STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of DODGE COUNTY Requesting a Declaratory Ruling Pursuant to Section 227.06, Wis. Stats., Involving a Dispute Between Said Petitioner and DODGE COUNTY SHERIFF'S DEPARTMENT EMPLOYEES, LOCAL 1323-B, AFSCME, AFL-CIO	Case LXXXVI No. 31282 DR(M)-296 Decision No. 21574

Appearances:

Mr. Steve Schmitz, Assistant Corporation Counsel, Dodge County, Dodge County Courthouse, Juneau, Wisconsin 53039, appearing on behalf of the County.

Lawton and Cates, Attorneys at Law, by Mr. Bruce Davey, 110 East Main Street, Madison, Wisconsin 53705, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Dodge County having, on March 4, 1983, filed a petition requesting the Wisconsin Employment Relations Commission to issue a declaratory ruling pursuant to Sec. 227.06, Stats., as to whether grievance arbitrators are lawfully empowered by the County's Collective Bargaining Agreement with AFSCME Local 1323-B to hear and decide the merits of grievances concerning the suspension, dismissal or demotion of deputy sheriffs covered by that Agreement; and AFSCME Local 1323-B having joined with the County in requesting that the Commission conduct hearing and issue a declaratory ruling on that subject; and hearing having been conducted in the matter by Andrew Roberts, an Examiner on the Commission's staff, on April 25, 1983, at Juneau, Wisconsin; and the parties having submitted briefs and reply briefs in the matter, the last of which was received by the Commission on July 1, 1983; and the Commission having considered the evidence and arguments adduced by the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Declaratory Ruling.

FINDINGS OF FACT

1. That Dodge County, referred to herein as the County, is a municipal employer with offices at the Dodge County Courthouse, Juneau, Wisconsin 53039; and that the County operates, inter alia, the Dodge County Sheriff's Department.

2. That Dodge County Sheriff's Department Employees, Local 1323-B, AFSCME, AFL-CIO, referred to herein as the Union or Local 1323-B, is a labor organization with offices c/o Anthony S. Soblewski, 16 South Henninger Street, Mayville, Wisconsin 53050.

3. That the County and Local 1323-B (also jointly referred to herein as the parties) have been parties to a series of collective bargaining agreements; that since their 1981 Agreement, the bargaining unit involved has consisted of a merged Sheriff's Department; and that prior to a merger in 1980, the deputy sheriffs in the Sheriff's Department were represented by Teamsters Local 695 (herein Teamsters) and Local 1323-B represented a separate unit of Traffic Department employes.

4. That the instant dispute concerns the scope and legality of the grievance and arbitration provisions of the County's 1982 Collective Bargaining Agreement with the Union (referred to herein as the Agreement or the 1982 Agreement); that the County has taken the position that the Agreement excludes disputes concerning the suspension, dismissal or demotion of Local 1323-B bargaining unit deputy sheriffs from the grievance and arbitration procedure and subjects them exclusively to the Sec. 59.21(8) Stats., procedure invoked by the County's Civil Service Ordinance; that the County has taken the further position that the Agreement could not lawfully subject such claims to the contractual grievance and arbitration procedure refusals due to an irreconcilable conflict with Sec. 59.21(8), Stats., and the County's Civil Service Ordinance, both of which pre-dated the 1982 Agreement; and that the Union has taken the position that the County is legally obligated to process such claims through the contractual grievance procedure and to comply with resultant awards and that the County's admitted refusals to process at least two such cases through that procedure constitute prohibited practices violative of MERA.

5. That the instant dispute arose most recently when two County deputy sheriffs in the bargaining unit covered by the parties' 1982 Agreement-- Detective Gerald V. Beier and Sergeant William Oestreich--were the subjects of separate disciplinary proceedings that resulted in the imposition of suspensions of three days; that the County's Chief Deputy Sheriff, Jerry Witte, filed a complaint and recommendations for discipline with the Grievance Committee of the Dodge County Sheriff's Department; that the Grievance Committee gave the employes notice of an opportunity to be heard before the Committee; that neither of the employes participated in any proceedings before the Grievance Committee; and that the Grievance Committee ultimately imposed three day suspensions without pay in each case.

6. That when Chief Deputy Witte filed the above-noted complaints with the Department's Grievance Committee, written grievances were filed on behalf of Oestreich and Beier with Witte as the second step grievance procedure representative; that the Chief Deputy responded in writing that in his opinion the matters addressed in the grievances did not constitute "grievances" within the meaning of the parties' Agreement; that shortly thereafter, a written appeal of the Chief Deputy's response was sent on behalf of Beier and Oestreich to the County's representative at the third step of the contractual grievance procedure, the County Board's Personnel and Labor Negotiations Committee; that said Personnel Committee responded in writing that the claims presented were not subject to the contractual grievance and arbitration procedure but were, instead, exclusively subject to the procedure for disciplinary action set forth in Sec. 59.21(8)b, Stats., as invoked by the County's Civil Service Ordinance, No. 187.

7. That a similar refusal by the County in 1981 to submit a grievance challenging a disciplinary action led to a decision by WERC Examiner Edmond Bielarczyk, Jr., concerning a Union prohibited practice complaint that the County's refusal to arbitrate violated Sec. 111.70(3)(a)5, Stats.; that the Examiner in that case concluded that the County's refusal was a prohibited practice in violation of that section; that, however, the Examiner left to the arbitration forum the question of whether the merits of the disciplinary action taken were within the scope of the grievance arbitration procedure contained in the 1982 Agreement; and that no arbitral ruling in that regard was rendered because the Union did not resubmit the specific dispute involved for arbitration.

8. That the suspensions of Beier and Oestreich were imposed in 1983 during the extended term of the parties' 1982 Agreement.

9. That the parties' Agreements for calendar 1982 and calendar 1983 each contained, the following provisions:

AGREEMENT

. . .

> WHEREAS, it is intended that the following Agreement shall be an implementation of the provisions of Section 111.77 of the Wisconsin Statutes, consistent with that legislative authority which devolves upon the County of Dodge, the statutes and, insofar as applicable, the rules and regulations relating to or promulgated by the Civil Service Ordinance.

. . .

ARTICLE II
Management Rights

2.1 Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of their work, and all other matters pertaining to the management and operation of the County, including the hiring, promoting, transferring, demoting, suspending or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provisions of this section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

. . .

ARTICLE IV
Grievance Procedure

4.1 Grievance: A grievance is defined as any matter involving the interpretation, application, or enforcement of the terms of this Agreement.

4.2 Procedure: Grievances shall be presented in the following manner: (time limits set forth shall be exclusive of Saturday, Sunday or holidays).

4.21 The Employee and/or the Grievance Committee representative shall take the grievance up orally with the Employee's immediate supervisor within twenty (20) work days after the Employee knew or should have known of the event giving rise to the grievance. The supervisor shall attempt to make a mutually satisfactory adjustment of the matter and in any event shall be required to give an answer within seventy-two (72) hours.

4.22 The grievance shall be considered settled in 4.21 unless within five (5) days from the date of the supervisor's answer, the grievance is presented in writing to the Chief Deputy. The Chief Deputy shall attempt to make a mutually satisfactory adjustment of the matter and in any event shall be required to give an answer within seventy-two (72) hours.

4.23 The grievance shall be considered settled in 4.22 unless, within five (5) days from the date of the Chief Deputy's written answer, the grievance is presented in writing to the Personnel and Labor Negotiations Committee. The Personnel and Labor Negotiations Committee shall meet within two (2) weeks after receipt of the grievance and shall submit a written answer to the Grievance Committee, the Employee or his representative within five (5) days.

4.3 Arbitration: If a satisfactory settlement is not reached as outlined above, either party may, within ten (10) days after the written answer is received or due from the Personnel and Labor Negotiations Committee, request the Wisconsin Employment Relations Committee to appoint an arbitrator from its staff to hear the

grievance, whose decision shall be final and binding on both parties.

. . .

10. That each of the County's Agreements with Local 1323-B since the 1980 merger has contained the same introductory (WHEREAS) language (referring to the Civil Service Ordinance) as is noted in the preceding Finding of Fact; that the Civil Service Ordinance referred to in each of those Agreements is County Ordinance 187, in effect since January 1, 1981; that Ordinance 187 provides civil service status for the County's deputy sheriffs as set forth in Sec. 59.21(8)(a) and Chapter 63 of the Wisconsin Statutes.

11. That County Ordinance 187, provides in pertinent part, as follows:

ORDINANCE NO. 187

ORDINANCE PROVIDING CIVIL SERVICE STATUS FOR DEPUTY SHERIFFS OF DODGE COUNTY

THE COUNTY BOARD OF SUPERVISORS OF DODGE COUNTY DO HEREBY ORDAIN AS FOLLOWS:

SECTION I - PURPOSE

This ordinance is intended to bring qualified persons into County Law Enforcement work by a system of competitive examinations and to insure continuity in County Law Enforcement work by virtue of permanent appointment as deputy sheriff under a civil service law as set forth in Section 59.21(8)(a) and Chapter 63 of the Wisconsin Statutes.

Section II - COMMISSION

(A) There is hereby established a County Civil Service Commission with the duties, functions and authority set forth in Section 59.21 and Chapter 63 of the Wisconsin Statutes:

. . .

Section VII - SUSPENSION, DISMISSAL OR OTHER DISCIPLINARY PROVISIONS

(A) Whenever the Sheriff or Chief Deputy or a majority of the members of the commission determines that a deputy sheriff is incompetent to perform his or her duties, or merits suspension, demotion or dismissal, a written report shall be made to the Grievance Committee setting forth the complaint.

(B) There is hereby created a Grievance Committee for the Dodge County Sheriff's Department, said committee shall consist of five (5) members.

The Grievance Committee shall be appointed in the same manner and at the same time as standing committees of the County Board of Supervisors are appointed, except that the first Grievance Committee shall be appointed and prepared to serve as of January 1, 1981. The committee may be made up of members of the Board of Supervisors, or other electors in Dodge County, or both.

(C) Any member of the Dodge County Sheriff's Department may be suspended, demoted or dismissed in accordance with Section 59.21(8)(b) Wis. Stats., for cause. If the complaining official is the Sheriff he may suspend or demote the officer at the time such complaint is filed.

(D) The Grievance Committee shall forthwith notify the accused officer of the filing of the charges and upon request furnish him with a copy of the same.

(E) The Grievance Committee shall, if the officer requests hearing, hold such hearing following the procedure as designated in Wis. Stats. 59.21.

. . .

12. That by reason of its enactment (and non-repeal at any material time) of Ordinance 187, and of a predecessor Ordinance 112 containing materially parallel provisions, the County has been operating under subsection 59.21(8), Stats., at all material times since 1975.

13. That Sec. 59.21(8)(b), Stats., as it relates to disciplinary actions against deputy sheriffs in Counties operating under subsection 59.21(8), Stats., provides as follows:

59.21 Sheriff; undersheriff; deputies:

. . .

(8)(a) In counties having a population of less than 500,000, the county board may by ordinance fix the number of deputy sheriffs to be appointed in said county which number shall not be less than that required by sub. (1)(a) and (b), and fix the salary of such deputies; and may further provide by ordinance, that deputy sheriff positions shall be filled by appointment by the sheriff from a list of 3 persons for each position, such list to consist of the 3 candidates who shall receive the highest rating in a competitive examination of persons residing in this state for at least one full year prior to the date of such examination.

. . .

(b)1. The persons appointed shall hold the office of deputy sheriff on good behavior. In any county operating under this subsection, but not under s.59.07(20), whenever the sheriff or undersheriff or a majority of the members of a civil service commission for the selection of deputy sheriffs believes that a deputy has acted so as to show him to be incompetent to perform his duties or to have merited suspension, demotion or dismissal he shall report in writing to the grievance committee setting forth specifically his complaint, and, when the party filing the complaint is a sheriff or undersheriff, may suspend or demote the officer at the time such complaint is filed. The grievance committee shall be appointed in the same manner and at the same time as standing committees of the county board of supervisors are appointed. The committee may be made up of members of the county board or other electors of the county, or both. Such members shall be paid in the same manner as members of other county board committees.

2. The grievance committee shall forthwith notify the accused officer of the filing of the charges and on request furnish him with a copy of the same.

3. The grievance committee shall, if the officer requests a hearing, appoint a time and place for the hearing of the charges, the time to be within 3 weeks after the filing of such request for a hearing and the committee shall notify the sheriff or undersheriff or the members of the civil service commission, whichever filed the complaint with the committee, and the accused of the time and place of such hearing. If the accused officer makes no request to the grievance committee, then the committee may take whatever action they deem justifiable on the basis of the charges filed and shall issue an order in writing as provided in subd. 5. The committee may take testimony at the hearing, and any testimony taken shall be transcribed. The chairman of the committee shall issue subpoenas for the attendance of such witnesses as may be requested by the accused.

4. At such hearing the chairman of the committee shall possess authority to maintain order and enforce obedience to his lawful requirements and if any person at the hearing shall conduct himself in a disorderly manner, and after notice from the chairman shall persist therein, the chairman may order him to withdraw from the hearing, and on his refusal may order the sheriff or other person, to take him into custody until the hearing is adjourned for that day.

5. At the termination of the hearing the grievance committee shall determine in writing whether or not the charge is well founded and shall take such action by way of suspension, demotion, discharge or reinstatement as it may deem requisite and proper under the circumstances and file the same with the secretary of the committee.

6. The accused may appeal from the order to the circuit court by serving written notice thereof on the secretary of the committee 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 the 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 county. If the order of the committee is reversed, the accused shall be forthwith reinstated and entitled to his pay as though in continuous service. If the order of the committee is sustained it shall be final and conclusive.

. . .

(cm) Any county board may, by a majority vote, establish by ordinance in connection with the adoption of an ordinance providing for civil service selection and tenure of deputy sheriffs under pars. (a) and (b) or by amendment to such an ordinance previously adopted, a traffic division of the sheriff's department and fix the number of deputy sheriffs as traffic patrolmen and other employes in said division in which case s. 83.016 shall become inoperative as to that county. The board in such ordinance shall further provide that the personnel in such traffic division of the sheriff's department shall be appointed and hold their positions in the manner and under the conditions set forth in pars. (a) and (b). The county board may also provide that traffic patrolmen who have been appointed pursuant to s. 83.016 and who are employed by the county at the time of the adoption of such ordinance pursuant to this subsection establishing a traffic division in the sheriff's department and providing civil service therefor shall be appointed to positions in such traffic division without examination.

. . .

14. That on two occasions prior to the 1980 merger noted in Finding of Fact 3, above, the County and Teamsters submitted grievances challenging a disciplinary suspension or discharge to arbitration under the Teamster agreements; that in each such instance, the grievance and award issued with respect thereto was based at least in part on a claim that the "just cause" requirement in the Teamster agreement had been violated by the imposition of the suspensions involved; that each of the Teamster agreements under which such grievances were submitted contained introductory (WHEREAS) language not materially different from

that contained in Local 1323-B's post merger Agreements and the same grievance definition as was contained in Local 1323-B's 1981 agreement with the County; that the Civil Service Ordinance referred to in the introductory language of those Teamster agreements was Ordinance 112; that Ordinance 112 was in effect from 1975 through the end of 1980; that Ordinance 112 contained provisions materially paralleling those in Ordinance 187 and, in addition, Ordinance 112 set forth specific definitions "grounds for suspension, demotion or dismissal"; and that, notwithstanding the Ordinance 112 provision for a Grievance Committee, there was no Sheriff's Department Grievance Committee appointed or functioning until Ordinance 187 became effective in January of 1981.

15. That in 1982 and 1983, the County's Grievance Committee was composed in its entirety of the same County Board Supervisors that comprised the County's Personnel and Labor Negotiations Committee.

16. That in the parties' negotiations leading to the 1982 Agreement, the County proposed, and the Union agreed, to delete the underlined portion below from what had been the grievance definition in their 1981 Agreement:

> Grievance: A grievance is defined as a matter involving the interpretation, application or enforcement of the terms of this Agreement or a claim by an Employee, Employees or Employee representative that he has been discriminated against or treated unfairly or arbitrarily by the employer as a result of any action taken in the exercise of its rights and powers.

17. That the parties' 1982 and 1983 Agreements mean that decisions as to whether suspension, dismissal, or demotion shall be imposed on deputy sheriffs shall be made by the Grievance Committee of the Dodge County Sheriff's Department in the manner prescribed in the County's Civil Service Ordinance, but that an employe dissatisfied with a decision of the Grievance Committee shall be entitled, at his option, to process a grievance challenging that decision as violative of the "for cause" requirement in Art. II (Management Rights) through the grievance and arbitration procedure of the Agreement so long as the employe has not initiated a Sec. 59.21(8)b.6, Stats., appeal of such Grievance Committee decision to Circuit Court.

CONCLUSIONS OF LAW

1. That the parties' 1982 and 1983 Agreements mean that decisions as to whether suspension, dismissal, or demotion shall be imposed on deputy sheriffs shall be made by the Grievance Committee of the Dodge County Sheriff's Department in the manner prescribed in the County's Civil Service Ordinance, but that an employe dissatisfied with a decision of the Grievance Committee shall be entitled, at the employe's option, to process a grievance challenging that decision as violative of the "for cause" requirement in Art. II (Management Rights) through the grievance and arbitration procedure of the Agreement so long as the employe has not initiated a Sec. 59.21(8)b.6, Stats., appeal of such Grievance Committee decision to Circuit Court.

2. That Section 111.70(3)(a)5, Stats., requires the County to comply with the above-noted interpretation of the parties' 1982 and 1983 Agreements, as regards both processing of grievances at the various steps of the grievance and arbitration procedure and as regards compliance with grievance arbitrator awards.

3. That bargaining unit members' claims that disciplinary actions imposed by the Grievance Committee of the Dodge County Sheriff's Department violate the "for cause" requirement in Art. II of the parties 1982 and 1983 Agreements constitute matters that are substantively grievable and arbitrable under the grievance and arbitration procedures in those Agreements; that grievance arbitrators duly selected under those Agreements would have jurisdiction of the subject matter of such claims; and that awards on the merits of such claims are enforceable through prohibited practice proceedings under Sec. 111.70(3)(a)5, Stats.

4. That, however, claims that the County has violated the 1982 or 1983 Agreements merely by the filing of complaints/charges and recommendations for disciplinary action with said Grievance Committee do not constitute "grievances" within the meaning of those Agreements.

5. That the interpretations of the Agreements and MERA, above, are neither irreconcilably in conflict with Section 59.21, Stats., nor otherwise legally unenforceable.

DECLARATORY RULING 1/

1. That the parties' 1982 and 1983 Agreements mean that decisions as to whether suspension, dismissal, or demotion shall be imposed on deputy sheriffs shall be made by the Grievance Committee of the Dodge County Sheriff's Department in the manner prescribed in the County's Civil Service Ordinance, but that an employe dissatisfied with a decision of the Grievance Committee shall be entitled, at the employe's option, to process a grievance challenging that decision as violative of the "for cause" requirement in Art. II (Management Rights) through the grievance and arbitration procedure of the Agreement so long as the employe has not initiated a Sec. 59.21(8)b.6, Stats., appeal of such Grievance Committee decision to Circuit Court.

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.

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.

2. That the parties' 1982 and 1983 Collective Bargaining Agreements and Sec. 111.70(3)(a)5, Stats., require that the County process through the Agreement's grievance and arbitration procedure, claims asserting that disciplinary actions imposed by the Grievance Committee of the Dodge County Sheriff's Department violate the "for cause" requirement of Art. II. of those Agreements; but that neither those Agreements nor Sec. 111.70(3)(a)5, Stats., require the County to so process any such claims concerning Grievance Committee disciplinary actions as to which an appeal to Circuit Court has been taken pursuant to Sec. 59.21(8)b.6., Stats.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

BACKGROUND

The County initiated this proceeding by petitioning the Commission to exercise its discretion under Sec. 227.06, Stats., to hear and decide a dispute concerning the scope and legality of the grievance and arbitration provisions of the County's 1982 Collective Bargaining Agreement (herein Agreement) 2/ with Local 1323-B. Specifically, the County requests that the Commission issue a declaratory ruling that the Agreement excludes disputes concerning the suspension, dismissal or demotion of Local 1323-B bargaining unit deputy sheriffs from the grievance and arbitration procedure and subjects them exclusively to the Sec. 59.21(8), Stats., procedure invoked by the County's Civil Service Ordinance. Alternatively, the County requests a ruling that any Agreement provision subjecting such claims to the contractual grievance and arbitration procedure would be legally unenforceable due to an irreconcilable conflict with Sec. 59.21(8), Stats., and the County's Civil Service Ordinance, both of which pre-dated the 1982 Agreement.

In its response to the petition, the Union agreed that the WERC should hear and decide the questions raised by the petition and amended petition, but the Union asserted that the appropriate ruling is that the County is legally obligated to process such claims through the contractual grievance procedure and to comply with resultant awards and that the County's admitted refusals to process two such cases through that procedure constitute prohibited practices violative of MERA.

The factual settings in which the instant dispute has arisen are described in Findings of Fact 5-8 and need not be repeated here.

The County filed the instant declaratory ruling petition shortly after the Grievance Committee imposed the Beier suspension and amended its petition following the subsequent imposition of the Oestreich suspension.

The WERC elected to exercise its discretionary Sec. 227.06, Stats., jurisdiction to hear and decide the matter, and an examiner was assigned to conduct hearing in the matter.

At the WERC hearing, the Examiner permitted the Union to introduce, over County objection, evidence concerning the history of bargaining and administration of the parties' 1982 and 1981 Agreements and of the County's agreements with Teamsters Local 695 covering deputy sheriffs prior to a 1980 merger with the traffic unit that resulted in Local 1323-B becoming the deputy sheriff's collective bargaining representative for the first time.

POSITION OF THE UNION

The Commission should rule that the County has violated Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate the Beier and Oestreich grievances, and the Commission should enter an order directing the County to arbitrate the merits of those grievances and to refrain from refusing to do so in other such cases in the future.

Article II of the Agreement expressly limits the County's right to suspend or discharge bargaining unit employes by requiring that any such actions be "for cause." Claims that disciplinary actions taken by the County are not "for cause" fall squarely within the broad and unlimited Agreement definition of a grievance as "any matter involving the interpretation, application or enforcement of the terms of this Agreement."

2/ The portions of the parties' 1982 and 1983 Agreements that are material herein are identical; hence, references to the Agreement herein refer equally to each of those Agreements unless otherwise noted.

Absent an explicit exclusion, disciplinary actions must be held subject to the grievance and arbitration procedure. The Commission has consistently resolved refusal to arbitrate questions on whether the party seeking arbitration has stated a claim which, on its face, is covered by the collective bargaining agreement. To give effect to the statutory policy favoring voluntary dispute resolution and voluntary dispute resolution methods, grievance procedure language is to be liberally construed in favor of finding disputes arbitrable. Only if an explicit exclusion is present in the agreement is a matter to be deemed outside the scope of the grievance arbitration agreement. Citing, Jt. School Dist. No. 10 v. Jefferson Education Assn., 78 Wis. 2d 94, 111 (1977).

The introductory (WHEREAS) language of the Agreement does not create an exclusion from the grievance procedure for disciplinary cases. Both the language of the Agreement as a whole and its history of bargaining show convincingly that the introductory language had an understood and established meaning whereby disciplinary grievances were understood to be not excluded from the contractual grievance procedure. For, that introductory language was taken directly from the County's prior contracts with Teamsters under which there had been arbitration of disciplinary grievances, without objection by the County under a virtually identical Civil Service Ordinance and materially similar grievance and arbitration provisions.

The language of the Agreement's introductory provision only requires interpreting the Agreement consistent with the "rules and regulations" promulgated under the Civil Service Ordinance. The "rules and regulations" reference does not include the "procedures" set forth in the Ordinance for determining whether "rules and regulations" have been complied with. The County's contention that the Agreement must be consistent with all of the provisions of the Civil Service Ordinance would render meaningless the "insofar as applicable, the rules and regulations relating to or promulgated by" limitation contained in the WHEREAS language.

That introductory language was drawn essentially verbatim from the Teamsters' 1979-80 and 1977 contracts. Local 1323-B proposed to include it in the parties' first post-merger agreement, and the County had no objection to that inclusion. The Civil Service Ordinance referred to in the Teamster agreements, No. 112, was virtually identical to the current Ordinance No. 187. It, too, was adopted pursuant to Sec. 59.21(8)b, Stats. It, too, provided for a Grievance Committee. It, too, made reference to the ch. 59 procedure as regards suspension, dismissal and demotion matters. And it, too, contained rules and regulations in addition to procedures applicable to employes in the bargaining unit.

Under one of the Teamster agreements, and at a time when Ordinance 112 was in effect, a grievance was filed with regard to a suspension and subsequent discharge imposed on employe T____. The arbitrator's decision in that matter reveals no County objection to the applicability of the grievance procedure to that dispute. Indeed, the County waived certain pre-arbitral grievance procedure steps and joined the Teamsters in requesting a WERC staff arbitrator as called for in the Agreement. The arbitrator issued a decision in the matter in which he recited that he arbitrated the matter "in accordance with the binding arbitration provisions of the collective bargaining agreement. . . ." Similarly, with regard to a 1977 suspension of employe H____, the County cited Ordinance 112 in imposing the suspension, a grievance was processed under the Teamster agreement and submitted to arbitration without any County contention that such a matter was not substantively arbitrable.

Significantly, then, under materially the same introductory language and ordinance provisions, the County submitted at least two discipline cases to final and binding grievance arbitration cases under the Teamster contracts. Given the absence of a material change in language and the absence of any discussion at the bargaining table to the effect that the County intended to change the prior interpretation given that language, it can be fairly presumed that the parties intended the language to have the same meaning it had in the County's prior contracts with the Teamsters from which it was drawn. In such circumstances, it cannot be concluded that the instant parties, instead, intended that the virtually identical introductory language of the Agreements would constitute an exclusion of disciplinary cases from the grievance procedure.

Finding the introductory language is not such an exclusion does not render it meaningless. The Ordinance also provides for rules of conduct and regulations which the introductory language requires be taken into account in interpreting the

Agreement. The Ordinance procedures for processing disciplinary matters were not incorporated into the contract.

Nor would such an interpretation render the Ordinance a nullity. For, the Ordinance would apply in full to deputies outside the bargaining unit, and its rules and regulations would be applicable to employes within and outside the unit.

The Union's evidence concerning arbitrations under the Teamster agreements does not contradict the clear meaning of the Agreement and is worthy of consideration. The Union's failure to call its representative (James Koch) as a witness warrants no inference against the Union. The relevant facts regarding bargaining history came in through documents that were admitted. Koch's testimony would have been repetitious. The County could have called Koch, too. He was present at the hearing.

The change in the grievance definition agreed upon in the negotiations leading to the 1982 Agreement did not exclude disciplinary actions. It merely removed language of the 1981 Agreement that was repetitious, to wit, "or a claim by an Employee, Employees, or Employee representative that he had been discriminated against or treated unfairly and arbitrarily by the Employer as a result of any action taken in the exercise of its rights and powers." That deletion constitutes neither an express nor an implied exclusion of disciplinary matters from the grievance procedure.

No irreconcilable conflict arises between the instant Agreement and Sec. 59.21(8)b, Stats.

Interpretations of collective bargaining agreements must, wherever possible be harmonized with statutes that also bear on conditions of employment. Citing, Glendale Professional Policemen's Assn. v. Glendale, 83 Wis. 2d 90 (1978); and Fortney v. School District of West Salem, 108, Wis. 2d 167 (1982). Under MERA, standards for job retention and the procedures for review of disciplinary action are mandatory subjects of bargaining. Thus, in City of Sun Prairie, 16591 (9/73) the Commission held that the statutory power granted to the Board of Police and Fire Commissioners under Sec. 62.13(5), Stats., could lawfully be limited by mandatory subject MERA collective bargaining for grievance arbitrator authority to review disciplinary actions. Similarly, in Crawford County, 20116 (12/82) the Commission held that a sheriff's Sec. 59.21(4), Stats., power to discharge could lawfully be limited by collectively bargaining a requirement of just cause and the potential for arbitral review. In Fortney, supra, the school board's power to discharge under 118.22(2), Stats., was held similarly limitable by the terms of a collective bargaining agreement. The Court noted that if the employer was dissatisfied with the arrangement he could seek to negotiate something different, and the same principle applies here.

The Commission's Milwaukee County, 17832 (5/80) case relied on by the County is distinguishable. There, the special Milwaukee County procedures under Sec. 63.10 were mandated whereas those specified in Sec. 59.21(8)(b) are optional. The Statutes do not require that the County opt for a Civil Service Ordinance. Rather, Section 59.21(8)(cm) provides: "Any county board may . . . establish . . . an ordinance . . . providing for . . . tenure of deputy sheriffs under paragraphs (a) and (b)." Moreover, Ordinance 187 by its own terms does not mandate the Sec. 59.21(8)(b) procedures be followed. Rather it merely permits that option to be followed by stating that members of the Department "may be suspended . . . . . in accordance with Sec. 59.21(8)(b), Stats., for cause". Thus, Sec. 59.21, Stats., gives counties the option to establish by ordinance a Grievance Committee to receive complaints and to discipline deputies. In the instant case, the County has bargained away the right to use that optional Grievance Committee procedure as regards deputies in the bargaining unit and has, in essence, agreed to limit its Grievance Committee's authority to receiving and processing only such disciplinary complaints as concern deputies not included in the bargaining unit. In Milwaukee County, that county could not bargain away the procedure because it had no such choice available to it under the statutory provisions involved.

Finally, there is no merit to the County's contention that Constitutional equal protection would be denied under the Union's interpretation of Ordinance 187. The rules and regulations in Ordinance 187 are applicable to all employes. The procedure referred to in the Ordinance for discipline cases are applicable to non-bargaining unit employes. Employes gain some advantages when they organize

and form a union. Notably, if there were no Civil Service Ordinance, unrepresented employes would be terminable at will with no right to a hearing. Thus, under the Union's interpretation, neither the Ordinance nor the Sec. 59.21(8)b, Stats. enabling legislation would make an arbitrary or irrational distinction between unit and non-unit employes.

For the foregoing reasons, the Commission should declare that the County violated Sec. 111.70(3)(8)a 5, Stats., by refusing to arbitrate the Beier and Oestreich grievances and should also enter an order directing the County to arbitrate those grievances and to refrain from similar refusals to arbitrate in the future.

POSITION OF THE COUNTY

The Commission should issue a declaratory ruling that, as grievance arbitrator under the parties' Agreement, the WERC or its designee would have no authority or jurisdiction to issue an arbitration decision on the merits of suspensions, dismissals and demotions of County deputy sheriffs. The Commission should further declare that if such an award were issued, the County would not commit a prohibited practice by refusing to comply with such award because it would not be a lawful decision.

The contract language clearly and unambiguously reflects the parties' agreement that suspension, demotion or dismissal of a deputy sheriff would be governed by the Civil Service Ordinance which makes no provision for arbitration. The introductory language contains an express aknowledgement of the County's authority under the Civil Service Ordinance. It expressly refers to and hence incorporates the County's Civil Service Ordinance. Moreover, as laws in existence at the time and place the Agreement was made, Ordinance 187 and Sec. 59.21, Stats. constitute a part of the Agreement as it expressly incorporated therein. Citing, Williston on Contracts, 3 ed., sec. 615. Hence, the entire Agreement consists of the Civil Service Ordinance plus the language within the four corners of the 1982 Collective Bargaining Agreement.

Whatever it might mean in the absence of the introductory language, the contract grievance definition must be read in the context of the provisions of the Civil Service Ordinance. The grievance definition is nonspecific, whereas the Civil Service Ordinance specifically provides a separate procedure for dealing with suspension, demotion or dismissal situations. The specific must govern over the general, especially so in view of the language of the introductory provision. The WHEREAS provision makes the Civil Service Ordinance applicable to the parties' relationship. It is "applicable" to those situations to which it is clearly addressed. The Ordinance creates a Grievance Committee, calls for hearings to be conducted by that Committee in accordance with Sec. 59.21, Stats., and Sec. 59.21(8)(b)6 provides the officer with a right to appeal a decision of the Grievance Committee to the Circuit Court. Neither the Ordinance nor the Statute provides for submitting such matters to arbitration.

It would not be reasonable to read the Agreement so as to entirely ignore the provisions of the Civil Service Ordinance. That would render meaningless the parties' express recognition of and reference to the Ordinance.

It would also be unreasonable to give only partial effect to the Agreement's incorporation of the Ordinance, for example: the Chief Deputy files a complaint and the Grievance Committee suspends but the matter is thereafter subject to the grievance procedure steps and to ultimate arbitration. That would produce absurd and hence unintended results under the grievance procedure as a whole and it would be inconsistent with the provisions of the Civil Service Ordinance and the Sec. 59.21, Stats., procedures invoked therein. For, the Chief Deputy, as the County's second step representative in the grievance procedure, would necessarily be presented with a grievance protesting discipline in cases in which he had previously recommended some measure of discipline. Such nonsense could not have been the parties' intention, and there is no support in the language of the Agreement for bypassing the Chief Deputy step in such cases. Furthermore, the grievance procedure provides for arbitration to be requested within 10 days of a written answer from the County's Personnel and Labor Negotiations Committee. It makes no such provision concerning answers or decisions from the Grievance Committee.

Reasonably read, then, the Agreement can have only one meaning: cases falling within general definition of a grievance that are not specifically dealt with

elsewhere are to be processed through the successive steps of the grievance and arbitration procedure; however, suspensions, dismissals and demotions are to be handled by complaints to Grievance Committee and Grievance Committee processing and decision. If dissatisfied with the Grievance Committee's decision, the officer may appeal that decision to Circuit Court. There is no agreement to have the Grievance Committee decision submitted to arbitration.

That clear and unambiguous meaning of the language of the Agreement renders inappropriate any consideration of evidence concerning matters extrinsic to the contract language.

However, if such extrinsic evidence is given any consideration, it supports the County's conclusion that there was no agreement to arbitrate a suspension, demotion or dismissal.

Thus, Local 1323-B's Traffic Department agreement for 1979-80 made no reference to a Civil Service Ordinance. The first post-merger agreement contained a reference to the Civil Service Ordinance. Ordinance 187 was first effective in 1981, and that was the first year in which a County agreement with Local 1323-B contained a reference to a Civil Service Ordinance.

The introductory language containing that reference was proposed by the Union; hence any doubts as to its meaning must be resolved against the Union as the drafting party. Indeed, any such doubts should be resolved "most strongly" against the Union since the Union was proposing language that recognized the authority of the County under the Civil Service Ordinance.

The Union failed to call an available witness to explain what it meant when it proposed and agreed to that introductory language. The Commission must therefore conclude that had the Union called its available witness, the witness would have testified unfavorably to the Union on those points.

When the Union agreed to the County's proposal to remove language from the 1982 Agreement grievance definition, the change was obviously mutually intended to narrow the scope of the grievance procedure's applicability. By removing the previous inclusion of the terms "or a claim of discriminatory, arbitrary or unfair treatment of an employee by the County in the exercise of its rights or powers", the parties could only have been agreeing that such claims would no longer be a "grievance" and hence would no longer be arbitrable.

Thus any arguable basis that may have existed under the previous pre- and post-merger Sheriff's Department agreements for finding a discipline dispute subject to the grievance procedure was removed by mutual agreement in the negotiations leading to the 1982 Agreement.

Any Agreement interpretation to the effect that the County agreed to arbitrate a suspension, demotion or dismissal improperly ignores the explicit reference to the Civil Service Ordinance and makes that reference inexplicable and meaningless. On the other hand, interpreting the 1982 Agreement to exclude a suspension, demotion or dismissal from the scope of the grievance and arbitration procedure still gives a reasonable meaning to all of the Agreement's provisions. The reference to the Civil Service Ordinance means that as to a suspension, demotion or dismissal, the decision of the Grievance Committee is final, nonarbitrable, and subject only to review by the Circuit Court as provided in Sec. 59.21(8)b, Stats. The grievance definition and procedure mean that all other disputes that come within the definition of grievance are subject to arbitration. Only matters governed by the Ordinance are excepted.

To adopt the Union's interpretation leads to the following unreasonable result: although ch. 59 of the Statutes authorizes the County to enact a Civil Service Ordinance, and although the County exercised that authority and did so, and although the Union proposed and the parties agreed on contract language recognizing the County's authority under that Ordinance by name and the Statutes generally, yet the provision means nothing. The meaning which leads to reasonable consequences is that which removes suspensions, demotions and dismissals from the grievance and arbitration provisions of the Agreement.

If the foregoing contract interpretation principles somehow do not conclusively support the County's position, then principles of public sector labor law require the ruling the County requests.

In Milwaukee County, 17832 (5/80), the Commission held that in cases of an irreconcilable conflict between a statute and a collective bargaining agreement, the statute must prevail. The Commission rejected a union claim that grievance arbitration could be a lawful alternative to the disciplinary procedure provided for in Sec. 63.10 Stats. The Commission reasoned that to hold otherwise would improperly give the employe a choice of forums, but give the County no choice, and that it would eliminate a function of the County's personnel review board contrary to a statutory mandate that that Board shall perform the function of hearing and finally deciding the matters at issue. So here. To interpret the instant Agreement as requiring arbitration of dismissals, suspensions and demotions would irreconcilably conflict with Sec. 59.21(8) Stats., and with the Civil Service Ordinance. Grievance arbitration is an inherently inappropriate forum to decide what discipline shall be imposed; that is a mangement function to be performed by the Grievance Committee where, as here, the County has opted for that internal decision-making process.

The irreconcilable conflict with the Statute and Ordinance cannot be avoided by giving partial effect to the Civil Service Ordinance such as by subjecting Grievance Committee decisions to grievance and arbitration procedure processing. For, under Sec. 59.21(8)b.6., Stats., appeal of a Grievance Committee decision is to be to Circuit Court, and, if sustained the order is "final and conclusive".

Finally, the Ordinance must prevail to avoid a result that would conflict with the Constitutional guarantee of equal protection. Citing dicta in WERC v. Teamsters Local 563, 75 Wis. 2d 602 (1977). To impose a distinction between union and non-union employes as to enforcement or non-enforcement of some or all of the Ordinance is arbitrary and without a rational basis, particularly where a collective bargaining agreement contains an explicit reference to the Ordinance.

The precedents and legal theories relied on by the Union are not applicable or controlling in the fact situation involved herein. Crawford County is distinguishable in that it involved no Civil Service Ordinance, no explicit reference to such an ordinance in a contract or proposal, and the proposal under scrutiny would have unequivocally provided for the use of grievance arbitration for suspensions and other discipline, unlike the contract language involved herein. The Fortney case is inapposite since the agreement involved there expressly subjected the disciplinary decisions of the school board to arbitration, and the Court's decision dealt only with whether the arbitral review was de novo or limited in scope. The Union's reliance on a caselaw presumption of facial arbitrability is misplaced since it is a determination of the actual scope of authority of an arbitrator under the Agreement that is called for here, not the facial arbitrability question to which Examiner Bielarczyk limited his decision in 1982. The Union's request for an affirmative remedial order in addition to a declaratory ruling is inappropriate. This is not a prohibited practice case; it is only a declaratory ruling proceeding.

The Union's past practice evidence is weak in form and substance. The Union presented no witnesses, just two grievance arbitration decisions issued 5 and 6 years ago and involving the Teamsters contracts with the County. Those decisions do not amount to persuasive support for the notion that the County did or did not object to the arbitration of disciplinary grievances under the Teamster agreements involved. The Union's evidence is not sufficient to support a conclusion concerning whether the County had an understanding concerning its agreements with the Teamsters as to the meaning of the introductory language in the Teamster agreements. Several intervening changes also make any understanding about the meaning of the Teamsters agreements inapplicable herein: The Teamsters no longer represent the deputies unit; a new Civil Service Ordinance was enacted effective in 1981; a Grievance Committee was appointed and functioning only after the new Ordinance was enacted; and the language of the grievance definition was materially narrowed in the negotiations leading to the 1982 Agreement. Finally, the practice relied on by the Union is not uniform. For, in 1982, the County did object to and refuse to arbitrate a disciplinary suspension grievance under the instant Agreement language. Although the Union obtained a WERC Examiner ruling that it was for the arbitrator to decide whether the Agreement made such disputes substantively arbitrable, the Union did not resubmit the matter for an arbitral determination.

For all of those reasons, the ruling requested by the County should be issued.

DISCUSSION

Interpretation of Agreement

The parties have both advanced rather extreme interpretations of the Agreement. Thus, the County contends that, despite the broad and unqualified grievance definition and the express "for cause" limitation on the right to impose suspensions and discharges on bargaining unit employes, the Agreement clearly and unambiguously excludes discipline from the grievance and arbitration procedure. The Union, on the other hand, contends that despite the enactment and nonrepeal of Ordinance 187 and the WHEREAS clause reference thereto, the Agreement represents an agreement by the County to opt not to utilize the Sec. 59.21(8)b, Stats., and Civil Service Ordinance procedure for suspension, dismissal or demotion of bargaining unit deputies.

We find neither of those extreme interpretations to be supported by the record herein. Rather, in our view, the Agreement must be interpreted to give effect to the references to the Civil Service Ordinance as well as to the "for cause" limit on suspension and discharge actions and the broad grievance definition applicable to "any matter involving the interpretation, application, or enforcement of the terms of this Agreement."

When so interpreted, in our view, the Agreement calls for the disciplinary procedure contained in the Civil Service Ordinance and Sec. 59.21(8)(b), Stats., to apply to suspensions, dismissals and demotions of bargaining unit deputies, but it further provides that an employe dissatisfied with the decision of the Grievance Committee has the option of appealing that decision through the contract grievance and arbitration procedure rather than to Circuit Court.

As the County correctly points out, more than a question of facial arbitrability is at issue herein. Arbitrators' determinations of substantive arbitrability may involve a greater scrutiny than initial facial arbitrability determinations in the mill run refusal to arbitrate case. 3/ Our arbitrability determination herein is not based upon a caselaw presumption of arbitrability. Rather it is based on what we find to be the most reasonable interpretation of the scope of the contractual arbitration obligation, reading the Agreement as a whole and in the context of the relevant record evidence.

3/ See generally, Elkouri and Elkouri, How Arbitration Works, (3ed., 1973) at 175-6:

> "Several arbitrators have emphasized that when parties go to an arbitrator on the question of substantive arbitrability, he should exercise his own judgment on the question; that he is not restricted to the criteria established for the Courts by the Trilogy, and should not decide the issue slavishly on the basis of how a court might decide it. (citations omitted) Some other arbitrators, in holding that doubts concerning arbitrability should be resolved in the affirmative, appear to have their eye on the basic Trilogy standard of presumptive arbitrability (citations omitted).
>
> "May an arbitrator determine a dispute to be nonarbitrable after a court has ordered arbitration under the Trilogy? Arbitrator Edgar A. Jones has expressed belief that an arbitrator may do so (though he did not do so in the case before him) since there may be surface indication of arbitrability to justify a court in ordering arbitration whereas the arbitrator in delving deeper into the case may conclude that it was not intended to be arbitrable (citations omitted). Court decisions go both ways on this question (citations omitted)."

The potential inconsistency of the Civil Service Ordinance reference on the one hand and the "for cause" and broad grievance definition provisions on the other is not, in our view, persuasively resolved by the Union's proposed distinction between "procedure" and "rules and regulations". We note in that regard that Ordinance 187, unlike its predecessor 112, does not set forth specific grounds for suspension, dismissal and demotion. Thus, we do not find the provisions of Ordinance 187 susceptible to the rules and regulations versus procedures distinction urged by the Union.

The potential inconsistency noted above is, however, a persuasive basis for deeming the agreement ambiguous so as to warrant consideration of the parol evidence concerning history of bargaining and administration.

We find the Union's bargaining history arguments sufficient to render the WHEREAS language ineffective as an exclusion of suspensions, dismissals and demotions from the contract grievance and arbitration procedure. The fact that two such matters were submitted to arbitration under materially the same introductory language as the parties carried forward into the post-merger agreements indicates that that language was not understood to be an agreement to exclude such matters from the scope of contract grievance arbitration under the Teamsters agreements. The facts that the operative provisions of Ordinance 187 were materially paralleled in Ordinance 112 in effect when those matters were submitted to arbitration warrants the conclusion that the introductory language carried forward into the 1981 Agreement was not intended to be an exclusion of suspensions, dismissals and demotions from the contract grievance and arbitration procedure. The fact that the County never actually appointed a Sheriff's Department Grievance Committee as was provided for in Ordinance 112 and only did so after the enactment of Ordinance 187 does not alter the fact that the operative provisions of the Ordinance to which the Teamster agreements referred were parallel to those in the current Civil Service Ordinance, No. 187. No adverse inference can properly be drawn from the Union's election not to call a witness to testify concerning "what the Union intended by proposing and then agreeing to" the reference to the Civil Service Ordinance in the Agreement. (County brief at 10). The subjective intentions of one of the parties would not be relevant evidence and the arbitration decisions and underlying Teamster agreements speak for themselves.

The parties appear to have narrowed the substantive scope of the grievance and arbitration procedure when in the negotiations leading to the 1982 Agreement they removed "or claim by an Employee, Employees or employee representative that he had been discriminated against or treated unfairly or arbitrarily by the Employer as a result of any action taken in the exercise of its rights and powers." However, they retained the "any matter involving the interpretation, application or enforcement of the terms of this Agreement" which, in our view, includes claims that suspensions, dismissals or demotions imposed by the Sheriff's Department Grievance Committee did not conform to the "for cause" requirement of the management rights provision. It can also be noted that the Teamster arbitrations did not turn solely on claims of discrimination or unfair or arbitrary treatment exercise of rights and powers. Rather, in each case, the claims advanced and decisions rendered included references to compliance or noncompliance with a contractual "just cause" standard for discipline.

While the Chief Deputy and Personnel and Labor Negotiations Committee steps of the grievance procedure are unlikely to be willing to rescind disciplinary actions taken by the Grievance Committee following receipt of a complaint and recommendations from the Chief Deputy, that is not a sufficient consideration to warrant the conclusion that the parties could not have intended disciplinary matters to be subject to grievance procedure processing. As a practical matter, the parties can mutually agree to waive some or all of the pre-arbitral grievance steps as was done in at least one of the disciplinary grievance arbitrations under the Teamster agreement.

For those reasons, we find that, as was true of the parallel introductory language in the 1981 Agreement, the introductory language in the 1982 Agreement was not intended or understood as an exclusion of suspension, dismissal and demotion matters from the grievance and arbitration procedure.

Although the parties carried forward the critical Agreement language unchanged in their 1983 Agreement with knowledge of the existence of a dispute as to its meaning, neither of them can be said to have acquiesced in the position of the other. Rather, they retained the right to assert their respective interpretations when and if the matter subsequently arose. Similarly, neither the fact that the

Union prevailed in Examiner Bielarczyk's July 1983 decision that the question of substantive arbitrability of a suspension grievance is facially arbitrable, nor the fact that that particular suspension dispute was not resubmitted to an arbitrator, affects the parties rights to assert their respective interpretations when and if the arbitrability question subsequently arose, as it has herein.

Based on the foregoing, we have concluded that the parties' 1982 and 1983 Agreements mean that decisions as to whether suspension, dismissal, or demotion shall be imposed on bargaining unit deputy sheriffs shall be made by the Grievance Committee of the Dodge County Sheriff's Department in the manner prescribed in the County's Civil Service Ordinance, but that an employe dissatisfied with a decision of the Grievance Committee shall be entitled, at the employe's option, to process a grievance challenging that decision as violative of the "for cause" requirement in Art. II (Management Rights) through the grievance and arbitration procedure of the Agreement. However, as noted below, to maintain consistency and harmony with ch. 59, Stats., we have found it necessary and appropriate to refine our interpretation to add that the employe's right to process such matters through the grievance and arbitration procedure obtains only so long as the employe has not initiated a Sec. 59.21(8)b.6., Stats., appeal of such Grievance Committee decision to Circuit Court.

Alleged Contradiction of Statute

As both parties have recognized, the Commission and the Courts have held that collective bargaining agreements which limit but do not eliminate statutory powers are to be deemed lawful as a requisite and proper harmonization of MERA with the general powers statutes. E.g., City of Glendale, supra. On the other hand, where the provisions of an agreement or a proposed interpretation of an agreement would directly conflict with a command of statute, the statute controls. E.g., Milwaukee County, supra.

In Milwaukee County, the Commission held that it would irreconcilably conflict with the Sec. 63.10, Stats. for a collective bargaining agreement to require Milwaukee County to arbitrate grievances challenging disciplinary actions subject to the Sec. 63.10, Stats., mandates that such matters be heard and acted upon by that County's Personnel Review Board and that that board's decision is final.

In our view, it is not the case that Sec. 59.21(8)b, Stats., would similarly render unlawful any and all collective bargaining agreement provisions or interpretations that would subject challenges of disciplinary suspensions, dismissals or demotions to review under a contractual grievance and arbitration procedure. Rather, we conclude that MERA can be harmonized with Sec. 59.21 and subsection (8)b thereof so long as the agreement does not eliminate either the Sec. 59.21(8)b, Stats., Grievance Committee role in making initial discipline determinations or the "final and conclusive" nature of the results of a Circuit Court decision if an appeal to Circuit Court is taken under Sec. 59.21(8)b.6., Stats.

In a case addressing a similar statutory scheme and refining somewhat the earlier decision in Sun Prairie, supra, the Commission held in City of DePere, 19703-B (12/83) that a collective bargaining agreement could not lawfully be interpreted to require a City to arbitrate a grievance challenging a disciplinary action imposed by the City's Board of Police and Fire Commissioners once that action had been made the subject of an appeal to Circuit Court pursuant to Sec. 62.13(5)(i), Stats. In dicta, the Commission further stated that a collective bargaining agreement could not lawfully be interpreted to make recommended or provisionally-imposed disciplinary actions subject to grievance procedure processing until the Board had decided what, if any, discipline was appropriate to be imposed in the circumstances. The Commission further commented, however, that a collective bargaining agreement could lawfully provide an employe the choice of appealing a Board disciplinary action to a contract grievance arbitrator instead of to Circuit Court. The Commission reasoned that such a provision would avoid squarely conflicting with statutory mandates that the Board "shall" decide in the first instance what discipline if any is appropriate in the circumstances and that if an appeal of a Board disciplinary action is taken to Circuit Court decision that the outcome in Circuit Court "shall be final and conclusive". The Commission further reasoned, however, that since Sec. 62.13(5)(i), Stats., provides only that a Circuit Court appeal "may" be taken that it would therefore not conflict with the statutory scheme for MERA to be harmonized in such a way as

to make lawful and enforceable a collectively bargained alternative final and binding appeal process in the form of grievance arbitration. The Commission further noted, however, that such disputes would not be lawfully subject to processing at any of the prearbitral steps that might be provided for in a collective bargaining agreement where such would conflict with the Sec. 62.13(5), Stats., statutory scheme.

We are persuaded that a similar analysis is appropriate under the Sec. 59.21(8), Stats., scheme and Agreement involved herein. 4/

The County has unquestionably exercised its Sec. 59.21(8)(cm), Stats., option to enact and operate under a Civil Service Ordinance. We are not persuaded by the Union's contentions that the Agreement represents a County agreement to operate with respect to bargaining unit employes as if there were no Civil Service Ordinance or as if the Civil Service Ordinance does not apply to the very situations to which it was clearly addressed. (Thus, we are not presented with and do not address the question of whether a collective bargaining agreement can lawfully control the exercise of such options by a County.)

Accordingly, as the County argues, this case differs from Crawford County in which the municipal employer had not enacted a Civil Service Ordinance such as No. 187 and, hence, had not invoked the Sec. 59.21(8) procedure for discipline. Rather than involving a Grievance Committee created to receive and decide upon complaints and recommendations concerning deputy suspensions, dismissals and demotions, Crawford County involved a situation where those powers were entirely within the control of the Sheriff.

The instant Agreement acknowledges that the Civil Service Ordinance is to have effect in the interpretation and application of the terms of the Agreement. As noted, we have resolved the tension between that reference on the one hand and the "for cause" requirement and broad grievance definition on the other by concluding that decisions as to whether a suspension, dismissal or demotion will be imposed in the first instance are to be made as provided in the Civil Service Ordinance and Sec. 59.21(8)b, Stats., but that the employe has a right to appeal the decision through the grievance procedure under the "for cause" requirement in the management rights clause.

That interpretation avoids eliminating the statutorily mandated role of the Grievance Committee while harmonizing therewith the requirements of the Collective Bargaining Agreement grievance and arbitration language.

As we held in City of DePere, supra, the Agreement must also be interpreted in a way that avoids conflicting with the statutory mandate that the result of an appeal to Circuit Court, if taken, shall be "final and conclusive" if the penalty imposed by the Grievance Committee is sustained. We have done so by interpreting the grievance procedure as an available forum in which to challenge a Grievance Committee disciplinary action only so long as the employe has not filed a Sec. 59.21(8)b.6., Stats. appeal to Circuit Court.

We reject the County's assertion that such an interpretation irreconcilably conflicts with Sec. 59.21(8)b.6., Stats. That provision states only that an appeal of a Grievance Committee decision "may" be taken to Circuit Court, but it does not expressly foreclose appeals of such decisions to a final and binding grievance arbitration forum as an alternative available if the employe elects it. As in City of DePere, we find it possible -- and hence appropriate in harmonzing MERA and collective bargaining agreements with other statutes -- to treat the grievance arbitration forum as an available alternative appeal forum so long as a Circuit Court appeal has not been taken in the matter.

4/ It could be argued that the approach we are taking gives the County's labor negotiators the ability to fashion contractual standards that could indirectly limit the Grievance Committee's authority by creating a greater or lesser standard of review than the reasonableness-of-decision standard in Sec. 59.21(8)6.b., Stats. We are satisfied, however, that such an indirect impact on the Sec. 59.21(8), Stats., authority relationships is permissible and required by the harmonization principle. See, Glendale, supra.

We do not find that it would conflict with a command of law to subject grievances challenging Grievance Committee disciplinary actions to each of the pre-arbitral steps in the Agreement. 5/ Of course, as a practical matter the Chief Deputy and Personnel and Labor Negotiations Committee are unlikely to resolve a discipline grievance in the employe's favor so as to undercut the Grievance Committee's decision to impose a disciplinary action. Yet, grievance procedure steps frequently present matters beyond the practical authority of the early-step management representatives to adjust. Sometimes waivers of such steps in such situations are expressly provided for, and sometimes they are mutually agreed upon a case-by-case basis as in at least one of the Teamster arbitrations in evidence herein. In any event, we do not find here an irreconcilable conflict with the statute such as would render the processing of discipline grievances at any of the pre-arbitral steps unlawful. 6/

Accordingly, we have concluded that, as interpreted above, the Agreement does not irreconcilably conflict with ch. 59, Stats. We find no Constitutional Equal Protection problems in the interpretation we have adopted herein because different treatment of unit and non-unit personnel is predicted on the rational and non-arbitrary purposes of promoting peaceful labor-management relations that underlie MERA. See, e.g., Sec. 111.70(6), Stats., Declaration of Policy.

Union's Request for Affirmative Relief

We have fashioned Conclusions of Law and a Declaratory Ruling with respect to the proper interpretation of the Agreement and the rights and obligations of the parties thereunder. The Union has also requested a remedial order requiring the County to submit to arbitration the merits of the Beier and Oestreich grievances and further requiring the County to cease and desist from future refusals to arbitrate such matters.

5/ In City of DePere (at p. 7 n. 8) we suggested a different conclusion should obtain under Sec. 62.13(5), Stats.:

> the notion that the Chief, Mayor or Council could sit in direct judgment of particular Board decisions would so clearly contradict the purposes of Sec. 62.13, Stats., scheme as to irreconcilably conflict therewith.

We rendered that dicta because under that law, members of the public are given a right to directly complain to the Board about law enforcement employe conduct. Under Sec. 59.21(8), complaints are submitted to the Committee by the Sheriff or Chief Deputy or a majority of the members of the County's Civil Service Commission.

6/ Even if Sec. 59.21(8), Stats., were irreconcilably in conflict with the notion of permitting the Deputy Chief and the Personnel and Labor Negotiations Committee to undercut through grievance settlements the disciplinary actions taken by the Grievance Committee, that would not alter our conclusion that the Agreement lawfully makes such grievances subject to the contract grievance arbitration procedure. For, while the grievance procedure language on its face would subject suspension/dismissal/demotion grievances to each of the steps specified therein, it would be more appropriate -- in effectuating harmonization and contract interpretation -- to give effect to those steps deemed not in conflict with statute than to conclude that the parties intended that unless all of the steps would be lawful none of them would be enforceable. We note in that regard that the Agreement contains an express severability provision which reads as follows:

> Should any of the provisions of this Agreement be found to be in violation of any law, all other provisions of the Agreement shall remain in full force and effect for the duration of this Agreement. The Union and the County shall negotiate any area found in violation.

We agree with the County that because the instant proceeding is a declaratory ruling proceeding, it would not be appropriate for the Commission to include such an affirmative remedial order within the confines of this declaratory ruling decision.

Dated at Madison, Wisconsin this 10th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner