STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS SMITS, Complainant, vs. CITY OF DE PERE, POLICE DEPARTMENT, Respondent.	:	Case X No. 29621 MP-1330 Decision No. 19703-A

Appearances:

Bowman & Matyas, Attorneys at Law, by Mr. Ken Bowman, 366 Main Avenue, De Pere, Wisconsin 54115, for Complainant.

Mr. Richard J. Dietz, City Attorney, 335 South Broadway, De Pere, Wisconsin 54115, for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Thomas Smits, having filed a complaint on April 16, 1982 with the Wisconsin Employment Relations Commission, alleging that the City of De Pere Police Department has committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act; and the Commission having appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter; and hearing on said complaint having been held at De Pere, Wisconsin on July 13, 1982 before the Examiner at which time the record was stipulated; and the parties having filed briefs and reply briefs by October 8, 1982; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Thomas Smits, herein Complainant or Smits, is an individual who was employed as a police officer by the City of De Pere until February 23, 1981 and during that time was a municipal employe; and that Smits resides at Main Avenue, De Pere, Wisconsin 54115.

2. That Respondent City of De Pere, herein City, is a municipal employer with its offices located at 335 South Broadway, De Pere, Wisconsin 54115; and that among its functions the City maintains and operates the City of De Pere Police Department.

3. That at all times material herein, the De Pere Police Benevolent Association, herein the Union, has been the voluntarily recognized exclusive collective bargaining representative for the collective bargaining unit consisting of protective occupation personnel in the employ of the City of De Pere Police Department, and that until the time of his termination in 1981 Smits was a membr of said bargaining unit.

4. That the De Pere Board of Police and Fire Commissioners, herein Board, is a police and fire commission established pursuant to Section 62.13 of the Wisconsin Statutes; that the Board has consisted of a group of individuals who are city officers; and that at all times material herein the Board was acting on behalf of the City pursuant to its authority under Section 62.13 (5) of the Wisconsin Statutes.

5. That Section 62.13 of the Wisconsin Statutes contains the following relevant provisions:

> 62.13 Police and fire departments. (1) COMMISSIONERS. 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.
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> . . .
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> (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.
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> (4) SUBORDINATES; REEMPLOYMENT. (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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> . . .
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> (5) DISCIPLINARY ACTIONS AGAINST SUBORDINATES. (a) A subordinate may be suspended as hereinafter provided as a penalty. He may also be suspended by the commission pending the disposition of charges filed against him.
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> (b) Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by an elector of the city. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.
>
> (c) A subordinate may be suspended for cause by the chief or the board as a penalty. The chief shall file a report of such suspension with the commission immediately upon issuing the suspension. No hearing on such suspension shall be held unless requested by the suspended subordinate. If the subordinate suspended by the chief requests a hearing before the board, the chief shall be required to file charges with the board upon which such suspension was based.
>
> (d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges shall be public, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas which shall be issued by the president of the board on request and be served as are subpoenas under ch. 885.
>
> (e) If the board determines that the charges are not sustained, the accused, if he has been suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

(f) Findings and determinations hereunder and orders of suspension, reduction, suspension and reduction, or removal, shall be in writing and, if they follow a hearing, shall be filed within 3 days thereof with the secretary of the board.

(g) Further rules for the administration of this subsection may be made by the board.

(h) No person shall be deprived of compensation while suspended pending disposition of charges.

(i) Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice thereof on the secretary of the board within 10 days after the order is filed. Within 5 days thereafter the board shall certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes. The action shall then be at issue and shall have precedence over any other cause of a different nature pending in said court, which shall always be open to the trial thereof. The court shall upon application of the accused or of the board fix a date of trial, which shall not be later than 15 days after such application except by agreement. The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence by the board. The question to be determined by the court shall be: Upon the evidence was the order of the board reasonable? No costs shall be allowed either party and the clerk's fees shall be paid by the city. If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to his pay as though in continous service. if the order of the board is sustained it shall be final and conclusive.

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6. That all times material herein, Armond Wecker has held the position of Chief of Police of the City of De Pere Police Department and has acted as an agent for, and on behalf of, the City.

7. That the City and the Union have been parties to a series of collective bargaining agreements covering the wages, hours and conditions of employment of employes in the bargaining unit; that the 1977 agreement was in effect both when the original charges were filed against Smits and when the Board took its original disciplinary action that eventually gave rise to the instant complaint; and that said 1977 agreement contained in relevant part the following provisions:

ARTICLE I

Recognition

The City agrees to recognize the Bargaining Unit as the bargaining agent for personnel of the De Pere Police Department in the matter of wages, hours of work and working conditions, except in situations wherein this contract is in conflict with existing Wisconsin Statutes. In cases of conflict, the statute will apply. The Finance Committee of the City of De Pere shall represent the City in the bargaining conferences and negotiations. Prior to any negotiations, the Finance Committee shall be furnished with a list of the membership on the Bargaining Unit.

ARTICLE II

Purpose of Agreement

It is the intent and purpose of the parties hereto that this agreement shall promote and improve working conditions between the City and the De Pere Police Benevolent Association Bargaining Unit and to set forth herein wages, hours, and conditions of employment to be observed by the parties hereto. In keeping with the spirit and purpose of this agreement, the City agrees that there shall be no discrimination by the City against any employee covered by this agreement because of his membership or activities in the bargaining unit, nor will the City interfere with the right of such employees to become members of the Bargaining Unit.

ARTICLE III

Management Rights

The Association recognizes that the City on its own behalf, retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities it had prior to the execution of this agreement, customarily executed by management and conferred upon and vested in it by applicable law, rules and regulations.

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ARTICLE XII

Longevity Pay

Employees shall receive additional compensation, as longevity pay, beginning the first month after qualification of such additional compensation, as follows:

(A) After completion of five (5) years of continuous service- $10.00 per month.

(B) After completion of ten (10) years of continuous service- $20.00 per month.

(C) After completion of fifteen (15) years of continuous service - $25.00 per month.

(D) After completion of twenty (20) years of continuous service - $30.00 per month.

. . .

ARTICLE XXX

Grievance Procedure

A grievance is defined as any complaint involving the interpretation application or alleged violation of the terms of this Agreement involving wages, hours and conditions of employment. A grievant may be an employee or, upon the mutual agreement of the parties hereto, grievances involving the same issue may be consolidated in one proceeding.

(A) The Chief of the Department or the Police and Fire Commission or members thereof may confer with the Union and such employees or other persons they deem appropriate before making their determination.

(B) The calendar days indicated at each step should be considered a maximum. The time limits may be extended by mutual consent.

(C) Steps in the procedure may be waived by mutual agreement of the parties.

(Step 1.) In the event of a grievance the grievant, or the Union Grievance Committee on his behalf, shall have the right to present the grievance in writing to the Chief within twenty (20) calendar days of the date of the act or occurrence involved. The grievance shall contain a statement of the facts upon which the grievance is based and state the action requested. The Chief shall furnish the grievant or the Grievance Committee an answer within five (5) calendar days after receiving the grievance.

(Step 2.) If the grievance is not satisfactorily resolved at Step 1 the written grievance may be submitted to the Police and Fire Commission within five (5) calendar days of receipt of the Chief's Answer. The Commission, within ten (10) calendar days of the receipt of the written grievance, shall furnish the grievant or the Grievance Committee its decision to the grievance, together with supporting reasons.

(Step 3.) If the Grievance is not satisfactorily resolved at Step 2 the written grievance may be appealed and submitted to the Mayor within five (5) calendar days of receipt of the Commission's decision. If such appeal is submitted the Commission shall submit a full report to the Mayor. The Mayor, within five (5) calendar days of receipt of the written appeal, shall furnish the grievant or the Grievance Committee with his decision thereon.

(Step 4.) Grievances not resolved at Step 3 may be appealed within thirty (30) calendar days to the Wisconsin Employment Relations Commission for arbitration. Such Commission shall appoint an arbitrator; the dispute shall be presented to such arbitrator for determination, which shall be final and binding.

. . .

8. That on December 1, 1977, the Chief of Police for the De Pere Police Department, Armond Wecker, herein the Chief, filed nine charges of misconduct with the Board against Smits, pursuant to Section 62.13(5), Wis. Stats.; and that on February 24, 1978, the Board sustained seven of the charges and terminated Smits' employment with the De Pere Police Department.

9. That Smits appealed the Board's decision to the circuit court pursuant to Section 62.13(5)(i), Wis. Stats.,; that the court determined that four of the charges were not substantiated and remanded the matter to the Board for reevaluation of the sanctions; that the Board subsequently conducted further proceedings and on April 24, 1979 reaffirmed its decision to terminate Smits; and that Smits again appealed and the circuit court reversed on the ground that the sanction of termination was too severe, ordered Smits reinstated and issued a guideline to the Board suggesting a maximum penalty of a one year suspension.

10. That on July 18, 1979 the Board issued an amended order suspending Smits without pay for the equivalent of 52 work weeks, or a period of 15 months and 12 days; that Smits subsequently instituted certiorari proceedings, seeking reversal of the Board's amended order; that on February 23, 1981 Smits' employment with the De Pere Police Department was terminated for reasons unrelated to this proceeding; and that on October 6, 1981 the Wisconsin Supreme Court, on writ of certiorari, held that the Board had exceeded its jursidiction in suspending Smits for the

equivalent of 52 work weeks and remanded the matter back to the circuit court with orders to remand to the Board with directions that "it may suspend petitioner (Smits) one calendar year from April 15, 1978..."

11. That on March 29, 1982 the Board ordered Smits suspended without pay retroactively for one calendar year from April 15, 1978 to April 14, 1979.

12. That on April 5, 1982 Smits attempted to utilize the contractual grievance procedure by filing a written grievance with the Chief, which grievance stated in relevant part:

> To: Armand Wecker, Chief of Police
> De Pere Police Department
> 307 S. Broadway
> De Pere, WI 54115
>
> Pursuant to Article XXX of the Collective Bargaining Agreement, Grievant herein complains that on March 22, 1982, the Board of Police and Fire Commissioners entered an Order suspending Grievant for a period of twelve months, without pay or payment of Grievant's longevity pay from April 15, 1978 through April 14, 1979, for the following three (3) charges:
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> Charge 1. On two occasions, Grievant was not in a position to back up his fellow officers on duty.
>
> Charge 2. On one occasions, Grievant erroneously reported his position and whereabouts to his shift supervisor.
>
> Charge 3. On one occasion, on January 14, 1978, Grievant slept while on duty.
>
> That testimony presented at the hearing clearly revealed that as a past practice the employer had disciplined its employees for such charges as shoplifting and stealing from the Police Department and that such charges warranted suspensions, without pay, of up to two (2) weeks. Further, that testimony at said Board of Police and Fire Commissioners' hearing revealed that, as a past practice, the employer had always paid suspended employees their longevity pay.
>
> Grievant states that the imposition of the sanction imposed by the Board of Police and Fire Commissioners on March 22, 1982, violates past practices established as conditions of Grievant's employment and amounts to and was intended to discriminate against Grievant contrary to:
>
> a) ARTICLE II of the Collective Bargaining Agreement;
>
> b) Section 111.70(3) Wisconsin Statutes;
>
> c) ARTICLE XII of the Collective Bargaining Agreement;
>
> d) ARTICLE I of the Collective Bargaining Agreement;
>
> e) The Board has failed to mete out punishment on an equal basis providing like punishment for like offenses in the past and that said discipline was excessive in light of the work rules that were violated.
>
> Grievant presents this issue to the Chief of Police, pursuant to the applicable Collective Bargaining Agreement for resolution.

Dated this 31st day of March, 1982.

Respectfully, submitted,

Thomas Smits /s/
Thomas Smits, Grievant

13. That the 1981 collective bargaining agreement between the City and the Union was in effect at the time Smits was terminated in 1981 and on March 29, 1982 at the time the Board ordered Smits retroactively suspended for one calendar year; and that said agreement contained in part the following provisions:

ARTICLE I

Recognition

The City agrees to recognize the Bargaining Unit as the bargaining agent for protective occupation personnel of the De Pere Police Department in the matter of wages, hours of work and working conditions, except in situations wherein this contract is in conflict with existing Wisconsin Statutes. In cases of conflict, the statute will apply. The Finance Committee of the City of De Pere shall represent the City in the bargaining conferences and negotiations. Prior to any negotiations, the Finance Committee shall be furnished with a list of the membership on the Bargaining Unit.

