BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CHIPPEWA FALLS PROFESSIONAL POLICE ASSOCIATION	Case 103 No. 48846 MA-7732
and	
CITY OF CHIPPEWA FALLS	

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin, 53703, by Mr. Gordon E. McQuillen, appearing on behalf of the Association.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin, 54702-1030, by Mr. Stevens L. Riley, appearing on behalf of the Employer.

ARBITRATION AWARD

The Chippewa Falls Professional Police Association, hereafter the Association, and the City of Chippewa Falls, hereafter the City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. On April 16, 1993, the Commission designated Coleen A. Burns, a member of its staff, as impartial arbitrator. Hearing was held on July 13, 1993, in Chippewa Falls, Wisconsin. The hearing was not transcribed and the record was closed on November 8, 1993, upon receipt of written argument.

ISSUE:

The parties have stipulated to the following statement of the issue:

> Whether or not Article XXVIII requires the City to assume the costs and fees of defending officers against charges filed under Sec. 62.13(5), Stats.? 1/

1/ At hearing, the relevant contract provision was incorrectly identified as Article XXIX. The undersigned has modified the parties' stipulation to correctly identify the Article in dispute.

If so, what is the appropriate remedy? 2/

RELEVANT CONTRACT LANGUAGE

ARTICLE XXVIII - DEFENSE OF OFFICERS

In the event that any member of the Association is proceeded against for acts performed in his official capacity, the Employer agrees, unless mutually agreed upon, that the City Attorney for Chippewa Falls shall defend the cause of action. That additionally, the provisions of Wisconsin Statutes 895.46 shall apply.

RELEVANT STATUTORY LANGUAGE

Section 895.46, Wis. Stats. - State and political subdivisions thereof to pay judgments taken against officers.
(1)(a) If the defendant in any action or special proceeding is a public officer or employe and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employe and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employe in excess of any insurance applicable to the officer or employe shall be paid by the state or political subdivision of which the defendant is an officer or employe. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employe, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employe did not act within the scope of employment. If the employing state agency or the attorney general denies that the state

2/ The parties agreed that if the Association prevailed upon the grievance, then the undersigned should retain jurisdiction for the purpose of resolving any disputes as to the appropriate remedy.

officer, employe or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit. Failure by the officer or employe to give notice to his or her department head of an action or special proceeding commenced against the defendant officer or employe as soon as reasonably possible is a bar to recovery by the officer or employe from the state or political subdivision of reasonable attorney fees and costs of defending the action. The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employe legal counsel and the offer is refused by the defendant officer or employe. If the officer, employe or agent of the state refuses to cooperate in the defense of the litigation, the officer, employe or agent is not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.

. . .

62.13(5), Wis. Stats. - 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 cause 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 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 be 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.

(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 thereof on the secretary of the board within 10 days after the order is filed. Within 5 days thereafter 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 have precedence over any other cause of a different nature pending in said court, which shall always be open to the trial thereof. The court shall upon application of the accused or of 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 or further evidence by the board. The question to be determined by the court shall be: Upon the evidence was the order of the board reasonable? No costs shall be allowed either party and the clerk's fees shall be paid 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.
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> (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.

BACKGROUND

On December 2, 1992, John J. Kappus filed a written complaint with the Chippewa Falls Police and Fire Commission alleging that Sergeant Mark Hanson, hereafter Grievant, had violated Police Department policy, rules and procedures. On January 4, 1993, the Grievant sent the following to Paul Gordon, Chippewa Falls City Attorney:

> On Dec. 29, 1992, I was served a photo-copy of a letter addressed to Joan Anderson, president of the city Police and Fire Commission, apparently submitted and signed by John J. Kappus, in which he requests that the P.F.C. investigate and hold a hearing regarding myself and alleged violations of departmental policies and also, apparently, of state law.
>
> It is my understanding that the city is required to provide legal counsel for me, or pay the expenses of legal counsel of my own choosing.

> I, therefore, am asking you if you will be representing me in this matter, or if I should secure my own legal representation. I request that you notify me of your decision in writing, and in a timely fashion, so that we all may proceed.
>
> Thank you in advance for your time.

