

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

APPLETON FIRE FIGHTERS, LOCAL 257, IAFF, PFFW, AFL-CIO

and

CITY OF APPLETON (FIRE DEPARTMENT)

Case 451
No. 68209
MA-14157

(Grievance #08-02, failure to award Captain position to Paul Thompson)

Appearances:

Mr. Jeffrey P. Sweetland, Attorney at Law, Hawks, Quindel, Ehlke & Perry, S.C., 700 West Michigan, P.O. Box 442, Milwaukee, Wisconsin 53201, on behalf of the Union.

Ms. Ellen Totzke, Deputy City Attorney, City of Appleton, 100 North Appleton Street, Appleton, Wisconsin 54911-4799, on behalf of the City.

ARBITRATION AWARD

The Appleton Fire Fighters, Local 257, IAFF, PFFW, AFL-CIO (herein the Union) and the City of Appleton (herein the City) are parties to a collective bargaining agreement covering the period from January 1, 2007 through December 31, 2008 (herein the Agreement). On August 11, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (herein the WERC) to initiate grievance arbitration concerning a grievance relating to the City of Appleton Police and Fire Commission rejection of the City Fire Chief's appointment of Paul Thompson for promotion to the position of Captain. The WERC thereafter designated the undersigned to arbitrate the dispute. The proceedings were transcribed and the transcript was filed on March 14, 2009. The parties waived reply briefing and filed their respective briefs by May 3, 2009, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

1. Did the City violate the Collective Bargaining Agreement when the Police and Fire Commission rejected the appointment of Fire Lieutenant Paul Thomson for the position of fire captain?

2. If so, what is the remedy?

PERTINENT AGREEMENT LANGUAGE

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ARTICLE 1. - Purpose of Agreement

This Agreement made and entered into by and between the City of Appleton, Appleton, Wisconsin, and the International Association of Fire Fighters, AFL-CIO-CLC, Local 257.

It is the intent and purpose of the parties hereto that this Agreement shall promote and improve working conditions between the CITY and the UNION set forth herein rates of pay, hours of work and other terms and conditions of employment to be observed by the parties hereto. It shall be inherent in this Agreement that all Articles and provisions thereof are binding on both parties to the Agreement except in cases where a provision may be invalidated by law or other jurisdiction as provided in Article 26 of this Contract.

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ARTICLE 2 - Recognition

This Agreement made and entered into at Appleton, Wisconsin, pursuant to the provisions of Chapter 111.70 and 62.13 of the Wisconsin Statutes by and between the CITY OF APPLETON, a municipal corporation, as municipal employer with the Fire Chief as its agent, hereinafter referred to as the CITY and APPLETON FIRE FIGHTERS, Local 257, AFL-CIO-CLC, as employees hereinafter referred to as the UNION.

The terms "officer in charge", "CITY" and "Appleton Fire Department" as used herein shall be interpreted to mean the Fire Chief or his/her designee.

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ARTICLE 16 - Posting of Jobs

A. Vacancies in existing positions:

1. Before any vacancy is filled, a notice shall be posted at all fire stations and remain posted for a period of not less than one (1) week. The notice shall clearly state the application requirements, an outline of job requirements, pay classifications applicable to the positions, and/or any other information applicable.

B. Vacancies for newly created positions:

1. Before any vacancy is filled, a notice shall be posted at all fire stations and remain posted for a period of not less than one (1) week. The notice shall clearly state the application requirements, an outline of job requirements, pay classifications applicable to the positions, and/or any other information applicable.

C. Application forms for posted positions shall be made available at all fire stations to be filled out by all applicants.

D. The Union will be furnished a copy of such notice.

E. A "promotional vacancy" as used herein shall be deemed to mean vacancies created by newly created positions, but shall not include the position of Fire Fighter. Employees appointed to temporarily fill such vacancies or performing the duties required of such vacant positions, shall be paid not less than the rate of pay applicable to such position.

Time spent on temporary assignments from the time of vacancy occurs until it is filled shall be used in determining step progression for the employee who is selected to fill that vacancy.

ARTICLE 18 – Promotions

All positions within the Fire Department other than that of Fire Fighter shall be promotional and shall be offered to qualified existing employees on the basis of seniority except that vacancies in the Fire Support Division shall be filled by the Chief from among all qualified Fire Department employees. Qualifications for each position shall not be arbitrary or capricious, shall be reasonably related to the work involved, shall be in writing, and copies of said qualifications shall be supplied to the Union as and when qualifications are established or changed. Only in the event that such promotion is refused by all qualified employees, shall the City hire a new employee to fill such vacancy or newly created position.

PERTINENT 1980-1981 AGREEMENT LANGUAGE

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ARTICLE 18 - Promotions

All positions within the Fire Department other than that of Fire Fighters shall be promotional and shall be offered to qualified existing employees on the basis of seniority in accordance with Exhibit "C" which is attached hereto and made a part hereof. Only in the event that such promotion is refused by all qualified employees shall the City hire a new employee to fill such vacancy or newly created positions.

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EXHIBIT "C"

Promotional Procedure of the Appleton Fire Department

I. Line Personnel

A. If a vacancy occurs for the position of Captain, the three senior Lieutenants making application for said position will be eligible to take the examination.

The examination shall consist of:

1. written test from an outside Firm or Agency
2. Oral interview with Promotion Committee
3. Past performance
 - a. at fires
 - b. at training
 - c. in station
4. Supervise and conduct
 - a. drills with all ladders used by the training bureau
 - b. all hose drills used by the training bureau
 - c. rescue operation

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III. Related Information:

1. The Promotion Committee will consist of the Deputy Chief and four Assistant Chiefs. The oral interview score, the score for supervising and conducting various drills, and the score for performance of pumping evolutions and driving shall each be based on the three scores remaining after the high and low scores have been discarded.

. . .

6. The senior applicant(s) for Line positions of those who receive passing scores shall be promoted.

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9. All promotions will be subject to final approval by the Fire and Police Commission.

PERTINENT STATUTORY PROVISION

(Wis. Stats. 2007-08)

62.13 Police and fire departments. (1) COMMISSIONERS. Except as provided in subs. (2m) and (2s), each city shall have a board of police and fire commissioners consisting of 5 citizens, 3 of whom shall constitute a quorum. The mayor shall annually, between the last Monday of April and the first Monday of May, appoint in writing to be filed with the secretary of the board, one member for a term of 5 years. No appointment shall be made which will result in more than 3 members of the board belonging to the same political party. The board shall keep a record of its proceedings.

. . .

(3) CHIEFS. The board shall appoint the chief of police and the chief of the fire department, who shall hold their offices during good behavior, subject to suspension or removal by the board for cause.

(4) SUBORDINATES. (a) The chiefs shall appoint subordinates subject to approval by the board. Such appointments shall be made by promotion when this can be done with advantage, otherwise from an eligible list provided by examination and approval by the board and kept on file with the clerk.

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BACKGROUND

The City is a municipal corporation whose operations include the Appleton Fire Department (herein the Department). The Union represents a bargaining unit consisting of the Appleton Fire Fighters, civilian Inspectors and civilian Mechanics. The City and Union have been parties to a series of collective bargaining agreements since at least the 1970's. All of those agreements have been negotiated by Union representatives and representatives of the City's Human Resources and Fire Departments, subject to ratification by the Union's membership and the City Council.

The City of Appleton Police and Fire Commission (herein the PFC), created and operating pursuant to Sec. 62.13, Stats., performs certain statutory functions regarding Department hiring, promotion and discipline, including those described in Sec. 62.13(4), Stats., quoted above. The PFC and its members have never been involved either in the day-to-day operations of the Department or in contract negotiation or administration between the City and Union. They have never been asked to give input, approval or signature(s) as regards the collective bargaining agreements between the City and Union.

The grievance giving rise to this arbitration was filed by Union president Mike Woodzicka on behalf of the entire Union membership on June 5, 2008. In pertinent part, the grievance asserts that, on May 29, 2008, the City violated Article "18, and any other applicable article . . ." in that:

The City violated Article 18 when it failed to promote Lieutenant Thomson to the position of Captain. The bargaining agreement states that promotions shall be offered to qualified existing employees on the basis of seniority. Lieutenant Thomson was the most senior qualified applicant for the position. The City and the Fire Department conducted a rigorous promotional process and the Fire Chief appointed Lieutenant Thomson to the Captain's position as he was deemed qualified by the process to perform the duties of the open Captain's position. The Commission, [i.e., the PFC], which failed to approve the Chief's appointment of Lieutenant Thomson to the vacant position, is bound by the Collective Bargaining Agreement to approve the Chief's appointment.

By way of remedy, the grievance requested, "Lieutenant Thomson shall be promoted and made whole for all losses [sic] as a consequence of the breach."

City Human Resources Director Sandy Neisen denied the grievance, in pertinent part, as follows:

This grievance arose out of the results of the recent Captain promotional process. The Union alleges a violation of Article 18-Promotions. The Union states that the City violated Article 18 when it failed to promote Lt. Thomson to the position of Captain. The Union states that the collective bargaining

agreement requires that promotions shall be offered to qualified existing employees on the basis of seniority, that Lt. Thomson was in fact qualified as determined by the City's own promotional process and that the Police and Fire Commission is bound by the labor agreement to approve the Chief's appointment.

The City has reviewed the information submitted by the Union and the information presented at the fact finding meeting. Based on the City's review of the information and the contractual provisions, the City does not feel that it violated the collective bargaining agreement by not promoting Lt. Thomson when the PFC did not approve the Chief's appointment. The City believes that it followed the collective bargaining agreement when the Chief appointed Lt. Thomson and that it is the Statute and not the collective bargaining agreement that requires the approval by the PFC of the Chief's appointment. The City does not agree that it has or can bargain away the authority of the Police and Fire Commission.

The circumstances leading up to the instant grievance are not disputed.

On March 7, 2008, the Fire Chief posted two vacancies for captain in the Operations Division of the Department. In pertinent part, the posting read as follows:

There currently exist two vacancies in the Operations Division for the position of Captain. (Job Description attached) In accordance with Article 16 of the current labor agreement, this posting will serve as notice of a vacancy in an existing position. The position will be compensated in accordance with the pay schedule of that labor agreement.

Applicants must possess the skills and abilities described in the job description and be capable of performing all essential functions of the position. The attached document describes additional qualifications and the anticipated promotional process -- specific dates forthcoming. This posting will serve as a notice for both positions; Position 1 Captain - Fire Instructor, Position 2 Captain - Speciality. Candidates may post for an individual position or for both positions. The positions will be offered based on senior qualified for the appropriate position applied for. Candidates applying for both positions will be offered the position based on seniority and availability.

Position 1 Captain - Fire Instructor: Successful candidate must obtain and maintain the necessary qualifications and certification for Fire Service Instruction within the probationary period.

Position 2 Captain - Speciality: Successful candidate must obtain and maintain the necessary qualifications and certifications in the Confined Space/Rope

Technician Speciality within the probationary period. A successful candidate already holding a different speciality would be able to maintain the current speciality in lieu of obtaining a new speciality.

Qualified employees wishing to be considered for either [of the] positions must submit a letter of interest and a current City of Appleton Application for Employment to my attention via the Assistant to the Chief no later than 1600 hours on March 14, 2008. Your letter of intent must identify which position or positions that you are applying for.

Additional Qualifications - Captain

Effective January 1, 2007, Captain vacancies will be filled based on seniority of qualified candidates for promotion. The most senior qualified candidate will be appointed by the Chief, subject to approval by the Board of Police and Fire Commissioners.

Candidates who have successfully completed items 1-5 below will not have to retake those items in subsequent testing processes unless; there is a change in the position job description, a new component added to the promotional process which would be integrated into one of the below steps requiring retesting on that step, or an additional new step is added to the assessment process requiring the candidate to complete only the new section.

1. Applicant must currently hold the position of Fire Lieutenant within the Appleton Fire Department.
2. State of Wisconsin Fire Officer I certification obtained on or before the date of the posting for the vacant officer position.
3. Obtaining a grade of 70% on a written exam obtained from an independent supplier of written promotional testing material.
4. Successfully passing an assessment process of 70% conducted in conjunction with the City of Appleton Human Resources Department including an evaluation of the candidate's abilities in supervision, leadership, problem solving, time management, and communications. Including but not limited to:
 - a. an incident based practical assessment scenario evaluating the candidate's ability to train and evaluate subordinates
 - b. an incident based scenario assessment in managing multiple fire units at an emergency situation.

c. an oral board examination.

5. Successfully completing an evaluation conducted by the City approved industrial psychologist.

Four employees applied in response to that posting, including Thomson. Thomson applied for both of the Captain vacancies referred to in the posting. Of the four applicants, Thomson was second most senior and Jay Thomas was the least senior. The most senior and the third most senior applicants did not obtain the necessary passing scores in the testing process. By letters dated May 27, 2008, the Chief appointed Thomson and Thomas to the posted Captain positions, "Subject to the approval by the Board of Police and Fire Commissioners on May 29, 2008." The Chief's appointment letter to Thomson read as follows:

Congratulations on your success in the recent promotional process. I am appointing you to the position of fire Captain, subject to the approval by the Board of Police and Fire Commissioners on May 29, 2008. No promotion shall be effective until approval of the Board of Police and Fire Commissioners as outlined in Wisconsin Statute 62.13(4).

In accordance with the job description, posting, and side letter agreement related to specialties, you will be required to obtain and maintain a specialty skill as a Fire Service Instructor within your probationary period. In addition, based on your request, you will be maintaining your current specialty certifications.

[the letter presented the following endorsement for Thomson's signature:]

I wish to accept this appointment and move forward to the Board of Police and Fire commissioners. Please sign and return a copy to City of Appleton, Human Resources, 100 N. Appleton Street, Appleton WI 54911.

Thomson responded by promptly executing and forwarding the endorsement to the PFC.

Following interviews of Thomson and Thomas at its May 29, 2008, meeting, the PFC approved Thomas, but did not approve Thomson, for promotion to the posted Captain positions.

The arbitration hearing record clearly establishes that, because of Sec. 62.13 (4)(a), Stats., selection for promotion to a higher rank in the Department is a two-step process: appointment by the Chief and approval of the appointment by the PFC, such that no promotion can be completed without the PFC's approval. (tr.99, 101). The parties stipulated that "Lt. Thomson met the qualifications for promotion to captain, pursuant to the Chief's standards" (tr.72), and the Union also presented evidence that amply establishes that Thomson met the qualifications listed in the posting.

The record also establishes that the language in Agreement Art. 18 has remained unchanged since at least the 1992-93 agreement; and that, prior to that agreement and since at least the 1970's, Art. 18 included the first and last sentence of the current Art. 18. The record also reveals that from at least 1977 through 1981, Art. 18 contained additional language referring to an Exhibit which read as on the "Exhibit C" in the 1980-81 agreement set forth above. It is undisputed that the Exhibit and the Art. 18 reference to it were removed in negotiations for the 1982-83 agreement after the City took the position that Exhibit was not a mandatory subject of bargaining.

The record also establishes that since 1998, Chief Cameron changed the promotion procedure on numerous occasions.

From 1998 to 2002, Chief Cameron utilized a promotional list from which he appointed candidates for promotion to officer positions. To be placed on the list, candidates had to have a certain amount of fire service experience and had to successfully complete a practical skills assessment; an interview by an oral board that included the chief, representatives of human resources (HR) and officers from other fire departments; an assessment center testing the candidate's ability to interact in different situations that he could expect to face as an officer; and an interview with an industrial psychologist hired by the City. Once the promotional list was developed, Chief Cameron appointed new Fire Lieutenants from it by seniority. The PFC routinely approved the appointments without meeting with the candidates.

Prior to 2003, temporary assignments to perform the duties of an officer were available only to persons on the promotional list for that position. Beginning January 1, 2003, Chief Cameron established a separate qualification process for temporary assignments as company officers. To be eligible for temporary assignments, candidates had to have at least three years full time fire service experience with Department, be certified as Fire Fighter II, trained in HAZMAT, qualified to drive and operate Department equipment, and able to demonstrate various other competencies. The evaluation process included practical and written tests and an oral board. The PFC was not involved in the selection of candidates for temporary assignments. At the same time, Chief Cameron announced that promotional lists for officer positions would be phased out over time and that "Any future Lieutenant vacancies will be posted at the time of the vacancy and a promotional process conducted for that position." In 2003, Chief Cameron also added a new step to the pre-appointment evaluation process: an interview with the PFC. Vacancies for Lieutenant and Captain would thereafter "be filled in accordance with the labor contract provisions from a list of qualified candidates for promotion provided to the Fire Chief by the Appleton Fire and Police Commission." Prior to 2003, the PFC had not been involved in the promotional process leading to appointment by the Fire Chief.

Prior to 2007, Chief Cameron filled any officer vacancies by appointment from a list of candidates who both the Department and the PFC had determined were qualified. The Union did not grieve the use of that procedure in those instances; however, in each instance, the most senior qualified applicant was ultimately awarded the position.

On December 13, 2006, Chief Cameron posted a Lieutenant vacancy. The selection process was to include a written exam, an assessment center, an interview with the City's industrial psychologist and an interview with the PFC, all prior to the Chief's appointment decision. In order of seniority, three candidates for the 2007 Lieutenant position were Fire Fighters Paul Steel, Patrick Lewis and Jeffrey Nelessen. All three successfully completed the written test, assessment center and psychologist interview. The Department submitted all three names to the PFC. On March 5, 2007, however, the PFC struck Steel and Lewis and forwarded only Nelessen, the least senior candidate, to Chief Cameron for appointment. On March 10, 2007, the Union, on behalf of Steel and Lewis, grieved Nelessen's promotion. The Steel-Lewis grievance asserted that the "[p]romotional process was arbitrary, capricious and unreasonable" because the PFC had forwarded to the Chief only the least-senior of the qualified candidates. On June 15, 2007, the City denied the grievance, asserting that "the City does not feel that it violated the collective bargaining agreement [and that] the City believes the decision of the Fire & Police Commission to grant approval of the appointment of Nelessen and not Lewis or Steel is not subject to the jurisdiction of the arbitration procedure."

During the pendency of the Steel-Lewis grievance, the Union wrote the PFC to ask what rules and regulations the PFC follows and what guidelines or criteria were used by the PFC to pass or fail a candidate in the last Fire Lieutenant promotional process.

Harvey Samson, the Secretary of the PFC responded with what was received at the hearing as Union Exh. 19, which reads, in pertinent part, as follows:

The Appleton Police and Fire Commission operates pursuant to the authority of Section 62.13, Wisconsin Statutes. A copy of the statute is enclosed for your information. Section 62.13, Wisconsin Statutes establishes the duties, responsibilities and authority of the Commission concerning police and fire services. Guidelines have been established for the hiring, promotional and disciplinary procedures consistent with the requirements of Section 62.13, Wisconsin Statutes.

The specific guidelines concerning promotional procedures within the Appleton Fire Department can be obtained from Chief Neil Cameron. These include meeting minimum years of service, written testing and interview with the Commission, consistent with the applicable labor agreement.

Regarding the guidelines and/or criteria used by the Commission in the last Fire Lieutenant promotional process, the Commission does not utilize specific guidelines and/or criteria in determining which, if any, of the candidates, will move forward in the promotional process. The Commission leaves to management of the Fire Department whether a particular candidate possesses the strategic and technical firefighting skills and the knowledge of the rules, regulations and policies of the Appleton Fire Department.

The Commission, during the interview process is looking at leadership skills and knowledge and the ability of a particular candidate to further the mission and goals of the Appleton Fire Department. An understanding of, ability to articulate and demonstrated ability in effective communication, management, leadership, organizational skills, group dynamics, motivational theory and the ability to "think, on one's feet" are sought by the Commission. Additionally, the Commission is always evaluating whether a candidate demonstrates the ability to be an effective leader in the department now and in the future.

The members of the Appleton Police and Fire Commission have extensive experience in the selection of leadership personnel. Two of the commissioners are human resource professionals, one owning her own executive search business and another being the human resources director of a national company. Another of the commissioners is a retired senior staff member of the Appleton Public Schools with vast personnel experience. Another commissioner is a retired very senior executive of a multi-national business where success or failure is dependent on selection of key leadership personnel. I have been in private legal practice for 34 years and have served on the Commission for over 21 years.

The Commission takes seriously its responsibilities to comply with the requirements of Section 62.13, Wisconsin Statutes and to the citizens of the City of Appleton. All decisions of the Commission are based on those responsibilities.

I would also note that all interviews and considerations of personnel matters are appropriately determined in closed session pursuant to Section 19.85, Wisconsin Statutes. The Commission does not keep records of those closed sessions.

In a Settlement Agreement signed on September 27, 2007, the Union and the City resolved the Steel-Lewis Grievance on the following terms:

- 1) The City and the Chief agree that as long as the relevant and material provisions of Article 18 of the CBA remain the same as they exist at the time of this Agreement, the Chief of the Fire Department will "appoint" (as the term is used by Section 62.13(4), Stats.) only the "qualified existing employees on the basis of seniority" as that phrase is used by Section 62.13(4), Stats.
- 2) The City and Chief further agree that Jordan Steel shall be appointed to the next vacancy for the position of lieutenant in the Fire Department. If the Commission does not approve such appointment, then Pat Lewis

shall be appointed to that position. If the Appleton Police and Fire Commission approves Steel's appointment, Pat Lewis shall be appointed to the next subsequent vacancy for the position of lieutenant. If either Jordan Steel or Pat Lewis are not approved by the Commission, the provisions of paragraph 3 shall apply. The provisions of this paragraph supersede the promotional provisions of the Collective Bargaining Agreement.

- 3) The City and Union recognize that they may disagree regarding the obligation of the City of Appleton Police and Fire Commission to "approve" (as that term is used by Sec. 62.13(4), Stats.) the Chief's "appointment" and each expressly reserves the right to assert whatever legal claims or arguments they may have with regard to such disagreement. By entering into this agreement neither the City nor the Union waives any right, claim, argument or defense they may have with regard to such possible disagreement.
- 4) The Union will dismiss Grievance No. 07-1 with prejudice and without precedent except as provided in this Agreement.

The promotion procedure followed in the instant case tracks with that agreed to in the Steel-Lewis grievance settlement agreement, in that the PFC played no role in the selection process until after the Chief issued his letter appointing the respective individuals whom he determined to be the most senior qualified applicant for the two posted positions.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the law permits and the Agreement requires that Art. 18's requirement that promotions be "offered to qualified existing employees on the basis of seniority" be applicable to the PFC in the exercise of its "approval" authority under Sec. 62.13(4), Stats., and not just to the Chief's exercise of his "appointing" authority.

The Union asserts that, in the matter of promotions, the PFC functions as an "instrument" of the City, acting on behalf of the City within the scope of the PFC's authority, expressed in Sec. 62.13(4)(a), Stats. As such, the Union argues, the PFC's decisions are attributable to the City as the fire fighters' municipal employer, and are subject to the City's Sec. 111.70(1)(a), Stats., obligation to bargain collectively with the Union over the fire fighters' wages, hours and conditions of employment. The Union contends that in *GLENDALÉ PROF. POLICEMEN'S ASS'N V. CITY OF GLENDALÉ*, 83 Wis. 2d 90, 103 (1978) the Wisconsin Supreme Court held that "promotions are a condition of employment and are subject to mandatory bargaining;" that Secs. 111.70 and 62.13 can and therefore must be harmonized; that the discretion of the Chief and PFC regarding promotions can lawfully be limited by a

collective bargaining agreement provision requiring promotion of the senior qualified applicant so long as the agreement does not require the promotion of a non-qualified applicant and does not transfer from the Chief or the PFC any of the authority to determine who is qualified. Accordingly, the Court reinstated a grievance arbitrator's award that ordered the promotion of the most senior qualified candidate for promotion to a police sergeant position. While the Union acknowledges that the primary focus of the GLENDALE decision was on the extent to which the collective bargaining agreement could lawfully limit the Chief's powers under Sec. 62.13, the Union points out that the Court's order did not leave the PFC free to approve or reject the grievant regardless of his being the senior qualified applicant, and the Court's decision made at least three references to the same principles applying to the PFC as were being applied to the Chief's statutory powers. CITING, GLENDALE, above, at 83 Wis. 2D at 102, 107. The Union also notes that the WERC recently concluded in CITY OF MILWAUKEE (POLICE SUPERVISORS), DEC. NO. 31936 (WERC, 11/06) that a PFC can lawfully be bound by promotions language in a collective bargaining agreement negotiated under Sec. 111.70, Stats.; that GLENDALE "provides substantial guidance" in determining the extent to which a PFC may be so bound; and that there was no merit to Milwaukee's argument that "no arbitral review of any promotional decision can be bargained." CITING ID. at 22.

The Union argues that Art. 18 meets those legal standards for a lawful limitation on the PFC because it requires only the promotion of the senior qualified applicant, it does not require the promotion of a non-qualified applicant, and it does not transfer from the Chief or the PFC any of the authority to determine who is qualified. Accordingly, the Union concludes, there is no legal impediment to the PFC's being bound to Art. 18's command that "All positions within the Fire Department other than that of Fire Fighter shall be promotional and shall be offered to qualified existing employees on the basis of seniority."

While the Union acknowledges that Art. 18 is ambiguous in that it does not explicitly state whether or not the PFC must approve the promotion of qualified employees on the basis of seniority, The Union asserts that Art. 18 does unequivocally represent the City's agreement that promotions shall be offered to qualified employees on the basis of seniority. The Union asserts that the City, as the contracting party, necessarily binds both of its instruments that are tasked with making promotion decisions on its behalf, the Chief and the PFC; and that because PFC approval is as essential as Chief appointment to any promotion; the City can only offer a promotion if both the Chief and the PFC are bound by the requirement that they offer it to the senior qualified candidate. The Union argues that the City's contention that Art. 18 binds the Chief but not the PFC must be rejected on well-established contract interpretation principles because it would produce a harsh, absurd, or nonsensical result, while the Union's alternative interpretation is equally consistent with the Agreement language and would lead to just and reasonable results. The Union argues that the City's interpretation unreasonably renders hollow and illusory the Art. 18 City's promise of the benefit that promotions would be offered to the senior qualified applicant.

The Union argues that it is irrelevant that the PFC has not signed or been involved in negotiating the City's agreements with the Union. It notes that those facts did not prevent the

WERC from concluding that the PFC could be bound by a collective bargaining agreement in CITY OF MILWAUKEE (POLICE SUPERVISORS), above. The Union counters that "the PFC has, at all times, been the City's instrument and agent in its promotions decisions [and that] there is no evidence that, in their contract negotiations, the City and the Union ever understood or agreed that Article 18 only applied to the Chief and not to the PFC." Union brief at 18. The Union asserts that the parties' inclusion in their agreements from at least 1977 through 1981 of an Exhibit establishing standards and procedures for determining who was qualified for promotion to the various higher ranks in the bargaining unit and providing that promotions were "subject to final approval by the Fire and Police Commission" shows that the City and Union understood that the PFC was a part of the promotion process to which Art. 18 applied. The Union asserts that the City had the right to remove that Exhibit from the agreement because "establishing the minimum job-related qualifications is a management prerogative that need not be bargained [and] how those minimum job-related qualifications are established is a managerial prerogative which also need not be bargained." citing, CITY OF MILWAUKEE (POLICE SUPERVISORS), above, at 21. The Union further asserts that there is nothing in the record to suggest that the Exhibit's removal was also intended to uncouple the PFC from Art. 18's command that promotions be offered to the senior qualified candidate.

The Union argues that, prior to the Steel-Lewis grievance in 2007, neither the City nor the PFC took any actions inconsistent with Art. 18's binding the PFC: for years the Chief appointed the senior qualified candidate, and the PFC routinely approved the promotion; in 2003, when the Chief made a candidate's interview with the PFC part of the pre-appointment selection process so that officer vacancies would, as provided in the postings, ". . . be filled in accordance with the labor contract provisions from a list of qualified candidates for promotion provided to the Fire chief by the Appleton Fire and Police Commission," the contract provisions could only be complied with if both the PFC and the Chief were bound by Art. 18; otherwise, the City, through the PFC, could evade Art. 18 altogether before senior candidates even reached the Chief. The Union argues that is what gave rise to the Steel-Lewis grievance: for the first time, the PFC rejected senior candidates and forwarded only the least senior candidate to the Chief for appointment. The Union further argues that, in settlement of that grievance, the City agreed to settlement terms whereby, among other things, the parties agreed to disagree about Art. 18's applicability to the PFC. The Union adds that, in the meantime, the City withdrew the PFC interview from the pre-appointment evaluation process.

The Union notes that it is undisputed: that Thomson met all of the qualifications for the promotion posted by the Chief; that the Chief determined that he was qualified and therefore appointed him; and that no explanation has been offered for the PFC's decision not to approve Thomson's promotion. The Union asserts that Thomson was therefore the senior qualified existing employee applying for the promotion, and that Art. 18 required not only that the Chief appoint him, but also that the PFC approve his promotion. The Union concludes that the PFC's unexplained decision not to approve Thomson's promotion violated Art. 18, and that the conventional remedy (and the remedy enforced by the Supreme Court in GLENDALE) should be imposed by the Arbitrator: an order that Thomson be awarded the Captain position and that he be made whole for the losses he experienced by not being awarded the position. The Union also

requests that the Arbitrator retain jurisdiction to resolve any disputes concerning the implementation of the remedy ordered.

The City

The City asserts that the law does not empower the City to bind the PFC to the terms of the City's Agreement with the Union and that, in any event, the City has not agreed to do so.

The City argues that the Union's proposed interpretation of the Agreement would irreconcilably conflict with and render meaningless the PFC's authority to approve promotions under Sec. 62.13(4)(a), Stats., and would constitute an unconstitutional local government interference with matters of statewide concern, citing Sec. 62.13(12), Stats., and Art. XI, Sec. 3(1) of the Wisconsin Constitution.

The City notes that, in *GLENDAL*, the Supreme Court stated that "collective bargaining agreements and statutes governing conditions of employment must be harmonized whenever possible[. but w]hen an irreconcilable conflict exists, . . . the collective bargaining agreement should not be interpreted to authorize a violation of law." CITING, *GLENDAL* 83 Wis.2d at 105-106. The City argues that the Court achieved harmonization in the case before it by allowing a collective bargaining agreement to limit the discretion of the Chief, who is clearly a party bound by the contractual language, to comply with that language. The Court did not have occasion in that case to similarly limit the statutory power of the PFC. It also notes that the Court of Appeals, in *STATE EX REL HEIL V. GREEN BAY POLICE AND FIRE COM'N*, 2002 WI App 228, 256 Wis. 2d 1008, stated at 1016 that:

The PFC is composed of an impartial body that operates independently of the city itself. (citation omitted) By statute, the PFC is to be comprised of five, not six, citizen members who have no direct interest in the outcome of the case, as would a party to the dispute. (citation omitted) Member appointment is designed to prevent the board from operating as an agent of a city official or police or fire chief. (citation omitted).

The City notes that, on that basis, the Court of Appeals concluded that the mere presence of a Common Council "liaison" to sit with and join in the discussion of evidence with the PFC during a disciplinary hearing sufficiently tainted the PFC's proceedings that it voided the result. The City further cites *RACINE FIRE AND POLICE COMMISSION V. STANFIELD*, 70 Wis.2d 395 (1975) for the proposition that a City cannot bind an independent legal entity with the capacity to sue or be sued in furtherance of its statutory obligations. The City also cites *EAU CLAIRE COUNTY V. GENERAL TEAMSTERS UNION LOCAL NO. 662*, 228 Wis.2d 640, 650 (CtApp 1999) for the proposition that, unlike a County grievance committee which is composed of County Board members, a PFC is an impartial body that operates independently of the City itself.

In any event, the City argues, the Agreement on its face does not purport to limit the powers of, bargain away the powers of, or bind the PFC. The City further argues that if the parties had intended to modify so important and specific a statutory right as the PFC's right to approve promotions: they would have done so explicitly, rather than expecting an arbitrator to "read something in by inference;" and they would have said that employees shall be "promoted" by seniority rather than merely having the position "offered" on the basis of seniority, since the latter term allows for later "approval" by the PFC in the exercise of its well-known, independent statutory role.

The City asserts that the City complied with Art. 18 in this case when the Chief offered the promotion to Thomson subject to the approval of the PFC. Indeed, the City points out, Thomson signed off that he accepted the appointment subject to the approval of the PFC. The City asserts that Art. 18 does not limit or change the role of the PFC because that role is statutory not contractual.

The City further asserts that, over the years, the Union has made it clear that it expects the PFC to relinquish its statutory promotion approval authority and do nothing more than "rubber stamp" the Chief's selection. The City notes in that regard that when the Union has approved of the candidate selected, it has not grieved the role played by the PFC, whether that role was before or after the Chief's issuance of an appointment; only when the Union has been dissatisfied with the candidate selected has the Union objected to the PFC performing its statutory responsibility. The City further notes that the Union witnesses did not assert that the criteria considered by the PFC when interviewing a promotional candidate for approval (as described in Union Exhibit 19, above) were arbitrary or capricious.

The City argues that its December, 1981 elimination of the Exhibit relating to promotional procedure in no way manifested acquiescence that the Agreement supersedes or limits the PFC's Sec. 62.13(4) approval authority; that the record confirms that the City removed the Exhibit because it was not a mandatory subject of bargaining; that the consequent removal of the portion of the Exhibit stating that "All promotions will be subject to final approval by the Fire and Police Commission" did not represent an agreement by the City to modify the statutory authority of the PFC; that the first sentence Art. 18 at issue here remained unchanged after the Exhibit and the Art. 18 reference to it were removed; and that there was no contractual reason to retain that quoted language in the Exhibit when it remained in effect in the statute. The City also notes that the Agreement elsewhere acknowledges Sec. 62.13 in the Art. 2 Recognition clause.

The City further argues that the PFC cannot be deemed to have agreed to be bound by the terms of the Agreement. In that regard the City points out that the PFC is an independent entity not subject to the governing body of the City, the Common Council; that PFC's members are appointed by the Mayor, under Sec. 62.13(1); and that the PFC has no authority to enter into a collective bargaining agreement, was not a participant in any of the bargaining leading up to the City's agreements with the Unions, was not a signatory to any of those agreements, and is not involved in their day-to-day administration.

For the foregoing reasons, the City requests that the Arbitrator rule that the PFC could not have and did not violate the Agreement when it failed to approve the promotion of Thomson to the position of Captain, and that therefore the City did not violate the Agreement when the PFC rejected Thomson's appointment.

DISCUSSION

In a contract interpretation case of this kind, the Union bears the burden of persuasion. For the reasons outlined below, on the two sub-issues on which the answer to ISSUE 1 depends, the Arbitrator concludes that the Union has persuasively shown that the City could lawfully enter into a collective bargaining agreement that requires the PFC to approve the promotion of the senior qualified applicant, but that the Union has not persuasively shown that the City has agreed to do so in the Agreement.

Can the City Lawfully Enter into a Collective Bargaining Agreement that Requires the PFC to Approve the Promotion of the Senior Qualified Applicant?

The Arbitrator finds the Union's arguments outlined above to be persuasive on the first sub-issue.

The GLENDALE decision provides authoritative and reliable guidance in determining whether the City can lawfully bind the PFC to approve the promotion of the senior qualified applicant. The Arbitrator is persuaded, as was the WERC in CITY OF MILWAUKEE (POLICE SUPERVISORS), above, regarding a statute similar to Sec. 62.13(4), Stats., that the powers granted to the PFC to approve promotions under that Section can, and therefore must, be harmonized with the City's Sec. 111.70, Stats., duty to bargain collectively with the Union about the mandatory subject of which qualified employee will be promoted. Article 18 of the Agreement assures that only qualified applicants are promoted. It does not remove the PFC from its statutorily mandated role of approving applicants for promotion before their promotions are complete. Rather, it limits the PFC's discretion in that regard, just as it limits the Chief's discretion regarding which qualified applicant for promotion to appoint. The GLENDALE Court found lawful the imposition -- through a labor agreement ratified by the Common Council -- of such a limitation on the discretion of the Chief and the PFC. The Arbitrator reaches the same conclusion here.

While the Court's primary focus was on the Chief's powers, it unconditionally enforced an award that the senior qualified applicant involved be promoted, and in doing so it expressly analyzed the issues in the case broadly, approving limits on the promotion powers of both the Chief and the PFC. Specifically, the Court stated,

Although sec. 62.134(4)(a), Stats., requires all subordinates to be appointed by the chief with the approval of the board [i.e., the PFC], it does not, at least expressly, prohibit the chief or the board from exercising the power of

promotion of a qualified person according to a set of rules for selecting one among several candidates.

GLENDAL, above, 83 Wis.2D at 102 (emphasis added). It further stated,

The labor agreement in this case can be harmonized with sec. 62.13(4)(a), Stats. The statute vests authority in the chief to appoint subordinates with the approval of the board. . . . Although by entering into the collective bargaining agreement the City relinquished some of the discretion the Chief and the Board enjoyed previously concerning appointments and promotions, it has not transferred from the Chief or the Board the authority to determine who is who is qualified, and it has not transferred away the appointing authority.

Id., 83 Wis.2D at 106-7 (emphasis added).

The City's remaining arguments on the lawfulness sub-issue are also not persuasive.

The City's argument based on the home rule amendment to the Wisconsin Constitution (Art. XI, Sec. 3) was considered and rejected by the GLENDAL Court as follows:

In entering into this [collective bargaining] agreement, the City is not illegally exercising local autonomy in an area of statewide concern but is effectuating the legislature's mandate in Sec. 111.70. Under these circumstances, where the issue is the relationship between the requirements of two state laws, home rule considerations are inapplicable. . . . The promotions provision of the labor agreement does not violate the home rule amendment. It complements, rather than contradicts, Sec. 62.13(4)(a), Stats., and for that reason the circuit court erred in declaring it unenforceable.

Id., 83 Wis.2D at 108-109.

The Supreme Court's decision in RACINE, above, held that the Racine PFC had the right to sue, in its own name, and for the benefit of the citizens of the state, to obtain a declaratory judgment regarding the nature and extent of its powers in disciplinary matters. That case did not address the merits of the Racine PFC's contentions regarding the nature and extent of its disciplinary powers or address in any way the PFC's promotion powers in relation to a collective bargaining agreement.

The Court of Appeals decision in EAU CLAIRE COUNTY, above, resolved a dispute as to the claimed exclusivity of a County grievance committee operating under Ch. 59, Stats. The Court of Appeals' dicta comparing that committee to a PFC is not a persuasive basis on which to disregard the guidance provided by the text of the Supreme Court's GLENDAL decision quoted above.

The Court of Appeals in *HEIL*, above, concluded that the Green Bay PFC's hearing regarding disciplinary charges brought against Heil was tainted and void because the PFC had allowed a representative of the Mayor to participate as a resource in the PFC's deliberations. The Court concluded that Heil's due process rights were violated when the five member commission prescribed by Sec. 62.13 effectively added a sixth participant. That case did not involve harmonization of Sec. 62.13 with Sec. 111.70; indeed, there was no discussion of harmonization in the decision, at all. Moreover, the instant case, like *GLENDALE*, involves no modification of the composition of the PFC, and it does not implicate the due process rights of an employee facing disciplinary charges.

For those reasons, the Arbitrator concludes that the City could lawfully enter into a collective bargaining agreement that requires the PFC to approve the promotion of the senior qualified applicant.

Has the City Entered into a Collective Bargaining Agreement that Requires the PFC to Approve the Promotion of the Senior Qualified Applicant?

The Union aptly describes the Art. 18 agreement language as follows: "Article 18 is admittedly ambiguous. It does not explicitly state that the PFC must approve the promotion of qualified employees on the basis of seniority, nor does it explicitly exempt the PFC from its command. Instead, it requires that promotions be offered to qualified employees on the basis of seniority." Union brief at 17.

The Union insists that by requiring that promotions be offered to qualified employees on the basis of seniority, the City and Union must have mutually intended that the PFC would be required to approve the senior qualified applicant appointed by the Chief. In that regard, it is undisputed that if the Agreement does not require the PFC to approve the senior qualified applicant, there is no assurance that the senior qualified applicant would ultimately be awarded the promotional position.

It does not follow, however, that Art. 18 would be rendered of no benefit whatever to the senior qualified applicant if the PFC is not required to approve the promotion of the senior qualified applicant. Article 18 would nonetheless assure the senior qualified applicant that the Chief would appoint him or her and thereby make his or her promotion subject to PFC approval. While that assurance is unquestionably far less than the Union would have the Arbitrator conclude that Art. 18 requires, it is not insignificant.

To the extent that the Union is arguing, that Art. 18 could be rendered entirely meaningless if the City were to revert to a promotion procedure whereby the PFC could prevent the Chief from appointing the senior qualified applicant altogether as it did in the Steel-Lewis case, that argument is unpersuasive because it is by no means clear that either the Steel-Lewis settlement agreement or Art. 18 would permit the City to follow a promotion procedure that forecloses the Chief from appointing the senior qualified applicant. However, that is not

an issue presented by the facts of the instant case, so it is not one on which the Arbitrator intends to rule in this Award.

The Union also insists that "There is no evidence that, in their contract negotiations, the City and the Union ever understood or agreed that Article 18 only applied to the Chief and not the PFC." However, that assertion is seriously undercut by the language of Agreement Arts. 1 and 2 and by the parties' bargaining history.

It is true that there is no record evidence concerning bargaining table communications between the parties' representatives on that subject. However, Art. 2 expressly provides that "The terms "officer in charge", "CITY" and "Appleton Fire Department" as used herein shall be interpreted to mean the Fire Chief or his/her designee," and the second paragraph of Art. 1 provides,

It is the intent and purpose of the parties hereto that this Agreement shall promote and improve working conditions between the CITY and the UNION set forth herein rates of pay, hours of work and other terms and conditions of employment to be observed by the parties hereto. It shall be inherent in this Agreement that all Articles and provisions thereof are binding on both parties to the Agreement except in cases where a provision may be invalidated by law or other jurisdiction as provided in Article 26 of this Contract. (emphasis added).

While the Agreement obviously binds the Common Council and Mayor as well as the Fire Chief or his/her designee, if the parties intended that the Agreement references to the "CITY" were to apply to the PFC as well as to the Fire Chief or his/her designees, it would seem reasonable that the parties would have so stated in the second paragraph of Art. 2. The same could be said regarding the implications of the parties' express reference to the Chief as the City's "agent" in the first paragraph of Art. 2 but the absence of any such reference to the PFC.

Similarly, during the years (at least 1977-1981) when the parties' agreements included the promotional procedure Exhibit quoted above; those agreements also contained the first and last sentences of the current Art. 18 language and various Exhibit provisions [e.g., II.a. and III.6.] similarly stating that the senior qualified applicant will be promoted. Those agreements also included Exhibit para. III.9, which read, "All promotions will be subject to final approval by the Fire and Police Commission." If the parties intended that the PFC would be required to approve promotions of the senior qualified applicant, it would seem reasonable that the parties would have so stated in Exhibit para. III.9. when that language was a part of their agreements. The fact that the parties' agreements in those years included both Exhibit para. III.9. (without any language so limiting the PFC's approval discretion) along with the language that currently exists in the first and last sentences of the current Art. 18, suggests that the parties did not understand the current language of Art. 18 alone to require the PFC to approve promotions of the senior qualified applicant.

The record establishes that the promotional procedure Exhibit was removed because the City asserted that it was not a mandatory subject of bargaining. In light of the existence of Sec. 62.13(4)(a), Stats., at all material times, the absence of the Exhibit from the parties' agreements after 1981 does not suggest that the parties had reached any agreement or had any understanding that was inconsistent with the former Exhibit para. III.9. In that regard, it can also be noted that the first sentence in Art. 2 of the Agreement expressly recognizes that the Agreement is entered into pursuant to the provisions of both Ch. 111.70 and Sec. 62.13.

The history of the parties' administration of Art. 18 does not persuasively support either party's position in this case. The Arbitrator finds no persuasive indications regarding the parties mutual intentions regarding Art. 18 from the facts that nearly all of the promotions in the Department have been of the senior qualified applicant; that many of those promotions were approved by the PFC without a PFC interview of the applicants; that the Union did not grieve the various roles played by the PFC when the senior qualified applicant was ultimately promoted; or that the parties settled the Steel-Lewis case on the terms set forth above and reserved their respective rights as noted in paragraph 3 of those terms.

In sum, Sec. 62.13(4)(a), Stats., has, at all material times, made the Chief's promotional appointments subject to approval of the PFC. While the Agreement provides that promotions "shall be offered to qualified existing employees on the basis of seniority," it does not expressly state that the PFC is required to approve the promotions of the senior qualified applicant appointed by the Chief. The Agreement does expressly state: that it was entered into between the City and the Union pursuant to Secs. 62.13 and 111.70, Stats.; that it is intended to bind the City and the Union; and that the as used in the Agreement, term "City" means the "Chief or his/her designee." The absence of a similar express reference to the PFC suggests that the parties did not similarly intend the Agreement to bind the PFC. The inclusion in previous agreements of the Art. 18 seniority language along with language stating, "All promotions will be subject to final approval by the Fire and Police Commission," without a proviso that the PFC must approve the Chief's appointments of senior qualified applicants, also suggests that the parties did not understand the language now in Art. 18, alone, to require the PFC to approve such appointments. The history of administration of Art. 18 does not provide reliable guidance one way or the other. In the foregoing context, the Union has not persuasively shown that the parties mutually intended that Art. 18 would, by implication, limit the PFC's statutory promotion approval authority so as to require the PFC to approve the senior qualified applicant appointed by the Chief.

It follows that the PFC's rejection of Thomson's promotion did not violate the Agreement.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The City did not violate the Collective Bargaining Agreement when the Police and Fire Commission rejected the appointment of Fire Lieutenant Paul Thomson for the position of Fire Captain.

Accordingly, the grievance is denied.

Dated at Fond du Lac, Wisconsin, this 6th day of August, 2009.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc
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