STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OSHKOSH PROFESSIONAL POLICE OFFICERS' ASSOCIATION, Complainant,

and

CITY OF OSHKOSH and CHIEF DAVID ERICKSON, Respondents.

Case 334
No. 61221
MP-3827

(del Plaine Termination)

Decision No. 30443-A

Appearances:

Frederick J. Mohr, S.C. by **Attorney Frederick J. Mohr**, P.O. Box 1015, Green Bay, WI 54305, appearing on behalf of the Complainant.

Davis & Kuelthau, S.C. by **Attorney Susan M. Love**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-6613, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: The above-named Complainant, Oshkosh Professional Police Officers' Association, having filed with the Commission a complaint, alleging that the above-named Respondents, City of Oshkosh and Police Chief David Erickson, have violated the provisions of Ch. 111.70, MERA, by refusing to proceed to arbitration on a grievance brought by the Association on behalf of Officer Roberta del Plaine, one its members; and the Commission having appointed Daniel Nielsen, an Examiner on its staff to conduct a hearing and to make Findings of Fact and Conclusions of Law, and to issue appropriate Orders; and a hearing having been on held on the complaint on August 28, 2002, at the City Hall in Oshkosh, Wisconsin, at which time all parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute; the parties submitted post-hearing briefs and reply briefs; and in January of 2003, the Examiner having written to the parties, advising them of pending decisions by the Wisconsin Supreme Court in cases relevant to proper resolution

of conflicts between the jurisdiction of the Police and Fire Commission and the collective bargaining agreement, and holding the record open until such time as the Court ruled in those cases, and the parties had an opportunity to comment; and on May 30, 2003, the Court having issued its rulings in KRAUS V. CITY OF WAUKESHA PFC, 2003 WI 51, 261 WIS.2D 485, 662 N.W.2D 294, (hereinafter referred to as "KRAUS") and CITY OF MADISON V. WERC, 2003 WI 52, 261 WIS.2D 423, 662 N.W.2D 318 (hereinafter referred to as "MADISON V. WERC"); and the Examiner having forwarded copies of the rulings to the parties; and the parties having submitted additional briefs on the significance of those rulings, the last of which was received on July 16, 2003; and the Examiner being fully advised in the premises, now makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. The Complainant, Oshkosh Professional Police Officers' Association, hereinafter referred to as either the Complainant or the Association, is a labor organization which the is the exclusive bargaining representative for non-supervisory sworn law enforcement personnel employed by the City of Oshkosh Police Department. The Association's bargaining representative is Attorney Frederick J. Mohr, P.O. Box 1015, Green Bay, WI 54305.

2. The Respondent, City of Oshkosh, hereinafter referred to as either the Respondent or the City, is a municipal employer providing general governmental services to the people of Oshkosh, Wisconsin. Among the services provided is law enforcement, through the City's Police Department. The Respondent, David W. Erickson is, at all times relevant to this dispute, the Chief of the Oshkosh Police Department, and Richard Wollangk is the City Administrator. The City's principal offices are maintained at 215 Church Street, Oshkosh, Wisconsin.

3. The Union and the Authority have been parties to a series of collective bargaining agreements. The agreement in effect at the relevant times contained, *inter alia*, the provisions describing the general purpose of the agreement, the rights of management, the retention of legal rights by each party and the effect of illegality of any provision of the contract, the normal progression of discipline, what constitutes a grievance and the procedure to be followed in the event of a grievance:

AGREEMENT

> THIS AGREEMENT is entered into by and between the CITY OF OSHKOSH, Wisconsin, party of the first part hereinafter referred to as the Employer, and the OSHKOSH PROFESSIONAL POLICE OFFICERS ASSOCIATION, party of the second part hereinafter referred to as the Association.

IN ORDER TO INCREASE GENERAL EFFICIENCY, to maintain the existing harmonious relations between the Employer and its employees, to promote the morale, well being and security of said employees, to maintain a uniform minimum scale of wages, hours, and conditions of employment among the employees and to promote orderly procedures for the processing of any grievance between the employer and the employees, the following Employment Contract is made.

ARTICLE I

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wis. Stats. Sec. 111.70.

. . .

ARTICLE XI

WAIVER OF RIGHTS

Neither party to this agreement by such act at the time hereof or subsequent hereto agrees to and does waive any rights possessed by it or them under state and federal laws, regulations or statutes. In the event any clause or portion of this agreement is in conflict with statutes of the State of Wisconsin governing municipalities or other statutes such clause or portion of the agreement shall be declared invalid and negotiations shall be instituted to adjust the invalidated clause or portion thereof.

. . .

ARTICLE XIV

PROGRESSION OF DISCIPLINARY ACTION

Progression of disciplinary action shall be as follows: First, oral reprimand or written reprimand. An Association representative may be present with the employee at the time (or at such time as) any oral or written reprimand, suspension or dismissal is registered with the employee.

The Association may be furnished a copy of any written notice of reprimand or suspension. A written reprimand sustained in the grievance procedure or not contested shall be recorded.

An employee shall have the right to the presence of an Association representative when his work performance or conduct affecting his status as an employee are the subject of discussion for the record. The City shall, at all steps of this Article, affirmatively ask the employee if he desires an Association representative to be present.

. . .

ARTICLE XVI

GRIEVANCE PROCEDURE

Both the Association and the City 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 or knowledge of the incident, whichever is the latter. Any grievance not reported or filed within five (5) days shall be invalid. A grievance is defined as any dispute or misunderstanding relating to employment between the City and the Association.

For the purpose of the final step of the grievance procedure, a grievance will be limited to the interpretation or application of the terms and conditions of this agreement, including past practices and policies incorporated in this agreement by its terms, and shall be handled in the following manner:

1. The grieved employee shall present the grievance orally to his Supervisor, either alone or accompanied by an Association representative, or if the employee refuses to present the grievance, the Association may present the grievance. The supervisor shall, within three (3) days, excluding Saturdays, Sundays and holidays, provide a response to the employee.

2. If the grievance is not settled at the first step, the grievance shall be presented in writing to the Police Chief within five (5) days (Saturday, Sunday and Holidays excluded). The Chief shall within five (5) days (Saturday, Sunday, and Holidays excluded) hold an informal meeting with the aggrieved employee, and Association representatives. The Chief's Response to the grievance shall be in writing. If the grievance is not resolved to the satisfaction of all parties within three (3) days (Saturday, Sunday and Holidays excluded), either party may proceed to the next step.

3. The grievance shall be presented in writing to the City Manager for disposition within five (5) working days (Saturday, Sunday and Holidays excluded). Response to the grievance shall be in writing.

4. If the grievance is not settled under the provisions of paragraph 3 above and one of the parties deems the issue to be arbitrated, the party shall process the grievance within five (5) days (Saturday, Sunday and Holidays excluded) of completion of the provisions of paragraph 3 to arbitration. Arbitration procedures shall follow that outlined in State Statutes. The decision of the arbitrator shall be final and binding on the parties, subject to judicial review.

Expenses for the arbitrator's services and the proceedings shall be borne equally by the employer and the Association. However, each party shall be responsible for compensating its own representatives and witnesses.

4. On October 18, 2001, Chief Erickson sent a notice of termination to Officer Roberta del Plaine, who was a member of the bargaining unit represented by the Association. The notice advised Officer del Plaine that:

. . .

Because your medical condition prevents you from fulfilling the police officer job requirement of regular and predictable attendance and poses the threat of a substantial risk of harm to yourself and others when you are performing your duties, your employment with the City of Oshkosh is terminated effective October 18, 2001.

. . .

5. In response to the termination letter, Attorney Mohr sent a letter to Chief Erickson on October 24th, grieving the termination:

. . .

On behalf of the Association and Roberta del Plaine, I am grieving your termination notice of October 18, 2001. The basis of the grievance is as follows.

1. Your action violates Article 14 - Progression of Disciplinary Action.

2. Your actions fail to comply with the statutory requirement contained in Wis. Stats. § 62.13(5).

3. Your actions violate Policy 115.13.

4. Your actions violate the Family Leave Act.

5. Your actions are discriminatory.

Pursuant to the contract, please call to schedule a required contractual meeting.

6. On January 4, 2002, Attorney Mohr appealed the termination to City Manager Richard Wollangk:

. . .

I am the attorney for the Oshkosh Professional Police Association. I am appealing a grievance which was filed on behalf of Roberta del Plaine to your level of the grievance procedure.

On October 18, Roberta del Plane was terminated from her employment as an Oshkosh police officer. On October 24, I wrote to Chief Erickson requesting a meeting pursuant to our contractual requirements. I am enclosing a copy of the letter for your perusal.

Chief Erickson responded that he could not meet within the contractual deadlines due to prior commitments. We accommodated his request and met thereafter on November 5. We presented our arguments at that time and the Chief indicated that he would consider them but it might take some time to respond. I again accommodated that request and waited one month before contacting him again to inquire regarding the status of that grievance. I am enclosing my letter of December 7 for your perusal.

I have not yet heard from the Chief and must appeal the grievance to your level at this time. I have received no explanation from the Chief on why he did not comply with the contractual requirements in response to our request. It is my feeling that perhaps he understands he exceeded his authority and consequently violated the terms of our contract in the manner in which he terminated Ms. del Plaine.

Although there are several issues dealing with the substance of the discipline, the most glaring error of the Chief was his failure to follow the procedural requirements of the Wisconsin Statutes and the Department's own policies and procedures as well as our contract.

Specifically, Department Policy 115.13 outlines the method by which an employee may be fired. This policy authorizes the Chief to suspend the officer but the actual termination can only be decided upon by the Police and Fire Commission. This policy adopts the procedures which are contained in Wis. Stats. § 62.13(5). Under these procedures, the Chief is required to forward formal charges to the Police and Fire Commission whereupon the affected employee has the opportunity to request a hearing. The Chief failed to follow this procedure and is in violation of the statute.

It should be of note that an officer must continue to be paid until this procedure is followed. Officer del Plaine's pay was terminated and as the clock ticks so does the amount of money the City ultimately will be responsible for paying her during this hiatus.

In essence, the Chief terminated Officer del Plaine for tardiness. There are serious questions of substance regarding this calculation and imposition of a termination which directly violates the Family Leave Law. That aside, his failure to follow proper procedure is enough that Ms. del Plaine should be reimbursed until procedures are properly followed.

I would ask you to take these matters into consideration and review' with the City Attorney the proper procedures on termination as well as the statutory requirements of continued pay until such time as the procedures are followed and the officer is given the opportunity to request a hearing before the Police and Fire Commission. With the tight budget constraints the City constantly reminds us of at the bargaining table, I find it ironic that the Chief would let this matter slide as long as he has knowing the potential for back pay. I trust that you will look into the City's best interest to get this matter resolved at the earliest date.

I look forward to your response.

. . .

7. Wollangk replied to Mohr on January 14th, denying that Chief Erickson had not replied to the initial grievance. He also denied that the City had terminated Officer del Plaine for tardiness, asserting instead that Officer del Plaine had been removed from the job because she pronounced herself unfit for duty:

. . .

On January 4, 2002 you filed an appeal to the grievance filed on behalf of Ms. Del Plaine. In your appeal you indicated that Chief Erickson had not answered the grievance. On November 15, 2001, Attorney Susan Love responded on behalf of Chief Erickson.

> I have reviewed the grievance. The grievance is denied. Ms. Del Plaine was not terminated for tardiness as you allege. Ms. Del Plaine was removed from her position when she informed Chief Erickson that she was not fit to perform the duties of a police officer and was a threat to the safety of herself and others. Her termination was not discriminatory and was not a violation of the FMLA.
>
> You indicated in the meeting with Chief Erickson that Ms. Del Plaine may consider a settlement agreement to resolve this matter. If you are still interested in settling the matter, please send a settlement demand to Susan Love, our attorney in this matter. . . .

8. The Association appealed the grievance to arbitration on January 18th, and asked that the Wisconsin Employment Relations Commission assign an arbitrator. Arbitrator David Shaw was assigned.

9. On January 30th, Officer del Plaine filed charges with the Equal Rights Division of the Wisconsin Department of Workforce Development, asserting that her termination was a violation of the Wisconsin Fair Employment Law, and constituted discrimination based on disability and/or a refusal to accommodate a disability.

10. On April 30th, Attorney Susan Love, on behalf of the City, advised Arbitrator Shaw that the City would not concur in the request for arbitration, because it believed the grievance was not arbitrable.

11. The instant complaint was filed on May 17, 2002, alleging that the City's refusal to proceed to arbitration on the grievance over Officer del Plaine's termination was a violation of Sec. 111.70(3)(a)1, 3, 4, and 5.

