

# **LEGAL UPDATE**

**WCPA Annual Conference**

**July 30, 2007**

**Madison, Wisconsin**

**James R. Korom  
von Briesen & Roper, s.c.  
411 East Wisconsin Avenue, Suite 700  
Milwaukee, Wisconsin 53202**

**(414) 276-1122**

**(800) 622-0607**

**[jkorom@vonbriesen.com](mailto:jkorom@vonbriesen.com)**

**(414) 287-1231 (Mr. Korom's direct line)**

I. *Castenada v. Milwaukee PFC*, Case No. 2004AP 3306 (July 17, 2007)

- A. Section 62.50(19) Wis. Stats., like Section 62.13, allows any “aggrieved person” to file charges with the PFC.
- B. Section 62.50(3)(a), like Section 62.13(5)(g), gives the PFC the power to enact rules for administration of these Charges (such authority is also implied. See pg. 17 of the decision).
- C. The PFC’s rules “frustrated legislative intent” by:
  - 1. Requiring the citizen to identify a specific named officer;
  - 2. Requiring the citizen to identify a specific rule allegedly violated;
  - 3. Requiring the citizen to state the specific “cause” for discipline;
  - 4. Provided for the faulty Charges to be referred to the respective Chief for investigation and disposition;
  - 5. Allowed only those “directly” affected to file charges; and
  - 6. Contained no timetable of any kind.
- D. A Few Practical Concerns:
  - 1. The court blurs the distinction between a “charge” and a “complaint”.
  - 2. Who, exactly, will “investigate” these ambiguous charges, if not the Chief, without tainting the PFC as “neutral judges”? (and, who will pay for it?)
  - 3. I read somewhere that accused police officers are entitled to something called “due process.” How does a poorly drafted Charge address those rights?
  - 4. If a hearing is held, who “prosecutes”? The charging party who can’t cite a rule or find out the name of the officer will have a hard time convincing the PFC of the Seven Tests.
- E. Citizen Complaint Procedures (See attached samples):
  - 1. They are complaints, not Charges.
  - 2. Avoid the tendency to create barriers to these complaints—where else will the complainant go?

## II. Disturbing Provisions in the Budget Bill Affecting Discipline.

- A. The usual (and perennial) problem with addressing policy issues in the budget process.
- B. Three primary elements:
  - 1. Allow bargaining over PFC powers to control discipline.
  - 2. Prohibit employers only from negotiating any take-backs over discipline.
  - 3. End the finality of the appeal process.
- C. Lobbying Efforts Underway.
  - 1. See July 17, 2007 letter to the legislature.
  - 2. See July 2, 2007 analysis by legal counsel to Madison PFC Scott Herrick.
- D. Comparison of Procedural Changes (See attached flow charts).
- E. Selected Items to be Litigated Under Proposed Law.
  - 1. Can citizen file Charges?
  - 2. Can the Chief file Charges?
  - 3. Can the City/Mayor/City Council file Charges?
  - 4. What is the employee's pay status during PFC hearing? Arbitration hearing? All judicial appeals?
  - 5. Does the arbitrator hold a new evidentiary hearing, or rely on the PFC's record?
  - 6. What legal standard does the arbitrator apply, general just cause, the statutory Seven Tests, or some other standard?
  - 7. Can the Union propose a Final Offer in bargaining that increases job security for their members? Can the City propose reductions in job security?
  - 8. If the City is "prohibited" from bargaining certain issues, but the Union is not, how do we respond to their proposals?
  - 9. How do we inform the Mayor/Council about the facts of a discipline case they are considering arbitrating under defamation, privacy, or open meetings laws?
- F. What will you do?

**Source of Mandate for Written Citizen Complaint Policy**

§ 66.312 Law enforcement agency policies on ... citizen complaint procedures

- (3) CITIZEN COMPLAINT PROCEDURE. Each person in charge of a law enforcement agency shall prepare in writing and make available for public scrutiny a specific procedure for processing and resolving a complaint by any person regarding the conduct of a law enforcement officer employed by the agency.

<b>POLICE DEPARTMENT POLICY</b>	<b>TITLE:</b> CITIZEN COMPLAINT POLICY		
<b>ISSUE DATE:</b>	<b>LAST UPDATE:</b>	<b>SECTION:</b>	<b>TOTAL PAGES: 5</b>
<b>SPECIAL INSTRUCTIONS:</b>		<b>TEXT NAME: CITIZEN COMPLAINT POLICY</b>	

### **I. PURPOSE**

The purpose of this policy is to provide a specific procedure for processing and resolving a complaint by any person regarding the conduct of a law enforcement officer or civilian employee as provided in Wisconsin Statutes 62.13(5) and 66.312(3); to maintain the quality of police services, to improve the relationship between the police and citizens; and to provide citizens with a fair and effective avenue for resolving legitimate grievances against law enforcement officers.

The objective is to protect the public and to maintain the integrity of the Department and the individual employee. An essential balance must be maintained to ensure fair and impartial treatment of the issues and parties concerned. Throughout these procedures the rights of the individual police officer and citizen must be acknowledged and not compromised.

### **II. POLICY**

It is the policy of this law enforcement agency to accept, investigate, and resolve complaints by any persons regarding the conduct of law enforcement officers and civilians employed by the Department.

### **III. APPLICATION**

This policy and procedure is applicable to all department personnel and shall apply to complaints by any persons regarding the conduct of law enforcement officers and/or employees of the agency.

## **IV. PROCEDURE**

### **Receipt of Complaint by Non-Supervisory Personnel**

When misconduct is observed or complaints of misconduct are received by non-supervisory personnel such member shall immediately notify a superior of the matter. Complaints received by telephone or in person shall be referred to a superior commander. A complainant should be encouraged to file his/her complaint in person.

### **Supervisory Personnel**

1. When misconduct is observed or complaints of misconduct are received by a supervisor, that person shall immediately initiate a preliminary investigation into the matter in accordance with this policy.
2. Upon initiation of the investigation, the supervisor shall notify the Chief of Police as soon as practical.
3. Supervisory personnel shall complete a thorough investigation when directed to do so by the Chief of Police.

### **Chief of Police**

1. The Chief of Police shall review the results of the investigation and will take such action as he deems appropriate.
2. Nothing in this policy and procedure shall be construed to limit prerogatives of the Chief of Police or any other supervisory officer to investigate or take corrective action against subordinates whenever appropriate, nor to prevent the Chief of Police from taking disciplinary action against a subordinate under Wis. Stat. 62.13(5), irrespective of any complaint.

### **Citizen Complaint Procedures**

1. All employees of the Department are charged with the responsibility for courteously and willingly receiving any complaint regarding the conduct of an employee employed by the Department, to include complaints made over the telephone or received by mail. Complaints received by telephone or in person shall be referred to the on-duty supervisor.
2. A complainant should be encouraged to file his or her complaint in person. All complaints should be documented on the Citizen Complaint Form (Appendix A) and signed by the complainant.

3. The shift commander shall use the Citizen Complaint Form to determine further action regarding the complaint. In situations where the concern of the complaint can be immediately resolved through an informal inquiry, the Citizen Complaint Form shall serve as the only record of the complaint. This resolution shall not be construed to preclude an independent investigation and/or discipline by the Department for such situations.
4. The shift commander will forward a completed complaint and all Inter-Office reports relating to the incident to the Chief of Police.
5. The Chief of Police will also review the complaint and reports. If necessary, an investigating supervisory staff officer shall be assigned.
6. Disciplinary action taken by the Chief of Police on a citizen complaint shall be reported to the President of the Police and Fire Commission pursuant to 62.13(5).
7. The Citizen Complaint Form shall include the following:
  - a. Name and contact information of the person making the complaint, if known.
  - b. Date, time and location of the incident and when the incident is being reported.
  - c. Name of the employee(s) involved, if known, or action, policy, or procedure in question.
  - d. Specific details of the complaint including any witnesses.
  - e. Statement of appeal rights.
  - f. A conspicuous notification of the prohibition and penalty under § 946.66 Wis. Stats.

### **Complaints Against the Chief of Police**

Shift commanders receiving complaints directed against the Chief of Police and arising out of specified conduct on the part of the Chief of Police, shall file the complaint with the Mayor for investigation pursuant to Wis. Stat. 62.13(5).

### **Guidelines to the Officer Being Investigated**

- a. Section 164.02 of the Wisconsin Statutes provides:

**164.02 Interrogation. (1)** If a law enforcement officer is under investigation and is subjected to interrogation for any reason which could lead to disciplinary

action, demotion, dismissal or criminal charges, the interrogation shall comply with the following requirements:

(a) The law enforcement officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(b) At the request of any law enforcement officer under interrogation, he or she may be represented by a representative of his or her choice who, at the discretion of the officer, may be present at all times during the interrogation.

(2) Evidence obtained during the course of any interrogation not conducted in accordance with sub. (1) may not be utilized in any subsequent disciplinary proceeding against the law enforcement officer.

- b. All questions asked of the employee under investigation that are specifically related to employment must be fully and truthfully answered. Refusal to answer may result in disciplinary action.

## **DISPOSITION**

### **Disposition of Complaints**

The Chief of Police shall make the final disposition of the complaint as may be appropriate. No disposition involving disciplinary action will be made without first confronting the employee involved with the results of the investigation and affording the employee an opportunity to respond. The Chief of Police shall inform the employee in writing of a disposition of the complaint.

The case disposition classifications shall be as follows:

1. **Unfounded.** Investigation indicates that the allegations are false.
2. **Not sustained.** Insufficient evidence to either prove or disprove the allegations.
3. **Sustained.** The allegations are supported by sufficient evidence to conclude they are true, and an appropriate departmental action was imposed.

If sustained, the Chief of Police shall take such action against the employee as is appropriate, which may include disciplinary action against the employee pursuant to State Stat. 62.13(5).

4. **Exonerated.** Investigation indicates that the incident occurred, but was justified, lawful, and proper under the circumstances.

5. **Policy failure.** The investigation reveals that the allegations are true, however, the employee was acting in accordance with established Department policy.

**Complainant Notification of Disposition**

The Chief of Police or designee shall inform the complainant named in the complaint in writing of the disposition and the reasons therefore within a reasonable period of time.

**Police and Fire Commission Notification of Disciplinary Action**

The Chief of Police shall notify the President of the Police and Fire Commission of any disciplinary action taken with respect to a citizen complaint.

**Complainant's Right to a Commission Hearing**

As part of the written notification of the disposition of the complaint, the Chief of Police or designee shall inform the complainant that if not satisfied with the results of the investigation, he/she may, within 30 days of the date of such notification, file written Charges with the President of the Board of Police and Fire Commissioners.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Chief of Police

3rd Draft

July 17, 2007

To: Honorable Members, Wisconsin Legislature

From: Edward J. Huck

Subject: Police and Fire Discipline

When a state budget bill is passed and signed into law, lawmakers sometimes react to an odious provision discovered tucked into its hundreds of pages by exclaiming, "I didn't know that was there!" This letter is intended to alert you to a provision in the Senate-passed version of the budget that threatens the civil rights of all Wisconsin citizens, particularly minorities.

The language in the Senate passed version of the budget would eliminate the right of Wisconsin citizens to complain formally about police misconduct. . It would eliminate a police chief's right to file a complaint against an errant officer, and provide a municipality with no authority to file a complaint, unless a union gives its OK. And it would inject politics into a process that Wisconsin has attempted to hold above politics for more than 100 years.

We've had a citizen complaint process for discipline of public safety personnel in place since the 1890s. It's been an effective deterrent to mischief. Budget language that would eliminate that deterrent is:

*SECTION 2666f. 111.70 (4) (c) 2. b. of the statutes is created to read:*

*111.70 (4) (c) 2. b. A collective bargaining agreement entered into between law enforcement and fire*

*fighting personnel and a municipal employer may, notwithstanding s. 62.13 (5), contain dispute resolution procedures, including arbitration, that address the suspension, reduction in rank, suspension and reduction in rank, or removal of such personnel. If the procedures include arbitration, the arbitration hearing shall be public and the decision of the arbitrator shall be issued within 180 days of the conclusion of the hearing.*

*SECTION 2679i. 111.70 (4) (mc) of the statutes is created to read:*

*111.70 (4) (mc) Prohibited subjects of bargaining; fire fighting and law enforcement personnel. In a bargaining unit containing fire fighting or law enforcement personnel, the municipal employer is prohibited from bargaining collectively with respect to:*

- 1. The prohibition of access to arbitration as an alternative to the procedures in s. 62.13 (5).*
- 2. The reduction of standards in s. 62.13 (5) (em) 1. to 7.*
- 3. The payment of compensation in a way that is inconsistent with s. 62.13 (5)(h).*

The Senate amendment also deletes the following sentence from sec. 62.13(5)(i):

*"If the order of the board is sustained [in court] it shall be final and conclusive.*

Under the budget language, citizens would be unable to file a complaint against a member of a police or fire union unless the union approves the process and approach. City leaders across Wisconsin are loathe to surrender the rights of their citizens to make such complaints. Why are some members of the Legislature apparently willing to do so? *(continued)*

3rd Draft

Do citizens have a right to expect that the personnel who serve and protect be held to performance standards — performance standards as high as they choose to set? Will citizens understand if the Legislature gives those rights away?

The language enumerated above puts quality public protection in communities across the state on the endangered species list.

Maybe the idea of citizen control over the conduct of our most trusted public servants will go the way of the dodo bird, and people won't notice. Endangered species don't disappear overnight. The professionalism of those who serve and protect will erode gradually, probably over decades.

What will happen almost immediately if s.2666f and s.2679i of the Senate-passed budget became law is that communities across the state would be faced with difficult financial decisions. The language would give communities the Hobson's choice of saving money or going to the carpet to protect the integrity of their police and fire departments.

How many years and how many millions of dollars should a municipality spend to get rid of a bad cop? The provisions on police and fire discipline in the Senate-passed budget are another unfunded local mandate that will cost Wisconsin taxpayers millions of dollars.

Please tell your legislative leadership this issue in any form should not be in a budget forwarded to the governor for his signature.

This issue deserves a full public debate through separate legislation. If lawmakers are determined to change the state's direction after more than 100 years of citizen control of police and fire discipline, a majority will vote to do so in separate legislation. That's government in the sunshine. That's democracy. Choosing another path is to choose darkness over sunshine.

# Herrick & Kasdorf, L.L.P.

Patricia K. Hammel  
Scott N. Herrick *Court Commissioner*  
Robert T. Kasdorf *Trustee in Bankruptcy*  
Juscha E.M. Robinson  
David R. Sparer

Robert L. Reynolds, Jr. (1930-1994)

## Law Offices

16 N. Carroll, Suite 500  
Madison WI 53703

Peter Zarov *of counsel*  
Gretchen Twietmeyer *of counsel*  
Roger Buffet *of counsel*

July 2, 2007

Memo to PFC legislation working group  
From Scott Herrick  
Senate Budget Text Analysis and Comment (based on legislative text emailed from Curt Witynski)

SECTION 2666f. 111.70 (4) (c) 2. b. of the statutes is created to read:

111.70 (4) (c) 2. b. A collective bargaining agreement entered into between law enforcement and fire fighting personnel and a municipal employer may, notwithstanding s. 62.13 (5), contain dispute resolution procedures, including arbitration, that address the suspension, reduction in rank, suspension and reduction in rank, or removal of such personnel. If the procedures include arbitration, the arbitration hearing shall be public and the decision of the arbitrator shall be issued within 180 days of the conclusion of the hearing.

### SH ANALYSIS:

- • Wisconsin courts have consistently held that WS 62.13(5) is not subject to the collective bargaining provisions of WS 111.70. Senate Amendment 1 reverses that line of holdings with the word *notwithstanding*. This sentence seems to make all of WS 62.13(5) contingent upon and open to collective bargaining. The only limit to the alterations which a collective bargaining agreement may make in the statutory provisions is the phrase *such personnel*, which seems to preclude alterations affecting personnel who are not subject to the collective bargaining agreement, i.e., chiefs and managers. However, with respect to *such personnel*, the CBA apparently may alter any aspect of WS 62.13(5), including portions dealing with statements of charges filed by "aggrieved persons," i.e. citizens, as well as charges filed by individual commissioners and a commission itself.
- • I now believe that my first impression of the Senate text, shared by email several days ago, was mistaken. I suggested then that the focus of the text on the collective bargaining arrangement would not affect the "aggrieved person" and other categories of complainant not parties to a CBA. Now that I have read the text more carefully, I fear that I was wrong.
- • If the Senate text becomes law, attorneys such as myself may attempt to defend the view that I now feel may have been mistaken. Budget or Reference Bureau staff reports on the Senate text may cast further light on this issue - - do such exist?
- • Present law provides that a commission must issue a written decision within 3 days of the conclusion of its hearing. In practice, this unrealistically short calendar is sometimes adjusted by extending the "hearing" to allow for briefing and deliberations, but even so PFC decisions are almost always issued on a much shorter schedule than the 180 days provided by the new text. Some will argue that an arbitration process may take less calendar time

than a PFC process, although data probably does not exist to settle that issue one way or the other.

- • The more interesting concern is that the statute at 62.13 (5)(h) currently provides that the charged officer continues to be paid pending PFC proceedings. Presumably the CBAs under the new provision will continue that pattern at least through the arbitration decision and possibly through subsequent appeals, particularly in light of the prohibition on certain changes from WS 62.13(5) provided below, notably the prohibition on “payment of compensation in a way that is inconsistent with s. 62.13 (5)(h).”
- • The Senate text makes several deep changes from current law, none of them apparent on the face of the proposal:
  - • In most disciplinary cases under WS 62.13(5), the complaining party under current law is the Chief - - NOT the municipality. (Occasionally the complainant is a citizen, or “aggrieved person.” Very rarely, the complainant is the commission or an individual commissioner.) The historical function and purpose of this assignment of role has been to insulate the disciplinary process from the political process, at both the mayor and council levels. Wisconsin Chiefs historically have been accorded highly independent, professional status, responsibility, and rights, among which has been the duty to be the complainant in disciplinary cases. Under the Senate text, the complainant now will be the municipal employer - - i.e. in practice, the mayor and common council. Cases would now be investigated (or not), brought (or not), prosecuted (or not), settled (or not), and if necessary appealed (or not) by decision of the mayor and common council. A Chief may have no direct, substantive role in major discipline, except coincidentally as a fact witness in rare cases, or formally as a witness regarding department policies.
  - • A key feature of the current PFC system and structure has been that the method of addressing major discipline is not subject to local adjustment in light of local controversy; the system of WS 62.13(5) has been a basic, unalterable framework. Local controversies regarding specific facts and cases have often arisen, but have never penetrated to the level of changing the disciplinary method by which the controversy would be resolved. Both officers and Chiefs, and for that matter the public, have been able to rely upon - - or have been stuck with - - the PFC system. Under the proposal, specific local controversies will give rise to local efforts to change the disciplinary system. Because disciplinary procedures will be mandatory subjects of bargaining, they will be bargained, in some instances under the pressure of specific controversies - - in some instances probably as “memoranda of understandings” addressing particular cases. Not merely the case itself, but the venue of the trial of the case, will be part of the political controversy.
  - • A related key feature of the current PFC system and structure has been that the method of addressing major discipline has been uniform around the state, across all ranks, and across both police and fire departments. Now each CBA will provide its own method. Of course there will be repeated patterns, but instead of one disciplinary system for all

protective personnel, the state will have as many systems as we have contracts, plus an extra system for disciplining Chiefs and managers.

SECTION 2679i. 111.70 (4) (mc) of the statutes is created to read:

111.70 (4) (mc) Prohibited subjects of bargaining; fire fighting and law enforcement personnel. In a bargaining unit containing fire fighting or law enforcement personnel, the municipal employer is prohibited from bargaining collectively with respect to:

SH ANALYSIS:

- • An interesting fail-safe, intending that the collective bargaining process start out from the current statute as a base-line only, without risking that major pro-employee provisions be lost in the bargaining process.

