STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS SMITS, Complainant, vs. CITY OF DEPERE, POLICE DEPARTMENT, Respondent.	Case X No. 29621 MP-1330 Decision No. 19703-B

Appearances:
Bowman & Matyas, Attorneys at Law, by Mr. Ken Bowman, 366 Main Avenue, DePere, Wisconsin 54115, for Complainant.
Mr. Richard J. Dietz, City Attorney, 335 South Broadway, DePere, Wisconsin 54115, for Respondent.

ORDER MODIFYING IN PART EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

Examiner David E. Shaw having, on January 31, 1983, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein he concluded that the Respondent had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.; and the Respondent having, on February 21, 1983 timely filed a petition for Commission review of said decision; and the parties having filed briefs and reply briefs in the matter, the last of which was received on May 9, 1983; and the Commission having reviewed the record in the matter including the petition for review and the briefs filed in support of and in opposition thereto, and the Commission having reviewed the decision of the Examiner, modifies, in part, the Examiner's Findings of Fact and Conclusions of Law and reverses the Examiner's Order.

NOW, THEREFORE, it is

ORDERED 1/

1. That the Commission affirms and adopts as its own the Examiner's Findings of Facts 1-13.

2. That paragraphs 14 and 15 of the Examiner's Findings of Fact are set aside and in their place the following findings are adopted:

> 14. That the City, by its Chief of Police, has failed or refused to respond to the grievance filed by Smits on April 5, 1982.
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> 15. That the grievance filed by Smits on April 5, 1982 constitutes an appeal of the suspension without pay imposed by the DePere Board of Police and Fire Commissioners on July 18, 1979 and later amended on March 29, 1982 as a result of Circuit Court proceedings pursuant to Sec. 62.13, Stats.
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> 16. That the 1977 and 1981 collective bargaining agreements noted above, when interpreted in a manner necessary to avoid an otherwise irreconcilable conflict with Sec. 62.13, Stats., make the grievance and arbitration procedures therein applicable to disciplinary actions imposed by the DePere Board of Police and Fire Commissioners only if such disciplinary actions have not been appealed to Circuit Court pursuant to Sec. 62.13, Stats., and then only to the extent that such grievances are subject to processing at no other step than the grievance arbitration step of those procedures.

17. That inasmuch as Smits' April 5, 1982 grievance concerns a disciplinary action previously appealed to Circuit Court pursuant to Sec. 62.13, Stats., that grievance is not a matter to which the grievance and arbitration procedures of either of the above collective bargaining agreements applies.

3. That the Commission affirms the Examiner's Conclusion of Law 1 and revises the balance of the Examiner's Conclusions of Law and Order to read as follows:

REVISED CONCLUSIONS OF LAW

2. That the 1977 and 1981 collective bargaining agreements noted above, when interpreted in a manner necessary to avoid an otherwise irreconcilable conflict with Sec. 62.13, Stats., make the grievance and arbitration procedures therein applicable to disciplinary actions imposed by the DePere Board of Police and Fire Commissioners only if such disciplinary actions have not been appealed to Circuit Court pursuant to Sec. 62.13, Stats., and then only to the extent that such grievances are subject to processing at no other step than the grievance arbitration step of those procedures.

3. That inasmuch as Smits' April 5, 1982 grievance concerns a disciplinary action previously appealed to Circuit Court pursuant to Sec. 62.13, Stats., that grievance is not a matter to which the grievance and arbitration procedures of either of the above collective bargaining agreements applies.

4. That the City, therefore, did not violate the terms of a collective bargaining agreement and did not commit a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats., by its failure or refusal to process that grievance.

REVISED ORDER

1. That the complaint in the above matter shall be, and hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 1st day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats. (Continued on Page Three)

1/ *(Continued)*

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING ORDER MODIFYING IN PART EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

BACKGROUND

In his complaint initiating this proceeding, the Complainant alleged that the City committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act by refusing to process through the contractual grievance procedure a grievance related to his suspension without pay. In response, the City denied suspending the grievant without pay, asserting that any discipline was imposed by its independent Board of Police and Fire Commissioners. It further alleged that the statutory appeal procedure set forth in Sec. 62.13(5), Stats., was pursued by Complainant thereby precluding his access to the grievance procedure with respect to said discipline on the basis of election of remedies and/or res adjudicata. In addition, the City alleged that the Complainant had subsequently been terminated which foreclosed his right to file a grievance thereafter.

THE EXAMINER'S DECISION

The Examiner's Findings of Fact, with respect to the history of this matter, establish that the City's Police Chief filed charges against the Complainant with the Board of Police and Fire Commissioners, which, in turn, conducted a hearing on the charges, sustained seven of them and terminated the Complainant. Pursuant to Sec. 62.13(5)(i), Stats., the Complainant appealed to Circuit Court which found four of the seven charges had not been substantiated and remanded the matter. The Board again terminated the Complainant on the basis of the three remaining charges which action was again appealed by Complainant to the Circuit Court which found the penalty to be too severe and again remanded the matter to the Board indicating that a suspension not to exceed one year would be appropriate. The Board then reconsidered the matter and suspended the Complainant for a period of fifty-two work weeks which translated to more than one calendar year. The Complainant then filed a writ of certiorari and the Wisconsin Supreme Court reversed the Board's action and remanded the matter with instructions that the suspension could not exceed one calendar year. Thereafter the Board on March 29, 1982 suspended the Complainant without pay for one calendar year.

On April 5, 1982, the Complainant filed a grievance under the contractual grievance procedure challenging the suspension without pay for the period of said suspension. The City refused to process the grievance. The Examiner concluded that the City's Board of Police and Fire Commissioners was acting on behalf of the City when it suspended the Complainant. The Examiner also concluded that the grievance alleged a violation of the collective bargaining agreement concerning longevity pay and discipline and the City, by its refusal to process the grievance through the contractual grievance procedure, committed a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats. The Examiner rejected the City's claim that Sec. 62.13(5)(i), Stats. provides the exclusive method of appeal from the Board's disciplinary action and found no irreconcilable conflict between the Board's statutory authority and the collective bargaining agreement. The Examiner concluded that the doctrine of election of remedies did not prevent the Complainant from processing an appeal of the discipline to both the court under Sec. 62.13(5), Stats. and through the grievance procedure of the contract on the basis that these were not legally or factually inconsistent. The doctrine of res adjudicata was found not applicable on the grounds that the court had not considered the alleged contractual violation. Additionally, the timeliness of the grievance and the status of the Complainant as an ex-employe were determined to be issues of arbitrability which were solely in the province of the arbitrator to decide. The Examiner ordered the City to cease and desist from responding to the grievance and to comply with the contractual grievance procedure.

THE PETITION FOR REVIEW

In its petition for review, the City contends that the Examiner was wrong in concluding that the Board of Police and Fire Commissioners was acting on behalf of the City because by statute the Board is autonomous and its independent authority

cannot be abrogated by the terms of a collective bargaining agreement or by Sec. 111.70, Stats. The City argues that inasmuch as Sec. 62.13, Stats., provides for judicial review of a Board's decision, such procedure is exclusive and no other review is available. It refers to the legislative history of Sec. 62.13, Stats., and relies on State ex. rel. Enk v. Mentkowski, 76 Wis. 2d 565, 252 N.W. 2d 28 (1977), (herein Enk), in support of its position that the statutory means of appeal is exclusive. It also contends that the Examiner's rejection of the City's election of remedies defense is erroneous because there is an irreconcilable conflict between Sec. 62.13, Stats. and the collective bargaining agreement. It distinguishes the present case from Glendale Professional Policemen's Association v. City of Glendale, 83 Wis 2d 90, 264 N.W. 2d 594 (1978), (herein Glendale), on the basis that in that case the powers of the Chief of Police could be limited by the parties' agreement because the Chief was the City's agent, whereas here, the Board's independent powers cannot be limited as it is not the City's agent. It similarly distinguishes Fortney v. School District of West Salem, 108 Wis. 2d 167, 321 N.W. 2d 225 (1982) on the grounds that the School Board as disciplinarian cannot be distinguished from its role as employer and party to the collective bargaining agreement. The City relies on City of Greenfield, 19872 (9/82), claiming that there is an irreconcilable conflict between the procedures set forth in Section 62.13(5), Stats., and those contained in the collective bargaining agreement. The City further asserts that the Examiner erred by implicitly finding that the grievance was timely filed. It asks that the Examiner's Order be set aside and that the complaint be dismissed.

The Complainant contends that the City's argument that the Board of Police and Fire Commissioners was not acting on its behalf is erroneous. He asserts that as in Glendale, supra, the statutory authority of the Board can be harmonized with the collective bargaining agreement. The Complainant claims that he is not attempting to take away the Board's authority to discipline, but is merely seeking damages under the agreement which places some limits on the degree of discretion of the Board. The Complainant distinguishes City of Greenfield, supra, on the grounds that in that case specific time constraints of the statute could not be harmonized with the right to utilize advisory arbitration, a circumstance not present here. He relies on Crawford County, 20116 (12/82), claiming that as long as there is no explicit contradiction of the Board's power, but only a contractual limitation of the power, then harmonization is proper. The Complainant further argues that Sec. 62.13(5)(i), Stats., need not be deemed the exclusive procedure to appeal the Board's actions related to discipline as he is merely seeking redress against the City for its violation of his contractual rights afforded by MERA. Complainant requests that the Examiner's decision be affirmed in all respects.

