AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between Watertown Firefighters Association, Local 1347/IAFF and Town of Watertown	AAA # 01-20-0015-4650 Grievant: [redacted]

BEFORE: EILEEN A. CENCI

APPEARANCES:

For the Town: Brian Maser

For the Union: Patrick Bryant

Place of Hearing: Virtual Hearing

Date of Hearing: January 28, 2021

AWARD: The grievance is arbitrable.

Date of Award: March 19, 2021

Eileen A Cenci

Eileen A. Cenci

OPINION

STATEMENT OF PROCEEDINGS:

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement between the Watertown Firefighters Association, Local 1347 (Union) and the Town of Watertown (Town). A virtual hearing in this matter was held before me on January 28, 2021. The parties appeared and were given a full and fair opportunity to be heard, to present evidence and argument and to examine and cross-examine witnesses. The parties agreed to file post-hearing briefs on February 15, 2021 and later agreed to extend that deadline until February 16, 2021 because the fifteenth was a holiday. The briefs were timely filed and the record was then closed. The parties were notified by the AAA that the decision would be due on March 19, 2021.

ISSUE:

The parties agreed to the following statement of the issue before the Arbitrator:

Is the grievance arbitrable?

FACTS:

The grievant, [redacted], was employed by the Town of Watertown Fire Department from 1997 until he was terminated from his employment on September 3, 2020 by Town Manager Michael Driscoll following a disciplinary hearing.[1]

The Town of Watertown accepted the provisions of Chapter 19 of the Revised Laws of the Commonwealth at Town Meeting on November 11, 1912, making members of the Fire Department Civil Service employees. Most other unionized Town employees are also covered by the Civil Service statute (G.L. c. 31).

Following the passage of G.L. c. 150E in 1973, which granted collective bargaining rights to municipal employees, the Labor Relations Commission certified the Union as the exclusive

1 Though the nature of the disciplinary issue is not directly relevant to the issue of arbitrability before me, I note that, based upon the record, the matter apparently involved an alleged violation of [redacted].

bargaining agent for firefighters. The parties entered into their first collective bargaining agreement in 1975. That agreement provided, in Article I, Section B, the management rights clause, that the Town retained the rights, unless otherwise restricted by the terms of the Agreement, "to reprimand, suspend, discharge or otherwise discipline employees for just cause." In a later contract the parties added a just clause provision to Article II, the grievance procedure article of the contract, providing in Section B that "Unit employees shall not be discharged or disciplined except for just cause."

Following the termination of [redacted], the Union made the Town aware of its intention to file a grievance over the termination. On September 9, 2020 Union Counsel asked Town Attorney Brian Maser whether the Town would be willing to waive the usual steps of the grievance procedure and go directly to arbitration. The reason for the request was that under the grievance process the Fire Chief was responsible for hearing the grievance at Step 2, but he lacked authority to overturn a decision by the Town Manager. The Town Manager, who had made the decision to terminate [redacted], would hear the grievance at Step 3. The Union took the position that there was no point in going through Steps 2 and 3 of the grievance process under the circumstances.

The Town Attorney responded to the Union request by stating that he would speak to the Town Manager. In an e-mail to Union Counsel dated September 11, 2020, Town Attorney Brian Maser stated that it was the Town's understanding that the practice between the parties relative to discipline cases had been that discipline was appealed to the Civil Service Commission pursuant to Article XIV of the collective bargaining agreement. Union Counsel responded by e-mail on the same day that he had reviewed the archives of the Civil Service Commission and there had been only two discipline appeals involving firefighters in twenty (20) years. Both matters were dismissed by the Commission since in one case the matter was deemed not to be discipline, and in the other the Town had failed to appear at the hearing. Union Attorney Patrick Bryant informed Town Attorney Maser that the Union intended to grieve and demand arbitration, and again asked for the courtesy to waive the steps of the grievance procedure and proceed directly to arbitration. Union Counsel further stated that "to the degree that [redacted] files with Civil Service Commission, it will be only to preserve the right to a de novo appeal and without waiver as to grievance and arbitrability." The Attorney for the Town responded in a further e-mail that he had

already communicated the Town's position relative to the appropriate avenue of appeal, and that the Town was not inclined to agree to anything relative to the grievance procedure in this matter.

[redacted] filed an appeal with the Civil Service Commission on September 15, 2020. The Union also pursued a grievance on behalf of [redacted] through the steps of the grievance procedure, since the Town had not agreed to waive those steps. The Fire Chief denied the grievance at Step 2 on September 15, 2020 stating that he did not have the authority to make a ruling on it since the Town Manager was the appointing authority. The Town Manager denied the grievance at Step 3 on October 9, 2020. In his denial, the Town Manager wrote that the grievance was not arbitrable

> as the collective bargaining agreement contemplates, and the past practice between the parties confirms, that disciplinary appeals are to be filed at the Civil Service Commission. Article XIV provides that the "EMPLOYER and the UNION shall recognize and adhere to all Civil Service Rules and Regulations whenever applicable, including but not limited to seniority, promotions, transfers, discharges, removals and suspensions.

The Union inquired about selecting an arbitrator on October 28, 2020 and Town Attorney Maser responded that the Town would not agree since it had made known its position that arbitration was an improper forum. The parties subsequently selected this arbitrator and the first day of hearing was scheduled for January 28, 2021. The Town sought to postpone that hearing pending a decision by the Civil Service Commission on a motion filed by [redacted] asking it to issue a *dismissal nisi* of his appeal. That motion essentially asked that the Commission retain jurisdiction over the matter only if the arbitrator determined that the grievance was inarbitrable. The Town opposed the motion for *dismissal nisi*, arguing that [redacted] had elected arbitration and that the Commission was without jurisdiction even if the arbitrator determined that the matter was inarbitrable. The Town further argued that [redacted] could rescind his election of arbitration and pursue an appeal before the Commission.

In a conference call with this arbitrator on January 4, 2021, the parties agreed to hold an arbitration hearing on the scheduled January 28, 2021 date, solely on the issue of arbitrability. On January 14, 2021 the Civil Service Commission granted [redacted]'s motion for *dismissal nisi.*

The Union also filed a Charge of Prohibited Practice at the Department of Labor Relations (DLR), alleging that the termination of [redacted] was motivated by his Union activity. That

matter is still pending before DLR.

There is evidence in the record that two firefighter termination cases have been appealed to the Civil Service Commission in Watertown, while none have been arbitrated. In the [redacted] case, the Union filed a grievance over the Town's placement of [redacted] on paid administrative leave in order to undergo a fitness for duty evaluation, and demanded arbitration of that grievance. The grievance did not, however, allege that the order that [redacted] submit to a fitness for duty examination amounted to discipline without just cause. [redacted] also filed an appeal with the Civil Service Commission seeking a just cause ruling on the order that he complete a fitness exam. [redacted] completed the examination, was found fit for duty and was returned to duty with no loss of pay, benefits or seniority. The Town successfully moved to dismiss the Civil Service appeal on the grounds that the matter was not disciplinary in nature. The [redacted] disciplinary case was appealed to the Civil Service Commission but was the matter was settled and withdrawn prior to hearing.

One employee of the Watertown Department of Public Works (DPW) arbitrated a grievance over his termination ([redacted]). The arbitrator in that case reduced the termination to a suspension. The Town appealed to Superior Court, which affirmed the arbitrator's award. The Town then appealed to the Massachusetts Appeals Court, which, in Town of Watertown v. Watertown Municipal Employees Association, 65 Mass. App. Ct. 1116 (2006) upheld the decision of the Superior Court judge that the arbitration award should not be vacated

CONTRACT:

Article 1 Recognition

Section B Management Rights

The EMPLOYER retains all of the powers conferred upon it by law and as previously exercised (except insofar as said powers may be expressly restricted by the terms of this Agreement), including but not limited to the right to establish and administer policies relating to operations, services and functions of the Fire Department: to reprimand, suspend, discharge or otherwise discipline employees for just cause…

Article II Grievance Procedure

Section A-Definitions

1. A "grievance" shall mean a complaint that there has been, as to an employee, a violation, misinterpretation or inequitable application of any of the provisions of this Agreement…

Section B-Purpose

…

2. Unit employees shall not be discharged or disciplined except for just cause.

Section C-Procedure

…

4. Level Four.

(a) If the aggrieved person is not satisfied with the disposition of his grievance at Level Three, or if no decision has been rendered with ten (10) work days after he has first met with the Town Manager or his designated agent, he may within five (5) work days after a decision by the Town Manager or fifteen (15) work days after he has first met with the Town Manager or his designated agent, whichever is sooner, request in writing from the Chairman of the Grievance Committee that his grievance be submitted to arbitration. If the Grievance Committee determines that the grievance is meritorious, it may submit the grievance to binding arbitration within fifteen (15) work days after receipt of the request by the aggrieved person.

(b) Within ten (10) work days after such written notice of submission to arbitration, the Town Manager or his duly designated agent and the Grievance Committee will agree upon a mutually acceptable arbitrator and will obtain a commitment from said arbitrator t serve. If the parties are unable to agree upon an arbitrator or to obtain such a commitment within the specified period, a request for a list of arbitrators may be made to the American Arbitration Association by either party.

…

Section D-Rights of Employees to Representation

…

5. Notwithstanding anything to the contrary, no dispute or controversy shall be the subject matter for arbitration unless it involves a grievance as defined in Section A, Subsection 1, of this Article.

6. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement: and he shall arrive at his decision solely upon the facts, the evidence and the contentions as presented by the parties during the arbitration proceedings.

Article XIV, Civil Service

The EMPLOYER and the UNION shall recognize and adhere to all Civil Service Rules and Regulations whenever applicable, including but not limited to seniority, promotions, transfers, discharges, removals and suspensions. Employees hereunder shall retain their Civil Service rights as now in effect under the provisions of the G.L. c. 31…

Article XXII General Provisions

F—Civil Service

If any provision of this Agreement is in conflict with any Civil Service Law, rule or regulation, such Civil Service Law, rule or regulation shall prevail so law as such conflict shall exist.

POSITIONS OF THE PARTIES:

Town of Watertown

The Town maintains that the grievance is inarbitable. Arbitration is a creation of a collective bargaining agreement and is limited by the terms of that Agreement. Here, the Agreement contains clear and unambiguous language which, when read as a whole, excludes termination appeals from arbitration.

The language in the Watertown contract is almost identical to the language of the contract at issue in Falmouth Police Superior Officers Ass'n v. Town of Falmouth, 80 Mass. App. Ct. 833, (2011), in which the Appeals Court ruled that a grievance was inarbitrable. While it is true that the Watertown contract contains a just cause provision, while the Falmouth contract did not, that distinction does not necessitate a different result. The existence of a just cause provision is not dispositive on the question of whether disputes that could be appealed to the Civil Service Commission are also arbitrable since not all matters can be appealed to the Commission. The just cause provisions in the collective bargaining agreement should be read as providing bargaining unit members an avenue to appeal disciplinary actions that cannot be appealed to the Civil Service Commission. Those contract provisions do not grant firefighters the right to utilize the grievance and arbitration process in matters over which the Civil Service Commission has jurisdiction.

The fact that Articles I and II include the word "discharge" creates a conflict between their provisions and those of Article XIV. Article XXII resolves that conflict in favor of Civil Service

jurisdiction over termination appeals.

It is a widely accepted principle of contract interpretation that a contract should not be interpreted so as to render a clause superfluous or meaningless. If the Arbitrator finds the Union's grievance arbitrable, that ruling would render Article XIV meaningless, and essentially write it out of the contract. Article XIV requires the parties to adhere to Civil Service Rules and regulations relative to discharges. If firefighters can appeal terminations to arbitration, Article XIV would be rendered meaningless. A finding that this matter is inarbitrable would not similarly write the just cause provisions out of the contract, because some disciplinary matters cannot be appealed to the Civil Service Commission and such matters would be subject to arbitration. The arbitrator should interpret the contract so as to give force and effect to Articles I, II and XIV.

Although the Town maintains that the contract language requiring appeals to the Civil Service Commission is clear and unambiguous, past practice is instructive if the arbitrator determines that the contract language is ambiguous. Without exception, disciplinary appeals in Watertown firefighter cases that are subject to the original jurisdiction of the Civil Service Commission have been appealed to that forum. Both the [redacted] and [redacted] appeals were filed with the Civil Service Commission. The fact that [redacted] served as Union president at the time of his appeal to the Civil Service Commission is also instructive, and speaks volumes as to the understanding between the parties concerning the proper forum for appeals.

The [redacted] case, on which the Union relies, involving a Watertown DPW employee, is irrelevant to this matter since it involved a different bargaining unit and a different collective bargaining agreement. Moreover, even if the Town did not assert its right to insist upon an appeal to the Civil Service Commission in that case, it did not waive its right to enforce the requirement in the current case.

Contrary to the Union's argument, the Town has not attempted to foreclose the grievant's ability to contest his termination in any forum. Rather, it has argued that the grievant should be required to select which forum he intends to use. If the arbitrator were to find this matter inarbitrable, [redacted] would have the opportunity to reactivate his appeal and have a full hearing on the merits before the Commission.

The Town asks that the arbitrator find the matter inarbitrable.

Watertown Firefighters Association

The grievance in this case is clearly arbitrable. The collective bargaining agreement includes two just cause provisions, as well as grievance and arbitration provisions allowing members of the bargaining unit to grieve discipline, including termination. There is a strong presumption in the law in favor of arbitrability. The Falmouth Appeals Court decision cited by the Town holds that a matter is inarbitrable only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." To prevent arbitration, the proponent must show "either (1) the existence of an express provision excluding the grievance from arbitration or (2) the 'most forceful evidence' of a purpose to exclude the claim from arbitration."

The arbitration cases cited by the Town in support of its position that firefighters are required to appeal terminations to the Civil Service Commission are distinguishable from the current one. In Falmouth Police Superior Officers Association and Town of Falmouth, AAA Case #11-390-02422-07, the arbitration case which led to the Falmouth Appeals Court decision cited above, Arbitrator John Cochran found a grievance over the discharge of a police officer inarbitrable because there was no just cause provision in the contract permitting arbitration. In contrast, the collective bargaining agreement in the current case includes a broad arbitration clause, and has just cause language in two separate contract provisions.

In City of Leominster and Leominster Police Patrolmen's Union, AAA Case No: 1139-1559-12, Arbitrator James Litton ruled that the grievance was inarbitrable since the police officer's only appeal was to the Civil Service Commission. There was, however, explicit language in the Leominster contract providing that "No grievance, complaint, or dispute which is subject to Civil Service Laws of the Commonwealth of Massachusetts may be submitted as a grievance under the provisions of this Article." There is no similar language in the current contract.

Similarly, Arbitrator Tammy Brynie found a grievance over the termination of a police officer inarbitrable in City of Fitchburg and Fitchburg Police Union, AAA #11 390 1143 12 because the contract did not include a just cause provision, and it also stated explicitly that rights pursuant to the civil service statute were excluded from the contractual grievance and arbitration provisions, and that an arbitrator had no power to render a decision or award concerning them.

The fact that Watertown firefighters are also Civil Service employees, who have the option of challenging termination at the Civil Service Commission, does not render the grievance and arbitration provisions inoperable. Article XIV does not reflect an intent to exclude discipline from arbitration. The Town adopted Civil Service for other Town employees, including police, who have grieved discipline. The Town participated in extensive arbitration and litigation involving a DPW employee, [redacted], who was also a Civil Service employee, without arguing at any point that the matter was inarbitrable. The DPW employee arbitrated his claim and an arbitrator ruled that the termination should be reduced to a suspension. The Appeals Court refused to vacate that arbitration award. Town of Watertown v. Watertown Municipal Employees Association, 65 Mass. App. Ct. 1116 (2006).

The parties to the collective bargaining agreement at issue in this case never discussed or reached any agreement to exclude discipline from the grievance/arbitration procedure. No such language exists in the contract, and no discipline grievances have been denied on the basis of arbitrability.

The Town's reliance on past practice is unpersuasive. The Town has identified only two firefighter discipline cases that were appealed to the Civil Service Commission. This is insufficient to establish a binding past practice.

Bargaining history does not support the Town's contention. Just cause language was added to the CBA after the first collective bargaining agreement, at a time when firefighters were Civil Service employees and Article XIV was already part of the contract. It is nonsensical to argue that the parties intended to exclude discipline from the grievance/arbitration process at the time they added just cause language to grievance Article of the Agreement.

The Town's failure to forcefully and timely assert the arbitrability argument also demonstrates its lack of merit. When the Union initiated discussions about arbitration, the Town did not unequivocally assert that the matter was beyond the scope of arbitral review. The Town first asserted its position on arbitrability months after the grievance was filed and the Union made known its decision to arbitrate the matter.

The Town is asking the arbitrator to deprive [redacted] of any possible appeal of his termination, since it asserts that neither the arbitrator nor the Commission has jurisdiction to review the matter. This is a bad faith argument by the Town and should be rejected by the arbitrator.

The Union asks that the arbitrator find that the matter is arbitrable.

DISCUSSION:

After careful review of the contract language, the briefs filed by the parties and the authority cited in support of their respective positions, I conclude that this matter is arbitrable.

The collective bargaining agreement, which was first negotiated many years after firefighters in Watertown became Civil Service employees, contains just cause provisions in both Article I, the recognition and management rights provision, and Article II, the grievance provision. While the Article I just cause language was included in the original contract negotiated by the parties, the just cause provision in Article II, pertaining to the grievance arbitration process, was added in a subsequent collective bargaining agreement. The addition of just cause language to the grievance and arbitration article in a successor to the first collective bargaining agreement seems inconsistent with an interpretation that discipline can only be challenged by firefighters at the Civil Service Commission and not through grievance arbitration. Firefighters were already Civil Service employees when Article II was amended, and a grievance under Article II is defined as "a complaint that there has been, as to an employee, a violation, misinterpretation or inequitable application of any of the provisions of this Agreement." The addition of just cause language to Article II is consistent with an intent to permit firefighters to utilize the grievance and arbitration provisions of the contract to challenge discipline on the basis of just cause.

There is no language in Article II limiting the right of Civil Service employees in the Town to file grievances. In that respect the Watertown contract is distinguishable from the contracts in the Fitchburg and Leominster cases discussed above, where arbitrators concluded the grievances filed over police terminations were inarbitrable. The contracts in both Fitchburg and Leominster specifically and explicitly excluded matters that could be appealed to the Civil Service Commission from grievance arbitration. The language in the Watertown contract is also distinguishable from the language at issue in the Falmouth case, where the contract did not include a just cause provision.

The Town's argument that there is a past practice of firefighters appealing only to the Civil Service Commission is unpersuasive. The Town has pointed to only two cases in which firefighters appealed terminations to the Civil Service Commission (the [redacted] and [redacted] cases).

This is an insufficient number of cases to establish the existence of a past practice.

Arbitrator Richard Mittenthal addressed the factors that must exist in order to establish a past practice in a 1961 Michigan Law Review article that has been widely cited by arbitrators in determinations as to whether past practice has been proved. [*Past Practice and the Administration of Collective Bargaining Agreements*, Michigan Law Review, Volume 59, Issue 7 (1961)]. Among the elements described in that article as necessary to establish a past practice are that there must be clarity and consistency, as well as longevity and repetition of the practice. Arbitrator Mittenthal concluded that, "one or two isolated instances of certain conduct do not ordinarily establish a practice" (Id. at 1019). While no previous firefighter termination cases have been arbitrated under the Watertown contract, it is impossible to conclude that a binding past practice exists, requiring that appeals can only be made to the Commission, on the basis of only two firefighter discipline cases that have been appealed to the Commission. The numbers are insufficient to conclude that clarity, consistency, longevity and repetition have been established.

While there are no examples of Watertown firefighters appealing discipline to arbitration, Civil Service employees in other Watertown bargaining units have done so, and there is no evidence that the Town has argued, or that any arbitrator has ruled, such matters inarbitrable on the grounds that the Civil Service employee was required to appeal to the Civil Service Commission rather than to arbitration. The fact that a Watertown DPW employee who was also a Civil Service employee arbitrated a disciplinary matter, and a court affirmed the arbitrator's decision, suggests that employees covered by both the Civil Service statute and just cause contractual provisions may contest disciplinary matters either before the Civil Service Commission, where it has jurisdiction, or through the grievance and arbitration processes. Although the DPW case does not have precedential value in this matter, since it involves a different bargaining unit and a different contract, it has persuasive value. The Town points out that it did not waive its right to argue arbitrability in the current case, even if it did not raise arbitrability in the DPW case. Without ruling directly on that argument, I find the current matter arbitrable on other grounds, as set forth in this decision.

I am not persuaded that finding this matter arbitrable would, in effect, write Article XIV out of the collective bargaining agreement. Nor am I persuaded that there is necessarily a conflict between Article XIV and the just cause provisions of the collective bargaining agreement. Article

XIV requires that the Employer and Union recognize and adhere to all applicable Civil Service Rules and Regulations. G.L. c. 31, section 41 prohibits certain employment actions, including discharge, being taken without just cause. The statute further provides that employees may appeal a discharge to the Civil Service Commission. Nothing in either the Civil Service statute or the Watertown collective bargaining agreement, however, provides that appeal to the Civil Service Commission is the only possibly avenue of appeal where an employee alleges that he or she has been discharged without just cause. This is a notable omission, since such language is included in some collective bargaining agreements, such as the Fitchburg and Leominster agreements discussed in this Opinion. Where, as here, the collective bargaining agreement includes both just cause provisions and a provision pertaining to Civil Service, it is reasonable to interpret the various contract articles harmoniously, as allowing appeal to either the Commission or to arbitration, at the discretion of the employee.

Having determined that the matter is arbitrable for the reasons stated above, I do not address in depth certain other arguments made by the Union. I do not find that the Town waived its right to challenge the arbitrability of this matter because it failed to assert the arbitrability claim in a timely manner, or that its late assertion of the arbitrability argument reflects on the strength of that argument. It is a well-established principle of labor law that an arbitrability claim can be asserted at any point in the process, including for the first time at arbitration.

Since this matter has been found arbitrable, and the grievant will be permitted to have a hearing on the merits before an arbitrator, I have also not addressed the argument made by the Union that the Town is attempting to prevent [redacted] from contesting his termination before either the Civil Service Commission or an arbitrator.

For the reasons set forth above, I find the grievance arbitrable.