STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF APPLETON

Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and

APPLETON PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 257, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO

Case 399
No. 59103
DR(M)-616

Decision No. 30253

Appearances:

Attorney Ellen Totzke, Deputy City Attorney, City of Appleton, 100 North Appleton Street, Appleton, Wisconsin 54911-4799, appearing on behalf of the City of Appleton.

Shneidman, Hawks & Ehlke, S.C., by **Attorney Timothy E. Hawks,** 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Appleton Professional Firefighters Association, Local 257, International Association of Fire Fighters, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On August 8, 2000, the City of Appleton filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether the City had a duty to bargain with the Appleton Professional Firefighters Association, Local 257, International Association of Firefighters, AFL-CIO over certain matters.

A hearing on the petition was held in Appleton, Wisconsin on October 13, 2000 by Examiner Peter G. Davis, a member of the Commission's staff. During the hearing, the parties resolved or refined portions of the dispute.

The parties thereafter reached agreement on a 2000-2002 contract that included an agreement that certain provisions of the contract would continue to be included in or would be deleted from the 2000-2002 contract based on this declaratory ruling. The parties filed written argument, the last of which was received January 29, 2001.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Appleton, herein the City, is a municipal employer having its principal offices at 100 North Appleton Street, Appleton, Wisconsin.

2. Appleton Professional Firefighters Association, Local 257, International Association of Fire Fighters, AFL-CIO, herein the Union, is a labor organization having its principal offices in Appleton, Wisconsin.

3. The City and the Union have a dispute over their duty to bargain as to underlined portions of the following language:

Article 22-Disciplinary Action

A. Infractions of any rules of conduct established by the City of which the Union has been duly notified shall be subject to disciplinary action. The Fire Fighter and the Union shall be notified not more than seven (7) days (excluding Saturdays, Sundays and holidays) from the date the City knew or should have known of the infraction or incident and unless so notified, no disciplinary action shall be taken thereon.

EXHIBIT B-DISCIPLINARY ACTION SCHEDULE

. . .

C.

Provided, however, that all previous warnings and penalties will be stricken from an employee's record after one (1) year from the previous tardy offense.

. . .

E. Prior disciplinary action for a related offense shall not be used as a basis for progressive discipline when one year or more has elapsed since the previous related offense.

4. The disputed portion of Article 22 is primarily related to conditions of employment.

5. The disputed portions of Exhibit B are primarily related to conditions of employment.

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

CONCLUSIONS OF LAW

1. The disputed portion of Article 22 is a mandatory subject of bargaining.

2. The disputed portions of Exhibit B are mandatory subjects of bargaining to the extent they apply to disciplinary decisions that are not subject to the jurisdiction of the board of police and fire commissioners and circuit court under Secs. 62.13(5)(em) and (5)(i), Stats., respectively.

3. The disputed portions of Exhibit B are prohibited subjects of bargaining to the extent they apply to disciplinary decisions that are subject to the jurisdiction of the board of police and fire commissioners and circuit court under Secs. 62.13(5)(em) and (5)(i), Stats., respectively.

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

DECLARATORY RULING

1. The City of Appleton and the Appleton Professional Fire Fighters Association have a duty to bargain within the meaning of Secs. 111.70(1)(a) and 111.70(3)(a)4, Stats., over the disputed portion of Article 22.

2. The City of Appleton and the Appleton Professional Fire Fighters Association have a duty to bargain within the meaning of Secs. 111.70(1)(a) and 111.70(3)(a)4, Stats., over the disputed portions of Exhibit B to the extent set forth in Conclusion of Law 2.

3. The City of Appleton and the Appleton Professional Fire Fighters Association are prohibited from bargaining within the meaning of Secs. 111.70(1)(a) and 111.70(3)(a)4, Stats., over the disputed portions of Exhibit B to the extent set forth in Conclusion of Law 3.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of December, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Chairperson James R. Meier did not participate.

City of Appleton

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

Applicable Legal Standards

In WEST BEND EDUCATION ASS'N V. WERC, 121 WIS.2d 1, 7-9 (1984), the Wisconsin Supreme Court concluded the following as to how Sec. 111.70(1)(a), Stats., (then Sec. 111.70(1)(d), Stats.) should be interpreted when determining whether a subject of bargaining is mandatory or permissive:

> Sec. 111.70(1)(d) sets forth the legislative delineation between mandatory and nonmandatory subjects of bargaining. It requires municipal employers, a term defined as including school districts, sec. 111.70(1)(a), to bargain "with respect to wages, hours and conditions of employment." At the same time it provides that a municipal employer "shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes." Furthermore, sec. 111.70(1)(d) recognizes the municipal employer's duty to act for the government, good order and commercial benefit of the municipality and for the health, safety and welfare of the public, subject to the constitutional statutory rights of the public employees.
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> Sec. 111.70(1)(d) thus recognizes that the municipal employer has a dual role. It is both an employer in charge of personnel and operations and a governmental unit, which is a political entity responsible for determining the public policy and implementing the will of the people. Since the integrity of managerial decision making and of the political process requires that certain issues not be mandatory subjects of collective bargaining, UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89, 259 N.W.2D 724 (1977), sec. 111.70(1)(d) provides an accommodation between the bargaining rights of public employees and the rights of the public through its elected representatives.
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> In recognizing the interests of the employees and the interests of the municipal employer as manager and political entity, the statute necessarily presents certain tensions and difficulties in its application. Such tensions arise

> principally when a proposal touches simultaneously upon wages, hours, and conditions of employment and upon managerial decision making or public policy. To resolve these conflict situations, this court has interpreted sec. 111.70(1)(d) as setting forth a "primarily related" standard. Applied to the case at bar, the standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to "wages, hours and conditions of employment," to "educational policy and school management and operation," to "'management and direction' of the school system" or to "formulation or management of public policy." Unified SCHOOL DISTRICT NO. 1 OF RACINE COUNTY v WERC, 81 WIS.2D 89, 95-96, 102, 259 N.W.2D 724 (1977). This court has construed "primarily" to mean "fundamentally," "basically," or "essentially," BELOIT EDUCATION ASSO. V. WERC, 73 WIS.2D 43, 54 242 N.W.2D 231 (1976).
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> As applied on a case-by-case basis, t his primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contract, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE CO. V. WERC SUPRA, 81 WIS.2D AT 102; BELOIT EDUCATION ASSO., SUPRA, 73 WIS.2D AT 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable competing interests in a specific situation and evaluating them. (footnotes omitted).

When it is asserted that a proposal is a prohibited subject of bargaining, the question is whether the proposal irreconcilably conflicts with a statutory provision or limits constitutional rights. EAU CLAIRE COUNTY V. TEAMSTERS UNION 662, 235 WIS.2D 385 (2000); CITY OF JANESVILLE V. WERC, 193 WIS.2D 492 (CT.APP. 1995); FORTNEY V. SCHOOL DISTRICT OF WEST SALEM, 108 WIS.2D 169 (1982); PROFESSIONAL POLICE ASSOCIATION V. DANE COUNTY, 106 WIS.2D 303 (1982); GLENDALE PROF. POLICEMAN'S ASSO. V. GLENDALE, 83 WIS.2D 90 (1978); WERC V. TEAMSTERS LOCAL NO. 563, 75 WIS.2D 602 (1977).

The Wisconsin Supreme Court has held that the provisions of the Municipal Employment Relations Act (and collective bargaining provisions bargained under the Act's auspices) should be harmonized with other statutes whenever possible. MUSKEGO-NORWAY CONSOLIDATED JT. SCHOOL DIST. NO. 9 V. WERB, 35 WIS.2D 540 (1967); GLENDALE, SUPRA. In GLENDALE, the Court found that a chief of police's promotional discretion under Sec. 62.13, Stats., could be harmonized with a collective bargaining agreement that required the chief to promote the most senior qualified candidate. The Court reasoned that harmonization was possible because the agreement merely restricted but did not eliminate the chief's statutory discretion. On the other hand, in JANESVILLE, SUPRA, the Court of Appeals concluded that it was not possible to harmonize a proposal that would allow police officers to use final and binding arbitration to review suspensions imposed by a police chief because such a proposal eliminated the board of fire and police commission's statutory authority under Sec. 62.13, Stats.

Applicable Statutes

Section 62.13(5), Stats., provides as follows:

(5) DISCIPLINARY ACTIONS AGAINST SUBORDINATES.

(a) A subordinate may be suspended as hereinafter provided as a penalty. The subordinate may also be suspended by the commission pending the disposition of charges filed against the subordinate.

(b) Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

(c) A subordinate may be suspended for just cause, as described in par.(em), by the chief or the board as a penalty. The chief shall file a report of such suspension with the commission immediately upon issuing the suspension. No hearing on such suspension shall be held unless requested by the suspended subordinate. If the subordinate suspended by the chief requests a hearing before the board, the chief shall be required to file charges with the board upon which such suspension was based.

(d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges shall be public, and both the accused and the

complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas which shall be issued by the president of the board on request and served as are subpoenas under ch. 885.