ARTICLE II

Purpose of Agreement

(As in the 1977 agreement)

ARTICLE III

Management Rights

The Association recognizes that, except as otherwise provided in this Agreement or as may affect the wages, hours, and working conditions of the members of the Association, the management of the City and its business and the direction of its work force is vested exclusively in the employer in that all powers, rights, authority, duties, and responsibilities which the City had prior to the execution of this Agreement customarily executed by management or conferred upon and vested in it by applicable rules, regulationss, and laws, and not the subject of collective bargaining under Wisconsin law, are hereby retained. Such rights include, but are not limited to, the following:

a. To direct and supervise the work of its employees;

b. To hire, promote, and transfer employees;

c. To lay off employees for lack of funds or other legitimate reasons;

d. To discipline or discharge employees for just cause;

. . .

ARTICLE XII

Longevity Pay

Employees shall receive additional compensation, as longevity pay, beginning the first month after qualification of such additional compensation, as follows:

(A) After completion of five (5) years of continuous service - $15.00 per month.

(B) After completion of ten (10) years of continuous service - $25.00 per month.

(C) After completion of fifteen (15) years of continuous service - $30.00 per month.

(D) After completion of twenty (20) years of continuous service - $35.00 per month.

. . .

ARTICLE XXX

Grievance Procedure

(Remained identical to ARTICLE XXX, Grievance Procedure, in the 1977 agreement with the exception that the Chief and the Mayor are given 10 calendar days to respond to a grievance in the 1981 agreement.

14. That under either the 1977 agreement or the 1981 agreement, the grievance filed by Smits on April 5, 1982, states a claim which, on its face, is governed by the collective bargaining agreement.

15. That the City, through its Chief of Police, has failed or refused to respond to the grievance filed by Smits and continues to refuse to respond to said grievance.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the De Pere Board of Police and Fire Commissioners is a "person" within the meaning of Section 111.70(1)(k) of the Wisconsin Statutes and was at all times material herein acting on behalf of the Respondent City of De Pere pursuant to the authority granted it by Section 62.13(5) of the Wisconsin Statutes.

2. That the Smits grievance states a claim which, on its face, is governed by the terms of the parties' collective bargaining agreement, and therefore, the Respondent, by its refusal to respond to the grievance in accordance with the contractual grievance procedure, has committed a prohibited practice within the meaning of Section 111.70(3)(a)(5) of the Wisconsin Statutes.

On the basis of the above Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 1/

That the Respondent, City of De Pere and its agents, shall immediately:

1. Cease and desist from refusing to respond to the aforesaid grievance.

2. Take the following action which the Examiner finds will effectuate the policies of Section 111.70 of the Wisconsin Statutes:

   a) Comply with the provisions of the grievance procedure in the 1981 collective bargaining agreement in effect between the City and the De Pere Police Benevolent Association with respect to responding to the grievance filed by Thomas Smits on April 5, 1982.

   b) Notify Thomas Smits and his legal counsel that the City will respond to Smits' grievance.

c) Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days from the date of this Order, as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 31st day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant, Smits, alleges that the Respondent City has committed a prohibited practice by refusing to process a written grievance submitted to the Chief of Police by Smits, as an individual, in accordance with the contractual grievance procedure.

The City does not deny that it has refused to respond to Smits' grievance, but takes the position that for a number of reasons Smits was not entitled to file a grievance regarding his suspension, and that therefore, the City is under no obligation to respond to the grievance.

Positions of the Parties

It is the City's position that Section 62.13(5), Wis. Stats., provides for the exclusive procedure to be followed regarding disciplinary procedures against police officers. In support of its position the City argues that there is an irreconcilable conflict between Section 62.13(5) and a provision in a labor agreement which would allow a police officer to grieve a disciplinary determination of a board of police and fire commissioners, established pursuant to Section 62.13, Wis. Stats. This is especially so in this case since the Chief did not take disciplinary action against Smits, but merely filed charges against Smits with the Board. The Board, acting independently of the City, then imposed the discipline in accord with the statutory directives and after judicial review of its proceedings.

In addition, while a school board may agree in bargaining to modify its own authority to impose discipline on its employes, the City has no authority to waive the statutory powers and duties of its Board. Citing Durkin vs. Board of Police and Fire Commissioners, 48 Wis. 2d 112 (1978) The Board is an independent body whose decisions are required to be judicially reviewed pursuant to a specific statutory procedure. the City has no contractual or statutory right to amend or adjust the Board's disciplinary determinations. Therefore, the grievance procedure cannot be invoked to review the Board's determination in this case.

Having established that there is an irreconcilable conflict between Section 62.13(5) and a labor agreement that would allow a police and fire commission's disciplinary determination to be grieved, it must be concluded that the statute prevails. Citing Glendale Professional Policemen's Association vs. Glendale, 23 Wis. 2d 90 (1976); WERC v. Teamsters Local 563, 75 Wis. 2d 602 (1977); Wisconsin Professional Policemen's Association v. Dane County, 106 Wis. 2d 303 (1982)

The City also takes the position that the matter of the discipline imposed on Smits by the Board is not covered by the labor agreement between the City and the Union, rather it arose under the procedures of Section 62.13. Since the grievance procedure applies only to complaints involving the interpretation, application or alleged violation of the terms of the labor agreement, that definition does not cover this disciplinary matter. Also, a review of the first three steps of the grievance procedure in the labor agreement reveals that a grievance is reviewed by the Chief, the Board and the Mayor, in that order. It is argued that it would be impractical, if not illegal, to create a situation whereby the Chief would have the authority to overrule the Board's decision; that it is inconceivable that the Board should review its own determination, especially after that decision is reached on the basis of a due process proceeding; and that having the Mayor, an elected official, review the Board's determination would be contrary to the very purpose behind the legislative creation of a police and fire commission, i.e., to take politics out of such decisions and base them on the fitness to serve.

The City also contends that to allow Smits to pursue judicial review at every level over a three year period, and then seek an alternative resource through MERA would be inequitable and contrary to the concept of prompt labor decisions for the purpose of maintaining labor peace. Therefore, Smits should be estopped from maintaining his action upon the theory of election of remedies.

Timeliness is also alleged by the City as a defense. It is contended that by ruling that the suspension would be imposed retroactively, effective April 15, 1978, the courts created a situation whereby Smits' grievance is untimely. The City notes too, that Smits was no longer an employe and a member of the bargaining unit covered by the agreement, upon which agreement he now relies, by the time the matter was ultimately resolved in the courts.

Finally, it is contended that the Board's final action has already been determined to have been reasonable by the Wisconsin Supreme Court, State ex. rel. Smits v. City of De Pere 104 Wis. 2d 26 (1981). It is argued that res adjudicata bars not only those issues actually desired in the prior action, "...but also any issues which could have been raised." Lee v. City of Peoria, et al, 29 FEP 892. Therefore, the issue raised by Smits is res adjudicata and not subject to collateral attack.

The Complainant, Smits, takes the position that both the 1977 and 1981 labor agreements define a grievance broadly, and that the matter of his discipline is within the scope of that definition. The grievance alleges violations of past practice and specific provisions of the agreement, and Smits filed the grievance with the Chief within twenty calendar days of the Board's order of March 22, 1982, suspending him retroactively, as required by the agreement. The provisions of the contractual grievance procedure are mandatory and require the Chief to answer a grievance within ten calendar days (five calendar days in the 1977 agreement). Since the Chief has refused to answer the grievance he has violated the grievance procedure provisions in the agreement.

The Complainant also responds to the numerous defenses raised by the City.

Regarding the City's ability to bind the Board via a collective bargaining agreement, Smits argues that the Wisconsin Supreme Court has held that a provision in a labor agreement which can be reasonably interpreted to not conflict with the statute should be given effect. Citing Wisconsin Professional Police Association v. County of Dane, 106 Wis. 2d 303 (1982); Glendale Professional Policeman's Association v. City of Glendale, 83 Wis. 2d 90 (1983). Both of the cases cited dealt with a city's ability to limit the statutory discretion granted to a sheriff and chief of police, respectively. In Wisconsin Professional Police Association the Court held that were it not for the constitutional basis for the sheriff's statutory authority, the statute alone would not bar enforcement of the labor agreement.

Smits argues that under the above authority it is clear that a labor agreement may restrict what had previously been the unrestricted discretion of a police chief or a police and fire commission, as long as the agreement does not eliminate or remove their statutory authority to act. Under Section 62.13(5) the Board's empowered to determine whether charges filed against a subordinate are sustained, if so, the Board may take certain disciplinary action as the good of the service may require.

Smits alleges that he is not grieving the Board's authority to hear the charges or reach a determination, and that he is also not grieving the authority of the Board to impose the sanction it did. What is being grieved is the discretion that was exercised by the Board in this case and that the sanction imposed violated the labor agreement.

As to the City's argument that the grievance involves matters beyond the scope of the labor agreement, Smits contends that the grievance alleges violations of past practice and specific provisions of the agreement. It is argued further that there is no provision in Section 62.13(5) that gives the Board the "full authority" to suspend an employe for one year without pay. Section 62.13(5) only controls the perimeters of the Board's jurisdiction to act, and does not expressly or inferentially prohibit the City from further restricting the permissible perimeters of disciplinary discretion via a collective bargaining agreement.

Also, the City's contention that the steps of the grievance procedure demonstrates that decisions of the Board were not intended to be covered is not convincing. Complainant argues that the grievance procedure is simply an agreed upon mechanism for attempting to resolve employment problems, and that it is often the case that the initial steps of the grievance procedure involve individuals without the authority to overturn the decision being grieved.

Regarding the doctrine of election of remedies, Complainant contends that the doctrine is viewed with disfavor in the eyes of the law and is given only restricted application. The test for its applicability is "whether there has been an efficient election between two or more remedies which are inconsistent or which are repugnant. In Re Mendel's Will, 164 Wis. 136 (1916). The appeals of the Board's decision were based on the Board acting beyond its jurisdiction, initially due to the order of discharge being "unreasonable", and thereafter, because the discipline imposed exceeded the recommended perimeters set by the circuit court. The Board's final order in March of 1982 was within its jurisdiction, however, it does not automatically follow that by acting within its jurisdiction it complied with the provisions of the agreement. There is nothing inconsistent about the Complainant first assuring that the Board acts within its legal authority and jurisdiction, and once the Board has so confined itself, asserting that it has violated the terms of the agreement. Complainant also notes that there is no possibility that he will be unjustly enriched by his being allowed to grieve the matter.

Relative to his no longer being an employe and member of the bargaining unit at the time of the Board's final order in March of 1982, Complainant makes several arguments that he should still have the benefit of the labor agreement. First, the agreement does not expressly require that a grievant be an employe at the time. Secondly, by virtue of his being an employe at the time that the agreement was negotiated he became a third party beneficiary of that contract. Third, it would be unreasonable and unrealistic to construe the grievance procedure so as to restrict its use to only those who are employes at the time they file the grievances. To do so would prevent an employe who was fired from challenging the discharge through the grievance procedure.

Finally, regarding the City's contention that the matter is res adjudicata, that doctrine is based on the issue having already been presented to the court, and considered and passed upon by the court, and extends to all questions within the issue which were actually passed upon by the court in reaching its decision. The Complainant's appeal to the courts involved the issue of whether the Board's order was reasonable based on the evidence, and subsequently, the issues of whether the order was beyond the Board's jurisdiction or the result of an incorrect theory of law. The issue of whether the Board's order breached the terms of the applicable labor agreement was never presented to the courts, or considered by the courts, and was in fact beyond the scope of review as defined in the statutes. Therefore, the issue of whether the Board violated the terms of the labor agreement by its order has never been considered or decided by the courts and could not have been, since it was beyond the court's scope of review.

DISCUSSION

It is initially noted that neither party in this action has raised the issue of whether there ultimately exists a duty to arbitrate should the City be required to respond to the grievance and the parties are unable to resolve the matter. The City contends that Smits was not entitled to file a grievance on the matter, and therefore, it had no duty to respond. The Complainant contends that the issue is whether the City violated the collective bargaining agreement by failing to respond to the grievance within the time period provided for in the agreement. 2/

The parties having refrained from raising the issue of whether the grievance is ultimately substantively arbitrable, the Examiner will refrain from making an express determination on that issue. 3/

2/ In his reply brief, Complainant expressly asserts that the issue of whether the grievance is substantively arbitrable has been expressly left to an arbitrator pursuant to the language defining a "grievance" in the agreement.

3/ The Examiner is aware that many of the arguments raised by the parties, and the policies involved in making a determination as to whether the City is required to respond to the grievance, are applicable to the issue of whether the grievance is substantively arbitrable, and that the parties may choose to draw certain inferences from the Examiner's decision.

Although substantive arbitrability is not an issue to be decided in this case, the same reasoning and policy considerations involved in the decisions of the Commission and the courts regarding the duty to arbitrate also apply to the issue of whether an employer has the duty to respond to a grievance filed under a collective bargaining agreement.

As have the federal courts, 4/ the Commission has long followed policy favoring the submission of grievances to arbitration as a means of resolving problems before they become major labor disputes. 5/ The Commission has consistently held that if a grievance states a claim which, on its face, is governed by the parties' collective bargaining agreement, the grievance is substantively arbitrable. 6/ The Wisconsin Supreme Court has affirmed the policy followed by the Commission. In Joint School District No. 10, City of Jefferson, et al v. Jefferson Education Association, 78 Wis. 2d 94 (1977), the Court stated the policy followed in this state:

> When the court determines arbitrability it must exercise great caution. The court has no business weighing the merits of the grievance. It is the arbitrators' decision for which the parties bargained. In Dehnart v. Waukesha Brewing Co., Inc., 17 Wis. 2d 44, 115 N.W. 2d 490 (1962), this court adopted the Steelworkers Trilogy teachings of the court's limited function. The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. This case differs from those in the Steelworkers Trilogy. United Steel Workers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The Steelworkers Cases involve broad arbitration clauses submitting questions of contract interpretation to the arbitrator. This contract delineates a restricted area of arbitrable grievances. Nevertheless, we believe the teachings of the Steelworkers Trilogy are applicable to the case at bar.
>
> "An order to arbitrate the particular grievance should not be denied unless 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 or coverage." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 583 (1960).
>
> Our adherence to the Trilogy is in keeping with the strong legislative policy in Wisconsin favoring arbitration in the municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes. Secs. 111.70(3)(a) 5, 111.70(6), Stats.; Local 1226 v. Rhinelander, 35 Wis. 2d 209, 216, 151 N.W.2d 30 (1967); Teamsters Union Local 695 v. Waukesha County, 57 Wis. 2d 62, 69, 203 N.W. 2d 707 (1973). (at pp. 111-112).

4/ United Steel Workers v. American Manufacturing Co., 363 U.S. 584 (1960); United Steel Workers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steel Workers v. Enterprise Wheel and Car Corp., 363 U.S., 593 (1960).

5/ Seaman-Andwall Corp., (5910) 1/62; Oostsburg Jt. School Dist. No. 14, (11196-A, B) 12/72, aff'd Sheboygan County Cir. Ct. 6/74; Portage Jt. School District No. 1 (12116-A, B), 11/74; Milwaukee Board of School Directors 14614-A, B) 2/77.

6/ City of St. Francis, (13182-B) 4/75; Oostburg Jt. School District No. 14, supra; Milwaukee Board of School Directors, supra.

Therefore, the test to be applied in this case is whether the grievance filed by Smits states a claim which, on its face, is governed by the applicable collective bargaining agreement. If it does, absent other factors, the City must respond to the grievance.

In order to determine whether Smits' claim is governed by the collective bargaining agreement it will be necessary to review the agreements involved. It was stipulated that the 1977 agreement was in effect both when the charges were filed against Smits with the Board in December of 1977 and when the Board took its action on those charges in February of 1978 terminating Smits. The 1981 agreement was in effect in 1981 when Smits was terminated for unrelated matters and was also in effect in March of 1982 when the Board made its final determination on its original decision to discharge Smits.

The City contends that the grievance involves matters beyond the scope of the agreement since it arises from the actions of the Board taken pursuant to Section 62.13(5), Wis. Stats. The Complainant takes the position that the grievance is within the scope of the agreement's broad definition of a grievance in that it alleges violations of the terms of the agreement and involves wages and conditions of employment.

The definition of a grievance is the same in both the 1977 and 1981 agreements:

> "A grievance is defined as any complaint involving the interpretation application or alleged violation of the terms of this Agreement involving wages, hours and conditions of employment."

The grievance filed by Smits on April 5, 1982 alleges the violation of three specific provisions of the "Collective Bargaining Agreement", 7/ Article I - Recognition, Article II - Purpose of Agreement and Article XII - Longevity Pay. The grievance also alleges a violation of past practice and discrimination against Smits. The issue of the application of Article III - Management Rights has also been subsequently raised.

The 1977 agreement contains the broad definition of a grievance set forth above and that agreement contains no express exclusion of disciplinary matters. It does not, however, contain any provision expressly relating to discipline. The 1981 agreement also contains the same broad definition of a grievance and in Article III - Management Rights, expressly requires "just cause" for discipline or discharge. In both agreements the Board is named as the City's representative at Step 2 of the grievance procedure and is also mentioned in paragraph (A) of that procedure.

The U. S. Supreme Court, in United Steel Workers, 363 U.S. 574, supra , stated in the majority opinion that:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective bargaining agreement."

The court then went on to hold that "Doubts should be resolved in favor of coverage." In Jefferson, supra, the Wisconsin Supreme Court concluded that the dispute in that case was arbitrable:

> We hold that it cannot be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. The grievance is therefore arbitrable. (at p. 113).

7/ Smits' grievance does not indicate which agreement he is alleging has been violated, the 1977 agreement or 1981 agreement. The Examiner deems the issue of which agreement would apply to be an issue more appropriately decided by an arbitrator.

Similar to the Court in Jefferson, the Examiner cannot find with positive assurance that the grievance provisions in the bargaining agreements involved are not susceptible of an interpretation covering the matters raised in Smits' grievance. The grievance concerns at least one topic expressly covered by both agreements, i.e. longevity pay, and alleges violations of other provisions which ultimately may be found applicable by an arbitrator. Moreover, Article III of the 1981 agreement expressly covers discipline. In addition, the grievance alleges a violation of past practice. As the Complainant noted in his initial brief, there have been instances where arbitrators have held past practice to be binding as an "implied" term of the bargaining agreement.

The City's contention that the grievance procedure was not intended to cover disputes involving disciplinary decisions of the Board, as evidenced by the fact that the Chief, Board and Mayor, respectively, are involved in the first three steps of the procedure, is not convincing. The purpose of a grievance procedure is to provide a mechanism for the discussion and resolution of disputes between the parties to the collective bargaining agreement. While it is not suggested as the ideal situation, depending on the issue, it is not uncommon that the individuals or bodies involved in the grievance steps on behalf of the employer do not have the authority, on their own, to compromise on the original management decision or action, but that they must instead seek the acquiesence of someone not formally a part of the grievance procedure. 8/ It is not necessary in order to process Smits' grievance that the persons in each of the successive steps of the grievance procedure have the authority to modify or overturn the Board's determination on their own.

It is concluded that, on its face, the grievance states a claim that is governed by the bargaining agreement, regardless of which agreement is found to apply. Having reached that conclusion, absent other factors, the City must respond to Smits' grievance.

The City raises a number of additional defenses in support of its position.

The City contends that the procedures in Section 62.13(5), Wis. Stats., provide the exclusive remedy regarding a disciplinary determination by the Board, and that therefore, the matter raised in Smits' grievance is not grievable.

In support of its position the City contends that there is an irreconcilable conflict between Section 62.13(5) and a bargaining agreement which would allow an officer to grieve a disciplinary determination by a board of police and fire commissioners made pursuant to the statute. The irreconcilable conflict is assertedly due to the City's inability to bind the Board or modify its authority via a collective bargaining agreement. Further, that it was the Board, acting independently, and not the City or the Chief, that took the disciplinary action in question. Therefore, the City cannot be required to answer a grievance concerning that action. Rather than through the grievance procedure, the proper and exclusive route for appealing the Board's disciplinary determination is through the statutory procedure for judicial review.

The Examiner notes that this issue has never been decided by either the Commission or the courts. The Wisconsin Supreme Court has twice found it unnecessary to decide the issue, one of those cases being Durkin, supra, upon which the City relies. In Durkin the Court noted that:

> The narrow issue presented by this case is whether the amnesty clause above referred to and contained in the collective bargaining agreement abrogates the statutory right of an elector to file a complaint with the appellant contained in sec. 62.13(5)(b), Stats.

8/ The grievance procedure in both agreements expressly provides that the City's representatives at the different steps may confer with one another, Article XXX, paragraph (A).

The Court expressly refused to consider the issue raised here by the City: 9/

> This case deals solely with a complaint on charges lawfully filed by an elector. Thus, having determined that the city council cannot enter into an agreement which would foreclose an elector from filing charges with the Board, we do not reach the question of whether the Board is bound by the contract between the City and the Union.

Given the above, it is obvious that Durkin is not dispositive of the issue. Requiring the City to respond to a grievance concerning the Board's determination has no effect on an elector's right to file charges with the Board against an officer, nor does it have any effect on the Board's abilitv to process such charges in accordance with 62.13(5).

While the Wisconsin Supreme Court has not ruled on the issue, in Kaiser v. Board of Police and Fire Commissioners, 104 Wis. 2d 498 (1981); it held that a probationary police officer did not have the right to challenge his discharge through 62.13(5). The Court relied in part on a provision in the applicable collective bargaining agreement in reaching its decision.

Discipline is a basic condition of employment and is a mandatory subject of bargaining. 10/ As such, a provision in a collective bargaining agreement that would allow an employe to grieve the imposition of discipline is directly authorized by Section 111.70, Wis. Stats. In Glendale Professional Policemen's Association v. City of Glendale, 83 Wis. 2d 90 (1978), the Wisconsin Supreme court was confronted with a provision in a collective bargaining agreement which required the promotion of the most senior qualified applicant. The City in that case argued that such a provision was illegal as it was in conflict with a police chief's unfettered power to appoint under Section 62.13(4)(a) Wis. Stats., and that the City had no authority to limit the Chief's power via a collective bargaining agreement. That therefore, the provision was not enforceable under the agreement's grievance and arbitration procedure. The Court held:

> "Because a promotions provision of this collective bargaining agreement is directly authorized by Section 111.70, Stats., we are constrained to give effect to both the agreement and the statutes if this can be done." (At p. 103).

The Court noted that:

> "The relationship between public sector bargaining agreements and other statutes governing terms and conditions of employment can be one of the most difficult issues in public sector labor law. As one commentator has pointed out, a rule giving automatic priority to the statute can reduce the statutory duty to bargain into insignificance, while a rule giving automatic priority to the agreement can result in effective repeal of state law." (At p. 105).

With regard to Section 111.70, the Court stated:

> (We) have held that collective bargaining agreements and statutes also governing conditions of employment must be harmonized whenever possible. When an irreconcilable conflict exists, we have held that the collective bargaining agreement should not be interpreted to authorize a violation of law.

9/ In Racine Fire and Police Commission v. Stanfield 70 Wis. 2d 395 (1975) the Court expressly refused to decide the issue of whether an officer could proceed to arbitration on his dismissal by the Fire and Police Commission.

10/ City of Green Bay (12402-B) 1/75; Beloit Education Association v. W.E.R.C., 73 Wis. 2d 43 (1976).

Citing WERC v. Teamsters Local 563, 75 Wis. 2d 602 (1977) (At p. 106) (Emphasis added).

The Court found that the agreement and the statute could be harmonized:

> "Our construction gives effect to both the Chief's power under sec. 62.13(4)(a) and the municipality's duty to bargain under sec. 111.70, Stats. Sec. 62.13(4)(a) is enabling legislation which places the exercise of discretion in a certain office, while sec. 111.70 permits the City to limit the scope of this discretion through a collective bargaining agreement. The Common Council has not, as the City contends, bargained away a power possessed by the Chief that is not the City's to bargain. In ratifying the agreement, the Council has effectuated the municipal employer's statutory duty to bargain on conditions of employment and has preserved the statutory requirement that only qualified persons be appointed." (At p. 107)

The Court also rejected the city's argument that it could not legally limit the chief's discretion via a collective bargaining agreement, holding that:

> "Sec. 111.70, Stats., is legislation that specically authorizes local action, i.e., the adoption of collective bargaining agreements covering wages, hours, and conditions of employment even though statutes of statewide concern also govern wages, hours, and conditions of employment.
>
> Thus this is not a case of a municipality in the exercise of its home rule power deciding to "withdraw" from or circumvent sec. 62.13(4)(a), Stats., Sec. 17.01 of the agreement is authorized by sec. 111.70, Stats., a statute which also deals with a matter of statewide concern. In entering into this 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. ... (At pp.108-9)

While the Commission has not specifically ruled on the issue of the right to grieve a police and fire commission's disciplinary decision rendered under Section 62.13(5), it has ruled on the status of proposals that would subject a sheriff's decision to terminate a deputy to the grievance and arbitration procedures in the collective bargaining agreement. 11/ In Crawford County the County argued that the Sheriff had unlimited discretion under Section 59.21(4), Wis. Stats., to terminate deputies he appoints, that his statutory authority could not be limited by a collective bargaining agreement, and that therefore, the County was precluded from bargaining with the Union over such proposals. The Commission rejected the County's argument finding the statute and proposals could be harmonized:

> "The County's argument that the just cause and arbitration proposals are prohibited subjects of bargaining must be rejected. The proposals do not "explicitly contradict" the Sheriff's statutory power under Sec. 59.21(4), Stats. Harmonization between this statutory power and the collective bargaining proposals can be accomplished since the

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11/ Crawford County (Sheriff's Dept.) (20116) 12/82.

Sheriff retains his exclusive right to discharge. Said right is simply limited by the requirement that the Sheriff must have just cause for discharge and by the potential for arbitral review of his decision. This harmonization parallels that found appropriate by the court in West Salem, supra wherein it was concluded that a school board's statutory power to discharge teachers, under Sec. 118.22, Stats., could be limited by provisions of a collective brgaining agreement providing a just cause standard and arbitral review of discharge decisions. As the court there held:

> "We conclude that harmonizing the collective bargaining agreement provisions with the Board's power to discharge set forth in sec. 118.22(2), Stats., leaves the Board with the exclusive right to discharge an employe, but requires that just cause exist for the discharge. If the employe contends there was no just cause for discharge, he may process a grievance through the procedure contained in the agreement.
>
> If that grievance goes to arbitration, the arbitrators, under the terms of the agreement, may make an independent determination of whether there was just cause for the discharge, relying on whatever procedures they deem necessary to reach that determination. If the parties disagree with the procedure employed by the arbitrators, their remedy is to change the language of the agreement." 12/

The Examiner finds the reasoning of the Court in Glendale,supra, and the Commission in Crawford County, applicable to the City's position in this case. The Board retains its statutory authority to make disciplinary determinations pursuant to the statutory procedures set forth in Section 62.13(5) Wis. Stats. As with a sheriff acting under Section 59.21(4), Wis. Stats., or a school board acting under Section 118.22, Wis. Stats., it is merely the discretion of the Board in imposing discipline, and not its statutory authority to act, that maybe limited by allowing its disciplinary decision to be grieved under either the 1977 or 1981 collective bargaining agreement. 13/ Furthermore, subjecting the disciplinary determination to the contractual grievance procedure, and ultimately to arbitration, would promote, rather than contravene, the legislative purpose underlying Section 62.13(5), i.e., to remove political considerations from disciplinary decisions.

Also, the fact that Section 62.13(5)(i), Wis. Stats., provides a procedure for obtaining judicial review of the Board's disciplinary determination does not, in itself, require a conclusion that that procedure is the exclusive method of obtaining a review of the Board's decision. Other than State ex. rel. Smits, supra, the City cites no authority for its proposition that judicial review was the exclusive recourse available to Smits. That case, however, dealt with the Court's scope of review on a writ of certiorari, and not with whether 62.13(5)(i) provides for the only method of obtaining review from an adverse disciplinary decision of a police and fire commission. Given the policy in Wisconsin favoring the submission of disputes to the grievance procedure and arbitration, and the lack of authority for finding an exception to that policy in this case, it is concluded that the existence of the statutory procedure for seeking review of a police and fire commission's disciplinary determination does not preclude a police

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12/ A somewhat similar result was reached in Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, Local 695 v. County of Sauk, Ct. of App. Dist. IV, 79-1376 (1981), unpublished opinion. In that case the Court rejected the County's argument, which was based in part on Section 59.21(4), Wis. Stats., that an arbitrator had exceeded his authority bv overturning the Sheriff's decision to discharge a deputy.

13/ This case is distinguishable from the Commission's decision in City of Greenfield (19872) 9/82, where a proposal for advisory arbitration prior to the police and fire commission's hearing and determination was found to be an illegal subject of bargaining since it interfered with the statutory time lines. That is not the case here where the grievance follows the Board's action and does not interfere with the Board's ability to follow its statutory procedures.

officer from grieving that determination under a collective bargaining agreement. 14/

There is also no merit in the City's contention that since it was the Board, and not the Chief, that took the action in question, the City cannot be required to respond to a grievance regarding that action. While the Board is by statute delegated considerable independent authority to make its determination in order to insulate its decisions from political considerations, it does not automatically follow that its actions are not taken on behalf of the City. The Board members are appointed by the Mayor 15/, by statute are "city officers," 16/ and the City is liable for damages and costs awarded against the Board members in actions against them in their official capacity. 17/ Moreover, in City of La Crosse (17076-B, 17084-C) 4/82, the Commission expressly concluded as a matter of law that the City's police and fire commission was acting on behalf of the City when it imposed the discipline in question in that case. It is further noted that in this case the Board is specifically named in both agreements as the City's representative at Step 2 of the grievance procedure. Hence, it is concluded that the disciplinary action that is the subject of Smits' grievance was taken by the Board on behalf of the City.

The City also contends that, based on the doctrine of election of remedies, Smits should be estopped from grieving his suspension since he sought judicial review of that suspension. That doctrine has no application in this case. The Wisconsin Supreme Court has indicated that the doctrine is not to be applied broadly, and in 5-M Ltd. v. Dede the court of appeals reiterated the Court's test for its applicability: 18/

> The Wisconsin Supreme Court has indicated that it does not favor a broad application or applicability of the doctrine of election of remedies. Bank of Commerce v. Paine, Webber, Jackson & Curtis, 39 Wis. 2d 30, 40, 158 N.W. 2d 350 (1968). In that case the court explained the concept of inconsistency required before the doctrine of election of remedies becomes applicable.
>
> For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other. Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other. In this sense, inconsistency may arise either because one remedy must allege as fact what the other denies, or because the theory of one must necessarily be repugnant to the other. (Emphasis supplied.)
>
> The next step then is to determine whether there exists a true inconsistency, for without such inconsistency the doctrine is completely inapplicable. (At p. 289)

14/ See also the U.S. Supreme Court's decision in Alexander v. Gardner - Denver Co., infra, where the Court notes that a contractual right to submit a claim to arbitration is not displaced simply because there exists a statutory right to proceed on the same claim.

15/ Section 62.13(1), Wis. Stats.

16/ Section 62.09(1)(a), Wis. Stats.

17/ Sections 62.25(2), 814.24 and 895.46(1)(a), Wis. Stats.

18/ 86 Wis. 2d 287 (1978).

A similar view has been adopted by the U.S. Supreme Court. In Alexander v. Gardner-Denver Co., 19/ the Court reversed the District Court's finding that the appellant was estopped from pursuing a Title VII action based on racial discrimination after having grieved and arbitrated his discharge under the collective bargaining agreement. Rejecting the District Court's reliance on the doctrine of election of remedies the Court held:

> In reaching the opposite conclusion, the District Court relied in part on the doctrine of election of remedies. That doctrine, which refers to situations where an individual pursues remedies that are legally or factually inconsistent, has no application in the present context. In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective baraining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate natue of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. (Emphasis Added).

The Court further clarified its ruling, holding that:

> "Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee."

Based upon the above-cited authority, in order for the doctrine to apply the remedies sought most be legally or factually inconsistent. The remedies sought by Smits are neither legally or factually inconsistent. In pursuing the judicial review of his discipline Smits was not required to assert the non-existence of an applicable collective bargaining agreement and rights thereunder. Similarily, in grieving the discipline it is not necessary that he repudiate the existence of his statutory right to judicial review or allege facts inconsistent with those alleged in his court appeals. Also, as Complainant notes, there is no potential for unjust enrichment by allowing him to grieve his suspension. Therefore, the doctrine of election of remedies does not apply in this case.

The City also contends that by the time Smits finally filed a grievance, he was no longer an employe, having been terminated for reasons unrelated to this proceeding. Thus, he should not be allowed to file a grievance.

The City's argument is premature. The mere fact of not being a current employe does not, in itself, always completely foreclose a former employe from having access to the grievance procedure, since to do so would leave a wrongfully terminated employe without any contractual remedy. Ultimately, it is for an arbitrator to decide whether a grievant's claim is stale.

Similarily, the City's allegation that Smits did not timely file the grievance is a question of procedural arbitrability which is properly within the jurisidiction of an arbitrator, and not the Examiner, to decide. 20/

Finally, the City contends that the issue raised in Smits' grievance is res adjudicata, since the Wisconsin Supreme Court has already determined that suspending him for one calendar year without pay is reasonable. State ex. rel Smits v. City of DePere, supra.

19/ 415 U.S. 36 (1974).

20/ City of Racine (17348) 10/79; Milwaukee County (16448-B) 4/79; Monona Grove Jt. School District No. 4 (11614-A, B) 8/73; Milwaukee Board of School Directors, supra.

The Examiner finds that the doctrine of res judicata is not applicable in this case. For the doctrine to apply the issue must already have been presented to the court and have been considered and passed upon by the court. Pfenning v. Griffith, 29 Wis. 618 (1972); Denhart vs. Waukesha Brewing Co., 21 Wis. 2d 583 (1963). The doctrine also applies to issues which might have been presented in the former proceeding. Barbian v. Lindner Bros. Trucking Co., Inc., 106 Wis. 2d 291 (1982). The only issue presented and resolved in Smits' initial appeal was whether the order of the Board to terminate Smits was reasonable based on the evidence. 21/. Smits' subsequent appeal by writ of certiorari was limited to the issues of whether the Board exceeded its jurisdiction, or whether the Board proceeded on an incorrect theory of law, in suspending Smits without pay retroactively for fifty-two work weeks. 22/ The issue presented in Smit's grievance is whether the Board's action in suspending him retroactively for one year without pay violated the terms of the collective bargaining agreement. That issue was not considered by the courts, and could not have been raised or considered by the courts in the prior litigation, under Section 62.13(5)(i), Wis. Stats., and under a writ of certiorari.

Based upon the finding that Smits' grievance states a claim which, on its face, is covered by the terms of either the 1977 of the 1981 agreements, the strong legislative policy in Wisconsin favoring the submission of disputes to grievance arbitration, the policy favoring the harmonization of a statute with the terms of a collective bargaining agreement, whenever possible, and the finding that there is no irreconcilable conflict between Section 62.13 (5), and the terms of a collective bargaining agreement that allows Smits to grieve the Board's disciplinary action taken under the statute, it is concluded that the City must respond to Smits' grievance. 23/

Dated at Madison, Wisconsin this 31st day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

21/ Section 62.13(5)(i), Wis. Stats.; City of De Pere Board of Police and Fire Commissioners, Brown Co. Cir. Ct. (12/29/79).

22/ State ex. rel. Smits v. City of De Pere, supra, at page 32 of that decision.

23/ It is expressly noted that the Examiner makes no finding as to the merits of the grievance.