

THE POWERS & AUTHORITIES OF THE POLICE AND FIRE COMMISSION OF WISCONSIN

Origins of Authority and Disciplinary Issues

A Presentation of:
Cities and Villages Mutual Insurance Company

To The Stevens Point
Police and Fire Commission

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Presented By:

Gregg J. Gunta, Esq.

Gunta Law Offices, S.C.

9898 West Bluemound Road, Suite 2

Wauwatosa, Wisconsin 53226

Telephone: (414) 291-7979

E-Mail: gjg@guntalaw.com

GREGG J. GUNTA

Legal Experience

Mr. Gunta is the senior shareholder in the law firm of Gunta Law Offices, S.C., located in Wauwatosa, Wisconsin. The firm concentrates in municipal and employment liability and litigation matters, with a special emphasis on federal civil rights claims against police and other municipal officials. Mr. Gunta has practiced in this area of the law for over 40 years.

Mr. Gunta was an Assistant City Attorney for the City of Milwaukee for eight years before moving into private practice in 1987. His primary responsibilities were in the area of municipal civil trial defense work. He was also the Acting Risk Manager for the City of Milwaukee for six years. He is intimately acquainted with Federal Civil Rights Statutes, and state laws affecting government operations and employees, and the creation and operations of Police and Fire Commissions. He has also lectured for the State Bar of Wisconsin and multiple other organizations representing municipalities in the defense of civil rights actions.

Mr. Gunta has represented municipal clients in hundreds of cases involving general liability claims, employment practice liability claims, public official claims, and police professional claims. He has defended numerous law enforcement officers, and has litigated matters in both state and federal courts, as well as in the 7th Circuit Court of Appeals, arising out of the alleged constitutional violations, and violations of state and federal statutes involving municipal employees. Mr. Gunta has also represented a prominent Justice of the Wisconsin Supreme Court. Mr. Gunta has achieved the AV Preeminent rating from his peers and judges, which is the highest possible rating in both legal ability and ethical standards reflecting the confidential opinions of the Bar and judiciary for over twenty years, the most recent being in 2020.

Mr. Gunta is an advisor to numerous police agencies and municipal officers, as well as the Cities and Villages Mutual Insurance Company, and has conducted numerous risk prevention lectures for police and government personnel. He is an associate member of the Wisconsin Chiefs of Police Association. He is a member of the International Association of Chiefs of Police and a member of its Legal Officers Section.

Personal Information and Education

Mr. Gunta was born in Milwaukee, Wisconsin, on May 28, 1951. In 1979 he was admitted to the Wisconsin and Illinois Bars and the U.S. Court of Appeals, 7th Circuit. He was admitted as an attorney and counselor to the United States Supreme Court on February 22, 1988. He received a B.A. at the University of Wisconsin-Milwaukee in 1973, a Masters of Science in Urban Affairs from the University of Wisconsin-Milwaukee in 1977, and J.D. from the Indiana University School of Law-Bloomington in 1979.

I.

Historical Evolutions of Wisconsin's Police and Fire Commissions

- State legislature in 1885 in Chapter 378 § 1 Wisconsin Laws 1251 (1885) created the police and fire commission for the City of Milwaukee.
- Political control over local police and fire departments was a principal stimulus in the creation of police and fire commissions in Wisconsin.
- Local ordinances often provided mayors with the authority to appoint chiefs.
 - New mayors would appoint their political allies to head police and fire departments often resulting in entire department resignations or the new mayor or chief firing key department personnel.
 - Citizens ultimately responded at the ballot box to the uncertainty and politics of police and fire protection.
 - The 1885 legislation created a Milwaukee board of police and fire commissioners with authority to appoint chiefs for life subject to removal for cause.
 - The 1885 legislation also championed the commission's authority to approve appointments of rank and file Milwaukee department members.
 - The Wisconsin legislature enacted legislation in 1897, under Chapter 247 § 1, Wisconsin Laws 462 (1897) that provide for Milwaukee type police and fire commissions in second and third class cities.

- The commissions were made up of four persons no more than two of them could belong to the same political party.
- Currently police and fire commissions consist of 5 persons, 3 of whom constitute a quorum. § 62.13(1), Wis. Stats.
- The mayor annually appoints one member for a five year commissioner term, and no more than three members can belong to the same political party. § 62.13(1), Wis. Stats.
- Wisconsin law provides that cities with populations of over 4,000 shall have police and fire commissions and cities under 4,000 population create police and fire commissions by ordinance § 62.13(2), Wis. Stats.
- Appointment of special representatives or observers to police and fire commissions may result in challenges to an entire process by an aggrieved person. It has been argued that mayor non-voting appointees to police and fire commissions taint the entire process and void any action taken by a commission while under the shadow of the mayoral appointee.
- In order to avoid these due process challenges you may wish to repeal any ordinances that provide for the appointment of these observers by your executive officers.

II.

Statutory Authority & Your Police & Fire Commission

- The management and control of your City's Police and Fire Departments is established by several Wisconsin statutes and involves four separate individuals, bodies or boards: the Mayor, the Police Chief and Fire Chief, the Common Council and the Board of Police and Fire Commissioners.

- **The Mayor.** § 62.09(8)(a) and (d), Wis. Stats. provide:

(8) **MAYOR.** (a) The mayor shall be the chief executive officer. The mayor shall take care that city ordinances and state laws are observed and enforced and that all city officers and employees discharge their duties.

(d) Except in cities that have adopted § 62.13(6), Wis. Stats. the mayor shall be the head of the fire and police departments, and where there is no board of police and fire commissioners shall appoint all police officers, and the mayor may, in any city, appoint security personnel to serve without pay, and in case of riot or other emergency, appoint as many special police officers as may be necessary.

(Note: § 62.13(6), Wis. Stats. will be discussed later in this outline.)

Section 62.09(7)(a), Wis. Stats. provides:

(7) **GENERAL PROVISIONS.** (a) The corporate authority of the city shall be vested in the mayor and common council.

- **The Police Chief.** Section 62.09(13)(a), Wis. Stats.

provides, in part:

(13) **POLICE.** (a) The chief of police shall have command of the police force of the city under the direction of the mayor. The chief shall obey all lawful written orders of the mayor or common council.

- **The Fire Chief.** Section 62.13(10m), Wis. Stats. provides:

(10m) **RULES GOVERNING LEAVING CITY.** Subject to approval of the common council, the fire chief may establish rules requiring firefighters to obtain permission before leaving the city.

- **The Common Council.** Section 62.11(5), Wis. Stats. provides:

(5) **POWERS.** Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition all other grants, **and shall be limited only by express language.**

- Section 62.13(4)(e), Wis. Stats. provides:

(e) The council of any city of the 2nd, 3rd or 4th class may

provide that members of the police force shall be both sexes. The fire and police commission shall select each police officer from an eligible list.

- Section 62.13(7) and (8), Wis. Stats. provide:

(7) **COMPENSATION.** The salaries of chiefs and subordinates shall be fixed by the council. Unless the council otherwise provides, in cities of the 4th class rewards for the apprehension of criminals may be retained by the person entitled thereof. Such salaries when so fixed may be increased but not decreased by the council without a previous recommendation of the board. The council may provide that the salaries shall increase with length of service.

(8) **FIRE DEPARTMENT.** The council may provide by ordinance for either a paid or a volunteer fire department and for management and equipment of either insofar as not otherwise provided by law. In the case where a combination of paid and volunteer fire department is provided for, such city shall be reimbursed by the department of transportation, not to exceed \$100 for any fire calls on a state trunk highway or on any highway that is a part of the national system of interstate highways and is maintained by the department of transportation.

- The Common Council is also directed by statute to provide certain rest days and hours of work for police officers and firefighters in Sections 62.13(7m) and (7n) and in Section 62.13(11) and (11a), Wis. Stats.
- **The Authority of the Board of Police and Fire Commissioners.** The commission having been created by the legislature has only those powers which have been either expressly conferred or which are, by necessity, to be implied from the four corners of the statute under which it operates.

The effect of this rule has generally been that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted. Racine Fire and Police Commission v. Stanfield, 70 Wis. 2d 395, 234 N.W.2d 307, 309 (1976).

The authority granted to police and fire commissions under Chapter 62, Wisconsin Statutes is as follows:

- Appoint, suspend or remove the chief of the police department and the chief of the fire department. (§ 62.13(3), Wis. Stats.)
 - Section 62.13(5)(j), Wis. Stats., states the same seven standards of just cause shall apply to disciplinary actions against the police and fire chiefs. A police and fire commission should find that applying the seven standards in disciplinary actions against a police chief or a fire chief are easy steps to take in relation to the total process of conducting hearings and determining what form of discipline is appropriate.
- Approve all appointments made by the police chief and fire chief, including the promotion of subordinates. (§ 62.13(4)(a), Wis. Stats.)
- Approve competitive examinations used to judge suitability for appointment of subordinates. (§ 62.13(4)(a), Wis. Stats.)
- Approve competitive examinations used to judge suitability for appointment of subordinates. (§ 62.13(4)(d), Wis. Stats.)
- Approve each list of individuals determined to be eligible for appointment. (§ 62.13(4)(a), Wis. Stats.)
- Suspend the chief of a department or subordinates pending the filing and hearing of charges against them. (§ 62.13(3))

and (5)(a), Wis. Stats.)

- Initiate charges against the chief of a department or any subordinate. (§ 62.13(5)(b), Wis. Stats.)
- Hear charges filed against the chief of a department or a subordinate, make findings and determinations, and impose penalties. (§ 62.13(5)(d) and (5)(e), Wis. Stats.)
- Hear appeals of disciplinary actions initiated by the chief of a department against any subordinate. (§ 62.13(5)(d), Wis. Stats.)
- **OPTIONAL POWERS.** If authorized by a referendum election pursuant to Section 62.13(6), a board of police and fire commissions also has the following “optional” powers.
 - To organize and supervise the fire and police departments and to prescribe rules and regulations for their control and management.
 - To contract for an purchase all necessary apparatus and supplies for the use of the departments under their supervision, exclusive of the erection and control of the police and fire station buildings.
 - To audit all bills, claims and expenses of the fire and police departments before the same are paid by the city treasurer.
 - Optional Powers Commission disciplinary authority and obligations are no different than those of the Non-Optional Powers Commissions.

III.

"JUST CAUSE" FOR DISCIPLINE § 62.13(5)(em), Wis. Stats.

In determining whether "just cause" exists, the following standards must be applied to the extent applicable:

- a. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
- b. Whether the rule or order that the subordinate allegedly violated is reasonable.
- c. 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.
- d. Whether the effort described under subd. c. was fair and objective.
- e. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
- f. Whether the chief is applying the rule or order fairly and without discrimination to the subordinate.
- g. 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 standards (a.-g.) set forth, above, are a codification of the seven tests of just cause enunciated by Arbitrator Carol Daugherty in Enterprise Wire Co.,

46 Lab. Arb. Rep. (BNA) 359, 362-365 (1966). These tests have been frequently applied by labor arbitrators pursuant to the assumption that if the tests are posed as questions (for example, "Could the employee reasonably be expected to have had knowledge of the probable consequences of his conduct?"), and the answer to one or more of the questions is "no," there was no "just cause." Interestingly, the new legislation provides that these standards must be considered, but does not offer any guidance as to whether a just cause finding is dependent upon findings in favor of the administrator with respect to each standard. In other words, if the standards are posed as questions, the statute offers no guidance as to whether a finding of "just cause" requires a "yes" answer to 7 out of 7, 6 out of 7, 5 out of 7, etc.

JUST CAUSE CHECKLIST

	<u>YES</u>	<u>NO</u>
● Was the rule or policy alleged to have been violated, communicated and known by the employee?	_____	_____
● Was the employee given a copy of the rule of policy	_____	_____
● Was the employee aware of the consequences involved for violation of the rule?	_____	_____
● If the other employees have violated the same rule or policy, did they receive the same discipline as the employee?	_____	_____
● Has the rule or policy been enforced on a consistent basis?	_____	_____
● Has the employee ever received a warning or other discipline if the employee has violated the same rule or policy in the past?	_____	_____
● If a progressive discipline policy exists, either by contract or by a handbook, etc., were the terms of the policy followed with the employee?	_____	_____
● Has the employee had sufficient time and opportunity to correct the condition that led the department to take this action?	_____	_____
● Was the incident which constituted a violation of the rule or policy carefully investigated by the employer?	_____	_____

- Has the employer carefully documented the investigation? _____
- Was the employee given the opportunity to provide oral or written evidence to support his or her side of the incident? _____
- Is the punishment of termination related to:
 - (a) seriousness of the proven offense; _____
 - (b) the employee's past record; _____
 - (c) the employee's length of service. _____
- Would the department be able to justify dismissal of this employee if he/she claims discrimination or unjust dismissal? _____
- Will the police and fire commission and the courts conclude that our treatment of this employee was for just cause? _____

CREATED BY:

NANCY L. PIRKEY, ESQ.
April 7, 1994

IV. Circuit Court Appeals of Police & Fire Commission “Just Cause”

- **Commissioner’s Liability for Failing to Provide Procedural Due Process.**
 - Due process is a fundamental concept in most legal systems; it is based on a belief that governments may not deprive individuals of life, liberty or property unless certain procedures are observed. Both the Fifth and Fourteenth Amendments to the U.S. Constitution contain clauses safeguarding an individual’s right to due process.
 - It should be noted that for purposes of due process, the concept of “property” is not limited to tangible goods, such as a person’s home, land, cash or investments; it also means a person’s interest in other forms of property, such as a job or position, salary or wages earned, and benefits to which a person is entitled. Neither tangible nor intangible property may be taken from a person without due process.
 - The kind of due process members of a police and fire commission must be aware of is referred to as “procedural due process” and applies to situations in which an action is taken to deprive a police officer or fire fighter of property (job, rank, income or benefits). Simply stated, in any action taken to discharge, demote or suspend a police officer or fire fighter for just cause, that person must be afforded due process.
 - Procedural due process involves several basic elements:
 - The individual is entitled to notice of charges that have been made, or will be made, as well as actions that will or may be taken against the individual.

- The individual is entitled to a hearing for the purpose of responding to the charges.
- The individual is entitled to representation.
- The individual is entitled to confront and cross-examine his or her accusers.
- The individual is entitled to present evidence and argue his or her view of the facts.
- Wisconsin courts have determined a person discharged while serving in a probationary status does not have a constitutional or statutory right to a statement of specifications or a hearing, either before or after termination. Kaiser v. Board of Police and Fire Commissioners, 104 Wis. 2d 498, 311 N.W. 2d 646 (1981).
- **Judicial Review of Police & Fire Commission Disciplinary Proceedings.**
 - A police officer or fire fighter, disciplined by a police and fire commission, may take advantage of two separate avenues of appeal: That provided for in § 62.13(5)(i), Wis. Stats., and that allowed under a common law writ of certiorari.
 - If the direct statutory appeal right of § 62.13(5)(i), Wis. Stats. is selected, the question before the court is: Upon the evidence is there just cause, as described under par. (em), to sustain the charges against the accused? (§ 62.13(5)(em), Wis. Stats., sets forth the seven standards to be used, to the extent they are applicable, in making a just cause determination.)
 - Under certiorari review, the scope of a court's review is limited to a determination of: (1) whether the police and fire commission

acted within its jurisdiction; and (2) whether the commission acted under a correct view of the law.

- Prior to Act 53 a court's standard of review, when faced with an appeal of a commission's decision under § 62.13(5)(i), Wis. Stats., was limited to asking the question: Based on available evidence, was the action taken by a commission reasonable?
- As a result of this change, a circuit court is authorized to initiate a de novo review of the commission's "just cause" determination; the court begins its own review of the matter without particular regard for what may have previously transpired or the decision made by a commission in the matter.
- Under the revised standard for judicial review, the circuit court reviewing the matter make a separate, independent determination, based on available evidence, of whether "just cause" exists to sustain the charges against the individual being disciplined. The court's determination of whether the seven standards set for in § 62.13(5), Wis. Stats., are met is made without any particular regard for what the police and fire commission may have done or decided. While it does not especially matter to the court what the commission decided, it is imperative that sufficient evidence exist in records, submitted by the commission, to satisfy the court that the seven standards established by 1993 Act 53 are met.
- If the court concludes the evidence presented does not support the commission's action, it may order the individual disciplined to be reinstated (in the case of a demotion or firing) and to receive all back pay and allowances (in the case of suspension for just cause, demotion or firing). The court also may direct a commission to consider and impose a different penalty, one that may be less severe than the penalty called for in a commission's written order.
- A commission's failure to meet requirements under Wisconsin's

open meetings law provides yet another possible avenue of appeal. An individual disciplined by a police and fire commission, or any other person with an interest in the matter, may file a complaint with the district attorney claiming the commission failed to meet one or more requirements governing meetings of public bodies. A circuit court may penalize a governing body, found in violation of the open meetings law, by voiding an action taken by the body while in violation of the law. (§ 19.97(3), Wis. Stats.) If this occurs, a commission could face the prospect of having to conduct another hearing on the same charges.

V.

Important Case Law from the Wisconsin Court of Appeals and the Supreme Court

Alexander v. City of Milwaukee, 474 F.3d 437 (7th Cir. 2007). Members of a city police and fire commission who participated from 1997 to 2003 in a race-conscious promotion system with no identifiable standards to narrowly tailor it to the specific, identifiable, compelling needs of the municipal department in question were not entitled to qualified immunity and its no personal liability benefit since current law provided fair notice to the commissioner that their actions were outside of the constitutionally permissible bounds for such a system.

Trial court's decision finding a city liable under § 1983 of the Civil Rights Act for the actions of members of its police and fire commission and under Title VII of the Civil Rights Act for the actions of its police chief who all participated in an unconstitutional race-conscious promotion system was proper given that the police and fire commission was a final policymaker and § 1983 provides no liability exemption for unlawful conduct of a final policymaker and, irrespective of final policymaker status, a city is liable for the actions of its police chief under the respondeat superior theory of liability embraced by Title VII.

Punitive damages should be proportional to the wrongfulness of each defendant's conduct and a jury must be clearly instructed that each individual defendant's actions and fault must serve as the basis for fashioning an appropriate punitive damages award.

Application of the lost chance doctrine to calculate compensatory damages in a discriminatory promotion case requires a plaintiff to establish the probability that they would be promoted over all other potential candidates, not just other plaintiffs.

Antisdel v. City of Oak Creek, 229 Wis.2d 433, 600 N.W.2d 1 (Wis. App. 1999).

In this case, Police Officer James Antisdel was promoted to the position of sergeant upon completion of a one year probationary period by then Chief Michael Younglove. Nine months later, then Acting Chief Thomas Bauer sent Antisdel a memorandum notifying him that he failed to pass the probation period. Antisdel requested a hearing

before the Oak Creek PFC in compliance with Wis. Stats. § 62.13(5)(em). The PFC concluded that Antidel's promotion was subject to a one-year probationary period and that probationary employees are not entitled to a just cause procedure under Wis. Stats. § 62.13(5)(em). Antidel then filed a Notice of Review in Milwaukee County Circuit Court seeking to compel the PFC to grant him a hearing. The circuit court granted defendant's motion to dismiss plaintiff's action, relying on the police chief's use of a probationary program for new sergeants and on Wis. Stats. § 62.13(4) which grants police chiefs great latitude in running their departments. The court of appeals reversed the judgment of the circuit court holding that the plaintiff was entitled to a 'just cause'; procedure pursuant to Wis. Stats. § 62.13(5)(em) to contest his reduction in rank. This court affirmed the decision of the court of appeals.

Balcerzak v. Bd. of Fire and Police Comm., 233 Wis. 2d 644, 608 N.W.2d 382 (Wis. App. 2000). The City of Milwaukee Board of Fire and Police Commissioners (FPC) and Chief of Police Philip Arreola appealed the circuit court's grant of summary judgment to Milwaukee Police Officer John A. Balcerzak in Balcerzak's disciplinary proceeding. The FPC and the Chief assert that the circuit court erred in finding that the statutory language found in Wis. Stats. § 62.50(50) (1989-90) "be suspended without pay for a period not exceeding 60 days," was unambiguous. Further, the FPC and the Chief claim that the circuit court erred in deciding that the holding in State ex rel. Smits v. City of DePere Board of Police & Fire Commissioners, 104 Wis. 2d 26, 310 N.W.2d 607 (1981), was dispositive and as a result, the FPC exceeded its jurisdiction in suspending Balcerzak for 60 working days. This court reversed the circuit court's decision, concluding that the clause found in Wis. Stats. § 62.50(17) is ambiguous and that the Smits case is not dispositive. In applying the rules of statutory construction, this court was persuaded that the FPC's and the Chief's interpretation of the statute - that suspensions must be applied to working days - is correct, as evidenced by its 20-year practice of issuing suspension for working days.

City of Madison v. State of Wisconsin Dept. of Workforce Development, Equal Rights Division, 262 Wis. 2d 652, 664 N.W.2d 584 (Wis. App. 2003). The issue in this case is whether a firefighter who is terminated from city service after a 'just cause' hearing before a police and fire commission may pursue a discrimination complaint regarding the termination before the Department of Workforce Development under the Wisconsin Fair Employment Act.

Disciplinary terminations of police and fire personnel are reviewed under the procedures established in Wis. Stats. § 62.13(5). This procedure requires the PFC to determine whether any proposed disciplinary termination is supported by "just cause" which includes a determination of whether the rule or order allegedly violated is reasonable and applied without discrimination.

Any termination sustained under Wis. Stats. § 62.13(5)(em) and (f) is subject only to judicial review in circuit court under Wis. Stats. § 62.13(5)(1) or by common law certiorari. Therefore, any claim that a disciplinary termination is discriminatory under WFEA must be raised before the PFC, which is the body with exclusive statutory authority under Wis. Stats. § 62.13(5) to review police and fire personnel disciplines. The state may not take over jurisdiction over a WFEA complaint arising out of a decision of a PFC.

City of Madison v. WERC, 231 Wis. 2d 378, 607 N.W.2d 293 (Wis. App. 1999). In this case, a fire chief informed Firefighter Chris Gentilli that his promotion was revoked. Gentilli, through his union, filed a grievance seeking reinstatement to the rank of fire apparatus engineer, and back pay and benefits associated with the higher rank. The City of Madison, declined to arbitrate the grievance, asserting that Wisconsin Statutes and the collective bargaining agreement prohibited arbitration of this management decision. The union filed a prohibited practice complaint with the WERC. The WERC held that the City was obligated to arbitrate the grievance and that its refusal to do so violated Wis. Stats. § 111.70(3)(a)5, and ordered the City to arbitrate the grievance. The City sought review in Dane County Circuit Court, and the Hon. C. William Foust affirmed the WERC's order. On review, the court of appeals certified the case to this court pursuant to Wis. Stats. § 809.61 on two issues: 1) whether a firefighter who is promoted on a probationary basis but is returned to his/her former rank for failing to successfully complete probation for a non-disciplinary reason is entitled to the just cause protections of Wis. Stats. § 62.13(5)(em); and 2) whether the fire chief's decision not to recommend successful completion of a probationary period for a promotion of a tenured firefighter to a higher position is subject to arbitration. The Court held that an arbitrator may not substitute his judgment for a fire chief's determination.

