STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 311, THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, Complainant

vs.

CITY OF MADISON (FIRE DEPARTMENT), Respondent

Case 193
No. 54493
MP-3221

Decision No. 28920-A

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, by **Mr. John C. Talis**, on behalf of Complainant Local Union No. 311, I.A.F.F., AFL-CIO.

Mr. Larry W. O'Brien, Assistant City Attorney, City of Madison, Room 401, City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710, on behalf of the Respondent, City of Madison.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 3, 1996, the Complainant Local Union No. 311, International Association of Fire Fighters, AFL-CIO, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, hereinafter the Commission, wherein it alleged that the Respondent City of Madison had refused to arbitrate a grievance regarding the alleged violation of the parties' Collective Bargaining Agreement, and thereby violated Sections 111.70(3)(a)1 and 5, Stats. On January 6, 1997, the Respondent City of Madison filed its answer to the complaint wherein it admitted it has refused to arbitrate the grievance and asserted as affirmative defenses that the subject matter of the grievance is not subject to review through the grievance or

arbitration procedures in the parties' Agreement and that the nonreviewability of management's actions in this case is controlled by the decision in HINKES V. BOARD OF POLICE AND FIRE COMMISSIONERS OF THE CITY OF MADISON, ET AL., (Dane County Cir. Ct. 1992).

The Commission appointed a member of its staff, David E. Shaw, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearings in the matter were held before the Examiner on January 14 and February 10, 1997, in Madison, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by May 6, 1997.

Based upon the record and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Respondent City of Madison, hereinafter the City, is a municipal employer having its principal offices located at the City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin. At all times material herein, the City has maintained and operated the City of Madison Fire Department, which Department is administratively headed by the Fire Chief. The City has established and appointed a Board of Police and Fire Commissioners which Board has existed at all times material herein. At all times material herein, Earle Roberts held the position of Chief and Fred Kinney has held the position of Assistant Chief - Personnel Officer in the Department.

2. The Complainant Local Union No. 311, International Association of Fire Fighters, AFL-CIO, hereinafter the Union, is a labor organization having its principal offices located at 821 Williamson Street, Madison, Wisconsin. At all times material herein, the Union has been the exclusive collective bargaining representative for all employes in the classifications of Firefighter, Chief's Aide, Apparatus Engineer, Lieutenant, Fire Investigator, Fire Inspector, Director of Community Education, Firefighter/Paramedic, Community Educator and Captain, and excluding those employes in the classifications of Division Chief, Assistant Chief, Deputy Chief and Fire Chief, employed in the City's Fire Department. From 1993 to 1996, Lionel Spartz was the Union's President. Since 1996, Joseph Conway has been the Union's President. At all times material herein, Chris Gentilli has been employed in the City's Fire Department and has been in the bargaining unit represented by the Union.

3. The Union and the City have been parties to a series of collective bargaining agreements covering the employes in the bargaining unit represented by the Union and described above in Finding 2.

4. Effective January 1, 1995, Gentilli along with 53 other employes of the Department, was promoted from Firefighter to the position of Apparatus Engineer subject to successfully serving a one-year probationary period in the position. By letter of November 29, 1995, Gentilli was notified by then-Fire Chief Earle Roberts that his probation in the Apparatus Engineer position was being revoked "effective immediately". It was the view of the Union and Gentilli that his probation was being revoked due to a "heated discussion" that had taken place between he and Division Chief Aldworth.

5. By the following letter of December 15, 1995, the Union requested a hearing for Gentilli before the Board of Police and Fire Commissioners, hereinafter the PFC:

> Chief Roberts:
>
> This letter is to request a hearing before the Board of Police and Fire Commissioners concerning the demotion of Chris Gentilli from the position of Apparatus Engineer to the rank of Fire Fighter, by your letter of November 29, 1995. Chris has authorized me to make this request on his behalf.
>
> Sincerely,
>
> Lionel Spartz /s/
> Lionel Spartz
> President, IAFF Local 311

6. On December 22, 1995, the Union filed the following grievance regarding the revocation of Gentilli's probation in the Apparatus Engineer position, which read in relevant part:

> Name - First, Last, Middle Initial
>
> GENTILLI, CHRIS
>
> Department/Division
>
> Madison Fire Department
>
> Bargaining Unit
>
> IAFF Local 311

This grievance alleges violation of Article(s) 5 Section(s) J & K of Labor Agreement 11-29-95

Describe the grievance - state all facts, including time, place of incident, names of persons involved, etc. (attach additional sheets)

On January 1, 1995, grievant was promoted to the position of Apparatus Engineer on the Madison Fire Department. During the course of 1995, grievant received satisfactory marks when he was evaluated on his performance of his new Apparatus Engineer duties. On or about November 29, 1995, the Madison Fire Department arbitrarily and capriciously revoked grievant's status as an Apparatus Engineer. The labor agreement between the City of Madison and IAFF Local 311 requires that the Fire Department exercise its' managerial rights, including the right to promote and demote, in a reasonable manner. Fire Department Administration acted unreasonably in this situation.

Relief Sought:

That grievant be restored to the position of Apparatus Engineer, and that he be made whole for any lost wages or other benefits.

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On December 26, 1995, Assistant Chief Kinney responded to the grievance as follows: "NO CONTRACT VIOLATION, GRIEVANCE DENIED."

7. By the following memorandum of January 2, 1996, the Attorney for the Board of the PFC advised Kinney as to the Board's position on Spartz's December 15th request for a hearing before the Board on the revocation of Gentilli's probation:

FAX Memo to **Fred Kinney**

From Scott Herrick

Re: **Chris Gentilli correspondence and Madison PFC**

Of course the Board has not had an opportunity to review this matter but I think it is fairly straight-forward and I am clear on my advice to the Board, along the following lines:

In my opinion a chief's decision that probation has not been satisfactorily completed is not a demotion or "reduction in rank" as that term is used in WS 62.13. (For the sake of completeness I note that it also is neither a suspension nor a termination.) Therefore, the Chief's decision is not subject to the provisions of WS 62.13 by which the officer may compel the chief to file a statement of charges before the Board. In the absence of a statement of charges the Board cannot logically or legally conduct a hearing.

The practice of Madison Police and Fire Departments and the Madison Board has been well established and consistently followed, as far as I know. The Board understands and expects that both hiring and promotional recommendations from the chiefs are made conditionally, with a standard probation contingency; the Board's approval of these recommendations has been made on this understanding, as reflected in Board rule and in minutes of its actions. If either chief should desire to alter either appointive or promotional probation policy the Board would expect to be fully advised.

I would expect that the Fire Department would respond to Mr. Spartz' letter of December 15, 1995, by informing him that Mr. Gentilli had not been reduced in rank and that he therefore is not entitled to require the filing of a statement of charges with the Board of Police and Fire Commissioners. I intend to bring the matter to the Board on January 8 and recommend the attached response.

If Mr. Spartz or Mr. Gentilli pursue the matter after that point, the Board may perhaps not be directly informed or involved. Therefore, I will appreciate your keeping me informed of further developments, since the Board will maintain an ongoing concern for the integrity of probation.

By the following letter of January 4, 1996 from the Attorney for the Board of the PFC, the Board advised the Union of its response to the December 15, 1995 request for a hearing on the revocation of Gentilli's probation:

Lionel Spartz
President, IAFF Local 311
821 Williamson St.
Madison, WI 53703

Re. Chris Gentilli

Dear President Spartz:

Your letter of December 15 to Chief Roberts does not formally require a response from me or the Board, but we appreciate your sending us a copy and for the sake of good communications take this opportunity to clarify our views, which we believe are shared by department management. We do not regard a promotion as complete until probation has been satisfactorily completed. Therefore, non-completion of probation is not a "demotion" or "reduction in rank", as the statute calls it. Without a demotion in rank, there is no basis for the officer to compel the chief to file a statement of charges with us. And of course, with no statement of charges, the Board cannot hold a hearing.

To the best of my knowledge, this policy and practice has been consistently followed by both chiefs and by the Board for many years; the only variations I recall were a shortening of the standard promotional probation from 18 months to 12 months several years ago, and individual adjustments to the probationary period based on special circumstances – for example, extending probation non—prejudicially because of lost time due to temporary disability.

If these comments are not satisfying I hope they are at least informative.

Very truly yours,
For the Madison Board of Police and Fire Commissioners,

Scott Herrick /s/
Scott Herrick,
counsel to the Board

By the following letter of January 10, 1996, Kinney advised the Union that the Department planned no further action on the Union's request for a hearing:

Local 311
President Lionel Spartz
821 Williamson Street
Madison WI 53703

Dear President Spartz:

Chief Roberts had asked me to address your letter dated December 15, 1995

regarding Chris Gentilli. I had forwarded your request to Scott Herrick. Today

I received a copy of the response from the Police and Fire Commission. The fire department plans no further action.

Sincerely,

Fred Kinney /s/
Fred Kinney
Assistant Chief

8. Sometime subsequent to Kinney's January 10, 1996, representatives of the City and the Union selected William Petrie as the Arbitrator to hear and decide the December 22, 1995 grievance filed on Gentilli's behalf and Spartz notified Petrie of his selection. By letter of February 21, 1996, Arbitrator Petrie notified Spartz and the City's legal counsel, Assistant City Attorney Larry O'Brien, of the dates he had available to hear the grievance. The City's legal counsel subsequently notified the Union that the City would not agree to arbitrate the dispute. By letter of March 12, 1996, Spartz notified Arbitrator Petrie that the City was refusing to arbitrate the dispute and cancelled the arbitration hearing that had been scheduled for June 6, 1996.

By letter of August 26, 1996, the Union's legal counsel, John Talis, requested that the City advise him in writing as to its position regarding arbitration of the grievance. The City did not respond to Talis' letter. Talis subsequently sent the following letter of September 20, 1996 to the City's legal counsel:

Mr. Larry O'Brien, Esq.
Assistant City Attorney
City-County Building, Rm. 401
210 Martin Luther King Blvd.
Madison, WI 53710

RE: IAFF Local 311 v. City of Madison
A/P M-96-235
(Chris Gentilli)

Dear Larry:

The Union has received no response to its letter of August 26, 1996. As stated previously, the Union would like to avoid an unnecessary ULP proceeding. However, it cannot wait indefinitely for the City's cooperation.

If we have not received confirmation in writing on or before October 1, 1996 that the City is prepared to arbitrate this matter, the Union will have no alternative but to institute a ULP with the WERC.

Please let me know the City's position.

Very truly yours,

John C. Talis /s/
Talis C. Talis

O'Brien responded to Talis' letter with the following letter of October 2, 1996:

John C. Talis, Esq.
Lawton & Cates, S.C.
214 W. Mifflin Street
PO Box 2965
Madison, WI 53701-2965

RE: Local 311 v. City of Madison - WERC Case No. A/P M-96 235
Chris Gentilli

Greetings:

I have received your September 20, 1996 letter. Our position remains unchanged. You are quite free to pursue whatever course of action you deem appropriate.

Very truly yours,

Larry W. O'Brien /s/
Larry W. O'Brien
Assistant City Attorney

9. The City and the Union were party to a collective bargaining agreement which covered the period of January 1, 1994 through December 31, 1995. Said Agreement contained, in relevant part, the following provisions:

ARTICLE 5

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 or 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:

A. To utilize personnel, methods, procedures, and means in the most appropriate and efficient manner possible.

B. To manage and direct the employees of the Fire Department.

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

D. To suspend, demote, discharge, or take other appropriate disciplinary action against the employees for just cause.

• • •

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.

K. Any dispute with respect to Management Rights shall not in any way be subject to arbitration but any grievance with respect to the reasonableness of the application of said Management Rights may be subject to the grievance procedure contained herein.

ARTICLE 9

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.

• • •

C. GENERAL GRIEVANCES: Union grievances involving the general interpretation, application or enforcement of this Agreement may be initiated at Step Two of this procedure. Grievances initiated at Step Two must meet the time limits set forth in Step One.

• • •

H. 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.

I. 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.

• • •

K. 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.

• • •

M. The arbitrator shall neither add to nor detract from nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for arbitration within the limitations expressed herein. The arbitrator shall have no authority to change wage rates or salaries. The arbitrator shall expressly confine himself/herself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other

issue(s) not so submitted to him/her or to render

observations or declarations of opinion, which are not directly essential in reaching the determination.

• • •

O. The arbitrator shall hold a hearing at Madison, Wisconsin, at a time and place convenient to the parties at the earliest possible date following notification of a selection. The arbitrator shall take such evidence as in his judgment is appropriate for the disposition of the dispute. Statements of position may be made by the parties and witnesses may be called. 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.

P. Proceedings shall be as provided in Arbitration Chapter 788, Wisconsin Statutes.

Q. LIMITATIONS ON GRIEVANCE ARBITRATORS:

1. Arbitration shall be limited to grievances over matters involving interpretation, application or enforcement of the terms of this Agreement.

2. Arbitration shall not apply where Section 62.13 of the Wisconsin Statutes is applicable and where Management has reserved rights relating to arbitration in Article 5 of this Agreement.

3. 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.

• • •

10. The parties' dispute as to whether the City violated the parties' 1994-1995 Collective Bargaining Agreement by removing Chris Gentilli from the probationary period he was serving for promotion to Apparatus Engineer is arguably covered by Article 9, Grievance and Arbitration Procedure, Sections A and I, of that Agreement, and said dispute is not expressly excluded by any provision of the Agreement. Therefore, it cannot be said with positive assurance that the arbitration clause in the parties' Agreement is not susceptible of an interpretation that covers this dispute.

11. The City has refused, and continues to refuse, to proceed to arbitration on the Gentilli grievance.

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

CONCLUSIONS OF LAW

1. The grievance of Chris Gentilli filed on December 2, 1995 raises issues which are arguably covered by the arbitration clause in the 1994-1995 Collective Bargaining Agreement between Local Union No. 311, IAFF, AFL-CIO and the City of Madison, and which are not specifically excluded from the grievance and arbitration procedure contained in that Agreement, and is therefore arbitrable.

2. Disputes as to whether the revocation of Gentilli's probationary status in the Apparatus Engineer position constituted appropriate discipline for the violation of a work rule, a demotion, or the unreasonable application of certain management rights are issues that are to be decided by an arbitrator.

3. By refusing to proceed to arbitration on the grievance filed on December 22, 1995 on behalf of Chris Gentilli, the City of Madison, its officers and agents, have violated its agreement with Local Union No. 311, IAFF, AFL-CIO, to arbitrate disputes involving the interpretation, application or enforcement of the terms of the parties' 1994-1995 Collective Bargaining Agreement, and thereby violated Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

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

ORDER

The Respondent City of Madison, its officers and agents, shall immediately:

(1) Cease and desist from refusing to proceed to arbitration on the grievance filed on behalf of Chris Gentilli.

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

(a) Participate in the arbitration of the grievance noted above.

(b) Post the Notice attached hereto as Appendix "A" in conspicuous places in the City's buildings where notices to Fire Department employes are posted. The Notice shall be signed by the representative for the City and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to the action the City has taken to comply with this Order.

Dated at Madison, Wisconsin this 20th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

_____

David E. Shaw, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

WE WILL NOT violate Sections 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act by refusing to participate in the arbitration of grievances which raise contractual issues not specifically excluded from the contractual arbitration process.

WE WILL participate with Local Union No. 311, IAFF, AFL-CIO in the arbitration of the grievance of Chris Gentilli.

Dated this _____ day of November, 1997.

CITY OF MADISON

By _____

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

CITY OF MADISON (FIRE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union has alleged that the City violated Sec. 111.70(3)(a)5, and derivatively, Sec. 111.70(3)(a)1, Stats., by refusing to arbitrate the grievance involving the revocation of the promotional probation of Chris Gentilli and his return to his former position of Firefighter. The City has responded that it has retained the management right to take such action and that the nonreviewability of the failure to make probation or the decision to revoke probation is well established both by past practice and a decision of the Circuit Court in a prior, identical situation.

