

BEFORE THE ARBITRATOR

---

In the Matter of an Arbitration Between  
**INTERNATIONAL ASSOCIATION OF  
FIRE FIGHTERS LOCAL 407**

and

**CITY OF WAUKESHA**

Case 132  
No. 57222  
MA-10555

Case 135  
No. 57738  
MA-10734

*(Berghoefer Promotional Grievances)*

---

Appearances:

**Mr. John Kiel**, Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, 700 West Michigan Street, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, for the labor organization.

**Mr. Vince Moschella**, Assistant City Attorney, City of Waukesha, Waukesha City Hall, 201 Delafield Street, Waukesha, Wisconsin 53188, for the municipal employer.

**ARBITRATION AWARD**

The International Association of Fire Fighters Local 407 (“the Association,”) and the City of Waukesha (“the City,”) are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide two grievances over the interpretation and application of the terms of the agreement relating to promotions. The Commission designated Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in

Waukesha, Wisconsin on April 7, 1999. A stenographic transcript was prepared and available to the parties as of May 6, 1999. The Association filed written arguments on July 23 and September 2; the City filed briefs on July 6 and August 30, 1999.

### ISSUE

The parties stipulated to the following statements of the issues:

Case 132: Did the city violate the collective bargaining agreement when it promoted Daniel Berghoefler to equipment operator on or about May 14, 1998? If so, what is the appropriate remedy?

Case 135: Did the city violate the collective bargaining agreement when it promoted Daniel Berghoefler to paramedic on or about January 12, 1999? If so, what is the appropriate remedy?

### RELEVANT CONTRACTUAL PROVISIONS

#### **ARTICLE 1 - RECOGNITION**

The City hereby recognizes the Association as the exclusive bargaining agent for the ranks of Firefighter, Equipment Operator, Paramedic, Shift E.M.S. Coordinator, Lieutenant, Inspector, and Lieutenant-Inspector, but excluding the Chief and Assistant Chiefs, and Deputy Chiefs.

...

#### **ARTICLE 3 - RIGHTS OF EMPLOYER**

Section 1: It is agreed that the rights, functions and authority to manage all operations and functions are vested in the Employer and include, but are not limited to the following:

- a. To prescribe and administer rules and regulations essential to the accomplishment of the services desired by the City.
- b. To manage and otherwise supervise all employees.

- c. To hire, promote, transfer, assign and retain employees and to suspend, demote, dismiss or take other disciplinary action against employees as circumstances warrant.
- d. To relieve employees of duties because of lack of work or for other legitimate reasons.
- e. To maintain the efficiency and economy of the City operations entrusted to the administration.
- f. To determine the methods, means and personnel by which such operations are to be conducted.
- g. To take whatever action may be necessary to carry out the objectives of the City Council in emergency situations.
- h. To exercise discretion in the operation of the City, the budget, organization, assignment of personnel and the technology of work performance.

Section 2: Nothing in this clause shall derogate from or alter the responsibilities of the Fire and Police Commission or change the application of other specific provisions of this Agreement.

...

## **ARTICLE 20 – SALARY SCHEDULE**

...

Section 2: The City shall be relieved of paramedic pay in the event that any employee so qualified is granted, per such employee's requests, a leave from such program for a period in excess of thirty (30) duty days.

Section 3: E.M.T. or Paramedic trainees required to attend classes on off-duty time will be paid at a rate of time and one-half their hourly rate for all actual class time.

EMT-DA State certification will be maintained by all firefighters. All certifications will be on file at the fire department on or before November 1<sup>st</sup> of the renewal year. All employees will comply with all management directive to allow recertification at the earliest opportunity.

Section 4: A “regular” equipment operator shall continue in such position and receive such premium thereafter until promoted, retired, or removed from the position for just cause. A “regular” equipment operator shall be appointed to operate each first line engine or ladder truck. In the event of a “regular” equipment operator’s absence, a “relief” operator shall be designated as a substitute.

Employees retained on the eligibility list shall first be utilized as relief operators provided they are on the same shift as the absent regular driver and are not otherwise needed as paramedics or officers.

Paramedics who are promoted to equipment operator or lieutenant shall have the option to maintain their paramedic license. These individuals will be utilized as Equipment Operator/Paramedics or Lieutenant/Paramedics and will be paid based upon the current salary schedule.

Section 5: Longevity is \$10.00 per month after five (5) years of service, then an additional \$2.00 per month for each year of service thereafter up to a maximum of 20 years for a maximum total of \$40.00 per month.

## **ARTICLE 21 - PROMOTIONS**

When a vacancy in the ranks of Equipment Operator, Paramedic, Shift E.M.S. Coordinator, Inspector, Lieutenant, or Lieutenant Inspector should exist, such vacancy shall be filled according to the following method:

Section 1. A notice of examination to establish an eligibility list shall be posted on the Department bulletin board at least thirty (30) days prior to the last day on which applications are acceptable. The notice shall state the date, time and place of written examination. It shall further state the eligibility requirements, the type and nature of the test or tests to be conducted, the written manuals or other materials, if any, which will to some extent be included, the general subject matter to be covered, the weight to be given each specific test, the graded needed to be qualified and the manner of grading to be used.

Section 2. The promotional process as posted shall be adhered to. The selection shall be made from those applicants who have qualified, if any. All other qualified applicants shall be ranked in order of employer preference. All qualified applicants shall be notified in writing of their ranking. Those qualified applicants not selected shall constitute an eligibility list to remain in effect for two (2) years provided the applicant remains capable of fulfilling the position, and subsequent promotions during that period to the same job classification shall be made therefrom according to the highest ranking, subject to Section 4 below. The complete list of those qualified, his/her scores per test and final scores, and his/her ultimate ranking shall be made available to each applicant.

