STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF JANESVILLE Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats. Involving a Dispute Between Said Petitioner and JANESVILLE PROFESSIONAL POLICE ASSOCIATION	Case 61 No. 47886 DR(M)-503 Decision No. 27645

Appearances:

Brennan, Steil, Basting & MacDougall, S.C., by Mr. Dennis M. White, Suite 100, 433 West Washington Avenue, P.O. Box 990, Madison, Wisconsin 53701-0990, for the City.

Cullen, Weston, Pines & Bach, by Mr. Gordon E. McQuillen, 20 North Carroll Street, Madison, Wisconsin 53703, for the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On August 11, 1992, the City of Janesville (City) filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to whether a proposal of the Janesville Professional Police Association (Union) is a mandatory subject of bargaining. The Union filed a Statement in Response to the petition on November 13, 1992.

On December 22, 1992, the City filed an amended petition along with a stipulation of facts entered into by the parties. The stipulation was amended by the parties December 29, 1992. The Union filed a response to the amended petition on January 13, 1993. The City filed a reply on January 26, 1993.

By letter dated February 18, 1993, the Commission sought a clarification as to the scope of the parties' dispute. The parties' filed responses to the Commission's letter, the last of which was received March 12, 1993.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Janesville, herein the City, is a municipal employer having its principal offices at Janesville, Wisconsin.

2. The Janesville Professional Police Association, herein the Union, is a labor organization which represents certain law enforcement employes of the City for the purpose of collective bargaining.

3. The 1991 contract between the City and the Union contains the following provisions:

ARTICLE XIX
MAINTENANCE OF RIGHTS - MANAGEMENT & ASSOCIATION

> The Union recognizes the City as the Employer and except as specifically limited by the express provisions of this Agreement, as having the rights . . . to discipline, demote, suspend or discharge employees for just cause; . . .

ARTICLE XXII
GRIEVANCE PROCEDURE

1. A grievance is defined to be controversy between the Association and the City or between any member or group of members of the Association and the City as to any matter involving the interpretation of this Agreement, any matter involving an alleged violation of this Agreement in which a member of the Association or a group of members of the Association or the City maintains that any of their rights or privileges have been impaired in violation of this Agreement, and any matter involving work conditions.

2. Grievances shall be processed in the following manner and within the following time limits which shall be exclusive of Saturdays, Sundays, and holidays. The grievance may be processed either by the employee or by a representative of the Association. The employee or the Association may be represented by any person including an attorney-at-law, at any stage of this grievance procedure.

   A. Step One. The grievance shall be presented in writing to the Chief of Police within ten (10) days of knowledge of its occurrence. The Chief of Police shall respond in writing within ten (10) days to the person who made such complaint. During such ten (10) day period, the Chief of Police may schedule one (1) meeting with the party(s) making

such complaint.

B. Step Two. If the grievance has not been satisfactorily resolved in the foregoing step, the grievance shall be presented in writing to the City Manager or to his representative as designated in writing by the President of the Association within five (5) days after the response has been received from the Chief of Police. The City Manager shall respond to the party(s) making the complaint within ten (10) days after receipt of such grievance. During such ten (10) day period, the City Manager or his designate may schedule one (1) meeting with the filing party(s).

C. Step Three. If the grievance has not been satisfactorily resolved in the foregoing step, the City, the Association, or any member of the Association dissatisfied with any results after the foregoing step, shall request in writing, within five (5) days after completion of Step Two, that the dispute be submitted to an impartial arbitrator. The impartial arbitrator shall, if possible, be mutually agreed upon by the parties. If agreement on the arbitrator is not reached within five (5) days after the date of the notice requesting arbitration or if the parties do not agree within said time upon a method of selecting an arbi-trator, then the Wisconsin Employment Relations Commission shall be requested to submit a panel of five (5) arbitrators. The parties shall alternately strike names until one (1) remains, and the party requesting arbitration shall be the first to strike a name. Each party shall pay one-half (1/2) of the cost of the arbitrator.

D. Authority of Arbitrator. The decision of the arbitrator shall be final and binding on the parties and the arbitrator shall submit, in writing, the decision to the City and to the Union within thirty (30) days after the conclusion of testimony and argu-ments. The decision shall be based solely on the interpretation of the meaning of the express written provisions of the agreement as applied to the facts of the grievance presented. The arbitrator or arbitrators shall have no power or right to amend, notify, nullify, ignore, add to or subtract from this agreement and shall only consider and make a decision with respect to the specific

issue submitted by the City and the Association, and shall have no right or power or authority to make a decision on any other issue not so submitted. The arbi-trator or arbitrators shall have no power or authority to make a decision contrary to or inconsistent with or modifying or varying in any way the application of the laws and rules and regulations having the force and effect of law.

3. Time limits set forth in the foregoing steps may be extended by mutual agreement in writing.

4. Nothing in this grievance procedure shall be construed as limiting or abrogating any rights or remedies provided by Wisconsin Statutes or regulations of Wisconsin administrative agencies.

5. Step One of this procedure may be taken without prejudicing any right to request a hearing by the Police and Fire Commission. However, after Step One is completed, the party(s) shall decide, in accordance with Wisconsin Statutes, to pursue the grievance to its conclusion through the Commission or through the arbitration procedures specified herein, but not both. It is the express intention of the parties by this paragraph to limit only the right of the individual member for availing him-self of two simultaneous appeal procedures.

4. On January 24, 1992, the Union filed a complaint with the Wisconsin Employment Relations Commission alleging the City had committed a prohibited practice by refusing to arbitrate a suspension.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The 1991 collective bargaining agreement noted above, when interpreted in a manner necessary to avoid an otherwise irreconcilable conflict with Sec. 62.13, Stats., makes the grievance and arbitration procedure therein applicable to disciplinary actions imposed by the Janesville Board of Police and Fire Commissioners only if such disciplinary actions have not been appealed to Circuit Court pursuant to Sec. 62.13, Stats., and then only to the extent that such grievances are subject to processing at no other step than the grievance arbitration step of those procedures.

2. The 1991 collective bargaining agreement noted above, when interpreted in a manner necessary to avoid an otherwise irreconcilable conflict with Sec. 62.13, Stats., makes the grievance and arbitration procedure therein applicable to disciplinary actions imposed by the Chief of Police where the Janesville Board of Police and Fire Commissioner's jurisdiction over such discipline has not been invoked.

3. When interpreted and administered in a manner consistent with Conclusions of Law 1 and 2, the disputed provisions of the parties' 1991 contract are primarily related to wages, hours and conditions of employment.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

When interpreted and administered in a manner consistent with Conclusions of Law 1 and 2, the disputed provisions of the parties' 1991 contract are mandatory subjects of bargaining.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of May, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Found on pages 6 and 7.

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

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1/ Continued

> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
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> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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

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

Through this declaratory ruling proceeding, the parties ask the following: 2/

1. Where discipline has been imposed by the Board of Police and Fire Commissioners on an officer pursuant to Sec. 62.13(5)(e), Stats., is a proposal which would allow the disciplined officer to choose judicial review under Sec. 62.13(5)(i), Stats., or final and binding grievance arbitration a mandatory subject of bargaining?

2. Where an officer is suspended by the Chief of Police without pay pursuant to Sec. 62.13(5)(c), Stats. and elects not to request a hearing before the Board of Police and Fire Commissioners and where no charges are subsequently filed with the Commission, is a proposal which would allow the suspended officer to seek review of the suspension through final and binding grievance arbitration a mandatory subject of bargaining?

In Beloit Education Association v. WERC 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC 81 Wis.2d 89 (1977) and City of Brook-field v. WERC 87 Wis.2d 819 (1979), the Court set forth the definition of a mandatory subject of bargaining under Sec. 111.70(1)(d) Stats. as a matter which is primarily related to employes' wages, hours, and conditions of employment. However, there are occasions on which there is at least an arguable conflict between the scope of the duty to bargain under Sec. 111.70(1)(d) Stats. and the content of other statutory provisions. While the Court in Glendale Professional Policeman's Association v. City of Glendale 83 Wis.2d 90 (1978) noted that such conflicts are difficult to resolve because Sec. 111.70 Stats. does not contain any specific legislative resolution thereof, it reaffirmed its prior holdings in Muskego-Norway C.S.J.S.D. No 9 v. WERB 35 Wis.2d 540 (1967) Joint School District No. 8 v. WERB 37 Wis.2d 483 (1967) and Board of Education v. WERB 52 Wis.2d 625 (1971) that: (1) Sec. 111.70 Stats. should be harmonized within existing statutes when possible inasmuch as

2/ In its response to the City's initial petition, the Union noted that the parties' dispute also implicated the just cause standard of arbitral review contained in the parties' contract. The City then filed an amended petition which explicitly incorporated the just cause standard as being part of the dispute before the Commission. The Union then filed a Motion to Dismiss urging the Commission not to consider the just cause provision. We hereby deny the Union's Motion. Clearly, the standard which an arbitrator would apply to discipline which has been or could be subject to Sec. 62.13(5), Stats. proceedings must be considered when determining whether arbitral review can co-exist with Sec. 62.13(5), Stats. See DePere at page 7, footnote 8.

Sec. 111.70 is presumed to have been enacted with full knowledge of pre-existing statutes; and (2) that a statutory construction which gives each provision force and effect should be made if at all possible. However, if there is an irreconcilable conflict between a contract proposal made under the auspices of Sec. 111.70 Stats. and a specific statutory provision, the proposal must be found a prohibited subject of bargaining, because a contract provision which runs counter to an express statutory command is void and unenforceable. Board of Education v. WERB, supra; WERC v. Teamsters Local No. 563 75 Wis.2d 602 (1977); Drivers, etc. Local No. 695 v. WERC 121 Wis.2d 291 (CtApp, 1984).

Here, it is correctly conceded by the City that the disputed provisions are primarily related to wages, hours and conditions of employment. As noted in City of Greenfield, Dec. No. 19872 (WERC, 9/82), but for the existence of Sec. 62.13, Stats.:

> . . . there would be no question that a proposal setting a mechanism to challenge a municipal employer's disciplinary decisions would constitute a mandatory subject of bargaining. It is hard to imagine anything more primarily related to working conditions than the ability to challenge an employer decision that an employe be disciplined or discharged. See Beloit, supra; Racine Unified School District 11315-B, D (4/74).

Thus, the issue before us is one of determining whether there is an irreconcilable conflict between the disputed provisions and Sec. 62.13, Stats. which renders these provisions prohibited subjects of bargaining.

In City of DePere, Dec. No. 19703-B (WERC, 12/83) as to question 1 above, we concluded that there is no irreconcilable conflict between final and binding grievance arbitration procedures and Sec. 62.13, Stats., if the discipline imposed by the Board has not been appealed to Circuit Court and so long as the grievance arbitration procedure does not allow Board decisions to be modified by the Chief, Mayor or Common Council. In DePere we reasoned:

. . .

> At the outset, we note that the City's reliance on Racine Fire and Police Commission v. Stanfield, 70 Wis.2d 395, 234 N.W.2d 307 (1975), (herein Racine), and Enk, supra in support of its argument that Sec. 62.13(5()i), Stats. is exclusive, is misplaced. A review of these cases reveals that in Enk, supra, the issue was not before the court as it merely discussed the mutual exclusivity of an appeal under Sec. 62.13(5)(i), Stats., disciplinary matters could be made the subject of grievance arbitration under a collective bargaining agreement. 3/
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> Nevertheless, as the City points out, it is well settled that where a MERA-enforceable collective bargaining agreement contradicts the terms of another statute after attempts to harmonize the two are unsuccessful, the requirements of the statute will supersede the terms of the agreement contradicting it. 4/ Where a party refuses to process a grievance on

the grounds that subjecting its subject matter to the grievance procedure would constitute an irreconcilable conflict with a statute, it is appropriate for the Commission in a Sec. 111.70(3)(a)5, Stats., complaint proceeding to interpret the agreement in order to determine whether there is a conflict and whether it is irreconcilable.

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

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

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

When the requisite effort is made to harmonize MERA-enforceable collective bargaining agreements with Sec. 62.13(5), Stats., to the fullest possible extent, we conclude that it is possible in at least some circum-stances for Sec. 62.13, Stats., disciplinary actions to be subject to grievance procedure processing

under a collective bargaining agreement without contradicting Sec. 62.13, Stats.

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

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

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

3/ 70 Wis.2d at 402.

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

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

6/ However, the WERC would not necessarily defer to the pendency or resolution in any other forum of

a challenge of a disciplinary action in a complaint filed with the Commission alleging that the disciplinary action involved constituted, e.g., interference within the meaning of Sec. 111.70(3)(a)1, Stats., or discrimination within the meaning of Sec. 111.70(3)(a)3, Stats. See, City of Milwaukee (Police) 14873-B (8/80) at 32-33, 36-37. (WERC held that neither the pendency of nor the availability of a Sec. 62.50, Stats., police and fire commission commission (sic) proceeding to challenge the merits of a disciplinary action taken by the Milwaukee Chief bars or warrants deferral of a complaint to WERC that the affected employes had been denied their Sec. 111.70(3)(a)1, Stats., right to representation in a pre-disciplinary departmental trial-board procedure.)

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

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

At the City's urging in this proceeding, we have evaluated DePere in light of the subsequent holdings in Drivers, etc. Local No. 695 v. WERC, supra; Milwaukee Police Association v. Milwaukee, 113 Wis.2d 192 (CtApp, 1983); and Iowa County v. Iowa County Courthouse, 166 Wis.2d 614 (1992). We believe that our reasoning in DePere continues to be sound.

As to Drivers, the City correctly notes the Court therein generally included "disciplinary actions against subordinates" in a list of matters regulated by Sec. 62.13, Stats. as to which other occupational groups are "free to bargain." However, in our view, the Court's comment does not constitute a holding that a collective bargaining agreement providing contractual review of the Board's decision is impermissible. Rather, the Court's comment and subsequent discussion of Glendale Professional Policemen's Association v. Glendale, 83 Wis.2d 90 (1978) is an acknowledgement of difficulties met when

trying to ascertain the permissible scope of bargaining over subjects that are regulated to varying degrees by independent statute. In DePere, our holding reflects our sensitivity to this difficulty and our view that Sec. 62.13, Stats. does preclude collective bargaining in certain areas.

In Milwaukee, the Court concluded that under the contractual language before it, the termination of a probationary officer by the City was not arbitrable. The Court based its holding on the absence of an express provision in the parties' contract making such terminations arbitrable, the inapplicability of Sec. 62.13(5), Stats. to probationary officers, and the provisions of Sec. 165.85, Stats. Here, we have express contract language, Sec. 62.13(5), Stats. is applicable 3/ and Sec. 165.85, Stats. is not. Thus, contrary to the City's argument, we do not find Milwaukee to be a persuasive basis for altering our holding in DePere.

As to Iowa County, the Court therein concluded that a collective bargaining agreement cannot regulate a circuit judge's power to appoint a register in probate because the judge is not a municipal employer, a county employe or a county agent. As indicated in the quoted portion of DePere, we have concluded that a Board of Police and Fire Commissioners is a municipal employer acting on behalf of the City and thus Iowa County also does not persuade us to modify DePere.

Given all of the foregoing, it remains our view that arbitral review of discipline imposed by a Board of Police and Fire Commissioners does not irreconcilably conflict with Sec. 62.13(5), Stats. so long as the limitations set forth in DePere are honored. To the extent it is interpreted and administered consistent with DePere, the Union proposal is a mandatory subject of bargaining.

Turning to the second issue before us, the Union asks that we conclude grievance arbitration is available to review discipline imposed by the Chief of Police (suspensions without pay) where Board of Police and Fire Commissioners' jurisdiction could be but has not been invoked (i.e. the officer has not requested a hearing with the Board and no charges have been filed with the Board). The Union suggests that the alternative of arbitral review preserves Sec. 62.13, Stats. while conserving the parties resources by avoiding the necessity of a Board proceeding prior to an arbitration hearing. The City reads our DePere decision as holding that arbitration is only permitted after Board proceedings. 4/ It contends that the Union's resources argument is irrelevant to the question of whether arbitration can be harmonized with Sec. 62.13, Stats.

In DePere we stated:

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

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3/ Based on Milwaukee, the Union has acknowledged that it does not seek a ruling that terminations of probationary officers are arbitrable.

4/ The City asserts that if this aspect of the Union's proposal runs afoul and DePere, the proposal is then permissive. We disagree. To the extent it is not possible to harmonize, the proposal is prohibited and unenforceable.

> decide the matter. Otherwise, the requirement that the Board "shall" hear and decide such matters would be contradicted. . . .

However, "the requirement that the Board's shall hear and decide matters" is limited to circumstances in which its jurisdiction has been invoked. The issue before us in this portion of the decision is whether grievance arbitration can be available where the Board's jurisdiction has not been invoked. Thus, contrary to the City, our holding in DePere does not resolve this issue. However, as argued by the City, the Union's resource argument is irrelevant to the prohibited or mandatory status of the proposal. The question before us is not whether it is good policy to have arbitral review in lieu of Sec. 62.13(5), Stats. proceedings, but whether the availability of Sec. 62.13(5), Stats. proceedings precludes use of an alternative forum. We conclude that it does not.

We view this issue as akin to the question of whether the availability of circuit court review of Board discipline precludes review in an alternative forum. In both situations, the initial disciplinary decision is not final and in both situations Sec. 62.13, Stats. does not state that the statutorily established review procedure is exclusive. Thus, we conclude that there is no irreconcilable conflict between Sec. 62.13, Stats. and arbitral review of suspensions without pay imposed by the Chief of Police. Thus, as to this issue, the Union proposal is also a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 7th day of May, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner