BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KAUKAUNA FIRE FIGHTERS, LOCAL 1594, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, CLC

and

CITY OF KAUKAUNA

Case 115
No. 65463
MA-13230

(Promotion Grievance)

Appearances:

Patrick Kilbane, Field Services Representative, IAFF Fifth District, appeared on behalf of the Union.

James Macy, Attorney, Davis & Kuelthau, appeared on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and City or Employer, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on March 27, 2006 in Kaukauna, Wisconsin. The parties subsequently filed briefs and reply briefs, whereupon the record was closed on June 19, 2006. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUES

The parties stipulated to the following issues:

1. Is the grievance timely within the requirements of Article XXIII of the collective bargaining agreement?

2. If so, did the Employer violate Article XIX of the collective bargaining agreement when it promoted Chad Gerrits to lieutenant, and if so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2002-2004 collective bargaining agreement contained the following pertinent provisions:

ARTICLE XIX

VACANCIES AND PROMOTIONS

A. When a vacancy occurs in any position, it shall be posted for a period of ten (10) days to give each member in the next lower classification an equal opportunity to apply for the vacancy. From the names of the applicants the qualified member with the most seniority shall be given the first opportunity to fill the vacancy. If he is shown not to be qualified then it shall go to the next senior man whose name is on the list. In the event that the member selected is retained in said vacancy for a period of thirty (30) days or more, then he shall be considered qualified and assigned to the job. All vacancies shall be posted within five (5) days and dated.

B. All appointments and promotions shall be made from the ranks providing the member appointed or promoted is qualified for the position. If the man is disqualified it shall be presented in writing to the Secretary of the Union. The decision on any new appointment may constitute a grievance and be processed in accordance with the provisions under Article 23 of this Agreement.

. . .

ARTICLE XXIII

GRIEVANCE PROCEDURE

Both the Union and the City recognize that grievances and complaints should be settled promptly at the earliest possible stage and that the grievance process must be initiated within twelve (12) days (Saturdays, Sundays, and holidays excluded) of the incident. Any grievances not reported or filed within twelve (12) days (Saturdays, Sundays, and holidays excluded) shall be invalid.

. . .

ARTICLE XXX

RIGHTS OF THE EMPLOYER

Subject to other provisions of this contract, it is agreed that the rights, function and authority to manage all operations and functions are vested in the employer and include, but are not limited to the following:

A. To prescribe and administer rules and regulations essential to the accomplishment of the services desired by the City Council.

B. To manage and otherwise supervise all employees in the bargaining unit.

C. To hire, promote, transfer, assign and retain employees and suspend, demote, dismiss or take other disciplinary action against employees as circumstances warrant.

. . .

E. To maintain the efficiency and economy of the City operations entrusted to the administration.

F. To determine the methods, means and personnel by which such operations are to be conducted.

FACTS

Among its many governmental functions, the City operates a fire department. Prior to January 1, 2005, the fire department's organizational structure was as follows. There was the fire chief and one assistant fire chief who both worked a standard work week. The chief and assistant chief positions were not represented. Additionally, there were three platoons. Each platoon consisted of one captain, two driver engineers and two fire fighters. All of these positions were represented by the Union.

The existing fire chief retired sometime in 2004 and Paul Hirte was appointed as the new fire chief effective January 1, 2005. Hirte was the assistant fire chief prior to being appointed fire chief. Hirte's replacement as assistant fire chief was Don Grindheim. Grindheim was a captain prior to being appointed assistant fire chief.

Upon being appointed fire chief, the City Council asked Hirte to make recommendations to the Council concerning a possible reorganization of the department. He did. He recommended that the Department be reorganized by increasing the number of assistant chief positions from one to four. As he envisioned it, the new assistant chief

positions would be excluded from the bargaining unit and would provide direct supervision on each of the different platoons 24/7. They would replace the captain as the shift supervisor. Hirte also recommended that the three existing captain positions and a paramedic coordinator position be eliminated, and that three new lieutenant positions be created. These new lieutenant positions would pay less than the eliminated captain positions. The lieutenants would be the second in command on each shift. In sum then, Hirte recommended the following revised department organizational structure: a fire chief and one assistant fire chief, both working a standard workweek, and three assistant fire chiefs working a 24 hour shift schedule with one assigned to each of the three platoons. All of the chief positions would be excluded from the bargaining unit. In addition, each platoon would consist of a lieutenant, two driver engineer/paramedics and a fire fighter/paramedic, all of which would be in the bargaining unit.

The City Council subsequently reviewed Hirte's proposed departmental reorganization plan and adopted it on March 15, 2005.

After the City Council adopted Hirte's departmental reorganization plan, the department's new table of organization was shared with all departmental personnel via a memo dated March 16, 2005.

The Union responded to the departmental reorganization by filing several grievances. One grievance challenged the City's right to create the positions of assistant chief and lieutenant. That grievance was subsequently dropped. Another grievance challenged the City's right to determine the qualifications for the new positions. That grievance was also subsequently dropped.

The City filled the assistant fire chief positions first. After developing its process for filling those positions, the City encouraged all ranks in the department to apply for the new assistant chief positions. Thus, everyone was invited to apply, regardless of their rank in the department. Employees of all ranks subsequently applied for the assistant chief positions. The City ultimately filled the four assistant chief positions with three (former) driver engineers, and a (former) captain. No grievance was filed by the Union regarding the filling of the assistant chief positions.

After a (former) captain was promoted to assistant chief, the Union filed a grievance on March 23, 2005 which contended that the department needed to fill the then-vacant captain position. The City denied the grievance noting the position of captain had been eliminated. The Union subsequently appealed that grievance to arbitration.

In May, 2005, the Union filed a unit clarification petition with the WERC seeking to include the positions of assistant fire chief and lieutenant in the bargaining unit. The City acknowledged that the position of lieutenant should be in the bargaining unit, but maintained that the assistant chief positions were supervisory, managerial and/or confidential. The matter was set for hearing.

After the City had filled two of the three vacant assistant chief positions, it began the process of filling the lieutenant positions. The process which was used consisted of the following steps: the submission of a resumé and a narrative statement; taking a written test; and participating in an assessment center process. Points were assessed for each of these categories as well as seniority. The City decided that to be deemed qualified for the position, it was necessary to gain a score of 50 or better in the process. The Chair of the Fire Protection Department at Fox Valley Technical Institute validated this process as appropriate.

The process just referenced had never been used before. Previously when vacancies were filled, the applicants were not formally tested to determine their qualifications. This time though, the Chief wanted to test the applicants.

On July 25, 2005, the position of lieutenant was posted along with its new job description. The posting encouraged all ranks in the department to apply for the lieutenant position. Thus, everyone was invited to apply, regardless of their rank in the department. Five employees subsequently applied; four were driver engineers and one was a fire fighter. The fire fighter was Chad Gerrits. The Union was aware that fire fighter Gerrits applied for the lieutenant position. No grievance was filed by the Union at that time regarding the posting being open to all employees regardless of rank.

In August, 2005, Chief Hirte sent two memos to those five applicants intended to keep them informed of the progress of the promotion process. These memos noted that fire fighter Gerrits was one of the applicants.

That same month, the parties met and discussed some impact issues related to the new lieutenant positions.

On September 2, 2005, the previously-referenced unit clarification petition proceeded to hearing before the WERC. During the course of the hearing, the Union withdrew its petition seeking inclusion of the assistant fire chief positions in the bargaining unit. This resolved the status of the assistant fire chiefs and the lieutenants relative to their inclusion in, or exclusion from, the bargaining unit: the assistant fire chiefs are excluded and the lieutenants are included.

On September 29, 2005, the parties met again to address various issues related to the lieutenant positions. At that meeting, the parties reached agreement on the following matters regarding filling the lieutenant positions. First, they agreed that the Chief could continue using the process and method he was then using to determine which applicants were qualified for the lieutenant positions. Thus, the Chief would not have to restart the selection process, but could instead finalize the process he was using and select lieutenants from the current list of applicants. Second, the Chief agreed to place a former captain, Glen Bubolz, in a lieutenant position without the need for Bubolz to apply for the position or be found qualified through the process which was being used to fill the lieutenant positions. Bubolz is the current union president. Third, the parties reached agreement for Bubolz's pay in the lieutenant's position.

Fourth, the parties reached agreement on the pay for the lieutenant position. Fifth, the Union agreed to withdraw the grievance which was still pending at the arbitration step which contended that the City needed to post a vacant captain position. At the end of that meeting, the parties memorialized their settlement with the following document:

Settlement Agreement Between The City of Kaukauna And Local 1594 Regarding Implementation of Lieutenant/Paramedic Positions in the City of Kaukauna Fire Department.

The Fire Chief agrees to place Glen Bubolz in one of the Lieutenant/Paramedic positions.

The City agrees to continue Glen Bubolz's current pay and increase it in the future by the across the board wage adjustments negotiated in the labor agreement until he retires.

Lieutenant/Paramedic pay will be either 3.5% above Driver/Engineer pay or 3% above Driver/Engineer pay and 5% above Driver/Engineer pay after 10 years. (Either option is acceptable to the City. Local 1594 will notify the City regarding which option it would prefer.)

Local 1594 agrees not to contest the Fire Chief's process used to determine qualified candidates for the Lieutenant position.

Local 1594 agrees to withdraw grievance 3.

Dated: September 29, 2005

Paul Hirte /s/
Fire Chief
Paul Hirte

Glen Bubolz /s/
Local 1594 President
Glen Bubolz

John J. Lambie /s/
Mayor
John J. Lambie

Travis Teesch /s/
Local 1594 Vice-President
Travis Teesch

Attached to this Settlement Agreement was another document entitled "Scoring for Lieutenant Assessment Center" which is not reproduced here.

In October, 2005, the City finalized the lieutenant selection process. Two of the five applicants for the lieutenant position were eliminated because they did not receive the 50 points required to qualify for the position. The remaining three applicants were deemed qualified.

One of those three applicants then accepted the last open assistant chief position. His doing so left two applicants who were deemed qualified for the lieutenant position.

Those two applicants – Doug Bartelt and Chad Gerrits – were subsequently awarded lieutenant positions. Prior to being awarded the position of lieutenant, Bartelt had held the rank of driver engineer and Gerrits had held the rank of fire fighter.

The remaining lieutenant position was awarded to Glen Bubolz pursuant to the Settlement Agreement just referenced.

To recap, the three lieutenant positions were filled as follows: one was awarded to Bartelt, one was awarded to Gerrits, and one was awarded to Bubolz.

The Chief notified one of the applicants of his selection on October 14, 2005, some of the applicants of their selection/non-selection on October 17, 2005, and one applicant, who was on vacation, was subsequently notified of his non-selection by mail.

On November 1, 2005, the Union filed the instant grievance. The grievance listed the date of the infraction as October 17, 2005. The grievance contended that "by promoting a fire fighter to the position of lieutenant", the City violated Article XIX of the collective bargaining agreement. Although he is not named in the grievance, the fire fighter being referenced is Gerrits. The City denied the grievance. In its denial, the City maintained that the grievance was untimely filed. The matter was ultimately appealed to arbitration.

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Several of the participants at the September 29, 2005 meeting referenced above testified at the hearing. They agreed that during the meeting, the parties discussed different scenarios that could occur depending upon who received the promotions under the City's selection process. They disputed whether one of the scenarios discussed involved Chad Gerrits receiving a lieutenant position. The Employer's witnesses testified that was discussed, while the Union's witnesses testified it was not.

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As of the date of the hearing, the parties were in the process of negotiating a successor labor agreement and were exchanging final offers. One of the language items which each side addressed in their final offers was the first sentence in Article XIX, Section A. As noted in the **PERTINENT CONTRACT PROVISIONS** section, that language currently includes the words "in the next lower classification. . ." In the City's final offers, it removed those words, while the Union's final offers maintained them. Thus, as it relates to that contract language, the City's final offers tried to change the status quo, while the Union's final offers tried to maintain it.

POSITIONS OF THE PARTIES

Union

The Union's position is that the City violated Article XIX when it promoted Chad Gerrits to lieutenant. It makes the following arguments to support that contention.

First, the Union responds to the City's contention that the grievance was not timely filed. The Union disputes that assertion. Here's why. The Union acknowledges that Article XXIII (i.e. the parties' grievance procedure) says that a grievance "must be initiated within twelve (12) days. . . of the incident." According to the Union, this grievance - which was filed November 1, 2005 - was filed in accordance with that timeframe. The Union avers that the factual "incident" prompting the grievance was Chad Gerrits being appointed to a lieutenant's position. The Union asserts that the date it became aware of same was October 17, 2005. Counting forward from that date, and excluding Saturdays and Sundays, the Union submits that this grievance was filed 11 days after October 17, and thus is timely. With regard to the City's contention that the grievance should have been filed before Gerrits was appointed to the position of lieutenant, the Union responds that the reason it did not grieve when Gerrits applied for the position was because, as will be addressed in more detail later, it was the Union's view that as a firefighter, he was not eligible to be appointed to a lieutenant position. According to the Union, the "incident" prompting the grievance was not Gerrits' application for the position of lieutenant; rather it was his actual appointment to that position. The Union also disputes using the date of September 29, 2005 (when the parties met and negotiated the terms of the Settlement Agreement document) as the date of the "incident". The Union therefore asks the arbitrator to address this case on the merits and not dismiss it on procedural grounds.

With regard to the merits, the Union avers that Gerrits' appointment to the position of lieutenant violated Article XIX, Section A because, in the Union's view, he was not eligible for appointment to that position. The Union's contention is based on the premise that the first sentence in Article XIX, Section A limits promotions to those members of the department who are from "the next lower classification". As the Union sees it, the meaning of that phrase is clear and unambiguous. Applying that phrase here, the Union asserts that "the next lower classification" below the rank of lieutenant is the rank of driver engineer. It notes that Gerrits was not a driver engineer, but instead was a fire fighter. It further notes that the rank of fire fighter is the rank below that of driver engineer. Putting the foregoing facts together, the Union maintains that since Gerrits was not in "the next lower classification" when he applied for the position of lieutenant, he (Gerrits) should not have been promoted to a lieutenant position.

Next, the Union argues that the parties' bargaining history supports its position here. What the Union is referring to is this: in bargaining for a successor labor agreement, the City proposed to change the first sentence in Article XIX, Section A by removing the words "in the next lower classification" from that section. As the Union sees it, that fact establishes that the

existing language in Article XIX, Section A precludes a fire fighter from being promoted to lieutenant (which, of course, is what happened here). The Union submits that is why the City wanted to amend the existing contract language and why it wanted to keep the language status quo.

Next, with regard to the meeting held September 29, 2005, and the related Settlement Agreement document, it is the Union's view that while the City would like to believe that the parties reached an agreement at that meeting to change Article XIX, Section A, no such agreement was reached during that meeting. As the Union sees it, during that meeting the parties did not address the contract language found in the first sentence in Article XIX, Section A (specifically, the phrase "the next lower classification"). Building on that premise, the Union asserts it did not agree to amend or change the contract language by eliminating the phrase "in the next lower classification" from Article XIX, Section A, nor did it agree to waive the application of that provision to the filling of the lieutenant positions. According to the Union, all it agreed to do in that meeting was to accept and not contest the Chief's testing process and scoring system to determine the qualifications of the applicants who were eligible to be appointed. That's it. The Union argues that since the parties did not agree to change Article XIX, Section A or waive its application, that section was still applicable to the filling of lieutenant positions. The Union submits that pursuant to that language, the City should have selected someone for the lieutenant position other than Gerrits who was from "the next lower classification" (in this instance, the driver engineer classification).

The Union therefore requests that the grievance be sustained. It does not opine on what remedy should be awarded or what specific action should be taken to remedy the alleged contract violation.

City

The City contends that the grievance should be denied for two basic reasons. First, the City avers that the grievance was untimely filed. The City argues that the grievance should be denied on that basis alone. Second, if the arbitrator addresses the merits, the City contends it did not violate the collective bargaining agreement when it promoted Gerrits to lieutenant. It elaborates on these contentions as follows.

The City avers at the outset that the grievance filed November 1, 2005 was not filed in a timely fashion. According to the City, it should have been filed earlier than that. As the Employer sees it, the Union had multiple situations where it could have filed a timely grievance. One possibility was on July 25, 2005 when the City posted the lieutenant positions. It notes that that posting encouraged all interested candidates to apply, and the Union subsequently became aware that Gerrits, a fire fighter, applied for the position. Another possibility was in August, 2005 when the parties met and discussed some impact issues related to the new lieutenant positions. Another possibility was also in August, 2005 when the Chief sent memos to the applicants keeping them informed of the progress of the promotion process. Another possibility was on September 25, 2005 after the parties negotiated the Settlement

Agreement. Once again, the City notes that the Union was aware of the fact that Gerrits had applied for a lieutenant position and was going through the hiring process. It also avers that at that meeting, the parties specifically discussed Gerrits and the possibilities that could occur depending on who got the promotions. In all these instances, the Employer's timeliness contention is based on the premise that the Union knew that a fire fighter (i.e. Gerrits) had applied for a lieutenant position and was going through that process, yet it failed to grieve it at the time and instead grieved it November 1, 2005. As the City sees it, that was too late. It cites various arbitrators who have dismissed untimely grievances and asks this arbitrator to follow their lead.

Next, assuming that the arbitrator finds the grievance timely and addresses the merits, the City argues that its promotion of Gerrits to lieutenant did not violate the collective bargaining agreement. In its view, the contract language that the Union relies on (namely, the first sentence of Article XIX, Section A which references "the next lower classification") is not controlling in this case. The Employer characterizes that language as the old promotion language. It maintains that the lieutenant positions were newly-accreted to the bargaining unit, and as such, the terms of the collective bargaining agreement did not automatically apply to the new lieutenant positions. The City therefore contends that the arbitrator should not rely on the first sentence in Article XIX, Section A to decide this case. Instead, it believes that the arbitrator should rely on the Management Rights clause and the Settlement Agreement reached September 29, 2005. Here's why.

First, as just noted, the City relies on the Management Rights clause to support its position herein. The City maintains that that provision gives it the right to determine qualifications for positions (including the new lieutenant position), and it decided to not set a minimum rank, or a set rank, as a threshold requirement to apply for the lieutenant position. Thus, applicants did not have to be driver engineers to apply.

Second, as noted above, the City relies on the Settlement Agreement reached September 29, 2005 to support its position herein. It notes at the outset that settlement agreements are part of an existing collective bargaining agreement. Next, the City emphasizes that when the parties met on that date to discuss the process and scoring that the City was using to determine which applicants were qualified, the Union was aware of the following facts: what process the City was using; that the City's process set no rank requirement for applying; that the posting was open to all employees regardless of rank; and which employees had applied, and specifically that Fire Fighter Gerrits had applied. The City avers that it was against this context that the parties agreed the City could complete the existing process already in progress for filling the lieutenant positions. Thus, the process did not have to be restarted, and Gerrits did not have to be excluded. According to the City, these points were all covered by the following statement in the Settlement Agreement: "Local 1594 agrees not to contest the Fire Chief's process used to determine qualified candidates for the lieutenant position." As the City sees it, that part of the Settlement Agreement made it clear that the City's process for selecting lieutenants was appropriate and would not be challenged by the Union. However, by filing the instant grievance, the Union did just that, and challenged the promotion process which they agreed was acceptable on September 29, 2005.

Aside from that, the City submits that if "the next lower classification" language is applied literally so as to preclude Gerrits from receiving a lieutenant position because he was not from "the next lower classification", then the same result should also apply to union president Bubolz because he was not from "the next lower classification" either. Instead, he came from a higher rank (i.e. captain). Thus, for the purpose of consistency, Bubolz would have to lose his lieutenant position which the parties agreed to in the Settlement Agreement.

Next, the City argues that another reason the grievance should be denied is this: after the posting process was finished, there were just three applicants who earned the necessary score of 50 or more so as to be deemed qualified. One of those three applicants then accepted an open assistant chief position. This left just two qualified applicants to fill the three open lieutenant positions. One of the lieutenant positions was then given to Bubolz per the Settlement Agreement. That left two remaining lieutenant positions to fill and two individuals who had gone through the posting process and been found qualified. The City awarded the two lieutenant positions to those two candidates, one of which was Gerrits. As the City sees it, the actions just noted did not violate the collective bargaining agreement.

In sum then, the City's position is that no contract violation occurred when it promoted Gerrits to lieutenant. It therefore asks that the grievance be denied.

DISCUSSION

Timeliness

Since the City contends the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance was timely filed.

I find that it was timely filed. My rationale follows.

Like most contractual grievance procedures, the instant grievance procedure contains a timeline for filing grievances. In this contract, the timeline for filing a grievance is found in the first paragraph in Article XXIII. That section specifies that grievances "must be initiated within twelve (12) days (Saturdays, Sundays, and holidays excluded) of the incident." The next sentence provides that "grievances not reported or filed within twelve (12) days (Saturdays, Sundays, and holidays excluded) shall be invalid." When the word "invalid" is used in this context, it means that unless a grievance meets this time limitation, it is time-barred. Said another way, if a grievance is filed after that, it is untimely.

Sometimes there is no question about the date on which a grievance arose. Take, for example, a grievance which challenges employee discipline. In such a situation, the grievance would be said to have arisen on the date the employer disciplined the employee.

In other situations, though, determining when a grievance arose can be more problematic than the discipline example just given. Such is the case here. As the City sees it, the instant grievance challenges the City's decision to allow Gerrits to apply for the lieutenant position in the first place. Building on that premise, the City avers that the grievance could have been filed when the City posted the lieutenant positions in July, 2005 (which encouraged everyone in the department to apply and did not limit applicants to just driver engineers), or on various dates in August, 2005 as the promotion process ensued, or on September 29, 2005 when the parties met and addressed various issues related to the lieutenant positions and signed a Settlement Agreement concerning same. The Employer asserts that on all those dates, the Union was aware of the fact that Gerrits had applied for a lieutenant position and was going through the promotion process. The Union, however, does not see any of those dates as being dispositive herein. In its view, the "incident" complained of was not that the City allowed Gerrits to apply for the position of lieutenant; rather, it was that the City appointed him to that position (in contravention of Article XIX).

If the Union had filed a grievance which challenged the City's decision to allow a fire fighter to apply for a lieutenant position, then the City's timeliness contention would be well-founded. However, that is not the "incident" which the Union grieved. What the Union grieved was that "by promoting a fire fighter to the position of lieutenant", the City violated Article XIX. The statement just quoted, which is taken directly from the grievance itself, makes it clear that the incident being grieved was that the City appointed a fire fighter to a lieutenant position.

Having just found that the "incident" (within the meaning of Article XXIII) prompting the grievance was Gerrits' appointment to a lieutenant position, the next question is whether the Union's grievance challenging same was timely filed. The Chief notified one of the applicants of his selection on October 14, 2005, and all but one of the other applicants of their selection/non-selection on October 17, 2005. It can be inferred from the Chief's testimony that Gerrits was notified of his selection on October 17, 2005. That is the same day that the Union asserts it learned that Gerrits was appointed. Counting forward from that date (i.e. October 17), and excluding Saturdays and Sundays, the instant grievance was filed 11 days later on November 1, 2005. As such, it met the 12-day time limitation. I therefore find that the grievance was timely filed.

Merits

Attention is now turned to the substantive merits of the grievance. The stipulated issue is whether the Employer violated Article XIX when it promoted Gerrits to lieutenant. Based on the following rationale, I answer that question in the negative, meaning that Gerrits' promotion did not violate the collective bargaining agreement.

My discussion is structured as follows. First, I will address the contract language cited by the parties. They relied on two contract provisions: the Management Rights clause (Article XXX) and the Vacancies and Promotions article (Article XIX). Those provisions will be addressed in the order just listed. After that, I will address the Settlement Agreement.

The first contract provision relied on by the City is the Management Rights clause which is found in Article XXX. That clause provides in pertinent part that the City has the right "to promote. . .employees", "to maintain the efficiency. . .of the City operations" and "to determine the. . .personnel by which such operations are to be conducted." Given that grant of general authority to the Employer to do those things, the question to be answered is whether there are any contract provisions which limit that general authority. The Union essentially contends that there is a provision which limits the Employer's general authority to "promote" employees, and that this limitation is found in the first sentence of Article XIX, Section A. The focus now turns to that provision.

Article XIX, Section A establishes a procedure that the Employer has to follow when it fills (position) vacancies. The first step in that procedure is that the Employer has to post the vacancy for a requisite number of days. While there are obviously steps that occur after the posting goes up, those steps are not relevant to this case and need not be identified here. Thus, in the context of this case, the only part of Section A that is relevant is the first sentence.

The first sentence in Section A essentially has two parts. The first part says that "when a vacancy occurs", it will be posted for ten days. The second part of the sentence says that the posting is "to give each member in the next lower classification an equal opportunity to apply for the vacancy." It is this part of the sentence – particularly the phrase "in the next lower classification" – that is at issue here. While the phrase "in the next lower classification" is found within a sentence that starts out dealing with a posting requirement, this phrase addresses a different topic. The topic it addresses is who is eligible for the posting. The phrase just quoted limits eligibility to a specific class of employees (i.e. namely those "in the next lower classification"). What this means is that when a posting goes up, not everyone in the department can apply. Instead, pursuant to the phrase just quoted, the only employees in the department who can apply for the posted vacancy are those employees "in the next lower classification" from the position being posted. The word "classification" refers to ranks in the department's organizational structure. Say the Employer were to post a vacancy for a driver engineer. The only employees who can apply for it are those "in the next lower classification" which, in that example, would be fire fighters.

When the first sentence of Article XIX, Section A is read together with the Employer's general right to "promote" employees (which is granted to it in the Management Rights clause), the former limits the latter. Specifically, the limitation on who can apply for a posted position (which is found in the first sentence of Article XIX, Section A) places one restriction on the Employer's general authority to "promote" employees. What I mean is this: the Employer still gets to "promote" employees, of course, but the employees it "promotes" have to be from "the next lower classification" from the position being filled; they cannot be from other classifications.

In this case, the Employer filled three lieutenant positions. Pursuant to the first sentence of Article XIX, Section A, the applicants should have been from "the next lower classification" which would have been the driver engineer classification. However, just one of

the three lieutenant positions was filled with a driver engineer (Bartelt). The other two lieutenant positions were filled with employees from other classifications – one was a captain (Bubolz) and one was a fire fighter (Gerrits). Since neither Bubolz nor Gerrits was a driver engineer when they were appointed lieutenant, the Employer's promotion of those two employees did not comply with the first sentence of Article XIX, Section A.

That finding does not end this case though. There's more to this case than just the contract language referenced above. I'm referring, of course, to the Settlement Agreement.

My discussion of the Settlement Agreement begins with the following general comments. The parties to a labor agreement (namely the Union and the Employer) may amend it or change it if they wish. It is their call to make. While the labor agreement is the chief instrument that guides the parties in their relationship, on occasion it becomes necessary to clarify, add to, waive, or make exceptions to the labor agreement in some manner. That's what side agreements do. Side agreements are very common in labor relations. Side agreements can be denominated in different ways and be given different titles. One title is to call such a document a settlement agreement. The title is not that important though; what is important is the content. Side agreements and settlement agreements are considered part of the parties' collective bargaining agreement.

In this case, the parties entered into such a side agreement on September 29, 2005. I've decided that the following facts bear repeating because of their relevance to the outcome herein. On that date, the parties reached agreement on several matters related to filling the lieutenant positions. Just two of their agreements will be repeated here. First, they agreed to place Bubolz, a former captain, in a lieutenant position without the need for him to apply for the position or be found qualified through the process which was being used to fill the three lieutenant positions. Second, they agreed that the Chief could continue using the process he was then using to determine which applicants were qualified for the lieutenant positions. Thus, the Chief would not have to restart the selection process, but could instead finalize the process he was using and select lieutenants from the current list of applicants. At the end of the meeting, the parties memorialized their agreement with a Settlement Agreement document. It provided in pertinent part:

. . .

> The Fire Chief agrees to place Glen Bubolz in one of the Lieutenant/Paramedic positions.
>
> . . .
>
> Local 1594 agrees not to contest the Fire Chief's process used to determine qualified candidates for the Lieutenant position.

. . .

The Union contends that when the parties entered into the Settlement Agreement, they did not agree to amend or change the contract language by eliminating the phrase "in the next lower classification" from Article XIX, Section A, nor did they agree to waive the application of that provision to the filling of the lieutenant positions. Those contentions are addressed separately.

The Union is correct that when the parties entered into the Settlement Agreement, they did not agree to amend or change the contract language by eliminating the phrase "in the next lower classification" from Article XIX, Section A. No such agreement was reached at that meeting to delete that phrase from the collective bargaining agreement, and the Settlement Agreement does not make any reference to same.

The Union is incorrect though in its assertion that when the parties entered into the Settlement Agreement, they did not agree to waive the application of that provision to the filling of the lieutenant positions. That's exactly what they did. The following shows this. First, when the parties agreed to place Bubolz into a lieutenant position, they knew he was a captain as opposed to a driver engineer. As such, he was not from "the next lower classification" within the meaning of the first sentence of Article XIX, Section A; instead, he was from a higher classification. That being so, he was not contractually eligible for a lieutenant position. The parties nonetheless agreed to place him in one of the lieutenant positions. In doing that (i.e. placing an employee who was not from "the next lower classification" in a lieutenant position), both sides knew or should have known they were waiving the requirement in Article XIX, Section A that eligibility for a posted position is limited to employees from "the next lower classification." That was their call to make. Second, when the parties agreed that the Union would not contest the Chief's process and that the Chief could continue using the process he was then using to determine which of the applicants were qualified for the lieutenant positions, they knew who the applicants were. Specifically, they knew that one of the applicants was Gerrits. They further knew he was a fire fighter as opposed to a driver engineer. As such, just like Bubolz, he was not from "the next lower classification" within the meaning of the first sentence of Article XIX, Section A. That being so, he was not contractually eligible for a lieutenant position either. While the parties did not agree to place Gerrits in one of the lieutenant positions like they did with Bubolz, they did agree that the Chief would not have to restart the selection process, but could finalize the process he was using with the applicants he had. This agreement not only allowed the Chief to use the testing and scoring process he wanted to use, but it also ensured that the employees selected for lieutenant would come from the existing list of applicants. As just noted, one of those applicants was Gerrits. The impact of this agreement on Gerrits was that he was left in the running, so to speak, for one of the lieutenant positions. By agreeing to that (i.e. agreeing that an employee who was not from "the next lower classification" could continue in the running for a lieutenant position and was not excluded from further consideration), both sides knew or should have known they were waiving the requirement in Article XIX, Section A that eligibility for a posted position is limited to employees from "the next lower classification." Once again, that was their call to make.

Based on the above, I find that when the parties reached the Settlement Agreement on September 29, 2005, they waived the application of the first sentence in Article XIX, Section A insofar as the filling of the lieutenant positions was concerned. Consequently, the parties' Settlement Agreement is controlling here rather than the first sentence of Article XIX, Section A. Gerrits' promotion to lieutenant was permissible under that Settlement Agreement.

In so finding, it is expressly noted that the Settlement Agreement which has been found controlling here did not change or amend the first sentence of Article XIX, Section A. That language still exists and limits the eligibility of those applying for posted positions to those "in the next lower classification". In this instance though, that language was waived for the filling of the lieutenant positions by the September 29, 2005 Settlement Agreement.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

In light of the above, it is my

AWARD

1. That the grievance was timely filed within the requirements of Article XXIII of the collective bargaining agreement; and

2. That the Employer did not violate the first sentence of Article XIX, Section A when it promoted Chad Gerrits to lieutenant because the parties waived the application of that provision to the filling of the lieutenant positions by the September 29, 2005 Settlement Agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 5th day of September, 2006.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
7036