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-B

Appearances:

Lawton & Cates, S.C., by **Attorney John C. Talis,** 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, 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 Respondent City of Madison.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 20, 1997, Examiner David E. Shaw issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that the Respondent City of Madison had committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1, Stats., by refusing to arbitrate a grievance. He ordered Respondent to proceed to arbitration.

On December 9, 1997, Respondent filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed briefs in support of and in opposition to the petition, the last of which was received February 19, 1998.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 30th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I concur

James R. Meier /s/
James R. Meier, Chairperson

City of Madison

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PLEADINGS

In its complaint, Local Union No. 311, International Association of Fire Fighters, AFL-CIO alleges that the City of Madison has violated Secs. 111.70(3)(a)5 and 1, Stats., by refusing to arbitrate a grievance. In its answer, the City asserts that the grievance raises issues which are not arbitrable under the parties' labor agreement and that its conduct did not violate Secs. 111.70(3)(a)5 or 1, Stats.

THE EXAMINER'S DECISION

The Examiner found that the City was obligated to arbitrate the grievance and that its refusal violated Secs. 111.70(3)(a)5 and 1, Stats. He reasoned as follows:

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.
>
> . . .
>
> 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 acknowledgment of an unchangeable 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. (footnote omitted)

POSITIONS OF THE PARTIES ON REVIEW

The City

The City contends the Examiner erred when he concluded that the City violated Secs. 111.70(3)(a)5 and 1, Stats., by refusing to arbitrate the promotion grievance in question. The City asks that the Examiner be reversed and the complaint dismissed.

The City asserts that under the holdings of HINKES V. BOARD OF POLICE & FIRE COMMISSION, (CIRCT-DANE) 91 CV 4422; KAISER V. BOARD OF POLICE & FIRE COMMISSION, 104 WIS.2D 498 (1981); MILWAUKEE POLICE ASSOCIATION V. CITY OF MILWAUKEE, 113 WIS.2D 192 (1983); and CITY OF JANESVILLE V. WERC, 193 WIS.2D 492 (1995), it is clear that the City of Madison Police and Fire Commission (PFC) has exclusive and supreme statutory authority over all matters related to promotions and that no contract provision can allow an arbitrator to intrude into the PFC's statutory power. The City alleges that the record establishes the Complainant's awareness of the supremacy of the PFC and understanding that it

has no right to arbitrate grievances over the termination of an employe's probationary period – whether that probationary period relates to an initial hire or to an employe who has been promoted on a probationary basis. The City argues that the Examiner failed to accept the exclusive nature of the PFC's authority when deciding this case.

The City emphasizes that because of the exclusive nature of the PFC's statutory authority, the language of the contract does not and cannot control the outcome of this case. The City contends that it cannot give the arbitrator power to overturn promotional/probationary decisions which fall within the exclusive statutory authority of the PFC. Thus, the presence or absence of contractual language limiting the scope of what is arbitrable is irrelevant to the outcome of this case. The authority of the PFC does not depend on the presence of contract language.

The City urges the Commission to reject the Complainant's attempts to draw distinctions between the probationary period applicable to new hires and probationary periods related to promotions. In both instances, the probationary period serves as a selection tool and the City argues that selection for promotion is indistinguishable from selection for hiring. Both types of probation ultimately relate to matters requiring PFC approval-promotion and hiring. The PFC rule giving the Fire Chief authority to act on behalf of the Commission in matters of promotional probationary periods is a valid exercise of the PFC's statutory authority. The Chief's exercise of PFC's exclusive statutory authority cannot be subject to an arbitrator's authority.

Given the foregoing, the City asks that the Examiner be reversed.

The Complainant

Complainant urges affirmance of the Examiner. It argues that the City's position in this litigation blithely disregards the strong statutory policy in Wisconsin favoring arbitration of disputes in municipal employment and ignores the application of JOINT SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D 94 (1978) to the language in the parties' contract. The Complainant contends the Examiner properly applied JEFFERSON when he concluded the City was obligated to arbitrate the grievance.

Complainant contends the Examiner properly ignored the City's attempt to litigate the merits of the grievance as part of its effort to avoid arbitration. Complainant asserts the merits of the grievance are irrelevant to the issue of arbitrability.

Complainant disputes the City's contention that permitting arbitration will impermissibly intrude on the statutory authority of the PFC. Complainant contends the PFC has specifically indicated in this case that it has no jurisdiction over the matter. Thus, Complainant argues that there can be no conflict with PFC authority if the grievance is arbitrated and that the holding of CITY OF JANESVILLE is therefore inapplicable to this case.

Complainant also asserts the City has failed to establish any actual conflict between the provisions of Chapter 62 and arbitration of this grievance. The Complainant argues that Sec. 62.13 (4)(a), Stats. does not grant the PFC the power to promulgate and enforce rules regarding promotion and thus that arbitration of the grievance does not conflict with the PFC's statutory power.

Even if the PFC's rules are valid, Complainant contends they cannot override conflicting provisions of the Municipal Employment Relations Act, particularly where, as here, the PFC has disclaimed jurisdiction. Complainant asserts the City and Complainant have the bilateral right to bargain a contract which requires arbitration of unresolved grievances as to matters over which the PFC has no jurisdiction.

Lastly , Complainant urges close examination of the KAISER and CITY OF MILWAUKEE cases cited by the City. KAISER involves a statutory provision (Sec. 165.85(4)(b), Stats.) which is inapplicable to firefighters and, most importantly, presents contractual language far more restrictive than that at issue herein. Thus, KAISER is inapplicable to this dispute. CITY OF MILWAUKEE also involves statutory provisions inapplicable to firefighters and raised the question of whether the termination of police officers during their probationary period was arbitrable -- not the arbitrability of a promotional dispute involving an 18-year firefighter. Complainant also points out that in CITY OF MILWAUKEE, the Court noted that the case before it did not involve promotion of permanent employes, a matter found appropriate for collective bargaining in GLENDALE PROFESSIONAL POLICEMAN'S ASSOCIATION V. CITY OF GLENDALE, 83 WIS.2D 90 (1978).

Given all of the foregoing, Complainant asks that the Examiner's decision be affirmed.

DISCUSSION

On appeal, the City has largely abandoned the arguments made to the Examiner and instead focused on a contention that the statutory authority of the PFC and the Fire Chief over promotions cannot be limited by contract. Perhaps this abandonment is because the Examiner so persuasively rejected the arguments the City made to him. In any event, we think it clear that the Examiner properly applied the teachings of JEFFERSON to the contract language in question when he concluded that the Gentilli grievance is substantively arbitrable. We adopt the Examiner's above-quoted reasoning as our own.

In effect, the City now argues that even if a conventional JEFFERSON analysis would produce a conclusion that the Gentilli grievance is substantively arbitrable, that conclusion is overridden by the exclusive statutory power of the PFC and the Chief. In essence, the City contends that it does not have the authority to contractually limit the promotional power of the PFC and the Chief through a collective bargaining agreement . We would initially note that this argument presumes that the Gentilli grievance only involves contractual rights related to promotions. As is evident from the above-quoted portions of the Examiner's decision, the grievance also raises potential issues regarding demotion, discipline, and application of work rules. However, even assuming the issues to be arbitrated can be restricted to a promotional context, we do not find the City's argument persuasive.

The City raises its defense within the following statutory and factual context.

Section 62.13(4)(a), Stats., provides:

> SUBORDINATES. (a) The chiefs shall appoint subordinates subject to approval by the board. Such appointments shall be made by promotion when this can be done with advantage, otherwise from an eligible list provided by examination and approval by the board and kept on file with the clerk.

Section 62.13(6)(a)1, Stats. provides:

> OPTIONAL POWERS OF BOARD. (a) The board of fire and police commissioners shall have the further power:
>
> To organize and supervise the fire and police departments and to prescribe rules and regulations for their control and management.