12. The decision to terminate Officer del Plaine was made by the Chief of Police, without the filing of charges with the Police and Fire Commission.

13. The termination of Officer del Plaine was not an act of discipline, in that no rule violation or other misconduct was alleged.

14. The termination of Officer del Plaine was not part of an effort to bring about a general reduction in the size of the Police Department's workforce.

15. The termination of Officer del Plaine was accomplished through the exercise of management rights, pursuant to Article I of the collective bargaining agreement.

16. The termination of Officer del Plaine did not raise any issues addressed in Sec. 62.13(5) or (5m), Stats.

17. The termination of Officer del Plaine created a dispute or misunderstanding relating to employment between the City and the Association. The arbitration provision of the collective bargaining agreement cannot be said with positive assurance to exclude an interpretation allowing the arbitration of the del Plaine grievance.

18. The collective bargaining agreement contains no provision expressly barring the arbitration of the grievance filed on behalf of Officer del Plaine.

19. The grievance filed on behalf of Officer del Plaine is arbitrable.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The Complainant, Oshkosh Professional Police Officer Association, is a labor organization within the meaning of Sec. 111.70(1)h, MERA.

2. The Respondent, City of Oshkosh, is an "employer" within the meaning of Sec. 111.70(1)j, MERA.

3. By the acts described in the above and foregoing Findings of Fact, specifically by refusing to proceed to arbitration on the del Plaine grievance, the Respondent Employer violated a collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of the collective bargaining agreement in violation of Sec. 111.70(3)(a)5, and committed a derivative act of interference with the rights of municipal employees, in violation of Sec. 111.70(3)(a)1.

4. By the acts described in the above and foregoing Findings of Fact, specifically by refusing to proceed to arbitration on the del Plaine grievance, the Respondent Employer did not discriminate against any employee for the exercise of protected rights in violation of Sec. 111.70(3)(a)3 or refuse to bargain collectively with any labor organization in violation of Sec. 111.70(3)(a)5.

On the basis of the above and foregoing Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ORDERED that the Respondent City of Oshkosh will immediately

1. Proceed to arbitration on the del Plaine grievance; and

2. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Racine, Wisconsin, this 9th day of October, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

CITY OF OSHKOSH (POLICE)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The facts are not disputed. Officer Roberta del Plaine was employed as a police officer with the City of Oshkosh. Officer del Plaine suffered from migraine headaches, which affected her attendance at work. In October of 2001, Office del Plaine was terminated. The stated reasons were that her condition kept her from satisfying the "police officer job requirement of regular and predictable attendance and poses the threat of a substantial risk of harm to yourself and others when you are performing your duties . . ." A grievance was filed on her behalf by the Association. The City denied the grievance, and the Association appealed to arbitration. After the grievance denial, Officer del Plaine also filed charges with the Equal Rights Division of the Department of Workforce Development, alleging that the City terminated her because of a disability. The City thereafter refused to proceed to arbitration.

ARGUMENTS OF THE PARTIES

The Respondent's Justification for Refusing to Proceed to Arbitration

The Respondent recognizes its obligation under Sec. 111.70(3)(a)5 to arbitrate disputes concerning the "meaning or application of the terms of a collective bargaining agreement . . ." The del Plaine grievance, however, does not assert a claim under the collective bargaining agreement. The City has reserved its statutory rights, except "to the extent expressly abridged by a specific provision" of the contract. On its face, this grievance asserts that the City has engaged in illegal discrimination and a failure to abide by the Family and Medical Leave Act. These are statutory claims, and nowhere in the agreement has the City given up its right to have allegations of statutory violations heard by the proper governmental agency. The jurisdiction for resolving Officer del Plaine's statutory claims lies with government agencies, not with a grievance arbitrator.

The grievance also asserts that the City violated Sec. 62.13, Wis. Stats., relating to the regulation of police and fire departments. In Wisconsin, it is a matter of law that matters governed by Sec. 62.13 are properly the subject of Police and Fire Commission proceedings, and are appealable to the circuit courts, not to a grievance arbitrator.

Inasmuch as each claim raised in the grievance is within the jurisdiction of a regulatory agency or a court, there is no dispute in this case that concerns the "meaning or application" of the contract, and thus there is no duty to submit to grievance arbitration.

The Complainant's Reply

The Complainant asserts that the del Plaine grievance is clearly arbitrable, and that the City has violated Sec. 111.70 in refusing to proceed with arbitration. The negotiated contract defines a grievance as "any dispute or misunderstanding relating to employment between the City and the Association." The del Plaine grievance quite plainly raises a dispute relating to employment. The contract goes on to require arbitration of grievances appealed to arbitration in a timely fashion. This grievance was appealed in a timely fashion. On the face of the grievance procedure, the City is obligated to go forward.

The City's claim that the reservation of legal rights in the Management Rights clause somehow insulates it from arbitration when a grievance raises a discrimination claim is refuted by the language of that clause itself. The legal rights are reserved except where they are "expressly abridged by a specific provision" of the contract. The broad definition of a grievance in the negotiated grievance procedure is a specific provision expressly abridging the City's right to insist on a forum other than arbitration for employment disputes. Officer del Plaine's claim that she was discriminated against is an employment dispute between the parties.

The Complainant agrees that disciplinary actions of the Police and Fire Commission are appealable to the circuit court, and not to a grievance arbitrator. However, there is no action by the Police and Fire Commission in this case. The Chief acted on his own to terminate Officer del Plaine, and never brought charges before the Police and Fire Commission. It is he, and not any grievance arbitrator, who is usurping the rights of the Police and Fire Commission. Having elected to circumvent the statutory channels for discharging sworn officers, the City cannot now hide behind the Police and Fire Commission.

The Respondent's Rebuttal Argument

The Examiner must look to the actual substance of this grievance, rather than relying on general principles. Certainly, there is a presumption in favor of arbitration, but that presumption applies only where the grievance, as filed, actually raises a question which the parties have agreed to arbitrate. Here, the grievance as filed challenges the employee's termination. There is no just cause standard in the contract, and no other provision that can be read to make discharges arbitrable. The mere assertion that a complaint is a grievance under the contract does not automatically trigger a right to arbitration. The Association's own argument is that Sec. 62.13 should govern the dispute, and that it is arbitrable only because the City failed to follow Sec. 62.13. There is absolutely no basis for this assertion. The parties cannot waive state law. If Sec. 62.13 controls the termination, the statutory scheme is exclusive and arbitration is not an option. If the Association has some complaint about the manner in which Sec. 62.13 was applied in this case, it must look to the statute, not the arbitrator, for relief.

Respondent's Argument Concerning Madison and Kraus

The Respondent argues that the decisions of the Wisconsin Supreme Court in MADISON V. WERC and KRAUS cement the exclusivity of the PFC's jurisdiction in matters such as termination. The Court reaffirmed the prior rulings that Sec. 62.13 is comprehensive and exclusive in providing a uniform method of regulating protective services in the state of Wisconsin. Here, the grievance asserts a failure to follow Sec. 62.13, admitting that the *statute* is the source of del Plaines' asserted rights. The Court is clear that "Nothing in MERA authorizes WERC or an arbitrator to displace the authority of the chief or the PFC to make the difficult judgments . . . that they are statutorily entitled and uniquely qualified to make." CITY OF MADISON at page 11. While MADISON concerns other aspects of the PFC's jurisdiction, the Court does not parse out questions of termination for different treatment. Thus, the termination of del Plaine is obviously beyond the scope of the contract's arbitration provision.

As for del Plaines' complaint that the City failed to follow the proper procedures to effect her termination under Sec. 62.13, it does not follow that her remedy is to be found before a grievance arbitrator. Nothing in the contract suggests this outcome. The Court recited the familiar rule that a dispute is arbitrable only if (1) the arbitration clause covers the grievance on its face and (2) if there is no other clause specifically excluding arbitration. This contract contains a broad Management Rights provision, and does not specifically or by implication provide just cause protections for termination. Only reprimands are expressly subject to the grievance procedure. The clear conclusion to be drawn from this is that other discipline is not arbitrable. For these reasons, and for the reasons previously detailed, the Respondent asks that the complaint be dismissed.

Complainant's Argument Concerning Madison and Kraus

The Complainant takes the position that neither CITY OF MADISON V. WERC nor KRAUS has any bearing on this dispute. Those cases involved the demotion of probationary employees. Here, the Chief has asserted the right to terminate a non-probationary officer, even though Sec. 62.13 grants him no such right. The statute requires that the Chief file charges with the PFC as a pre-condition to seeking dismissal of an officer, and that the PFC make detailed findings of fact in support of its ultimate decision. These safeguards were evaded in this case, and the City cannot use the jurisdiction of the PFC as a shield in a case where it refused to invoke that jurisdiction in the first place. The City left Officer del Plaine with only two options – go to court and face the certain allegation that the matter should be deferred to arbitration, or seek arbitration as provided in the labor agreement. As there is a strong public policy favoring the arbitration of disputes, the contract defines a grievance as "any dispute or misunderstanding relating to employment between the City and the Association" and since Officer del Plaine's termination is plainly such a dispute, the Association has pursued the only avenue realistically open to it in order to secure a due process hearing for this officer. Accordingly, the Examiner should find that the Chief overstepped his authority, and that the City has compounded this error by refusing to arbitrate the grievance.

DISCUSSION

This case presents the issue of how completely Sec. 62.13, Stats., occupies the field in police officer terminations. There is no question that, under existing law, a labor agreement cannot interpose a grievance arbitrator where an officer seeks to challenge discipline imposed by a Police and Fire Commission. The Appeals Court in CITY OF JANESVILLE V. WERC, 193 WIS. 2D 492, 504, 535 N.W.2D 34 (CT. APP. 1995) held that a bargaining proposal to allow a grievance arbitrator to review disciplinary decisions of the PFC could not be harmonized with the provisions of Sec. 62.13, which mandate court review of such decisions. In the recent MADISON V. WERC decision, the State Supreme Court found that an attempt to arbitrate demotion decisions by the Fire Chief was inconsistent with the statutory scheme of Section 62.13. Following on that, in CITY OF MADISON V. DEPARTMENT OF WORKFORCE DEVELOPMENT, 2003 WI 76, 262 WIS.2D 652, 664 N.W.2D 584 (2003) (hereinafter referred to as "MADISON V. DWD"), the court found that the jurisdiction of the PFC to determine just cause making final determinations as to discrimination issues, precluding a collateral challenge before the DWD's Equal Rights Division.

Here, the Chief dismissed the officer without seeking to invoke the PFC's authority or processes, and refused to process the grievance to arbitration, thus denying the officer any venue for a hearing or the presentation of a defense. The City asserts that the matter is not arbitrable, both because the labor agreement does not contemplate arbitration of this type of dispute, and because police officer terminations are inarbitrable as a matter of public policy, being exclusively reserved to the Police and Fire Commission.

Traditional Arbitrability Analysis

The initial question is whether the dispute is arbitrable under the traditional test for arbitrability. As recently formulated by the Court majority in MADISON V. WERC, that test is whether the arbitration clause covers the grievance on its face and whether there is another clause specifically excluding arbitration of the dispute.

> . . . "'An order to arbitrate [a] particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" Milwaukee I, 92 Wis. 2d at 152 (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)). There is "a broad presumption of arbitrability," and courts are limited to determining whether the arbitration language in the contract encompasses the grievance in question and whether any other provision of the contract excludes arbitration. Milwaukee II, 97 Wis. 2d at 22. "When the court determines arbitrability, it is limited to considering whether the arbitration clause can be construed to cover the grievance on its face *and* whether any other provision of the contract specifically excludes it." Id. (emphasis added)(citing Joint Sch. Dist. No. 10, 78 Wis. 2d at 111).

¶21. Thus, there are two relevant contractual inquiries in the analysis of arbitrability: 1) does the arbitration clause cover the grievance on its face; and 2) is there another provision of the collective bargaining agreement that specifically excludes arbitration? Milwaukee II, 97 Wis. 2d at 22; Milwaukee I, 92 Wis. 2d at 151; Joint Sch. Dist. No. 10, 78 Wis. 2d at 111. The fact that the arbitration clause covers the grievance on its face does not end the inquiry; if another provision of the contract specifically excludes arbitration of the relevant dispute, then arbitration is unavailable. Milwaukee II, 97 Wis. 2d at 22; Milwaukee I, 92 Wis. 2d at 151; Joint Sch. Dist. No. 10, 78 Wis. 2d at 111.

. . .

¶25. Here, the parties' collective bargaining agreement broadly recognizes and protects the management rights of the City and the chief of the fire department, including the right "[t]o hire, schedule, promote, transfer, assign, train or retrain employees in positions within the Fire Department." CBA, Article 5.C. The following additional provisions of the collective bargaining agreement are important here:

> Any dispute with respect to Management Rights shall not in any way be subject to arbitration but any grievance with respect to the reasonableness of the application of said Management Rights may be subject to the grievance procedure contained herein.

CBA, Article 5.K.

> Arbitration shall be limited to grievances over matters involving interpretation, application or enforcement of the terms of this Agreement.

CBA, Article 9.Q.1.

> Arbitration shall not apply where Section 62.13 of the Wisconsin Statutes is applicable and where Management has reserved rights relating to arbitration in Article 5 of this Agreement.

CBA, Article 9.Q.2.

¶26. The first two sections quoted above might be read to generally permit arbitration of disputes regarding the reasonableness of individual applications of reserved management rights, as well as disputes regarding the interpretation, application, or enforcement of the terms of the agreement. The third quoted section, however, specifically and unequivocally excludes arbitration of matters

> falling within the chief's or PFC's statutory authority under Wis. Stat. § 62.13: arbitration "shall not apply" when Wis. Stat. § 62.13 is applicable and management has reserved its rights in this regard. CBA, Article 9.Q.2.

Under the Oshkosh Police contract, the arbitration provision is the final step of the grievance procedure. The grievance procedure initially defines a grievance broadly: "A grievance is defined as any dispute or misunderstanding relating to employment between the City and the Association." The next paragraph narrows that definition for the purpose of arbitration: "For the purpose of the final step of the grievance procedure, a grievance will be limited to the interpretation or application of the terms and conditions of this agreement, including past practices and policies incorporated in this agreement by its terms, and shall be handled in the following manner:" The provision then goes on to define the steps preceding arbitration, and ends with the referral to arbitration: "Arbitration procedures shall follow that outlined in State Statutes. The decision of the arbitrator shall be final and binding on the parties, subject to judicial review."

As with the contract language at issue in MADISON V. WERC, the limitation to the "interpretation or application" of the terms of the agreement can be read to permit challenges to the exercise of management's reserved rights, including failure to follow written Departmental policies. Unlike the language in MADISON V. WERC, this contract contains no express exclusion for matters falling within the jurisdiction of the Police and Fire Commission. Applying the usual presumption of arbitrability, it cannot "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" nor can it be said that "any other provision of the contract excludes arbitration." Even if, as argued by the City, the substantive right under the contract may be limited by the absence of a just cause standard for dismissals, that goes to the standard to be employed by the arbitrator in considering the merits of the grievance, not to the question of whether the grievance is arbitrable. It is for the arbitrator, not the Examiner, to decide what substantive provisions are implicated by the grievance, what standard applies and what remedies may be appropriate should he or she determine that a contract violation occurred. Thus, I conclude that the grievance over the termination of Officer del Plaine is substantively arbitrable.

The City also argues, however, that even if the termination arguably raises an arbitrable issue under the contract, the subject of police officer terminations is solely within the purview of the Police and Fire Commission and may not be submitted to arbitration, as a matter of public policy. Thus the second question is whether this specific case is reserved to the Police and Fire Commission established pursuant to Sec. 62.13, Stats.

<u>Public Policy and Section 62.13</u>

In JANESVILLE, the appeals court found that a contract provision allowing discipline imposed by a Police and Fire Commission to be reviewed *de novo* by an arbitrator rather than through an appeal to the circuit courts could not be harmonized with the provisions of

Sec. 62.13, Stats. Section 62.13 provides a comprehensive system for the imposition of discipline on a police officer, beginning with the filing of charges against the officer with the Police and Fire Commission (§62.13(5)(b) and, on request, a just cause hearing before the PFC (§62.13.(5)(c) and (d)), which then determines the existence or non-existence of just cause (§62.13(5)(em)), using statutorily defined factors(§62.13(5)(em) 1-7). The decision of the PFC is appealable to the circuit court (§62.13(5)(i)). The appeals court concluded that allowing appeal to an arbitrator, who would then have an opportunity for *de novo* consideration of the cause issue, amounted to elimination of the PFC's statutory powers to make that decision. In the court's view, this could not be reconciled with the provision in the statute that the PFC's decision would be "final and conclusive" if its just cause finding was sustained by the circuit court.

