

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CITY OF EAU CLAIRE**

and

**LOCAL 487, INTERNATIONAL ASSOCIATION  
OF FIREFIGHTERS**

Case 244

No. 59087

MA-11170

*(Promotional Testing Grievance)*

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Appearances:

**Mr. Stephen L. Weld**, Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the City.

**Mr. Joe Conway, Jr.**, IAFF 5<sup>th</sup> District Vice-President, 821 Williamson Street, Madison, Wisconsin 53703-3547, appeared on behalf of the Union.

**ARBITRATION AWARD**

On July 31, 2000, the City of Eau Claire and Local 487, IAFF selected William C. Houlihan from a panel of staff arbitrators supplied by the Wisconsin Employment Relations Commission, to hear and decide a grievance between the parties. A hearing was conducted on February 27, 2001, in Eau Claire, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were filed and exchanged by April 20, 2001.

This Award addresses the parties' promotional testing procedures.

**BACKGROUND AND FACTS**

The City and Union have been signatories to a series of collective bargaining agreements that go back many years. The promotional system has long been a source of irritation and conflict. Ronald Brown came to Eau Claire as Fire Chief in 1989. It was

Brown's testimony that prior to his arrival, there was no promotional procedure in place, and promotions were made at the discretion of the Chief. Local Union President Greg Stegge testified that upon Brown's arrival there was a feeling within the department that Brown had changed the traditional promotional procedures.

By 1991, the promotional system was under attack. In March of 1991, the Union filed a grievance relative to promotions. The flavor of the grievance is captured by the following excerpt:

Fire Fighters Local 487, states with this grievance, that we believe a conspiracy has been perpetrated upon us, the likes of which have never been witnessed in the history of this Union, nor we hope, will ever be again. We charge that the Fire Administration and their accomplices, conspired illegally to promote favored people to relatively high paying positions on the Eau Claire Fire Department, and that they also conspired to destroy all documentation proving the illegality of their acts. Consequently, the Fire Fighters that were qualified for promotion were cheated out of a promotion and the pay that went with it.

Negotiations ensued over the following year. In February, 1992, the Union sent a letter to the Police and Fire Commission complaining about what it regarded as abuses on the part of Chief Brown relative to promotions. A newspaper story in March, 1992, reported that the Union was critical of Brown, that a lawsuit was threatened, and that the ". . . Fire Department is like a keg of powder ready to blow up. . .", according to a quoted Union source. In 1995, the Union sent the Chief a letter of no confidence, with the issue of promotions spotlighted.

By 1994, the parties had negotiated a promotional procedure, and subsequently incorporated it into their collective bargaining agreement, as appendix Article XIII, PROMOTION, set forth below in its entirety. The negotiated provision has been in effect ever since. As noted, the context of the promotional procedure is one of suspicion, mistrust and anger.

IPMA, an independent testing agency, was secured to develop and administer promotional tests. In 1995, only two of seventeen Lieutenant candidates passed the Lieutenant exam. Chief Brown met with Union officials over the low pass rate, and as a consequence, the parties agreed that candidates for Lieutenant would have the option of taking either the Lieutenant or Captain exam. In 1996, IPMA advised the City that it no longer offered an Engineers test. As a result, the City purchased the Engineers exam from Merit Employment Assessment Services (MEAS), another independent testing agency. The City became dissatisfied with IPMA, and by 1997, MEAS was administering all promotional exams.

The following chart, Joint Exhibit #4 in this proceeding, summarizes the test results in the Eau Claire Fire Department from 1995 - 2000:

**Eau Claire Fire & Rescue  
Test Analysis  
1995-2000**

**1995**

Rank	Number Tested	No Passed	No Failed	% of Successful	Test Administered
Engineer	19	13	6	68.4%	IPMA
Lieutenant	17	2	15	11.8%	IPMA
Captain	7	7	0	100%	IPMA

**1996**

Rank	Number Tested	No Passed	No Failed	% of Successful	Test Administered
Engineer	9	1	8	11.1%	MEAS
Lieutenant	9	2	7	22.2%	IPMA
Captain	11	10	1	90.9%	IPMA

**1997**

Rank	Number Tested	No Passed	No Failed	% of Successful	Test Administered
Engineer	10	3	7	30%	MEAS
Lieutenant	8	4	4	50%	MEAS
Captain	1	0	1	0%	MEAS

**1998**

Rank	Number Tested	No Passed	No Failed	% of Successful	Test Administered
Engineer	11	4	7	36.4%	MEAS
Lieutenant	5	0	5	0%	MEAS
Captain	4	0	4	0%	MEAS

**1999**

Rank	Number Tested	No Passed	No Failed	% of Successful	Test Administered
Engineer	12	6	6	50%	MEAS
Lieutenant	5	4	1	80%	MEAS
Captain	4	0	4	0%	MEAS

**2000**

Rank	Number Tested	No Passed	No Failed	% of Successful	Test Administered
Engineer	11	3	8	27%	MEAS
Lieutenant	4	0	4	0%	MEAS
Captain	5	4	1	80%	MEAS

\* By agreement with Local 487, persons testing for Lieutenant eligibility were allowed to write either the Lieutenant or Captain exam; see the letter dated May 12, 1997 (Ryberg) for more specific information.

No one passed the Captain exam from 1997-1999. In 1998 MEAS prepared a new Captain test, which no one passed. The 1997 test was repeated in 1999, and again no one passed. The City and Union tried, unsuccessfully, to cooperate in a review of the exam.

Chief Brown contacted MEAS' president, Dr. Thomas Tyler for assistance. In July, 1999, Tyler forwarded a copy of the test, and answer key to Dale Peters, Director of Human Relations. The test was sent in a sealed envelope, which Peters kept in a locked drawer. Chief Brown and certain staff officers were given the test in November, 1999. No notes were taken out of the exam room. The tests were thereafter collected, resealed, and returned.

Members of the Command Staff discussed their impressions of the exam. Certain categories were regarded as not applicable to Eau Claire. The Command Staff test takers did conclude that the test was passable for someone who studied. Based upon the Command Staff experience, Brown contacted Tyler, and asked that a new test be developed. Brown testified that he reviewed the Command Staff results with Tyler, including the areas deemed not particularly relevant, including history, labor and trivia. He indicated that questions on E.M.S., HazMat, and supervision would make appropriate additions.

Tyler testified that he wrote all questions on the exams, that tests are job related, and content valid. He acknowledged the conversation with Brown relative to test subject areas. Tyler indicated that certain areas of the exam were modified and others were not. It was his

testimony that it is common for him to have conversations with Command Staff relative to the testing process. He also indicated that it is good practice to provide feedback to test candidates as to their performance, by giving them the exam and answer key after they take the test. Eau Claire does not allow for this, which is unusual in his practice. Tyler testified that the City asked him to remove “picky” questions, but never specified the questions regarded as “picky”. The topics of history and labor were mentioned, and one or two such questions were removed. He modified a good deal of the exam, and indicated that he did so by removing questions that did not work well, defined as those no one got right.

A new test was developed and administered in 2000. Four of five Captain candidates passed the test. The Union grieved the Chief’s influence in having modifications made to the test.

### ISSUE

The parties could not agree upon an issue. The City believes the issues to be:

- A. Did the City violate Article IV, Section 1; Article XII, Section 1; and/or Article XIII, Promotion, Section 3, in modifying the exam used to test applicants for a Captain’s vacancy on April 14, 2000?
- B. If so, what is the appropriate remedy?

The Union regards the issue as:

Did the Employer violate the collective bargaining agreement, when it directed the modification of the Captain’s promotional exam given on April 14, 2000?

If so, what is the remedy?

As a practical matter, I think the stated issues to be substantively indistinguishable.

## RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

### **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:

...

- J. To determine status, tenure, and seniority of employees, certify payrolls, and review appointments and promotions.

...

**ARTICLE VII  
GRIEVANCE ARBITRATION**

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Section 3. The arbitrator shall limit his/her decision strictly to the interpretation, application or enforcement of this Agreement and shall be without power and authority to make any decision contrary to, or inconsistent with, or modifying or varying in any way, the terms of this Agreement.

...

**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.

...

TO: Dave Tobisch, President-Local 487  
FROM: Everett W. Foss, Director of Human Resources  
DATE: August 11, 1994  
RE: Promotional Process

The following promotional procedure is agreed upon as a complete resolution to grievances #1992-100, #1992-200, and #1994-100. Local 487 hereby agrees to drop the above grievances with prejudice.

## ARTICLE XIII PROMOTION

### Section 1.

Candidates must have one year in grade before they can become eligible for promotion to the next higher grade. 1<sup>st</sup> Class Fire Fighters and candidates for Superintendent of Maintenance will be exceptions to this rule. This will not prohibit any individual from taking the written test for any position for which the individual will meet all the eligibility requirements prior to the next testing opportunity.

### Section 2.

Candidates must go through each grade in the promotional system and not skip a grade. Example: 1<sup>st</sup> Class to Engineer; Engineer to Lieutenant; Lieutenant to Captain; except Management may select from any rank for the Superintendent of Maintenance and select from Engineers, Lieutenants, and Captains for the position of Inspector. If Management receives less than three applicants for Inspector from the three above listed classifications, then the Inspector position may, at Management's discretion, be opened to all classifications.

### 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 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 an 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 an 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.

#### Section 5.

Management will attempt to fill bargaining unit rank positions in an expeditious manner and will not use delay as a tool to defeat the intent of this agreement. However, the parties recognize that management may exercise its rights as established under Article IV of the Agreement between the City of Eau Claire and Eau Claire Fire Fighters Local 487 as necessary.

In order to provide maximum promotional opportunity to persons who have accrued five passover points and who are at the end of their six-year eligibility period, the following provision will be afforded.

In the event a bargaining unit person should retire or other personnel action causes the position of Engineer, Lieutenant or Captain to open within the six years of eligibility of the candidate defined above, the candidate meeting the above criteria would be allowed an extension of passover points and eligibility until disposition of the affected ranks.

In the event Management decides to eliminate a position, this elimination of a position would supersede any and all promotional requirements contained therein.

Should Management decide to postpone the filling of a position because of budgetary considerations, all eligibility time limits would be frozen for those persons with five passover points until the disposition of the postponed position is resolved. Eligibility time limits for all other personnel would continue as usual.



Section 6.

Each newly promoted employee will be required to complete a one-year probationary period. During the probationary period, an individual may be returned to his/her former position without recourse.

Section 7.

The parties understand that the above process is subject to the Police and Fire Commission accepting qualified individuals on a certified list and exercising any other legal duties of the Commission.

Everett W. Foss /s/

Dave Tobisch /s/

**POSITIONS OF THE PARTIES**

The Union contends that the history of the Promotional clause, Article XIII, supports its position in this proceeding. The Union points to the traumatic history of the provision, and argues that the theme of the controversy was the Union's perception that the Chief was manipulating or improperly influencing the outcome of the process. Part of the intent of Article XIII was to eliminate the Fire Chief's ability to have input into the construction of the promotional exams. Under the clause, the Chief's authority is limited to selecting, not composing, the exam.

The Union contends that the practice of administering the exam supports its position. Prior to the City's request, and subsequent review of the exam, no member of management had ever seen or influenced any promotional exam. This was the fact since the contract only permits the Chief to select a promotional exam. The Union goes on to argue that in the context of the Chief's limited role, and the circumstances surrounding the creation of the exam, the Chief's review of the exam, and recommended changes constitute a violation of the promotion clause.

The Union points to the testimony of Chief Brown and that of Dr. Tyler and points to a number of inconsistencies which it contend undermine the Chief's version of what was changed. The Union contends that what actually did occur is that the Captain's exam was made easier. The decision to make the test easier was the Chief's. That is alleged to violate Article XIII.

There are now three promotional exams. One has been designed to be easier than the other two. The Chief is now positioned to select an easy or difficult exam, depending upon the candidate pool. This level of influence is intolerable under the contract, and invites the form of manipulation feared by the Union.

The City contends that the applicable contract language is clear and unambiguous. Article XIII allows management to select a written test. Whether the test is an old test, a new test or a test provided by a different vendor is a management call. The City cites arbitral authority for the premise that clear and unambiguous contract language should be accepted at face value. The City points to Sec. 7.2052 which prevents the arbitrator from changing or adding to the provisions of the agreement. It is the view of the City that Section 3 is clear and unambiguous. Management selects the test that a reputable third party gives and scores. The Merit Employment Assessment Service testing company is a reputable testing agency. The contract was not violated.

The City claims a right to unilaterally modify the test. The City cites authority for the propositions that an employer is generally free to test for ability so long as the test is job-related, is fair, is administered in good faith and without discrimination, and is properly evaluated. The test here is alleged to satisfy all of these criteria.

The City argues that the test was conducted consistently with Sec. 62.13, Wis. Stats., the statutory regulation of Fire Department promotions.

The City contends that the history of the department's promotions is that the City has changed various aspects of its promotional system over the years without Union involvement. These various changes are allowed by the contract, as is the modification of the test involved here. Finally, the City argues that the Union has made a number of allegations that the Chief has manipulated the exam or that the security of the exam has been compromised. The City contends that none of these allegations are supported by the record.

### DISCUSSION

Article XIII, PROMOTION, is the primary, though not sole, contractual provision applicable to this proceeding. Article XII requires that promotions be in accordance with Section 62.13 of the Wisconsin Statutes and past practices of the department. There is no claim that Section 62.13, Wis. Stats., has been violated. The parties dispute whether the City's actions violate past practice. Article IV, Management Rights, also makes reference to promotions, and reserves to the employer those powers not otherwise contracted away. By definition the clause is only applicable where some other provision is not controlling. To the extent Article XIII does control the disposition of this matter, the residual rights contained in Article IV are preempted.

The applicable portions of Article XIII are Sections 3 and 4. Section 3 requires candidates to qualify for positions by completing a written test selected by management for each respective position. Here, a test was given. It was selected by Management. It was designed for the position (Captain) in question. The written test is to be given and scored by a third party. The test involved in this proceeding was written. Since the inception of this Article, a third party test service has given and scored the test. The Article goes on to require that the third party be a recognized and reputable education or testing agency. There has been no challenge to the credibility of MEAS.

Candidates must score 70% or better to qualify. That standard was used here. It appears that both Management and Local 487 were given individuals' pass/fail status, and that the employer informed the individuals. It does not appear that the balance of paragraph 3 is applicable.

The first sentence of Section 4 allows the Chief to promote any individual from the list created in Section 3, using a process deemed appropriate by the Chief. Given the discretion expressed in this sentence, there is nothing in this record to suggest a violation of this sentence. The balance of Section 4 does not appear to be applicable to this dispute.

The Union advances a number of claims that the Chief intruded impermissibly into the formulation, as opposed to selection, of the promotional exam. The Union claims the tumultuous history of the clause supports its claim that it was the intent of the parties to eliminate the Chief's influence in the construction of the exam. The record leaves no doubt that the Union was highly critical of the Chief, and his promotional selections. A great deal of suspicion remains. However, the intent of the parties is best reflected in the words of the agreement. Parties to a collective bargaining process frequently approach bargaining with different, and at times conflicting, goals in mind. It is common for a party to approach bargaining with a goal in mind, and leave with something less than full expectations satisfied.

The Union contends that the Chief's role is limited to "select" the exam. That is a very narrow reading of the language, and ignores the context of the promotion provision, which is contained in a comprehensive collective bargaining agreement, which also contains a Management Rights clause. In essence, the Union argues that the Chief is authorized to select, but may not see, an exam.

In the Union's view, the Chief has violated the practice of the parties relative to the selection of written exams for promotion. As noted, Article XII directs the parties to adhere to practice in the promotional process. In the Union's view, the practice is for the Chief to have no input into the creation of an exam. The Union is correct that prior to 1999, the Chief had never seen, nor commented on a promotional exam. In 1996, the City changed the exam administrator. At the time, IPMA was unable to furnish an Engineer exam, and so a new vendor was needed for the Engineer exam. However, the City determined to use MEAS for all promotional exams. The decision was not challenged, though it resulted in all promotional exams being changed. In 1997, the parties agreed that applicants for Lieutenant would be allowed to write either the Lieutenant or Captain exam. By the end of the test cycle in 1999, no one had passed the Captain exam in three years. The parties were unsuccessful in their efforts to resolve the problem. It is in this context that the "past practice of the department" must be analyzed.

I do not believe the practice of the department can fairly be described as limiting the role of the Chief to selecting an exam. He is entitled to run the department, subject to Statute and the contract. Here, he was confronted with a circumstance where there were no successful candidates for Captain for a three-year period. Efforts to resolve the problem with the Union had failed. I believe the Chief was entitled to do more than select another exam.

Article XIII, Sec. 3 implies that the promotional exam be composed by a third party. If the Chief or other management official were allowed to construct or substantively modify the content of the exam, it would undermine the contractual requirement that the test be 'given' by a third party. The City took strict measures to ensure the security of the exam. It was sealed both before and after it was administered to Command staff. No copies left the exam room. The individuals who took the test were not candidates for promotion. The process by which City management reviewed the exam is not in question here.

What is at play in this proceeding is the fact that there was a review of the exam by Departmental management, an exchange occurred involving the substance of the exam, and the exam was modified as a result.

I do not believe that the record supports a finding that the Chief had an inappropriate influence in the content of the exam. Chief Brown and Dr. Tyler testified to a conversation that involved relatively narrow and limited aspects of the existing tests. The result was a substantially modified exam, with 30% of the content changed. It was Dr. Tyler's testimony that he wrote all exam questions, and that the City contributed none. Tyler testified, without contradiction, that all questions are job-related and content valid. It was his testimony that while discussions occurred relative to the test, the City made no suggestions as to test additions. He testified that the City asked him to remove "picky" questions, but did not specify those questions. Tyler testified that he creates tests by drawing from a pool of questions he has developed for that purpose. In this instance, he changed portions of the exam by ". . .removing questions which were not working well. . .ones which no one got right." Tyler testified that he eliminated questions which no one got right because such questions do not distinguish among candidates. It was his expressed view that it is statistically unlikely that a question which everyone gets wrong is a valid question to test knowledge in a subject area. Tyler testified that he was not creating an easier test.

I believe this record supports a finding that the resultant test was a professionally developed, valid exam. The Chief did not improperly influence the content of the test. The test was easier. The act of removing questions which all test takers got wrong, and replacing those questions, inherently operates to raise test scores. This is particularly true of an exam which requires a successful candidate to answer an absolute number of questions right (70%) to pass. While I do believe the resultant exam is "easier", it also appears the exam is a valid promotional exam. Its creation was also a legitimate reaction to a situation where no one could pass the prior promotional exam.

While I do not believe that Command staff access to the exam violates the contract, neither do I see much value in the exercise. Tyler testified that his modifications were the result of his review of the success of previous exams. Aside from addressing local curiosity as to why no one could pass the test, local review accomplished little. Part of the problem is the lack of ongoing feedback that would normally occur. Because of the strained relationship in the Eau Claire Fire Department, tests are not returned to test takers. The informal communication between Management and the test service, which is common elsewhere, does not occur in Eau Claire. These parties have few tools with which to address problems.

The Union contends that it is unreasonable for the Chief to select from a pool of written exams that are of different degrees of difficulty. In essence, the Union argues that this gives the Chief the kind of discretion the Article was designed to eliminate. However, one right expressly conferred upon the Chief is to select an exam. So long as each exam conforms to the requirements of the agreement, the contract allows the Chief to select.

**AWARD**

The grievance is denied.

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

William C. Houlihan /s/

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William C. Houlihan, Arbitrator