The Rules and Regulations of the Board of Police and Fire Commissioners of the City of

Madison, Wisconsin (PFC) provide in pertinent part:

> Appointments to Commissioned Positions within the Police and Fire Departments, other than the Positions of Police Officer and Firefighter. (emphasis in original)
>
> 5.01 The following rules apply to the appointment to commissioned positions within the police and fire departments other than the positions of Police Officer, Firefighter or Chief.
>
> 5.02 The Chief shall appoint subordinates subject to approval by the Board. Such appointments shall be made by promotion when this can be done with advantage otherwise from an eligible list provided by examination.
>
> . . .
>
> 5.04 All promotional appointments shall be probationary for 12 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. (emphasis added)
>
> 5.05 Promotional probation periods will expire automatically after twelve (12) months period of time unless the Chief of the Department requests an extension for a longer probationary period.

By letter dated December 6, 1994, Fire Chief Roberts advised the PFC as follows:

> I respectfully request your approval to promote the following individuals to the position of Fire Apparatus Engineer effective January 1, 1995:
>
> . . .

The letter listed the names of 55 employes including Chris Gentilli.

The minutes of the December 12, 1994 PFC meeting state in pertinent part:

> Fire Department Promotions. Asst. Ch. Kinney presented Chief Robert's recommendation for the promotions to the new rank of Fire Apparatus Engineer shown on the Chief's letter of December 6, 1994, attached. Motion: to approve promotions to the rank of Fire Apparatus Engineer pursuant to the recommendations of Chief Roberts dated December 6, 1994, effective Jan. 1, 1995, subject to standard probation in rank. (McMurray: unanimous consent)

By letter dated November 29, 1995, Chief Roberts advised Gentilli as follows:

Dear Firefighter Gentilli:

I am revoking your Apparatus Engineer probation effective immediately.

On December 22, 1995, the Union filed the following grievance on Gentilli's behalf:

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.

The grievance was denied.

The Union also requested a hearing before the PFC "concerning the demotion of Chris Gentilli. . . ." By letter dated January 4, 1996, the PFC responded as follows:

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,

. . .

In GLENDALE PROF. POLICEMEN'S ASSO. V. GLENDALE, 83 WIS.2D 90 (1978), our Supreme Court laid out the law and analytical framework within which this City defense must be considered. In GLENDALE, the Court was confronted with the question of whether the same statutory promotion language before us in this proceeding (i.e. Sec. 62.13(4), Stats.) could be reconciled with the promotion provision of a collective bargaining agreement. The Court held as follows:

Is the promotion provision of the collective bargaining agreement enforceable?

Sec. 62.13, Stats., is a provision of the general charter law which applies to all cities except cities of the first class, *i.e.,* Milwaukee. In Wisconsin, municipalities have no inherent power to govern, and the general charter law, like the special charter legislation before it, is the necessary enabling legislation setting out the areas in which local government can enact legislation. VAN GILDER V. CITY OF MADISON, 222 WIS. 58, 85, 268 N.W. 108, 109 (1936).

Sec. 62.13, Stats., governs the organization of police and fire departments. Subsection (4)(a) states that "The chiefs shall appoint subordinates subject to the approval of the board." Sec. 62.13(12), Stats., states that "The provisions of section 62.13 . . . shall be construed as an enactment of state-wide concern for the purpose of providing a uniform regulation of police and fire departments."

The City contends that by making the chief's appointments subject only to approval by the board, sec. 62.13(4)(a), Stats., vests unfettered discretion in the chief concerning promotion of subordinates, restricted only by the requirement of board approval. The City argues that a contract term requiring the chief to promote the most senior qualified candidate cannot be reconciled with sec. 62.13(4)(a). The City contends further that, since sec. 62.13(4)(a) is a statewide concern prompted by an effort to achieve uniformity in city organization, a provision of a labor agreement restricting this discretion is illegal. 3/

A labor contract may not violate the law. In WERC V. TEAMSTERS LOCAL NO. 563, SUPRA, we held that a contract provision interpreted to permit an employee to violate an ordinance requiring him to live within the city was illegal. In DURKIN V. BOARD OF POLICE & FIRE COMMISSIONERS, 48 WIS.2D 112, 180 N.W.2D 1 (1970), we held that an amnesty clause in a contract could not foreclose an elector from exercising his statutory power to file disciplinary charges with the board. However, we are not persuaded by the City's argument that the promotion provision of this labor agreement is void because it violates sec. 62.13(4)(a), Stats.

[7]

Although sec. 62.13(4)(a), Stats., requires all subordinates to be appointed by the chief with the approval of the board, it does not, at least expressly, prohibit the chief or the board from exercising the power of promotion of a qualified person according to a set of rules for selecting one among several qualified applicants. In fact, the record shows that the Chief of Police has already accepted limitation of his discretion to promote by considering as qualified only those three candidates recommended to him by the Board. A labor contract requiring the chief to appoint the most senior qualified candidate does not contradict an express command of law. *Compare:* WERC V. TEAMSTERS LOCAL NO. 563, SUPRA. It does not purport to take away a power expressly conferred by law. *Compare:* DURKIN V. BOARD OF POLICE & FIRE COMMISSIONERS, SUPRA. A requirement that the chief promote

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3/ We note that the same contention could not be made if the employer were the City of Milwaukee. Sec. 111.70(4)(jm)4.d., Stats., provides that at a collective bargaining impasse between the City of Milwaukee and representative of the police department a promotional program can be established by an arbitrator.

the most senior qualified applicant merely restricts the discretion that would otherwise exist. 4/ The City appears to concede that the Chief himself can decide to limit his discretion without violating sec. 62.13(4)(a), Stats. We conclude that the same can be done through a labor agreement ratified by the Common Council.

[8]

Moreover, as a municipal employer under sec. 111.70(1)(a), Stats., the City of Glendale must bargain with the chosen representatives of the municipal employees concerning "wages, hours, and conditions of employment," the mandatory subjects of collective bargaining under sec. 111.70(1)(d).

BELOIT EDUCATION ASSO. V. WERC, SUPRA. Promotions are a condition of employment and are subject to mandatory collective bargaining. Because a promotions provision of this collective bargaining agreement is directly authorized by sec. 111.70, Stats., we are constrained to give effect to both the agreement and the statutes if this can be done.

[9]

MUSKEGO-NORWAY CONSOLIDATED JT. SCHOOL DIST. NO. 9 V. WISCONSIN EMPLOYMENT RELATIONS BOARD, 35 WIS.2D 540, 556, 151 N.W.2D 617 (1967), we held that sec. 111.70, Stats., should be harmonized with other statutes whenever possible and that the provisions of sec. 111.70 can modify preexisting statutes. Specific contract provisions authorized by MERA must also be harmonized with the preexisting statutory scheme. In JOINT SCHOOL DIST. NO. 8 V. WISCONSIN EMPLOYMENT RELATIONS BOARD, 37 WIS.2D 483, 492, 155 N.W.2D 78 (1967), we held that matters concerning wages, hours, and conditions of employment which are fixed by the school statutes in ch. 40 cannot be the subject of collective bargaining, but that "[w]hat is left to the school boards in respect to the school calendar is subject to compulsory discussion and negotiation." 5/ This conclusion was based, at least in part, on the conclusion that because sec. 111.70, Stats., was enacted after ch. 40, it is presumed to have been enacted with full knowledge of the preexisting statutes and that these statutes should be harmonized by construction.

4/ Prior to the existence of a labor contract, an employer has all rights connected with promotions and transfers, and the employer need pay no heed to seniority. See: Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534-5 (1962). This freedom with regard to promotions and transfers can be limited by a collective bargaining agreement using seniority as a system of employment preference. It has been said that "one of the principal purposes for entering into a collective bargaining agreement is usually to secure for the employees the prized right of seniority in case of layoff and promotion." COURNOYER V. AMERICAN TELEVISION & RADIO COL., 249 MINN. 577, 581, 83 N.W.2D 409 (1957).