Section 3. The next qualified applicant on the eligibility list shall be appointed as soon as possible but not later than 60 days after the vacancy was created unless the City has abolished the position by resolution prior to that time, or can establish reasonable justification that the outside appointment of a qualified applicant was necessary. If the position is abolished, no employee will be assigned to the position.

Section 4. A vacancy shall not be deemed to exist unless a new or additional position is created or an existing position is available due to the death, termination for just cause, or promotion, resignation or retirement of the employee previously appointed to such position. Actors, per Article 9 may be utilized by the City to temporarily fill all appointed positions during the absence of the appointed officer.

Section 5. The promotional application forms shall be provided by the Chief.

Section 6:

Three (3) association members are to be selected by the association per constitution and bylaws provisions.

Three (3) management members are to be selected by the Chief.

### **BACKGROUND**

On July 27, 1985, the Waukesha Fire Department hired Dan Berghoefer as a fire fighter. This grievance concerns two promotions Berghoefer received in 1998 and 1999 which the Association claims were wrongfully granted, to the detriment of other unit members.

In descending order, the organizational chain of command for the Department includes the Chief, an assistant chief, three deputy chiefs, lieutenants, paramedics, equipment operators and firefighter.

On or about March 9 1995, Berghoefer was promoted to the position of Equipment Operator. On October 23, 1995, the Department published a Notice to Develop an Eligibility List for Promotion to the Position of Paramedic, which included, *inter alia*, the following requirements:

1. Applicant shall have a minimum of two (2) years of seniority on the City of Waukesha Fire Department as of December 1, 1995. Applicant must have, and maintain, a current EMT-DA, and Wisconsin State Fire Fighter Level II Certification.
2. Applicants must make a four (4) year commitment of service to the Paramedic Program, and must be willing to postpone vacations prior to the completion of training.

Pursuant to the provisions of the collective bargaining agreement, a joint committee representing the Association and the Department reviewed and approved this posting before it was published.

Pursuant to that posting, Berghoefer applied and was ranked first on a seven-person eligibility list that was to remain valid for two years from its publication on December 13, 1995. In January, 1996, Berghoefer stepped down from his position as equipment operator and began paramedic school; after completing his training and passing his state certification examination, he began work as a paramedic on or about June 24, 1996.

On July 17, 1996 the Department published a Notice to Develop an Eligibility List for Promotion to the Position of Equipment Operator, which included, *inter alia*, the following requirement:

1. Applicant shall have a minimum of five (5) years of seniority as of Monday, September 16, 1996; Applicant must have, and maintain, a current EMT-DA Certification, Wisconsin State Fire Fighter Level II Certification, and Waukesha Fire Department Certified Equipment Operator Status. In addition, Paramedics shall have a minimum of two (2) years as a Waukesha Fire Department Certified Paramedic prior to being promoted to the position of Equipment Operator.

As before, the joint promotions committee reviewed and approved the elements of this posting before it was published.

On August 7, 1996, Berghoefer wrote to Fire Chief Robert Stedman as follows:

This letter is to inform you that I would like to participate in the upcoming EO exam. I am aware that since I am a new Paramedic that I cannot be promoted for two years but I feel that it would be in my best interest to become a REO for the promotional point value in the future. If you have any questions feel free to contact me.

On September 13, 1996, the Department published an eligibility list for promotion to equipment operator, to remain in effect for two years. Berghoefer ranked third, following Dead Brewer and Kevin Johnson, and immediately ahead of Jesse Alba and George Behrens.

Brewer and Johnson were promoted to operator in December 1996 and April 1997 respectively. When another vacancy arose for appointment later in 1997, the department asked Berghoefer if he would be willing to give up his paramedic position to take the operator promotion, which he was not. The department thereupon promoted Alba on or about September 1, 1997.

Another vacancy arose in the early spring of 1998, with the retirement of operator Duane Poulson. It was just a few months until the expiration of the 1996-98 eligibility list, and there were no stationhouse rumors of other retirements coming soon. By this time the department had concluded that it would not honor the two-year service requirement for paramedics applying to become equipment operators because it felt that provision in the posting to be in conflict with the third paragraph of Article 20, Section 4 of the collective bargaining agreement.

On April 8, 1998, Assistant Chief Allen LaConte distributed the following memorandum to all personnel:

Due to the recent retirement of Equipment Operator Duane Paulson, the name of Fire Fighter/Paramedic Dan Berghoefer will be recommended for promotion to the position of Equipment Operator to the Police & Fire Commission for their approval. The next scheduled meeting of the Police & Fire Commission is Thursday, May 14, 1998.

Dan Berghoefer has become eligible for this promotion due to the fact that he is the next person on the eligibility list to be promoted, and he has requested that he be taken out of the Paramedic Program, in order to be eligible for this promotion.

On May 7, 1998, Berghoefer wrote to LaConte as follows:

I am writing this to you as a clarification for my reasoning to request my resignation from the paramedic program. In the past few weeks there have been many rumors and inaccurate statements regarding my resignation that have circulated this department. It has also been mentioned that Local 407 has assumed that I have made some sort of business deal. This is a blatant lie!

After much discussion with my wife, we have decide (sic) that I should leave the paramedic program. The reasons are personal in nature and I would prefer not to disclose them at this time. Everyone has some difficult decisions to make in life and this was one of those decisions but at this time I feel it is the best decision for my family, the fire department and myself. I hope that this is enough without going into further detail and please disregard the vicious rumors that seem to surround this issue.

At no time relevant did Berghoefer exhibit any difficulties at work. The department at no time inquired as to the nature of the personal reasons Berghoefer cited for wanting to leave the paramedic program. The department continued Berghoefer in the position of paramedic until May 15, when it formally promoted him to equipment operator.

On May 26, 1998, La Conte wrote to the Local 407 Executive Board as follows:

On May 19, 1998 you filed with me Step No. 2 of a grievance concerning the promotion of "FF/Paramedic Dan Berghoefer to Equipment Operator". You stated during the delivery of your memo, that the grievance dealt with Article 21 Section 2 specifically the first sentence. The first sentence states "The promotional process as posted shall be adhered to."

In reviewing Article 21, Section 2, and the posting for "Notice to Develop an Eligibility List For The Position of Paramedic" dated Monday, October 23, 1995, I believe we have adhered to the posting. There appears to be an emphasis put on Item 2 of that posting, by Local 407 regarding the (4) year



commitment of service as a paramedic. The City of Waukesha Fire Department adheres to this item, but has “in the past”, allowed paramedics to break this commitment for personal reasons. Equipment Operator Daniel Berghoefer has forwarded a memo to Chief Stedman requesting to be released from the 4 year commitment for personal reasons. Both Chief Stedman and I feel a responsibility to the community as well as the members of the department and Equipment Operator Daniel Berghoefer to honor his request.

In reviewing “Notice to Develop an Eligibility List For Promotion To The Position of Equipment Operator” dated July 17, 1996, I feel we have adhered to the posting as well as Article 21 Section 3 by promoting Firefighter Daniel Berghoefer to Equipment Operator.

With this, I consider Local 407’s grievance regarding the promotion of Firefighter Daniel Berghoefer to Equipment Operator not justifiable.

There were no further promotions to equipment operator made off the list that was published on September 13, 1996. Accordingly, Behrens did not get appointed off that list, and at the time of hearing still held the rank of firefighter.

On July 17, 1998, the Department published a Notice to Develop an Eligibility List for Promotion to the Position of Equipment Operator/Equipment Operator-Paramedic, which included, *inter alia*, the requirement that paramedic applicants “shall have a minimum of one (1) year as a Waukesha Fire Department Certified Paramedic prior to being promoted...” to the equipment operator or equipment operator-paramedic position. As before, this posting was reviewed and approved by the joint promotions committee before its publication. On September 11, 1998, the department published the resulting eligibility list for the position of equipment operator, to remain in effect for a period of two years. The list included eleven qualified applicants, and did not include Berghoefer among its number.

On October 13, 1998, the Department published a Notice to Develop an Eligibility List for Promotion to the Position of Paramedic, which included the requirement that applicants “shall have a minimum of 18 months of seniority” with the Department, hold the relevant certifications, and be willing to postpone vacations during training. As before, this posting was reviewed and approved by the joint promotions committee before its publication. On December 2, 1998, the department published its Eligibility List for the Position of Paramedic, to be in effect for period of two years. The list included eight qualified applicants, and did not include Berghoefer among its number.

On October 30, 1998, Stedman wrote to Berghoefer as follows:

To: Firefighter Daniel Berghoefer

From: Chief Robert Stedman

Date: October 30, 1998

Re: Answer to 3<sup>rd</sup> Step Grievance

This letter is in regards to the 3<sup>rd</sup> step of the grievance you filed concerning the contradiction of the Equipment Operator posting dated July 17, 1996 that stated "Paramedics shall have a minimum of two years as a WFD Certified Paramedic prior to being promoted", and the contract language which states "Paramedics who are promoted to equipment operator or lieutenant shall have the option to maintain their paramedic license."

We agree that the language is contradictory. The fact is the contract language was agreed to in the new contract that was signed on March 13, 1996 and the intent of the language in the contract was to allow paramedics that were promoted the option to maintain their paramedic licenses.

When the posting for equipment operator was posted on July 17, 1996 we (management) simply failed to change the language in the posting about paramedics having two years in the program before being promoted. The Association promotion committee reviewed the posting and did not see the mistake of the language not being eliminated from the posting even though it violated the new contract language.

The language in the all promotional postings prior to the new contract language was there, because we did not want to lose paramedics from the program because of a promotion after investing time and money into their training. The purpose of eliminating the contract language to allow paramedics to maintain their license upon being promoted was to eliminate the problem.

In answer to your grievance, we agree the language in the Equipment Operator posting of July 17, 1996 and the labor agreement Article 20, Section 4 contradicted each other. Our position is that paramedics that are promoted to equipment operator and/or lieutenant have the option to maintain their paramedic license as stated in the labor agreement contract under Article 20, Section 4.

I am anticipating that this reply will end the grievance process for this situation, but please contact me if you have any questions.

On December 7, 1998, Personnel Director Thomas Wisniewski wrote to Local 407 President Dean Brewer as follows:

**SUBJECT: 4<sup>TH</sup> Step Grievance Answer – Promotion of D. Berghoefer, filed by J. Sment.**

The above stated grievance was heard at Step 4 of the grievance procedure, by the Personnel Committee, during their regularly scheduled meeting on August 10, 1998.

The grievance states the following alleged contract violation:

*“The promotion of Firefighter Paramedic Berghoefer to Equipment Operator is in violation of Article 21, Section 2 specifically the first sentence that states, “the promotional process as posted shall be adhered to.”*

The remedy sought is:

*“The promotion shall not stand.”*

Dean Brewer, President of Local 417, argued that Mr. Berghoefer should not be allowed to remain in the closed session of the grievance procedure for fourth step. He stated that the grievance was not about the individual involved but the process. The grievance was filed by Local 407, not an individual. The stance the Association is taking is on the contract language. Mr. Berghoefer did not file the grievance and should therefore not be allowed to stay in the grievance hearing.

Chief Stedman stated that Mr. Berghoefer is the subject of the grievance and, therefore, should be allowed to stay.

Mr. Wisniewski stated that, in the past, when the subject of the grievance is not the grievant, the subject has been allowed to stay.

It was the decision of Ald. Ripplinger, without objection from the Personnel Committee, to allow Mr. Berghoefer to stay for the grievance proceedings.

Dean Brewer stated that during the previous negotiation process for the 1995-1997 Labor Agreement, the promotional process was changed. Management has the right to post the promotional process putting on the posting the qualifications of what is wanted. About every two years there are small changes. For example, the equipment operator posting of July, 1996, requires two years as a paramedic prior to being promoted to equipment operator. The posting of October 23, 1995 notice, under item 2 stated "Applicants must make a four (4) year commitment of service to the Paramedic Program, and must be willing to postpone vacations prior to the completion of training." In this case, the person promoted did not fulfill this commitment. Mr. Brewer stated that July 1, of this year, would have been two years as a paramedic for Mr. Berghoefer. He was promoted before the completion of the four year period. This is the basis for the grievance. The Association acknowledges and understands that there was a mistake in the posting, however, it is not the Association's fault that the posting was in error. Mr. Brewer stated that the association admits that there was a mistake, but that the language of the labor agreement (Article 21, Section 2) needs to be enforced.

Chef Stedman stated that the facts of this case are that in late June of 1996, Firefighter Berghoefer was promoted to the position of paramedic. He started paramedic training January, 1996, ending such training in June of that same year. He has served on a daily basis as a Paramedic until early April, 1998, when Firefighter Berghoefer requested that he be removed from paramedic duty for personal reasons. To leave an individual on paramedic duty after having requested to be taken off that duty is not an effective way to operate such a vital service. He granted the request.

The Chief stated that he recommended the promotion of Firefighter Berghoefer to Equipment Operator to the Police and Fire Commission, based on revised contract language. He told us that the Commission deliberated in closed session and approved the promotion. Subsequently, on May 15, 1998, Firefighter Berghoefer was promoted to the position of Equipment Operator, the position he currently holds. Since that promotion, Berghoefer continues to maintain his paramedic license as allowed by the Labor Agreement.

Chief Stedman stated that the information the Association presented is correct; that the notice for promotion to paramedic, as listed in the 1995 posting, requested applicants to make a four year commitment to the Paramedic Program. As well, the July, 1996, posting for Equipment Operator states that applicants shall have two years as a paramedic prior to being promoted.

However, these postings are in error in that the 1995-1997 Labor Agreement changed the way paramedics are utilized. The 1995-1997 contract created the actual positions of Paramedic, Equipment Operator and Lieutenant Paramedic. New language, negotiated into that Labor Agreement as Article 20, Section 4, made keeping the paramedic license an option. Therefore, the two year paramedic minimum as listed in the 1996 posting, was no longer necessary and in error. The Labor Agreement certainly supersedes the erroneous posting.

The Chief stated that management has promoted other department employees in the past and not held them to the four year commitment when it involved personal reasons. Shawn Merath was promoted off the same list and attended paramedic training, but requested to be released from that paramedic program for personal reasons. His request was granted and the Association did not grieve that promotion.

The Committee deliberated the facts and circumstances presented at the hearing and has determined that there is no contract violation. First, both the association and management agree that the posting is in error. The intent regarding the language of the Labor Agreement was not in fact correctly embodied in the posting. Second, the history of the department shows that this type of consideration and a subsequent promotional action has been done before under the same posting and contract language without the filing of a grievance, and as such, was mutually acceptable. Lastly, the contract must be read as a whole. The Committee cannot let stand a posting that is in error, especially

when weighted against the negotiated Labor Agreement. Articles 21, Section 2, and Article 20, Section 4, must be applied together to derive a harmonized meaning of the language. Individual sections of the contract cannot be isolated from the rest of the agreement and given meaning independently of the purpose intended by the parties. The grievance is denied.

On December 9, 1998, Berghoefer wrote to Stedman and LaConte as follows:

In April of this year I requested my removal from the paramedic program for some personal reasons. I appreciate the fact that you granted my request and by doing so I was able to work through my personal problems without the added stress. Since then my problems have been rectified and I would like to return to the paramedic program if possible. Thank you for your understanding.

On January 12, 1998, Stedman wrote to Berghoefer as follows:

This letter is to reply to your request to return to the Paramedic Program. In April 1998, you requested to be taken out of the Paramedic program for personal reasons, and we granted that request.

The City of Waukesha Fire Department and the taxpayers have a substantial investment in the training you received to become a Paramedic, and therefore we are going to grant your request to return to the Paramedic Program, effective immediately. You will need to coordinate with Assistant Chief LaConte training you will need to complete in order to assure that your Paramedic skills are up to date.

Stedman testified that he had the authority to make appointments to the paramedic program without further action by the Police and Fire Commission.

On that same date, Stedman wrote to Local 407 President Brewer as follows:

In April 1998, Dan Berghoefer requested to be removed from the Paramedic Program for personal reasons, and the request was approved.

Dan Berghoefer has now requested to return to the Paramedic Program as his personal problems have been rectified, and the Department is going to approve his request and place him back in the Paramedic Program.

The grievance that was filed by Jeff Sment in May 1998 regarding the promotion of Dan Berghoefer was in regards to the fact that Dan Berghoefer had been allowed out of the Paramedic Program before he had completed a four year period.

It appears as though the fact that Dan Berghoefer has requested to return to the Paramedic Program, and his request is being granted that the Jeff Sment grievance will not be a settled dispute. We are therefore requesting that the Association withdraw your request for arbitration as requested on December 23, 1998.

It costs the city between approximately \$30,000 and \$60,000 to put someone through a full paramedic training program, considering salary for time not providing firefighting services, overtime to maintain staffing levels, registration, mileage, room and board.

### **POSITIONS OF THE PARTIES**

In support of its position that the grievances should be sustained, the Association asserts and avers as follows:

The collective bargaining agreement establishes an unambiguous promotional procedure which, if followed, would have barred Berghoefer's promotion to equipment operator. Article 21, Section 2 plainly requires that the promotional process shall be followed without exception. But while the paramedic posting of October 23 1995 required a four-year commitment, Berghoefer was allowed to resign after less than two years of paramedic service. By accepting Berghoefer's resignation - without which he would not have been eligible for promotion to equipment operator -- the city violated the collective bargaining agreement.

The City acted in blatant contradiction of the plain and unambiguous language of the paramedic posting when it allowed Berghoefer to resign from the paramedic service. But for this violation of the collective bargaining agreement, Berghoefer would not have been promoted to equipment operator. Denying the grievance

challenging Berghoefer's promotion to equipment operator allows the city to violate the collective bargaining agreement, it grants Berghoefer a windfall and it deprives Behrens of the economic benefit he would have received but for the City's failure to comply with the paramedic program.

The City places inordinate emphasis on a single phrase and argues that the requirement for two years of paramedic service in the equipment operator posting was somehow a mistake. But the collective bargaining agreement and the posting are easily harmonized, and both provisions are satisfied when a paramedic is promoted to the position of equipment operator after completing two years as a paramedic. It must be concluded that the city violated the collective bargaining agreement by promoting Berghoefer to equipment operator before he had completed two years as a certified paramedic. The city should not be encouraged to violate the promotional process as posted or disregard provisions of the contract as it did when it promoted Berghoefer. The grievances should be sustained and a make whole relief ordered.

The City's claim of mistake does not provide a basis on which to deny the grievance regarding Berghoefer's promotion to equipment operator. The city's argument that the qualification period of two years as a paramedic prior to appointment as an equipment operator conflicts with the contractual provision allowing concurrent status as a paramedic and equipment operator must fail. The city's claim of mistake in the posting is absurd, a transparent and bold attempt to justify its violation of the agreement. The city should be admonished for its blatant attempt to circumvent the terms of the agreement, and the grievance over Berghoefer's promotion to equipment operator should be upheld.

Accepting the city's position would, in effect, rewrite the agreement and eliminate the sentence requiring that the promotional process shall be adhered to. But the arbitrator has no authority to delete select provisions from the contract, and is obligated to interpret the contract in a way that will give meaning to all its provisions.

The promotion of Berghoefer to equipment operator before he fulfilled his commitment to the paramedic program, which was a posted requirement, violated the posting language of the collective bargaining agreement. The arbitrator should not allow the city to rewrite the collective bargaining agreement to eliminate the provisions regarding adherence to the posting.



The claim that Berghoefer's removal from the paramedic program was a temporary leave due to personal reasons is a transparent attempt to avoid the two-year qualification period for promotion to equipment operator and an obvious effort to avoid compliance with the paramedic promotional procedure held after Berghoefer's resignation. Berghoefer did not ask for a leave from the paramedic program; he resigned from the program. The city's claim that it was a leave, and its denial of the effort to prematurely qualify Berghoefer for promotion to equipment operator have several credibility problems. Since Berghoefer resigned from the paramedic service, his request to return to the program should not be used as a substitute for the promotional process set by the earlier posting.

The city's refusal to live up to its contractual obligations set off a chain of successive contract violations. The City tries to justify each and every violation with wanting and untenable excuses.

The first violation was when the City allowed Berghoefer to escape his four year commitment to the paramedic program, in an effort to qualify for promotion to equipment operator. Then the City promoted Berghoefer even though he had not completed the two-year qualification period as a certified paramedic. Then it allowed Berghoefer to return to the paramedic program from which he resigned, without competition, claiming he had merely been on leave.

This series of extensive and far-reaching violations have harmed several bargaining unit members, especially one (George Behrens) who would have been promoted to equipment operator had the City required Berghoefer to fulfill his qualification period,

Ordering the return of Berghoefer to the rank of firefighter/paramedic and the promotion of Behrens raises questions regarding the role of the Police and Fire Commission. Another approach would be to order the City to make the appropriate premium pay adjustments already described as a way to make the affected bargaining unit members whole. Regardless of remedy, the City's violation of the contract should not be tolerated.

In support of its position that the grievances should be denied, the City asserts and avers as follows:

The Association errs in asking that the equipment operator posting be followed because the posting itself violates the plan language of the collective bargaining agreement by its requirement of two years of service as a paramedic before promotion. By allowing paramedics who have been promoted to equipment operator to maintain their paramedic license, Article 20, Section 4 reversed the previous provision and abolished the requirement of two years of service as a paramedic prior to becoming an equipment operator. The issue for the arbitrator is whether the contractual requirement of adherence to the posting can negate the language of Article 20, Section 4, which is contrary to the posting. The City's position is that the job posting cannot negate a provision of the collective bargaining agreement. Thus, Article 21, Section 1, which requires adherence to the posting, should be understood to mean that the posting shall be adhered to, unless it violates the collective bargaining agreement.

The Association also errs in alleging the collective bargaining agreement was violated when the City allowed Berghoefer to return to the paramedic program in January 1999. Because he continued to be licensed as a paramedic, and because the City wanted to protect its investment in Berghoefer's paramedic training, his action to step down as a paramedic should properly be understood as taking a leave, rather than a resignation. Thus, his return to the program was not a violation of the collective bargaining agreement because the Chief has the right under Article 20, Section 2 to grant such leaves. The Association's proposed construction of the collective bargaining agreement would elevate Article 21, Section 1, requiring adherence to the job posting, to a position superior to that of the leave provision, violating the cardinal rule of contract construction that all provisions must be harmonized whenever possible. Here the fair and reasonable harmonization is that "promotions shall follow the job posting unless someone is returning from a leave."

The Association also errs in seeking remedies that are unjust and not permitted by the collective bargaining agreement. The Arbitrator cannot demote Berghoefer from his position, as such authority rests only with the Police and Fire Commission. And the Association's bid to have George Behrens receive premium pay without performing the duties of the higher position would be an injustice which the contract does not allow.

It would also be an injustice to use the authority of the Arbitrator to settle a dispute which is internal to the Association, where the real dispute is between Association brothers Behrens and Berghoefer. The practice of allowing an individual association member and the Association to file two grievances over the same issue should not be allowed to succeed. It is an abuse of the grievance procedure to take conflicting positions to gain that which the contract does not allow, namely equipment operator pay for a person not performing that job.

The Association's remedy regarding the paramedic position, payment of premium pay to the next person on the list, shares the "higher pay for no work" injustice with the equipment operator promotion. It creates a pay position where one does not now exist, which the contract does not allow for. The most prudent route is to deny the grievance as inconsistent with the plain language of the contract, which allowed for Berghoefer's right to return from "leave" prior to the next person on the list becoming a paramedic.

Accordingly, because the express terms of Article 21, Section 4 allow a paramedic to be promoted to paramedic/equipment operator, and because the express terms of Article 20, Section 2 allow a paramedic to take a leave from the program and return, the City did not violate the collective bargaining agreement in any regard and the grievances should be dismissed.

In its reply brief, the Association argues further as follows:

The claim that the equipment operator posting mistakenly included an eligibility requirement of two years of paramedic service is not persuasive. The City has the burden of proving that the service requirement was a mistake, but only makes a series of arguments that raise more questions than they answer. If the inclusion of an eligibility requirement was a mistake, isn't it reasonable to conclude that at least one of the six people who reviewed it would have so noticed before the posting was distributed? And even after the posting, no one objected to the service requirement; in fact, Berghoefer and Stedman even validated its inclusion. The claim of mistake is not even subtle, but is plainly an eleventh hour effort to justify the City's violation of the contract. Further, the eligibility requirement should be enforced even if it is assumed that it was mistakenly included in the equipment operator posting. Any mistake that might have occurred was the fault of the City, which must live with its consequences.

Contrary to the City's claims, the Association's position does not leave any contract provision without meaning, in that it is easy to reconcile adherence to the posting and the provision allowing paramedics to serve as equipment operators. Once a bargaining member has completed two years of paramedic service they are eligible for promotion to equipment operator.

The suggestion that an award to the Association leaves the City free to change wages, hours or working conditions via a job posting is illogical. And the issue of Berghoefer's licensure as a paramedic is irrelevant.

Contrary to the claim of the City, Berghoefer did not seek nor was he granted a leave from the paramedic program; rather, as all the evidence clearly shows, he quit the program. Neither he nor the City treated his resignation as a request for leave until it was convenient for them to do so. The arbitrator should resist their effort to rewrite history.

The remedy which the Association has recommended is both fair and legal. Because Behrens was harmed by Berghoefer's promotion to equipment operator, he should receive the premium pay he was unjustly denied until such time as he is promoted. And because Berghoefer's return to the paramedic program unjustly denied another bargaining unit member the opportunity for training and promotion, the next individual who would have been sent to paramedic school and received promotion should receive paramedic premium pay until such time as that individual becomes a paramedic. These make whole remedies are consistent with well-established principles of labor law. They are narrow and reasonable means of rectifying the results of the City's wrongdoing.

The grievances should be sustained and the remedies ordered.

In its reply brief, the City argues further as follows:

There are two major irrelevancies in the Association's brief that the arbitrator should ignore. The fatal flaw in the Association's brief is its complete and utter failure to make more than a minimal mention of the obvious conflict between the two job postings and the other language of the collective bargaining agreement. By ignoring the importance of Article 20, Section 4, the Association brief is exposed in its true nature – a blatant attempt to distract the Arbitrator with two red herrings.

The Association's proposed construction of the contract violates the rules of contract construction because it would negate the language of Article 20, Section 4 which, contrary to the Association's construction, eliminates the two-year deferral of equipment operator/paramedic status. That deferral is directly contrary to the express language and history of this provision.

The Association's construction would also negate the language of Article 20, Section 2, which allows for leaves from the paramedic program. It also violates Articles 23 and 25, in that its argument that there was a joint attempt to amend the contract via the job descriptions is prohibited by the contract.

Contrary to the fatal flaws in the Association's arguments, the City's proposed construction does not violate any rules of contract construction. The City merely asks that the arbitrator disregard language in a job posting that is contrary to the contract. Whether that language was inserted by intentional act or mistake is irrelevant; all that matters is that it is directly contrary to Article 21, Section 4, (unenumerated) paragraph 3. Acceptance of the City's construction will maintain the primacy of the contract.

Accordingly, the arbitrator should dismiss the grievances.

### DISCUSSION

This grievance links personnel transactions over a three-year period, making the association's case complex and many-layered. Its essential nature is as follows: the contract requires adherence to the posting process; the 1995 paramedic posting required a four-year commitment; by accepting this promotion in 1996, Berghoefer agreed to serve as a paramedic at least until 2000; the 1998 operator posting required that paramedics have at least two years of service; in 1998 the city allowed Berghoefer to void his four-year commitment to the paramedic program, and avoid the two-year requirement for paramedic applicants, in order to become eligible for the operator promotion; therefore the 1998 promotion of Berghoefer to operator violated the contract. The association analysis of Berghoefer's 1999 promotion to paramedic is more direct, focusing on his direct readmission to the program and his non-compliance with the paramedic posting of October, 1998.

The Association is correct in its central allegation -- Berghoefer accepted a paramedic position in 1996 knowing it entailed a four-year commitment, which he broke in order to avoid the two-year requirement in the 1998 posting for operator and become eligible for that promotion. Moreover, the department knew what he was doing and why, and actively participated through its favorable treatment of Berghoefer throughout the promotional process.

But do the actions by the department and Berghoefer voiding the four-year commitment have direct bearing on the operator promotion? After all, given his overall seniority, Berghoefer would have been eligible for the operator promotion even without being a paramedic. What impact does the fact that Berghoefer was a paramedic at the time of his application have on the ultimate disposition of his application?

Berghoefer began fulfilling his four-year commitment to working as a paramedic on June 24 1996. Seven weeks later, he wrote to Fire Chief Stedman for permission to participate in the upcoming operator exam. "I am aware that since I am a new Paramedic that I cannot be promoted for two years," he wrote, "but I feel it would be in my best interest to become (a relief operator) for the promotional point value." Berghoefer took the equipment operator test. In the eligibility list published September 13, 1996, to be effective for two years, Berghoefer ranked third.

At Article 21, the collective bargaining agreement's discussion of the promotional process repeatedly uses the phrase, "qualified applicants." Indeed, it is only "those qualified applicants" who are not initially selected who "constitute an eligibility list" that remains in effect for two years. Clearly, only "qualified applicants" can be included in the written eligibility list.

The two applicants ahead of Berghoefer, Brewer and Johnson, were promoted in late 1996 and spring 1997 respectively. But when another vacancy arose for appointment later in 1997, the city didn't promote Berghoefer; instead, it asked Berghoefer if he would be willing to give up his paramedic position to take the operator promotion, which he was not. The department thereupon promoted Alba on or about September 1, 1997. That is, the department passed over Berghoefer and appointed Alba, *explicitly and precisely because* Berghoefer was a paramedic without the stated two years' service.

By its actions regarding the September 1997 promotion, the department thus acknowledges that Berghoefer was not a qualified applicant even as of that date. The City's problem is that a full year prior, in September 1996, the department had published an eligibility list for the operator position which included Berghoefer as the third-ranking *qualified applicant*. This is could not do.

There were no further promotional opportunities until the early spring of 1998, when equipment operator Duane Poulson retired. It was just a few months until the expiration of the 1996 - 98 eligibility list. If there were no further retirements, this would be the last promotion to be taken off that list; if the city held to its position as of the September 1997 vacancy, Berghoefer might go without promotion despite his high ranking.

At that time Berghoefer was still a few months short of the two-year tenure at the time of Poulson's retirement. However, being a paramedic is not a requirement for the equipment operator promotion – the requirement is only that if you *are* a paramedic, you have at least two years' service. And Berghoefer well met the postings' overall seniority requirement of only five years, less than half his actual service seniority.

Berghoefer then resigned as a paramedic for reasons that were “personal in nature.” The department, which had invested approximately \$30,000 in Berghoefer's training and certification as a paramedic, did not make a single inquiry into the nature of what would cause Berghoefer to take such a drastic act as to “leave the paramedic program.”

Consistent with its beliefs as exemplified in the September 1997 promotion, the department even acknowledged at the time that Berghoefer stepped down as a paramedic that he did so *for purpose of appointment* as an equipment operator. Assistant Chief LaConte's April 8, 1998 memo announcing Berghoefer's operator appointment explains that Berghoefer “has requested that he be taken out of the Paramedic Program **in order to be eligible** for this promotion.” (emphasis added)

The department says it determined, and so maintained throughout this proceeding, that the requirement for two years' service for applicants who were paramedics was a mistake, a vestige from a time when someone could not be both a paramedic and lieutenant. The department contends the requirement in the posting was somehow in conflict with the last paragraph of Section 4, Article 20, and that the provision is thus invalid.

The provision upon which the department relies as nullifying the two-year requirement for applicants who were paramedics is as follows:

Paramedics who are promoted to equipment operator or lieutenant shall have the option to maintain their paramedic license. These individuals will be utilized as Equipment Operator/Paramedics of Lieutenant/Paramedics and will be paid based upon the current salary schedule.

The city may well be right that the purpose for the two-year requirement was in the former context, and that the reason for the requirement was no longer present. The city is also correct that the contractual provisions of the collective bargaining agreement would supersede the details in a position description or job posting. But the city is wrong is claiming that the language of the collective bargaining agreement quoted above conflicts with the requirement in the posting; there may no longer be a contractual necessity for the provision, but that is far different from saying the provision is contractually barred. By its text, this paragraph is clear

and unambiguous, and has no evident bearing on whether a job posting for equipment operator can include a qualification that applicants who are paramedics have met certain requirements for length of service in that capacity.

The collective bargaining agreement requires that “the promotional process as posted shall be adhered to.” The promotional posting for the position of equipment operator included the requirement that paramedics “shall have a minimum of two years” as a department paramedic prior to appointment. This was a valid requirement that the department was required to honor.

The department let Berghoefer take the operator test in September 1996, knowing that he was not eligible for appointment. I find no violation or offense in this action. There’s nothing wrong with allowing an ambitious employe to take a practice exam – *provided it stays a practice exam during the period of ineligibility*,

There are a number of variables and overlapping possibilities which would define the extent of such a period of ineligibility; there may well situations where the department may publish an eligibility list which includes parties not eligible for appointment *as of the date of the test*. But the department may not publish their names on the list *until the date of eligibility under the terms of the posting*.

But the department did more than just let Berghoefer take a test everyone acknowledged he was not eligible for. It also included him on the official eligibility list published on September 13, 1996, the basis of his May 7, 1998 appointment. In so doing, the city violated the terms of the collective bargaining agreement requiring adherence to the posting process.

The collective bargaining agreement, at Article 21 Section 2, states that, “all qualified applicants shall be notified in writing of their ranking.” At the time the department notified Berghoefer in writing of his ranking on the operator test, Berghoefer was not in fact qualified. Berghoefer was a paramedic with less than two years’ service, who had a continuing 30-month commitment to the paramedic program. As Berghoefer was not a qualified applicant, the department violated the collective bargaining agreement by including him on its published rankings for the operator position, and using that ranking to promote him on May 7, 1998.

Consideration of the second grievance requires a less detailed analysis, because its essential nature is conveyed in just four short memos over a six week period.



On December 2 1998, the department published the new eligibility list for paramedic, to be in effect for two years. Berghoefer wasn't on the list. A week later, Berghoefer wrote to Stedman and LaCronte saying that his former personal problems "have been rectified," and saying he "would like to return to the paramedic program if possible." On January 12, 1999, Stedman wrote to Berghoefer that "we are going to grant your request ... effective immediately."

That is, the department promoted Berghoefer six weeks after publishing an eligibility list that did not include him as a qualified applicant. It is hard to see how this is consistent with the department's contractual duty to adhere to the posting process.

Oddly, however, the department apparently believed it was doing the Association a favor by restoring Berghoefer to the paramedic program, because this meant he would once again be honoring his original four-year commitment. Accordingly, Stedman asked the Association to withdraw the initial grievance, which it understandably declined to do.

In explaining Berghoefer's return to the paramedic program six weeks after it published an eligibility list which did not include him as a qualified applicant, the city contends that Berghoefer's original departure from the program was not a resignation, but in fact merely some sort of personal leave.

The city's claim that Berghoefer never resigned as a paramedic, but instead took a leave, is entirely without support in the record. Not only is there no evidence that Berghoefer took a leave - there is affirmative and undisputed evidence that Berghoefer himself understood that he was quitting.

The collective bargaining agreement (Article 20, Section 2) provides that the city is relieved of the pay differential for any paramedic who "is granted, per such employee's request, a leave from such program for a period" over thirty days. Berghoefer made no such request, and the city granted no such leave. His May 7 letter to Chief LaConte twice refers to "my resignation," and offer's Berghoefer's explanation of why he and his wife decided "that I should leave the paramedic program." At no point does Berghoefer refer to, or ask for, a leave of any kind.

Moreover, the department's actions are inconsistent with a belief that Berghoefer had legitimate performance issues justifying a leave for personal reasons. If the department believed there was cause for Berghoefer to cease performing paramedic duties, it would not have continued him in that position until his promotion to operator more than a month later.

Berghoefer did not request and he was not granted a leave, temporary or otherwise, from the paramedic program. I find as a fact in this record that Berghoefer resigned from the paramedic program and that the city accepted his resignation.

By its action restoring Berghoefer to the paramedic program on January 2, 1999, the department denied some other firefighter the opportunity for training and promotion. Strangely, the record is silent on that individual's identity, thus complicating an already-complicated issue of remedy.

Having found that both grievances are meritorious and must be sustained, I now address that issue. There is some ambiguity in the record as to the relationship of my authority with that of the Waukesha Police and Fire Commission. The city states and the Association acknowledges that the demotion of Berghoefer from the equipment operator position is under the exclusive jurisdiction of the Waukesha Police and Fire Commission. I decline to issue any award that would challenge that jurisdiction. However, Chief Stedman testified that promotion to the position of paramedic does not go to the PFC for its review and approval. For its part, the Association does not seek an award ordering Behrens' appointment as an equipment operator, but that he be made economically whole until such an appointment is forthcoming.

Whatever my jurisdiction on appointment and demotion, it is well-settled I have sufficient authority to order a remedy which provides economic redress to someone improperly denied the equipment operator promotion.

The record establishes that firefighter George Behrens would have been appointed equipment operator in the spring of 1998, but for the promotion of Berghoefer. He has thus suffered economic harm due to the department's actions, and must be made whole to the extent authorized by law.

The record does not establish the identity of the firefighter denied the training and promotional opportunity lost when the department improperly returned Berghoefer to paramedic status on January 12, 1999. The parties will have to clarify this in a supplemental proceeding.

Accordingly, on the basis of the collective bargaining agreement, the sworn testimony and record evidence and the arguments of the parties, it is my

**AWARD**

1. That the grievance in Case 132, MA-10555 is sustained, in that the city violated Article 21, Section 2 by including Dan Berghoefer on its published rankings for the equipment operator position and using that ranking to promote him to equipment operator on May 7, 1998;

2. That the grievance in Case 135, MA-10734 is sustained, in that the city violated Article 21, Section 2 by returning Berghoefer to the paramedic program on January 12, 1999, when he was not included among the qualified applicants on appropriate the Eligibility List for the Position of Paramedic which the department published on December 2, 1998.

3. That as remedy in Case 132, the city shall make George Behrens whole as to wages and other benefits, as though had been promoted to the position of equipment operator on May 15, 1998, and continuing until such time as he is promoted to such position.

4. That as remedy in Case 135, the City shall make whole the firefighter who would have received the paramedic promotion on or about January 12, 1999 but for Berghoefer's return to the paramedic program.

5. For the purpose of implementing these remedies, I shall retain jurisdiction until January 12, 2000, unless prior to that time either party requests my further participation in a supplemental proceeding, or both parties release me.

Dated at Madison, Wisconsin this 24th day of November, 1999.

Stuart Levitan /s/

---

Stuart Levitan, Arbitrator

