

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL 487, AFL-CIO**

and

CITY OF EAU CLAIRE (FIRE DEPARTMENT)

Case 243
No. 58898
MA-11100

(Tim McCaughey Grievance)

Appearances:

Mr. Joe Conway, Jr., 5th District Vice-President, International Association of Fire Fighters, appearing on behalf of IAFF Local 487.

Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, by **Mr. Stephen Weld** and **Mr. John Behling**, appearing on behalf of the City of Eau Claire.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and City respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on February 6, 2001 in Eau Claire, Wisconsin. Afterwards the parties filed briefs, whereupon the record was closed on March 13, 2001. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the City violate Article III, Section 4 and/or Article IV, Section 5 of the collective bargaining agreement when it failed to promote Engineer Tim McCaughey to Lieutenant? If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1998-2000 collective bargaining agreement contained the following pertinent provisions:

ARTICLE III UNION RECOGNITION AND ACTIVITIES

Pursuant to and in accordance with all applicable provisions of Chapters 111.70 and 111.77 of the Wisconsin Statutes, the City hereby recognizes the Union as the exclusive representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and conditions of employment for all non-civilian uniformed employees of the City's Fire Department for the term of this Agreement.

...

Section 4. The City agrees that no employee will be discriminated against because of membership in, or activity in connection with, the Union, and the City will not interfere with the rights of the employees to become members. The City will not discourage membership in the Union.

...

ARTICLE IV MANAGEMENT RIGHTS

Section 1. It shall be the right of the City to operate and manage its affairs in all respects in accordance with its responsibility, and the powers or authority which the City has not specifically abridged, delegated or modified by other provisions of this Agreement are retained by the City. Such powers and authority, in general, include, but are not limited to the following:

A. To determine the mission of the agency, set standards of service to be offered to the public, exercise control and discretion over its organization and operations, and to utilize personnel in the most appropriate and efficient manner possible.

...

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

...

Section 5. 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 procedures contained herein.

...

**ARTICLE XII
PROMOTIONS, REEMPLOYMENT, PROBATION,
SUSPENSIONS, DISMISSALS, LAYOFF**

Section 1. All promotions, reemployment, suspensions, and dismissal of any member of the Fire Department subject to this Agreement will be in accordance with Section 62.13 of the Wisconsin Statutes, and past practices of the department as of the effective date of this Agreement.

...

The collective bargaining agreement also contains a memorandum dated August 11, 1994 from Director of Human Resources Everett Foss to Local 487 President Dave Tobisch entitled "Promotional Process". It contains the following pertinent provisions:

Section 3.

Candidates must qualify for each position by completing a written test selected by Management for each respective position. The written test will be given and scored by a third party. The third party must be a recognized and reputable education or testing agency. Candidates must score 70% or above in order to qualify for the eligibility list for each respective position. Management and Local 487 will be notified of each individual's pass or fail status, and Management will notify the individual. No scores will be given to individuals or management. Candidates that pass the written test will be put on the eligibility list for three years. After three years, each candidate that wishes to stay eligible would have to take and pass the next available test given for that

respective position. In the time period between the end of a candidate's three years and the time he/she takes their next written test, each candidate would remain eligible for promotion. No candidate would have to take or pass more than two written tests in a six-year period. Candidates that do not pass the written test will not be eligible for promotion unless they pass the next written test. Written tests will be given at least once each year.

Section 4.

Using a process the Chief feels appropriate, the Fire Chief may promote any individual placed on the eligibility list. An individual on the eligibility list may not be passed over more than five times by a less senior employee in a six-year period. The six years begins when the individual is placed on the eligibility list for each respective position. The individual must remain qualified throughout the six-year period as described in this policy. At the end of a person's six-year qualifying period, an individual may re-qualify and continue to be considered for promotion; however, the pass-overs of any previous periods will not be considered for purposes of an automatic promotion.

No passover credit will be assigned to employees while serving a promotional probationary period.

BACKGROUND

Among its many governmental functions, the City operates a fire department. The Union is the collective bargaining representative for most of the department's employees. The Union and the City have been parties to a series of collective bargaining agreements.

