

STATE OF WISCONSIN
CIRCUIT COURT
ROCK COUNTY

CITY OF JANESVILLE,
Plaintiff,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Defendant.

#93-CV-412
Decision No. 27645

MEMORANDUM DECISION

This is a review of the decision of the Wisconsin Employment Relations Commission (WERC), wherein the WERC interpreted section 62.13, Wis. Stats., to allow arbitral review, using a "just cause" standard established by labor contract, of Police and Fire Commission (PFC) disciplinary decisions. Accordingly, the WERC declared that the grievance and arbitration provision contained in the 1991 City of Janesville - Janesville Professional Police Association (JPPA) contract was a mandatory subject of bargaining as applicable to disciplinary proceedings.

The City contends the union proposals violate section 62.13, Wis. Stats., and are therefore prohibited subjects of bargaining because they interfere with the exclusive authority of the PFC to demote, suspend and discharge employees.

The City and the JPPA were parties to a 1991 collective bargaining agreement. The agreement recognized the right of the City as the employer to discipline, demote, suspend or discharge employees for just cause. The agreement also contained a grievance and arbitration procedure. A grievance was defined as a controversy involving the interpretation of the agreement, involving an alleged violation of the agreement, and involving working conditions.

The grievance and arbitration procedure had three steps. At Step One, the grievance was to be submitted to the chief of police and the chief was to respond in writing. If the grievance was not resolved at Step One, Step Two provided for the grievance to be submitted to the city manager for a written response. If the grievance was not resolved at Step Two, Step Three provided for the grievance to be submitted to an impartial arbitrator for a final and binding arbitration decision.

The agreement provided that Step One could be invoked without prejudicing any right to request a hearing by the Janesville Board of Police and Fire commissioners (JBPFC). After Step One, the grievant could either pursue a hearing before the JBPFCC or could pursue arbitration, but not both. Finally, the agreement provided that the grievance and arbitration provision "shall not be construed as limiting or abrogating any rights or remedies provided by Wisconsin Statutes..."

The collective bargaining agreement in this case provides that after Step One, the grievant could either pursue a hearing before the JBPFPC or could pursue arbitration, but not both. The WERC ruled that this was a mandatory subject of bargaining.

In City of DePere, Dec. No. 19703-B (WERC 12/83), the WERC decided that a grievance and arbitration provision could not be applied at any point before a board of police and fire commissioners had had a chance to hear and decide a disciplinary matter because section 62.13(5)(d)-(f), Wis. Stats., provides that the board "shall" hear and decide such matters. The WERC distinguished City of DePere from the present case on the grounds that the requirement that the board "shall" hear and decide matters is limited to circumstances where the board's jurisdiction has been invoked ("[n]o hearing... shall be held unless requested by the suspended subordinate), section 62.13(5)(c), Stats., and that the issue in the present case is whether the grievance and arbitration provision can be made available where the board's jurisdiction has not been invoked (WERC's decision, p. 14). In answering this issue in the affirmative, the WERC stated:

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.

The City challenges the WERC's decision, primarily on the basis of the exclusive remedy principle (the exclusive remedy for a suspension imposed by the chief of police is a hearing before the JBPFPC and a subsequent appeal to the Circuit Court).

The PFC is a creature of statute with its powers and duties set forth in section 62.13, Wis. Stats. In construing section 62.13, Wis. Stats., the court said, in Racine Fire and Police Comm. v. Stanfield, 70 Wis. 2d 395, at 398-399:

...that the fire and police commission can assert its authority even when it may appear to be antagonistic to the policies of the city upon the overriding consideration that uniformity of management of fire and police affairs is a matter of statewide concern.

It is the general rule that an agency or board created by the legislature has only those powers which are either expressly conferred or which are, by necessity, to be implied from the four corners of the statute under which it operates. State ex rel. Farrell v. Schubert (1971), 52 Wis. 2d 351, 190 N.W. 2d 529; Ford v. Wisconsin Real Estate Examining Board (1970), 48 Wis. 2d 91, 179 N.W. 2d 786; American Brass Co. v. State Board of Health (1944), 245 Wis. 440, 15 N.W. 2d 27. The effect of this rule has generally been that such statutes are strictly construed to preclude the

exercise of a power which is not expressly granted. See: 3 Sutherland, Statutory Construction (4th ed.), p. 150, sec. 65.02. 1/

In Schiller v. DILHR, 103 Wis. 2d 353, 309 N.W. 2d 5 (Wis. App. 1981), the Wisconsin Court of Appeals interpreted statutory language related to the Labor and Industry Review Commission (LIRC) similar to the language of section 62.13, Stats. Like police and fire commissions, LIRC acts as a quasi-judicial body. LIRC holds evidentiary hearings, applies a statutory standard of review, and issues decisions. Once LIRC issues a decision, the parties to that decision "...may commence action for judicial review..." in the circuit courts. See section 108.09(7)(a), Wis. Stats., (1991-92) (related to unemployment compensation hearings); section 102.23(1)(a), Wis. Stats., (1991-92) (related to workers compensation hearings) ; section 111. 395, Wis. Stats., (1991-92) (related to discrimination cases).

As in this case, a central issue in Schiller was whether the use of the words "may commence action for judicial review" meant employees could use appeal procedures other than those set forth in the statutes cited above. 103 Wis. 2d at 356, 309 N.W. 2d at 6-7. The Schiller court said no. It wrote, "Where a statute provides a direct method of judicial review of agency action, the method is generally exclusive." 103 Wis. 2d at 355, 309 N.W. 2d at 6. The Union has made similar arguments in this case. Because of the similarity between the statutes describing the LIRC appeals process and the corresponding provision in section 62.13, Wis. Stats., the same analysis applies to the case at hand. Section 62.13, Wis. Stats., makes no provision for arbitration. Judicial review is the exclusive method of appeal under section 62.13, Wis. Stats., and the WERC's decision is in error.

Further support for the City's position is found in Drivers, etc., Local No. 695 v. WERC, 121 Wis. 2d 291, 359 N.W. 2d 174 (Ct. App. 1984). The court there stated (121. Wis. 2d at 297-98):

Section 62.13, Stats., specifically regulates police and fire departments and "shall be construed as an enactment of state-wide concern for the purpose of providing a uniform regulation of police and fire departments." Sec. 62.13(12). It regulates several matters that other occupational groups are free to bargain and only one provision, sec. 62.13(4)(d), is expressly made subject to Chapter 111, Employment Relations. (6)

(6) The other matters regulated include rest days, sec. 62.13(7m), Stats., hours of labor, sec. 62.13(7n), disciplinary actions against subordinates, sec. 62.13(5), and dismissal and employment, sec. 62.13(5m). Only sec. 62.13(4), which regulates the reemployment of subordinates, specifies at (d) that examinations given shall be "subject to sec. 111.321 and 111.335, arrest and conviction record." Section 111.321, Stats., specifies prohibited bases of employment discrimination, sec. 111.322 defines prohibited employment discrimination on the basis of arrest or conviction record.

* * *

In this case sec. 62.13, Stats., is specific to police and fire departments. It sets forth detailed prescriptions on matters sec. 111.70, Stats., does not address. Section 62.13 describes more narrowly the areas in which municipal police and fire departments

may bargain than the general municipal employee statute, sec. 111.70. We conclude that sec. 111.70, in the absence of sec. 62.13, could be interpreted to permit a collective bargaining agreement that provided layoff by bargaining unit seniority, since if sec. 111.70 stood alone the statutes would be silent on the matter. However, because sec. 62.13 specifically prohibits layoff in police and fire departments on any other basis than length of service in the department, we conclude that the legislature has expressly prohibited bargaining any contract provision that violates that statute. (Emphasis added)

The court thus concluded that the legislature's specification of authority over certain issues as resting in the domain of the PFC precludes any infringement of the PFC's authority by collective bargaining.

This agreement was entered into between the City and the JPPA. The PFC was not a party to the agreement and is an independent commission established by statute with specific powers and responsibilities. The WERC in its decision has harmonized this contract with section 62.13, Wis. Stats., and Chapter 111 by creating a new procedure, i.e., arbitration as an alternative method to deal with disciplinary matters. This court is not persuaded by the authorities cited in support of that conclusion.

In summary, the language contained in the Racine and Schiller cases suggests that a statute should be strictly construed to preclude the exercise of a power which is not expressly granted. The power to demote, suspend and discharge employees is within the exclusive authority of the PFC, and judicial review of PFC decisions is the exclusive method of appeal under section 62.13, Wis. Stats.

The decision of the WERC is reversed.

Dated: February 18, 1994

BY THE COURT:

/s/ John H. Lussow

John H. Lussow

Circuit Judge

c: Atty. Dennis M. White

Atty. David C. Rice Asst. Atty. Gen.

Atty. James R. Korom

Atty. Richard Thal

ENDNOTES

1/ Although the Supreme Court framed the issue which is the subject of this action, the court did not decide the issue. Nevertheless, the court's analysis (dicta) is persuasive to this court.