

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO.1000

and

CITY OF ANTIGO

Case 81
No. 64035
MA-12782

Appearances:

Greg Stegge, Staff Representative, International Association of Firefighters, 1910 East Lexington Boulevard, Eau Claire, Wisconsin 54701, on behalf of the Union.

VonBriesen & Roper, S.C., by **James R. Korom**, 411 East Wisconsin Avenue, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin 53201-3262, on behalf of the City.

ARBITRATION AWARD

International Association of Fire Fighters, Local No. 1000 (herein the Union) and the City of Antigo (herein the City) were at all times pertinent hereto parties to a collective bargaining agreement dated May 20, 2002 and covering the period from January 1, 2002 through December 31, 2004. On September 27, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration concerning an allegation that the City had violated the collective bargaining agreement by reducing bargaining unit member Beau Gabriel from the rank of Acting Lieutenant to the rank of Fire Fighter without just cause. The undersigned was appointed to hear the dispute and a hearing was conducted on March 8, 2005. The proceedings were not transcribed. The parties' briefs were filed on May 1, 2005, whereupon the record was closed.

ISSUES

The parties did not agree to a statement of the issues.

The Union would frame the issue as follows:

Did the City violate Article 3, Probationary Period, when it demoted Beau Gabriel without cause from the classification of Acting Lieutenant?

The City would frame the issues as follows:

Did the City violate the Collective Bargaining Agreement as alleged in grievance 04-001?

The Arbitrator frames the issues as follows:

Is the grievance arbitrable?

If so, did the City violate the collective bargaining agreement by removing the designation of Acting Lieutenant from Beau Gabriel?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

PREAMBLE

This Agreement is made on the date hereinafter stated by and between the City of Antigo, Wisconsin, hereinafter referred to as the "City" or "Employer", and the Antigo Firefighters Union, hereinafter referred to as the "Union".

ARTICLE 2 - MANAGEMENT RIGHTS

...

- C. To hire, promote, transfer, schedule and assign employees to any Fire Department positions with the City which the employee is trained to perform;
- D. To suspend, demote, discharge and take other reasonable disciplinary action with just cause, against employees and to relieve employees from their duties because of lack of work or any other legitimate reason pursuant to Wisconsin Statutes 62.13;

...

APPENDIX A - WAGES

The bi-weekly salary rate is computed as follows: 12 months x monthly salary divided by 26 weeks = bi-weekly salary (e.g., 12 months x \$2,277) divided by

26 = \$1,050.92). The hourly rate is computed by dividing the annual salary by 2,912 hours per year (e.g. (\$2,277 x 12 months) divided by 2,912 hours = \$9.38 per hour). The use of the bi-weekly and hourly rate within the Labor Agreement is to clarify the computation of an employee's wage entitlement when, in every 10-year period, the number of pay periods increases from 26 to 27. Inclusion of the bi-weekly and hourly rate does not impact upon the current computation of over-time pay under the Fair Labor Standards Act and is not intended to provide additional compensation.

*** EMT I (Enhanced) staff shall be limited to nine (9) positions.**

*** Any employee upgrading their skill level shall remain in the same year level within the wage scale.**

ACTING OFFICER'S PAY

A firefighter assigned to replace an officer for a minimum period of two (2) hours shall be paid at the Lieutenant rate of pay for that time period. The firefighter assigned to replace an officer shall be compensated at the Lieutenant rate of pay, based on the number of years they have been providing the acting officer assignment. (e.g. a firefighter assigned to replace the Lieutenant has been providing these services for four years, would be compensated at the Lieutenant rate of pay for a four year Lieutenant). All wage increases for acting officers would be based on the anniversary date of their appointment for providing replacement services.

BACKGROUND

The City of Antigo Fire Department is comprised of a number of fire fighters whose ranks are determined by the Antigo Police and Fire Commission. Under the collective bargaining agreement, the Chief and Deputy Chief are excluded from belonging to the bargaining unit, which otherwise is comprised of the Firefighters and Fire Lieutenants. Fire Lieutenants are promoted from the ranks of Fire Fighters on the basis of screening, examination, interviews and the approval of the Police and Fire Commission and receive a higher rate of pay. The wage appendix to the contract also includes a provision for compensating Fire Fighters at the Fire Lieutenant rate of pay whenever they are assigned to replace an officer for two hours or more. Moreover, they receive the Lieutenant rate of pay consistent with the number of years since their appointment as a designated replacement officer (i.e., a Fire Fighter who has been serving as an acting officer for four years would receive Lieutenant pay at the four year level whenever working in that capacity). Acting Lieutenants are appointed by the Fire Chief and the appointments are not reviewed by the Commission. There is one assigned Lieutenant and one assigned Acting Lieutenant on each of the Department's three shifts.

The Grievant, Fire Fighter Beau Gabriel, has worked for the Department since 1996. In 2001, he participated in the formal process for promotion to one of several available Fire Lieutenant positions. At the end of the process, Gabriel was ranked sixth out of six candidates and was not promoted to Fire Lieutenant. Subsequently, the Fire Chief asked Gabriel to transfer to another shift and take over as Acting Lieutenant due to a conflict between the Lieutenant and Acting Lieutenant already on that shift. Gabriel agreed and continued to serve in this capacity until 2004. During this period, Gabriel received performance reviews as a Fire Fighter indicating that he met or exceeded expectations in all areas of assessment.

On April 5, 2004, the Fire Chief issued a memorandum indicating that the City was once again seeking applications for the position of Fire Lieutenant and explaining the application and selection process. Gabriel applied for the position. On April 27, 2004, Acting Chief Bob Donohue sent Gabriel a memorandum advising him that the assessment for the promotion would occur on May 18. Donohue also indicated that the highest scoring candidate would get the promotion and the next three highest scoring candidates would be appointed to the position of Acting Lieutenant. At the end of the selection process, Gabriel ranked fifth out of five candidates. As previously indicated by Donohue, the top candidate was promoted to Lieutenant and the next three were designated as Acting Lieutenants. On May 27, Gabriel was informed by the Deputy Chief that, inasmuch as he had not scored among the top four applicants, he would no longer be an Acting Lieutenant. This was later confirmed to him by Chief Donohue.

On May 29, 2004, Gabriel filed a grievance, contending that the City's action constituted a demotion without just cause, in violation of Article 3, Section B of the collective bargaining agreement. The City denied the grievance and it thereafter proceeded through the steps of contractual process without resolution, resulting in this arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the contract, Department regulations, Departmental memoranda and Departmental practices clearly establish the existence of the position of Acting Lieutenant. The Department has three shifts, each of which has a designated chain of command, including a specified Lieutenant and Acting Lieutenant. Department rules list uniform specifications for all ranks, including Acting Lieutenant. Acting Lieutenants are listed on the crew rotation roster and are assigned bedrooms, radios and filing cabinets. In addition, they receive a designated pay rate under the contract's wage appendix.

Contrary to the City's assertion, the contract language and evidence shows that the Acting Lieutenant position is a permanent, promotional position within the Department, rather than a temporary one to be filled at the discretion of the Chief. Under arbitral principles, clear and unambiguous language should be given its clear meaning. Appendix A clearly identifies

Acting Lieutenant as a promotional position. This is evidenced by the reference to the employee's anniversary date for determination of wage rate, since the anniversary referred to would be the date of promotion. The reference to "Acting Officer's Pay" also makes it clear that the position is a promotional one because it ties the wage rate to the number of years the officer has been in the position.

The testimony of Beau Gabriel also supports the Union's position, in that he testified that only Lieutenants and Acting Lieutenants can work in that capacity. When fill-ins are needed due to emergencies, vacations or overtime needs, Fire Fighters are not allowed to fill-in. Instead, the Department seeks volunteers from the Lieutenants and Acting Lieutenants and then forces them in if no one volunteers. Gabriel served as an Acting Lieutenant for three years and was evaluated three times, but at no time was he informed that his position was temporary and he was assured by Deputy Chief Petroskey that his status would not be affected by the outcome of the Lieutenant's exam. The only evidence that the position was considered temporary was a memo issued post-grievance, indicating an attempt to create a practice after the fact.

The Union's argument is supported by the Chief's actions. Both Gabriel and the Chief testified that the Chief demoted Gabriel on May 22, 2004. If the position was temporary and could be filled at the Chief's discretion it should not have been necessary to demote Gabriel. A demotion would only be necessary if the position was a permanent promotion to begin with. The record shows that Gabriel was promoted in June of 2001, as indicated by the fact that former Chief Kluck referred to the assignment as a promotion. Also, several exhibits establish that the Acting Lieutenant position requires greater skills and responsibility than that of Fire Fighter. In consequence of this, Gabriel received a higher wage rate than the Fire Fighters.

The 2004 application notice also makes clear that the promotional process was for the position of Lieutenant, not Acting Lieutenant. Gabriel met the posted requirements and applied for the position. At that time he was informed by Petroskey that his results would not affect his Acting Lieutenant status. Nevertheless, on May 22 he was demoted by Chief Donohue based on his exam performance. Had he not applied for the lieutenant position, Gabriel would not have lost his Acting Lieutenant rank. There was no just cause for this action. Article 3 gives the Chief a one-year period to reduce at his discretion the rank of an employee following a promotion. Gabriel held the position of Acting Lieutenant for three years before he was reduced. This was a violation of the contract and the grievance should be sustained.

The City

The City asserts that the contract language clearly shows that the Grievant was not "promoted" to a higher position. Article 3, Section B, refers to a probationary period and the possibility of reduction in rank for employees who have been promoted. The language of the contract, however, is subject to the provisions of Sec. 62.13 of the Wisconsin Statutes, which regulates appointments and promotions in police and fire departments. While the Wisconsin Supreme Court has recognized the ability to create probationary periods under collective

bargaining agreements (citations omitted), by statute appointments and promotions require the approval of the Police and Fire Commission. This is separate from the power of Police and Fire Chiefs to assign individuals to acting officer positions, such as Officer in Charge, School Liaison Officer, or Investigator. These assignments are not subject to the approval of the Commission. The contract here does not refer to Acting Lieutenant as a rank. All contractual references specify that the position is an assignment, not a promotion. Further, there is no mention of Acting Lieutenants in the Recognition Clause, nor is there a position of Acting Lieutenant in the wage grid, just a clause specifying that Fire Fighters assigned to Acting Lieutenant duties will receive Lieutenant pay.

The Union failed to show that the actions of the Department converted an assignment into a promotion. The references to Acting Lieutenant in Department memoranda regarding training do not constitute evidence that the Fire Fighters holding that designation have been promoted. Nor does a memorandum given Acting Lieutenants regarding supervisory duties, since they are supervisors while performing those duties. The memo regarding uniforms makes it clear that Acting Lieutenants wear the same uniforms as Fire Fighters and Gabriel himself testified that Acting Lieutenants are indistinguishable from Fire Fighters. Indeed, Gabriel demonstrated none of the indicia typically cited to indicate promotion, such as a congratulatory letter, a higher pay rate, a permanent title, or special insignia. It is of no significance that Gabriel was invited to supervisors' meetings, since the evidence shows that Fire Fighters are also invited to such meetings on occasion and Acting Lieutenants are dismissed from the meetings for discussion of certain matters. Likewise, the listing of Acting Lieutenants on the work schedule and the fact that they are given special bedrooms and desk drawers are not indicia of promotion. Gabriel's performance evaluations refer to him as a Fire Fighter and "fill-in supervisor," not as a regular supervisor.

There is no specified promotional process for the position of Acting Lieutenant. The promotional announcement for the Lieutenant position make sit clear that the process will not be used to create an eligibility list for other promotions. Clearly, therefore, Acting Lieutenant is considered an assignment, not a promotion. The only reference to a "promotion" to Acting Lieutenant appears in Union Exhibit #16, however the Union was unable to account for what the document is, who created it, or when. As such it has no meaning or probative value. The City's exhibits, by contrast, show that the Acting Lieutenant position has been consistently considered to be an assignment, not a promotion. Those employees who are so assigned are, in fact, Fire Fighters. By the same token, arbitrators and courts have distinguished between promotions and assignments and have made it clear that appointment to serve in an acting capacity, even when coupled with specialized training, does not constitute a promotion (citations omitted).

As with the contract language and the Department's practices, the equities of the situation also do not support the Grievant. The fact that he served as an Acting Lieutenant for three years does not entitle Gabriel to hold that position indefinitely. The Department uses the Acting Lieutenant position as a means to assist Fire Fighters who have shown a desire and aptitude to advance their careers by allowing them to develop their managerial and supervisory

skills. Gabriel finished last in the promotional process in 2001 and again in 2004. Other Fire Fighters demonstrated greater skills and abilities and thus placed higher. To accept Gabriel's argument would have the effect of placing him above other Fire Fighters who have demonstrated greater ability, which would clearly be inequitable. The Fire Fighters were told before the 2004 process began that three top unsuccessful candidates would be assigned as Acting Lieutenants. Gabriel never questioned this until he was not one of the top three. The other Fire Fighters relied on the promotional announcement and the Department's past practice in deciding to compete for the Lieutenant position. Were the Department to have denied one of them an Acting Lieutenant assignment to accommodate Gabriel they would also likely grieve the action. Had the Union believed that Gabriel was entitled to the position, one of the other Fire Fighters could have stepped aside, but none did, putting the City in an untenable position.

Finally, the Union has created a significant dilemma for itself. If, as the Union contends, the Acting Lieutenant position is a promotion, then it is by statute in the exclusive jurisdiction of the Police and Fire Commission and the arbitrator has no power to override the decision. The Supreme Court has held that contracts cannot be construed to transfer the appointment and promotional powers of the Chief and Commission to an arbitrator. Further, under Sec. 62.13, the Fire Chief does not have power to demote, which power is reserved to the Commission. If the Union is correct in asserting that there was a promotion and thus a demotion, then the Arbitrator has no jurisdiction and the matter must be referred to the Commission and the Courts. If there was no promotion, then Article 3 does not apply and the grievance must be dismissed.

DISCUSSION

The Union here contends that the Grievant was promoted to the position of Acting Lieutenant in 2001 and was subsequently demoted back to the position of Fire Fighter in 2004 without just cause. In the Union's view, this violates Article 3, Section B, of the contract, which specifically provides for the demotion of an officer to his former rank prior to completion of a one year probationary period, so long as the demotion decision is not arbitrary or capricious. Beyond that authority, under Article 2, Section D., the City may demote an officer for disciplinary reasons, with just cause. There is no dispute that Gabriel served as an Acting Lieutenant for more than one year, nor is there any contention that the removal of that designation was disciplinary. The crux of this matter, therefore, is whether the Grievant's designation as an Acting Lieutenant in 2001 constituted a promotion. If it was a promotion, then the just cause provision applies and the Arbitrator must contend with the City's jurisdictional challenge with respect to the statutory powers granted and reserved to the Police and Fire Commission. If it was not a promotion, then Article 3, Section B, does not apply and the Grievant's entitlement to the designation of Acting Lieutenant, if any, must be grounded elsewhere.

Gabriel was appointed to be an Acting Lieutenant by the previous Chief, Tim Kluck, in 2001. According to Gabriel, Kluck asked him to be an Acting Lieutenant on C shift due to a conflict between the Lieutenant and Acting Lieutenant already on that shift. Kluck indicated

that he believed Gabriel met the qualifications to be a Lieutenant and would do well. Gabriel agreed and Kluck congratulated him, although it is unclear whether Kluck ever referred to the change as a promotion. Gabriel did not meet with the Police and Fire Commission about the Acting Lieutenant position, although he had previously met with them when applying for the Lieutenant position. Thereafter, Gabriel continued to act as both Fire Fighter and Acting Lieutenant until relieved of the Acting Lieutenant designation in 2004. While serving in this capacity, Gabriel received the perquisites provided to Acting Lieutenants, such as a reserved desk drawer, a specified bedroom near the Lieutenants' quarters and access to certain leadership training programs. He also received Lieutenant's pay on days he served as an Acting Lieutenant, per the wage appendix to the contract.

So far as the record shows, Gabriel's removal from the list of Acting Lieutenants was in no way related to misconduct. Rather, the record is clear that the change occurred strictly in response to the results of the promotional process for the rank of Lieutenant that occurred in April and May of 2004. Further, it appears that the process followed in 2004 with respect to appointment of Acting Lieutenants was the same as had been used in 2001.

The record reveals that in 2001 there were six applicants for the position of Lieutenant and that the Grievant ultimately ranked sixth out of the six candidates. (City Ex. #3) One of the candidates was promoted to the rank of Lieutenant by the Police and Fire Commission and the next three in order of performance were assigned by the Chief as Acting Lieutenants. Eventually candidates Steve Berg and Jon Petroskey both received promotions to Lieutenant and Acting Lieutenant Rick Wild resigned his position following the incident described above, creating the opportunity for Gabriel to be asked to serve as an Acting Lieutenant. (Union Ex. #1) The process for filling an opening for a Lieutenant in 2004 was substantially the same and once again Gabriel ranked sixth among six candidates. On May 24, the top candidate, Mark McKinney, was recommended for promotion to the position of Lieutenant by Deputy (and Acting) Chief Donohue, who also recommended the promotion of the next highest candidate, Rick Wild, in the event his own promotion and that of Lieutenant Petroskey were approved. (City Ex #2, Union Ex. #12) Gabriel was told formally at that time that he would no longer be an Acting Lieutenant, which led to the filing of the grievance on May 29. The Commission approved all the promotions on July 14, 2004, whereupon the Chief announced that the next three highest candidates, Chad Ashbeck, Tom Thrash and Ron Pizl, would fill the role of Acting Lieutenant thereafter.

In this analysis, there are two aspects of the history of this matter that I deem to be of particular significance. One is, that unlike the promotional processes used for the positions of Chief, Deputy Chief and Lieutenant, the selection of Acting Lieutenants was not apparently subject to any approval process of the Police and Fire Commission, but was held to be within the discretionary power of the Chief. Under Sec. 62.13(4), Wis. Stats., however, all promotions of subordinates by the Chief are subject to the approval of the Board. For selection as an Acting Lieutenant without Commission approval to be considered a promotion, therefore, would appear to depart from the statutory scheme. One could perhaps argue that the Commission conferred upon the Chief the power to promote officers without case by case

approval being required and that the Commission's approval was tacit. The record does not support this hypothesis, however, especially since, as noted above, the Commission does approve other promotions. Absent some affirmative evidence, therefore, that the Commission had authorized an extraordinary procedure for specifically promoting Fire Fighters to the "rank" of Acting Lieutenant, the presumption would be that in the view of the Commission these appointments did not constitute promotions.

The second significant point is the apparent element of impermanence attached to the position of Acting Lieutenant. While the record is unclear on this point, there were, presumably, Fire Fighters serving as Acting Lieutenants prior to the promotional process undertaken in 2001. Nevertheless, the choices for Acting Lieutenants following that process appear to have been made according to performance on the Lieutenants' exam, not whether the Fire Fighters had been Acting Lieutenants before. Likewise, in 2004, the Fire Fighters were informed before the examination process that the top three non-selected candidates would become Acting Lieutenants, notwithstanding whether they had already been serving in that capacity. At the time, both Ashbeck and Gabriel were Acting Lieutenants and either could conceivably have lost his position as a result of the exam process. Nevertheless, there was no protest lodged about the process by anyone prior to the announcements of the results and the appointments of the new Acting Lieutenants.

Thus, whether based on statutory procedural requirements or the apparent practice within the bargaining unit, the same conclusion is reached, which is that the position of Acting Lieutenant is not a "rank" per se, but is, rather, an assignment which is conferred in the discretion of the Chief. This is also indicated by the wage appendix to the contract, which lists specified wage rates for the positions of Firefighter/EMT B, Firefighter/EMT IV, Firefighter/EMT I and Fire Lieutenant, but makes no reference to a job title of Acting Lieutenant. Instead, there is an added paragraph which merely states that "A firefighter assigned to replace an officer for a minimum period of two (2) hours shall be paid at the Lieutenant rate for that time period," with the rate to be calculated according to the number of years the firefighter has been serving as an acting officer. Other supporting indicators for this conclusion are the fact that the firefighters designated as Acting Lieutenants do not wear different uniforms than the other firefighters, although Lieutenants do, and continued to be referred to generally as firefighters, not as Acting Lieutenants, as evidenced by Gabriel's performance evaluations completed on December 11, 2002 and November 17, 2003. (Union Ex. #9 & #10)

The position of "Acting Lieutenant," therefore, appears to be something akin to a situation where an employee who is temporarily assigned to perform duties of a higher job classification receives "out of class" pay at the higher wage rate during those periods when working in the higher classification. Admittedly, there are some unique features to this situation because of the fact that the Chief only designates certain firefighters to act as Acting Lieutenants and provides them the additional accoutrements of a special sleeping area and desk drawer to use while working as Acting Lieutenants, but otherwise the analogy holds up.

Because the appointment of Acting Lieutenants is discretionary with the Chief, he has broad authority to determine who is to be selected to fill this role and how that selection occurs. Furthermore, since the decision to remove Gabriel from the roster of Acting Lieutenants was not disciplinary and was not a demotion, it is not subject to the just cause provisions of the contract. Nevertheless, because the effect of the Chief's decision is to deny Gabriel the opportunity, at least temporarily, to serve as an Acting Lieutenant and to receive the added pay and other accoutrements attaching to that status, the Chief's exercise of his discretion must not be arbitrary or capricious. For an action to be deemed to be arbitrary or capricious it must be taken in bad faith or be so unreasonable as to have virtually no rational basis. The arbitrator does not substitute his judgment for that of the employer and if the action taken is not shown to be in bad faith and is the result of a rational process it will not be found to be arbitrary or capricious.

Here, the decision of who would be assigned as Acting Lieutenants was based on the performance of the various candidates in the promotional process for a Lieutenant's position. This was explained to the candidates before the process began and appears to be consistent with how these decisions have been made in the past. The rationale of the Chief for the decision was that the highest rated unsuccessful candidates were most likely to be in line for future promotions to Lieutenant. Thus, by their performance they had already shown aptitude for leadership above other candidates and, by gaining experience as Acting Lieutenants they would be able to improve their skills while waiting for another opportunity for promotion. To be sure, Gabriel had served as an Acting Lieutenant for three years without negative comment, so the argument could also be made that he had demonstrated the skills necessary for the position. Nevertheless, as previously stated, the standard is not whether I or anyone else would have made the same decision, but whether the Chief's decision here was made in good faith and had a reasonable basis. Based on this record I find that it was.

For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

AWARD

The grievance does not invade the statutory functions or powers of the Police and Fire Commission and is, therefore, arbitrable. The City did not, however, violate the collective bargaining agreement by removing the designation of Acting Lieutenant from Beau Gabriel. The grievance is dismissed.

Dated at Fond du Lac, Wisconsin, this 19th day of July, 2005.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc

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