR-5).

2/ See footnote on Page 7.

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

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2/ 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.

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

CITY OF RACINE

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the City alleged that the Union committed prohibited practices by pursuing its May 4, 1994 grievance, contrary to Arbitrator Flaten's final and binding decision. The Union denied it had committed any prohibited practices and asserted that the City violated the arbitration procedures by refusing to arbitrate the May 4, 1994 grievance.

CITY'S POSITION

The City contends that the Union is trying to "have it both ways." It points out that the Union sought to have the promotional exams given by the City thrown out and the Union prevailed, but it knew all along that if it were successful, the individuals affected by the grievance would lose their temporary assignments. The City submits that the Arbitrator ordered the exam results discarded and the City complied with the Award and returned the individuals to their former positions and pay and now the Union's grievance challenges the City's implementation of the Arbitrator's Award. The City maintains that there was no agreement to any other process or procedure and its actions do comply with the Arbitrator's Award. The City argues that if it had failed to return employes to their prior positions, the Union would have filed a prohibited practice complaint alleging that the City was violating the agreement to be bound by the Arbitrator's decision. The City takes the position that the natural outcome of the Arbitrator's Award is to return employes to their former positions and it is inappropriate for the Union to now allege the City is refusing to comply with the Arbitrator's Award where the Union received the relief they sought before the Arbitrator.

The City claims the Union knew the ultimate outcome of the grievance if they prevailed and it cannot now allege a prohibited practice by the City for implementing the Award. The City asserts that the Union had ample opportunity to raise the issue of relief before the Arbitrator but it knowingly chose not to do so. The City asks for a finding that it has not engaged in any prohibited practice for refusing to arbitrate the May 4, 1994 grievance, and it is the Union that has committed a prohibited practice by filing and pursuing a grievance that violates the dictates of the statute.

UNION'S POSITION

The Union contends that the only issue is whether the May 4, 1994 grievance is arbitrable. It submits that a party has a right to proceed to arbitration when it makes a claim which on its face

is governed by the collective bargaining agreement. It insists that the grievance at issue is broad and general. Contrary to the City's argument that the Union seeks to undo the relief granted by Arbitrator Flaten in an earlier grievance, the Union submits that its May 4, 1994 grievance is not inconsistent with its earlier grievance which challenged the validity of the exam on the basis that materials were not furnished candidates as required in Article XIX. Here, according to the Union, the grievance challenges the City's refusal to red circle the pay rates of those who held the jobs for almost two years pending Arbitrator Flaten's final decision. It alleges that neither res judicata nor collateral estoppel bars the grievance. The Union maintains that the instant grievance alleges an unreasonable exercise of management rights by returning affected employes to their previous assignments without red circling their compensation. It argues that these employes were assured the City's test was proper and they acted in reliance on those assurances and the City should be estopped from unilaterally cutting their wages.

The Union claims that even in the absence of specific language prohibiting an unreasonable exercise of general management rights, such conduct has not been countenanced by arbitrators or courts.

The Union asserts that the parties never contemplated a situation where individuals would be "conditionally promoted" and it would be patently unfair to conditionally promote and then subsequently decrease the wages and benefits that employes have been accustomed to. The Union argues that the City deviated from the precedent set when dispatchers were reassigned and their rates red circled. The Union points out that there is nothing in the labor agreement which excludes the grievance. The Union submits that the standard upon which the dispute must be judged is whether the arbitration clause covers the dispute and not on the merits of the grievance, even if it appears frivolous. The Union concludes that the grievance is arbitrable and the City can assert its defenses before the arbitrator.

## DISCUSSION

The issue presented by the Union's complaint is whether the grievance of May 4, 1994, is arbitrable. As correctly pointed out by the Union, in determining arbitrability, the Commission has consistently applied the law enunciated by the U. S. Supreme Court in the Steelworkers 3/ trilogy and applied to the Municipal Employment Relations Act by the Wisconsin Supreme Court in Jt. School Dist. No. 10 v. Jefferson Ed. Assoc., 78 Wis.2d 94, 253 N.W.2d 536 (1977). The Court held that in determining arbitrability, the Court's function is limited to a determination whether

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3/ United Steelworkers v. American Mfg. Co., 363 U.S. 563 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 4/ The Commission has held that a party has a right to proceed to arbitration when it makes a claim which on its face is governed by the collective bargaining agreement. 5/

The grievance on its face asserts that the failure of the City to maintain the rates of pay of individuals who were promoted in violation of the contract (Article XIX) is an unreasonable exercise of the City's management rights. 6/ There is no provision in the collective bargaining agreement which provides for red circling of employes, particularly those who have been found by an arbitrator to have been promoted in violation of the contract. The real issue in this case is not whether the City exercised its management rights reasonably but rather relates to how the City complied with the Arbitrator's Award. The return of the employes to their former positions and pay is an implicit and natural consequence of the Arbitrator's Award. In short, the grievance does not, on its face, relate to any contractual provision but rather relates to the City's compliance with the Arbitrator's Award. There is nothing in the grievance procedure which provides for arbitrating the implementation of an arbitrator's award.

The Union's argument that the City assured employes that the test was proper and the status of "conditional promotion," relates to the issue of the contractual propriety of the promotion, which was the issue before the Arbitrator and has been decided in that proceeding with the attendant relief provided in the Arbitrator's Award.

Similarly, the Union's assertion that its grievance is consistent with its demand of March 16, 1992, for red circling these employes is not persuasive. In the March 16, 1992 letter, the Union stated it would not seek out-of-grade assignment back pay for the individuals who should have been promoted if the City in turn red circled those employes who were improperly promoted. 7/ This

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4/ Jt. School District No. 10, at 111.

5/ State of Wisconsin, Dec. No. 18012-C (WERC, 11/81).

6/ Ex. 10.

7/ Ex. 8.

was a quid pro quo offer of no back pay for red circling. The parties apparently met and discussed compliance with the Award and the City drafted an agreement on or about April 1, 1992, which provided that the successful employes would get back pay but red circling is not mentioned. 8/ It is not clear from the record that this agreement was finalized and executed. It is also unclear whether the Union gave up its right to

8/ Ex. 13.

grieve the red circling of those improperly promoted. 9/ The point is that this was not a demand but a quid pro quo offer. Furthermore, red circling was not referenced to the parties' agreement but to implementation of Arbitrator Flaten's Award of March 10, 1992.

The Union has also argued that it is unreasonable for the City to deviate from the precedent set when dispatchers were reassigned and red circled. The Union's arguments are inapplicable to the instant case. The dispatchers were replaced with civilians and the parties reached a separate agreement that the displaced dispatchers would be red circled. 10/ The evidence that the parties reached a separate agreement is further support for the conclusion that the contract does not provide for red circling and the fact the parties reached an agreement on this issue establishes that there was no past practice applicable to the instant dispute.

The evidence fails to establish that the grievance on its face is covered by the collective bargaining agreement. This is not a case of the City exercising its management rights; rather, it involves the City's implementation an arbitrator's award. There is no allegation that the City has not properly implemented the Arbitrator's Award, and even if there were, the only issue presented in this case is whether the grievance is arbitrable. As the grievance relates to the City's implementation of the Arbitrator's Award, it must be concluded that the arbitration clause is not susceptible to an interpretation that covers the grievance. Consequently, the grievance is not arbitrable and the City's refusal to arbitrate it does not violate any provision of Sec. 111.70(3)(a), Stats., and the complaint has therefore been dismissed.

Inasmuch as the City stipulated that the Union's complaint controlled this proceeding, and as this grievance has been found to be not arbitrable, the City's complaint is rendered moot and has also been dismissed.

Dated at Madison, Wisconsin, this 30th day of January, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

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9/ Ex. 7.

10/ TR-28.