1. The prohibition of access to arbitration as an alternative to the procedures in s. 62.13 (5).
2. The reduction of standards in s. 62.13 (5) (em) 1. to 7.

SH ANALYSIS:

- • The reference to "reduction of standards..." is problematic. The standards as currently presented in the statute are awkwardly drafted and difficult to apply; unions and employers bargaining in good faith under the new text will wish to consider altering the standards editorially at least, but will face the risk of allegations of prohibited practice or bad-faith bargaining if they make such proposals.

3. The payment of compensation in a way that is inconsistent with s. 62.13 (5)(h).

SH ANALYSIS:

- • If a CBA makes significant changes in the hearing process, it may become hard to determine what is "inconsistent" with current law. The CBA parties will face an interesting challenge in avoiding this "prohibited" subject.

The Senate amendment also deletes the following sentence from sec. 62.13(5)(i):  
If the order of the board is sustained it shall be final and conclusive.

SH ANALYSIS:

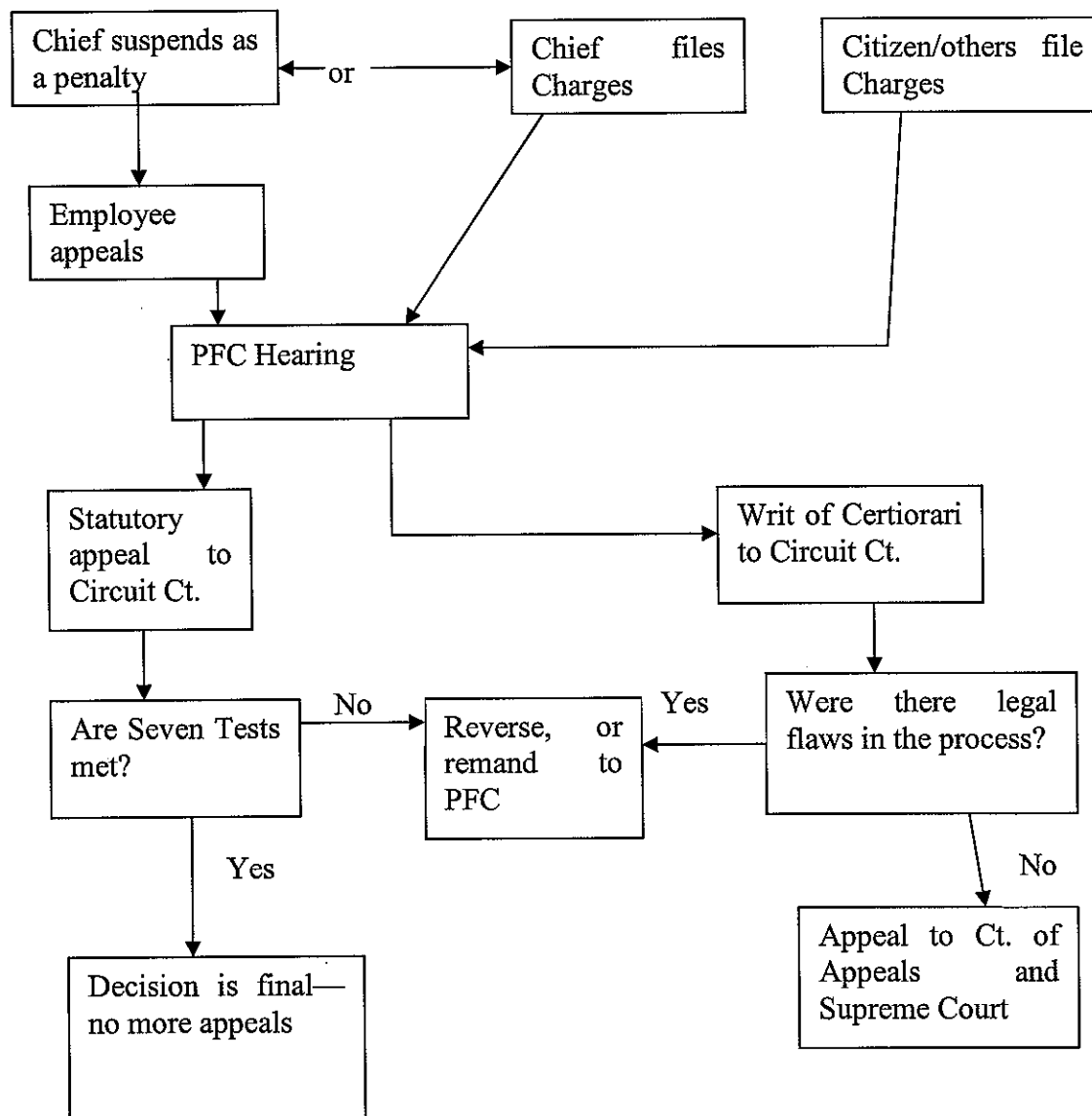
- • Deleting this sentence will have two effects.
  - • Note that this provision is not tied directly to the arbitration provision and would apply in cases heard by a PFC. The primary impact will be to allow disciplined officers for the first time to appeal from circuit court to the Court of Appeals and then to seek review by the Wisconsin Supreme Court. That avenue of extended judicial review was closed by the original statute as a trade-off for the extensive procedural protections of the hearing process in order to provide prompt closure to these vital public cases.
  - • Some union attorneys believe that this sentence by itself is the theoretical foundation of the current caselaw providing for the supremacy of WS 62.13(5): "final and conclusive," it has been suggested, crucially precludes post-PFC decision arrangements

which would otherwise be subject to bargaining. I have heard one such attorney argue that this change alone would be sufficient to reverse the *Janesville* decision, i.e., to allow post-PFC arbitration. Thus, this sentence is a back-door version of SB 57.

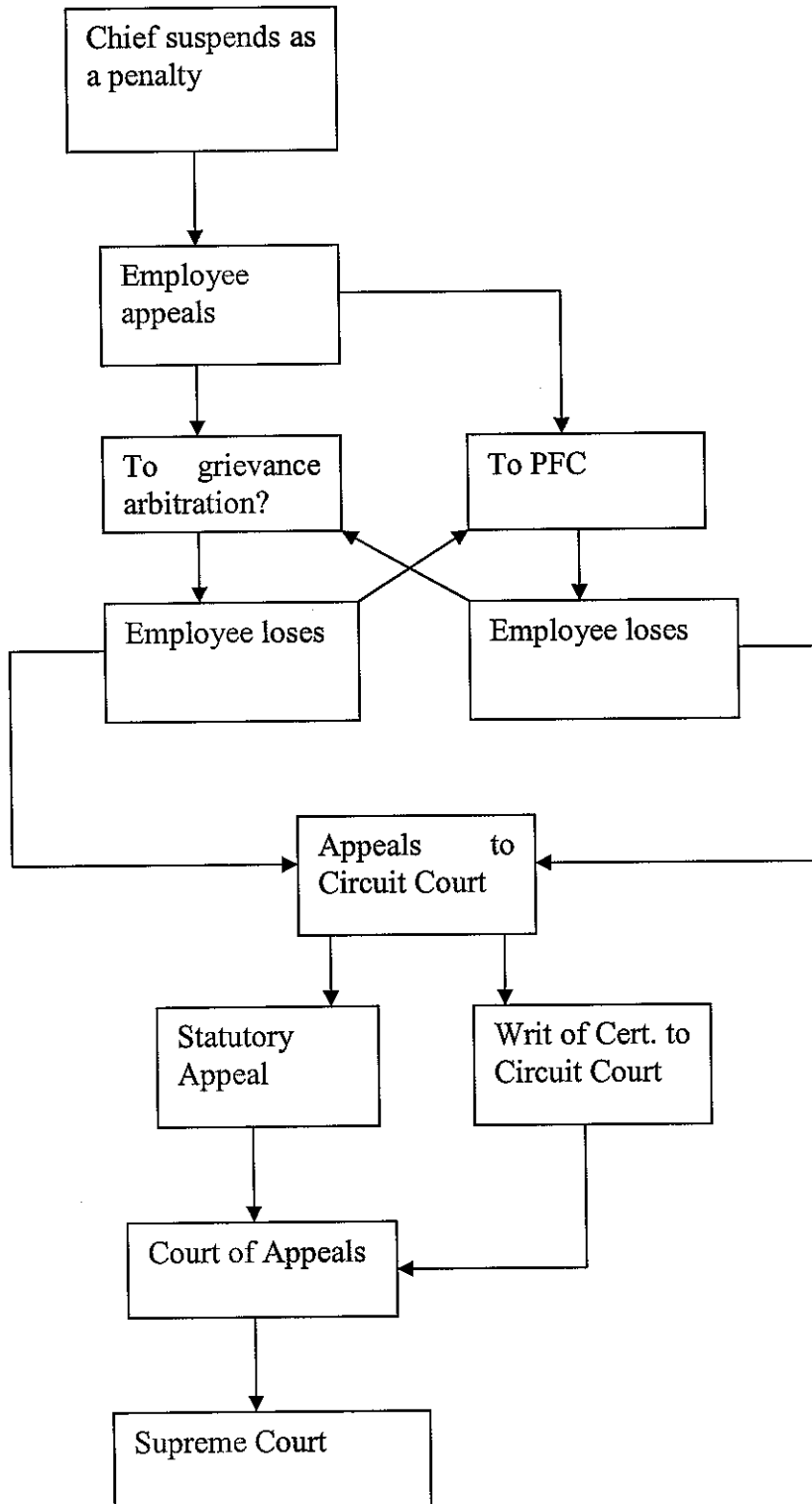
SH/hs

F:\DOCS HERRICK\SH\PFC\Legislation\Devil's Bill 2007\Senate Budget Text.Analysis.d01.wpd

EXISTING LAW



**PROPOSED LAW**



# **WISCONSIN CHIEFS OF POLICE ASSOCIATION**

**SUMMER CONFERENCE 2007**

## **LEGAL UPDATE**

**July 30, 2007**

**Attorney Kyle J. Gulya  
VON BRIESEN & ROPER, S.C.  
411 East Wisconsin Avenue: Suite 700  
Milwaukee, Wisconsin 53202  
[www.vonbriesen.com](http://www.vonbriesen.com)  
(800) 622-0607  
(414) 287-1377 (Mr. Gulya's direct line)  
[kgulya@vonbriesen.com](mailto:kgulya@vonbriesen.com)**

## - WISCONSIN PUBLIC RECORDS LAW LEGAL UPDATE -

- I. Personnel investigation records, pornographic images and website searches. *Zellner v. Cedarburg School District*, 2007 WI 53.
  - a. Disclosure of personnel investigation records after *Zellner*
  - b. Considerations for dealing with requests for records containing pornographic images or other copyrighted materials
    - i. Fair use of copyright materials v. copyright violations
    - ii. Disclosure of pornographic images to minor records requesters
  
- II. Electronic Records and Independent Contractors. *WIREDATA, Inc. v. Village of Sussex*, 2007 Wisc. App. LEXIS 7 (Wis. Ct. App. 2007) (review pending)
  - a. Record formats and disclosure of the records in that format
  - b. Who is liable under the Public Records Law—the contractor or the municipality?
  - c. Effectively handling contractors and negotiating contract language to protect the Department
  
- III. Driver's Privacy Protection Act 18 U.S.C. §§ 2721–2725 (2006)
  - a. Background
    - i. The DPPA and *Reno v. Condon*, 528 U.S. 141, 120 S. Ct. 666 (2000).
    - ii. *Deicher v. City of Evansville*, 2006 U.S. Dist. LEXIS 92222 (W.D. WI 2006); 2007 U.S. Dist. LEXIS 27553 (7th Cir. 2007).
    - iii. *Parus v. Cator*, 399 F. Supp. 2d 912 (W.D. WI 2005), *Parus v. Kroeplin*
    - iv. TIME!
  - b. Considerations custodians should consider
    - i. Context of the request for driver information
    - ii. The Law Enforcement Agency: the personal injury law firm marketing department!
    - iii. Sources of driver information and documentation of the source
    - iv. Requests for information v. Requests for records
    - v. Redaction v. nondisclosure