STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

**MENASHA PROFESSIONAL POLICE UNION,
LOCAL 603, AFSCME, AFL-CIO**

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

CITY OF MENASHA

Case 115
No. 68895
DR(M)-695

Decision No. 32918

Appearances:

Bruce F. Ehlke, Ehlke, Gartzke, Bero-Lehmann & Lounsbury, S.C., Attorneys at Law, 6502 Grand Teton Plaza, Suite 202, P.O. Box 2155, Madison, Wisconsin 53719, appearing on behalf of the Menasha Professional Police Union, Local 603, AFSCME, AFL-CIO.

James R. Macy and **Chad P. Wade**, Davis & Kuelthau, S.C. Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54901, appearing on behalf of the City of Menasha.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On May 11, 2009, the Menasha Professional Police Union, Local 603, AFSCME, AFL-CIO 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 bargaining proposal of the City of Menasha was a prohibited subject of bargaining. On June 5, 2009, the City filed a response to the petition asserting that its proposal was a mandatory subject of bargaining.

Hearing on the petition was held on June 30, 2009 in Menasha, Wisconsin by Commission Examiner Peter G. Davis. The parties thereafter filed written argument, the last of which was received on August 27, 2009.

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 Menasha, herein the City, is a municipal employer.

2. The Menasha Professional Police Union, Local 603, AFSCME, AFL-CIO, herein the Union, is a labor organization that serves as the collective bargaining representative of certain law enforcement employees of the City.

3. During bargaining over a successor to their 2007-2008 collective bargaining agreement, the City proposed to maintain language from the 2007-2008 agreement which required that the appeal procedures contained in Sec. 62.13, Stats. be utilized by a Union-represented employee who wished to challenge discipline imposed pursuant to that statutory provision.

4. A proposal specifying how an employee can challenge discipline is primarily related to wages, hours and conditions of employment.

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

CONCLUSIONS OF LAW

1. The proposal referenced in Finding of Fact 3 is a mandatory subject of bargaining unless the Municipal Employment Relations Act prohibits bargaining over such a proposal.

2. If proposed by a municipal employer, the Municipal Employment Relations Act does prohibit bargaining over the proposal referenced in Finding of Fact 3.

3. The proposal referenced in Finding of Fact 3 is a prohibited subject of bargaining.

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

DECLARATORY RULING

The Union does not have a duty to bargain within the meaning of Secs. 111.70 (1)(a) and (3)(a) 4, Stats. with the City over the proposal referenced in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of December, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

CITY OF MENASHA

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

As a general matter, it is correctly undisputed by the parties that a proposal which establishes the manner by which an employee can allege that the employer violated a collective bargaining agreement (including contractual protections related to discipline) is primarily related to wages, hours and conditions of employment and thus is a mandatory subject of bargaining. CITY OF JANESVILLE V WERC, 193 Wis. 2D 492 (Ct. App., 1995).

However, despite this general principal, the Court in JANESVILLE specifically concluded that a contractual grievance arbitration clause applicable to discipline imposed pursuant to Sec. 62.13 (5), Stats. was unenforceable because the statutory procedure contained in Sec. 62.13(5), Stats. is the exclusive mechanism for appeal of such discipline.

Sections 111.70(4)(c) 2. b. and 4(mc), Stats. were added to the Municipal Employment Relations Act in 2007. Both parties agree that these new statutory provisions overturned JANESVILLE. However, the parties disagree over whether these new statutory provisions prohibit a municipal employer from proposing that the Sec. 62.13 (5), Stats. disciplinary appeal procedures be the contractually agreed upon means by which an employee can challenge discipline that is imposed pursuant to Sec. 62.13, Stats. The City argues that these new statutory provisions simply overturn CITY OF JANESVILLE and allow the City to propose any contractual procedure (including contractual adoption of Sec. 62.13 (5), Stats. appeal procedures as contained in the parties' 2007-2008 contract) as the means by which employees can challenge discipline which is imposed pursuant to Sec. 62.13, Stats. The Union agrees that these new statutory provisions overturn JANESVILLE and allow bargaining over a contractual appeal process applicable to employee discipline but contends that by proposing to maintain the Sec. 62.13 (5), Stats. disciplinary appeal procedures as the exclusive contractually agreed upon challenge mechanism, the City is thereby bargaining over prohibiting access to grievance arbitration within the meaning of Sec. 111.70(4)(mc), Stats.

Section 111.70 (4)(c) 2. b., Stats. provides:

> (c) *Methods for peaceful settlement of disputes; law enforcement and firefighting personnel.*
>
> . . .
>
> 2. 'Arbitration.'
>
> . . .

> b. A collective bargaining agreement may, notwithstanding s. 62.13 (5), contain dispute resolution procedures, including arbitration, that address the suspension, reduction in rank, suspension and reduction in rank, or removal of such personnel. If the procedures include arbitration, the arbitration hearing shall be public and the decision of the arbitrator shall be issued within 180 days of the conclusion of the hearing.
>
> Section 111.70 (4)(mc), Stats. states:
>
> (mc) *Prohibited subjects of bargaining*. The municipal employer is prohibited from bargaining collectively with respect to:
>
> 1. The prohibition of access to arbitration as an alternative to the procedures in s. 62.13 (5).

The parties agree that both statutes are relevant to answering the question posed by this litigation. Given their relevance, we are satisfied that both statutes must be considered together when we attempt to discern the Legislature's intent. MCDONOUGH V DEPT. OF WORKFORCE DEVELOPMENT, 227 Wis. 2D 271, 279 (1999). It is the Union's view that Sec. 111.70(4)(mc), Stats. clearly prohibits the City proposal and that Sec. 111.70(4)(c) 2.b., Stats. can be interpreted in a manner that does not add ambiguity to the meaning of Sec. 111.70(4)(mc), Stats. While it is clear the Sec. 111.70(4)(mc), Stats. prohibits something, what is prohibited is less than clear. If, for instance, this statute stated that the municipal employer is prohibited from bargaining over "Contractual inclusion of the procedures in s. 62.13(5)", then clarity would be present and the Union's position in this matter would prevail. However, even absent consideration of Sec. 111.70(4)(c)2.b., Stats., the language in Sec. 111.70(4)(mc), Stats. is itself ambiguous as to its meaning. When consideration of Sec. 111.70(4)(c) 2. b., Stats. is added to the mix, the statutory ambiguity is heightened because there is nothing in Sec. 111.70(4)(c)2.b., Stats. that would suggest Sec. 62.13(5) appeal procedures are now off limits for collective bargaining. Given all of the foregoing, we conclude that statutory ambiguity is present as to the answer to the question posed in this litigation.

Both statutory provisions contain language consistent with ongoing viability for Sec. 62.13(5), Stats. as a contractual option. Section 111.70(4)(c)2.b., Stats. includes the phrase "notwithstanding s. 62.13 (5)" and Sec. 111.70(4)(mc), Stats. states "as an alternative to s. 62.13(5)." In our judgment, it is appropriate to give the words "notwithstanding" and "alternative " their ordinary meaning (See DODGELAND EDUCATION ASSOCIATION V. WERC, 250 Wis. 2D. 357 (2002) and, when we do so, we understand them to convey a legislative intent that the Sec. 62.13(5), Stats. appeal procedure remains a viable alternative at the bargaining table. However, it is important to acknowledge that the prohibition language contained in Sec. 111.70 (4)(mc), Stats. only applies to municipal employers-not to a union.

Thus, statutory language that gives ongoing viability to Sec. 62.13(5), Stats. but prohibits certain municipal employer conduct can most reasonably be understood as conveying a legislative intent that the union-but not the municipal employer-can propose that Sec. 62.13(5), Stats., be the exclusive contractual mechanism by which discipline is challenged. Under our interpretation, a union could propose and the parties could agree that Sec. 62.13(5), Stats. be the contractually adopted mechanism for challenge of discipline. However, where, as here, the municipal employer proposes that Sec. 62.13(5), Stats. be the exclusive mechanism by which discipline is challenged, it is thereby necessarily also proposing to prohibit access to grievance arbitration contrary to Sec. 111.70(4)(mc) Stats. Thus, we conclude that the City's proposal is a prohibited subject of bargaining.

In reaching our conclusion, we acknowledge the legislative history found in Exhibits 1-24-all of which, contrary to the Union, we find to be relevant to discerning legislative intent under the Court's holding in JUNEAU COUNTY V. COURTHOUSE EMPLOYEES, 221 Wis. 2D 630, 640-649 (1998). See also DODGELAND, *supra*. That legislative history supports the view that the new statutes were intended to overturn JANESVILLE and open up collective bargaining options as to how a contract can be enforced as to disciplinary issues. However, it is important to note that the statutory language (Secs. 111.70(4)(c) 2.b. and (mc), Stats.) by which this was accomplished differs substantially from that in prior proposed legislation which, in turn, substantially diminishes the value of such history when attempting to discern legislative intent. As to that portion of the legislative history which does directly relate to the new statutory language, we specifically acknowledge the response to Question 15 in the January 3, 2008 Legislative Council memo which states that it "appears" current contract language which makes Sec. 62.13(5), Stats. the exclusive appeal procedure is valid. Our ruling is not in conflict with the Legislative Council response. If the Union here were to propose and the City were to agree that the current contract language become part of the successor agreement, such contract language would be valid. However, where, as here, the City makes such a proposal, the City thereby is proposing to prohibit access to arbitration and thus acts contrary to Sec. 111.70(4)(mc), Stats.

Given all of the foregoing, we conclude that the City's disputed proposal is a prohibited subject of bargaining as to which the Union has no duty to bargain.

Dated at Madison, Wisconsin, this 1st day of December, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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