JANESVILLE stands for the proposition that, in matters of discipline against subordinate officers, arbitration may not be invoked at the expense of the Police and Fire Commission's authority. Since JANESVILLE, the Wisconsin Supreme Court has considered whether a PFC's decisions regarding probationary promotions and in discipline cases involving claims of discrimination were subject to review by arbitrators or other administrative agencies. The answer, in MADISON V. WERC and MADISON V. DWD was "no." MADISON V. WERC concerned an effort to arbitrate the rescission of a probationary promotion in a fire department. MADISON V. DWD concerned an effort to challenge a firefighter's disciplinary termination as being contrary to the Wisconsin Fair Employment Act. In each case, the Court determined that decisions of a PFC made pursuant to Sec. 62.13 were reserved exclusively to the PFC, and that the appeal to circuit court under that statute, or in limited cases, common law certiorari, would be the only appropriate venue for review of the PFC decision.

This case presents a different facet of the issue. Here, the termination of the officer was characterized by the Chief as having been for physical inability to function as a police officer. The City Manager, in his response to the grievance, expressly denied that the termination was for disciplinary reasons, and stated that it was based upon the officer's physical inability to serve in the position. That being the case, it does not appear that the termination of Officer del Plaine was an act of discipline.

Section 62.13 addresses two types of police officer terminations. Section 62.13(5) speaks to disciplinary actions. It allows a Chief to suspend a subordinate with pay pending the disposition by the PFC of the charges leading to the suspension. If the PFC finds just cause for the charges, it may then determine the appropriate penalty for the charges, including suspension, demotion and/or removal. This is the process which was at issue in JANESVILLE and CITY OF MADISON V. DWD.

Section 62.13(5m) also addresses termination. It provides for a reduction in the overall number of subordinate officers — in the common parlance a layoff. The provision requires that "emergency, special, temporary, part-time, or provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the shortest length of service in the department."

Neither of these provisions appear to have any application to the case at hand. Plainly, this was not a layoff pursuant to Sec. 62.13(5m), as there was no consideration of dismissing other employees or invoking seniority. By the same token, Officer del Plaine was not disciplined pursuant to Sec. 62.13(5). The Chief's termination letter did not raise any rule violation or other misconduct. The City Manager expressly disclaimed any disciplinary intent. Neither the Chief nor the City made any effort to invoke the jurisdiction of the PFC or to take recourse to the procedures required by the statute. Officer del Plaine was not suspended with pay pending resolution of charges. No charges were filed, and she was given no opportunity for a just cause hearing before the PFC.

The Court in KRAUS discussed the distinction between disciplinary acts, and adverse actions taken for reasons of job performance. As stated by the Court in footnote 19 of the majority opinion in KRAUS:

. . .

> Whether a job action is "disciplinary" is not determined by the consequences of the action, such as suspension, reduction in rank, or removal. It is determined by whether a "charge" is filed by the chief to impose a penalty.
>
> A job action that is not disciplinary may still require a due process hearing if the affected employee has a protected property interest, but the due process hearing need not conform to the dictates of Wis. Stat. § 62.13(5)(em). Schultz v. Baumgart, 738 F.2d 231, 236 (7th Cir. 1984). We disavow any language in Hussey that implies otherwise. 1/

1/ See, also, the discussion of what constitutes discipline and a disciplinary charge under Sec. 62.13 at ¶63-69 of the majority's opinion in KRAUS.

Here, the City of Oshkosh, both expressly and through the implication of its actions, has disclaimed any PFC involvement in the termination of Officer del Plaine and has disclaimed any underlying cause for the termination that would fall within the provisions of Sec. 62.13. The employee clearly has a property interest in her job and the attendant benefits and seniority granted by the labor agreement. Given this, it is difficult to make out the conflict between the statutory powers of the PFC and the officer's appeal to arbitration. The arbitrator would not be preempting the finality of the PFC's statutorily granted decision-making, as there has been no decision and appears to be no statutory basis for one. While Department Policy 115.13 may mirror the procedures in Sec. 62.13, this is the type of job action contemplated by the Court in KRAUS – an adverse job action which is not disciplinary and which does not trigger the right to a Sec. 62.13 hearing. There may be a conflict between the procedures set in the Departmental Policy and the

invocation of arbitration, but that does not implicate the statute, and therefore does not raise any issue of public policy. Accordingly, I conclude that the City is obligated to proceed to grievance arbitration on the del Plaine grievance.

Dated at Racine, Wisconsin, this 9th day of October, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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