(e) If the board determines that the charges are not sustained, the accused, if suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

(em) No subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board under par. (e), based on charges filed by the board, members of the board, an aggrieved person or the chief under par. (b), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3 was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

(f) Findings and determinations hereunder and orders of suspension, reduction, suspension and reduction, or removal, shall be in writing and, if they follow a hearing, shall be filed within 3 days thereof with the secretary of the board.

(g) Further rules for the administration of this subsection may be made by the board.

(h) No person shall be deprived of compensation while suspended pending disposition of charges.

(i) Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice of the appeal on the secretary of the board within 10 days after the order is filed. Within 5 days after receiving written notice of the appeal, 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 precedence of 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 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 is there just cause, as described under par. (em), to sustain the charges against the accused? No costs shall be allowed either party and the clerk's fees shall be applied by the city. If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to pay as though in continuous service. If the order of the board is sustained it shall be final and conclusive.

(j) The provisions of pars. (a) to (i) shall apply to disciplinary actions against the chiefs where applicable. In addition thereto, the board may suspend a chief pending disposition of charges filed by the board or by the mayor of the city.

The provisions of Secs. 62.13(5)(em) and (5)(i), Stats., became law after the Commission decided the Sec. 62.13 issue before it in what came to be CITY OF JANESVILLE V. WERC, 193 WIS.2D 492 (CT.APP. 1995). Thus, Secs. 62.13(5)(em) and (5)(i), Stats., were not before the Court in JANESVILLE.

ARTICLE 22

The disputed language of Article 22 provides:

A. Infractions of any rules of conduct established by the City of which the Union has been duly notified shall be subject to disciplinary action. The Fire Fighter and the Union shall be notified not more than seven (7) days (excluding Saturdays, Sundays and holidays) from the date the City knew or should have known of the infraction or incident and unless so notified, no disciplinary action shall be taken thereon.

The City asserts that the arbitrary time limitation for completion of an investigation contained in Article 22 conflicts with the fire chief's ability to meet the statutory obligations created by Secs. 62.13(5)(em) 3, 4 and 5, Stats., to discover through a fair and objective investigation whether there is substantial evidence that a violation of a rule or order occurred. The City also alleges that the time limitation may create excessively hasty investigations that in turn violate employees' constitutional procedural due process rights in disciplinary situations. Thus, the City argues that Article 22 is to that extent a prohibited subject of bargaining because it forces the City and the chief to: (1) make disciplinary decisions that either violate employee due process rights by failing to complete an investigation before making the required notification, or violate Sec. 62.13(5), Stats., by making inconsistent disciplinary decisions due to the unreasonably restrictive time limitation, or (2) withhold discipline in situations where discipline is appropriate because the Article 22 time limitation was not met. The City contends that under these circumstances, it is not possible to harmonize Article 22 with Sec. 62.13, Stats., under the teachings of the Court in JANESVILLE and GLENDALE.

The Union disputes the City's interpretation of Article 22. The Union argues that Article 22 does not require that the investigation of a potential disciplinary situation be completed within the seven day time limitation. The Union asserts that notice of the "incident" is all that is required if an investigation is ongoing. On that basis, the Union asks that the City arguments premised on an alleged lack of time to conduct an investigation should be rejected and that, consistent with existing precedent, the disputed portion of Article 22 be found to be a mandatory subject of bargaining.

We concur with the Union's interpretation of Article 22. In light of the use of the word "incident," we think it clear that Article 22 only requires that the employee and Union be notified that employee conduct is under investigation and thus does not require that the investigation be completed within the seven day period. Therefore, because we have rejected the premise upon which the City argues that Article 22 is a prohibited subject of bargaining, we conclude that Article 22 is not a prohibited subject of bargaining.

The Union correctly argues that in BELOIT SCHOOL DISTRICT V. WERC 73 WIS.2D. 43 (1976), the Court affirmed the Commission conclusion that notice of "alleged" employee job performance problems that could lead to discipline was a mandatory subject of bargaining. We find this precedent to be a persuasive basis for concluded that both the notice requirement in Article 22 and the related Article 22 prohibition against discipline where the notice is not given are mandatory subjects of bargaining given their close relationship to employee discipline/job security.

EXHIBIT B-DISCIPLINARY ACTION SCHEDULE

The disputed portions of Exhibit B provide:

. . .

C.

Provided, however, that all previous warnings or penalties will be stricken from an employee's record after one (1) year from (sic)previous tardy offense.

. . .

E. Prior disciplinary action for a related offense shall not be used as a basis for the progressive discipline when one year or more has elapsed since the previous related offense.

The City does not contest that matters related to employee discipline/job security are strongly related to employees' conditions of employment. However, the City asserts that because Sec. 62.13(5)(em)7, Stats., requires that the board of police and fire commissioners consider the totality of an employee's "record of service" when making disciplinary decisions as to suspensions, reductions in rank, suspensions and reductions in rank or terminations, the fire chief must of necessity be able to consider the employee's "record of service" when deciding whether to suspend or bring charges against an employee. Because portions of Exhibit B preclude consideration of certain disciplinary aspects of an employee's "record of service", the City asserts that Exhibit B is to that extent a prohibited subject of bargaining.

While acknowledging that some of the chief's disciplinary options are not subject to Sec. 62.13, Stats., the City nonetheless argues that it should not be compelled to bargain over a proposal that would set up two different standards for the chief's disciplinary decision making-one standard for disciplinary actions that are subject to the jurisdiction of the board of fire and police commissioners under Sec. 62.13, Stats., and one for disciplinary actions that are not.

The Union argues that under GLENDALE, it has the right to seek to limit the chief's discretion to consider stale disciplinary actions when determining what, if any, discipline is appropriate.

Section 62.13(5)(em)7, Stats. provides:

> (em) No subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board under par. (e), based on charges filed by the board, members of the board, an aggrieved person or the chief under par. (b), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board **shall apply the following standards**, to the extent applicable:
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> . . .
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> 7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the **subordinate's record of service** with the chief's department.
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> . . .
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> (i)Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court . . . **The question to be determined by the court shall be: Upon the evidence is there just cause, as described under par. (em), to sustain the charges against the accused?** . . . (emphasis added)

We begin by holding that because the above quoted portions of Sec. 62.13(5), Stats., state that: (1) the board of fire and police commissioners "shall" apply Sec. 62.13(5)(em) 7, Stats., when determining whether charges should be sustained and (2) the circuit court on appeal must also consider all of par. (em), a collective bargaining proposal cannot restrict the scope of the "record of service" to be considered by the board or by a reviewing circuit court. Applying the teachings of GLENDALE and JANESVILLE, we conclude is not possible to harmonize these statutory requirements with the duty to bargain. Thus, to the extent the Union's proposal restricts the ability of the board or circuit court to consider an employee's complete disciplinary record, the proposal is a prohibited subject of bargaining.

The focal point of the parties' dispute as to this proposal is whether the Union can propose that the chief's consideration of an employee's "record of service" be restricted when the chief decides whether to bring charges against an employee under Sec. 62.13(5), Stats. The Union argues the chief has discretion to exercise when deciding whether to bring charges and that under GLENDALE, it is permissible to restrict the exercise of that discretion. The City counters by contending that if the board and circuit court must consider Sec. 62.13(5)(em)7,

Stats., when deciding whether to sustain charges or sustain the board's decision on appeal, respectively, then the chief must be allowed to consider the same matters when deciding whether to bring such charges. We conclude that the City has the better of this argument. But for the applicability of Sec. 62.13(5)(em), Stats., it would be clear that the discipline/job security implications of a proposal that clears an employee's disciplinary record after the passage of time would make such a proposal primarily related to conditions of employment and thus a mandatory subject of bargaining. However, we conclude that Sec. 62.13(5)(em), Stats., creates standards that the chief must consider when seeking the suspension, reduction in rank, suspension and reduction in rank, or discharge of an employee. Thus, although the chief has discretion on whether to seek suspension etc., we hold that the statute requires that he consider all of the statutory (5)(em) factors when he decides to do so. Therefore, we find these Union proposals to be prohibited subjects of bargaining to that extent as well.

There remains for resolution the question of whether the disputed portions of Exhibit B are mandatory subjects of bargaining to the extent they apply to disciplinary actions that are not subject to Sec. 62.13(5)(em), Stats. The City argues that it cannot/should not be that the chief must consider an employee's "record of service" as to proposed disciplinary action covered by Sec. 62.13(5)(em), Stats., but cannot consider all past discipline as to disciplinary action that is not subject Sec. 62.13, Stats. While the City's argument is relevant to the merits of whether such a proposal should be included in a collective bargaining agreement, it is not persuasive as to the question of whether the proposal is a prohibited subject of bargaining. Where Sec. 62.13(5)(em), Stats., does not apply, there is no statutory conflict between the duty to bargain over matters primarily related to conditions of employment and the requirements of another statute. Absent such a conflict, the disputed language is a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 27th day of December, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Chairperson James R. Meier did not participate.

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