### In the Matter of the Arbitration of a Dispute Between

### CITY OF GREEN BAY (POLICE DEPARTMENT)

and

### **GREEN BAY PROTECTIVE POLICE ASSOCIATION**

Case 368 No. 64978 MA-13075

#### **Appearances:**

**Dean R. Dietrich**, Ruder Ware, LLSC, Attorneys at Law, 500 Third Street, Wausau, Wisconsin, appearing on behalf of the Employer.<sup>1</sup>

**Thomas J. Parins,** Parins Law Firm, S.C., Attorneys at Law, 422 Doty Street, Green Bay, Wisconsin, appearing on behalf of the Association.

### **INTERIM ARBITRATION AWARD**

Green Bay Police Protective Association, herein referred to as the "Association," and City of Green Bay (Police Department), herein referred to as the "Department," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing on June 28, 2006, in Green Bay, Wisconsin. Each party filed a post-hearing brief; the last of which was received September 11, 2006. Thereafter, the parties agreed at the arbitrator's request to re-open the record to add supplemental exhibits. That process was completed July 27, 2007.

#### ISSUES

The parties were unable to stipulate as to the issues in this case, but agreed that I could phrase them. The issues for the interim decision relate to the procedures to be followed with

<sup>&</sup>lt;sup>1</sup> Attorney Christopher M. Toner joined him on brief.

respect to the underlying dispute.<sup>2</sup> I phrase them as follows:

- 1. Are the issues now presented by the Association, arbitrable?
- 2. If so, did the Employer violate the agreement by dismissing Officer Fietzer for non-disciplinary reasons without having first proceeded before the appropriate tribunal and obtained a final order sustaining his dismissal?
- 3. If the answer to 2 is "no," what, if anything, is the proper procedure to be followed with respect to the non-disciplinary dismissal.
- 4. If the answer to issue 2 above is "yes" what is the appropriate remedy?
- 5. If the Department elects to proceed with disciplinary charges before the Police and Fire Commission for the related criminal convictions and underlying conduct, how, if at all, does Article 26 apply?

# FACTS

The City of Green Bay is a Wisconsin municipality. One of its departments is the Police Department. The Department is headed by a Police Chief Craig Van Schyndle who has the authority provided by Wisconsin law. The Association is the collective bargaining representative of various sworn police officers of the Department. At the material times, one of the police officers represented by the Association was Tony Fietzer, who was a Patrol Officer employed by the Department until his dismissal which resulted in the grievance which is the subject of this dispute.

On October 21, 2003, Officer Fietzer was arrested with respect to allegations of domestic abuse against his spouse. The Department suspended him with pay on October 22, 2003, because it concluded that the charges might have an impact on his continued employment.

Thereafter the Chief had communication with the Association through its legal counsel concerning the possibility of the charges affecting Officer Fietzer's employment. He was subsequently convicted of three criminal counts in conjunction with that arrest, Intimidation of a Victim/Dissuade Reporting-Domestic Abuse Incident and two counts of Bail Jumping-

<sup>&</sup>lt;sup>2</sup> The underlying dispute is as follows:

<sup>1.</sup> Did the Department violate the just cause provision of this agreement when it removed Officer Fietzer for alleged non-disciplinary reasons?

<sup>2.</sup> If so, what is the appropriate remedy?

Domestic Abuse Incident. The Association and the Department discussed and disagreed as to whether Officer Fietzer was subject to the prohibition under, 18 U.S.C. Sec's. 922(g), 925(a) (2000) of the Gun Control Act of 1968 and the Lautenberg Amendment from carrying a firearm for any purpose, including, but not limited to, in connection with his duties as a police officer for the Employer. Chief Van Schyndle requested in a letter dated November 30 that the Association provide him with a detailed legal argument as to why the Lautenberg Amendment did not apply and other relevant information in order that he might determine what action to take. The Association responded thereto with the arguments advanced at the arbitration hearing. Chief Van Schyndle made a final determination and dismissed Officer Fietzer for the non-disciplinary reason that he no longer met the minimum qualifications of the job, namely he no longer could lawfully carry a firearm.

The Association filed a grievance on behalf of Officer Fietzer on February 1, 2005, alleging that 1) the Chief does not have the authority to dismiss Officer Fietzer, but may only file charges with the Fire and Police Commission seeking his dismissal, 2) Article 26 requires that any dismissal be pursuant to Sec. 62.13(5), Stats. It sought the immediate reinstatement of Officer Fietzer with full back-pay. The Chief responded that the dismissal was non-disciplinary and, therefore, not subject to Article 26 or Sec. 62.13, Stats. He also noted that the Department reserved the right to proceed before the Police and Fire Commission on disciplinary grounds, if appropriate. The Association appealed the grievance, reiterating its previous positions, but also alleging that Officer Fietzer is entitled by law to carry a firearm. The grievance was properly appealed through the grievance procedure to arbitration. It was appealed to the last step, the Personnel Committee, February 16, 2005, and denied July 1, 2005. The request for arbitration was filed with the WERC on July 18, 2005. The hearing in this matter was held July 14, 2006, over one year later. The delay was largely occasioned by the fact that the assistant city attorney representing the Department left the employ of the city.

# **RELEVANT AGREEMENT PROVISIONS**

. . .

### ARTICLE 1. RECOGNITION/MANAGEMENT RIGHTS

1.03 MANAGEMENT RIGHTS. The Union recognizes the prerogative of the City, subject to its duties to collectively bargain, to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not abridged, delegated or modified by this Agreement, are retained by the City, including the power of establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote, and discipline for just cause, to determine reasonable schedules of work, to establish the methods and processes by which such work is performed. The City further has the right to establish reasonable work rules, to delete positions from the Table of Organization due to lack of work, lack of funds, or any other legitimate reasons, to determine the kinds and amounts of services to be performed as pertains to City government and the number and kinds of classifications to perform such services, to change existing methods or facilities, and to determine the methods, means and personnel by which City operations are to be conducted. The City agrees that it may not exercise the above rights, prerogatives, powers or authority in any manner which alters, changes or modifies any aspect of the wages, hours or conditions of employment of the Bargaining Unit, or the terms of this agreement, as administered, without first collectively bargaining the same or the effects thereof.

• • •

### ARTICLE 3. <u>GRIEVANCE PROCEDURES AND DISCIPLINARY</u> PROCEEDINGS

3.01 GRIEVANCE DEFINITION. A grievance is defined as any complaint involving wages, hours and conditions of employment of members of the bargaining unit, other than proceedings conducted pursuant to Section 62.13, Wis. Stats. A grievant may be an employee or the Union. Upon the mutual agreement of the parties hereto, grievances involving the same issues may be consolidated in one proceeding.

3.02 SUBJECT MATTER LIMIT. Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the relief sought, the date the incident or violation occurred and the signature of the grievant and the date.

• • •

3.05 WAIVER OF STEPS. Steps in the procedure may be waived by mutual agreement of the parties.

### 3.06 STEPS AND PROCEDURE.

(1) STEP ONE. The grievant or a Union representative on his/her behalf shall have the right to present the grievance in writing to the Chief within fifteen (15) working days after he/she or the Union knew or should have known of the event giving rise to such grievance. The Chief shall furnish the grievant and the Union representative an answer within five (5) working days after receiving the grievance.

(2) STEP TWO. If the grievance is not satisfactorily resolved at the first step, the grievant or the Union representative shall prepare a written

grievance and present it to the Human Resources Director within ten (10) working days of the Chief's response. The Human Resources Director shall review the grievance and shall respond in writing within five (5) calendar days after receipt of the written grievance.

(3) STEP THREE. If the grievance is not resolved at the second step, the grievant or the Union representative shall present the written grievance to the Personnel Committee within five (5) working days of the Human Resources Director's response. The Personnel Committee shall review the grievance and respond in writing within five (5) days after their decision, which shall be made at the next regularly scheduled Personnel Committee meeting. In reaching their decision the Personnel Committee may hold a fact-finding hearing after having received a written statement of fact and position by each party. The grievant and the Union shall be given a five (5) day notice of said hearing.

(4) STEP FOUR. If no agreement is reached in step 3, the dispute may be referred to arbitration. The party desiring arbitration shall, within fifteen (15) days of receiving the Personnel Committee decision, petition the Wisconsin Employment Relations Commission for arbitration with a copy of such petition sent to the other party.

# 3.07 GRIEVANCE ARBITRATION PROCEDURE.

(1) ACCESS TO RECORDS. The employee or his/her bargaining unit shall have access to the City's investigative file and all other pertinent documents or information once a disciplinary action has been meted out, but no sooner than three (3) days after such discipline has been meted out. Access to the employee's personnel file shall be subject to the restrictions of Section 103.13 (3) Wis. Stats. Nothing in this paragraph shall prohibit or restrict the City from taking a statement of the employee as part of an investigation to determine whether the employee should be disciplined.

(2) DISCLOSURE OF WITNESSES. Any time after step 2 of the grievance procedure, either party may demand a list of witnesses that the other party intends to call by furnishing the other party with a list of witnesses of the demanding party. The other party, upon whom the request is made, shall respond to that request within three (3) working days of the date of the request. The parties shall be under a continuing obligation to update and supplement the list of witnesses so provided. Any witness not identified in response to a demand before the date of the informal pre-hearing conference shall not be allowed as a witness in the case in chief in these proceedings.

(3) DEPOSITIONS. (a) Once a witness has been identified pursuant to the procedures set forth above, that witness may be deposed.

(b) Either party may identify witnesses they intend to call in these proceedings without receiving a demand from the other party. Upon identification of such witness, the party so identifying the witness shall, upon notice to the other party, be permitted to depose that witness for purposes of perpetuating testimony for the grievance hearing.

(c) Any depositions taken, whether during the investigation of the actions leading up to the discipline or at any point thereafter, may be used by either party at any step in the grievance procedure as may be otherwise provided by law.

3.08 COSTS. The party initiating the grievance shall pay for the administrative costs for initiating arbitration. Any other expenses or costs of the arbitration proceeding, including fees of the arbitrator, shall be split equally between the parties. The arbitration hearing shall be conducted in the City of Green Bay at a mutually agreeable time.

3.09 DECISION OF ARBITRATOR. The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to or delete from the express terms of this Agreement. The arbitrator's decision shall be final and binding.

3.10 REPRESENTATIVES. The Bargaining Unit may appoint representatives of the bargaining unit and shall inform the City of the names of the individuals so appointed and of any change thereafter made in such appointments. The City shall allow the representatives the necessary time to process grievances during the course of the duty day.

• • •

# ARTICLE 26. DISCIPLINE

26.01 RULES AND REGULATIONS. For disciplinary purposes, administrative or otherwise, the substantive rules and regulations for the conduct of members of the Police Department shall be as set forth in the policy and procedure manual for the Green Bay Police Department, as amended from time to time, excepting that no provisions in said manual which are subject to collective bargaining shall be valid until collectively bargained. In the event such rules and regulations conflict with the ordinances of the City of Green Bay, laws of the State of Wisconsin or United States, or this agreement, said ordinances, laws or agreement shall prevail.

26.02 OFF-DUTY CONDUCT. Off-duty action or inaction shall not be considered as grounds for discipline unless the conduct in question:

(1) Has been the basis for a conviction in a court of law of any local ordinance, quasi criminal or criminal law; or

(2) Is done under or pursuant to the officer's use of authority or powers of a sworn Green Bay Police Officer, or under the color of the officers (sic) articulated use of the same; or

(3) Is in violation of any rules and regulations governing off-duty conduct existing in the Green Bay Police Department Policy and Procedure Manual, excepting that Section I, Chapter 2, Paragraph D, of the existing Policies and Procedures Manual will be deleted.

26.03 INTERNAL INVESTIGATION. Internal investigations conducted by the City of Green Bay Police Department shall be subject to the following rules:

(1) The subject matter of any investigation shall be confined solely to those areas that are being investigated because the Department has grounds for reasonable suspicion that an officer may be subject to disciplinary action. All other areas of inquiry shall be avoided so as to ensure that investigators do not intrude upon the privacy of any officer. In this regard, the parties acknowledge the danger of questions not relevant to any specific investigation resulting in rumor and innuendo.

(2) When an officer under suspicion is questioned, that officer shall be first advised of the factual basis of the suspicion and advised as to what law, rule or regulation the officer is being suspected of breaking. The officer being investigated shall be provided a copy of pertinent writings whenever possible. Also, the officer shall be given the name of the complainant except when the complainant is an employee of the Police Department or has requested anonymity.

(3) Any time an investigation exonerates the officer, management will maintain the investigation file but there will be no record of the investigation in the officer's personnel file. Such investigation shall not form the basis for future discipline; however, it may be used by management in following-up on future complaints.

# 26.04 DISCIPLINARY PROCEDURES

(1) Section 62.13, Wisconsin Statutes. Suspension(s), reduction in rank, suspension and reduction in rank, and dismissal of bargaining unit members shall be governed by the procedures set forth in Section 62.13, Wis. Stats.

(2) All other disciplinary proceedings shall be governed by the Grievance Procedure.

. . . . "

#### **PAST AGREEMENT PROVISIONS**

#### **1985 AGREEMENT**

"...

#### APPENDIX A

#### **GRIEVANCE PROCEDURE**

Both the Bargaining Unit and the City recognize that grievances and complaints should be settled promptly and at the earliest possible stage and that the grievance process must be initiated within five (5) days of the incident or within thirty (30) days of the officer learning of the incident. Any grievance not reported or filed within the time limits set forth above shall be invalid.

Any difference of opinion or misunderstanding which may arise between the Bargaining Unit and the City shall be handled in the following manner:

• • •

(D) All grievances relating to wages, hours, and working conditions, or any other matter under jurisdiction of the Personnel Committee, shall be submitted to that committee. They shall, within five (5) days, set up an informal meeting with all parties involved up to this point. Within seven (7) days, (Saturday, Sunday, and holidays excluded) after this meeting, a determination shall be made and reduced to writing and copies submitted to all parties involved.

•••

(F) If the grievance is not settled in mediation, the aggrieved party may, within five (5) days of the mediation session, submit the grievance to an arbitrator. The arbitrator shall be selected by the Wisconsin

Employment Relations Commission. The decision of the arbitrator will be final and binding on all parties except for judicial review. The cost of the arbitration will be borne equally by the City and the Bargaining Unit.

### **1986 AGREEMENT**

" . . .

### ARTICLE III

#### GRIEVANCE PROCEDURES & DISCIPLINARY PROCEEDINGS

#### I. GRIEVANCES

A grievance is defined as any complaint involving wages, hours and conditions of employment of members of the bargaining unit, other than proceedings conducted pursuant to Section 62.13, Wisconsin Statutes. A grievant may be an employee or the Union. Upon mutual agreement of the parties hereto, grievances involving the same issues may be consolidated in one proceeding.

• • •

### E. Arbitration:

(4) <u>Decision of the Arbitrator</u>. A decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to or delete from the express terms of this Agreement. The arbitrator's decision shall be final and binding.

### II. DISCIPLINARY PROCEEDINGS

### A. All Discipline Except Termination.

(1) The Chief may discipline an employee short of termination for just cause. In the event of such discipline, the employee or the Union may grieve the discipline under the grievance procedure set forth above in this article, unless the employee exercises the rights available to the employee under Section 62.13, Wisconsin Statutes. In the event the employee exercises said Section 62.13 rights, those rights shall be the employee's sole remedy and the discipline shall not be grievable. The Chief shall file charges with the Board only if the officer wishes to proceed under Section 62.13.

(2) If the Chief determines that discipline short of termination of employment is justified as to any officer or officers, it shall advise the officer in question of the determination and the basis for the determination. Upon receipt of written notification of discipline short of termination of employment, the involved officer in question may grieve the determination of the Chief under the grievance procedure in Section I of this agreement, but only if the officer files before or at the time of the filing of the grievance under Section I a written election and waiver with the City stating:

a) That the officer is electing to proceed under the terms of the grievance procedure in the labor agreement;

b) That the grievance procedure in the labor agreement shall be the officer's only remedy as to the grievance in question;

c) That the officer is aware of the rights the officer may have to proceed under Section 62.13(5)(c), Wis. Stats., if the discipline is a suspension but chooses not to proceed under the procedure of Section 62.13(5)(c), Wis. Stats., and that the officer waives any and all rights to proceed under Section 62.13(5)(c), Wis. Stats.

B. <u>Filing of Charges to Terminate Employment</u>. The Chief may determine to file charges with the Board of Police and Fire Commissioners pursuant to Section 62.13(5), Wis. Stats., only in those instances where he determines there is just cause for termination of employment. That determination shall be grievable under the procedure set forth in Section I of this article. The officer shall be notified of such determination and the basis for the determination, and that the Chief intends to file charges with the Police and Fire Commission pursuant to Section 62.13, Wis. Stats., seeking such termination at least fifteen (15) days prior to the filing of charges to permit the filing of a grievance.

(1) If the Chief's determination is found to be reasonable and for cause by an arbitrator in Section E of the Grievance Procedure, that decision may be introduced as the best evidence before the Board of Police and Fire Commissioners. The Arbitrator shall determine whether the Chief's determination to file charges with the Board of Police and Fire Commissioners is reasonable and for cause. The arbitrator shall not determine whether the act of termination is appropriate, but rather, whether there exists a reasonable basis and cause for the Chief to seek a hearing on the reason of termination before the Board of Police and Fire Commissioners. In the event that there is a finding that the Chief's determination to file charges is reasonable and for cause, the Chief shall then have the right to file charges with the Police and Fire Commission under Section 62.13, Wis. Stats., and seek termination of

employment of the officer in question. If the Chief's determination is not grieved or is found to be reasonable and for cause by an arbitrator, such charges may then be filed and an employee's sole recourse from the decision of the Board of Police and Fire Commissioners shall be in accordance with the appeal procedures provided in Section 62.13, Wisconsin Statutes. The Chief's determination to file charges may be amended at any step of the Grievance Procedure to another form of discipline including suspension.

(2) In the event that the Chief's determination to file charges is not found to be reasonable and for cause by the arbitrator, the Chief may proceed to impose any discipline less than termination as was found reasonable by the arbitrator pursuant to the Grievance Procedure if any such discipline is set out in the arbitrator's decision, said imposition of discipline shall not be grievable or otherwise subject to appeal whatsoever under the Grievance Procedure of the labor contract or the provisions of Section 62.13, Wis. Stats. If the arbitrator's decision does not set forth any discipline which is deemed by the arbitrator to be reasonable, the Chief may proceed with a determination to impose discipline less than termination of employment, which determination shall be subject again to the Grievance Procedure set forth in the labor agreement.

In any grievance of a disciplinary matter under the terms of this article, the standard to be applied by the arbitrator shall be whether or not there is cause for the discipline imposed under II, A., or cause for the determination of the Chief to file charges under II, B., given all of the facts and circumstance constituting the grounds for the imposition of discipline or the determination to file charges.

Cause shall be determined by applying the following criteria:

a) Was the employee given advance notice of the possible or probable disciplinary consequences of employee's conduct; or was the conduct for which discipline is proposed to be imposed of such a nature that the employee knew or should have known that it was improper?

b) Was the conduct upon which discipline is to be imposed reasonably related to the effective and efficient operation of the Police Department?

c) Prior to determining to impose discipline, did the Chief, or his designee, make an effort to investigate the facts relating to the conduct for which discipline is proposed?

d) Was the Chief's, or his designee's, investigation conducted fairly and objectively?

e) Did such investigation produce sufficient evidence or proof that the employee was guilty of the conduct for which discipline is proposed?

f) Has the Chief, or his designee, applied a disciplinary penalty without discrimination?

g) Was the degree of discipline administered in the particular case reasonably related to the seriousness of the employee's proven offense and the employee's record of service with the Police Department?

In the event that a disciplinary matter is not grieved under the terms and conditions of the Grievance Procedure in the labor contract, or the above described written election and waiver is not filed, the City and the Chief may proceed in the matter of discipline of the officer in question as permitted by law, and the officer in question shall have no recourse to the Grievance Procedure in the labor agreement.

It is intended by the parties that in the event a grievance is filed pursuant to the Grievance Procedure of this Labor Agreement, and the above described election and waiver are filed with the City, the Grievance Procedure in the Labor Agreement shall be the sole and exclusive remedy of the City, the Chief, the Association, and the officer in question, and that no other discipline may be meted out to any officer based upon the subject matter of the grievance in question.

Discipline of an officer shall only be done according to the terms and conditions of this contract; however, the Chief shall have the right to suspend any officer with pay pending the outcome of any grievance filed pursuant to this agreement, or under Section 62.13, Wis. Stats.

The bargaining unit may appoint representatives of the bargaining unit and shall inform the City of the names of the individuals so appointed and of any change thereafter made in such appointments. The City shall allow the representatives the necessary time to process grievances during the course of the duty day.

. . . "

#### 1994-95 AGREEMENT

"...

#### ARTICLE 3

#### GRIEVANCE PROCEDURES AND DISCIPLINARY PROCEEDINGS

3.01 GRIEVANCE DEFINITION. A grievance is defined as any complaint involving wages, hours and conditions of employment of members of the bargaining unit, other than proceedings conducted pursuant to Section 62.13, Wis. Stats. A grievant may be an employee or the Union. Upon the mutual agreement of the parties hereto, grievances involving the same issues may be consolidated in one proceeding.

• • •

. . .

#### 3.06 STEPS AND PROCEDURE.

(4) STEP FOUR. If no agreement is reached in step 3, the dispute may be referred to arbitration. The party desiring arbitration shall, within fifteen (15) days of receiving the Personnel Committee decision, petition the Wisconsin Employment Relations Commission for arbitration with a copy of such petition sent to the other party.

### 3.07 ARBITRATION PROCEDURE.

(1) ACCESS TO RECORDS. The employee or his/her bargaining unit shall have access to the City's investigative file and all other pertinent documents or information once a disciplinary action has been meted out, but no sooner than three (3) days after such discipline has been meted out. Access to the employee's personnel file shall be subject to the restrictions of Section 103.13(3), Wis. Stats. Nothing in this paragraph shall prohibit or restrict the City from taking a statement of the employee as part of an investigation to determine whether the employee should be disciplined.

(2) DISCLOSURE OF WITNESSES. Any time after step 2 of the grievance procedure, either party may demand a list of witnesses that the other party intends to call by furnishing the other party with a list of witnesses of the demanding party. The other party, upon whom the request is made, shall respond to that request within three (3) working days of the date of the request. The parties shall be under a continuing obligation to update and supplement the list of witnesses so provided. Any witness not identified in response to a demand before the date of the informal pre-hearing conference shall not be allowed as a witness in the case in chief in these proceedings.

(3) DEPOSITIONS. (a) Once a witness has been identified pursuant to the procedures set forth above, that witness may be deposed.

(b) Either party may identify witnesses they intend to call in these proceedings without receiving a demand from the other party. Upon identification of such witness, the party so identifying the witness shall, upon notice to the other party, be permitted to depose that witness for purposes of perpetuating testimony for the grievance hearing.

(c) Any depositions taken, whether during the investigation of the actions leading up to the discipline or at any point thereafter, may be used by either party at any step in the grievance procedure as may be otherwise provided by law.

3.08 COSTS. The party initiating the grievance shall pay for the administrative costs for initiating arbitration. Any other expenses or costs of the arbitration proceeding, including fees of the arbitrator, shall be split equally between the parties. The arbitration hearing shall be conducted in the City of Green Bay at a mutually agreeable time.

3.09 DECISION OF ARBITRATOR. The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to or delete from the express terms of this Agreement. The arbitrator's decision shall be final and binding.

3.10 DISCIPLINARY PROCEEDINGS. (1) <u>All Discipline Except</u> Termination.

(a) The Chief may discipline an employee short of termination for just cause. In the event of such discipline, the employee or the Union may grieve the discipline under the grievance procedure set forth above in this article, unless the employee exercises the rights available to the employee under Section 62.13 Wis. Stats. In the event the employee exercises said Section 62.13 rights, those rights shall be the employee's sole remedy and the discipline shall not be grievable. The Chief shall file charges with the Board only if the officer wishes to proceed under Section 62.13.

(b) If the Chief determines that discipline short of termination of employment is justified as to any officer or officers, it shall advise the officer in question of the determination and the basis for the determination. Upon receipt of written notification of discipline short of termination of employment, the involved officer in question may grieve the determination of the Chief under the grievance procedure in Section 3.01 of this Agreement, but only if the officer files, before or at the time of the filing of the grievance under Section 3.01, a written election and waiver with the City stating:

1. That the officer is electing to proceed under the terms of the grievance procedure in the labor agreement;

2. That the grievance procedure in the labor agreement shall be the officer's only remedy as to the grievance in question;

3. That the officer is aware of the rights the officer may have to proceed under Section 62.13 (5) (c) Wis. Stats. If the discipline is a suspension, but chooses not to proceed under the procedure of Section 62.13 (5) (c) Wis. Stats. and that the officer waives any and all rights to proceed under said Section 62.13 (5) (c) Wis. Stats.

# (2) Filing of Charges to Terminate Employment.

(a) The Chief may determine to file charges with the Board of Police and Fire Commissioners pursuant to Section 62.13 (5) Wis. Stats. only in those instances where he determines there is just cause for termination of employment. That determination shall be grievable under the procedure set forth in Section 3.01 of this article. The Chief may not file charges with the Police and Fire Commission if a grievance has been filed until after the grievance has been determined/decided. The officer shall be notified of such determination and the basis for the determination, and that the Chief intends to file charges with the Police and Fire Commission pursuant to Section 62.13 Wis. Stats. seeking such determination at least fifteen (15) days prior to the filing of charges to permit the filing of a grievance.

(b) If the officer does not file a grievance or if the Chief's determination is found to be reasonable and for cause by the Personnel Committee at step 3 of the grievance procedure, then the Chief shall have the right to file charges with the Police and Fire Commission under Section 62.13 Wis. Stats., and seek termination of employment of the officer in question. The employee's sole recourse from the decision of the Board of Police and Fire Commissioners shall be in accordance with the appeal procedures provided in Section 62.13 Wis. Stats. The Chief's determination to file charges may be amended at any step of the grievance procedure to another form of discipline including suspension.

(c) The Board of Police and Fire Commissioners will be counseled at the termination hearing by an independent Brown County attorney. If the Board finds that the Chief's decision to terminate was reasonable and for cause but, in a written opinion, the attorney disagrees, then the officer in question shall remain on suspension with pay until the legal appeals proceedings are exhausted. If such review is no requested or if the attorney agrees with the Board, then the officer shall be terminated immediately following the Board's action.

(3) <u>Determination of Cause</u>. In any grievance of a disciplinary matter under the terms of this article, the standard to be applied by management and the applicable bodies shall be whether or not there is cause for the discipline imposed under Section 3.10 (1) or cause for the determination of the Chief to file charges under 3.10 (2), given all of the facts and circumstance constituting the grounds for the imposition of discipline or the determination to file charges. Cause shall be determined by applying the following criteria:

(a) Was the employee given advance notice of the possible or probable disciplinary consequences of employee's conduct or was the conduct for which discipline is proposed to be imposed of such a nature that the employee knew or should have known that it was improper?

(b) Was the conduct upon which discipline is to be imposed reasonably related to the effective and efficient operation of the Police Department?

(c) Prior to determining to impose discipline, did the Chief, or his designee, make an effort to investigate the facts relating to the conduct for which discipline is proposed?

(d) Was the Chief's, or his designee's, investigation conducted fairly and objectively?

(e) Did such investigation produce sufficient evidence or proof that the employee was guilty of the conduct for which discipline is proposed?

(f) Has the Chief, or his designee, applied a disciplinary penalty without discrimination?

(g) Was the degree of discipline administered in the particular case reasonably related to the seriousness of the employee's proven offense and the employee's record of service with the Police Department?

(4) <u>Effect of No Grievance Filed</u>. In the event that a disciplinary matter is not grieved under the terms and conditions of the grievance procedure in the labor contract, or the above-described written election and waiver is not filed, the City and the Chief may proceed in the matter of discipline of the officer in question as permitted by law, and the officer in question shall have no recourse to the grievance procedure in the labor agreement.

(5) <u>Remedy</u>. It is intended by the parties that in the event a grievance is filed pursuant to the grievance procedure of this labor agreement and the above-described election and waiver are filed with the City, the grievance procedure in the labor agreement shall be the sole and exclusive remedy of the City, the Chief, the Association, and the officer in question, and that no other discipline may be meted out to any officer based upon the subject matter of the grievance in question.

(6) <u>Limitation and Right</u>. Discipline of an officer shall only be done according to the terms and conditions of this contract. However, the Chief shall have the right to suspend any officer with pay pending the outcome of any grievance filed pursuant to this agreement or under Section 62.13, Wis. Stats.

3.11 REPRESENTATIVES. The Bargaining Unit may appoint representatives of the bargaining unit and shall inform the City of the names of the individuals so appointed and of any change thereafter made in such appointments. The City shall allow the representatives the necessary time to process grievances during the course of the duty day.

•••

### ARTICLE 26

# DISCIPLINE

26.01 RULES AND REGULATIONS. For disciplinary purposes, administrative or otherwise, the substantive rules and regulations for the conduct of members of the Police Department shall be as set forth in "City of Green Bay Police Department Rules and Regulations" (1961), and such may be amended from time to time by the City of Green Bay after negotiations with the Bargaining Unit. In the event such rules and regulations conflict with the ordinances of the City of Green Bay, laws of the State of Wisconsin or United States, or this agreement, said ordinances, laws or agreement shall prevail.

26.02 OFF-DUTY CONDUCT. Off-duty action or inaction shall not be considered as grounds for discipline unless the conduct in question:

(1) Constitutes a conviction of any local ordinance, quasi criminal or criminal law; or

(2) Is done under or pursuant to the officer's use of authority or powers of a sworn Green Bay Police Officer, or under the color of the officers articulated use of the same; or

(3) Is in violation of any rules and regulations governing off-duty conduct existing in the Green Bay Police Department Policy and Procedure Manual. Excepting that Section I Chapter 2 Paragraph D of the existing Policies and Procedures Manual will be deleted.

26.03 INTERNAL INVESTIGATION. Internal investigations conducted by the Green Bay Police Department shall be subject to the following rules:

(1) The subject matter of any investigation shall be confined solely to those areas that are being investigated because the Department has grounds for reasonable suspicion that an officer may be subject to disciplinary action. All other areas of inquiry shall be avoided so as to ensure that investigators do not intrude upon the privacy of any officer. In this regard, the parties acknowledge the danger of questions not relevant to any specific investigation resulting in rumor and innuendo.

(2) When an officer under suspicion is questioned, that officer shall be first advised of the factual basis of the suspicion and advised as to what law, rule or regulation the officer is suspected of breaking. The officer being investigated shall be provided a copy of pertinent writings whenever possible. Also, the officer shall be given the name of the complainant except when the complainant is an employee of the Police Department or has requested anonymity.

(3) Any time an investigation exonerates the officer, management will maintain the investigation file but there will be no record of the investigation in the officer's personnel file. Such investigation shall not form the basis for future discipline; however, it may be used by management in following-up on future complaints.

. . . . "

### **RELEVANT STATUTES**

"...

62.13 Police and Fire Departments

• • •

(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 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.

- (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 have precedence over 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 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 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 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.
- (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.

(5m) Dismissals and reemployment. (a) When it becomes necessary, because of need for economy, lack of work or funds, or for other just causes, to reduce the number of subordinates, the 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, provided that, in cities where a record of service rating has been established prior to January 1, 1933, for the said subordinates, the emergency, special, temporary, part-time provisional subordinates, if any, shall be dismissed first, and thereafter established prior to January 1, 1933, for the said subordinates, the emergency, special, temporary, part-time provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the least efficient as shown by the said service rating.

(b) When it becomes necessary for such reasons to reduce the number of subordinates in the higher positions or offices, or to abolish any higher positions or offices in the department, the subordinate or subordinates affected thereby, shall be placed in a position or office in the department

less responsible according to the subordinate's efficiency and length of service in the department.

(c) The name of a subordinate dismissed for any just cause set forth in this section shall be left on an eligible reemployment list for a period of 2 years after the date of dismissal, except that if the dismissal was for disciplinary reasons the subordinate may not be left on an eligible reemployment list. If any vacancy occurs, or if the number of subordinates is increased, in the department, the vacancy or new positions shall be filled by persons on the eligible reemployment list in the inverse order of the dismissal of the persons on the list.

. . . "

#### **POSITONS OF THE PARTIES**

#### Association

Officer Fietzer's dismissal is a proper subject for arbitration. If Sec. 62.13, Stats, were ignored, the Association would have the right to grieve and arbitrate the dismissal. The grievance procedure broadly defines as "any complaint involving wages, hours and conditions of employment . . . other than proceedings conducted pursuant to Section 62.13, Wis. Stats. No proceedings have been commenced under Sec. 62.13, Stats. The exclusive jurisdiction of the Police and Fire Commission under Sec. 62.13(5), Stats, over disciplinary action is not a factor in this arbitration. The Employer's position is that the removal of Officer Fietzer was not disciplinary and, therefore, not subject to the Sec. 62.13, Stats, procedure.

The dispute regarding whether (1) Officer Fietzer is precluded from carrying a weapon and (2) whether there exists a rule requiring his termination of employment, are both appropriate issues for arbitration. The arbitrator is not required to defer to the Chief of Police's judgment as to the interpretation of the outside legal issue as to whether Officer Fietzer is precluded from carrying a weapon by law. Officer Feizer has a right not to be dismissed without just cause, and by the procedures set forth in Section 62.13, Stats.

Officer Fietzer has a contractual right not to be dismissed without just cause. Agreement Section 1.03 limits the Employer's right to dismiss only for just cause. Section 26.04(1), providing ". . . dismissals . . . shall be governed by the procedures set forth in Section 62.13, Wis. Stats." does not require that dismissals be pursuant to proceedings conducted under Sec. 62.13, Stats. Rather, it requires only that the procedures of that statutory section apply to dismissals. The Association presented testimony as to the bargaining history and intent of Sec. 26.04(1) of the agreement. The Department presented no rebutting testimony. The testimony was specific that it was articulated by the Association to the Department at the bargaining that this provision was intended to cover situations over which the Police and Fire Commission did not take jurisdiction and intended to incorporate the "seven tests" of just cause in those situations when there were no Police and Fire Commission proceedings.

Officer Fietzer is entitled to reinstatement forthwith and the restoration of all compensation lost to date. The Department did not legally terminate Officer Fietzer's employment on January 24, 2005. It is established municipal law that a police officer in Wisconsin has a property right protected under the due process clause of the U.S. Constitution to his employment and a municipal Department cannot terminate his employment without affording the officer a due process hearing. The alleged due process hearing held by the Chief does not meet the tests for a due process hearing. The question of whether Officer Fietzer has continued employment with the Department involves the interpretation and application of municipal law which the WERC, its examiners and arbitrators, apply on a regular basis.

The arbitrator should not order further hearing if he concludes that Office Fietzer continues to be employed. The arbitrator should order further hearing if he concludes otherwise.

#### Department

The only issue in this matter is whether the Department violated Sec. 26.04(1) of the agreement by removing Officer Fietzer from active duty after determining that Officer Fietzer no longer met the minimum qualifications to be a police officer. There are a number of tangent issues that could be raised in this case, including whether Officer Fietzer can, in fact, legally carry a firearm, whether the Department terminated Fietzer for just cause, or whether being required to have the ability to carry a fire arm is an essential requirement of the job as a police officer. The arbitrator does not have jurisdiction over any of those issues because the Association has only requested a determination under Sec. 26.04(1).

Section 26.04(1) does not require a hearing under Sec. 62.13, Stats, for nondisciplinary reasons. Police officers are required to have the ability to carry firearms as evidenced, among other things, by the job description and firearms policy. Instead of contesting the Chief's interpretation of federal law, or the legality of a requirement that police officer's carry firearms as a condition of employment, the Association, instead, claims that Officer Fietzer's procedural rights have been violated. As the title suggests, the police officer's right to obtain a Sec. 62.13, Stats, hearing is when the dismissal is for disciplinary reasons. This is not a discipline case. The Department has the right to determine qualifications of officers under Sec. 1.03 of the management's rights provision of the agreement. Instead, this matter is governed by Sec. 26.04(2) which requires all other disputes to proceed through the grievance procedure. In EASTMAN V. CITY OF MADISON, 117 Wis.2D 106 (Ct. App., 1983), the Court of Appeals found that a police officer was not entitled to a Sec. 62.13, Stats, hearing when he was terminated for the non-disciplinary reason of violating the residency ordinance. The just cause standard of Sec. 62.13, Stats, is not designed to determine whether an officer meets the minimum criteria or qualifications for a job. The only determination to be made in this case is whether the Lautenberg Amendment prevents Fietzer from carrying a firearm. This decision is to be made solely by the Chief.

The Department could not have been more clear that the reason for terminating Officer Fietzer was his legal inability to carry a firearm. Instead of challenging that premise, the Association has brought a procedural challenge that has no possibility of resolving the issue of whether Fietzer can carry a firearm.

The Department followed the proper procedure in terminating Fietzer's employment. Fietzer's actions were investigated, criminal convictions were entered involving domestic violence, and legal determination was made that Officer Fietzer could no longer legally carry a firearm. Fietzer was given a hearing and failed to present sufficient evidence or argument to convince the Chief that he should legally possess a firearm.

He cannot make that showing. The Association's position only creates uncertainty and the possibility of conflicting rulings from multiple judicial and administrative bodies. If the Police and Fire Commission concludes Officer Fietzer was not terminated for just cause under the seven tests, the federal court could still determine that he is not legally allowed to carry a firearm, GILLESPIE V. CITY OF INDIANAPOLIS, 185 F.3D 693 (7th Cir., 1999).

In conclusion, the Department has terminated Officer Fietzer for non-disciplinary reasons. He is not entitled to a hearing under Sec. 62.13, Stats. The provisions of Sec. 26.04(1) are inapplicable. The Department requests that the grievance be dismissed.

### Association Reply

The Department misstates the issues. The Association has never asked the arbitrator to order a hearing before the Police and Fire Commission, but has only requested a determination as to whether Sec. 26.04(1) requires the Department to provide a just cause hearing following procedures similar to Sec. 62.13, Stats. The Department incorrectly cited the SCHULTZ V. BAUMGART, 738 F.3D 231 (CA 7, 1984) and GILLESPIE V. CITY OF INDIANAPOLIS, 185 F.3D 693 (CA 7, 1999) cases and misinterpreted others. Sec. 26.04(1) was not intended to refer to a Police and Fire Commission hearing. The provision excluding Police and Fire Commission "proceedings" from arbitration excludes them entirely from the agreement. Sec. 26.04(1) refers to "procedures" which is meant as incorporating those procedures into the agreement should the Department not file charges with the Police and Fire Commission. The interpretation that they merely refer to Police and Fire proceedings would render Sec. 26.04(1) meaningless. There is no evidence of "domestic violence" with the meaning of federal law and no one other than the Chief made the determination. A non-probationary police officer is entitled to a due-process hearing (including a disinterested decision maker) even if Sec. 62.13, Stats. does not apply. Whether or not non-disciplinary dismissals are subject to Police and Fire Commission jurisdiction under Sec. 62.13, Stats, is not an issue which is relevant in this case. It is an issue raised by the Department to distract the Arbitrator.

The Employer's brief illustrates why an evidentiary hearing should be required before dismissal. The Association should be able to challenge Officer Fietzer's dismissal. A minimal rudiment of due process is that the hearing should be presided over by a neutral hearing officer, not the Chief as was done herein. The concept of due process is not only required by law, but also required by the just cause doctrine. The arbitral forum under the parties' agreement is an appropriate forum to decide this case on its merits. There may well be other forums. The arbitrator should conclude that Officer Fietzer was not afforded due process by the action of the Chief and, therefore, should set aside the dismissal and reinstate Officer Fietzer and order him made whole for all losses.

### **Department Reply**

The sole issue presented by the Association through the entire grievance process was whether the Department had the contractual duty to submit this dismissal to the procedures under Sec. 62.13, Stats. The Department is shocked and prejudiced by this attempt to expand the issues. The Department reiterates its position that it is not obligated to submit this matter to a hearing under Sec. 62.13, Stats. The Department has complied with its obligations to provide Officer Fietzer with a due process hearing, and the Association had the opportunity to challenge the Employer's rationale through the grievance procedure, but failed to do so. The plain language of Article 26 is that only disciplinary actions must go through the grievance procedure. This is not a disciplinary action and, therefore, it is not subject to Article 26.

The issue as to whether the Lautenberg Amendment applies is not before the arbitrator. The Association's sole position in the grievance procedure was that Officer Feittzer had a continuing right to employment which could only be terminated by proceedings under Sec. 62.13.<sup>3</sup> It is not appropriate for the Arbitrator to address the underlying issues with respect to the propriety of the non-disciplinary dismissal. The Department does not consent to the bifurcation of this case to a second level of hearing. The Department does not waive is right to "choose" a venue to determine if the Lautenberg Amendment applies. The Association has waived its right to litigate the substance of the non-disciplinary dismissal. The Interval dismissal is not appropriate to the propriety of the substance of the non-disciplinary dismissal. The Association has waived its right to litigate the substance of the non-disciplinary dismissal. The Association did not raise the legitimacy of the Chief's determination within the fifteen day time limit of filing the grievance.

Officer Fietzer was given a due process hearing. Although the Association is correct that there is no rule requiring an officer to carry a firearm, carrying a firearm is a requirement included in the job description.

<sup>&</sup>lt;sup>3</sup> The Department attached various e mails sent by the Association in the grievance procedure defining the issues in this case. I have considered those e mails as evidence on the issues concerning the scope of the grievance because they were between the parties to the case, involved the scope of the grievance brought and did not involve the underlying facts of the Fietzer removal. The Association has not objected to their consideration or sought further hearing. These e mails do not involve the credibility of witnesses to the proceeding.

### DISCUSSION

#### **1.** Statement of the Issues

The parties disagreed as to the statement of the issues in this case. The Department phrased the issue at hearing as:

Whether the Department violated Article 26.04(1) of the labor agreement when it removed Officer Fietzer from active duty after determining that Officer Fietzer did not meet the minimum qualifications for the position of police officer?

The Association phrased the issue as:

Whether Section 26.04(1) of the labor agreement required that the Department follow the procedures of Wisconsin Statute Sec. 62.13 in dismissing Officer Fietzer on the grounds that Office Fietzer violated a rule that police officers must be able to carry a firearm?

The parties agreed that I could phrase the issues.

The briefs in this case reflect the fact that the parties had a different understanding of the positions of the other. The Department believes that this grievance dealt solely with the Employer's obligation to proceed before the Police and Fire Commission before dismissing Officer Fietzer and that nothing else is raised by this grievance. Alternatively, the Department believes that it has the right to dismiss Officer Fietzer on non-disciplinary grounds and that nothing in the agreement is intended to restrict that authority. The Association's position at hearing was that the Department was required to proceed before the Police and Fire Commission before dismissing Officer Fietzer, or, alternatively, the Department was required to proceed in arbitration in analogy to the substance and procedure of Sec. 62.13(5)(em), Stats. Under that theory, the Department could not dismiss Officer Fietzer until the arbitrator ruled in the Department's favor. Thus, as of hearing they agreed that the issues presented at the arbitration hearing were essentially about the applicability of the procedural provisions of the agreement to the "underlying dispute" and the proper procedures which apply to that dispute.

The "underlying dispute" is:

- 1. Did the Department violate the agreement when it dismissed Officer Fietzer on the "non-disciplinary" grounds that he was now legally disqualified from carrying a firearm?
- 2. If so, what is the appropriate, remedy?

The Department has also reserved the right to file disciplinary charges with the Police and Fire Commission concerning the conduct which was the subject of the underlying convictions. This presumably would occur if I ultimately conclude it did not properly dismiss him for the non-disciplinary reasons. There is a question about my responsibilities under Article 26, most specifically:

- 1. Did the Department violate Sec. 26.04 by having failed to promptly file charges under Sec. 62.13, Stats?
- 2. If so, what is the appropriate remedy?
- 3. If the Employer may still proceed under Sec. 62.13, Stats with the disciplinary action, is Officer Fietzer entitled pursuant to Sec. 26.04, to reinstatement to paid suspension and/or back pay?

Both parties now agree that removing an officer from active police duty because he or she no longer meets the minimum qualifications for the position is not actually subject to Sec. 62.13(5), Stats.<sup>4</sup>

The goal of the Association's position is to obtain an order directing that the Department to reinstate Officer Fietzer with full back pay without first litigating the merits. This would force the Department to prove to a neutral third party that Officer Fietzer is not minimally qualified and should be removed from active duty before it is actually accomplished. Thus, its focus has been upon the procedural aspects of this case. It seeks to do this under the "just cause" provision Article 1 and the disciplinary provisions of Article 26 applied in the following ways:

- 1. Under Article 26.04(1) to have the arbitrator apply the procedures of Sec. 62.13 by analogy to this dispute, particularly Sec. 62.13(5)(h), Stats, which requires that the Department keep Officer Fietzer in paid status until that decision is rendered.
- 2. Under the common law of the doctrine of "just cause" which some arbitrators interpret to impose upon an employer an obligation to give employees "due process" before discharging them.<sup>5</sup>

<sup>&</sup>lt;sup>4</sup> KRAUS V. CITY OF WAUKESHA POLICE AND FIRE COMMISSION, 261 Wis.2D 485, @ p 517 (2003), citing EASTMAN V. CITY OF MADISON, 117 Wis.2D 106 (Ct. App, 1983).

<sup>&</sup>lt;sup>5</sup> See, NAA, <u>The Common Law of the Workplace</u>, (BNA, 2d Ed.), Sec. 6.12, 201, et seq. Most arbitrators who require "due process" do not construe the "due process" doctrine under "just cause" to require that a Department submit to a hearing before a neutral decider before imposing a disciplinary action. The Association's alternative theory is that Officer Fietzer's property right to continued employment is a "term and condition of employment" subject to arbitration. Under U.S. Constitutional law, Officer Fietzer is entitled to due process of law before he is dismissed. See, SCHULTZ V. BAUMGART, 738 F. 2D 231 (8<sup>th</sup> Cir, 1984). In this regard, the Association's position is either to have the arbitrator decide this issue under federal law as a "condition of employment" within the meaning

The Association asserted, as an alternative to those procedural positions, that the arbitrator order a hearing with respect to the merits of dismissal under the agreement's "just cause" provision.<sup>6</sup> This issue was first addressed in its brief and changes the scope of the issues presented. Because this issue was first clearly articulated in the Association's brief, the Department has responded with a number of objections to the consideration of the underlying dispute on its merits. It has also claimed that it was surprised by the Association's "change" of position.

The core of the Association's alternative position is whether the "just cause" provision of Article 1 applies to the underlying dispute. This alternative position also raises procedural issues as to whether "just cause" must be determined under the standards of Sec. 62.13(em) 1-7 or the standards commonly used by the majority of modern labor arbitrators, and whether Officer Fietzer is entitled to reinstatement to paid suspension with or without back pay, pending the resolution of the underlying dispute. I have stated the issues accordingly above.

I have concluded that the position of the Association is substantively arbitrable, but that the Employer has been prejudiced in its right to a full hearing. I have outlined the provisions which apply to the underlying dispute and concluded that Officer Fietzer is not entitled to continued employment pending the determination of the underlying non-disciplinary dismissal issues.

### 2. Applicability of "Just Cause" Provision

Article 1 of the agreement provides that the Department has the authority to, *inter alia*, "... to determine qualifications and conditions of continued employment, to dismiss, demote, and discipline for just cause, to determine reasonable schedules of work." The underlying dispute outlined above is a dispute about the interpretation and application of the quoted provision of Article 1.

Even though the terms of this provision occur in the management rights provision, the use of the term "cause" in the context of a management rights provision is customarily viewed

of the definition of grievance or to try to get this arbitrator to engraft this aggressive view of Constitutional law into the contractual doctrine. See. Tr. P. 7.

<sup>&</sup>lt;sup>6</sup> At page 15 of the Association's brief, it states:

<sup>&</sup>quot;Although the [Association] suggests that the Arbitrator need not move this grievance forward to a just cause hearing should an award be issued that Officer Fietzer enjoys continued employment, the same is not true if that does not occur. In that event the merits regarding the just cause for dismissal should be hearing."

Throughout the brief the Association assumes that the standards for decision under the contractual doctrine of just cause are the same as the statutory standards of Sec. 63.12(5), Stats. It assumes that Sec. 26.04 requires this result. For the reasons discussed below, I conclude otherwise and rely upon the just cause doctrine of Article 1.

in labor relations as a restriction on the authority of management to discipline only when cause is present. The absence of cause is generally treated as a subject for grievance arbitration.

The parties agree that the case before me deals with the non-disciplinary dismissal. The term "dismiss" includes both disciplinary and at least some non-disciplinary terminations. The term "dismiss" is occasionally used as a synonym for discharge, but it is ordinarily used in labor relations in a broader sense to include situations in which ". . . the employee has no control and the separation does not result from infractions or violations of company rules or policy."<sup>7</sup> For example, the word "dismissed" is used in that same way in connection with reductions in force in Sec. 62.13(5m), Stats.

Arbitrators have applied the doctrine of "just cause" to issues involving the loss of basic qualifications.<sup>8</sup> In DANE COUNTY (unpublished, Michelstetter), I held that the employer therein violated the just cause provision when it unilaterally refused to reinstate an employee for non-disciplinary reasons who it concluded had not produced a satisfactory return-to-work medical authorization after a work-related disabling injury. This was over the employer's objection that the issue was not subject to the "just cause" provision. The Wisconsin Supreme Court affirmed the award, in relevant, part in DANE COUNTY V. DANE COUNTY UNION LOCAL 65, 210 Wis.2D 267, 282-284 (1997).

This case illustrates the need for an exercise of the just cause doctrine because it involves many "just cause" issues. Specifically, there is an underlying dispute as to whether or not the employee is prohibited by law from carrying a firearm. It is conceivable, but admittedly unlikely, that this prohibition is not permanent. Even if he were to be legally prohibited from carrying a firearm, the Association has, in effect. argued that the Department has retained other employees who have become unable to perform their work.

Additionally, granting the Department the unilateral authority to dismiss an officer for non-disciplinary reasons would seriously weaken the extensive protections this agreement intends to afford an officer. For example, the Department also investigated this matter to determine if it was appropriate to discipline Officer Fietzer for the off-duty misconduct. It was cheaper and easier to dismiss him this way rather than keep him in paid status pending a resolution of the disciplinary issues pursuant to Sec. 62.13, Stats. The Association has vigorously argued that the non-disciplinary legal disqualification issue was merely a pretext to avoid the expenses which it would incur in litigating the disciplinary off-duty misconduct issue.<sup>9</sup>

<sup>&</sup>lt;sup>7</sup> <u>Roberts' Dictionary of Industrial Relations</u>, (BNA, 4<sup>th</sup> Ed.) p. 178

<sup>&</sup>lt;sup>8</sup> See, KING & AMERICAN AMBULANCE COMPANY, 97 LA 78 (Concepcion, 1986). Norm Brand, Ed., *Discipline and Discharge in Arbitration* (BNA, 1998), 139 et seq.; 2001 Supplement p. 29 et seq.

<sup>&</sup>lt;sup>9</sup> It is not uncommon in other non-disciplinary situations such as disability to attempt to find other positions for which the employee is qualified. There is no indication in the record to date that the Chief considered this or that the Association raised the issue.

Section 1.03 of the agreement reserves to management the ". . . power . . . to determine qualifications and conditions of continued employment. . . ." It is important to discuss whether this provision removes the underlying dispute from review under the just cause provision. This authority is not unfettered, but is subject to the last provision of Sec. 1.03 that the Department may not exercise that right in any manner which modifies "conditions of employment" (as that term is used under Sec. 111.70, Stats.) without negotiating with the Association first. That power also has to be reconciled with the fact that it is somewhat subordinate to the dismissal-for-just-cause provision when its exercise effects a dismissal of an officer who is currently employed.

I also note that the issue of legal disability from carrying a firearm is not a normal "qualification" issue requiring a judgment of the Department. It is a legal issue. The management rights clause was not intended to give to the Department the unilateral authority to determine federal legal issues.

The Department's contention that by limiting Article 26 to disciplinary situations, the parties intended to leave non-disciplinary decisions to the sole discretion of the Chief is without merit. This would require that I interpret the "just cause" provision to mean only what it means in Sec. 62.13, Stats. In this regard, the Department seeks to have the agreement interpreted to expand upon the unilateral powers of the Chief to determine qualifications recognized in CITY OF MADISON V. WERC, 261 Wis.2D 423 (2003). In that case, the sharply divided Wisconsin Supreme Court, in relevant part, essentially concluded that a collective bargaining agreement could not restrict a fire chief's decision to terminate the promotion of a tenured fire fighter for non-disciplinary reasons where the Police and Fire Commission rules permitted the unfettered termination. In a prior case, GLENDALE PROFESSIONAL POLICEMEN'S ASSOCIATION V. CITY OF GLENDALE, 83 Wis.2D 90 (1977), the Court found that a provision requiring that the senior qualified police officer be promoted could be harmonized with the chief's authority under law. It is unclear the extent to which the statute will be interpreted to forbid collective bargaining over this type of dispute. If it does, there may be an issue as to whether the provisions of this agreement as applied may be lawful. In this case, it is the Arbitrator's responsibility to apply the agreement as it was written by the parties.

Attorney Parins' testimony and the history of the parties' agreement demonstrate that the parties intended broad protections for employees. Attornry Parins credibly testified that the agreement terms were drafted to avoid situations in which employees would be dismissed without recourse. This is discussed more below. The better view of the underlying issues in this case is that they are subject to the "just cause" provision of Sec. 1.03<sup>10</sup>

<sup>&</sup>lt;sup>10</sup> See, ANTISEDEL V. CITY OF OAK CREEK, 234 Wis.2D 154 (2000) in which a police officer's reduction from sergeant during his promotional probationary period was held to be more disciplinary in nature than evaluative of qualifications. It is difficult to reconcile this case with CITY OF MADISON, *supra*. The dissent at page 455 notes that there was a dispute as to whether the demotion was really disciplinary in nature.

Other provisions of this agreement might have independent applicability to this dispute, but are overshadowed by the just cause standard which is more extensive. For example, Sec. 26.04(1) requires that the Department take disciplinary actions to proceedings before the Police and Fire Commission. This provision prohibits using non-disciplinary removals as pretext for avoiding employee rights under Sec. 62.13(5)(em). Section 26.01 prohibits changes in rules and regulations which are subject to collective bargaining unless they are bargained first. This is confirmed in the last sentence of the management rights provision of Sec. 1.03. Section 3.01 subjects disputes about conditions of employment to arbitration. Both provisions may regulate the way in which the Chief creates or applies the job requirement concerning the ability to carry a firearm.<sup>11</sup>

# **3.** Substantive Arbitrability <sup>12</sup>

As noted above, the Association changed its primary position at the last minute to abandon the argument that the underlying dispute is actually subject to the jurisdiction of the Police and Fire Commission under Sec. 62.13(5), Stats. The Department's position is that the sole issue before the arbitrator was whether Officer Fietzer was entitled to a hearing before the Police and Fire Commission. This could be viewed as a challenge to whether the Association's position is arbitrable.<sup>13</sup>

In City of Madison v. WERC, supra, at 435, et seq., the Court again reiterated that the decision as to whether a grievance is substantively arbitrable is preliminarily one for the arbitrator, but ultimately one for the courts unless the agreement clearly expresses the intent that the arbitrator have final decisional authority to determine what is arbitrable. The Court reiterated that it applied the standards of determining arbitrability applied by the federal courts and stated the test of arbitrability as follows:

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. [citations omitted.]

Under Sec. 3.01 of the agreement a grievance is defined as:

<sup>&</sup>lt;sup>11</sup> See, for example, MILWAUKEE POLICE ASSOCIATION V. CITY OF MILWAUKEE, 250 Wis.2D 676 (2002), in which the definition of a "grievance" which included "conditions of employment" was found sufficient to make a grievance concerning transfers found by a federal court to be in violation of the First Amendment procedurally sufficient to be arbitrated.

<sup>&</sup>lt;sup>12</sup> The question of whether the substantive issue of inability to carry a firearm is subject to arbitration is discussed below.

<sup>&</sup>lt;sup>13</sup> See, CITY OF MADISON, *supra*, pp. 436-7 and cases cited therein. Also see, OSHKOSH PROFESSIONAL POLICE OFFICERS' ASSOCIATION V. CITY OF OSHKOSH, DEC. NO. 30443-A (Nielsen, 10/03). Aff'd by operation of law, (WERC, 11/03).

... any complaint involving wages, hours and conditions of employment of members of the bargaining unit, other than proceedings conducted pursuant to Section 62.13, Wis. Stats. A grievant may be an employee or the Union.

Grievances which are appealed to arbitration are subject to arbitration under Article 3. This provision is clear and unambiguous. If no proceedings are commenced under Sec. 62.13, Stats, the arbitrator has at least some jurisdiction. For the reasons stated above, I conclude I have substantive authority under the "just cause" provision to review the non-disciplinary dismissal.

Section 26.04 further defines some, but not all, of the terms under which the arbitrator may have jurisdiction with respect to disciplinary dismissals when no action is commenced before the Police and Fire Commission. That jurisdiction may be exercised as follows:

#### 26.04 DISCIPLINARY PROCEDURES

(1) Section 62.13, Wisconsin Statutes. Suspension(s), reduction in rank, suspension and reduction in rank, and dismissal of bargaining unit members shall be governed by the procedures set forth in Section 62.13, Wis. Stats.

(2) All other disciplinary proceedings shall be governed by the Grievance Procedure

The foregoing requires that dismissals which are disciplinary go the Police and Fire Commission. Among other things, it makes it a separate contractual violation if the Department uses a pretext to deny employees their rights under Sec. 62.13(5)(em), Stats.<sup>14</sup> The provision may also provide other protections to employees improperly denied their statutory rights.

Should the Department choose to seek Officer Fietzer's dismissal for the disciplinary reason of his off-duty misconduct underlying his criminal convictions, Sec. 26.04(1) directs that those proceedings be pursuant to Sec. 62.13, Stats. If the Department files charges with the Police and Fire Commission that dispute is not subject to arbitration. The rights of Officer Fietzer under Section 26.04(1), including issues as to whether the Department has waived its right to proceed before the Police and Fire Commission by its delay and/or whether Officer Fietzer is entitled to put into the position he would have been under Sec. 62.13(5)(h), Stats, had the Department proceeded promptly is substantively properly before the arbitrator.<sup>15</sup> I retain jurisdiction over those.<sup>16</sup>

<sup>&</sup>lt;sup>14</sup> No decision is expressed or implied with respect to layoffs under Sec. 62.13(5)(m), Stats.

<sup>&</sup>lt;sup>15</sup> See the discussion below about the scope of the grievance.

<sup>&</sup>lt;sup>16</sup> Under Article 3, a grievance is defined as a "dispute." The dispute in this case is that Officer Fietzer seeks reinstatement to his position. The parties disagreed in the grievance procedure about whether the Chief could

#### 4. Standards for Deciding the Underlying Dispute

As noted above, the Department's position is that Article 26 has no applicability to nondisciplinary dismissals and non-disciplinary dismissals are solely in the discretion of the Chief

The Association's position is in stark contrast. Section 26.04(1) applies to nondisciplinary dismissals. It incorporates and expands Sec. 62.13(5)(h), to require the Department to keep officers in paid suspension pending final determination of non-disciplinary removals in every case. Curiously, the Association seeks to have the arbitrator apply the "seven tests" of Sec. 62.13(5)(em) 1-7 by reference rather than the standards of "just cause" ordinarily applied by the majority of labor arbitrators which are far less deferential to the judgment of the Chief than the "seven tests."

The agreement is ambiguous in this regard. An agreement is ambiguous when it is fairly susceptible to one or more meanings. It is fairly susceptible to interpretations which would support all of the above stated positions. When an agreement is ambiguous, it is the responsibility of the arbitrator to determine what the parties intended by the ambiguous language. He or she does this by, among other things, looking at the past practices of the parties, the purposes of the agreement and the legal or other context it was made in, the bargaining history and the rules of construction ordinarily applied by the arbitrators and the courts.

All of these ambiguities are answered largely by the language of the agreement and the bargaining history of these and other disciplinary provisions of the agreement. As noted in Atty. Parins' testimony, the agreement between the parties which expired in 1986, simply provided that grievances involving discipline of police officers were to be heard by a labor arbitrator.<sup>17</sup>

In the negotiations ultimately leading to the 1986 agreement, the Department raised an issue as to whether a conclusion by an arbitrator that a discharge would be sustained would be effective as a matter of law to end the police officer's employment.<sup>18</sup> The parties created a grievance and arbitration procedure in their 1986 agreement to "meld" Sec. 62.13, Stats, and the arbitration provision.<sup>19</sup> Under that provision, the structure provides that any decision to file charges seeking dismissal of an officer had to be submitted to arbitration upon request of

<sup>18</sup> Tr. Pp. 47-50.

proceed to file charges before the Police and Fire Commission after having chosen to use the non-disciplinary approach. It is necessary to assert the fullest jurisdiction possible over this issue to be able to deal with the entire dispute. Accordingly, this issue is within the scope of this grievance.

<sup>&</sup>lt;sup>17</sup> It is unclear whether the arbitrator applied the traditional labor relations "just cause" standard or one which is more deferential to the Department. The 1986 agreement began to meld Sec. 62.13 disciplinary dismissal provisions with the former provisions. It provided that all discipline short of discharge had to be for just cause. It provided that discharges had to meet the "reasonable and for cause" standard which was basically akin to probable cause.

<sup>&</sup>lt;sup>19</sup> See, above section titled "1986 Agreement Relevant Provisions."

the officer for the purpose of determining whether there was a "reasonable basis" for the charge. This procedure stayed in effect through the 1995 agreement. This agreement evinced an intent to submit every disciplinary issue which did not go to the Fire and Police Commission to arbitration and to restrict the authority of the Chief to prefer charges seeking dismissal to only those circumstances were he or she could convince and arbitrator that it was "reasonable and for cause." This is demonstrated by several factors in the agreement. First, the parties used broad language as to the matters arbitrable. They listed the subject of arbitration as "any complaint involving wages, hours and conditions of employment," instead of the more common and narrower "disputes involving the interpretation and application of the agreement." Second, they exempted from the grievance procedure only "proceedings conducted pursuant to Section 62.13, Wisconsin Statutes." The purpose of this provision was to give the employee the option to submit his or her dispute concerning discipline short of discharge to arbitration. The agreement did not expressly address the issue of non-disciplinary dismissal. It appears that the agreement incorrectly assumed that any dismissal had to be pursuant to layoff or dismissal under Sec. 62.13, Stats. Even though the language was incomplete, it is clear that the parties intended that any dispute concerning a situation in which no charges were filed with the Police and Fire Commission would be subject to arbitration, even though there were ambiguities which would have had to have been resolved about the decisional standard.

The lower court decision underlying CITY OF JANESVILLE V. WERC, 193 Wis.2D 492 (Ct.App, 1995) was rendered in June, 2004. The Court of Appeals affirmed the lower court decision which concluded that Sec. 62.13, Stats, was the exclusive procedure for hearing city police officer discipline and discharge cases and, therefore, the arbitration of such a dispute was not a subject over which cities were required to collectively bargain. The Department sought to remove the melded procedure, but the parties retained the melded procedure. The final appellate decision in CITY OF JANESVILLE was rendered in 1995, after the agreement was signed.

As of that time, the parties' agreements still did not contain a management rights provision or separate just cause provision such as is in Sec. 1.03 of the current agreement. It provided in Sec. 3.10(2) that the Chief could only file charges with the Police and Fire Commission if he or she establishes before an arbitrator essentially whether there was a reasonable basis for the charges (applying the seven tests). Section 3.10(6) limited the authority of the Chief to only suspending the officer with pay pending the disciplinary disposition. While that agreement remained ambiguous with respect to non-disciplinary terminations, it can only be viewed as attempting to vigorously protect officers.

Attorney Parins testified as to the bargaining history of Sec.  $26.04^{20}$  in the subsequent agreement without contradiction. He stated that the Department sought to remove the provisions melding the arbitration provisions and Sec. 62.13, Stats. He stated that the parties

were both aware of cases in which the courts sustained the dismissal of employees without charges having been filed with police and fire commissions. The Association stated in bargaining that its proposed purpose of Sec. 26.04(1) was to insure that the principles of Sec. 62.13, Stats, would be preserved for officers in unusual situations, including but not limited to, situations in which officers were dismissed without the Chief having first pursued charges before the Police and Fire Commission. This viewpoint is buttressed by the fact that the parties added (then or later) the limitation in Sec. 1.03 that dismissals could occur only for just cause. This provision would be unnecessary if the parties contemplated that the Department would have unilateral authority of over all dismissals not actually covered by Sec. 62.13(5)(em), Stats. Accordingly, I conclude that Section 26.04 applies to non-disciplinary dismissals of a type over which the just cause provision of Article 1.03 applies. Section 26.04(1) is intended to authorize the application of Sec. 62.13(5)(h), Stats, but does not require that it be done in each case.<sup>21</sup>

I turn now to the standards the arbitrator must apply to determine just cause in nondisciplinary situations. The standards ordinarily applied by labor arbitrators under the doctrine of just cause are often less deferential to an employer than those contemplated by Sec. 63.13(5)(em), Stats. Some background may be helpful. The seven tests for deciding "just cause" which have been incorporated in Sec. 62.13(5)(em)1-7, Stats, were first articulated by Arbitrator Carroll Daugherty in GRIEF BROTHERS 42 LA 555, 557 (1964) and later refined. He developed the standards based upon his experience as a railroad umpire under the Railway Labor Act. That process is substantially different than labor arbitration of disciplinary disputes. Under that process, the railroad holds an evidentiary hearing in minor disputes on its property. The umpire essentially performs an appellate review of the record created by the railroad. Many arbitrators view these standards as significantly more restrictive than their view of "just cause" as used in provisions like Article I of this agreement. Some parties and some arbitrators adhere to them as the proper meaning of "just cause" under the ordinary agreement provisions.<sup>22</sup> Accordingly, some parties actually include provisions adopting the seven tests. The Department and the Association have incorporated them in prior agreements to preserve the discretion of the Chief, give advisory guidance to the Police and Fire Commission, and to insure that in any subsequent substantive court review of arbitrators' awards, that standards applied by the arbitrator would not conflict with Sec. 62.13(5)(em). The purposes of Sec. 26.04 are better served by applying these standards. They take into account the Chief's authority. Accordingly, the standards for the determination of just cause specified in Sec. 62.13(5)(em), Stats., apply to actions under the just cause provision of Article I.

<sup>&</sup>lt;sup>21</sup> This is a case by case determination in non-disciplinary dismissals. See the discussion below. I note that there are allegations that the Chief's actions were merely a pretext for avoiding this statutory obligation. The enforcement of this provision may involve remedies beyond the customary back-pay award in order to enforce the intent of this provision.

<sup>&</sup>lt;sup>22</sup> See, NAA, <u>*The Common Law of the Workplace*</u> (BNA, 2d Ed.), Sec. 6.1 and 6.12 (Reference portion); Brand, Ed., <u>*Discipline and Discharge*</u> (BNA, 1998), section entitled "Theories of Just Cause," 30, et seq.

### 5. Non-Waiver of Right to Proceed on the Merits/Prejudice in Proceeding to Merits

The Department has argued that the Association has waived it right to proceed to arbitration on the underlying issues. Alternatively, it has argued that the Arbitrator should not proceed to the merits because the Department has not had a chance to be heard on the merits. I conclude that the Association has not waived the right to proceed to arbitrate the merits of the underlying issues, but I do conclude that the Department has not had an adequate opportunity to be heard on the merits. Accordingly, I order that there be further proceedings on the merits.

The underlying issues substantially relate to Officer Fietzer's statutory right to not be dismissed without just cause. Accordingly, the correct interpretation of this agreement is that the waiver of Officer Feitzer's right to not have a hearing on the underlying issues must be clear and unmistakable.<sup>23</sup>

If the underlying issues are not fairly within the scope of the grievance filed herein, they would be effectively barred by the time limits of the grievance procedure.

The original grievance stated:

"... Officer Fietzer has a continuing employment contract with the City ... Neither yourself [Chief] or the City ... has the lawful authority to involuntarily terminate or remove Officer Fietzer; the Green Bay Police & Fire Commission has exclusive lawful authority and jurisdiction regarding termination and removal...

The second basis is that Article 26. . .specifies that termination or removal of a police officer . . . shall be pursuant to Section 62.13(5), Wis. Stats. . . .

The relief requested by this grievance is: (1) the immediate withdrawal of your letter of termination dated January 24, 2005; (2) immediate reinstatement and return to duty. . . and (3) that Officer Fietzer be made whole.

Grievances are liberally construed.<sup>24</sup> This grievance seeks Officer Fietzer's reinstatement, the remedy sought by a hearing on the merits. The second stated theory in the grievance can fairly be viewed to assume that the arbitrator, not the Police and Fire Commission, will apply the provisions of Sec. 62.13(5)(h), Stats., by a similar power conferred upon him under

<sup>&</sup>lt;sup>23</sup> See, WSEIU v. STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS DEC. NO. 31193-A, 18, OCAW LOCAL 1-547 v. NLRB, 842 F.2D 1141, 1144 (9<sup>th</sup> Cir., 1988)

<sup>&</sup>lt;sup>24</sup> MILWAUKEE POLICE ASSOCIATION V. CITY OF MILWAUKEE, 250 Wis.2D 676 (Ct. App, 2002)

Sec. 26.04(1). Thus, it can fairly be viewed as arguing that the arbitrator will decide the underlying issues on the merits.

I now turn to whether the Association waived a right to proceed on the merits by not communicating that alternative possibility to the Department in the grievance processing. Chief Van Schyndle responded to the grievance and stated that the dismissal was nondisciplinary, but, if reinstatement were warranted, he would ". . . reserve the right to proceed to the City of Green Bay Police and Fire Commission on disciplinary grounds, if appropriate." The Association appealed that response and, among other things, rejected any right of the Department to now seek Officer Fietzer's discharge through the procedures of Sec. 62.13(5)(cm), Stats. I conclude that both parties anticipated that there might be further litigation as to the merits of the underlying dispute should there be a finding that the underlying dispute was arbitrable under Article 1 and or Article 26.04. I conclude the Association did not waive its right to arbitrate the substance of the non-disciplinary removal. Further, I conclude that the interpretation and application of the provisions of Sec. 26.04(1) to a decision to proceed on the disciplinary action before the Police and Fire Commission is within the scope of this grievance.

The Department is correct in its position that it is premature for the Arbitrator to make a decision on the merits. The Association clearly represented to the Department that its legal position at the arbitration hearing was going to be limited to the procedural issues. The Department submitted an e-mail from Mr. Parins to Mr. Dietrich concerning what was to be litigated at hearing in which he stated:

"I do not believe it will be necessary at arbitration to frame the issue of whether Officer Fietzer was disqualified from carrying a weapon. . . . In fact, it would be our opinion that this would not be subject to arbitration. "Cause" for termination of employment in the police and fire service cannot be the subject of . . . a labor contract grievance/arb procedure."

At pages 6-7 of the transcript, Mr. Parins took the position:

The position of the association is not necessarily that the city violated the labor agreement and there ought to be a remedy for the violation. Rather, the position of the labor association here is that Tony Fietzer('s) . . . employment continues until such time as it was lawfully terminated.

The essence of the position of the Association at the time of the commencement of the hearing was that Sec. 26.04(1) conferred jurisdiction on the Police and Fire Commission to hear the non-disciplinary dismissal even though the same is not actually required by law. The Association continued that position through the hearing. It changed this position only after the hearing. Therefore, the Department has not had an opportunity to have a hearing on the merits of the underlying dispute. Accordingly, I have entered an interim order as specified below.

# 6. Interim Reinstatement <sup>25</sup>

Under Sec. 62.13(5)(h), Stats, officers are entitled to remain in paid status until disciplinary dismissals are resolved. I turn to the Association's argument that Officer Fietzer is entitled to reinstatement and/or back pay pending the resolution of the non-disciplinary dismissal herein.

Remaining in paid status is an unusual remedy in labor arbitration of dismissal cases because parties are usually satisfied with the speedy resolution of discharges cases in arbitration. I conclude that because the parties essentially incorporated the statutory procedure by reference, the authority to order reinstatement under that provision should be construed in accordance with the purposes of the statutory provision. The public purpose of Sec. 62.13(5), Stats, is rather clear. It is to insure honest policing free from political influence. The provision of pay pending disposition of charges prevents the abuse of police officers with arbitrary charges and long periods pending disposition without pay. However, Sec. 62.13(5)(h), does not apply when disputed layoffs occur or an employer takes non-disciplinary actions. These situations were not deemed by the legislature and courts to entail the same risks to the public. Accordingly, the power conferred by Sec. 26.04(1) to impose pay in analogy to Sec. 62.13(5)(h), Stats, is not properly exercised with respect to the non-disciplinary dismissal, but may be exercised if the purposes of the statutory provision are implicated. That determination must be made on a case-by-case basis.

This case is a mixed case. It has both a non-disciplinary and disciplinary aspect. There are allegations that the non-disciplinary action is a pre-text to avoid Officer Fietzer's rights under Sec. 62.13(5)(h), Stats. Accordingly, the statutory purposes are implicated.

I conclude that the following factors are important in making the determination of the applicability of the statute at this time:

- 1. The ability to get the underlying dispute promptly heard and promptly finally resolved.
- 2. Whether the interim request to invoke Sec. 62.12(5)(h), Stats, via Sec. 26.04(1) was made to the arbitrator without undue delay after the underlying dispute became evident.
- 3. Whether Officer Fietzer has a likelihood of success on the merits of the underlying dispute or the merits of a showing of a pre-text.

<sup>&</sup>lt;sup>25</sup> It is not necessary to determine the Association's argument that "due process" considerations might have required that the underlying issues be submitted to a neutral hearing officer before Officer Fietzer was dismissed. The parties have created an effective post-dismissal procedure which is more than adequate to comply with "due process" considerations. See, HANSON V. MADISON SERVICE CORPORATION, 150 Wis.2D 828 (Ct. App, 1989); EASTMAN V. CITY OF MADISON, 117 Wis.2D 106 (ct. App, 1983).

- 4. Any special needs or circumstances of Officer Fietzer.
- 5. The morale of the Department and/or the need to deter a pattern of abuse of the non-disciplinary process, if any.
- 6. The availability of effective post-award remedies.

I turn first to the likelihood of success regarding the underlying firearm issue. Under Sec. 18 USC Sec. 922, it is a federal felony for those convicted of a misdemeanor crime of domestic violence to possess firearms or ammunition. In relevant part, the law defines "crime of domestic violence" which has an element "the use or attempted use of physical force, of the threatened use of a deadly weapon." The Court disclosure document, exhibit 1, I, provides that ". . . a person is not considered to have been convicted if the conviction has been expunged, set aside, or is an offense for which the person has been pardoned or has had civil rights restored."

Officer Fietzer pled guilty to at least 4 counts of successive violations. He was subject to a deferred prosecution agreement on one or more of these counts. In case 04 CF 431 he was charged with the Class 1 felony of "stalking." The Court at the October 26, 2004, plea hearing at page 3-4 stated the elements as follows:

First is that you intentionally engaged in a course of conduct that caused the person to fear that there would be bodily injury or death to that person. . . .

And the second is that you knew or should have known that your conduct would cause that fear in the individual.

The Court accepted his "no contest" plea to that charge. The Court withheld a finding of guilt on that count under the deferred prosecution agreement, the terms of which are not in evidence. However, the felony count was a "read-in" at sentencing. It therefore was part of the factual basis for sentencing.

Special Prosecutor Prato recited the factual allegations accepted as the basis of the plea at the sentencing hearing on November 16, 2004, p. 7 in which she stated that Officer Fietzer pushed his significant other down on the stairs, shaking her and yelling vulgarities at her. There were other allegations that he threatened a homicide/suicide to prevent her from reporting the incident to police.

He was also convicted of two counts of misdemeanor bail jumping, domestic abuse, for incidents occurring November 27 and 30, 2003. Attorney Prado recited a chain of conduct constituting stalking and apparently culminating in the facts underlying the felony. However, at page 9 Atty. Prado stated that:

.... He was caught chasing her around her yard. He pulled her into the bathroom and .... That's where the threat against her life came in. He didn't

want her to report that truthfully to the police. That's when he threatened suicide/homicide. . . .

This appears to be the factual basis underlying a bail jumping charge relating to interference with a witness.

The Association's defense is that there has been no conviction as to the felony. It also argues that neither the foregoing felony nor the misdemeanor convictions have the use of physical force or threatened use of a deadly weapon as an element. It is unclear whether the acceptance of a plea under a deferred prosecution agreement is sufficient to be a conviction for the federal purpose.

It is unclear whether the threat was a factual basis for one of the bail jumping convictions. The Association's defense is based upon a technical avoidance of the nature of the threat. The factual basis of the threat is that Officer Fietzer created the fear by making a threat which a reasonable person could easily conclude would involve the use of a firearm. I conclude that the Association has a low probability of success on the firearm issue itself.

Next, I turn to the current factual basis of the request for this relief. Officer Fietzer was on paid suspension during the time he was first charged and committed later offenses. It was over a year and one-half from the filing of the grievance to hearing in this matter. The ill effects the statute was designed to avoid have very likely already occurred. The remedies imposed now would be much the same as those imposed after a final decision. Accordingly, the application of Sec. 62.13(5)(h), Stats, by virtue of Sec. 26.04(1) is inappropriate at this time.

# 7. Arbitrability of Lawful Authority to Carry a Weapon

The Department has challenged whether it is obligated to arbitrate the issue as to whether Officer Fietzer is now prohibited by federal law from carrying a firearm. Under Sec. 3.01 the authority of the arbitrator is limited to, in relevant part, disputes about conditions of employment. This phrase is a term of art in labor relations.<sup>26</sup> When used in this context it is intended to broader than, but totally inclusive of, the narrower standards of "interpretation, application or enforcement of the agreement" standard. One of the terms of the agreement is the "just cause" provision of Sec. 1.03.

The issue in this case is not whether Officer Fietzer is prohibited by federal law from carrying a firearm, but how the collective bargaining agreement should be administered in the light of that issue. The probable result of the federal firearms issue is likely to be a subelement of the issue, but it also possible that it will not be.<sup>27</sup>

<sup>&</sup>lt;sup>26</sup> See, Sec. 111.70(1)(a), Stats.

<sup>&</sup>lt;sup>27</sup> For example, the Department could be ordered to give Officer Fietzer reinstatement upon compliance with a condition precedent or subsequent. For example, the Department could be ordered to reinstate Officer Fietzer upon

The Department is not a proper party to the federal law issue. It does not have authority to waive the federal firearm issue.<sup>28</sup> The Department retains its law enforcement responsibilities toward Officer Fietzer should he be found with a firearm in potential violation of federal law. It is unlikely that Officer Fietzer has any authority to submit the federal firearm issue to binding arbitration, even with the proper parties.

Nonetheless, the federal courts have recognized the authority of labor arbitrators to interpret collective bargaining agreements in the light of federal law affecting their administration. In ALEXANDER V. GARDNER-DENVER, 415 U.S. 36 (1974), the petitioner therein sought to litigate a Title VII claim that his discharge was racially motivated after having lost a related just cause dismissal claim before a labor arbitrator. The Court noted in effect:

. . . the relationship between the forums is complimentary since consideration of the claim by both forums may promote the policies underlying each.<sup>29</sup>

The same general concept has been recognized in Wisconsin where the arbitrator is called upon to interpret and apply a "just cause" decision.<sup>30</sup> The WERC is specifically charged with determining criminal law issues under WEPA.<sup>31</sup> Labor arbitration of federal issues continues to occur.<sup>32</sup>

Because this dispute has not yet been fully heard, the parties have the opportunity to tailor the arbitration process in this particular case. They may consider the benefits of developing specific procedures to deal with the federal firearms issue, should deferral to the

<sup>28</sup> See, for example, GILLESPIE V. CITY OF INDIANAPOLIS, 185 F.3D 693 (CA 7, 1998).

<sup>29</sup> Pp. 50-51.

<sup>30</sup> See, MADISON PROFESSIONAL POLICE ASSOCIATION V. CITY OF MADISON, 144 Wis.2D 576, 585 (1988) overruling WERC v. TEAMSTERS LOCAL NO. 563 75 Wis.2D 602 (1977), and the dissenting opinion in WERC.

<sup>31</sup> Section 111.06(1)(1), Stats. See, LAYTON SCHOOL OF ART & DESIGN V. WERC, 82 Wis.2D 324 (1977).

his seeking declaratory relief in a federal court. Nothing in this decision should be construed to make a final decision as to the extent to which I should defer to the Employer's determination on the federal issue. That determination will be made after the parties have had an opportunity for hearing as to how the Department made its federal firearms issue determination and to brief the extent to which the 7 tests and Article 1 require that I defer to the Chief's decision.

<sup>&</sup>lt;sup>32</sup> See, for example, federal district court deferring to labor arbitrator's decision of employee rights under the Uniformed Services Employment and Reemployment Act, 38 USC Se. 4301, *et seq.*, KLEIN V. CITY OF LANSING, 2007 WL 1521187 (WD Mi, 2007).

Department's decision not be appropriate, in a way satisfactory to all.<sup>33</sup> For the foregoing reasons, I conclude the issue as to the application of the collective bargaining agreement in the light of potential federal firearms disability is arbitrable. Since this matter is appropriate for further proceedings, I will enter the following interim award.

# **INTERIM AWARD**

1. Since the just cause provisions of Article 1 and Article 26 apply to the underlying dispute, further hearing in this matter will be conducted on the underlying dispute and also as to the Association's request for interim relief, if any, at a date, place and time to be agreed upon by the parties.

2. Interim relief is denied at this time, with leave to renew the request after a hearing thereon.

3. I reserve jurisdiction over all issues cognizable under the agreement concerning the potential discipline or dismissal of Officer Fietzer should the Department determine to file charges before the Police and Fire Commission on the conduct which led to the criminal convictions underlying this dispute.

4. The parties shall notify me within 15 days of the date of this award of their willingness to proceed to hearing. I will then order a pre-hearing teleconference.

Dated at Madison, Wisconsin, this 8<sup>th</sup> of August, 2007.

Stanley H. Michelstetter II /s/ Stanley H. Michelstetter II, Arbitrator

<sup>&</sup>lt;sup>33</sup> For example, see the footnotes in GARNDER-DENVER, *supra*; SPIELBERG MFG. Co., 112 NLRB 1080, 36 LRRM 1152 (1955), COLLYER INSULATED WIRE, 192 NLRB 837, 77 LRRM 1931 (1977); MILWAUKEE POLICE ASSOCIATION V. CITY OF MILWAUKEE, 250 Wis.2D 676 (Ct. App, 2000) (issue of transfer in violation of First Amendment rights found arbitrable under "conditions of employment" and where parties deferred grievance until federal issue resolved.) GATEWAY TECHNOLOGIES, INC. V. MCI TELECOMMUNICATIONS CORP., 64 F.3D 993 (5<sup>th</sup> Cir., 1995) allows parties to include provisions for expanded judicial review, but see, L.L.C. V. MATTEL, INC. (9<sup>th</sup> Cir., 2006) unpublished, appeal pending, (U. S. Sup Ct. Docket No. 06-989) (2007)