

**CITY OF MADISON  
CITY ATTORNEY'S OFFICE  
Room 401, CCB  
266-4511**

September 26, 2001

**OPINION 2001-007**

**TO: Mary Ann Stalcup, Director of Human Resources**

**FROM: Eunice Gibson, City Attorney**

**SUBJECT: COLLECTIVE BARGAINING, POLICE AND FIRE DISCIPLINE, AND § 62.13, STATS.**

The City of Madison is preparing its collective bargaining positions in anticipation of negotiations with police and fire unions on the contracts for 2002 and 2003. In that context, you have requested formal legal advice from the City Attorney on the following point: Can the City enter into collective bargaining agreements with the police and fire unions which establish what, if any, specific discipline shall be imposed for a particular, identified police or fire department policy offense or rule violation, given the statutory authority of the Police Chief, the Fire Chief and the Board of Police and Fire Commissioners (PFC). As I understand it, you also ask whether the City can enter into a collective bargaining agreement that specifically states that discipline may not be imposed in certain circumstances (e.g. first positive in a random drug testing situation).

**SHORT ANSWER**

A collective bargaining agreement which provides for specific discipline or forbids any discipline for a specific rule or policy violation by a police officer or firefighter conflicts with §62.13 Stats. and would be invalid.

**STATUTES INVOLVED**

Your question requires analysis of statutes relating to municipal collective bargaining and employment relations (§ 111.70, et seq.), and disciplinary proceedings of sworn police and fire personnel before the PFC (§62.13(5), Stats.). Consistent with general rules of statutory construction, these statutes should be harmonized to the extent possible and in the case of a conflict, the more specific statutory enactment controls over the more general one. In that regard, I note that § 62.13, Stats., circumscribes more

narrowly the areas in which municipal bargaining agents may bargain than does the general municipal employee relations statute, § 111.70, Stats.

**62.13 Police and fire departments.** (1) COMMISSIONERS. Except as provided in sub. (2m), each city shall have a board of police and fire commissioners consisting of 5 citizens, 3 of whom shall constitute a quorum.

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(5) DISCIPLINARY ACTIONS AGAINST SUBORDINATES. (a) A subordinate may be suspended as hereinafter provided as a penalty.

(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 an aggrieved person . . . .

(c) A subordinate may be suspended for just cause, as described in par. (em), by the chief or the board as a penalty . . . . 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.

\* \* \*

(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 pa. (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 subordinates's record of service with the chief's department.

\* \* \*

**111.70 Municipal employment. (1) DEFINITIONS.** As used in this subchapter:

- (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment,

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## **DISCUSSION**

### **AUTHORITY OF THE PFC**

§ 62.13(5), Stats. governs the discipline of subordinates in both the police department and the fire department. Under the statute, both the Police Chief and Fire Chief and the PFC are accorded certain authority and responsibility in the disciplinary process. A Chief may suspend a subordinate as a penalty under § 62.13(5)(c), Stats. If the subordinate requests a hearing before the PFC, the Chief must file charges with the PFC.

The Chief is not the sole individual authorized to file charges, however. Under § 62.13(5)(b), Stats., charges may be filed by the Chief, the PFC, a member of the PFC individually or an aggrieved person. A hearing must be held to determine if there is just cause, as described in § 62.13(5)(em), Stats., to sustain the charges. If the charges are sustained, the PFC has the authority to suspend, to reduce in rank, to suspend and reduce in rank, or to remove the subordinate as the

good of the service may require.

You have asked whether an agreement which specifies the amount of discipline to be imposed, including the circumstances under which no discipline may be imposed, for a particular policy or rule violation impermissibly intrudes on the authority of the PFC under § 62.13(5), Stats., to hear and determine disciplinary actions.

City of Janesville v. WERC, 193 Wis. 2d 492 (Ct. App. 1995) sheds light on this matter. In that case, the appellate court affirmed the trial court's reversal of a decision of the Wisconsin Employment Relations Commission (WERC). The appellate court held that arbitration of suspensions imposed by the Police Chief and PFC of the City of Janesville was a prohibited subject of bargaining.

The case arose in the context of a prohibited practice complaint brought by the police union against Janesville for refusing to arbitrate the unpaid suspension of a police officer by the police chief. Interestingly, the language of the collective bargaining agreement specifically provided that a grievant could either pursue a hearing before the PFC or arbitration (but not both). The Court of Appeals began its analysis with a statement of the general rule relating to collective bargaining agreements negotiated pursuant to § 111.70, Stats., i.e., "if there is an irreconcilable conflict between a proposal made under § 111.70, Stats. and a specific statutory provision, the proposal is a prohibited subject of bargaining." Id., p. 500.

The court noted that pursuant to § 62.13(5), Stats., the PFC has the ultimate authority to suspend subordinates, and the exclusive authority to terminate or reduce them in rank. Relying on the express language of the statute, the court held that a proposal which would allow arbitration of a suspension imposed by the police chief or which would allow a subordinate to seek arbitration of disciplinary issues decided by the PFC would abrogate the PFC's authority under 62.13(5), Stats., and as such was a prohibited subject of bargaining.

While the proposed provision you have described is not so extreme as that in Janesville, it is my opinion that the court's analysis is nonetheless controlling. Under § 62.15(5)(em), Stats. the PFC has the responsibility to determine if there is "just cause" to sustain the charges. If the charges are sustained, the PFC shall impose such discipline, including suspension, demotion or termination "as the good of the service may require" §62.13(5)(e), Stats. In making its determination, it must apply the seven just cause standards set forth in the statute. Among the standards is standard 7: "whether the proposed discipline reasonably relates to the seriousness of the alleged violation and the subordinate's record of service with the Chief's department," §62.13(5)(em), Stats. It is my opinion that a collective bargaining provision which prescribes the discipline to be imposed for a particular violation of rule or policy impermissibly intrudes on the

authority of the PFC to determine discipline on the grounds articulated in the statute. It thus conflicts with the express authority of the PFC under § 62.13(5), Stats.

The case of Durkin v. Board of Police & Fire Comm., 48 Wis. 2d 112 (1977) involved a set of circumstances of some relevance here. That case, which may ring a familiar bell, arose in the aftermath of a strike by firefighters in violation of the state statute which prohibits strikes by public employees, § 111.70(4)(1), Stats. The strike settlement included an amnesty clause in a collective bargaining agreement, whereby the Union and the City agreed that no disciplinary action would be taken by the City against the strikers.

Following the settlement, an elector filed a complaint with the PFC alleging Fire Department rule violations and state law violations against Edward Durkin for having counseled, abetted and led a strike. The court held that the collective bargaining provision could not and did not abrogate the right of the elector to file a complaint; neither did it abrogate the PFC's authority to hear and determine the charges and impose discipline. (Although the court in its remand to the PFC opined that if further proceedings were found to be necessary, the PFC should take into consideration in making its ultimate decision the position of the City Council as reflected in the amnesty clause.)

The Durkin case arose prior to the 1993 amendments to § 62.13(5), Stats. At that time, a reviewing court was required to determine whether the PFC's decision was "reasonable." Whereas, the court must now determine whether there is "just cause" to sustain the charges. Although in dicta, the Durkin opinion contains statements that suggest a determination of "reasonableness" would involve taking into consideration the amnesty clause in the collective bargaining agreement which set forth the position of the Common Council in relation to the Union and the members, 48 Wis. 2d at p. 123. Arguably, the current "just cause" standards would similarly allow the PFC to weigh, to the extent applicable under § 62.13(5)(em), Stats., general punishment/rehabilitation policy statements adopted by the Common Council, provided they did not conflict with the express authority of the PFC as explained herein.

#### **AUTHORITY OF THE POLICE CHIEF AND FIRE CHIEF**

A separate issue to consider is whether the proposed bargaining provision would impermissibly interfere with the authority conferred on the Police Chief and Fire Chief under § 62.13(5), Stats. As summarized above, the Police Chief and Fire Chief may impose a suspension on a subordinate as a penalty pursuant to § 62.13(5)(a), Stats. The Chief may also file charges seeking the suspension, reduction in rank or removal of a subordinate for violation of Department rules and policies under § 62.13(5)(b), Stats. In such cases, the Chief has the burden of proving that there is just cause to sustain the charges. § 62.13 (5)(em), Stats. The just cause determination

probes whether the rules are reasonable; whether the subordinate could reasonably be expected to know the consequences of the alleged conduct; whether the investigatory and disciplinary process was thorough, fair, objective, and non-discriminatory; and whether the proposed discipline reasonably relates to the seriousness of the violation and the subordinate's record of service with the department.

The issue in the Janesville case turned on the conflict between a collective bargaining agreement and the statutory authority conferred on the PFC under § 62.13(5), Stats. It did not address the question of a possible conflict between a bargaining agreement provision and the Police Chief's or Fire Chief's express authority under § 62.13(5), Stats. In fact, this issue appears never to have been squarely addressed by the court in the context of disciplinary actions under § 62.13(5), Stats. However, two cases which concern the chief's role in the selection and promotion of subordinates under § 62.13(4), Stats. are illuminating. Glendale Prof. Policemen's Asso. v. Glendale, 83 Wis. 2d 90 (1977) examined whether a labor contract which required the chief of police to appoint the most senior qualified candidate conflicted with the statutory authority accorded the chief under § 62.13(4)(a) which requires all subordinates to be appointed by the chief with the approval of the board. The court concluded it did not. Noting that the provisions did not require the chief to appoint an unqualified candidate, the court held that the provision did not take away a power expressly conferred by law. Rather it merely restricted the discretion of the chief that would otherwise exist:

Although by entering into the collective bargaining agreement the City relinquished some of the discretion the Chief and the Board enjoyed previously concerning appointments and promotions, it has not transferred from the Chief or the Board the authority to determine who is qualified, and it has not transferred away the appointing authority. Id., p. 102-3.

Applying the same legal principles to a different set of facts, i.e., an attempt to arbitrate the termination of a probationary police officer, the court in Milwaukee Police Assn. v. Milwaukee, 113 Wis. 2d 199 (1983) reached a contrary conclusion. The court held that the challenged arbitration resulted in an abrogation of the authority of the PFC and the chief to select subordinates. The court declined to apply Glendale, supra, noting that the discretion of the chief was "not merely restricted, but transferred to the arbitrator." Expanding on its rationale, the court noted:

If an arbitrator may reverse the board's or chief's exercise of discretion in terminating a probationary employe and reinstate him, the board's or chief's decision becomes meaningless; . . . This cannot be harmonized with either secs. 62.13(4) or 165.85, Stats. The court in Glendale tacitly acknowledged that a wholesale transfer of authority is beyond the ambit of a labor agreement.

It is my opinion that a labor contract which establishes the specific penalty to be imposed for a specific rule or policy violation or which identifies circumstances under which no discipline may be imposed (for such rule or policy violation) by the Police Chief or Fire Chief under § 62.13(5)(c), Stats., or proposed by the Police Chief or Fire Chief as part of a disciplinary proceeding before the PFC under § 62.13(5)(em), Stats., impermissibly intrudes on the authority, indeed responsibility, of the Police Chief and Fire Chief under § 62.13(5), Stats. The Chiefs have the discretion to file charges under § 62.13(5), Stats. However, any discipline which is imposed by the Chief directly or proposed to the PFC upon filing charges must satisfy the seven just cause standards. These standards anticipate a case by case assessment of “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.”

The Chief’s decision will necessarily be informed by city policies. However, the transfer of authority to make such individual penalty assessments from the Police Chief and Fire Chief to a labor agreement conflicts with the authority expressly conferred on the Police Chief and Fire Chief under § 62.13(5), Stats.

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Eunice Gibson  
City Attorney

CSH:skm  
cc: Mayor  
City Clerk

**CAPTION:** A collective bargaining agreement which provides for specific discipline or forbids any discipline for a specific rule or policy violation by a police officer or firefighter conflicts with sec. 62.13, Stats. and would be invalid.

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a copy to AT Group - minus this page  
Central Opinion Book  
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File