Again, in BOARD OF EDUCATION V. WISCONSIN EMPLOYMENT RELATIONS BOARD, 52 WIS.2D 625, 638, 191 N.W.2D 242 (1971), the court held that sec. 118.21(4), Stats., which provides in part that "School boards may give to any teacher, without deduction from his wages, the whole or part of any time spent by him in attending a teachers' . . . convention . . .," gives school boards discretion as to whether teachers individually or collectively will be given time off to attend conventions, how much time off, how many conventions, or whether the time off shall be with or without pay in whole or in part. But the court also held that "although the final determination must rest with the board of education, it is a subject upon which the board . . . must negotiate with the representative of the majority labor organization representing the teachers." 52 WIS.2D AT 639.

Finally, in RICHARDS V. BOARD OF EDUCATION, 58 WIS.2D 444, 206 N.W.2D 597 (1973), a school board relieved a teacher of his coaching assignment without notice and a hearing. This was permitted by sec. 118.22, Stats. but it violated the grievance provisions of the collective bargaining agreement. In its original opinion the court concluded that:

"[The defendant, subject to sec. 118.22, Stats., was empowered to relieve the plaintiff of his coaching assignment without prior notice and the requirement of a common-law hearing. To the extent that the master agreement purports to limit this power, it is void.]" RICHARDS V. BOARD OF EDUCATION, SUPRA AT 460A.

On motion for rehearing this language was withdrawn. In its stead the court substituted in pertinent part:

"Under the act, a school district is considered to be a 'municipal employer,' sec. 111.70(1)(a), Stats., and this court has no difficulty in concluding that a grievance procedure established by a collective bargaining agreement, and relating to dismissals falls within the embrace of 'wages, hours and conditions of employment,' and that the conditions of such an agreement are binding on the parties. *See*, our opinion in LOCAL 1226 V. RHINELANDER (1967), 35 WIS.2D 209, 151 N.W.2D 30." RICHARDS V. BOARD OF EDUCATION, SUPRA, AT 460B.

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

[10]

The relationship between public sector bargaining agreements and other statutes governing terms and conditions of employment can be one of the most difficult issues in public sector labor law. 6/ As one commentator has pointed out, a rule giving automatic priority to the statute can reduce the statutory duty to bargain into insignificance, while a rule giving automatic priority to the agreement can result in effective repeal of state Law. 7/ The scope of the employer's duty to bargain under sec. 111.70, Stats., in light of the other statutes, is particularly difficult because sec. 111.70, Stats., does not contain a legislative resolution of any statutory conflicts as does the State Employment Labor Relations Act, secs. 111.80-97, Stats. The State Act provides that the labor agreement supersedes provisions of civil service and other statutes related

to wages, hours, and conditions of employment. Sec. 111.93, Stats. In the absence of such a legislative resolution of the problem in sec. 111.70, Stats., et seq., we have held that collective bargaining agreements and statutes also governing conditions of employment must be harmonized whenever possible. When an irreconcilable conflict exists, we have held that the collective bargaining agreement should not be

interpreted to authorize a violation of law. WERC V. TEAMSTERS LOCAL NO. 563, SUPRA.

[11]

The labor agreement in this case can be harmonized with sec. 62.13(4)(a), Stats. The statute vests authority in the chief to appoint subordinates with the approval of the board. Appointments are to be made by promotion within the ranks "when this can be done with advantage," presumably when qualified insiders exist. Under the labor agreement, the chief is under no compulsion to promote an unqualified person or a person determined solely by the union. The seniority restriction operates only where there is more than one qualified candidate. Nothing in sec. 17.01 of the labor contract requires an appointment by promotion of the most senior officer if there are no qualified candidates within the police force or in other City employment. The arbitrator found Officer Kerber to be qualified, and the City does not challenge that determination. Although by entering into the collective bargaining agreement the City relinquished some of the discretion the Chief and the Board enjoyed previously concerning appointments and promotions, it has not transferred from the Chief or the Board the authority to determine who is qualified, and it has not transferred away the appointing authority.

6/ *See generally*: Comment, The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation, 38 U. Chi. L. Rev. 826 (1971); Weisberger, The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience, 1977 Wis.L.Rev. 685 (1977).

7/ Weisberger, The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience, supra N. 6 AT 740.

[12]

Our construction given effect to both the Chief's power under sec. 62.13(4)(a) and the municipality's duty to bargain under sec. 111.70, Stats. Sec. 62.13(4)(a) is enabling legislation which places the exercise of discretion in a certain office, while sec. 111.70 permits the City to limit the scope of this discretion through a collective bargaining agreement. The Common Council has not, as the City contends, bargained away a power possessed by the Chief that is not the City's to bargain. In ratifying the agreement, the Council has effectuated the municipal employer's statutory duty to bargain on conditions of employment and has preserved the statutory requirement that only qualified persons be appointed.

Because we have concluded that the contract and the statute can be harmoniously construed, we are not persuaded that the promotions provision of the contract violates the home rule amendment. The home rule amendment provides in part that "Cities . . . organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city . . . ." Wis. Const., art. XI, sec. 3. Since the legislature has declared sec. 62.13(4)(a), to be a statute of statewide concern, the City contends that the contract term which limits the chief's discretion is illegal.

The home rule amendment makes a general grant of legislative power to municipalities with

respect to matters of local concern. STATE EX REL. MICHALEK V. LEGRAND, 77 WIS.2D 520, 526, 253 N.W.2D 505 (1977). It also restricts the power of cities and villages to elect not to be subject to state laws or to enact, repeal, or amend any part of their charger where the matter involved is a matter of statewide concern. VAN GILDER V. CITY OF MADISON, SUPRA. On the other hand, the fact that a state statute is one of statewide concern does not make invalid all local regulation in the area covered by the statute. The home rule amendment limits a municipality's power to veto, block, or withdraw from legislation of statewide concern, but it does not prohibit the legislature from authorizing local regulation to further proper public interests, even in areas of statewide concern. MENZER V. ELKHART LAKE, 51 WIS.2D 70, 186 N.W.2D 290 (1971). Sec. 111.70, Stats., is legislation that specifically authorizes local action, *i.e.,* the adoption of collective bargaining agreements covering wages, hours, and conditions of employment even though statutes of statewide concern also govern wages, hours, and conditions of employment.

[13]

Thus this is not a case of a municipality in the exercise of its home rule power deciding to "withdraw" from or circumvent sec. 62.13(4)(a), Stats. Sec. 17.01 of the agreement is authorized by sec. 111.70, Stats., a statute which *also* deals with a matter of statewide concern. In entering into this agreement, the City is not illegally exercising local autonomy in an area of statewide concern but is effectuating the legislature's mandate in sec. 111.70. Under these circumstances, where the issue is the relationship between the requirements of two state laws, home rule considerations are inapplicable.

[14]

The promotions provision of the labor agreement does not violate the home rule amendment. It complements, rather than contradicts, sec. 2.13(4)(a), Stats., and for that reason the circuit court erred in declaring it unenforceable. Since the arbitrator did not exceed his powers in enforcing this contract and since no other ground for vacating the award has been alleged, we must set aside the order vacating the award and direct the circuit court to enter an order confirming the award.

By the Court. – Judgment reversed, with directions to enter an order confirming the arbitrator's award.

As reflected above, GLENDALE conclusively establishes that collective bargaining agreements can restrict the promotional authority of the PFC and Chief so long as the authority is not transferred. 1/ Thus, the question before us is whether the promotion provisions of the 1994-1995 contract between the City and the Union restrict the statutory promotional authority of the Chief and the PFC or transfer same to the arbitrator. If the contract restricts the statutory authority, the City's defense must fail. If it transfers the promotional authority to the arbitrator, then the City's defense is meritorious and it has no obligation to arbitrate the grievance.

_____

1/ The Supreme Court reaffirmed the legitimacy of contractual limitations on Sec. 62.13, Stats., power in IOWA COUNTY V. IOWA COUNTY COURTHOUSE, 166 WIS.2D 614, 619 (1992) when it stated:

A police chief is employed by and is an agent of the city. Section 62.13(1) and (3).

Furthermore, a city qualifies as a "municipal employer" under sec. 111.70(1)(j) and thus may enter into a collective bargaining agreement for its employees. It is entirely reasonable then to allow the city to modify, through a collective bargaining agreement, the hiring discretion of the police chief.

_____

In resolving this question, we find two post-GLENDALE decisions by the Supreme Court to be instructive.

In MILWAUKEE POLICE ASSO. V. MILWAUKEE, 92 WIS.2D 145 (1979), herein CITY OF MILWAUKEE I, the Court was confronted with a contention that the statutory power of the Milwaukee Chief of Police over transfers was sufficient to preclude arbitration of a grievance regarding the exercise of that power. The Court held:

AUTHORITY TO ARBITRATE.

Appellant contends that there is no provision in the collective bargaining agreement that makes a denial of a request for transfer arbitrable, and therefore the arbitrator was without jurisdiction to arbitrate the dispute.

". . . The arbitrators obtain their authority from the contract, and the task of interpreting the contract to determine whether the dispute is arbitrable and whether the arbitrator has jurisdiction is for a court." JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., 78 WIS.2D 94, 101, 253 N.W.2D 536 (1977).

". . . The arbitrator cannot, except by agreement of the parties, be the judge of the scope of his authority under the contract. . . ." *Id*. At 101, 102.

[1,2]

In this case, the collective bargaining agreement is an agreement to submit certain future grievances to arbitration. Part III, Section I.A.1 of the Agreement states:

"1. Differences involving the interpretation, application or enforcement of the provisions of this Agreement or the application of a rule or regulation of the Chief of Police affecting wages, hours, or conditions of employment and not inconsistent with the 1911 Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto shall constitute a grievance under the provisions set forth below."

The agreement does not expressly or impliedly give the arbitrator the authority to determine the scope of his jurisdiction and make a final and binding decision on the question of arbitrability. Moreover, the parties did not submit the issue of arbitrability for a final and binding decision; the parties submitted the merits of the dispute to the arbitrator, and at the same time the appellant challenged the arbitrability of the transfer question. Therefore, this court may determine the issue of substantive arbitrability – that is, whether Stabbe's grievance was arbitrable within the terms of the collective bargaining agreement.

"When the Court determines arbitrability it must exercise great caution. The court has no business weighing the merits of the grievance. It is the arbitrators' decision for which the parties bargained. In DEHNART V. WAUKESHA BREWING CO., INC., 17 WIS.2D 44, 114 N.W.2D 490 (1962), this court adopted the STEELWORKERS TRILOGY teachings of the court's limited function. 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. . . ." JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED.. ASSO., SUPRA, AT 111.

In JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., SUPRA, this court held that, although the STEELWORKERS cases involved broad arbitration clauses submitting questions of contract interpretation to the arbitrator and the contract in the case before the court contained a narrow arbitration clause, the fundamental pronouncements of the issue of arbitrability as set forth in the STEELWORKERS TRILOGY were applicable to that case.

[3]

The present case involves a broad arbitration clause, providing for arbitration of any differences arising between the parties as to the interpretation, application or enforcement of the provisions of the agreement. Therefore the grievance alleged in this case is subject to arbitration because, as state din the STEELWORKERS CASES:

"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." UNITED STEELWORKERS OF AMERICA V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574, 582, 583 (1960).

The provisions in the collective bargaining agreement to which appellant refers in order to support its contention that the matter of transfers is not arbitrable appear in Part II of the Agreement under Section C. MANAGEMENT RIGHTS, and state as follows:

"6. The City and the Chief of Police shall have the right to transfer employes within the Police Department in a manner most advantageous to the City.

"7. Except as otherwise specifically provided in this Agreement, the City, the Chief of Police and the Fire and Police Commission shall retain all rights and authority to which by law they are entitled."

But respondent contends that it is precisely that provision granting the city and chief of police the right to transfer employees "in a manner most advantageous to the City" which gave the arbitrator the authority to arbitrate the dispute.

[4]

Appellant argues that subsections 6 and 7 quoted above specifically acknowledge the statutory authority of the chief to transfer. Respondent, on the other hand, argues that the chief of police and the city improperly interpreted and applied section 6 when the chief refused to grant grievant's request for a transfer. The arguments of both parties center around the interpretation to be given to subsection 6 of Part II, C of the Agreement. Thus, a "difference involving the interpretation" of the Agreement has arisen. The arbitration clause, therefore, covers the grievance on its face and there is no other provision of the contract which specifically excludes it. JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., SUPRA.

After finding the grievance substantively arbitrable, the Court went on to consider whether the arbitrator had exceeded his authority under the contract and stated:

AUTHORITY TO MAKE THE AWARD.

Appellant contends that the arbitrator exceeded his authority in awarding that Officer Stabbe be given first consideration for transfer to District One.

[5-8]

This court has repeatedly held that it has a "hands off" attitude toward arbitrators' decisions. WERC V. TEAMSTERS LOCAL NO. 563, 75 WIS.2D 602,

611, 250 N.W.2D 696 (1977); MILWAUKEE PRO. FIREFIGHTERS, LOCAL 215 V. MILWAUKEE, 78 WIS.2D 1, 21, 22, 263 N.W.2D 481 (1977); JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., SUPRA, AT 117.

"'Judicial review of arbitration awards is very limited. The strong policy favoring arbitration as a method for settling disputes under collective bargaining agreements requires a reluctance on the part of the courts to interfere with the arbitrator's award upon issues properly submitted . . . Thus the function of the court upon review of an arbitration award is a supervisory one, the goal being to insure that

the parties receive the arbitration they bargained for.' MILWAUKEE PROFESSIONAL FIREFIGHTERS V. MILWAUKEE, SUPRA.

"The decision of an arbitrator cannot be interfered with for mere errors of judgment as to law or fact. Courts will overturn an arbitrator's award if there is perverse misconstruction or if there is positive misconduct plainly established, or if there is manifest disregard of the law, or if the award itself is illegal or violates strong public policy." JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., SUPRA, AT 117, 118.

Before the arbitrator, appellant contended that subsection 6 of Part II, C, MANAGEMENT RIGHTS, of the collective bargaining agreement gave the chief of police the sole right to decide when and where transfers are to be made. Appellant also argued that the Milwaukee City Charter gives the police chief so broad a mandate in regard to matters relating to refusal to transfer that such refusals do not constitute a grievance.

Sec. 1, Chapter 586, Laws of 1911, (formerly section 959-46d. 23 of the statutes, and presently 62.50(23), Stats.) provides:

"The chief engineer of the fire department and the chief of police of said cities, shall be the head of their respective departments and shall have power to regulate said departments and prescribe rules for the government of its members. The chief of police shall cause the public peace to be prescribed and see that all laws and ordinances of the city are enforced. He shall be responsible for the efficiency and general good conduct of the department under his control. Each of said chiefs shall have the custody and control of all public property pertaining to said departments and everything connected therewith and belonging thereto. They shall have the custody and control of all books, records, machines, tools, implements, and apparatus of every kind whatsoever necessary for use in each of said departments."

Various provisions of the collective bargaining agreement, in addition to subsections 6 and 7 of Part II, C, MANAGEMENT RIGHTS, and the arbitration clause in section I.A.1 of Part III, GRIEVANCE AND ARBITRATION PROCEDURE, recognize the power of the chief of police to manage and direct the operation of the police department and give deference to his authority conferred by Chapter 586, Laws of 1911 and the amendments thereto. These provisions are:

"WHEREAS, it is intended that the following Agreement shall be an implementation of the provisions of Section 111.70, Wisconsin Statutes, consistent with the legislative authority which devolves upon the Common Council of the City of Milwaukee, the Special laws of the State of Wisconsin, Chapter 586 of the Laws of 1911 and amendments thereto, relating to the Chief of Police and the Board of Fire and Police Commissioners, the municipal budget law, Chapter 65,l Wisconsin Statutes, 1971, and other statutes and laws applicable to the City of Milwaukee; and

"WHEREAS, it is intended by the provisions of this Agreement that there be no abrogation of the duties, obligations, or responsibilities of any agency or department of City government which is not expressly provided for respectively either by: state statutes, charter ordinances and ordinances of the City of Milwaukee except as expressly limited herein; . . .

". . . .

"PART I

". . . .

"H. *SUBJECT TO CHARTER*

"In the event that the provisions of this Agreement or application of this Agreement conflicts with the legislative authority which devolves upon the Common Council of the City of Milwaukee as more fully set forth in the provisions of the Milwaukee City Charter, the Special Laws of the State of Wisconsin, Chapter 586 of the Laws of 1911 and amendments thereto pertaining to the powers, functions, duties and responsibilities of the Chief of Police and the Board of Fire and Police Commissioners or the municipal budget law, Chapter 65, Wisconsin Statutes, 1971, or other applicable laws or statutes, this Agreement shall be subject to such provisions.

"PART II

". . . .

"C. *MANAGEMENT RIGHTS*

"1. The Association recognizes the right of the City and the Chief of Police to operate and manage their affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes. The Association recognizes the exclusive right of the Chief of Police to establish and maintain departmental rules and procedures for the administration of Police Department during the term of this Agreement provided that such rules and procedures do not violate any of the provisions of this Agreement.

". . . .

"11. The Association pledges cooperation to the increasing of departmental efficiency and effectiveness. Any and all rights concerning the management and direction of the Police Department and the police force shall be exclusively the right of the City and the Chief of Police unless otherwise provided by the terms of this Agreement as permitted by law.

". . . .

"PART III

"II. *GRIEVANCE ARBITRATION*

". . . .

"F. In reviewing any difference over application of a departmental rule or regulation under this grievance and arbitration procedure the arbitrator shall take into account the special statutory responsibilities granted to the Chief of Police under the 1911 Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto. The arbitrator shall not impair the ability of the Chief of Police to operate the department in accordance with the statutory responsibilities under the Special Laws of the State of Wisconsin, Chapter 586 of the Laws of 1911 and amendments thereto nor shall he impair the authority of the Chief of Police to maintain, establish and modify rules and regulations for the operation of the Police Department, provided such rules and regulations are not in violation of the specific provisions of this Agreement. In addition the arbitrator shall not prohibit the Chief of Police from executing departmental rules and regulations in a fair and equitable manner.

". . . .

"PART V

"A. *AID TO CONSTRUCTION OF PROVISIONS OF AGREEMENT*

". . . .

"2. The Association recognizes the powers, duties, and responsibilities of the Chief of Police as set forth in Chapter 586, Session Laws of 1911 and that pursuant thereto the Chief of Police and not the Common Council of the City of Milwaukee has the authority to establish rules and regulations applicable to the operation of the Police Department and to the conduct of the police officers employed therein."

The arbitrator acknowledged that the chief's right to transfer employees in a manner most advantageous to the city would seem to place the subject of transfers in a non-grievable category. He further recognized that Chapter 586 of the Laws of 1911 was incorporated in the collective bargaining agreement and gives the chief powers not normally enjoyed by other governmental department heads. The arbitrator even declared that "both the explicit terms of the contract and the state law incorporated therein seem to give the chief unbridled transfer power." However, the arbitrator discussed CONFEDERATION OF POLICE V. CITY OF CHICAGO, 629 F.2D 89 (7TH CIR. 1976), 1/ The arbitrator stated that in his opinion the arbitrator stated that in his opinion the CITY OF CHICACO CASE ruled that matters concerning adverse transfers are grievable, therefore, in order to be consistent, matters concerning requested transfers should be grievable. Thus, he found that the union's prayer for relief was reasonable. He declared:

"In view of the unanimous feeling of the parties, and in view of the recent Federal Court decision in our Circuit which seems to eliminate possible constraints of the Contract, I can freely rule that the request of the Grievant is not unreasonable."

Finally, the arbitrator directed that when and if an opening for a police officer develops in District Number One, Stabbe be given the first consideration for transfer to the district; and if the city does not transfer him, that he be given the right to a hearing to establish why the transfer is not advantageous to the city.

[9-11]

We believe that the arbitrator had no authority to direct that Stabbe be given the next assignment in District One, since both the statutes and the collective bargaining agreement vest authority in the chief of police to make decisions concerning transfers.

"An arbitrator obtains his authority form the contract of the parties. WISCONSIN EMPLOYMENT RELATIONS BOARD V. TEAMSTERS LOCAL NO. 563, 75 WIS.2D 602, 611, 250 N.W.2D 696 (1977). The function of the arbitrator in disputes under a collective bargaining agreement is to interpret and apply the agreement. Elkouri & Elkouri, How Arbitration Works 296 (1976).

1/ Actually the decision in the CITY OF CHICAGO CASE had been vacated by the United States Supreme Court, Confederation of Police v. City of Chicago, 427 U.S. 902 (1976) and was subsequently reversed in CONFEDERATION OF POLICE V. CITY OF CHICAGO, 547 F.2D 375 (7TH CIR.1977).

"'[A]n arbitrator is confined to the interpretation of the collective bargaining agreement; he does not sit to dispense his own brand of justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award.' UNITED STEELWORKERS OF AMERICA V. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 597 (1960)." MILW. PRO. FIREFIGHTERS, LOCAL 215 V. MILWAUKEE, SUPRA, AT 21.

The direction that Stabbe be given first consideration for transfer to District Number One or be afforded the right to a hearing if he is not transferred, does not draw its essence from the contract. The arbitrator was authorized to resolve only questions of contractual rights, and thus, the question before him was whether the contract required that Stabbe be given first consideration for transfer. Although he did direct that Stabbe be given first consideration, it is very clear from his decision that he did not do so

because the agreement, as he interpreted it, required such a remedy. Rather, this direction by the arbitrator was based upon his understanding of the feeling of the parties and upon a federal circuit case which had been vacated at the time of his decision and which he interpreted "to eliminate possible constraints of the Contract." The arbitrator ignored numerous provisions in the agreement giving deference to the authority and responsibilities placed upon the chief of policy by Chapter 586, Laws of 1911, and, in particular, subsection F of Part III, section II, GRIEVANCE ARBITRATION, which provides in part:

". . . The arbitrator shall not impair the ability of the Chief of Police to operate the department in accordance with the statutory responsibilities under the Special Laws of the State of Wisconsin, Chapter 586, of the Laws of 1911 and amendments thereto. . . ."

Furthermore, by directing that Stabbe be given first consideration for transfer, at the same time that he failed to find that the agreement required that Stabbe be given first consideration, the arbitrator has added to the labor agreement a provision compelling employee transfers. This is contrary to subsection D of Part III, section II providing that "The arbitrator shall neither add to, detract from, nor modify the language of the Agreement. . . ."

This case is similar to MILW. PRO. FIREFIGHTERS, LOCAL 215, V. MILWAUKEE, SUPRA, in which the union challenged certain orders issued by the fire chief calling for implementation of new rules regarding the scheduling of overtime work, vacation days and off days for the firefighters for the upcoming two years. The arbitrator found in favor of the union and his award, among other things, required that scheduling be conducted in the same manner that it had been prior to the issuance of the orders. On appeal, the city contended that the arbitrator exceeded his powers by disregarding the collective bargaining agreement. This court stated that the arbitrator was authorized to resolve only questions of contractual rights and so the question before him was whether the contract required that past practice be maintained. This court held that the circuit court erred in confirming the part of the award which directed the maintenance of past practice, since it was clear from the arbitrator's decision that he did not give such a direction because the agreement, as he interpreted it, required maintenance of past practice. Instead, his decision showed that his direction was based upon his understanding of the wishes of the parties. This court stated at page 25 of its decision:

". . . Although arbitrators are to be afforded flexibility and latitude in formulating remedies, the arbitrator here has not confined himself to the agreement, as he is required, and thus has denied the appellants the arbitration they bargained for. Since this aspect of the award has not drawn its essence from the collective bargaining agreement, the arbitrator exceeded his power in respect thereto."

In the case before us we conclude the arbitrator exceeded his power and contract authority. Therefore the circuit court erred in confirming the award.

In MILWAUKEE V. MILWAUKEE POLICE ASSO. 97 WIS.2D 15 (1980), herein CITY OF MILWAUKEE II, the Supreme Court applied its holding in CITY OF MILWAUKEE I and stated:

II.

The City asserts that the arbitrator did not have the authority to arbitrate the grievance filed by Mr. Lund. However, the motion to vacate the arbitration award did not challenge the authority of the arbitrator to hear the grievance. 4/ The motion stated that ". . . an arbitration award was entered . . . settling

a controversy that existed between the . . . parties . . . in accordance with the arbitration provisions of the Wisconsin Statutes." Nevertheless, the circuit court and the court of appeals ruled that the grievance in this case was not arbitrable.

[1]

While there is a broad presumption of arbitrability, the interpretation of the arbitration clause remains a judicial function unless the parties voluntarily submit the question of arbitrability to the arbitrator. INTERN U. OF OPERATING ENGINEERS, LOCAL UNION NO. 139 V. CARL A. MORSE, INC., 529 F.2D 574, 580 (7TH CIR. 1976). From the limited record before this court, it cannot be determined whether the parties submitted the question of the arbitrability of the dispute to the final and binding decision of the arbitrator. The agreement does not expressly or impliedly give the arbitrator the authority to determine the scope of his authority to make a binding determination as to arbitrability. Although the arbitrator noted the City's objection to the power of the arbitrator to arbitrate the dispute and to restore Mr. Lund to his status as an acting detective, it is not apparent whether the arbitrator's determination on the arbitrability issue was intended to be final and binding on the parties. This can be of substantial importance because, as this court has stated:

"If the parties submitted the issue of arbitrability to the arbitrators for final and binding decision, the scope of review of the award on the issue of arbitrability would be limited, as is the scope of review of the merits of the award.

4/ Because the defendants-petitioners do not raise the issue of whether the City has waived its right to contest the arbitrability of the dispute, we proceed to the merits of whether the arbitrator had the authority to hear the grievance of Marvin Lunc.

"If the parties submitted the merits to the arbitrators and at the same time challenged the arbitrability of the question and reserved the right to challenge in court an adverse ruling on arbitrability, the court would decide the issue of arbitrability *de novo*." JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., 78 WIS.2D 94, 106, 253 N.W.2D 536 (1977).

Because we conclude that the grievance involved in this case was arbitrable, even upon *de novo* judicial review, we need not determine whether the issue of arbitrability of the grievance was subject to the arbitrator's final and binding decision.

In DENHART V. WAUKESHA BREWING CO., 17 WIS.2D 44, 61, 119 N.W.2D 490 (1962), this court adopted the language from one of the decisions forming a part of the now famous "STEELWORKERS TRILOGY" 5/ which outlined the court's role in determining when an issue should be submitted to an arbitrator when the collective bargaining agreement provides that all questions of contract interpretation are

for the arbitrator. The United States Supreme Court stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its fact is governed by the contract. . . . In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." UNITED STEELWORKERS OF AMERICA V. AMERICAN MFG. CO., 363 U.S. 564, 567 (1960).

When the court determines arbitrability, it is limited to considering whether the arbitration clause can be construed to cover the grievance on its face and whether any other provision of the contract specifically excludes it. JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., 78 WIS.2D AT 111.

Neither of the lower courts had the benefit of this court's recent decision in MILWAUKEE POLICE ASSO. V. MILWAUKEE, 92 WIS.2D 145, 285 N.W.2D 199 (1979) when making their rulings in this case.

In MILWAUKEE POLICE ASSO. V. MILWAUKEE, SUPRA, this court had before it the same collective bargaining agreement, and hence, the same arbitration clause at issue in this case. The arbitration clause provides:

5/ Since that case was decided, the legislature redefined the municipal employer's duty to bargain and provided remedies for the employer's violation of that duty. Ch. 246, 1971 Wis. Laws.

> "1. Differences involving the interpretation, application or enforcement of the provisions of this Agreement or the application of a rule or regulation of the Chief of Police affecting wages, hours, or conditions of employment and not inconsistent with the 1911 Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto shall constitute a grievance under the provisions set forth below."

This is an expansive arbitration clause covering a broad class of disputes arising out of the "interpretation, application or enforcement" of the agreement. In reviewing *de novo* the arbitrability of the Chief of Police's power to transfer employees under this collective bargaining agreement, the court held in MILWAUKEE POLICE ASSO. V. MILWAUKEE, that because the parties disagreed as to the interpretation of the Chief of Police's authority to transfer, and the authority of the Chief of Police to transfer employees was provided for in the contract, there existed a "'difference involving the interpretation' of the Agreement." 92 Wis.2d at 153. As a result it was held that the grievance was covered by the arbitration clause and was subject to arbitration. 92 Wis.2d at 152-153.

[2]

In that case it was nowhere disputed that a transfer was involved. In this case, however, there is a dispute as to whether Mr. Lund was in fact transferred or merely "reassigned." We believe that

whatever the term used, the underlying question is whether the Chief of Police was limited by the collective bargaining agreement in laterally moving Mr. Lund from acting detective to patrolman. The City also argues that the "reassignment" of the grievant was not for disciplinary reasons and that the Chief of Police had the unrestricted power to make the reassignment. Under the rationale of MILWAUKEE POLICE ASSO. V. MILWAUKEE, SUPRA, even upon a de novo review of the arbitrator's decision as to the arbitrability of the grievance, the grievance in this case was arbitrable because a difference involving the interpretation of the agreement has arisen. MILWAUKEE POLICE ASSO. V. MILWAUKEE, 92 WIS.2D AT 153.

Having found the grievance to be substantively arbitrable, the Court went on to examine the award itself and stated:

> The authority of the arbitrator to hear a grievance is not the same as the authority of the arbitrator to make a particular award and the distinction between the two concepts must remain clear. The collective bargaining
>
> agreement may permit or require the arbitrator to hear a dispute, but it may also restrict him from reaching a particular result by limiting his powers of review or relief.
>
> . . .
>
> The collective bargaining agreement in the present case provides that certain rights are to be considered "management rights." In Part II C., it is provided:

> ". . . C. MANAGEMENT RIGHTS. 1. The Association recognizes the right of the City and the Chief of police to operate and manage their affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes. The Association recognizes the exclusive right of the Chief of Police to establish and maintain departmental rules and procedures for the administration of Police Department during the term of this Agreement provided that such rules and procedures do not violate any of the provisions of this Agreement. . . .
>
> "5. The City and the Chief of Police shall determine work schedules and establish methods and processes by which such work is performed.
>
> "6. The City and Chief of Police shall have the right to transfer employes within the Police Department in a manner most advantageous to the City.
>
> "7. Except as otherwise specifically provided in this Agreement, the City, the Chief of Police and the Fire and Police Commission shall retain all rights and authority to which by law they are entitled. . . .
>
> "11. The association pledges cooperation to the increasing of departmental efficiency and effectiveness. Any and all rights concerning the management and direction of the Police Department and the police force shall be exclusively the right of the City and the Chief of Police unless otherwise provided by the terms of this Agreement as permitted by law."