On January 4, 1993, the City Attorney replied as follows:

> Pursuant to your request of January 4, 1993, I will be representing the Police and Fire Commission and you should secure your own legal representation.

On January 6, 1993, City Attorney Paul Gordon sent the following to the Grievant:

> I reviewed the labor contract with the police union and after a conference with the City's labor attorney it appears that Article 29 does not provide coverage for your attorney's fees in the Jack Kappus matter.

On January 12, 1993, the Grievant filed a grievance which stated, inter alia, as follows:

> I feel the City of Chippewa Falls has violated the labor agreement with the C.F.P.P.A. by denying me defense counsel. I request that the city comply with Article 29 of the agreement and either provide me with responsible defense counsel, or bear the costs incurred by me securing outside counsel to be mutually agreed upon.

The grievance was denied at all steps, and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Association's Initial Brief

The Grievant is a "member of the Association"; the Grievant has been "proceeded against" by the filing of a complaint before the Police and Fire Commission; and the complaint against the Grievant charges him with having performed certain "acts" undertaken by the Grievant while acting "in his official capacity." The clear and unambiguous language of Article XXVIII requires the City to assume the costs and fees of defending the

Grievant against charges filed under Section 62.13(5), Stats.

Since the language in dispute is clear and unambiguous, it can be interpreted without resort to any outside reference. Evidence of negotiation history may not be relied upon to modify the clear contract language.

The Grievant asked the employer to represent him with respect to the charges filed against him, or in the alternative, to pay the expenses of legal counsel of his own choosing. City Attorney Gordon responded by saying "I will be representing the Police and Fire Commission and you should secure your own legal representation." There has been a mutual agreement that the City Attorney would not represent the Grievant and that the City would "pay the expenses of legal counsel of (the Grievant's) own choosing."

During negotiation of the disputed language, the City negotiators apparently knew that the City did not intend this language to apply to Section 62.13, Stats. Since the City did not express this intention to the Association, the City is now estopped from asserting such a position herein.

The City's negotiator claims that he wanted the Association to understand that the City's obligations did not exceed the obligations set forth in Section 250.58, Stats., (the predecessor to Section to 895.46, Stats.) This claim, however, is not supported by the language of the disputed provision. The benefits provided in the first sentence of Article XXVIII are supplemental to the benefits provided in the second sentence, i.e., Section 895.46 benefits. To hold otherwise would render the first sentence of Article XXVIII surplusage, a result which is not favored in arbitration.

The City's negotiator seemed to say that the purpose of the language was to provide defense in cases involving money damages. If this were correct, then in those instances noted by Association Witness Gunderson, the City would have undertaken the defense of officers, ab initio, and would not have waited until after the fact to reimburse them for legal fees.

The Arbitrator should order the City to pay the Grievant's attorney fees and the costs of the proceeding before the Police and Fire Commission, as well as for any appeals. Since the matters are intertwined, the Arbitrator should also order the payment of the Grievant's attorney fees arising from this grievance. Pursuant to the agreement of the parties, the Arbitrator must retain jurisdiction to ascertain the level of such fees in the event that the parties are unable to reach an agreement.

City's Initial Brief

The Association's interpretation of the "Defense of Officers" provision of Article XXVIII is inconsistent with the clear and unambiguous language of the parties' collective bargaining agreement, as well as with the evidence of bargaining history. The "Defense of Officers" language relates only to formal, civil court actions, as referenced by the words "cause of action."

In an opinion dated July 29, 1977, the Attorney General stated "Section 895.46(1), Stats., is only applicable where the action or special proceeding is brought for the purpose of securing a judgment for damages." Black's Law Dictionary defines "cause of action" as the "fact or facts which give a person a right to judicial relief." Wis. Stats. 971.20(1) defines an "action" as "all proceedings before a court. . . ." and Wis. Stats. 806.30(1) defines "action" as "a judicial proceeding or arbitration in which a money payment may be awarded or enforced. . . ."

The evidence of bargaining history establishes that when the Association made the proposal which gave rise to the disputed language, the Association was concerned that officers should not have to pay their own attorney to defend civil actions brought against them for money damages arising out of acts performed in their official capacity. The parties specifically discussed and agreed that the "Defense of Officers" clause would be limited to formal legal actions brought in a court of law. The parties did not discuss nor contemplate that the "Defense of Officers" provision would be applicable to the disciplinary actions of Section 62.13(5). Assuming arguendo, that there is ambiguity in the language of Article XXVIII, the parties' bargaining history clearly supports the position of the City.

The testimony of Association Witness Gunderson supports the conclusion that the Association introduced the proposal because of its concern that an officer might have to pay for his own legal expenses to defend an action brought against the officer for damages. The City's witnesses agreed that the issue of the applicability of the disputed provision to Section 62.13(5) was never raised at the bargaining table. This testimony was not contradicted by Association Witness Gunderson.

To accept the Association's interpretation of the disputed contract provision would lead to the bizarre situation wherein the City would be providing legal counsel for both the supervisor and the subordinate. If the parties had intended the provision to be applicable to 62.13(5), they could and should have included a specific reference to that statute. The inclusion was not made because the issue was neither contemplated nor discussed by the parties.

As demonstrated by the testimony of Detective Gunderson, in

every instance in which a police officer requested legal representation under Article XXVIII of the labor contract, the case involved a civil action commenced by a claimant seeking money damages. Gunderson conceded that no police officer has ever attempted to apply this section in a 62.13(5) internal disciplinary action.

The contract clause in question clearly and unambiguously supports the City's conclusion that the clause does not apply to Section 62.13(5) internal disciplinary proceedings. Such a conclusion is further supported by the evidence of bargaining history, as well as the absence of any past practice to support the Association's position. The grievance must be dismissed.

Association's Reply Brief

Contrary to the argument of the City, the proceeding before the Police and Fire Commission was not an internal disciplinary proceeding. Although John Kappus is employed as a City police officer, he was acting as a private citizen, without departmental aegis, when he filed his complaint with the Police and Fire Commission. The Grievant had already been the subject of an internal disciplinary proceeding which had resulted in a letter being placed in his personnel records. The proceeding against the Grievant was a case involving the defense of officers.

In arguing that the disputed contractual provision is "clear and unambiguous," the City relies upon an externally derived definition of "cause of action." The definition relied upon by the City is not the ordinary meaning. Had the parties intended the narrow meaning argued for by the City, the parties would have so defined the term in the Agreement.

The City's argument, that the parties intended to incorporate the concepts embodied in Wis. Stats. 270.58 into the contract, is not supported by the contract language. If the City's argument were correct, then the agreement would not contain the sentence "that additionally, the provisions of Wisconsin Statutes 895.46 (formerly 270.58) shall apply." The arbitrator should avoid an interpretation which leads to surplusage.

The City confuses the effect of the testimony of Homer Mittelstadt. Mittelstadt insisted that the parties never discussed the applicability of the disputed language to cases arising under Section 62.13, Stats. If this testimony is credited, then the City cannot reasonably argue that the parties meaningfully "limited" the effect of the provision to "formal legal actions". Moreover, since Mittelstadt drafted the disputed provision, it must be construed against the City.

The Opinions of the Attorney General, relied upon by the City, support the Association's case. The Opinions define the

applicability of Section 895.46, Stats. The scope of the language of the agreement has a broader scope because of the separate provision covering Section 895.46.

Contrary to the argument of the City, the record does not establish that the Association has a recollection that the disputed provision was intended to apply to civil court proceedings. Not only does the City fail to explain why it would be bizarre to have the City provide counsel for both the supervisor and the subordinate, the City ignores the facts of this case, i.e., the Grievant was the superior who was charged by his subordinate. In this case, the City wants to avoid paying either party's legal fees.

City's Reply Brief

The provisions of Section 895.46 is an indemnification statute, providing for the payment of judgments taken against officers. Section 62.13(5) governs procedures to be followed in disciplinary actions initiated by supervisors against subordinates. An attorney is not required in a Section 62.13(5) action unless the subordinate requests representation. The two statutes provide for completely different remedies. Given the distinct differences between the two statutes, it is unrealistic to conclude that the parties intended the "Defense of Officers" language to be applicable to Section 62.13(5) proceedings.

The Association argument that City Attorney Paul Gordon's response to the Grievant's request for legal representation, "I will be representing the Police and Fire Commission and you should secure your own representation," created a mutual agreement that the Grievant was to secure counsel at the City's expense is refuted by the City Attorney's letter of January 6, 1993, wherein the Grievant was advised that the collective bargaining agreement did not provide coverage for his attorney fees. The Association attempts to impose a mutual agreement on the parties where one clearly did not exist.

It is ludicrous to argue that since Homer Mittelstadt was aware of the existence of Section 62.13(5), he should have disclosed that Section 62.13(5) did not apply to the "Defense of Officers" provision. If the City should be estopped from arguing its position, then the Association must be equally estopped because the Association did not advise the City that the provision was applicable to Section 62.13(5) proceedings.

The complete lack of any discussion of Section 62.13(5) at the bargaining table, the existence of proposals which reference judgments against the officer, the specific discussion of the applicability of the indemnification provisions of Section 895.46 and the specific wording that the provision is applicable to "causes of action," establish that the parties never contemplated

that the "Defense of Officers" language would be applicable to Section 62.13(5) proceedings. Such a conclusion is supported by the fact that, in twenty years, the City has never paid legal fees or provided a defense in internal disciplinary proceedings.

Section 895.46 does not require the City to provide a defense before a judgment is rendered. A party does not indemnify another party until liability has been established. The Association's argument that the City is violating the statute by "never paying in the beginning" should be disregarded.

DISCUSSION

The Association, contrary to the City, argues that Article XXVIII requires the City to assume the costs and fees of defending officers against charges filed under Section 62.13(5), Stats. The Association relies upon the first sentence of Article XXVIII, which states as follows: "In the event that any member of the Association is proceeded against for acts performed in his official capacity, the Employer agrees, unless mutually agreed upon, that the City Attorney for Chippewa Falls shall defend the cause of action." 3/

The City Attorney's primary function is to represent the interests of the City. Since it is not reasonable to assume that the parties intended the City Attorney to represent competing interests, the designation of the City Attorney as the defender of the "cause of action" persuades the undersigned that the City's "Defense of Officers" duty extends to proceedings in which the City and the "proceeded against" Officer have a common interest in the "cause of action."

By adopting the proviso, "unless mutually agreed upon," the parties have recognized that there may be circumstances in which the interests of both parties may not be served by having the City Attorney defend the "cause of action." Inasmuch as there are circumstances in which the parties may have a common interest in the "cause of action", but may not wish to have the City Attorney defend the "cause of action", 4/ the existence of the proviso, per se, is not sufficient to persuade the undersigned that the City's "defense of officer" duty extends to "causes of action" in which the City and the "proceeded against" Officer do not have a common interest in the "cause of action."

3/ The second sentence of Article XXVIII states "That additionally, the provisions of Wisconsin Statutes 895.46 shall apply." The parties agree that the instant dispute does not involve a Sec. 895.46 proceeding.

4/ For example, the City Attorney may be too busy to provide an effective defense, or the City Attorney may not have the requisite expertise to provide an effective defense.

Under Section 62.13(5), Stats., a Police Chief, the Police and Fire Commission as a body, individual members of the Police and Fire Commission, or any aggrieved person may file charges against an Officer which may result in disciplinary action against the Officer. 5/ Pending the disposition of such charges, the Police Chief or the Police and Fire Commission may suspend the Officer. Given the nature of the Section 62.13(5) proceeding, i.e., to review charges brought against an employe of the City and to decide whether or not it is appropriate to discipline an employe of the City, the undersigned is satisfied that a Section 62.13(5) proceeding is not a "cause of action" in which the City and the "proceeded against" Officer have a common interest.

Despite the Association's arguments to the contrary, the language of Article XXVIII does not clearly and unambiguously require the City to pay the costs and fees of defending officers against charges filed under Section 62.13(5), Stats. The undersigned turns to the issue of whether the evidence of bargaining history and/or past practice establishes that the parties mutually intended the language of Article XXVIII to be applicable to Section 62.13(5) proceedings.

The language of Article XXVIII was adopted by the parties during the negotiation of their 1974 collective bargaining agreement. With the exception of the change in the statutory reference contained in the second sentence, the language of Article XXVIII has remained unchanged. 6/

The Association proposal which lead to the development of the Article XXVIII language stated as follows:

> ARTICLE ?? - DEFENCE (sic) OF OFFICERS BY THE CITY ATTORNEY:
>
> The city shall authorize the City Attorney to defend action brought against any Officer stemming from any acts done in the course of

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5/ It may be, as the Association argues, that John Kappus is a City Police Officer who is subordinate to the Grievant; that the Grievant has been the subject of an internal, i.e., Departmental, investigation; that a letter was placed in his personnel file; and that Kappus was not acting under the aegis of the Department. Such facts, however, are not established by the record.

6/ The initial contract language referenced Sec. 270.58, Stats., which was the predecessor of Sec. 895.46, Stats.

> his employment or out of any alleged breach of his duty as such an officer. Any judgement obtained against such officer shall be paid by the city provided the officer acted in good faith (or that the officer did not act in bad faith).

At the time that the parties negotiated their 1974 collective bargaining agreement, Homer Mittelstadt was the City Attorney and Richard Thornton was a City Council member. Mittelstadt and Thornton, who were on the City team which negotiated the "Defense of Officers" language, both recall that the parties' discussions focused on suits for money damages and that neither side mentioned or discussed Section 62.13(5), Stats. 7/ This testimony was not contradicted by Detective Gunderson, a member of the Association team which bargained the language in 1974. 8/

It is true that Mittelstadt drafted the "Defense of Officers" language which was ultimately adopted by the parties in 1974. It is also true that if contract language is susceptible to more than one reasonable interpretation, then the contract language may be construed against the drafter. However, neither the "Defense of Officers" language drafted by Mittelstadt, nor the evidence of bargaining history, persuades the undersigned that the Association negotiators could have reasonably interpreted the language to be applicable to Section 62.13(5) proceedings. Despite the Association's arguments to the contrary, the failure of Mittelstadt, or any other City representative, to expressly state that the "Defense of Officers" provision did not apply to Section 62.13(5) proceedings does not serve to bar or estop the City from asserting such a position herein.

At hearing, Gunderson, who has been with the City's Police Department for twenty-seven years, recalled that, in 1980, he requested representation under Article XXVIII when he and other Officers were sued for damages in a civil action in federal court. According to Gunderson, the City did not provide an attorney to defend Gunderson and his fellow Officers, but upon conclusion of the litigation, the City or the City's insurance company paid Gunderson's attorney fees. Gunderson further stated that, while the City has paid attorney fees for representation of other Officers, he did not believe that any of these cases involved a Section 62.13(5) proceeding. Neither Gunderson's testimony, nor any other record evidence, demonstrates that the City Attorney has

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7/ Sec. 62.13(5), Stats., was in existence at the time that the parties bargained their 1974 collective bargaining agreement.

8/ Indeed, Gunderson did not claim that, at the time that the parties negotiated the defense of officer language, the Association had any understanding that the language was applicable to Sec. 62.13(5) proceedings.

represented any Officer in a Section 62.13(5) proceeding, or that the City has paid the costs and fees of defending officers against charges filed under Section 62.13(5), Stats.

In summary, the plain language of Article XXVIII does not require the City to assume the costs and fees of defending officers against charges filed under Section 62.13(5), Stats. Neither the evidence of bargaining history, nor the evidence of past practice, persuades the undersigned that the parties mutually intended the language of Article XXVIII to be given any construction other than that which is reflected in its plain language. As the City argues, the letter of the City Attorney, dated January 6, 1993, clearly refutes the Association's assertion that, in the present case, the City agreed to assume the costs and fees of defending the Grievant against the 62.13(5) charges filed by John Kappus.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. Article XXVIII, Defense of Officers, does not require the City to assume the costs and fees of defending officers against charges filed under Section 62.13(5), Stats.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 16th day of November, 1993.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator