STATE OF WISCONSIN
BEFORE THE ARBITRATOR

In the Matter of the Petition of		
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION		Case 38 No. 35793
For Final and Binding Arbitration Involving Law Enforcement Personnel in the Employ of		MIA-1022 Decision No. 23555-A
CITY OF RHINELANDER (POLICE DEPARTMENT)		

APPEARANCES

On Behalf of the Union: Steven Dettinger, Attorney at Law
Cullen, Weston, Pines and Bach

On Behalf of the Association: Phillip I. Parkinson
City Attorney

I. BACKGROUND

On October 9, 1985, the Union filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to initiate final and binding arbitration pursuant to Sec. 111.77(3) of the Municipal Employment Relations Act, with regard to an impasse existing between the parties with respect to wages, hours and conditions of employment of law enforcement personnel for the year 1986. On March 24, 1986 a member of the Commission's staff conducted an investigation and the investigator advised the Commission on April 21, 1986 that the parties were at impasse on the existing issues as outlined in their final offers. On April 28, 1986 the Commission ordered the parties to select an arbitrator to resolve the dispute. The undersigned was advised of his selection on June 23, 1986.

The Arbitrator conducted a hearing on October 23, 1986; post hearing briefs were submitted and exchanged November 18, 1986. The following award is based on the relevant statutory criteria, the evidence and the arguments of the parties.

II. THE ISSUE

Both parties in their final offers agreed to a 4.0% increase and both agreed to continue all the undisputed portions of the 1985 agreement into 1986. The only issue is the Union's proposal to modify the grievance procedure as it relates to suspension, demotion, discharge and discipline. The City asks that the status quo be maintained.

The 1985 Agreement provided in part that:

"If the grievance is not satisfied in Step 1 it shall be reduced to writing and submitted to the Finance Committee within ten (10) working days. Provided, however, that if it is a matter which related to suspension, demotion, discharge or any other discipline a written request for a hearing may be submitted to the president of the Police and Fire Commission requesting a hearing, pursuant to 62.13. If the grievance is pursued to the Finance Committee, the Finance Committee shall set up a meeting within a reasonable time which shall not be later than twenty (20)

days to allow the grievant and/or his representative to present the grievance. Thereafter, the Finance Committee shall have two (2) working days to provide an answer to the grievant." (Emphasis added.)

Wisconsin Statutes 62.13 provides that an employee covered by its provisions may appeal a decision of the Police and Fire Commission, if dissatisfied, to circuit court.

The Union proposal in effect gives the employee an election of remedies. He or she may appeal the Police and Fire Commission to circuit court or to arbitration where the Arbitrator must apply the "for cause" standard. Their offer thus provides:

> "If the grievance is not satisfied in Step 1 it shall be reduced to writing and submitted to the Finance Committee within ten (10) working days. Provided, however, that if it is a matter which relates to suspension, demotion, discharge or any other discipline a written request for a hearing may be submitted to the president of the Police and Fire Commission requesting a hearing, pursuant to 62.13. After a matter related to suspension, demotion, discharge or other discipline is heard by the Police and Fire Commission pursuant to 62.13, the grievant may elect to appeal the decision of the Police and Fire Commission either to circuit court as provided by 62.13, or to arbitration as provided under Step 4, below, of this grievance procedure. An election of one disciplinary appeal option by the grievant shall preclude use of the other. The standard of review for arbitration of a disciplinary appeal by the grievant under Step 4, below, shall be "for cause". If the grievance is pursued to the Finance Committee, the Finance Committee shall set up a meeting within a reasonable time which shall not be later than twenty (20) days to allow the grievant and/or his representative to present the grievance. Thereafter the Finance Committee shall have two (2) working days to provide an answer to the grievant." (Emphasis in original.)

III. ARGUMENTS OF THE PARTIES

A. The Union

The Union states their purpose in selecting this language is simple. They believe it to be a reasonable request and one of benefit to both parties. They note that their language complies with the requirements procedure, expressly providing that arbitration is available only after a decision by the Police and Fire Commission and then only as an alternative to circuit court review.

Arbitration, in their opinion, is more valuable to officers than circuit court review because it is more independent. This is because when a Police and Fire Commission disciplinary decision is appealed to circuit court, the court is required to show substantial deference to the findings of the Police and Fire Commission. The court merely reviews the decision to insure that the Commission's decision is not whimsical, capricious or merely partisan. They cite Petition of Heffernan, 244 Wis. 104, 11 N.W. 2d 680 (1943) and suggest that in practice, circuit courts are very reluctant to overturn Commission decisions and they also suggest circuit courts do, in fact, show great deference. In contrast, when arbitrators review decisions reached by local government agencies, they are not required to show deference to the agency's decision. Arbitration between West Salem and Fortney, 108 Wis. 2d 167, 321 N.W. 2d 737 (1982). Instead, arbitration provides a trial de novo before a wholly impartial outside decision maker. This independent review is valuable to the Union.

They also argue arbitration is preferrable since arbitrators have far greater expertise in reviewing employment discipline than do circuit court judges. The Union also observes that judges are rarely, if ever, called upon to review the appropriateness of employment discipline. On the other hand, this is a common part of any arbitrator's job. Arbitrators therefore, in their opinion, bring far greater knowledge, skill, and sensitivity to this task and consequently the decisions they reach are of greater benefit to both the employer and the employee.

A preference for arbitration is also exhibited in the Union's opinion by the fact that arbitration is more accessible and inexpensive. Arbitration isn't subject to the same kind of procedural technicalities that accompany appeals under Wis. Stats. 62.13. In fact, they note the last appeal brought in this very department was lost on a procedural technicality. Additionally, the assistance and expense of a lawyer is necessary for 62.13 appeal and not necessary for arbitration. They also mention that in the event of a legal or procedural error by the Police and Fire Commission, the court will not review them under 62.13. If a Commission makes such errors in deciding police discipline, the Union must also file an independent action founded upon a common law writ of certiorari. In such cases, there are two circuit court actions, each with its own standards, procedures and expenses.

Next, in support of their proposal, the Union asserts that arbitration of police discipline disputes is common. They note that in northeast Wisconsin, the Town of Minoqua, the City of Wausau, the County of Oneida, the Town of Grand Chute, the Village of Little Chute and the City of Peshtigo all include the arbitration of police disciplinary disputes as a feature of the collective bargaining agreements with their local law enforcement units. Additionally, there are, of course, many other departments in other parts of the state who also have such provisions. Such arbitration is available in departments both larger and smaller than Rhinelander - in towns, cities, villages and counties.

In anticipation of the Employer's arguments, the Union develops the following points: (a) the Employer cannot be surprised by their proposal, (b) the burden of appeal on the City through arbitration is no greater than an appeal under Sec. 62.13, and (c) there is no benefit to the officers because the Commission members are "familiar" with them as suggested by the Employer's testimony.

B. The Employer

The Employer highlights as background the bargaining history surrounding the Union's proposal. The first proposal of the Police Union in this regard submitted on August 20, 1985 provided that an employee who was suspended would utilize the grievance procedure to arbitrate his discipline. Thus, the Union proposal mandated the arbitration of all discipline disputes and eliminated that function of the Police and Fire Commission. Even at the investigation stage, the dispute was whether or not the City would continue with status quo or go with the "just cause" provision advanced by the Police Union. It was only after impasse was reached that the Police Union first presented the language that now appears in the Union's final offer.

Also, as background the Employer notes the testimony of two Commission members establishing that in the last seven years there have only been three (3) hearings before the Rhinelander Police and Fire Commisison; one involving a fireman who was terminated in 1979 whose termination was appealed and upheld by Circuit Court, one involving a termination of a police officer occuring in 1980 who subsequently resigned from the force after his termination and did not appeal the decision of the Police and Fire Commission, and one hearing in 1985 involving an officer

suspended by the Chief of Police for thirty (30) days as a disciplinary action. In the last case, the Police and Fire Commission reduced the lay-off to fifteen (15) days which was appealed, pursuant to 62.13, but apparently was done so improperly and the decision of the Police and Fire Commission stood as presented.

They also note that both Police and Fire Commission members testified that they believe the present hearing and discipline system involving the Police and Fire Commission is important to maintain for these reasons: (1) to preserve local autonomy in the discipline of officers; (2) to assist in the mediation of disputes in that five-person boards decide the discipline versus the one-person arbitration; and (3) for the purposes of judicial economy; providing for one hearing for an officer with an appeal procedure versus two individual and separate hearings, one before the Police and Fire Commission and then a subsequent hearing before a labor arbitrator appointed by the WERC.

Against the background noted above, the Employer makes a number of arguments. First, they maintain that throughout the bargaining sessions between the City and the Policemen's Union, the present language or the format of the present language was never proposed. The Union requested that the Police and Fire Commission be replaced in total with a arbitrator as appointed by the WERC. Only after impasse was reached and both parties agreed to submit their final offers in writing did the language that is now before the arbitrator appear. As such, the City of Rhinelander and the police Union have never had an opportunity to bargain the language or the impact of the language during these and any other contract negotiations. It was necessary that during the arbitration hearing the impact and operation of the language need be explained to the City so that the actual operation of this new grievance procedure could be understood.

Next, they believe that of the various criteria to be applied to this case pursuant to Section 111.77(b) Wis. Stats. subsection (c) interest and welfare of the public, and subection (d) comparison with similar communities are particularly relevant in this case. Along these lines, they contend it is the Union's burden to show a need for change and moreover the City argues they have established that there is no apparent need for a change in the present Police and Fire Commission system. In this regard, they direct attention to the testimony which established the relatively few number of discipline actions involving the Police Union and the Police and Fire Commission over the last several years.

On the other hand, the City argues that the Union presented no testimony in which any specific problems were enunciated with the present procedure followed by the City of Rhinelander. The Rhinelander Police and Fire Commission follows the procedures and dictates of Sec. 62.13 Wis. Stats. Additionally, the statutes and the Wisconsin case law interpreting these statutes have been in existence for many years. Both the City and the Union are familiar with the workings of that procedure including the right of appeal. There was no testimony given by the Union that the present situation was inadequate or that it has caused a hardship to any particular officer in any case pending or past.

In addition to lack of apparent need for a change in the system, the testimony of Todd McEldowney and George Kirby, Commission members, established several valuable reasons for the present system. It was the testimony of both Kirby and McEldowney that a panel of five local citizens deciding the appropriate discipline of a police officer was more desirable than the decision of a single outside arbitrator for several reasons. These can be summarized as follows: (1) five heads are better than one, (2) the local autonomy of a local Police and Fire Commission reviewed by a local judge provides for a better understanding of the appropriate level of discipline to be handed down, (3) the Commission having knowledge of the day-

in, day-out work performance of the officer can be of benefit to the officer in such situations and (4) under the Union's proposal there is a duplication of efforts in having one hearing and one group of witnesses brought before the Police and Fire Commission only to have to retry the case in its entirety before a hearing examiner at a subsequent date.

Like the Union, the Employer anticipated some of the Union arguments and offered the following points of rebuttal. (1) Arbitrators are not better qualified than judges. Additionally there are other safeguards such as substitution and the availability of appeals. (2) The Union has available to it an expert group of attorneys, therefore there is no disadvantage to a police officer in appealing a Police and Fire Commission decision to a circuit court rather than to a labor arbitrator of WERC. (3) The Union's comparables are distinguished because Minocqua, Oneida County, Grand Chute, and Little Chute do not have Police and Fire Commissions and because in the case of Wausau and Peshtigo, Rhinelander is either much smaller or bigger. In fact, there are two comparables which support the City's offer. They presented labor contracts in police departments for the City of Merrill and the City of Antigo. The City states that these are the two best comparable contracts in that these cities have similar populations to that of Rhinelander and are located within fifty (50) miles of the Rhinelander city limits. Each of these contracts, like Rhinelander's, provides that the decision of the Police and Fire Commission be appealed to circuit court under Sec. 62.13.

IV. OPINION AND DISCUSSION

The applicable statutory criteria to be applied in matters such as this are as follows:

> (6) In reaching a decision the Arbitrator shall give weight to the following factors:
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> (a) The lawful authority of the Employer.
> (b) Stipulations of the parties.
> (c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.
> (d) Comparisons of the wages, hours and conditions of employment of the employes involved in the arbitration proceeding with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally:
> (1) In public employment in comparable communities.
> (2) In private employment in comparable communities.
> (e) The average consumer prices for goods and services, commonly known as the cost of living.
> (f) The overall compensation presently received by the employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
> (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
> (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

The criteria with relevance to this dispute are (b), (d) and (h).

With respect to criteria (b), both offers can be said to have a favorable impact on the public interest in some respects. Retaining the status quo would tend to retain more of the control the public has vested in the hands of the Police and Fire Commission. Additionally, a duplication of the judicial efforts--two hearings, one before the Police and Fire Commission and one before the Arbitrator--which would occur under the Union offer is a negative consideration.

However, on the other hand, forcing the Union to circuit court for appeals can be equally, if not more, time consuming and therefore more expensive for the City than the prospects of two hearings. This is especially true in view of the fact (1) that circuit court decisions would be somewhat more likely to be appealed than arbitration awards, therefore, increasing cost and (2) that the Union may be forced in some instances to initiate two court actions. Additionally, the burden of two hearings is mitigated somewhat by the fact that the arbitration services when provided by WERC are essentially free. Accordingly, arbitration may actually be more in the public interest since it is more often than not going to be less expensive than the more complex and legally tedious circuit court proceedings.

Given these competing considerations, it cannot be said that either offer is clearly preferable based on the public interest. However, it is equally true that neither offer is inconsistent with the public interest and welfare.

In terms of criteria (d), there are comparables which support both parties' positions. The Arbitrator, considering the non-economic nature of this issue, isn't too concerned about differences in size of the comparables. Given the general validity of the comparables used by both parties it is noted that two municipalities with police and fire commissions allow only the 62.13 avenue of appeal and two provide the election of remedies proposed by the Union.

The other employers cited by the Union are distinguished to some extent by their lack of a police and fire commission, however, they cannot be discounted totally. The fact there is no police and fire commission might distinguish them in the sense there may not be a requirement for a formal hearing in addition to an arbitration hearing. However, there are some essential similarities as well. A police and fire commission has no more of an interest in the public welfare than a county board or city council. In this respect, it would seem that the large number of municipalities having a just cause arbitration system is indicative of the fact that such an arrangement is not an unreasonable intrusion into the management of public safety officers. Accordingly, it is apparent that criteria (d) tends to support the Union offer.

The last relevant criteria is (h) which can be abbreviated as the "catch all" factor. One factor which is traditionally considered in interest arbitration is the relative intrinsic reasonableness or unreasonableness of a proposal. In this case there is nothing unreasonable about either offer, in fact both are reasonable proposals. The real question is which is more intrinsically reasonable. It is the conclusion of the Arbitrator that the Union's offer is more reasonable for the following reasons.

First, as mentioned, the arbitration process is more often going to be less financially burdensome on the employee, the Union and the Employer. Equally true it is probably going to be more effective and practical. Arbitration is and should be an informal process and as such it is easier to focus on the truth rather than legal technicalities and procedural considerations that may or may not have anything to do with the simple question of disciplinary propriety. This is evidenced by an appeal of the Police and Fire Commission where the merits were not addressed but instead it was dismissed based on technical considerations. In contrast to the court, the

Arbitrator can focus his or her attention on the two basic questions in discipline; (1) is the employee guilty of misconduct and (2) does the punishment fit the crime? Courts can get bogged down in other trappings far removed from these fundamental considerations.

The second reason the Union offer is more reasonable is related to the first. This relates to the suitability of judges versus arbitrators in deciding disciplinary matters. Certainly there are some judges more qualified than some arbitrators, but it is generally accepted--with no disrespect to judges--that arbitrators are in fact best suited to handle labor contract grievances. There is no higher legal authority to cite in support of this proposition than the United States Supreme Court. The comments of Justice Douglas in United Steelworkers of America v. Warrior and Gulf Navigation Co. 363 U. S. 574 (1960) are indicative of at least the Supreme Court's preference for the judgment of arbitrators compared to the judiciary when it comes to grievances:

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts."
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> * * * *
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> "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

The City did argue that the Union's procedure would prevent the Police and Fire Commission from bringing to bear their considered judgment based on their familiarity with an officer. This, it was suggested, would be of benefit to the employee. This ignores, however, the fact that Union's proposal doesn't preclude them from exercising such discretion when making their initial determination. If there are relevant and germane mitigating circumstances which they took into consideration an Arbitrator would be in error not to consider them. On the other hand, the Arbitrator can dismiss anything based on familiarity that is prejudicial and unfounded.

In summary, the Union offer is adopted because it is supported by the comparables, it is intrinsically more reasonable and is not inconsistent with the public interest and welfare.

AWARD

The final offer of the Union is adopted.