DISCUSSION

We have affirmed the Examiner's Findings and Conclusion that the Board of Police and Fire Commissioners was acting on behalf of the City. The Board, whose members are appointed by the Mayor, is a person within the meaning of Sec. 111.70(1)(k), Stats. Pursuant to Sec. 62.13(5), Stats., it has the effective power to decide whether discipline shall be imposed upon certain employes of the City in various circumstances. Hence, the Board acts on behalf of the City and is a "municipal employer" within the meaning of Sec.111.70(1)(a) of MERA. 2/

However, we disagree with (and have substantially modified) the Examiner's Findings, Conclusions and Order to the effect that the parties' agreement(s) could make the instant grievance subject to grievance and arbitration procedure processing in the instant circumstances without irreconcilably conflicting with Sec. 62.13(5), Stats. While we also reject the City's contention that Sec. 62.13, Stats., disciplinary actions can never be the subject of a collective bargaining agreement grievance and arbitration procedure, we nonetheless conclude that in the instant circumstances, where the grievant has exercised his Sec. 62.13, Stats., appeal to Circuit Court, the instant grievance cannot be deemed grievable or arbitrable without creating an irreconcilable conflict between the agreement(s) and Sec. 62.13, Stats.

2/ Milwaukee County, (14834-A) 5/77; Milwaukee County and Milwaukee Civil Service Commission, (14962-A) 3/78; City of LaCrosse, (17076-B, 17084-C) 4/82.

At the outset, we note that the City's reliance on Racine Fire and Police Commission v. Stanfield, 70 Wis. 2d 395, 234 N.W. 2d 307 (1975), (herein Racine), and Enk, supra in support of its argument that Sec. 62.13(5)(i), Stats. is exclusive, is misplaced. A review of these cases reveals that in Enk, supra, the issue was not before the court as it merely discussed the mutual exclusivity of an appeal under Sec. 62.13(5)(i), Stats., and a writ of certiorari. In Racine, supra, the Wisconsin Supreme Court expressly noted that it was not ruling therein on the question of whether Sec. 62.13, Stats., disciplinary matters could be made the subject of grievance arbitration under a collective bargaining agreement. 3/

Nevertheless, as the City points out, it is well settled that where a MERA-enforceable collective bargaining agreement contradicts the terms of another statute after attempts to harmonize the two are unsuccessful, the requirements of the statute will supersede the terms of the agreement contradicting it. 4/ Where a party refuses to process a grievance on the grounds that subjecting its subject matter to the grievance procedure would constitute an irreconcilable conflict with a statute, it is appropriate for the Commission in a Sec. 111.70(3)(a)5, Stats., complaint proceeding to interpret the agreement in order to determine whether there is a conflict and whether it is irreconcilable.

Section 62.13(5), Stats., unequivocally mandates that disciplinary actions be ruled upon by the Board and that if a Board decision is appealed to Circuit Court, the Circuit Court's decision is to be "final and conclusive." Furthermore, as the City argues, Sec. 62.13(5), Stats., appears clearly designed to remove disciplinary actions regarding law enforcement personnel from the direct control of the Mayor and City Council and from the sole control of the Police Chief.

We do not find it possible to avoid a conflict between Sec. 62.13, Stats., and grievance procedure processing of a Board disciplinary action that has been or comes to be appealed to the Circuit Court. It is true that the substantive standards applied by the two forums might well differ in that Sec. 62.13(5), Stats., calls upon the Court to decide whether the decision of the Board was "reasonable" whereas the agreement may subject the decision of the Board to a "just cause" or other standard of review. Nevertheless, each forum would be addressing the same general question, to wit, what shall be the disposition of the disciplinary action taken by the Board. Hence, permitting grievance procedure review of a matter appealed to the Circuit Court would contradict the Sec. 62.13, Stats., mandate that the Circuit Court decision be "final and conclusive" as regards the disposition to be made of the Board action.

On the other hand, unlike the situation in our Milwaukee County decision 5/ holding that the wording of Sec. 63.10, Stats., (requiring resort to a Board and making that Board's decision final) would necessarily be contradicted by a collective bargaining agreement providing for final and binding grievance arbitration of disciplinary matters within the Board's jurisdiction, Sec. 62.13, Stats., does not make the Board decision final. Moreover, while Sec. 62.13, Stats., makes Circuit Court review available, it provides that an appeal "may" be taken to that forum, does not state that that is the sole and exclusive appeal forum permitted by law, and hence is materially different than the statutory scheme involved in the Milwaukee County case.

When the requisite effort is made to harmonize MERA-enforceable collective bargaining agreements with Sec. 62.13(5), Stats., to the fullest possible extent, we conclude that it is possible in at least some circumstances for Sec. 62.13, Stats., disciplinary actions to be subject to grievance procedure processing under a collective bargaining agreement without contradicting Sec. 62.13, Stats.

Clearly, however, such agreement could only be enforced to the extent that it does not subject disciplinary actions to contractural dispute resolution at any point before the Board has a chance to hear and decide the matter. Otherwise, the

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3/ 70 Wis. 2d at 402.

4/ E.g., Glendale, supra, 83 Wis 2d 90 (1978) and Crawford County, 20116 (12/83).

5/ Decision No. 17832 (5/80).

requirement that the Board "shall" hear and decide such matters would be contradicted. In addition, the agreement could not subject Board decisions to review and possible modification by the Chief, Mayor or City Council since Sec. 62.13, Stats., appears clearly intended to remove those officials from the review of Board disciplinary actions. And finally, once an employe has appealed a Board action to Circuit Court, the agreement could not be interpreted in such a way as to permit grievance processing to be initiated or continued concerning the same disciplinary action. Otherwise, the provision making Circuit Court decisions regarding Board actions final and conclusive would be contradicted. 6/

Nonetheless, a contract grievance procedure that avoids those contradictions of Sec. 62.13, Stats., could be developed such as would allow an employe to opt to challenge a Board action through grievance arbitration, so long as the employe has not previously and does not thereafter appeal to the Circuit Court pursuant to Sec. 62.13, Stats. 7/ The employe's initiation of a Sec. 62.13, Stats., Circuit Court appeal within the statutory ten day filing period in Sec. 62.13, Stats., would extinguish the employe's right to further processing of a grievance challenging the Board disciplinary action involved in the Circuit Court appeal.

In the instant case, we find it appropriate to interpret the parties' 1977 and 1981 agreement(s) as subjecting discipline grievances to the grievance procedure only at the arbitration step and only as regards disciplinary matters already ruled upon by the Board and not appealed to the Circuit Court. That interpretation is consistent not only with the principle of harmonization but also with the express terms of Article 1 of the agreement(s) stating that existing statutes shall control where in conflict with provisions of the agreement. 8/

Even under the foregoing interpretation that harmonizes the agreement(s) with Sec. 62.13, Stats., to the fullest possible extent, the instant grievance is not subject to processing at any step of the grievance and arbitration procedure of the agreement(s) in the instant circumstances. For, the grievance challenges and seeks relief from the suspension without pay that was imposed by the Board of Police and Fire Commissioners on July 18, 1979 and later amended on March 29, 1982 as a result of Circuit Court proceedings brought by Complaniant Smits, pursuant to Sec. 62.13, Stats. The Circuit Court upheld the suspension without pay to the extent of one calendar year. The Court's determination in that regard is expressly made "final and conclusive" by Sec. 62.13, Stats. As discussed above, the agreement(s) cannot be interpreted so as to make a challenge to the same Board

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6/ However, the WERC would not necessarily defer to the pendency or resolution in any other forum of a challenge of a disciplinary action in a complaint filed with the Commission alleging that the disciplinary action involved constituted, e.g., interference within the meaning of Sec. 111.70(3)(a)1, Stats., or discrimination within the meaning of Sec. 111.70(3)(a)3, Stats. See, City of Milwaukee (Police) 14873-B (8/80) at 32-33, 36-37. (WERC held that neither the pendency of nor the availability of a Sec. 62.50, Stats., police and fire commission commission proceeding to challenge the merits of a disciplinary action taken by the Milwaukee Chief bars or warrants deferral of a complaint to WERC that the affected employes had been denied their Sec. 111.70(3)(a)1, Stats., right to representation in a pre-disciplinary departmental trial-board procedure.)

7/ See, City of West Allis, 15226-A (12/77), affirmed by WERC 15266-B (1/78), holding non-arbitrable a grievance challenging a civil service commission outcome where the employe had opted for that forum initially rather than an available grievance arbitration alternative.

8/ It could be argued that the approach that we are taking gives the City's labor negotiators the ability to fashion contractual standards that could indirectly limit the Board's authority by creating a greater or lesser standard of review than the reasonableness-of-Board's-decision standard in Sec. 62.13, Stats. We are satisfied, however, that such an indirect impact on the Sec. 62.13, Stats., authority relationships is permissible and required by the harmonization principle. See, Glendale, supra. In contrast, the notion that the Chief, Mayor or Council could sit in direct judgment of particular Board decisions would so clearly contradict the purposes of the Sec. 62.13, Stats., scheme as to irreconcilably conflict therewith.

disciplinary action as was dealt with in that Court decision grievable or arbitrable without impermissibly contradicting that stautory provision. We have therefore modified the Examiner's Conclusions of Law and Order so as to find no violation of MERA in the circumstances and to dismiss the complaint in its entirety.

Dated at Madison, Wisconsin this 1st day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner