

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL 407, WAUKESHA**

and

CITY OF WAUKESHA

Case 135
No. 57738
MA-10734

(Berghoefer Promotional Grievance No. 2)

Appearances:

Mr. John B. Kiel, Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, 700 West Michigan Street, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of International Association of Firefighters, Local 407.

Mr. Vincent D. Moschella, Assistant City Attorney, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin, appearing on behalf of the City of Waukesha.

SUPPLEMENTAL 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 that provides for final and binding arbitration of disputes arising thereunder. On January 26, 1999 the Association made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to provide a panel of five of its staff members from which the parties could choose an arbitrator to hear and decide two grievances over the interpretation and application of the terms of the agreement relating to promotions. The parties chose the undersigned to serve as the impartial arbitrator. Hearing in the matter was held in Waukesha, Wisconsin on April 7, 1999, with the parties filing written arguments and replies by September 2, 1999.

On November 24, 1999, I issued an Award in which I held, in part, as follows:

. . .

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 the appropriate Eligibility List for the Position of Paramedic which the department published on December 2, 1999.

. . .

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 .

Prior to January 12, 2000, the parties informed me that they had agreed to ask that I retain jurisdiction over this matter for purposes of the remedy until January 26, 2000, which date they later lifted, leaving me with full jurisdiction regarding remedy. 1/ At my request, the parties on February 21 reached a stipulation of supplemental facts to complete the record, as follows:

1/ Confirming correspondence, dated January 12, 2000 was received in this office on January 13, 2000.

1. The first four firefighters on the paramedic eligibility list which was established on December 2, 1998 were (in descending order): Andrew VanHaag, Aaron Wilke, Joseph Coffey and Mike Kanter.

2. VanHaag, Wilke and Coffey began paramedic training in Janesville on or about January 11, 1999. Berghoefer returned to the paramedic program on or about January 12, 1999. VanHaag, Wilke and Coffey completed their training on or about June 18, 1999. Pursuant to long-standing practice, VanHaag, Wilke and Coffey did not receive any paramedic pay until they had completed training and passed the State Emergency Medical Technician-Paramedic licensure exam.
3. Kanter began paramedic training in Brookfield on July 21, 1999. He will complete that training on or about April 18, 2000, and, pursuant to long-standing practice, will not receive paramedic pay until he has completed training and passed the State Emergency Medical Technician-Paramedic licensure exam.
4. Prior to the present time, the Waukesha Fire Department never had more than three firefighters in a paramedic training program at any one time other than when the program first began in 1975.
5. In January 2000, the Waukesha Fire Department had five firefighters in a paramedic training program. Three Waukesha firefighters were enrolled in the Janesville paramedic training program that began in January 2000 and two enrolled in the City of Brookfield paramedic training program.
6. The number of paramedics sent for training each year is determined by the Chief.

The parties thereafter filed Supplemental Briefs and Reply Briefs, the last of which was received on March 28, 2000.

POSITIONS OF THE PARTIES

The parties stipulated that I was to base my Supplemental Award on the remedies they proposed, which condition I accepted.

The Association proposes as remedy the following:

1. Award paramedic premium pay and benefits retroactive to June 18, 1999 to Michael Kanter.

2. Order Berghoefer removed from the paramedic program so that other bargaining unit members can fairly compete for the paramedic opportunity that Berghoefer wrongfully occupies.

The City proposes a remedy that states that no member of the bargaining unit has been harmed by the City's actions and that no further remedy is necessary.

In support of its proposed remedy, the Association asserts and avers as follows:

Michael Kanter is entitled to premium pay for the period between June 18, 1999 and April 18, 2000 to make him whole for the City's violation of the collective bargaining agreement. There is no dispute Kanter was the fourth candidate on the eligibility list of December 2, 1998; but for Berghoefer's return to the program Kanter would have filled the paramedic vacancy by attending training with the others. Had the City sent Kanter to training rather than fill the vacancy with Berghoefer, Kanter would have become eligible for paramedic premium pay on June 18. The wrongful decision to return Berghoefer to the program, rather than train Kanter, cost Kanter \$8,134.61 in premium pay; the City should be ordered to make him whole.

In order to provide all bargaining unit members with the fair opportunity to participate in the competitive process for promotion to paramedic Berghoefer must be removed from the paramedic program. By restoring Berghoefer to the program after his resignation the City denied some other firefighter the opportunity for training and promotion to paramedic. Initially that firefighter was Kanter; now that the list has expired Berghoefer's continuation in the program deprives others of the chance to compete. Berghoefer's continuation in the paramedic program represents a continuing and ongoing violation of the collective bargaining agreement, and perpetually deprives other bargaining unit members of the chance to compete for a paramedic opportunity. Removal of Berghoefer from the program is a critical element of make whole relief for the bargaining unit.

In support of its proposed remedy, the City asserts and avers as follows:

No additional remedy is required because the record proves that no firefighter was harmed by Berghoefer's return to the paramedic program. As the parties stipulated, the City had never sent more than three firefighters to training at any one time; Kanter was fourth on the list in January 1999, and had no expectation of receiving training at that time. Kanter lost nothing by Berghoefer's return; as all the firefighters on the eligibility list of December 1998 are in or have

completed training, no other firefighter lost anything either. Further, the sole discretion of how many firefighters to send to training rests with the Chief; in the exercise of that discretion, the Chief had as of January 1999 never sent more than three firefighters to paramedic training at any time. Kanter and all other members of the bargaining unit received their training no later than they would have had Berghoefer not returned to the program. As no one lost anything by Berghoefer's return, no one needs to be made whole and no further remedy is required.

In further support of its proposed remedy, the Association replies as follows:

There are several problems with the City's argument that no members of the bargaining unit were harmed by Berghoefer's return to the paramedic program. First, the City has sent, and is sending, more than three students to paramedic training at a time. There is nothing in the record to suggest that the City could not send more than three to training at the same time in January 1999. Second, the dispute is not about the number of students sent to training at one time; the crux is about how candidates are selected and appointed to the program. Berghoefer was not on the eligibility list; Kanter was. In January 1999 there was a paramedic program vacancy to which the City should have appointed Kanter. Nothing prevented the City from sending four students to training at that time; indeed, the City sent five students to training just a few months later. Kanter should have been trained and appointed to the paramedic program ahead of Berghoefer, and should be made whole by a back pay award.

The City's opposition to setting aside Berghoefer's appointment defied arbitral precedent. Arbitrators have long held it appropriate to set aside a promotion which is obtained in violation of the collective bargaining agreement. The back pay to Kanter and the removal of Berghoefer from the paramedic program are appropriate and essential elements of relief.

In further support of its proposed remedy, the City replies as follows:

The Association's argument rests on a false premise which invalidates its entire argument. The Association errs when it incorrectly states there were four vacancies in the paramedic program in January 1999; the record shows this is not true. The Department does not have a fixed number of paramedics. As the stipulated facts state, the number of paramedics sent to training each year is

determined by the Chief. The Chief makes this determination primarily on the basis of funds for training being available, and not in relation to any fixed number of paramedics. Kanter lost nothing when Berghoefer returned to the program in January 1999 because the Department's practice at that time was to send only three firefighters to training at one time; there was no "vacancy" which was filled by Berghoefer rather than Kanter. Nor does Berghoefer hold a position that could be filled by someone else. Berghoefer's absence from the December eligibility list was irrelevant because he had already received his training and become a licensed paramedic.

Because there was no harm to anyone, there is no need for further remedy. However, there has already been a remedy, namely the award which found that the Chief had violated the collective bargaining agreement. The opprobrium which the Chief experienced as a result of that award certainly is a palpable consequence for the violation. Yet the Association now asks the Arbitrator to impose an additional remedy which does not punish the Chief but rather punishes one of its own members when his continued presence in the program harms no other bargaining unit member. The logic behind this is questionable at best, is unjust and should not be granted. Nor is backpay for Kanter appropriate. Kanter had no back pay entitlement, and to receive back pay would be a windfall and not just a remedy.

Any fair comparison of the two positions leads to the inescapable result that justice is better served by a finding that no further remedy is necessary, and the arbitrator should so find.

DISCUSSION

In Case 135, No. 57738, I found 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 the appropriate Eligibility List for the Position of Paramedic which the department published on December 2 1998.

A problem arose in framing the remedy – the absence from the record of any evidence as to who, if anyone, had been denied a training or promotional opportunity by the City's violation. Therefore, all I could do was to direct the City to 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. I reserved jurisdiction in the event the parties were unable to implement the remedy.

The parties were unable to reach an understanding on a mutually acceptable remedy, and have requested that I issue this Supplemental Award.

There are two elements at issue in considering an appropriate remedy -- Berghoefer's status in the paramedic program, and the make-whole remedy for the firefighter (since identified as Kanter), who was purportedly harmed by Berghoefer's return to the paramedic program on January 12, 1999.

The City has three reasons to oppose any further remedy. It asserts that Kanter had no reasonable entitlement because the City had never sent more than three firefighters at a time, part of the Chief's exercise of his ultimate managerial discretion. It notes that all firefighters on the January, 1999 Eligibility List have since been accepted into training and or promoted. And it says the shame it and Chief Steadman already feel is punishment enough.

The City may well be correct that due to established practice and the Chief's underlying discretion to set the number of firefighters accepted into training and promoted into pay status, Kanter had no reasonable expectation of or entitlement to promotion. The City might also be correct that there are no current or future individuals harmed by Berghoefer's continuing presence in the program. That would not mean, though, the end of this matter.

The facts show that the practice **as of January 11 1999** was for Chief Steadman, in his managerial discretion, to set at three the maximum number of firefighters sent for paramedic training at one time. Indeed, on that date Steadman could have sent as many as all 11 on the eligibility list or as few as none. That the City had since expanded the group to five should be seen as a positive development, not something to be interpreted adversely.

As the fourth firefighter on the eligibility list that hitherto had only had three, Kanter had no reasonable expectation or entitlement that that he would be given the opportunity at that time for training as a paramedic. Accordingly, I reject any financial remedy as proposed by the Association.

Finding for the City as to claimed remedy for Kanter does not, however, affect the analysis of Berghoefer's status in the paramedic program. Nor does the fact that the City is correct that Berghoefer's presence in the paramedic program holds no harm to any individual now or to become in the bargaining unit.

Despite the City's moving reference to the "opprobrium that the Chief has experienced in the eyes of the Union as a result" of my Award, I believe full remedy does require further arbitral involvement in the staffing of the department. I regret that this is so, and take seriously the responsibility for this action.

The City, through Chief Steadman, acknowledged at hearing that promotions to the position of paramedic are not taken to the Police and Fire Commission. Accordingly, the Association asserts, I have the authority to direct the City to take the necessary steps to affect Berghoefer's paramedic status. I agree.

The record evidence establishes that while training and certification as a paramedic are necessary prerequisites to appointment in the paramedic program, they are not sufficient for such status without such additional steps as application, designation as a qualified applicant, and appointment by the Chief. Berghoefer is trained and qualified – but neither he nor any other firefighter could attain pay status as a paramedic without undergoing the process pursuant to the collective bargaining agreement.

That is why my Award of November 24 1999 explicitly held that Berghoefer's promotion back into the program without being listed as a qualified applicant on the appropriate Eligibility List violated Article 21, Section 2 of the collective bargaining agreement. And because there was a violation – which violation continues – there must be a remedy.

As noted earlier, I concur with the City that there's no direct harm to anyone from Berghoefer's maintaining his status as a paramedic. But there is still harm – to the collective bargaining agreement itself.

Berghoefer's presence in the program at this time offends the collective bargaining agreement. He must be removed from the program, pending his return under a process consistent with that agreement.

Because of the critical nature of protective services, I will not issue an award which could compromise public safety. While the record is silent on the need for paramedic services in the City of Waukesha, the City has shown it wishes to employ a full complement of paramedics, in a spirit of aggressive training and promotion for public health and safety. Berghoefer is a trained and qualified paramedic, and the Chief obviously has confidence in his abilities. I am not going to prevent the City from using his services – yet.

That process for appointing paramedics begins with the publication of a Notice to Develop an Eligibility List for Promotion to the Position of Paramedic. It is from that list of qualified applicants that the Chief draws the next round of trainees and paramedics. The Chief has the discretion to set the number of trainings and promotions, but has no discretion to exempt anyone from the full application process.

Chief Steadman may, at his discretion, maintain Berghoefer in the paramedic program until such time as are the first promotions made under the next Notice to Develop Eligibility List for Promotion to Paramedic issued after May 24, 2000. Berghoefer is eligible to apply for that List, with the further conditions that he must test competitively but is exempt from any training requirements.

Therefore, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my Award that the grievances is sustained in part and denied in part, as follows:

1. Berghoefer is removed from the paramedic program on a date at the discretion of the Chief of Police but no later than the time of the first promotions made under the next Notice to Develop Eligibility List for Promotion to Paramedic which is issued after May 24, 2000.
2. Berghoefer is eligible to apply for that List, with the further conditions that he must test competitively but is exempt from any training requirements.
3. The remedy of back pay for Kanter is denied.

Dated at Madison, Wisconsin this 22nd of May, 2000.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