The parties' most recent collective bargaining agreement contains a memorandum dated August 11, 1994 which codifies the fire department's promotional procedure. That procedure specifies in Section 3 that candidates who want to be considered for promotions "must qualify for each position by completing a written test selected by Management for each respective position." This means that candidates must take, and pass, a written exam. The exam is developed and given by a testing agency. The candidates who pass the written exam are placed on an eligibility list. This eligibility list is valid for three years. When an internal vacant position is filled, it has to be someone who is on the eligibility list for that position. The promotional procedure specifies in Section 4 that "Using a process the Chief feels appropriate, the Fire Chief may promote any individual placed on the eligibility list." This means that the Chief has the discretion to select whomever he wants off the eligibility list for the position being filled.

Notwithstanding the language in Section 4 giving the Chief absolute discretion to select whomever he wants off the eligibility list, the current Fire Chief, Ron Brown, has used the following multi-step process in making promotion selection decisions for the last ten years. First, the department's four Battalion Chiefs interview each candidate on the eligibility list. The questions which are asked of the candidates are identical. The interviewers assign scores and rank the candidates. Second, the candidates are then interviewed by a group selected from the rest of department's command staff (namely, the Chief, the Assistant Chief and/or the Deputy Chiefs). Once again, the questions are identical. The interviewers again assign scores and rank the candidates. Third, the entire eight-person command staff then meets and considers all the candidates. According to Chief Brown, the factors which the command staff considers are the following: the candidate's work experience, educational opportunities, seniority, promotional passover points, disciplinary history, behavioral history, working knowledge, field performance, command presence, relationship with other individuals, interview results and supervisory recommendations. The command staff then tries to reach a consensus concerning who should be promoted. In this context, consensus does not mean unanimous agreement; it means less than unanimous agreement. Sometimes, a consensus is not reached by the command staff. Usually, though, consensus is reached by the command staff. When a consensus is reached, the Chief accepts the consensus candidate and promotes that person. Finally, after the selection decision is made, a member of the command staff meets with all the candidates individually and informs them of the results (i.e. who was selected for the position). In the meeting which follows, a discussion is supposed to ensue which provides constructive feedback to the candidate concerning their strengths and weaknesses.

In mid-1999, the City tested internal applicants for the Lieutenant classification. Six applicants passed the written test and were placed on the eligibility list. The six were Thomas Hanks, Wayne Klett, Tim McCaughey, William Mengele, David Okas and Scott Walby. The above-described process was used to score and rank the six.

In September, 1999, the Chief promoted Mengele to Lieutenant.

In January, 2000, the Chief promoted Klett and Okas to Lieutenant.

A fourth Lieutenant position was filled in March, 2000. This case involves the filling of that position.

FACTS

Pursuant to the procedure described above, the department's command staff met and discussed the three candidates who remained on the aforementioned eligibility list. The three were Hanks, McCaughey and Walby. Of the three, Walby was the highest-rated candidate in

the Battalion Chiefs' interviews, and the second highest-rated candidate in the Chiefs' interviews. His combination ranking was the highest of the three candidates. Hanks was the second-highest rated candidate in the Battalion Chiefs' interviews, and the highest-rated candidate in the Chiefs' interviews. His combination ranking was the second-highest of the three candidates. McCaughey was the lowest-rated candidate in both the Battalion Chiefs' and the Chiefs' interviews. His combination ranking was the lowest of the three candidates. Following the command staff's discussion of the three candidates, a consensus developed that Walby should be promoted. The Chief accepted the command staff's consensus, and promoted Walby to Lieutenant.

After that decision was made, Deputy Fire Chief Ed Kassing informed the three candidates of the results (i.e. who was selected for the position). The record does not indicate whether he did this in person or by phone with Walby and Hanks. In any event, he did it by phone with McCaughey. When Kassing talked to McCaughey, he (Kassing) told him (McCaughey) that the command staff felt that one of McCaughey's weaknesses as a candidate for promotion was his "personality". McCaughey interpreted this to mean that he was not being promoted because of his "personality". Kassing testified at the hearing that what he meant by the word "personality" was for McCaughey to be less abrasive (than he is).

