

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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 DARRELL BRENNECKE and THE :  
 NEW LONDON POLICE ASSOCIATION, :  
 :  
 Complainant, :  
 :  
 vs. : Case 17  
 : No. 46714 MP-2550  
 : Decision No. 27139-A  
 DAVID S. NEUMANN and the CITY OF :  
 NEW LONDON, :  
 :  
 Respondent. :  
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Appearances:

Mr. Frederick J. Mohr, Attorney, 414 East Walnut Street, Suite 261,  
 P.O. Box 1015, Green Bay, Wisconsin 54305, appearing on behalf of  
 von Briesen & Purtell, S.C., Attorneys, by Mr. James R. Korom, Suite 700,  
 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4470,  
 appearing on behalf of Respondents.

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FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On December 13, 1991, Darrell Brennecke and the New London Police Association filed a complaint with the Wisconsin Employment Relations Commission, alleging that the City of New London and its Police Chief David Neumann were violating Sec. 111.70(3)(a)5, Wis. Stats., by refusing to arbitrate Darrell Brennecke's discipline grievance. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Sec. 111.07, Wis. Stats. The parties agreed on a stipulation of facts, and waived hearing. The stipulation of facts was received on March 30, 1992, and the parties thereafter filed briefs, the last of which was received on May 28, 1992. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. New London Police Association is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal office at the law office of Frederick J. Mohr, 414 East Walnut Street, Suite 261, Green Bay, Wisconsin 54305.

2. The City of New London is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal office at 215 North Shawano Street, New London, Wisconsin 54961.

3. At all times material to this proceeding, Complainant Union has been the exclusive bargaining representative of all employees employed in the Police Department, excluding supervisors and department heads. Darrell Brennecke has at all material times been President of the Union, and David Neumann has at all material times been Chief of Police of the City.

4. At all material times Complainant Union and Respondent City have been

party to a collective bargaining agreement in effect from January 1, 1991 through December 31, 1992, which provides in relevant part as follows:

ARTICLE 1 - PURPOSE OF THE AGREEMENT

A. It is the purpose and intent of the parties hereto that this agreement shall promote and improve working conditions between the City of New London and the New London Police Association and to set forth herein rates of pay, hours of work and other terms and conditions of employment to be observed by the parties hereto.

B. The City agrees that there shall be no discrimination by the City against any employee covered by this agreement because of his membership or activities in the Association, nor will the City interfere with the right of such employees to become members of the Association.

ARTICLE 2 - VESTED RIGHT OF MANAGEMENT

A. Except as herein otherwise provided, the right to employ, to promote, to transfer, discipline and discharge employees and the management of the property and equipment of the City of New London is reserved by and shall be vested exclusively in the Common Council of the City of New London through its duly appointed Police and Fire Commission and through the duly appointed Chief of Police through authority vested in by him by the Common Council and the Police and Fire Commission shall have the right to determine how many men there will be employed or retained, together with the right to exercise full control and discipline in the proper conduct of the Police and Fire Commission Operations.

B. The Common Council through its Police and Fire Commission and Police Chief, shall have the sole right to contract for any work it chooses and direct its employees to perform such work wherever located in its jurisdiction. This will be subject only to the restrictions imposed by this agreement, Chapter 111 of the Wisconsin Statutes, and the Common Council.

C. The Police and Fire Commission shall have the exclusive right to determine the hours of employment and to make changes in details of employment of the various employees from time to time as it deems necessary for the efficient operation of the Police Department, subject again to the restrictions imposed by this agreement, and the Association and the members agree to cooperate with the Board and/or its representatives in all respects to promote the efficient operation of the Police Department.

ARTICLE 16 - FUNERAL LEAVE

If an officer experiences a death within the family, he/she shall be entitled to take up to the

following specified days off of work without said days being charged against the officer's accumulated sick leave:

- 1) Six (6) days for the death of a spouse or child
- 2) Three (3) days for the death of a father, mother, sister, brother, grandparents, mother-in-law, or father-in-law.

ARTICLE 17 - GRIEVANCE PROCEDURE

A. Both the Association and the City of New London recognize that grievances and complaints should be settled promptly and at the earliest possible stages and that the grievance process must be initiated within five (5) days of the incident. Any grievance not reported or filed within five (5) days shall not be valid. A grievance is defined as any dispute or misunderstanding relating to employment between the employee and the employer that are contract related. Any difference of opinion or misunderstanding which may arise between the Association and the City shall be handled in the following manner.

B. The aggrieved employee shall present the grievance orally to one of the Lt's or Captain either alone or accompanied by an Association representative.

C. If the grievance isn't settled at the first step, the grievance shall be presented in writing to the Police Chief. The written grievance shall include a statement of facts of the dispute, the alleged articles claimed violated, the issue and the remedy sought. The Chief shall within five (5) days, (Saturday, Sunday and Holidays excluded), hold an informal meeting with the aggrieved employee and the Lt. or Captain and the Association representative. If the grievance is not resolved to the satisfaction of all parties at this informal meeting between the aggrieved officer and the Lieutenant, Captain, and/or Chief, either party shall have three (3) days (excluding Saturdays, Sundays and Holidays) from the date of said meeting to proceed to the next step.

D. The grievance shall be presented in writing to the Personnel Committee. (1) The Personnel Committee shall within five (5) days set up an informal meeting with all parties involved up to this point. Within seven (7) days, (Saturday, Sunday and Holiday excluded), after this meeting a determination shall be made and reduced to writing and copies submitted to all parties involved.

E. If the grievance is not settled under the provisions of paragraph "D" above and one of the parties deems the issue to be arbitrated to be of such significance as to warrant a panel of three (3) arbitrators, each party shall, within five (5) working days of the notification of the request for

arbitration, which shall be served within three (3) working days after receipt of the written determination as provided in paragraph "D" above, appoint one (1) arbitrator, and the two arbitrators so appointed shall attempt to agree on a neutral person to serve as chairman of the arbitration panel. If no mutual agreement is reached within five (5) working days of the selection of the chairman, the City and the Association shall request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators to both parties. The parties shall within five (5) working days of the receipt of said list meet for the purpose of selecting the chairman by alternately striking names from the said list until one name remains. Such person shall then become the chairman of the arbitration panel. The decision of the arbitrator, or arbitrators, shall be final and binding on the parties, and the arbitrator or arbitrators shall request to issue a decision in writing within thirty (30) days after the conclusion of the testimony and argument. However, the arbitrator(s) shall not modify, delete, subtract, add to, or alter the agreement.

. . .

5. On or about November 16, 1991, Chief Neumann issued a two day suspension to Complainant Brennecke. Brennecke thereafter filed a grievance protesting that said suspension was given to him without "just cause". The grievant's letter cited "Article 16, Section C" as allegedly violated by this action.

6. On November 21, 1991 Neumann replied to the grievance by letter, stating that he believed that the grievance erroneously cited Article 16, C. when the grievant meant to cite Article 17, C., and stating that the contract did not provide for discipline issues to be submitted to the grievance process:

This is a response to your letter of 16 November and our informal meeting of 20 November. It concerns the 2 day suspension given to you.

In your letter you state that you are filing a grievance in objection to the suspension. In our informal meeting I asked you what you felt was an appropriate discipline since you felt mine was not. You stated that you felt no discipline was appropriate.

Further you cited the contract as your basis for the objection, stating Art. XVI (you meant Art. XVII), Section C.

In explaining that, you said the basis for the grievance was the line in Section A which referred to a difference of opinion or misunderstanding which may arise between the Association and the City . . .

At no time has the Association raised the issue as a group that there was a difference of opinion or misunderstanding. You have raised this personally since it was you and not the Association which has been disciplined.

I have read the contract. In no place does the contract state that discipline may be submitted to the grievance process. It appears as if your intent is to grieve the 2 day suspension in order to get the matter before the Personnel Committee and perhaps before an arbitrator.

It is my opinion that discipline cannot be a subject of a grievance. This is based on our contract, a legal opinion from the League of Municipalities, and state statutes. I have reached that conclusion for the following reasons:

1. The contract does not say that discipline can be submitted as a grievance.
2. The contract, however, does state in Article 2, Section A, that the right to discipline employees is vested in the Council through the Police and Fire Commission and through the duly appointed Chief of Police. The opening lines of that Article state: "Except as herein provided...." In searching the contract, the right to discipline remains the prerogative of the Chief and the Commission as there is no statement or provision for removing it from their authority.
3. Your statement that you feel it is subject to grievance because it is a difference of opinion or a misunderstanding between you and I is unreasonable. You feel that the difference is in the amount of discipline as nothing is less than 2 days. If I were to accept the "difference of opinion" or "misunderstanding" as a basis for grievance, then one could conclude that just about any matter could be subject to grievance. Questions would be raised. What if an officer had a "difference of opinion" about what make of car to use for a squad, what kind of uniform to wear, what sidearm to use, what his duties would be, etc? It is obvious that just not every difference of opinion is subject to grievance.
4. In addition, Art. 17, Sec. A defines a grievance as "any dispute or misunderstanding relating to employment between the employee and the employer that are contract related." As I stated in #2 above, no where in the contract do I see anything about discipline except that it is reserved solely to the Council and the Commission through the Chief of Police. Had the intent of the contract been to allow discipline to go to grievance, there would have been language indicating that. I find none.
5. In an opinion by its legal counsel, the League of Municipalities published an article in its January 1990 issue. A complete copy of that

article accompanies this document for your perusal. That article clearly states: "A Municipality may not eliminate the police and fire commission's power to hear and make determination regarding disciplinary charges filed by a citizen, the chief, or members of the commission against police officers under section 62.13(5), Stats., through a collective bargaining agreement." The article cites several cases already decided by the courts which leads the legal counsel to the conclusion that 62.13(5) would take precedent over any labor contract. In effect, that legal counsel infers that any contract which does allow discipline to be submitted to arbitration may be in violation of state statutes.

I am denying your grievance based on my opinion that discipline is not subject to grievance by our contract, and by the fact that statute 62.13(5) applies in this case and every other case of discipline.

I would remind you that if you wish to appeal my decision to suspend you on the two days specified, the appeal must be made to the Police and Fire Commission within the time frame required by law. If you do appeal, statute requires that I take the charges to the Police and Fire Commission for a public hearing.

. . .

7. By letter dated November 21, 1991 Attorney Mohr attempted to process the grievance to the personnel committee of the City. By letter dated November 25, 1991, City Administrator Lew Steinbrecher refused to process the discipline issue as a grievance:

The City of New London is in receipt of your letter addressed to the Chair of the Personnel Committee of the Common Council and dated November 21, 1991, wherein you have presented a grievance in writing. Joann Erickson, Chairperson of the Council's Personnel Committee, has asked me to respond to this letter. This grievance stems from disciplinary actions taken by Chief Neumann against Darrell Brennecke.

This matter is covered by the provisions of Section 62.13(5) of the Wisconsin Statutes. Officer Brennecke is entitled to due process by requesting a hearing before the Board of Police and Fire Commissioners of the City of New London. Depending upon the Board's decision, the officer may appeal to Circuit Court. Grieving this matter to the Personnel Committee of the New London Common Council is not the appropriate forum. As such, Officer Brennecke's grievance is not being recognized and your request for a meeting on his behalf is denied.

. . .

8. The complaint in this matter was filed December 13, 1991, and

contends in relevant part:

5. That there exists a labor agreement between the complainant and respondent. That pursuant to the terms of said agreement, and included therein, is a certain grievance procedure. That said grievance procedure defines a grievance as "any dispute or misunderstanding relating to employment between the employee and the employer that our (sic) contract related."

6. That prior to November 16, 1991, the respondent, Neumann, issued a two (2) day suspension to complainant, Darrell Brennecke. That thereafter Brennecke filed a grievance regarding said discipline. That an informal meeting was held on November 20, 1991 and a decision was issued on November 21, 1991, wherein the said grievance was denied.

7. That thereafter the complainants filed a request pursuant to the next step of the grievance procedure for a hearing before the Personnel Committee of the City of New London. That thereafter the complainant was informed through their attorney that the said committee would not process the grievance.

. . .

9. Article 2 of the collective bargaining agreement clearly and unambiguously reserves the right to "discipline" employes to "the duly appointed Chief of Police through authority vested in him by the common council and the Police and Fire Commission". Article 17 of the Agreement defines a grievance as "any dispute or misunderstanding relating to employment between the employe and the employer that are [sic] contract related". Article 2 constitutes a clear exclusion of general discipline issues from the grievance and arbitration procedure. The grievance clause is therefore not susceptible of an interpretation which covers the grievance filed by Darrell Brennecke.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

The City of New London and David Neumann did not violate Sec. 111.70(3)(a)5, Wis. Stats., when they refused to process the Darrell Brennecke discipline grievance, because said grievance as filed and as argued to the City did not allege a violation of any term of the collective bargaining agreement.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

ORDER 1/

IT IS ORDERED that the complaint filed in this matter be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 20th day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
Christopher Honeyman, Examiner

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

Section 111.07(5), Stats.

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



CITY OF NEW LONDON (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSION OF  
LAW AND ORDER

BACKGROUND:

The complaint alleges that the City violated Sec. 111.70(3)(a)5, Wis. Stats., by refusing to process a grievance concerning discipline. The essential facts were stipulated, are contained in the Findings and need not be repeated here.

DISCUSSION:

The Union asserts, and the City admits, that the standard which determines whether a grievance should be heard on the merits throughout, in arbitration if need be, is a broad one. I agree with the Union that the standard is that expressed by the Wisconsin Supreme Court in Joint School District No. 10 vs. Jefferson Education Association, 78 Wis.2d 94, 253 N.W. 2nd 536 (1977), at page 112:

An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. 2/

The Union contends first that the grievance definition here is a broad one, relying on the last sentence in Article 17, paragraph A, which states "Any difference of opinion or misunderstanding which may arise between the Association and the City shall be handled in the following manner". The City, however, argues that the grievance definition is narrow, relying on the sentence immediately proceeding that cited above, which states "A grievance is defined as any dispute or misunderstanding (sic) relating to employment between the employee and the employer that are (sic) contract related."

I agree with the Employer that this collective bargaining agreement cannot reasonably be read as providing for a broad definition of a grievance, i.e. a definition based on the language in the last sentence in Article 17 A. If that sentence existed by itself, I would find for the Union on this issue; but the fact that it immediately follows a sentence defining what a grievance is strongly suggests that the "any difference of opinion or misunderstanding" in the last sentence was intended to operate within the definition contained in the preceding sentence. Therefore, only "contract related" differences of opinion or misunderstandings may be "handled" through the grievance procedure here. A second reason for so concluding is that to define the ambit of the grievance procedure as the Union would have it, i.e. based exclusively on the last sentence in Article 17 A., makes the preceding sentence a nullity. There is no purpose to defining a grievance as involving only an item which is "contract related" if any dispute, whether contract related or not, can be processed through the grievance procedure including arbitration.

Underlining the apparent intent of Article 17 A, read as a whole, is the

2/ Citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 583 (1960).

inescapable intent of Article 2 A. It is not necessary for language to be well drafted for it to be clear on its face. In this instance a specification that "except as herein otherwise provided, the right to . . . discipline and discharge employees . . . shall be vested exclusively 3/ in the common council of the City of New London through its duly appointed Police and Fire Commission . . ." leaves no room for a conclusion that discipline cases are intended to be processed anywhere but through the Police and Fire Commission. There is no other provision governing general discipline and discharge issues elsewhere in the Agreement, nor any clause either stating or implying that disciplinary actions in general are reviewable in the grievance and arbitration procedure under a standard of "just cause." 4/

I therefore do not need to reach the City's extensive argument concerning the application of Chapter 62.13 to discipline cases involving police officers. The City asserts that as a matter of law Chapter 62.13 provides for the "handling" of such matters by Police and Fire Commissions, as opposed to contractual and grievance arbitration procedures. I note only that in this contract the parties have provided for the Police and Fire Commission to be the venue for an employe to raise a concern that discipline may have been unjust, and that they have done so by express, voluntary agreement, in Articles 2 and 17 A of the collective bargaining agreement.

A troubling aspect of this case, however, is the Union's assertion, first raised in its brief, that the grievant was discriminated against because he is president of the Union, and that the City has an obligation to process the grievance under Article 1, Section B, which prohibits such discrimination. The City agrees in its responsive brief that the grievant is president of the Association, but denies discrimination, and alleges that the grievance as raised did not allege a violation of Article 1, Section B, and made no reference to any such act of discrimination. The Union replies that it is traditional in interpretation of collective bargaining disputes to allow the complaining party great latitude in defining and redefining the issue and the nature of the violation complained of, because of the concern that unsophisticated parties might be entrapped by too great a focus on technicalities. The City replies that the grievant in this case was anything but unsophisticated, as he was president of the Association and well-familiar with collective bargaining methods and principles.

Under many circumstances I would find that a grievance alleging contract violation by discipline was broad enough to cover an allegation that the Employer's fundamental reason for the discipline was anti-union animus, and it is routine in arbitration not to hold grievants to the article number or specific explanation of the reason for the grievance which was first asserted.

In the circumstances of this case, however, I agree with the Employer that an injustice would be created by allowing the Union to replace completely the asserted basis for the dispute in its brief. First, the Complainants had ample opportunity to make fair and timely notice to the City of a discrimination allegation. The grievant was the Association president, and there is merit in the Employer's contention that it is entitled to know what it is charged with,

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3/ Emphasis added.

4/ A specific exception with respect to discrimination based on union activity is discussed below.

especially when the person making the charge is familiar with the contract. Second, the Union was represented by counsel in this matter as of a few days after the start of the dispute, but even though it filed both a demand to process the grievance to Step D of the grievance procedure and a formal WERC complaint, there is nothing whatsoever in either document to indicate any hint that a discrimination argument under Article 1, Section B was on the Union's mind. And third, the Employer has not taken a generally intransigent attitude, but has premised its refusal to process this matter as a "grievance" based on the specific issues asserted therein, as well as in the complaint as such. The City, upon receipt of the Union's brief, replied not only that it would probably have taken a different position as to grievance processing had an Article 1, Section B grievance referring to discrimination been filed, but that the appeal process available through the Police and Fire Commission as to the particular subject of the grievance continued to be available to Brennecke.

Article 17, Section C requires that a written grievance include "a statement of facts of the dispute, the alleged articles claimed violated, the issue and the remedy sought." These specifications were met by Brennecke and then by Attorney Mohr, in their letters to the City, exclusively in terms of "just cause". There is merit in the City's assertion that it should not be found to have violated the statute by refusing to process a grievance which was never visible on the face of the grievance documents or even of the complaint, and which emerged as a possible issue only when the briefs were filed. Jefferson, surely a stringently worded decision, requires only arbitration of "the particular grievance" if any interpretation of the arbitration clause will cover "the asserted dispute". The "particular grievance" which the Union attempted to process, and over which it filed the complaint herein, made no reference to discrimination or to Article 1 B. Furthermore, there is nothing in the record to show that in the first step grievance meeting, or by any other communication, an Article 1 (B) discrimination argument was fairly raised. I therefore conclude that "the asserted dispute" in this matter is the "just cause" dispute which I have found to be specifically excluded from coverage by the grievance and arbitration provisions of this Agreement.

Dated at Madison, Wisconsin this 20th day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
Christopher Honeyman, Examiner