STATE OF WISCONSIN
CIRCUIT COURT BRANCH 14
DANE COUNTY

CITY OF MADISON,

Petitioner,

v.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

Case No. 98-CV-1397
[Decision No. 28920-C]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

NOTICE OF ENTRY OF DECISION AND ORDER

To: Larry W. O'Brien
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PLEASE TAKE NOTICE that a Decision and Order affirming the decision of the respondent Wisconsin Employment Relations Commission, of which a true and correct copy is hereto attached, was signed by the court on the 25th day of January, 1999, and duly entered in the Circuit Court for Dane County, Wisconsin, on the 25th day of January, 1999.

Notice of entry of this Decision and Order is being given pursuant to secs. 806.06(5) and 808.04(1), Stats.

Dated this 27th day of January, 1999.

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David C. Rice /s/

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CIRCUIT COURT BRANCH 14
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CITY OF MADISON,
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WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
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DECISION
98 CV 1397

Petitioner, City of Madison seeks review of a decision of Respondent, Wisconsin Employment Relations Commission (WERC). The WERC affirmed the decision of its Examiner that the City had committed prohibited practices within the meaning of Wis. Stats. 111.70(3)(a)5 and 1 by refusing to arbitrate a grievance.

Chris Gentilli has worked for the Madison Fire Department for approximately eighteen years. In late 1994 Gentilli was selected by then Chief Roberts for promotion to the position of Fire Apparatus Engineer, commencing January 1, 1995. On December 12, 1994 the Police and Fire Commission approved the Chief's recommendation for promotion, subject to standard probation in rank. (Sec. 5.04 of the PFC Rules and Regulations requires that all promotional appointments shall be probationary for 12 months, giving the Chief the right to reduce the employe to his/her former rank without any right of appeal to the PFC during the probationary period.) November 29, 1995, Chief Roberts informed Gentilli that his Apparatus Engineer probation WAS revoked. The Union filed a grievance and requested a hearing before the PFC. Both were denied. The Union requested arbitration of the denied grievance. The City declined to arbitrate, taking

the position that the matter was not arbitrable. The Union filed a prohibited practices complaint and prevailed before the WERC, which ordered the City to arbitrate the grievance. The City seeks review.

The City asserts that arbitration of the grievance will transfer the exclusive and supreme statutory authority of the Chief and the PFC over promotion, probation, demotion or discipline to the WERC and its arbitrators. The City cites Wis.Stat. 62 13(4):

> SUBORDINATES: 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.

The City also relies on *Milwaukee Police Association v. City of Milwaukee, 113 Wis. 2d 192, 335 N.W.2d 417(Ct. App. 1983) (Milwaukee III) and City of Janesville v. WERC, 193 Wis. 2d, 492, 535 N.W.2d 34 (Ct. App. 1995)* in support of its argument regarding the impropriety of the transfer of authority from the Chief or PFC to the WERC and its arbitrators.

The Union and the WERC both urge me to uphold the decision of the WERC. They rely upon a number of cases voicing the favored policy of arbitration (in the Union's brief) and a pair of cases upholding arbitration in somewhat similar setting, based on long standing principles of arbitrability. *Milwaukee Police Association v. Milwaukee, 92 Wis. 2d 145, 285 N.W.2d 119 (1979) (Milwaukee I)* and *Milwaukee v. Milwaukee Police Association, 97 Wis. 2d 15, 292 N.W.2d 941 (1980) (Milwaukee II).*

The issue presented involves the harmonization of MERA with Wis. Stat. 62.13(4). This review is *de novo. City of Janesville v. WERC, 193 Wis. 2d 492, 498-99, 535 N.W.2d 34 (Ct.App. 1995).*

The relationship between Gentilli, his Union and the City was covered by a collective bargaining agreement. The management rights clause of the agreement read:

ARTICLE 5

MANAGEMENT RIGHTS

> Union recognizes the prerogative of the City and the Chief of the Fire Department to operate and manage its affairs in all respects, in accordance with its responsibilities and the powers or authority which the City has not officially abridged, delegated or modified by this Agreement and such powers or authority are retained by the City.
>
> These management rights include, but are not limited to the following:
>
> A. To utilize personnel, methods, procedures, and means in the most appropriate and efficient manner possible.
>
> B. To manage and direct the employees of the Fire Department.
>
> C. To hire, schedule, promote, transfer, assign, train or retain employees in positions within the Fire Department.
>
> D. To suspend, demote, discharge, or take other appropriate disciplinary action against the employees for just cause.
>
> K. Any dispute with respect to Management Rights shall not in any way be subject to arbitration but any grievance with respect to the reasonableness of the application of said Management Rights may be subject to the grievance procedure contained herein.

The grievance procedure contained in the collective bargaining agreement provides for arbitration as the third step in the process if the grievance is not settled by the Personnel Chief (at Step 1) or the Department Chief (at Step 2). Article 9, Section I of the agreement provides:

> 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.

Article 9, Section Q of the agreement sets forth certain limitations on arbitration under the agreement:

> 1. Arbitration shall be limited to grievances over matters involving interpretation, application or enforcement of the terms of this Agreement.
>
> 2. Arbitration shall not apply where Section 62.13 of the Wisconsin Statutes is applicable and where Management has reserved rights relating to arbitration in Article 5 of this Agreement.

The City claims that the dispute here is not arbitrable under the holding in *Milwaukee III.* In that case two Milwaukee Police new hires were terminated from employment after serving one and seven and one-half months, respectively, of their probationary terms. The Court of Appeals held that the termination of a probationary police officer is not an arbitrable grievance, citing Wis. Stat. 165.85 and *Kaiser v. Board of Police & Fire Commissioners, 104 Wis. 2d 498, 311 N.W.2d 646 (1981).* The court wrote,

> Because the strong public policy behind secs. 62.13 and 165.85, Stats., would be thwarted if the broad, general, and not express language of the collective bargaining agreement were read to make probationary terminations arbitrable, we reject so broad a reading and hold that the question is not arbitrable. *Milwaukee III, 113 Wis. 2d at 198.*

As the WERC points out in its brief, The Court of Appeals in *Milwaukee III* did not engage in the arbitrability analysis employed by the Supreme Court in *Milwaukee I* and *Milwaukee II*. That analysis has endured for nearly 40 years. See *United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), Dehnart v.*

Waukesha Brewing Co., Inc., 17 Wis. 2d 44, 115 N.W.2d 490 (1962), Jt. School District No. 10 v. Jefferson Ed. Asso., 78 Wis. 2d 94, 253 N.W.2d 536 (1977). As quoted in *Milwaukee I,*

> 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. Milwaukee I, 92 Wis. 2d at 151.*

Further,

> 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). Id.* at *152*.

The grievance and arbitration procedure of the agreement between the parties is broad.

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

It permits the grievance and arbitration of matters involving the application of the agreement. In the area of Management Rights, its scope is limited somewhat by the language of Article 5, Section K. That section limits the arbitration step of the grievance procedure to the "reasonableness of the application of said Management Rights".

There is further limiting language in the agreement. As stated above, Article 9, Section Q of the agreement provides, "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." It is questionable whether Wis. Stat. 62.13 applies to the facts of this case. Nor is it clear that the City has reserved any rights.

Wis. Stat. 62.13 is an "enactment of statewide concern for the purpose of providing a uniform regulation of police and fire departments." Wis. Stat. 62.13(12). The subsection of s. 62.13 that best applies to the facts of this case is (4) - "The chief shall appoint subordinates subject to approval by the board." In this case the board has taken itself out of the picture, though. The PFC informed the Union that it had no role to play in this situation until the end of the probationary period. Thus, the Chief's action in this case is not "subject to approval by the board." In fact, it is the City's position that the Chief's decision is not subject to approval by anyone, that the Chief's decision is subject to no review at all. This position can not be squared with the City's agreement that the reasonableness of the application of its Management Rights could be tested by the grievance process, including arbitration.

Nor is it clear that management has reserved rights relating to arbitration in Article 5 of the agreement in this context. Article 5 provides, in part, "any grievance with respect to the reasonableness of the application of said Management Rights may be subject to the grievance procedure contained herein." While the article prohibits the arbitration of any "dispute" over management rights, it expressly authorizes use of the grievance procedure in a situation involving the reasonableness of the application of such rights. "Dispute", as used in Article 5, may well refer to "interpretation" and "enforcement" as used in Article 9, Section A, prohibiting arbitration with respect to those issues.

I can not say "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). Id.* at *152.* I conclude that the dispute at hand is arbitrable.

Milwaukee III held that arbitrator review of the termination of probationary new-hires would work a transfer of the Chief's authority to the arbitrator, creating a direct conflict with the Chief's statutory authority under Wis. Stat. 62.13(4). The *Milwaukee III* court felt that it was not in a situation where the Chief's power was simply limited or restricted, a situation that had been approved in *Glendale Professional Policemen's Association v. City of Glendale, 83 Wis. 2d 90, 264, N.W.2d 594 (1978).* In *Glendale* the Supreme Court approved contract language that required a Chief to promote the most senior of a number of qualified candidates, noting that it amounted to a mere restriction of the Chief's discretion.

Arbitration of the dispute at hand does not transfer the Chief's authority to an arbitrator. It simply limits the Chief's authority in a manner agreed to in a collective bargaining agreement. That is, the Chief's application of management right must be reasonable – i.e. not arbitrary or capricious. This does not transfer the Chief's authority. It simply limits it, just as seniority limited the discretion of the Chief in *Glendale.*

The City and the WERC engage in some discussion of the authority of the arbitrator to make a particular award in this case. The WERC appropriately points out that there is a difference between the arbitrator's ability to hear the grievance and the authority to make an award.

> 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. *City of Milwaukee v. Milwaukee Police Ass'n, 97 Wis.2d 15, 23, 292 N.W.2d 841 (1980).*

The WERC asserts that the narrow issue before me is arbitrability of the dispute. The City urges me to look ahead to the prospect of the City's further litigation if the arbitrator awards Gentilli a promotion, urging me to put an end to this and prevent the needless expenditure of time and resources in a futile gesture. For the reasons set forth above, it is clear that I am not convinced the gesture is futile. However, even if I am wrong in the issue of transfer vs. limitation of authority, the WERC is correct when it states that the sole issue at hand is arbitrability. My task is to determine "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. Milwaukee I, 92 Wis. 2d at 151.*" I conclude that the arbitration clause here covers the grievance and that no provision specifically excludes it.

The decision of the Respondent is affirmed.

Dated this 25 day of January, 1999.

C. William Foust /s/
98CV1397
C. William Foust, Judge
Dane County Circuit Court
Branch 14