STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO AND ITS AFFILIATED LOCAL 742, Complainant, vs. CITY OF CUDAHY, Respondent.	Case 78 No. 51253 MP-2911 Decision No. 28167-A

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, by Ms. Nola J. Hitchcock Cross, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of the Complainant.

Michael, Best & Friedrich, Attorneys at Law, by Mr. Robert W. Mulcahy, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 742 filed a complaint with the Wisconsin Employment Relations Commission on June 30, 1994, alleging that the City of Cudahy had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 2, 3 and 5, Stats., by refusing to arbitrate a Class Action grievance (Jill Santi). On September 15, 1994, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on October 11, 1994, in Cudahy, Wisconsin. The parties filed briefs which were exchanged on January 20, 1995. The parties reserved the right to file reply briefs but neither party did and the record was closed on February 20, 1995. The Examiner, having considered the evidence and the arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 742, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the exclusive collective bargaining representative for certain employes of the City of Cudahy, and its offices are located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. The City of Cudahy, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 5050 South Lake Drive, Cudahy, Wisconsin 53110.

3. At all times material hereto, the Union and the City have been parties to a collective bargaining agreement which contains the following provisions:

ARTICLE VII-SENIORITY

. . .

2. Assignments:

. . .

Appointments to a lower classification, to a lateral classification, or to a higher classification shall be made through existing Civil Service procedures, with the following guidelines:

a. Seniority shall be used when an employee is qualified, based upon the qualifications which were developed by the Department head.

. . .

c. Article VII.2, Para. 3, shall apply to Dispatchers, provided, however, that part-time Dispatcher's seniority for non-dispatcher positions shall be deemed pro-rated based on hours of work in prior years of service compared with 2080 hours per year.

. . .

ARTICLE X-GRIEVANCE PROCEDURE

1. Definition: A grievance shall be defined to mean any dispute which arises over the interpretation or application of the terms of this collective bargaining agreement. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, (but the procedure can be used to challenge work rules that are not reasonable), fringe benefits, and position classifications established by ordinances and rules.

. . .

5. Steps in Procedure:

. . .

Step 3:

. . .

3. Arbitration Hearing: The parties shall attempt to agree in advance upon the issue involved and stipulate to facts to be used at the hearing. The Arbitrator selected or appointed shall meet with the parties at the earliest mutually agreeable date which can be set to review the evidence and hear testimony relating to the grievance. The Arbitrator shall take such evidence as in its judgement (sic) is appropriate for the disposition of the dispute. Upon completion of this review and hearing, the Arbitrator shall render a written decision as soon as possible to both the City and the Union which shall be final and binding upon both parties.

. . .

4. The City's Civil Service procedures provide, in pertinent part, as follows:

CIVIL SERVICE 7.01

7.01 DEFINITIONS. The following words and terms whenever used in these rules or in any regulations enforced

hereunder shall be construed as follows:

. . .

(8) PROMOTION. Means the advancement of an employee from the position which he occupies to a position involving greater responsibilities with a change in duties and higher compensation.

. . .

7.02 CIVIL SERVICE COMMISSION.

. . .

(5) PROCEDURAL RULES AND REGULATIONS. The Commission shall adopt such procedural rules as in its judgment are adapted to secure the best service in employment in positions of the classified service. Such procedural rules shall take effect upon adoption and shall be posted in conspicuous places so as to give notice thereof to all employees in the classified service. Such procedural rules may be amended from time to time by a majority vote of the Commission. Amendments to the rules shall be posted in the same manner as the original rules.

7.03 EXAMINATIONS. (1) When an appointing authority learns that a vacancy exists or is about to occur in any position in the classified service, he shall notify the Commission and request that he be furnished a list of eligible candidates for such position, if such list exists, or in the alternative, that an examination be called for the purpose of establishing such list.

(2) If no such eligible list is in existence as a result of previous examinations for the same position, the Commission shall advertise and schedule an open competitive examination therefore and announce the same. . . .

. . .

(7) ELIGIBLE LISTS. (a) All successful candidates shall be placed on an eligible list for the position for which they have qualified in the order of their relative standing in the

examination for such position. Such eligible list shall remain in force for one year after establishment, provided, however, the

Commission may, for cause spread upon its minutes, abolish such list or extend it for a period of time as determined by the Commission, but not to exceed 6 months.

. . .

7.04 CERTIFICATION AND APPOINTMENT. (Am. #1470) (1) When a vacancy occurs or is about to occur in the classified service and it is necessary that such position be filled, the appointing authority shall file a requisition with the Commission requesting certification of a list of eligibles for such position. Upon receipt of such requisition, the Commission shall furnish from a list of eligibles established in accordance with these rules the names of the 3 persons ranking highest on such list in the order of qualification for eligibility. Except for good cause shown, appointment to the position shall be made from the certified list. The Commission shall be the sole judge of the validity of grounds for rejection of any certified candidate and if the Commission concurs in the action of the appointing authority rejecting any candidate originally certified, it shall then certify the next highest ranking eligible to the appointing authority for consideration.

. . .

7.05 PROMOTION. (1) VACANCIES. (Rep. & recr. #1624) All vacancies in the classified service, except those in sub. (3), shall first be filled by posting the position. Promotional examinations may be held open to all qualified employees in the classified service. If no one is found qualified, the position shall be openly advertised.

(2) RULES GOVERNING PROMOTIONAL EXAMINATIONS. Certification and appointment, including probation, shall be the same as for original entrance examinations. However, no person shall be eligible for a promotional examination who is not at the time of examination on regular appointment to a position in the classified service, unless no one in the classified service qualifies and the position is openly advertised.

. . .

5. Jill Santi is employed in the City's Police Department as a part-time dispatcher working a 4-3, 3-4 schedule averaging 32 hours per week. Santi signed a posting for a Clerk II vacancy in the Treasurer's office. Santi was not on the certified eligibility list of qualified applicants and she was not selected for the position on that basis. On March 2, 1994, a grievance was filed over the City's failure to allow Santi to transfer from the inside posting. The City denied the grievance on the basis it was not a grievable matter and the Union appealed it to arbitration. The City refused to proceed to arbitration in that the matter was not arbitrable as the matter involved a violation of the rules of the Civil Service Commission and not the contract. The Union then filed the instant complaint.

6. The grievance filed on March 2, 1994, raises a claim that comes within the definition of a grievance under Article X, Section 1 of the parties' agreement.

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

CONCLUSION OF LAW

The City of Cudahy, by its refusal to arbitrate the March 2, 1994 grievance, has violated the terms of the parties' collective bargaining agreement and by this action has violated Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

IT IS ORDERED that the City of Cudahy, its officers and agents, shall immediately:

1. Cease and desist from refusing to submit the March 2, 1994 grievance related to Santi's posting for the Clerk II vacancy to final and binding arbitration.

2. Take the following affirmative actions which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

a. Submit the March 2, 1994 grievance to binding arbitration.

b. Notify the Commission within twenty (20) days of the date of this Order, in writing, of what steps have been taken to comply with this Order.

1/ See footnote on Page 7.

3. Any other violations of Sec. 111.70(3)(a) alleged but not found herein are dismissed.

Dated at Madison, Wisconsin, this 7th day of April, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

Section 111.07(5), Stats.

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

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 CUDAHY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, the Union alleged that the City committed prohibited practices by its refusal to proceed to arbitration on the grievance filed on Santi's posting for the vacant Clerk II position. The City denied it committed any prohibited practices and asserted that the grievance was not substantively arbitrable under the parties' collective bargaining agreement.

UNION'S POSITION

The Union contends that the grievance must be found arbitrable where, as here, the contract is susceptible of an interpretation that covers the dispute. It claims that arbitration should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute and all doubts must be resolved in favor of arbitration.

The Union points out that the parties' arbitration clause specifically excludes certain types of disputes but not even the City contends that this clause excludes this dispute. It submits that the City is arguing that the Union "waived" its right to grieve this matter by making reference to "existing Civil Service procedures" in the collective bargaining agreement. The Union argues that such contractual reference serves only to strengthen its position by requiring the arbitrator to interpret both the parties' collective bargaining agreement and the Civil Service procedures referenced therein. The Union maintains that the grievance is facially covered by Article VII of the agreement and is not excluded from the arbitration clause, so arbitration is required.

It claims that the City has knowingly and intentionally asserted a frivolous position and, as a result, it should be ordered and compelled to pay costs and fees, otherwise the City can continue, without penalty, to deny the Union the right to arbitration. It asks that prohibited practices be found and the requested relief granted.

CITY'S POSITION

The City contends that as a matter of law it cannot be forced to arbitrate the issue of substantive arbitrability. It cites legal authorities for the proposition that arbitration is a matter of contract and a party cannot be required to submit to arbitration a dispute which it has not agreed to

submit and it is in the province of the court to determine on the basis of the contract whether or not the employer is bound to arbitrate. The City objects to any determination of substantive arbitrability by an arbitrator and the issue of substantive arbitrability is for the examiner to determine.

The City maintains it did not agree to arbitrate application of the Civil Service Rules as a matter of contract. It submits the heart of the dispute is an interpretation of the Civil Service Commission's rules. It notes that the presentation of qualified candidates for hire is within the authority of the Civil Service Commission. It points out that Article VII, 2 states that appointments shall be made through existing Civil Service procedures and no evidence was presented that the parties agreed to arbitrate alleged violations of Civil Service Commission Rules.

The City contends that the standard applied by the courts on the application of contractual grievance arbitration provisions is whether the provision is susceptible to an interpretation that would cover the grievance. The City insists that there is no contract language which deals with the manner in which an employe is to be placed on the eligibility list for position vacancies as that is reserved to the Civil Service Commission and its rules, which are not subject to the grievance procedure. The City notes that the contract is silent as to the nature of the Civil Service Rules which apply to drawing a list of eligible applicants and only when the list is compiled do the provisions of Article VII, 2 apply. It maintains that the contract language does not afford an employe access to the eligibility list based on seniority.

The City concedes that the contractual definition of a grievance is broad but argues that it is not all encompassing. It claims that by ceding the process for preparation of the eligibility list to the Civil Service Commission, the parties have excluded any grievances in that area from the arbitration procedure. It points out that the grievance raises only the alleged violation of Civil Service Rules, not any specific term of the agreement.

The City argues that the Civil Service Rules establish the procedure for producing an eligibility list. It points out that only in the situation of a promotion does the internal candidate receive the first opportunity to qualify before external candidates are sought. It asserts that in the instant case, the grievant earns a higher rate of pay than the Clerk II position so a "promotion" as defined by the Civil Service Rules is not applicable to this case. The City also cites arbitral authorities to support its assertion that the movement from Dispatcher to a Clerk II is not a "promotion" as the rate of pay for Dispatcher is higher and a "promotion" is from a lower paying job to a higher paying job. The City claims that the eligibility list was extended pursuant to the Civil Service Rules and the grievant Santi was not on the list as she never applied at the time the original list was compiled, and she was not qualified according to the Civil Service Rules because she was not on the list nor eligible to be put on the list.

The City distinguishes the promotion of Kathleen Manka in 1984 from the instant case as Manka was in fact "promoted" and was the only internal candidate for the position and was found

to be qualified after an oral interview. It points out that this case does not involve a promotion. The City argues that the relief sought cannot be achieved in an arbitration forum as it requires action by the Civil Service Commission over which the arbitrator has no jurisdiction.

The City contends that a prior arbitration award confirms the exclusion of the issue from arbitration. The City argues that in the prior case the arbitrator found that the Civil Service Commission's official procedures controlled the establishment of the certified eligibility list. The City takes the position that based on this award, a demand to be considered for placement on the eligibility list under the Civil Service Rules is not a matter of contract interpretation which is arbitrable.

The City, noting that the complaint alleged violations of Sec. 111.70(3)(a)1, 2 and 4, Stats., asserts that no evidence was presented which related to these charges and they must be dismissed. The City concludes that the complaint should be dismissed in its entirety.

DISCUSSION

The issue presented in this case is whether the grievance dated March 2, 1994, is arbitrable. In determining arbitrability, the Commission has consistently applied the law enunciated by the U. S. Supreme Court in the Steelworkers 2/ 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 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. 3/ 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. 4/

The City has argued that the issue is limited to establishment of a certified eligibility list. A review of the record does not support such a narrow interpretation. The grievance alleges a violation of Article VII, Section 2 of the contract and asserts that Santi, a part-time dispatcher, applied from inside posting for a Clerk II vacancy and should be considered for this position as provided in the labor contract. 5/ Article VII, Section 2 provides, in part, that appointments to a lower, lateral or higher class shall be made through existing Civil Service procedures, "with the following guidelines: . . ." Thus, the collective bargaining agreement adopts Civil Service procedures by reference and subjects them to certain contractual guidelines. The definition of a

---

2/ United Steelworkers v. American Mfg. Co., 363 U.S. 564 (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).

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

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

5/ Ex. 2.

grievance as provided in the parties' collective bargaining agreement means any dispute which arises over the interpretation or application of the terms of the collective bargaining agreement. It appears that the statement of the grievance falls within this broad definition. The grievance procedure contains certain exclusions but Article VII, Section 2's procedures are not mentioned. The City cited University of Illinois at Chicago, 100 LA 728 (Goldstein, 1992); however, the language in that case specifically stated as follows:

> 2.03 The selection from among qualified candidates to fill a position is a management prerogative provided that it is accomplished in compliance with the rules and procedures of the State Universities Civil Service System. Employee grievances relating to such selection cannot be arbitrated.
>
> * * * *

The instant contract has no language which states that grievances relating to selection cannot be arbitrated. Similarly, the City's reliance on County of LaCrosse, 182 Wis.2d 15 (1994) is misplaced in that the Court held that the exclusive remedy provision for failure to rehire under the Worker's Compensation Act did not bar the arbitration of the termination or layoff of an employe following a work-related injury. It is not clear that the reference in the agreement to Civil Service procedures precludes a grievance over the interpretation and application of Article VII, Section 2. Whether the adoption of the Civil Service procedures by reference also includes the requirement that appeals must only go to the Civil Service Commission is for the arbitrator to determine. Other issues, such as past practice related to Manka, whether Santi's request to go from a Dispatcher to a Clerk II is or is not a promotion and what, if any, remedy is available, is also for the arbitrator to decide.

The City's reliance on the prior arbitration award by Arbitrator Greco supports a conclusion that the instant grievance is arbitrable. In the case before Arbitrator Greco, the issue involved whether the City violated Article VII by failing to offer a posted vacancy to the most senior bidder. The Arbitrator reviewed Article VII, Section 2 and concluded that in determining qualifications, the Civil Service Commission's decision governed the matter. The City here is asking the Examiner to conclude that this decision makes the issue here no longer arbitrable. It is for an arbitrator to decide whether a prior arbitrator's decision or interpretation should be followed. As the meaning and interpretation of Article VII, Section 2, including the role of Civil Service procedures has been arbitrated in the past and no language precludes such arbitration to interpret the contract, it follows that the grievance states a claim which on its face is governed by the terms of the collective bargaining agreement. Thus, the City violated Sec. 111.70(3)(a)5, Stats., by its refusal to arbitrate said grievance and is directed to proceed to arbitration on the grievance.

The Union in its complaint alleged that the City also violated Secs. 111.70(3)(a)1, 2 and 4, Stats., but no evidence was presented to establish these allegations and they have been dismissed in their entirety.

The Union has asked for fees and costs asserting that the City's position is frivolous. The Commission has held that attorneys' fees are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. 6/ The City's defenses have not been shown to be so frivolous, in bad faith or devoid of merit so as to warrant the imposition of costs and attorneys' fees and the Union's request for same is denied.

Dated at Madison, Wisconsin, this 7th day of April, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

6/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) citing Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81).