To the extent provided for in the agreement these rights are vested exclusively in the City and Chief of Police, and the arbitrator has no power to substitute his judgment or make an award where the power of decision-making is vested in the management.

The agreement also limits the arbitrator's authority. The grievance and arbitration provisions of the contract detail the restrictions placed on the arbitrator.

"Part III. *GRIEVANCE AND ARBITRATION PROCEDURE* . . . II. *GRIEVANCE ARBITRATION*. . . . D. The arbitrator shall neither add to, detract from, nor modify the language of the Agreement or of the rules and regulations in arriving at a determination of any issue presented that is proper for final and binding arbitration within the limitations expressed herein. The arbitrator shall have no authority to grant wage increases or wage decreases.

"E. The arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination.

"F. In reviewing any difference over application of a departmental rule or regulation under this grievance and arbitration procedure the arbitrator shall take into account the

special statutory responsibilities granted to the Chief of Police under the 1911 Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto. The arbitrator shall not impair the ability of the Chief of Police to operate the department in accordance with the statutory responsibilities under the Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto . . ."

Chapter 586, Laws of 1911, as amended, is found in sec. 62.50(23), Stats., 1977, and provides:

"62.50. **Police and fire departments in first class cities** . . . (23) DUTIES OF THE CHIEF. The chief engineer of the fire department and the chief of police of said cities, shall be the head of their respective departments. The chief of police shall cause the public peace to be preserved and see that all laws and ordinances of the city are enforced. The chief shall be responsible for the efficiency and general good conduct of the department under his control. The chief of each department shall have the power to regulate his or her respective department and shall prescribe rules for the government of its members. Any rule or regulation prescribed by a chief shall be subject to review and suspension by the board. Each of the chief's shall have the custody and control of all public property pertaining to their respective departments and everything connected therewith and belonging thereto. . . ." See, MILWAUKEE POLICE ASSO. V. MILWAUKEE, 92 WIS.2D AT 154.

This court in interpreting the forerunner of this provision has stressed the breadth of the management discretion vested in the Chief of Police. The Chief "has broad powers in order to . . . supervise the members of the department." STATE EX REL. KUSZEWSKI V. BOARD OF F. & P. COMM., 22 WIS.2D 19, 25, 125 N.W.2D 334 (1963). Although other provisions of this statute limit the power of the Chief to discipline, this limitation is to be strictly construed.

"The members of the force no longer take their offices subject to being summarily dismissed, demoted, or suspended by the chief. The act is designed to abolish those measures. In that regard, the powers of the chief are limited, but he does retain all of the powers not circumscribed. . . . The retained powers of the chief are those which do not defeat the purpose or object of the act."

STATE EX REL. KUSZEWSKI V. BOARD OF F. & P. COMM., 22 WIS.2D AT 24-25.

The foregoing contract provisions providing for the reservation of the right to transfer in the Chief of Police; the express acknowledgment in the contract of the Chief's statutory responsibilities under

Chapter 586 and the prohibition against the impairment of these responsibilities, when examined cumulatively, give the Chief of Police unrestricted discretion over transfers within the department.

In MILWAUKEE POLICE ASSO. V. MILWAUKEE, SUPRA, this court was asked to determine whether the arbitrator exceeded his authority when devising an award which required that "when and if an opening for a police officer develops": the grievant be granted a transfer. The court held that the arbitrator exceeded his power and contract authority because the arbitrator ". . . ignored numerous provisions in the agreement giving deference to the authority and responsibilities placed upon the chief of police . . ."" by statute and the collective bargaining agreement. In addition, the court found that the arbitrator by requiring that when an opening arose, a transfer be granted, in effect added to the labor agreement a provision compelling employee transfers. MILWAUKEE POLICE ASSO. V. MILWAUKEE, 92 WIS.2D AT 158-159.

That case, however, was not dealing with the further question presented here. The collective bargaining agreement vests authority in the arbitrator to decide grievances arising over discipline which are not subject to review by the Police and Fire Commission. Unless questions concerning the propriety of transfers are in the exclusive control of the Chief of Police, it would appear that the Chief of Police's power over transfers is limited by the arbitrator's power to resolve disciplinary grievances concerning transfers. This is not a case in which the Chief of Police has acted to limit his statutory discretion over the supervision of the department by contract; the contract at issue here expressly recognizes the reservation of power in the Chief. *See*, GLENDALE PROF. POLICEMEN'S ASSO. V. GLENDALE, 83 WIS.2D 90, 107, 265 N.W.2D 594 (1978).

The arbitrator in this case incorporated in his decision a portion of an earlier arbitration decision under the same collective bargaining agreement which ruled that transfers are subject to the arbitration process. The test adopted by the arbitrator to determine whether a transfer was "improper" was whether the transfer was made unfairly or showed favoritism. The problem with this ruling is that nowhere in the contract can be found a provision allowing the arbitrator to determine whether a transfer was "unfair" or showed "favoritism." The contract states that the City and the Chief "shall have *the right* to transfer employes . . . in a manner most advantageous to the City." There is nothing in the agreement to limit this right to only those transfers which the arbitrator deems fair and impartial. (emphasis added). The arbitrator ignored the numerous contract provisions detailed above. The arbitrator, in essence, added a provision to the agreement which did not otherwise exist and thereby exceeded the powers vested in him by the contract. (emphasis added)

The arbitrator only considered whether the transfer was unfair because he felt a higher burden was imposed upon the grievant to show unfairness in a transfer than need be demonstrated to show the transfer was a disciplinary measure for which no cause had been shown. The arbitrator in assessing his power under the contract stated that "since the contract provides that discipline shall be for cause, it would follow that the arbitrator has the authority to determine whether there was cause for the discipline, absent any other limitations in the Agreement." What the arbitrator failed to consider was that the contract had granted the City and Chief of Police the management right to transfer employes and the agreement also recognized the rights retained in the Chief of Police by statute. The contract provision governing discipline is subject to the management rights retained. The arbitrator therefore, in effect, removed the right to transfer from that group of management rights vested in the City and the Chief of Police and placed the right to transfer under the disciplinary provisions of the contract. This is a modification of the contract clearly in excess of the arbitrator's authority under the agreement.

From our review of CITY OF MILWAUKEE I and II, we conclude that when confronted with the combination of a broad arbitration clause and express contractual language which can reasonably be interpreted in a manner which limits but does not eliminate statutory personnel authority, the Court concludes the grievance is substantively arbitrable but strictly reviews the resultant arbitration award to ensure that appropriate deference is given to the contractually acknowledged statutory power when the contract is interpreted.

Here, if we have the same combination of contractual components that confronted the Court in CITY OF MILWAUKEE I and II, we must follow the same analytical approach used by the Court. We conclude the same components are present. We have a broad grievance arbitration clause which acknowledges the existence of Sec. 62.13, Stats. 2/ We have express contract language regarding the "Management Right" to "promote" and contract language which can be interpreted as subjecting the exercise of the right to "promote" to a "reasonableness" standard. 3/

2/ ***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 abridge, delegated or modified by this Agreement and such powers or authority are retained by the City. (emphasis added)

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

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

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

To hire, schedule, promote, transfer, assign, train or retrain employees in positions within the Fire Department. (emphasis added)

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

To determine the size and composition of the work force and to lay off employees.