POSITIONS OF THE PARTIES

Union

The Union alleges that Gentilli was subjected to an additional requirement to pass his probation and was removed from the probation period he was serving for promotion to Apparatus Engineer due to an incident that resulted in a "heated discussion" between Gentilli and Division Chief Aldworth and that Assistant Chief Kinney ultimately recommended that Gentilli be terminated from the Apparatus Engineer position as a result of that incident. The revocation of Gentilli's probation resulted in his being reduced to the rank of firefighter, a reduction in pay, and his being assigned to a different station. Upon investigation of the matter, the Union could find no work performance reason for Gentilli's removal and concluded that the incident between Gentilli and Aldworth was the sole basis for his removal, that Gentilli was being subjected to disparate treatment, and that Kinney harbored animosity towards Gentilli. As a result, the Union filed the grievance on December 22, 1995 regarding Gentilli's removal from the Apparatus Engineer position.

The Union asserts that it contested Gentilli's removal on multiple grounds, i.e. that the City's "power to promote, transfer, or assign,. . .to manage and direct the employes of the Fire Department,. . ." had not been exercised with "reasonableness" in violation of Article 5, Section K of the Agreement. The Union also alleged that the City's right to "suspend, demote, discharge, or take other appropriate disciplinary action against employes for just cause" had been violated both by its terms and in violation of Article 5, Section K's "reasonableness" requirement. The City denied the grievance and it was subsequently processed to arbitration and an arbitration hearing scheduled, however, the City subsequently refused to arbitrate the grievance.

The Union first argues that the parties' arbitration clause covers, or could be interpreted to cover, the Gentilli grievance. Wisconsin law recognizes a "strong legislative policy. . . favoring arbitration in a municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes." JOINT SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 Wis. 2d 94 (1978). In that case, the Court held that in determining arbitrability, the court must exercise great caution and has no business weighing the merits of the grievance. The court's function is limited to determining 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. 78 Wis. 2d at 111. The Union also asserts that Wisconsin has adopted the Federal *Steelworkers' Trilogy*, including UNITED STEELWORKERS OF AMERICA V. WARRIOR & GULF & CO., 363 U.S. 574 (1960). Citing, DENHART V. WAUKESHA BREWING COMPANY, 17 Wis. 2d 44, 51-52, (1962). Under both WARRIOR & GULF and JEFFERSON, doubts regarding the scope of the arbitration clause "should be resolved in favor of coverage." The holdings of those cases are controlling on the facts in this case. Here, the parties' arbitration clause provides, in relevant part, "Only matters involving interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth herein." There are multiple constructions of that clause which would cover this grievance and there is no contractual provision which "specifically excludes" the grievance filed on behalf of Gentilli. As stated on the face of the grievance, all of the constructions involve Article 5, Section K of the Agreement, Article 5, Section B provides that management has the right to "manage and direct the employes of the Fire Department." Here, Gentilli has been directed to return to duty as a firefighter and to work at a different station. Those actions may be tested through the grievance process for their "reasonableness" under Article 5, Section K. Section C permits the City to "promote, transfer, (or) assign. . .employes within the Fire Department." The actions taken against Gentilli related to his promotion and resulted in his being assigned to work as a Firefighter rather than as an Apparatus Engineer, and Gentilli was transferred to a different station. All of those actions must meet the "reasonable" standard in Article 5, Section K of the Agreement. Article 5, Section B, provides that the City may "demote. . .or take other disciplinary action against employes for just cause. . ." Gentilli was demoted from Apparatus Engineer to Firefighter, and even if this action was not considered a demotion, it is undisputed that Gentilli suffered a loss in pay and thus the City's action would constitute "other disciplinary action" within the meaning of Article 5, Section D. Therefore, the action is subject to the grievance procedure pursuant to the "just cause" standard in Article 5, Section D, or in the alternative, the "reasonableness" standard of Article 5, Section K.

The Wisconsin Supreme Court's decision in JEFFERSON held that in determining arbitrability, the court has no business weighing the merits of the grievance. Commission case law is in accord. MARINETTE COUNTY, Dec. No. 28783-B (WERC, 12/96). The reasoning in those cases is controlling in this case, and requires that despite the City's repeated attempts to address the merits of the grievance, the Commission not weigh the merits of the grievance. The

City's arguments go to the merits of the grievance and not to the question of whether it has contractually obligated itself to proceed to arbitration. MARINETTE COUNTY, supra.

The Union also asserts that it is entitled to costs and attorney's fees in this proceeding. An award of costs and fees is appropriate in the "exceptional" case, in which a parties' position is frivolous, rather than debatable. WISCONSIN DELLS SCHOOL DISTRICT, Dec. No. 25997-C (WERC, 8/90). The City refused to arbitrate in spite of the Union's requests, along with citation of relevant law, the City ultimately replied, "Our position remains unchanged. You are quite free to pursue whatever course of actions you deem appropriate", without any citation of supporting law or facts. The Union asserts that under those circumstances, it is entitled to an award of fees.

In its reply brief, the Union reasserts its argument that determining arbitrability does not involve weighing the merits of the grievance. While the City asserts that its right to terminate newly-hired and newly-promoted employes without recourse has been in existence for as long as anyone can remember, it cites no support in the record and is unable to point to requisite language in the collective bargaining agreement which prohibits the processing of the grievance. Thus, the City's assertions regarding past conduct are nothing but a past practice argument and it clearly has no role in this proceeding. Similarly, the City's argument regarding there being "no attempt to bargain" the issue by the Union is irrelevant. The fact that the Union filed the grievance in this case is the only relevant indication of its understanding of the scope of the arbitration clause. Assertions regarding what Spartz said at the time of the filing of the grievance goes to past practice, and the contentions regarding past grievances involving Hinkes, and their disposition, also go to past practice and are not relevant in this proceeding. Only the scope of the parties' arbitration clause is relevant, and the City's assertions regarding past practice and oral statements should be disregarded.

The Union also disputes the City's assertions regarding the relevant contractual provisions. The parties' arbitration clause covers "only matters involving interpretation, application, or enforcement of this Agreement". The Union has cited Article 5, Sections B, C, D and K of the Agreement alleging that the City's actions with regard to Gentilli, i.e. the exercise of the City's rights under those provisions, violated the reasonableness standard in Article 5, Section K. The application of those rights can be challenged for reasonableness through the grievance procedure, pursuant to Article 5, Section K. The City's assertions that the revocation of Gentilli's probation had nothing to do with promotions, and that the resulting change in his duties are not a change in assignment, are nonsensical and to say that he was not transferred to another station ignores the record. The City's assertion that there is "no other language" limiting the exercise of its management rights, ignores the reasonableness standard in Article 5, Section K. Further, the City's "definition" of terms such as "promote", "assign", and "transfer", have no basis, and those terms are not defined in the Agreement. Whatever the merit of those arguments, they are for an arbitrator to consider, and are not relevant here.

While the City contends that the action taken against Gentilli is neither discipline nor demotion, it has cited no definition of either term in the Agreement, as none exists. Such arguments are again appropriately resolved in arbitration, and not in this forum. Next, the Union asserts that the City's attempt to rely on KAISER V. BOARD OF POLICE AND FIRE COMMISSIONERS, 104 Wis. 2d 198 (1981) only further supports the Union's position. The applicable collective bargaining agreement in KAISER provided, "No claim or grievance shall be made by the (Union) or the employe with respect to layoff or discharge of the employe during such period of probation." 104 Wis. 2d at 502. The Court concluded that by the terms of the agreement, the probationary police officer could not arbitrate his termination. There is no similar language in the parties' Agreement. The City is instead asking that the Examiner insert such language into the Agreement in order to give it the same freedom of action as the employer in KAISER. To do so, however, would destroy the rule prohibiting the Examiner from addressing the merits at the arbitrability stage, and would also be contrary to the rule that "doubt should be resolved in favor of coverage." JEFFERSON, 78 Wis. 2d at 111-112. Also, KAISER is not controlling in this case for two reasons. First, KAISER involved an initial probation, rather than a probationary promotion of a permanent employe. Courts have held that permanent employes on a promotional probation are entitled to challenge revocation even if employes on initial probation are not. MUELLER V. ALASKA STATE BOARD OF PERSONNEL, 425 Pacific 2d. 145, 148 (Sup. Ct. Alaska, 1967). Second, the holdings in KAISER are explicitly based on Sec. 165.85, Stats., related to the Law Enforcement Standards Board. Those law enforcement provisions do not apply to firefighters and therefore KAISER is not applicable to this case.

The City's contention that by pressing its arguments, the Union is undermining the working relationships that collective bargaining agreements are designed to establish, turns the Legislature's stated public policy on its head. The Wisconsin Supreme Court has specifically held that the language of Sec. 111.70(6), Stats., represents "the strong legislative policy in Wisconsin favoring arbitration in the municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes." JEFFERSON, 78 Wis. 2d at 112. Whether the Union is right or wrong on the merits is irrelevant for the purposes of this proceeding. Seeking resolution of the parties' dispute by way of grievance arbitration is consistent with the Legislature's stated public policy, and it is the City's refusal to arbitrate which has caused the frustration, expense and delay which legislative policy is designed to avoid. Finally, the Union asserts that the City's failure to address the Union's claim for attorney's fees and costs in its initial brief or to seek such relief on its own behalf, constitutes a waiver of that issue.

City

First, the City asserts that there is no serious dispute, in fact or in law, that recommending a person for promotion does not constitute a "promotion". This is consistent with Gentilli's testimony that he understood that he had to serve a 12-month probationary period in the new position, that the probation could be revoked, and that he was not promoted to the new position until he had passed probation and his name had been submitted for final confirmation by the PFC. This is also consistent with the rules of the City's PFC 1/ and with Kinney's testimony. Since Gentilli's probation was revoked before it ended, he was not submitted to the PFC for confirmation and was therefore not "promoted" and was instead returned to Firefighter. The City also asserts that Kinney's testimony regarding his conversation with Spartz, wherein Spartz acknowledged that the Union could not grieve the matter or go to the PFC in that regard and Spartz' frustration with the situation, establishes the Department's long-established management right to revoke probation, whether for a newly-hired employe or on a recommendation for promotion, without any right of appeal. The City also notes Spartz' testimony that he had no recollection of the conversation with Chief Kinney and asserts that his speculation on what he would have said or might have said can be accorded no weight, as that speculation is totally self-serving.

The City also asserts that its position is consistent with the Circuit Court's decision in HINKES V. BOARD OF POLICE FIRE COMMISSIONERS, ET. AL, (unpublished opinion) and with the Union's lack of action in this regard over the years. The Union has made no serious attempt to bargain the issue of review of a decision to revoke probation and provided no testimony that there was any attempt to challenge that non-reviewability over the long history of its use, until this case. The City also asserts that the grievance filed in this case alleged only violations of Article 5, Sections J and K, and notes that, the Union's current president alleged in his testimony that the actions also violated Article 5, Sections B, C and D. The City objects to having to address these latter allegations, as they have not been grieved.

By way of argument, the City first asserts that there is no dispute that the right of management to revoke the probation of newly-hired employes has been existence for as long as anyone can recall and that similarly, the right to revoke the probation of an employe recommended for promotion, with the resulting return to his/her former position, has been in existence for almost the same period of time. Further, PFC rule 5.04 has been in existence for a number of years as well. That rule clearly establishes that there is no appeal to the PFC from either of the above-mentioned management decisions. The rule also reflects the Department's practice, as supported by law. In that latter regard, the Wisconsin Supreme Court's decision in KAISER V. BOARD OF POLICE AND FIRE COMMISSIONERS, 104 Wis. 2d, 498 (1981) dealt with the issue of whether a newly-hired employe on probation had the right to have charges filed and to a hearing before the PFC when the employe was terminated after failing to make probation:

> Kaiser was not disciplined; he was terminated as not suited for service as a police officer.
>
> Sec. 62.13(4)(d), Stats., provides that boards of police shall examine candidates to determine their qualifications. The rules governing examination shall be "calculated" to secure the best service in the departments. There is no doubt that the use of a probationary period is an excellent means of examining candidates and is well-suited to securing the best service available. It enables the board to better evaluate a potential officer's skill and character. Probation is a continuation of the hiring process.
>
> At 104 Wis. 2d, 503, 504.
>
> . . .
>
> Kaiser did not have a constitutional right, nor statutory right, to a statement of specifications and a hearing on the City of Wauwatosa's decision not to retain him for this nontenured appointment. RICHARDS V. BOARD OF EDUCATION, 58 Wis. 2d 444, 206 N.W. 2d 597 (1973).
>
> 104 Wis. 2d at 506.

Further, in 1992, a former City firefighter, Hinkes, in a situation similar to Gentilli's, began a lawsuit in an attempt to force the Fire Chief to file charges with the PFC, and to force the PFC to hold a hearing on the matter. In both HINKES and here, the actions arose after the revocation of a promotional probation and the return of an employe to a former position. The Circuit Court, in refusing to order the filing of charges or the holding of a hearing, held:

> "A person thus cannot be promoted and begin service at the new rank until the PFC approves this step (approval of promotion)."
>
> . . .
>
> "Thus, the action of the chief to revoke petitioner's probation on June 16 of 1991 did not constitute a suspension, a reduction in rank, a demotion, or a removal, and thus did not require charges to be filed with the Police & Fire Commission. It was no more than a failure to continue the hiring process which the court in KAISER concluded did not require a hearing."

The Circuit Court's decision was not appealed.

Together, KAISER and HINKES establish that there is no promotion until the employe passes probation and is confirmed by the PFC, and that the revocation of probation of either a newly-hired employe or an employe seeking promotion is neither discipline nor demotion. Thus, eliminating the contentions that Gentilli was "promoted" or that Article 5, Section D of the Agreement relating to demotion or disciplinary action was in any way violated. There is nothing in that provision that allows for any "interpretation" of the Agreement when the matter has been conclusively settled by previous judicial action. Those decisions also explain Spartz' frustration and his comment to Kinney, as it would be incredible that as an active union member and then president, he would not know of the HINKES decision. Even if he did not, the Union must be held to have known of it. The Union has never grieved the separation from service of a newly-hired employe whose probation has been revoked. While Hinkes did file a grievance, the Union was made aware of the City's position that the matter was not grievable or arbitrable, and never pursued the grievance after the HINKES decision. Although Hinkes was awarded a disability retirement, the grievance involved undisputed facts and the Union could have pursued it if it had wished to do so. The City asserts that this evidence is not offered as "past practice", but as an additional piece of evidence that the Union understood at that time that the parties' Agreement did not provide for grieving or arbitration of the matter. HINKES was decided in July of 1992 and the Agreement in force at the time relevant herein did not become effective until January 1, 1994, yet the Union made no attempt to bargain over the grievability/arbitrability of this issue or the abrogation, delegation or modification of the management rights to revoke probation, even though bargaining took place after Gentilli's probation had been revoked. The foregoing establishes a clear and positive understanding by the parties prior to the filing of the instant grievance that management's right in this area was well-settled, and that the decision to revoke probation of an employe recommended for probation is neither grievable nor arbitrable under the Agreement.

The City next asserts that the Agreement's language is the foundation for its position. Article 5 reserves and retains all management rights to the City and the Fire Chief ". . .which the City has not officially abridged, delegated or modified by this Agreement." Unless language in other portions of the Agreement in some fashion abridges, delegates or modifies a right listed in Article 5, there is no limitation on the exercise of that right. Absent such limiting language, Article 9, Section Q,2, protects the exercise of that right against the arbitration of matters over which management has reserved rights under Article 5, specifically as to matters relating to a dispute over, not in abrogation of, such rights. That is the entire purpose of Section Q,2 as there can be no other logical explanation for its existence. With regard to the alleged violation of Article 5, Section J, of the Agreement relating to work rules and rules of conduct, the City asserts it cannot see how its decision to revoke Gentilli's promotional probation relates to a work rule. Nothing in the record identifies which work rule might be involved, nor is there any evidence that Gentilli violated any such rule. The City also does not understand Conway's assertion that the matter involves management's right to manage or direct employes under Article 5, Section B. Regardless, there are no limitations in the contract limiting the exercise of those

rights in relation to this incident. The City asserts that it has already established the inapplicability of Article 5, Section D as revocation of probation is neither discipline nor demotion. The City also asserts that there is no issue raised as to transfer under Article 5, Section C, as only the rights to assign, promote or hire are even remotely implicated. The parties' Agreement reserves every management right to the City and Fire Chief unless, "officially abridged, delegated or modified", by the Agreement, and disputes with respect to management rights are not arbitrable pursuant to Article 5, Section K. Since all words and phrases of a contract should be given credence, this can only mean that unless a "right" is applied in a fashion contrary to an official abridgement, delegation or modification of that right in the agreement, that right is not arbitrable. The City asserts that there is no language in the Agreement limiting management's authority to assign personnel to a given fire station, and there is no language limiting the authority of management to revoke promotional probations under any circumstances and the right to promote, as it pertains here, is also unfettered. Thus, there is a dispute over those retained rights, but not the application of those rights.

While the parties may officially agree to abrogate, delegate or modify management rights, "officially" in the context of the Agreement must mean that it is expressed in the Agreement itself, e.g. discipline only for just cause per Article 5, Section D. Management action contrary to such provisions is grievable and arbitrable. The key distinction between a dispute over an application of a management right, and thus its arbitrability, is the official and knowing abridgement, delegation, or modification of a management right, which must be specifically expressed in the Agreement. A requirement for a clear expression of the limitation of a management right is critical in this case. Spartz acknowledged the absolute right of the Department to revoke probationary periods for new hires, and to separate those employes from service, even though there is no specific language in the contract authorizing that action. Since management has reserved to itself all of its rights unless limited by specific language of the contract, such a specific grant of authority is not required. Still the Union asserts that employes such as Gentilli are entitled to grieve and arbitrate the revocations of their promotional probations, even though there is nothing in the contract which limits management's authority to revoke promotional probations. There is also nothing in the record suggesting that the matter has ever been brought up in negotiations at any time. The City concludes that it is "absolutely inconceivable", considering the foregoing, that the parties' Agreement could be interpreted in a manner that the City had agreed to arbitrate a decision to revoke promotional probation as a "hire" or anything else, or that the action was appealable as discipline or a demotion.

The City asserts that collective bargaining agreements are designed to establish a relationship between the parties and that each clause and phrase is included to express that relationship and must be accorded significance, including management rights provisions and the clause limiting the matters subject to arbitration. Attempts at "back door interpretations" and arguments pressed beyond "the limits of credulity" undermine the working relationships that such agreements are designed to establish. Accepting the Union's position in this case would

constitute a "serious conceptual remaking of the underpinnings of the whole probationary theory" as it would nullify the contractual provisions and turn everything in the management rights provision into an abitrable "application".

In its reply brief, the City asserts that while it does not disagree with the general principles outlined in the case law cited by the Union, those cases do not stand for the proposition that a party will be forced to arbitrate an issue that the parties have agreed is not subject to arbitration. The City also asserts that the Union has failed to address the issue of what constitutes a "promotion", as well as the long-standing understanding of its own representatives regarding the Department's ability to revoke probation in situations involving both new hires and tenured employes recommended for promotion. The Union merely assumes away all of these problems and issues, e.g., it assumes that the recommendation to promote the grievant, subject to completing probation, constituted a "promotion" and that the revocation of that probation constituted a "demotion", contrary to both the history and the language of the parties' Agreement. Under the Union's view of the law and the facts of this case, there is nothing that is not arbitrable. That view conveniently erases the language of the Agreement limiting matters which may be subject to arbitration and the limitations on the authority of arbitrators. The Union must be held to the agreement it made, including binding it to abide by the non-arbitration clauses it accepted in entering into the Agreement. The Union's position in this case is designed to evade that Agreement regarding the non-arbitrability of certain management rights, including the right to revoke promotional probations. Thus, the grievance must be held to be non-arbitrable.

DISCUSSION

This case involves the alleged violation of Sec. 111.70(3)(a)5, Stats., by the City's refusal to arbitrate the Gentilli grievance. Section 111.70(3)(a)5 provides, in relevant part, that it is a prohibited practice for a municipal employer:

> "To violate any collective bargaining agreement previously agreed upon by the parties. . ., including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award where previously the parties have agreed to accept such award as final and binding upon them.

The law in this State with respect to enforcing an agreement to arbitrate is well-settled. In DENHART V. WAUKESHA BREWING COMPANY, INC., 17 Wis. 2d 44 (1962), the Wisconsin Supreme Court adopted the U.S. Supreme Court's view of a court's limited function in these cases, as is expressed in its decisions in the *Steelworker's Trilogy*. 2/ In its decision in JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, supra, the Wisconsin

Supreme Court explained a court's function and the test to be applied in determining arbitrability:

> The court has no business weighing the merits of the grievance. It is the arbitrators' decision for which the parties bargained. . .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.
>
> 78 Wis. 2d at 111.
>
> An 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 dispute. Doubts should be resolved in favor of coverage.
>
> 78 Wis. 2d at 113.

The question to be answered is whether or not the parties have agreed to arbitrate the matters raised in Gentilli's grievance, remembering that doubts should be resolved in favor of finding that they have.

The parties' Agreement provides, in relevant part, as follows:

> ARTICLE 9
>
> 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.
>
> . . .
>
> H. 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.

> I. 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.
>
> . . .

Thus, to be grievable and subject to arbitration, a matter must involve the "interpretation, application or enforcement" of a term of the Agreement. The grievance in this case alleges, in relevant part:

> On or about November 29, 1995, the Madison Fire Department arbitrarily and capriciously revoked grievant's status as an Apparatus Engineer. The labor agreement between the City of Madison and IAFF Local 311 requires that the Fire Department exercise its' managerial rights, including the right to promote and demote, in a reasonable manner. Fire Department Administration acted unreasonably in this situation.

