

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

September 24, 2001

**OPINION 2000-007**

**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

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' 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,

\* \* \*

## 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

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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.

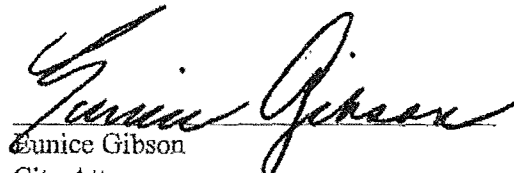
#### **AUTHORITY OF THE POLICE CHIEF AND FIRE CHIEF**

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

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.

  
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.