To determine the mission of the City and the methods and means necessary to efficiently fulfill the mission including: the transfer, alteration, curtailment, or discontinuance of any goods or services; the establishment of acceptable standards of job performance; the purchase and utilization of equipment for the production of goods or the performance of services; and the utilization of students, and/or temporary, limited-term, art-time, emergency, provisional or seasonal employees.

The City has the right to schedule overtime as required in the manner most advantageous to the City and consistent with the requirements of municipal employment in the public interest.

It is understood by the parties that every incidental duty connected with operations enumerated in job descriptions is not always specifically described. Nevertheless, it is intended that all such duties shall be performed by the employee.

Contracting and Subcontracting - The Union recognized that the City has statutory rights and obligations in contracting for matters relating to municipal operations. The right of contracting or subcontracting is vested in the City including the exercise of said contracting and subcontracting rights in the event of emergency, or essential public need or where it is uneconomical for City employees to perform said work.

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.

Any dispute with respect to Management Rights shall not in any way be subject to arbitration by <u>any grievance with respect to the reasonableness of the application of said Management Rights may be subject to the grievance procedure contained herein</u>. (emphasis added)

3/

ARTICLE 9

GRIEVANCE AND ARBITRATION PROCEDURE

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

The City agrees to allow an executive Board Member and members of the grievance committee sufficient time off for the proper processing of grievances at the appropriate steps as outlined in this Article. The aggrieved party, if any, shall also be given sufficient time off for the processing of his grievance.

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.

Grievances related to the education incentive program shall be initiated at Step Two of the Grievance Procedure.

Time limits set forth in the grievance procedure, with the exception of the initial time limit on the filing of grievances, shall be exclusive of Saturdays, Sundays and holidays. The time limits for processing grievances from one step to the procedure to another may be extended upon mutual written agreement on the parties. In no event shall the time limit at the initial step be extended without the prior written approval of the Labor Relations Manager.

STEP ONE: All grievances must be filed within thirty (30) calendar days of the date that the grievant should have been aware of the act by the exercise of reasonable diligence but, in no event more than ninety (90) calendar days from the date of the occurrence with a copy to the Labor Relations Manager, otherwise the right to file a grievance is forfeited and no grievance is deemed to exist. The Personnel Chief or his/her designee shall be required to give a written answer within five (5) days.

STEP TWO: The grievance shall be considered settled in Step One unless within five (5) days after the Personnel Chief's answer is due, the grievance is reduced to writing and presented to the Chief of the Department with a copy to the Labor Relations Manager. Within five (5) days, the Chief of the Department, or his/her designee, shall furnish the employee with a written answer to the grievance, a copy of which shall be forwarded to the designated Union Representative and to the Labor Relations Manager.

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

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

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

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

If the parties, within five (5) working days following the receipt of such written notice, do not agree to the selection of an arbitrator, either party may, in writing, request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators to the parties. Either party may, within five (5) working days of receipt of said list, notify the other party and the Wisconsin Employment Relations Commission of its intent to reject the entire list submitted by the Wisconsin Employment Relations Commission. Upon receipt of such notice, the Wisconsin

Employment Relations Commission shall submit a new list which shall not duplicate in any way the original list. The option to reject the entire list may only be exercised by each party once per grievance.

Alternate elimination shall be used to select the arbitrator. The last remaining person shall then be appointed. A toss of a coin shall determine who shall eliminate first.

If the parties mutually agree, a staff member of the Wisconsin Employment Relations Commission shall serve as arbitrator. In that event, no other provisions contained herein related to arbitrator selection shall apply.

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

All expenses of arbitration proceedings shall be borne equally by the parties. However, expenses relating to the calling of witnesses or any other similar expenses associated with such proceeding, shall be borne by the party at whose request such witnesses are required. If either or both parties request that an independent stenographic record of the proceedings be made and transcripts provided, the parties shall equally share the entire cost of such service, including the provision of a transcript to each party and the arbitrator.

A. 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.

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

LIMITATIONS ON GRIEVANCE ARBITRATORS:

Arbitration shall be limited to grievances over matters involving interpretation,

application or enforcement of the terms of this Agreement.

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.

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

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

It is contemplated by the provisions of this Agreement that any arbitration award shall be issued by the Arbitrator at their earliest date after completion of the hearing.

We are also satisfied that this contractual combination can be interpreted in a manner which limits but does not eliminate the authority of the Chief and PFC, under Sec. 62.13, Stats. Again, CITY OF MILWAUKEE II is instructive. When discussing the validity of the arbitrator's award in MILWAUKEE II, the Court went to great lengths (in language we have underlined for emphasis in our prior quote from the opinion) to note the absence of contract language restricting the transfer authority of the City and the Chief. Had such language been present, the award would presumably not have been overturned. Most importantly from our perspective is the fact that there would have been no need for the Court to discuss the absence of such language if its presence would have inappropriately transferred authority to the arbitrator. In effect, the Court was indirectly concluding that the restriction the Chief's statutory power imposed by an "unfair" or "favoritism" standard was a permissible limitation under the GLENDALE case it had decided two years earlier. From the Court's MILWAUKEE II opinion, we comfortably conclude that should an arbitrator determine it is appropriate to apply the contractual standard of "reasonableness" to the Gentilli promotion, such an interpretation would constitute a permissible limitation on the statutory authority to promote, particularly in the context of PFC Rules and confirming conduct which reflect the City's view that the PFC has no role to play in this matter. Thus, we are persuaded that subjecting the Chief's statutory and contractual promotional power to a reasonableness standard is a limitation on and not a transfer of statutory authority and, as such, that the City's defense should be rejected.

The City has gone to great lengths to argue the impact of MILWAUKEE POLICE ASSN. V. MILWAUKEE, 133 WIS.2D 192 (CT. APP 1993), herein MILWAUKEE III, on this case. We find those efforts unpersuasive. In MILWAUKEE III, when finding the discharges of probationary employes were not arbitrable, the Court emphasized the lack of express contractual language which limited the statutory authority in question. We have express language (i.e. "reasonableness") in the case before us. The Court also noted the strong public policy interests involved in the hiring of employes. The dispute before us involves the promotion of employe with 19 years of seniority. Given the foregoing and contrary to the City, we do not find the common presence of a probationary period in both MILWAUKEE III and this dispute to be a persuasive basis for concluding that MILWAUKEE III governs the outcome of this dispute.

The City also places great emphasis on CITY OF JANESVILLE V. WERC, 193 WIS.2D 492 (CT. APP 1995). We again find that emphasis misplaced. In JANESVILLE, the Court concluded that an arbitrator could not review the propriety of disciplinary action which was subject to the action of the PFC, particularly where the statute specified that the PFC's order is "final and conclusive" unless reversed by the circuit court. The Court reasoned that the PFC order becomes "meaningless" if it is subject to arbitral review. Here, the PFC has concluded that it has no role. It has concluded that it has no jurisdiction over the matter. Thus, the conflict presented in JANESVILLE is not present here.

In summary, we are satisfied that the Gentilli grievance is substantively arbitrable under a JEFFERSON analysis and that under a GLENDALE/CITY OF MILWAUKEE I AND II analysis, the collective bargaining agreement limits but does not transfer the statutory authority of the PFC and the Chief regarding promotions. Thus, the City is obligated to arbitrate the Gentilli grievance.

Dated at the City of Madison, Wisconsin this 30th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

CONCURRING OPINION OF CHAIRPERSON JAMES R. MEIER

I concur that the Gentilli grievance is arbitrable as I see it as a demotion. The PFC's conclusion that they have no jurisdiction over the termination of his probationary promotion distinguishes the matter from CITY OF JANESVILLE and I am otherwise satisfied that the grievance is arbitrable under JEFFERSON.

James R. Meier /s/

JAMES R. MEIER, CHAIRPERSON