Contrary to the City's assertion that the original grievance only alleged violations of Article 5, Sections J and K, the grievance also alleges that management exercised its right to revoke Gentilli's promotional probation in an arbitrary and capricious manner and exercised its rights to promote and demote in an unreasonable manner. The City's assertions that its right to promote or demote are not susceptible to challenge here because it has not in fact taken such actions in this case, are not well-taken. In those regards, the City relies upon the Wisconsin Supreme Court's decision in KAISER, supra, and the Circuit Court's decision in the HINKES case. The KAISER case, however, involved the revocation of the probationary status, and resulting termination, of a newly-hired police officer and that individual's rights with regard to a police and fire commission. The Court, in reaching its decision in KAISER, found that, due to his probationary status under Sec. 165.85, Stats., Kaiser was not a subordinate within the meaning of Sec. 62.13(5), Stats. (the basis for the rights he was claiming) in that he was not a police officer until he passed probation. 104 Wis. 2d at 501-503. Due to the factual differences in the cases and the differences in the bases of the rights being claimed, the Court's decision in KAISER may provide some guidance as to the effect of being considered to be on "probationary" status, but it is not dispositive. Similarly, while the HINKES case involved the removal of an employe from promotional probation, as does this case, the Circuit Court's decision dealt with Hinkes' rights before the Police and Fire Commission, not with his rights under a collective bargaining agreement. Again, the decision may provide guidance in some regards, but it is not dispositive of Gentilli's right to proceed to arbitration under the parties' Agreement. The determination of whether Gentilli was "promoted", "demoted" or "disciplined" are factual calls for an arbitrator to make. The Examiner would also add at this point that the evidence presented as to the Union's handling of the grievances filed in the HINKES case presents a number of possible bases for the Union's ultimate decision not to pursue them, other than acknowledgement of an unchallengeable management right. It is clear from the foregoing that, on its face, the grievance

arguably raises issues involving the "interpretation, application and enforcement" of terms of the parties' Agreement, and therefore meets the first element of the Court's analysis in JEFFERSON.

The first element of the test in JEFFERSON having been met, it is necessary to apply the second element of that analysis, i.e., to determine whether there is a provision of the parties' Agreement that specifically excludes such matters from arbitration. In this regard, the City relies upon the introductory paragraph of Article 5, Management Rights, and Section K of that same provision, and Article 9, Section Q, 2, of the Agreement. The City argues that, when read together, these provisions mean "that unless a 'right' is applied in a fashion contrary to an official abridgment, delegation or modification in the Agreement, it is not arbitrable." The City's assertion that there are no applicable official abridgments, delegations or modifications clearly and expressly set forth in the Agreement that limit its rights in this case, ignores the express modification of its right to exercise its management rights set forth in the remainder of Article 5, Section K. That provision expressly provides that "any grievance with respect to the reasonableness of the application of said Management Rights may be subject to the grievance procedure contained herein." It is also noted in this regard that the parties use essentially the same terms in Article 9, Section I, to define what is arbitrable as they use in Article 9, Section A, to define what is grievable, i.e., issues regarding the "interpretation, application or enforcement" of the provisions of the Agreement. Thus, while the City's construction of the arbitration clauses in the parties' Agreement may be a reasonable one, it is not the only possible construction and the wording of those clauses is not so clear and unambiguous that it may be said with positive assurance that those provisions are not susceptible of an interpretation that covers this dispute. It must also be remembered that "doubts are to be resolved in favor of coverage." JEFFERSON, 78 Wis. 2d at 113. Therefore, it has been found that the parties' dispute is arguably covered by the Agreement's arbitration clauses and is not specifically excluded.

It is also noted that Gentilli's grievance alleges a violation of Article 5, Section J of the Agreement. That provision relates to management's right to establish work rules and expressly provides the right to grieve and arbitrate the reasonableness of the application of such work rules. The Union has alleged that it would show that Gentilli had been involved in a heated discussion with Division Chief Aldworth and that he was subjected to an additional requirement in his probation, unlike anyone else, and that he had his probation revoked because he did not meet that requirement. Whether or not the Union can sufficiently establish such facts, and whether doing so would establish the unreasonable application of a work rule, are issues for an arbitrator to decide.

For the foregoing reasons, the Examiner has concluded that by refusing to proceed to arbitration on the Gentilli grievance, the City has violated Sec. 111.70(3)(a)5, and derivatively, Sec. 111.70(3)(a)1, Stats.

With regard to the Union's claim for costs and attorney's fees, there has been no award made in that regard as it has not been found that the City's position in this case was "frivolous", a prerequisite to ordering such relief. WISCONSIN DELLS SCHOOL DISTRICT, Decision No. 25997-C (WERC, 8/90).

Dated at Madison, Wisconsin this 20th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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David E. Shaw, Examiner

ENDNOTES

1/ 5.04 All promotional appointments shall be probationary for 18 months unless extended by the appointing authority for a longer probationary period. During said probationary period, the Chief may reduce the person appointed to that person's former rank. The appointee shall not be entitled to an appeal to the Board from the termination of a probationary appointment or any reduction in rank which results therefrom.

5.05 Promotional/probationary periods will expire automatically after twelve (12) months of time unless the Chief of the Department requests an extension for a longer probationary period.

2/ UNITED STEELWORKERS V. AMERICAN MFG. CO., 363 U.S. 564 (1960); UNITED STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574 (1960); UNITED STEELWORKERS V. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593 (1960).

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