City of Menasha v. WERC, 335 Wis. 2d 250, 802 N.W.2d 531 (Wis. App. 2011). The City of Menasha, a municipal employer, engaged in bargaining with the Menasha Professional Police Union over a successor agreement to a 2007-08 collective

bargaining agreement. The City proposed to maintain language from 2007-08 agreement which required that the appeal procedures under Wis. Stats. § 62.13 be utilized by a union-represented employee who wished to challenge discipline imposed pursuant to that statutory provision. The Union countered with a proposal to omit the language relating to the review of disciplinary action by the City of Menasha Police and Fire Commission and such review by an arbitrator.

At issue on appeal is whether the circuit court erred in affirming the WERC's determination that Wis. Stats. § 111.70(4)(c)2.b. and (4)(mc)1 prohibits a City from bargaining collectively to require that law enforcement officers represented by a union use the procedures set forth in Wis. Stats. § 62.13(5) exclusively to challenge discipline and are not permitted to use arbitration as an alternative. This court concluded that Wis. Stats. § 111.70(4)(c)2.b. permits bargaining as to dispute resolution procedures and does not require the use of Wis. Stats. § 62.13(5) procedures. However, if the parties bargain for the use of Wis. Stats. § 62.13(5) procedures, then Wis. Stats. § 111.70(4)(mc)1. requires arbitration as an alternative. Thus, this court upheld the WERC's determination in favor of the Menasha Professional Police Union Local 603.

Conway v. Board of Fire and Police Comm., 256 Wis. 2d 13, 647 N.W. 291 (Wis. App. 2002). In this case, the Supreme Court affirmed the decision of the Court of Appeals that the City of Madison's Police & Fire Commission had express statutory authority to promulgate rules for the administration of the Board and that said Rule 7.20 was in accordance with 62.13(5)(g), Wis. Stats. Rule 7.20 ensured that the ultimate decision-making authority was not delegated away from the board to a hearing examiner. The Court confirmed that a police and fire commission may engage a hearing examiner to conduct the initial hearing and the continuing evidentiary hearings. The rule also provides that at the initial hearing, the hearing examiner is charged with the responsibility to rule on procedural motions, make rulings on discovery issues, set a date for the hearing and, where appropriate, dismiss the complaint filed against the subordinate employee. The hearing examiner is charged with the responsibility to hear the case and prepare a comprehensive report including an evaluation of witness credibility and demeanor for review by the Board

and including the recommendations of the hearing examiner regarding disposition of the charges.

Kraus v. City of Waukesha, 261 Wis.2d 485, 662 N.W.2d 294 (Wis. App. 2003).

In this case, the court affirmed the decision of the Waukesha County Circuit Court that the Waukesha PFC proceeded under the correct theory of law when it denied Kraus a hearing under Wis. Stat. § 62.13(5)(em) following his reduction in rank from police sergeant to patrol officer before he completed his one-year probationary period. -The court further held that under Wis. Stat. § 62.13(4), supported by the rulemaking authority granted PFCs under Wis. Stat. § 62:13(6), police chiefs and PFCs in Wisconsin are authorized _ to promote subordinates within a department on probationary basis, provided the probationary period is reasonable in duration. If, during the probationary period following a promotion, the chief concludes that an officer's performance is inadequate or that some other lawful, nondisciplinary reason militates against the officer serving in the higher rank, the chief and PFC may return that officer to the officer's prior rank without hearing under Wis. Stat. § 62.13(5)(em). The court also concluded that an officer who is promoted on a probationary basis , but returned during the probationary period to his/her prior rank for nondisciplinary reasons, does not possess a constitutionally protected property interest in the higher rank that would require an alternative type of due process hearing.

State ex. rel. Heil v. Green Bay P.F.C., 256 Wis.2d 1008, 652 N.W.2d 118 (Wis. App. 2002).

(Supreme Court never heard. Matter removed from Supreme Court calendar.) In discharge proceedings before city police and fire commission, police officer's rights to due process and to judgment by an impartial board were violated by the presence of a common council liaison to the commission; liaison was mayor's representative and the charges were brought by police chief, who was another subordinate of the mayor, which violated statutory mandate for panel composition since prosecuting official's superior appointed his own representative.