McCaughey grieved the City's failure to promote him to Lieutenant. The grievance was processed through the contractual grievance procedure and ultimately appealed to arbitration.

When the grievance was being processed, Chief Brown acknowledged in writing that the word "personality" was an inappropriate word choice and he apologized for its use. Brown also made the following comments in that letter:

Many factors are considered when making a decision as to who should be recommended to the Police and Fire Commission for promotion. Employee behavior is a component of that consideration. . .One's personality has nothing to do with the decision-making process. I truly believe Deputy Chief Kassing was using the word personality to help Engineer McCaughey understand that he demonstrates behaviors that are contrary to the mission of the department and to a positive relationship among all members of the department. An example of such a behavior was provided at our meeting.

Pertinent factual information about McCaughey and Walby follows. McCaughey is addressed first.

McCaughey has been employed by the Eau Claire Fire Department since July, 1985. Four years ago he was promoted from Firefighter to Engineer. That is his current rank. As an Engineer, he has filled in for absent Lieutenants in an acting capacity. The record indicates that about seven or eight years ago, he received several oral and written reprimands for a variety of matters. The Employer's educational incentive records indicate that in 1999, he had zero accumulated "academic credits".

Walby has been employed by the Eau Claire Fire Department since December, 1985. The record does not indicate anything about his disciplinary history with the Department. The Employer's educational incentive records indicate that in 1999, he had 28 accumulated "academic credits". Prior to being promoted to Lieutenant, he was in the department's paramedic program and wanted out because of what was characterized as EMS burnout. Additionally, prior to being promoted, he was transferred from one station to another at his own request because of conflict with his commanding officer.

Chief Brown testified that Walby was selected for promotion for the following reasons: he is a paramedic; he is considered dedicated and dependable; he responds positively to direction, he has pursued educational opportunities; and he had the greatest support among the Assistant Chiefs.

Chief Brown also testified that while McCaughey has some shadows (as he put it), he is not saying that McCaughey is not promotable or a bad employee. Brown opined that on occasion though, McCaughey has unnecessarily injected himself into (departmental) matters that he did not need to inject himself into.

McCaughey considers himself an outspoken union activist with a high profile in departmental union matters. His involvement in union activities is summarized as follows. In the mid-1990's, he served as a union steward. The record does not indicate how many grievances he processed while a steward. In any event, none of the grievances which he processed went to grievance arbitration. During that same period (the mid-1990's), he also served on the Union's Executive Board. The record does not indicate the size of that board. While he was on the board, the Union sent a "no confidence" letter to the Fire Chief. That letter was signed by the Union's then-President. McCaughey did not sign the letter, nor was he mentioned in same. In 1994, McCaughey served on the Union's negotiating committee. McCaughey has never held elected union office. He has not been on the Union's Executive Board or bargaining committee since the mid-1990's. As of the date of the instant hearing, McCaughey was serving as union steward for the "B" shift, was assisting the local union president in an unofficial capacity, and was a member of the Union's health care committee. Current local Union President Greg Stegge considers McCaughey to be very active in the Union's internal affairs.

POSITIONS OF THE PARTIES

Union

The Union contends that the City violated Article III, Section 4 and/or Article IV, Section 5, of the collective bargaining agreement when it did not promote McCaughey to Lieutenant. According to the Union, it should have. It makes the following arguments to support this contention.

The Union starts with the premise that McCaughey is deserving of promotion to Lieutenant. It notes in this regard that his 1997 job evaluation indicates in pertinent part that:

Engineer McCaughey uses the Incident Command system very well when he is in an acting officer role. He gives a good size up and is willing to take command of incidents until a supervisor arrives. It appears that he does not get to (sic) excited and is able to maintain his composure. Tim has excellent job knowledge. Tim makes good decisions on the emergency scene and I feel comfortable when he informs me of a resolution.

Building on the premise that McCaughey is deserving of promotion to Lieutenant, the Union then reviews McCaughey's past promotional history with the department. It notes in this regard that when he was on the Engineer and Lieutenant promotional lists, "everyone who maintained eligibility" was promoted before him. The Union asks rhetorically why that was. It further asks rhetorically whether his work performance was substandard. The Union answers that question in the negative. According to the Union, the only logical reason for McCaughey's not being promoted "is his aggressive advocacy of his union, nothing else."

The Union contends that McCaughey is an outspoken union activist with a long history of service to the Union. The Union acknowledges that McCaughey has never been an elected officer in the Union, but it nonetheless characterizes him as a valued "foot soldier" who is "active in the daily education of the younger members" concerning the Union's history, positions and policies. The Union concedes that over the years, McCaughey has been considered "abrasive" and "outspoken" by management, but the Union contends that the matters he was abrasive and outspoken on were "union issues" and "union speech".

The Union acknowledges it has no hard evidence that McCaughey was not promoted to Lieutenant because of his past union activities. Said another way, it concedes there is no smoking gun, so to speak. Be that as it may, the Union believes that there are plenty of holes in the City's reasons for not promoting McCaughey to Lieutenant. It elaborates on them as follows.

The Union begins by addressing the standard which the arbitrator should use to decide this case. In that regard, the Union cites the standard/test which was applied by the Illinois State Labor Relations Board in a case involving the North Maine Firefighters. NORTH MAINE FIREFIGHTERS, IAFF, LOCAL 2224, 16 PERI P2037 (Ill. SLRB, 2000). In that case, the Illinois SLRB applied the following test:

To establish a prima facie case of discrimination, the charging party must demonstrate that: (1) . . .engaged in union or other protected concerted activity; (2) the employer was aware of the nature of the employees' conduct; and (3) the employer took adverse action against the employees for discriminatory reasons, i.e., with animus towards their participation in such activities."

The Union essentially asks that this standard be applied here. When the Union applies that standard to the instant facts, it asserts that the "prima facie" case is readily evident in that McCaughey was not promoted because of union animus. As the Union sees it, the Chief was biased against McCaughey from the start because of his past union activity.

Second, the Union argues that the promotional process which the City used to justify its pick is "subjective, ripe for discrimination and inherently unreasonable." According to the Union, the existing promotional process "is nothing more than a popularity contest" wherein "the Chief and his command staff are the judges." The Union asks rhetorically what the criteria, validation, benchmarks and scoring system is for the existing system. The Union answers that question by saying that none exists. To support that premise, the Union calls attention to the fact that the City did not provide the actual questions which were asked at the interview, whether the questions were validated, and what benchmarks were used to compare candidates or the scoring system itself. The Union further contends that when the command staff met and attempted to reach consensus on a candidate, "any and all factors" were considered, including personality and past union activity.

Third, the Union responds to the fact that McCaughey's disciplinary history shows that he has received several oral and written reprimands over the years. As the Union sees it, that disciplinary history is irrelevant and should carry no weight in the arbitrator's decision. To support this view, the Union calls attention to the fact that the disciplinary action in question is dated, in that it occurred prior to McCaughey being promoted to Engineer in 1996. In the event the arbitrator looks at the Joe Snow incident which occurred in 1998, the Union avers that what happened there was that McCaughey was caught in the middle of an incident command breakdown at a fire scene. The Union asserts that overall, there is nothing in McCaughey's disciplinary history which should serve as the basis for denying him promotion to Lieutenant.

Fourth, the Union contends that Walby was not selected for the promotion because he was the better candidate. To support this premise and raise doubts about Walby's candidacy, the Union calls attention to the following matters: 1) that prior to being promoted, Walby wanted out of the paramedic program because of EMS burnout; and 2) that Walby had been transferred from one station to another because of conflict with his commanding officer. The Union further maintains that the real reason Walby was selected for promotion was to keep it (i.e. the promotion) from going to McCaughey ("anybody but McCaughey" is the way the Union puts it in its brief). Additionally, the Union submits that the Chief's stated reasons for promoting Walby bear no resemblance to the factors which the Chief said the command staff considered.

Finally, the Union argues that while there have been numerous former union officers who have been promoted in the department over the years, that fact proves nothing here. According to the Union, just because the City did not have animus toward those union officers and promoted them does not mean that the City did not have animus toward McCaughey.

In sum, the Union believes the City violated the collective bargaining agreement when it failed to promote McCaughey to Lieutenant. In order to remedy this contractual breach, the Union asks that McCaughey be awarded the Lieutenant position and be made whole for lost wages.

City

The City contends that it did not violate the collective bargaining agreement by not picking McCaughey for promotion to Lieutenant. It elaborates on this contention as follows.

First, the City addresses what it considers to be the scope of the grievance being litigated. For background purposes, it notes that under the promotion language, the Chief can pick whomever he wants off the eligibility list, so long as he: 1) does not violate the so-called "pass-over" provision which is included in the promotional language; 2) is consistent with Section 62.13 of the Wisconsin Statutes; 3) is consistent with past practices of the department; 4) does not discriminate against union supporters; and 5) is not unreasonable. The City notes that in this case, the Union does not claim that the "pass over" provision was violated (item 1 above) or that Article XII, Section 1 was violated (items 2 and 3 above). That being so, the City believes that items 1, 2 and 3 above are not at issue; instead, the grievance is limited to just items 4 and 5 above (specifically, the grievance only raises violations of Article III, Section 4 and Article IV, Section 5).

Next, the City claims it complied with those contract sections (namely Article III, Section 4 and Article IV, Section 5) when the Chief made his selection decision. It addresses those contract sections separately below.

Before doing so though, the City emphasizes again that in the management rights clause (Article IV, Section K), it retained the right to decide who to promote. According to the City, it has “reserved the right to promote whomever it considers the best candidate to higher ranking positions in order to preserve multilevel confidence that decisions are being made consistent with departmental policies, procedures and protocols and in a coordinated fashion.” Building on that premise, the City avers that the only limitations pertinent to this case are the ones which specify that the Chief will not discriminate against Union supporters in making his selection decision and not be an unreasonable decision (i.e. items 4 and 5 referenced above). The City addresses those points in the order just listed.

The City contends that the Union’s argument that McCaughey’s “‘active union participation’ kept him from being promoted is simply without basis.” It avers that from its perspective, McCaughey is not all that active in the Union. To support that premise, it cites the fact that McCaughey has not been a member of the Union’s bargaining team in the last three bargains, and that he has never, in his role as a Union steward, processed a grievance to arbitration. With regard to his current role of assisting the local president, the City asserts that this “unofficial position” is not documented in any fashion, and furthermore the Union has never informed the department’s command staff that such a position exists. As further evidence to support its contention that it did not discriminate against McCaughey when it did not select him for promotion, the City calls attention to its own “track record” of promoting former union officials in the fire department. Specifically, it notes that former Assistant Chief Patrow, current Assistant Chief Fuerbringer, and current Battalion Chief Miller all served as Union presidents; current Deputy Chief Kassing was a Union vice president; and that the successful candidate here (Walby) was on the Union’s working relations committee, while the other unsuccessful candidate here (Hanks) was a former Union vice president. The City implies that these promotions establish there was no animus in this case either.

The City also contends that the Chief promoted the person who he thought was the best candidate. According to the City, the Chief’s determination that Walby was the most qualified candidate was not arbitrary, capricious, discriminatory, clearly wrong or made in bad faith. To support this contention, the City cites several arbitration awards for the proposition that if management’s position has reasonable evidentiary support, it will be upheld. The City argues that in this case, there is, in fact, reasonable evidentiary support for the Chief’s selection decision. It notes at the outset that whenever there is an opportunity for promotion, there are going to be unsuccessful candidates. The City submits that it is understandable that those not promoted will be disappointed. However, just because there are disappointed candidates (in this case, McCaughey) does not mean that the process utilized by the City violated the contract. The City avers that it has gone beyond what the contract requires in developing a process which is designed to promote the best qualified candidate. According to the City, the process was fair and was implemented fairly in this case. To support its contention that Walby was the best qualified candidate, the City calls particular attention to the following facts. First,

that Walby was viewed by the interviewing Battalion Chiefs as the best of the candidates because he received the highest interview score. Second, that after Walby was not selected for promotion to Lieutenant the prior fall, he improved his promotional prospects by going to school and taking an advanced education program. The City maintains that overall, Walby had the confidence of the command staff while McCaughey did not. According to the City, the command staff felt that McCaughey's "prior actions, whether labeled personality or whatever, create legitimate concerns at all levels of the command structure regarding his decision making ability and willingness to be part of the 'team'". To support that premise, the City asserts that McCaughey's own testimony was indicative of why he was not the best qualified candidate. In particular, the City cites the fact that on direct examination, McCaughey was asked if he had ever been disciplined, and he responded in the negative. On cross-examination though, he admitted that he had indeed received various oral and written reprimands.

In sum, the City maintains that no contract violation occurred when the Chief picked Walby, rather than McCaughey, for promotion to Lieutenant. The City therefore requests that the grievance be denied.

DISCUSSION

At issue here is whether the City violated the collective bargaining agreement when it failed to promote McCaughey to Lieutenant. The person who was promoted to Lieutenant was Walby. The Union contends McCaughey should have been promoted instead. The City disputes that assertion.

I begin my discussion by reviewing all the contract language that is pertinent to any grievance which challenges a promotion decision.

The first provision which is pertinent to any promotion case is found in the management rights clause (Article IV), Section K, wherein it says that the City has the authority to "promote. . . employees in positions within the Fire Department." The meaning of this sentence is clear: the Employer has reserved to itself the right to promote whomever it considers the best internal candidate to higher-ranking positions that are filled in the department. While no limitations are imposed on management's right to promote in this particular contract provision, a review of the contract indicates there are five limitations which are imposed on the Employer's right to promote. Those limitations are found in three other contract provisions. Those provisions are addressed next.

Article XII provides, in pertinent part, that "all promotions. . . will be in accordance with Section 62.13 of the Wisconsin Statutes, and past practices of the department as of the effective date of this Agreement." What this means is that all promotions which are made must be consistent with Section 62.13 of the Statutes and also be consistent with the past

practices of the department. These are the first and second limitations which are contractually imposed on the Employer's right to promote.

The next contract provision which is applicable to a promotion case is the recognition clause (Article III) wherein it provides in Section 4 that "no employee will be discriminated against because of membership in, or activity in connection with, the Union. . ." What this means is that when the Employer makes promotion decisions, it cannot discriminate against employees because of their union activity. This is the third limitation which is contractually imposed on the Employer's right to promote.

The next contract provision which is applicable to a promotion case is another section of the management rights clause, namely Section 5. Therein it provides that any grievance challenging the reasonableness of the Employer's application of its management rights is grievable. It is implicit from this that the Employer's exercise of their management rights must be reasonable. Building on that premise, this means that in the context of a promotion, the Employer's exercise of their management right to make promotion decisions cannot be unreasonable. This is the fourth limitation which is contractually imposed on the Employer's right to promote.

The final contract provision which is applicable to a promotion case is found in the memorandum dated August 11, 1994 which codifies the fire department's promotional procedure. Section 4 of that provision contains what the parties call the "pass-over" provision. It specifies that "an individual on the eligibility list may not be passed over more than five times by a less senior employee in a six-year period." This is the fifth limitation which is contractually imposed on the Employer's right to promote.

Having just identified five limitations on the Employer's right to promote, the threshold question is whether all five are applicable here. They are not. The Union does not challenge the instant promotion on the grounds that it violated the pass-over provision, was inconsistent with Section 62.13 of the Statutes, or was inconsistent with the department's past practices. That being the case, these three limitations are not at issue herein. It obviously follows then that just two of the five contractual limitations on the Employer's right to promote are at issue here: the first is the one which provides that the Employer cannot discriminate against union supporters in making promotion decisions, and the second is the one which provides that the Employer's promotion decision cannot be unreasonable. They will be addressed in the order just listed.

The Union contends that the City discriminated against McCaughey (specifically, did not promote him to Lieutenant) because of his past union activity. As was just noted, such discrimination is contractually proscribed by Article III, Section 4. Cases which allege discrimination based on union activity are oftentimes processed in Wisconsin as prohibited

practice complaints under the Municipal Employment Relations Act (MERA). Here, though, the Union decided to not go that route. Instead, as was its right, it opted to have the matter heard and decided by a grievance arbitrator. The reason the foregoing has been noted is that grievance arbitrators normally interpret labor agreements, as opposed to state and federal laws. That will be the situation here because the parties stipulated to an issue which is limited to interpreting the contract. That being so, the undersigned is not empowered in this case to look beyond the contract in deciding whether the City discriminated against McCaughey (i.e. failed to promote him to Lieutenant) because of his past union activity.

The first question is what standard of review I should use to make this call. While the City does not address what standard should be used, the Union does. According to the Union, the arbitrator should apply the following standard:

To establish a prima facie case of discrimination, the charging party must demonstrate that: (1). . . engaged in union or other protected concerted activity; (2) the employer was aware of the nature of the employees' conduct; and (3) the employer took adverse action against the employees for discriminatory reasons, i.e., with animus towards their participation in such activities.

This standard came from a decision issued by the Illinois State Labor Relations Board. At the Union's request, I will apply that standard here to decide whether the City's non-selection of McCaughey was due to his union activity. As a practical matter, this standard is similar to the one applied by WERC examiners in union discrimination cases involving Section 111.70(3)(a)3 of MERA. Under Wisconsin's in-part test, anti-union animus need not be the employer's primary motive in order for an act to contravene the statute. The undersigned does not know if this in-part test is applied under Illinois law. The reason this has been noted is that I'm not going to apply the in-part test here because this is not a (3)(a)3 case; instead, I'm just going to apply the standard proposed by the Union.

I find that elements one (i.e. involvement in union activity) and two (i.e. employer knowledge of the individual's union activity) have been satisfied. While the City quibbles somewhat over element one (contending that, from its perspective, McCaughey is not all that active in the Union), it suffices to say here that it is not imperative that an individual be an elected union officer, or have a high profile in union matters to satisfy the first element. Instead, all that is required to satisfy that element is that the individual engage in some union activity. McCaughey met this qualification by serving on the Union's executive board and being a union steward in the 1990's.

The real question in this case is whether element three (i.e. whether the employer failed to promote the employee because of his participation in union activity), has been satisfied.

The Union acknowledges there is no direct evidence in the record that McCaughey was not selected for promotion because of his past union activity. For example, Chief Brown flatly denied that union animus played a role in the promotion decision. Additionally, there is no testimony from any witness that when the command staff considered the candidates, one of them said something to the effect of: “let’s not promote McCaughey because of his past union activity.” That being the case, no direct evidence of union animus is in the record.

The Union contends it should nonetheless be inferred that McCaughey was not promoted because of his past union activity. To support this assertion, the Union cites the following matters: 1) the content of McCaughey’s 1997 job evaluation; and 2) the fact that Kassing told McCaughey that one of his weaknesses as a candidate for promotion was his “personality”. Each of these matters is reviewed below.

First, the Union asserts that the criticisms contained in McCaughey’s 1997 job evaluation show hostility toward his union activity. Specifically, the Union cites the following comments:

on occasion he still has a tendency to question some of management’s decisions. He also at times will express a negative position in front of the other firefighters.

I find that these comments do not reference union activity at all. In my view, these comments refer to conduct and/or activities which the evaluator felt McCaughey exhibited towards management while doing his job. Nothing more.

Next, the Union relies on the fact that Kassing told McCaughey that one of his weaknesses as a candidate for promotion was his “personality”. When McCaughey heard this, he interpreted it to mean that he was not being promoted because of his “personality”. According to the Union, the word “personality” is a reference, or code word, for his union activity. If that is the case, there is nothing in the record that makes that connection obvious. It is certainly possible for a person to have a negative attitude independent of union activity, and the City asserts that was the case with McCaughey. Based on the record evidence, the undersigned is hard pressed to disagree.

After considering these factors individually and collectively, I find they are insufficient to infer that McCaughey was not selected for promotion because of his union activity.

In so finding, it is expressly noted that I have not relied on the record evidence concerning past promotions in the department. The record indicates in this regard that some past union officers have been promoted. However, just because the City has promoted some union officers in the past does not prove that, in this particular instance, it did not promote McCaughey because of his union activity.

Having so found, the focus turns to the contractual limitation which specifies that the Employer's promotion decision cannot be unreasonable (Article IV, Section 5). My discussion begins with the following preliminary comments. Section 4 of the promotional procedure says that the Chief may use any process he "feels appropriate" to select whomever he wants off the eligibility list for promotion. This language obviously grants a tremendous amount of discretion to the Chief. As a practical matter, he can utilize any process he wants. As the City notes in its brief: "He could have drawn by lot, he could have used the alphabet, he could have used date of hire, and he could have selected a personal favorite."

Notwithstanding this contract language giving the Chief total discretion to pick whomever he wants off the eligibility list, the record indicates that the Chief has chosen to use a system which goes beyond what the contract requires. There is nothing in the contract which precludes him from doing so. What the Chief has chosen to do is involve all the members of the department's command staff in the candidate interviews and then involve them in the selection decision. The Union characterizes this procedure as subjective because "the Chief and his command staff are the judges." I do not disagree with that characterization. The Chief and his command staff can indeed play favorites under this promotional system if they are so inclined. Be that as it may, if the Union wants a promotional system that is less subjective, or one that is more objective, the place to get it is in negotiations. To date, the Union has not done so. As previously noted, the current language gives the Chief the right to make the promotion decision based on whatever "process the Chief feels appropriate." Having agreed to that broad language, the Union is hard pressed to question, as it does here, whether the interview questions were validated, what benchmarks were used to compare candidates and the scoring system itself. The fact of the matter is that given the contract language, the City does not have to establish any of the foregoing. To the extent that the contract language allows for a subjective determination, the process which the Chief used here made the ultimate selection decision less subjective than it would be if the Chief simply picked whomever he wanted.

The final question is whether the Chief's decision to select Walby for promotion has reasonably evidentiary support. I find that it does. The Chief offered the following reasons why Walby was promoted: 1) he is a paramedic; 2) he is considered dedicated and dependable; 3) he responds positively to direction; 4) he has pursued educational opportunities; and 5) he had the greatest support among the Assistant Chiefs. In my view, reasons two and three are subjective in nature while reasons one, four and five are more objective. I consider reasons four and five to be the most quantifiable. They will be addressed in inverse order. Walby was the highest-rated candidate in the Battalion Chiefs' interviews, and the second highest-rated candidate in the Chiefs' interviews. His combination ranking was the highest of the three candidates. It can be inferred from these numbers that he was the candidate with the greatest support among the command staff (particularly the Battalion Chiefs). In contrast, McCaughey was the lowest-rated candidate in both the Battalion Chiefs' and the Chiefs' interviews. His combination ranking was the lowest of the three candidates. It can be inferred from these

numbers that he was the candidate with the lowest support among the command staff. Next, one of the factors which the command staff considered was educational opportunities. The Employer's educational incentive records indicate that in 1999, Walby had 28 accumulated "academic credits" while McCaughey had zero accumulated "academic credits". At a minimum, it can be inferred from these numbers that Walby had availed himself of more educational opportunities than had McCaughey. Overall, these objective and quantifiable reasons persuade me that the Chief's decision to select Walby for promotion, rather than McCaughey, was not unreasonable under the facts, arbitrary or capricious. The Chief's promotion decision therefore passes contractual muster.

In sum then, it is held that the Employer's decision to not select McCaughey for promotion to Lieutenant did not violate the collective bargaining agreement.

In light of the above, I issue the following

AWARD

That the City did not violate either Article III, Section 4 or Article IV, Section 5 of the collective bargaining agreement when it failed to promote Engineer Tim McCaughey to Lieutenant. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 17th day of May, 2001.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

