SUPREME COURT
STATE OF WISCONSIN
Case No. 04-3306

STATE EX REL. JOSE CASTANEDA,
Plaintiff-Respondent,

v.

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID L. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION,
Defendants-Appellants.

APPEAL FROM DECISION OF THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE PATRICIA D. MCMAHON, CASE NO. 03-CV-008737, UPON ACCEPTANCE OF THE CERTIFICATION OF THE COURT OF APPEALS

BRIEF OF DEFENDANTS-APPELLANTS

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STATEMENT OF THE ISSUES

1. Does the Milwaukee Fire and Police Commission's rule-making authority in Wis. Stat. § 62.50(3)(a), for the "government of the members," authorize it to promulgate rules for the processing of citizen complaints against members of the Milwaukee Police Department under Wis. Stat. § 62.50(19)?

Answered by the trial court: No.

2. Are administrative rules relating to the processing of citizen complaints against members of the Milwaukee Police Department necessary in order for the Milwaukee Fire and Police Commission to carry out its investigatory and adjudicatory responsibilities imposed on it by Wis. Stat. § 62.50(19)?

Answered by the trial court: No.

3. Is Milwaukee Fire and Police Commission Rule XVII, particularly section (4) and subsection 6(b)i., consistent with Wis. Stat. §62.50(19)?

Answered by the trial court: No.

STATEMENT OF THE CASE

On September 30, 2003, plaintiff-respondent (Castaneda) filed a mandamus action seeking an order from the circuit court directing the defendants-respondents, Board of Milwaukee Fire and Police Commissioners (Board), to set a date for a trial and investigation for twenty-five citizen complaints filed with the Board under Wis. Stat. § 62.50(19). On October 3, 2003 the Board filed a motion to dismiss the mandamus action on the ground that the complaints had been processed in accordance with Fire and Police Commission Rule XVII. (R. 3, 4, 5). On October 7, 2003, Castaneda amended the complaint to include a declaratory judgment action, which sought a ruling from the court invalidating Rule

XVII of the Board, entitled "CITIZEN COMPLAINT PROCEDURE," on the basis that the Board had no statutory authority to promulgate the rule and that the rule was inconsistent with Wis. Stat. § 62.50(19).

Castaneda subsequently withdrew his mandamus action and proceeded on the declaratory judgment action. (R. 53 at 2). On July 15, 2004 the trial court issued a decision declaring Rule XVII invalid. The trial court determined that the Board had no rule-making authority to promulgate Rule XVII. Specifically, the trial court held that Wis. Stat. § 62.50 was narrowly drawn and contained "no broad grant of rule-making authority; it contains no statement of legislative intent that such broad authority be granted." Bd. App. at 128[1]; (R. 27 at 14). The trial court also concluded that even if the Board had authority to promulgate rules in order to fulfill its

[1] The Board's appendix attached to its brief in this court is referred to as "Bd. App."

responsibilities under Wis. Stat. § 62.50(19), section (4) and subsection (6)(b) of Rule XVII "as adopted and implemented" are inconsistent with and "frustrate the intent of the legislature in enacting Wis. Stat. § 62.50(19)." Bd. App. at 138; (R. 27 at 24)

An order invalidating Rule XVII based on the conclusions of the trial court was entered on August 16, 2004. (R. 33). The entire action was subsequently dismissed by stipulation of the parties and order of the court dated December 7, 2004. (R. 46). The Board appealed.

The court of appeals certified this appeal to the Wisconsin Supreme Court because the appeal raised "a significant issue of statutory construction, and policy, of considerable importance to the citizens, fire and police departments and fire and police commission of Milwaukee, Wisconsin's largest city." Certification of Wisconsin Court

of Appeals at 4; Bd. App. at 112. This Court accepted certification on November 6, 2006.

STATEMENT OF FACTS

Duties of the Board

The Board is obligated by Wis. Stat. § 62.50 to recruit and hire personnel for the police and fire departments of the City of Milwaukee. Wis. Stat. § 62.50(2). The Board is obligated to conduct yearly reviews of each of the departments under its jurisdiction. Wis. Stat. § 62.50(1m). The Board is obligated to hear disciplinary appeals of police officers and firefighters when the discipline imposed by their respective chiefs exceeds a five-day suspension. Wis. Stat. § 62.50(11), (13), (14), (15), (16), and (17). Under Wis. Stat. § 62.50(19), the Board is obligated to investigate and hold hearings on citizen complaints from members of the community who feel that they may have been wronged by a member of one of the departments when those complaints set

forth "sufficient cause for the removal" of a firefighter or police officer. Wisconsin Statute § 62.50(19) provides as follows:

> CHARGES BY AGGRIEVED PERSON. **In cases where duly verified charges are filed by any aggrieved person with the board of fire and police commissioners, setting forth sufficient cause for the removal of any member of either of the departments,** including the chiefs or their assistants, the board or chief may suspend such member or officer pending disposition of such charges. The board shall cause notice of the filing of the charges with a copy to be served upon the accused and shall set a date for the trial and investigation of the charges, following the procedure under this section. The board shall decide by a majority vote and subject to the just cause standard described in sub. (17) (b) whether the charges are sustained. If sustained, the board shall immediately determine whether the good of the service requires that the accused be removed, suspended from office without pay for a period not exceeding 60 days or reduced in rank. If the charges are not sustained, the accused shall be immediately reinstated without prejudice. The secretary of the board shall make the decision public.

(Emphasis added).

Wisconsin Statute § 62.50(3)(a), entitled "RULES" gives the Board authority to "prescribe rules for the government of the members of each department and may delegate its rule-making authority to the chief of each department."

RULE XVII

In order to fulfill its duties, the Board has established rules of procedure for handling disciplinary hearings involving police officers and firefighters. In particular, Rule XVII of the Board sets forth the procedure for handling citizen complaints.

The full text of Rule XVII is contained in the appendix to this brief at 101-108. Section 1 of the rule defines a citizen complaint broadly to include:

> . . . **any** written communication . . . received by the . . . Commission which alleges a violation of rules or standard

> operating procedures by a member of either the Fire or Police Department. . .

(Emphasis supplied).

The language of section 1 takes into account citizen complaints not only filed under Wis. Stat. § 62.50(19) (sworn and alleging sufficient cause to warrant dismissal), but also § 22-10 of the Milwaukee City Charter (not needing to be sworn or alleging sufficient cause to warrant removal).

Section 2 of the rule sets forth who may file a citizen complaint. Section 62.50(19) simply states that a citizen complaint can be filed by ". . . any aggrieved person . . . ." Rule XVII, section 2, clarifies that an aggrieved person may include a parent or guardian of one who is directly affected by the alleged misconduct; the statute is silent on this issue.

Section 3 of the rule sets forth where to file a citizen complaint. Again, that is not addressed by Wis. Stat. § 62.50(19).

Section 4 of Rule XVII specifies the information which must be alleged in the complaint in order to identify the officer involved and the alleged misconduct. Following Wis. Stat. § 62.50(19), Rule § 4(a), requires that the complaint must set forth sufficient facts for removal of the officer or firefighter complained against. Section 4(b) of Rule XVII deals with complaints filed under § 22-10 of the Milwaukee City Charter.[2]

Section 5 of Rule XVII states that when a citizen complaint is received by the Board, the complaint will be forwarded to the Committee on Rules and Complaints

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[2] Milwaukee City Charter § 22-10, allows charges to be brought by an elector against a member of the police or fire department. It provides as follows:

> **22-10 Charges Against Subordinates. 1.** Charges may be filed against a subordinate by the chief, by a member of the fire and police commission, by the board as a body, or by an elector of the city. Such charges shall be in writing and shall be filed by the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.
>
> **2.** It is the intention of the common council that the procedures, processes, and trial under this section shall be conducted in the same manner as provided in s. 62.50, Wis. Stats. (1983).

("Committee") and placed on the Committee's agenda.

Section 6(a) of Rule XVII states that the Committee will review the complaint to "determine whether the Board has jurisdiction over both the accused member and the subject matter of the complaint."

Section 6(b) of Rule XVII sets forth the various recommendations that the Committee can make to the Board regarding either disposition or further handling of the complaint. Subsection (i) of section 6(b) provides that the Committee can recommend to the Board that "the complaint be dismissed for lack of prosecutorial merit or for such other reason as may be determined by the Committee, or that the complaint be dismissed and referred to the Milwaukee Police or Fire Department for investigation and disposition."

Subsections (ii), (iii) and (iv) of subsection 6(b) of Rule XVII allow the Committee to recommend that the complaint be referred to a hearing examiner for hearing, or

for further investigation, or other actions as may be appropriate to the unique facts of each case.

Section 6(c) of Rule XVII requires the Board to announce its findings regarding provisional jurisdiction in open session, as is required by Wis. Stat. § 19.81 *et seq.* Section 6(d) of Rule XVII provides that if provisional jurisdiction is denied, the citizen complainant will be notified in writing of the dismissal and the reason(s) therefore.

Section 6(e) of Rule XVII provides that if provisional jurisdiction is granted the matter will be referred for hearing and the department member will be advised of the complaint and the rule(s) allegedly violated. Such action would be required by Wis. Stat. §§ 62.50(17)(b)2.-7.

Section 7 of XVII sets forth a system for attempting to resolve cases by conference and conciliation. Sections 8 through 21 of Rule XVII deal with various matters of trial

procedure, including the presentation of evidence, burdens of proof, and dispositions that may occur.

Facts Giving Rise to the Citizen Complaints and Mandamus and Declaratory Judgment Actions

On September 18, 2002 officers of the Milwaukee Police Department entered the El Rey Grocery and tortilla factory to execute a judicially ordered search warrant for the prescription drugs Ampicillin and Naproxen. The search warrant also sought sales receipts, order forms, invoices, containers for repackaging of prescriptions, label and label-makers and shipping containers. In the store, at the time, were at least the following individuals: Evangelina Esparza, Heliodoro Delira, Jose L. Castaneda (the plaintiff herein), Guillermo Cantoral, Theresa Martinez, Ostrid Millan, Mercedes Rayo, Oralia Salazar, Casme Veledez, Maria Veledez, Jose A. Sierra, Rosa E. Ruiz, Idalia Mercado, Tomas Martinez, Eva Juarez, Estevan Galicia, Blanca Ferrusquia,

Maria Elena Echeueste, Lorenzo P. Diaz, Yarra Quintana Perez, Serafin Nuno, Jose M. Rubalcaba, Ricardo Reyes, Maria Munoz-Rico, and Amado Martinez. On November 7, 2002, these twenty-five individuals filed a joint complaint pursuant to Wis. Stat § 62.50(19) requesting the Board to "investigate and discipline, any responsible members of the Milwaukee Police Department, including Police Chief Arthur Jones and all command police officers, detectives and patrol officers" for alleged misconduct in conjunction with the execution of the search warrant. Bd. App. at 163-166;(R. 5, Exh. 2). The misconduct alleged in the joint complaint was that the police exceeded the scope of their search warrant, improperly and unreasonably executed the search warrant, and improperly and unreasonably detained and imprisoned employees. Bd. App. at 163-166; (R. 5, Exh. 2).

The joint complaint sought: (1) an investigation of "the actions of all police officers in any way related to and/or

involved in the above-described events;" (2) and investigation as to whether the Milwaukee Police Department members "have filed all necessary reports on this incident;" (3) a hearing relating to the above-described events, "which all involved police officers are required to attend;" (4) imposition of appropriate discipline on "all officers involved;" (5) "a policy review of the Milwaukee Police Department search warrant execution policy and procedure;" and (6) an order directed to the Milwaukee Police Department "to issue a public apology to the El Rey employees and customers and to the South Side community." Bd. App. at 163-166; (R. 5, Exh. 2).

Upon receipt of the joint complaint, attempts were made by Board staff to identify potential rule violations and specific police officers involved in potential rule violations. The work done by staff members in processing the complaints of these twenty-five citizens is set forth in a memorandum

dated August 20, 2003 to the Board members. Bd. App. at 167-169; (R. 5, Exh. 3).

As set forth in the August 20, 2003 memorandum, Board staff attempted to identify specific rule violations and specific officers involved in any potential misconduct. The August 20, 2003 memorandum shows that in December, 2002 the Board had requested from the Milwaukee Police Department a list of identified personnel that were present during the execution of the search warrant on September 18, 2002. Bd. App. at 167-169; (R. 5, Exh. 3). In January, 2003, staff persons for the Board requested that each individual complainant file a separate complaint in order for staff to not only identify the specific potential rule violations which may have occurred to an individual complainant, but also to assist staff to identify the particular police officer being accused of the misconduct. In response to the request, each individual filed a separate complaint utilizing citizen complaints forms

provided by the Board. Each individual complaint was identical and the alleged misconduct merely referenced the joint complaint. Bd. App. at 161-162; (R. 5, Exh. 2). Under the portion of the complaint that asks for facts supporting the alleged misconduct, typed in each complaint was the following:

> The alleged misconduct is set forth in the attached joint complaint. I verify that those acts and incidents which I observed are true. I am not verifying that acts or incidents which I did not observe are true.

Bd. App. at 161-162; (R. 5, Exh. 2).

Between mid-February and mid-June of 2003, staff of the Board worked with the complainants and counsel for complainants to obtain information in order for staff to determine whether the conduct, which was generally alleged, constituted any specific rule violations, and further to identify who was responsible for the alleged misconduct. Bd. App. at 167-169, 173-176; (R. 5, Exh. 3). From the information

received, out of the twenty-five complaints, the staff was able to identify a specific rule violation in only two of the complaints. However, the staff could not identify the specific officer involved for either of these two complaints. Bd. App. at 167-169, 173-176; (R. 5, Exh. 3).

The August 20, 2003 memorandum indicates that staff personnel met with Committee members regarding procedural options available to the Board in light of the inability of complainants or staff to identify the officers involved in the two instances of potential misconduct. The memorandum states:

> The consensus was that due to the inability to identify the accused officers, the only alternative available to the Commission is to forward the complaints to the Chief of Police, at which time the matter is no longer under the jurisdiction of the FPC. After discussion, we agreed to suggest the following course of action.

Bd. App. at 167-169; (R. 5, Exh. 3).

Based on the recommendation of the Committee, the Board did not take jurisdiction over the complaints and referred the complaints to the Chief of Police for "a full investigation and appropriate disposition." Bd. App. at 170; (R. 5, Exh. 4). Under Rule XVII, § 6(b)i., if the Board accepts the recommendation of the Committee that it does not have jurisdiction over the complaint, it can refer the complaint to the Chief of Police for further action.

Referral of the Matter to the Chief of Police

The term of Chief Jones ended on November 15, 2003 and Chief Nannette Hegerty became Chief of Police on that date. On November 26, 2003 (following an in court hearing on November 17, 2003), the court ordered the Board to order the Chief to expedite the internal investigation to see if a rule violation attributable to particular officers could be found. (R. 15). On November 24, 2003, Mr. Heard, Executive Director of the Fire and Police Commission, forwarded a

letter to Chief Hegerty indicating that the court in a hearing on November 17, 2003 ordered that a report from the chief of police regarding her determination of whether or not any rule violations took place should be filed with the court no later than Friday, December 19, 2003. (R. 13). On December 16, 2003, Chief Hegerty concluded her investigation of the matter and that information was forwarded to the court. (R. 16, App. 103-104). In her report to the Commission, Chief Hegerty stated in relevant portion:

> I have reviewed the facts relevant to the search warrants executed on September 18, 2002, at the El Rey Grocery Store and El Rey Tortilla Factory. I examined the citizen complaint forms and latest correspondence identifying the officers involved in the search warrants. I have also discussed this incident with members of my command staff that were personally involved. It is clear to me that the El Rey search warrants were executed in a manner similar to that which is routinely performed at drug house raids and other high-risk operations. It is also clear to me

that the officers executing the warrants did as they were instructed.

The investigation into the sale of prescription medicine at the El Rey Grocery Store did not reveal information that would logically precipitate a 'high-risk' approach to the warrant execution. Nor was there reasonable suspicion of other illicit narcotics sales that would call for the use of drug-detection canines. Based upon my conclusions, I am instituting the following changes in an effort to ensure that this unfortunate sequence of events does not re-occur in the future.

Risk Assessment: I have directed that all search warrant executions will be preceded by a comprehensive risk assessment to ensure that the appropriate amount of force is utilized based upon known evidence specific to that individual warrant. Clear distinctions will be made between high, medium, and low risk warrants and each will be executed accordingly.

Canine Deployment: I have directed that drug-detection canines will not be utilized during the execution of warrants for which there is no reasonable suspicion

that the person(s) or premise(s) are trafficking in illicit narcotics. These canine units will not participate simply as a matter of practice.

Officer identification: All personnel involved in the execution of search warrants shall be identifiable at all times, regardless of an operation's degree of risk. More specifically, Tactical Enforcement Unit officers, even when outfitted in full tactical gear, shall have individual identification clearly visible on their outermost garment(s).

Training: I am currently designing and implementing training for all personnel involved in the search warrant process, specifically related to risk assessment, proper canine deployment, and other pertinent issues brought to light as a result of the El Rey warrants.

Community Sensitivity: All Department personnel, including those involved in search warrant executions will receive training related to diversity and community sensitivity issues.

Finally, I believe that this issue can only be truly resolved when all affected parties can sit together, face to face, and

> engage in open and honest communication. I strongly recommend that the aggrieved parties in the El Rey incident be invited to meet with representative(s) of the Fire and Police Commission and myself, in an effort to successfully resolve this complaint. I thank you in advance for your efforts in that regard and I look forward to our meeting.

(R. 16).

Chief Hegerty's suggestion that a face-to-face meeting be held among the members of the community, the aggrieved parties, Board members, and her in order to resolve the matter was recommended by the trial court in its order of December 30, 2003. Bd. App. 181-182; (R. 17). These meetings were held on February 2, 2004 and March 11, 2004. (R. 17). The mandamus action was subsequently dismissed, but Castaneda pursued the declaratory judgment action, which gives rise to this appeal.

STANDARD OF REVIEW

The nature and scope of an administrative agency's rule-making authority involves statutory interpretation. *Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Dept. of Natural Resources*, 2004 WI 40, ¶¶ 6, 12, 270 Wis. 2d 318, 677 N.W.2d 612. Determining whether an administrative rule is valid because it is consistent with the statute under which it is promulgated also involves statutory interpretation. *Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d 211, ¶¶ 25-26, 612 N.W.2d 659. This Court applies a *de novo* standard of review when reviewing both legal issues. *Wisconsin Citizens Concerned for Cranes & Doves* at ¶ 12; *Seider* at ¶ 25.

ARGUMENT

I. The Board has express or implied authority to promulgate an administrative rule for the processing of Citizen Complaints under Wis. Stat. § 62.50(19).

A. Administrative rule-making authority generally

An administrative agency only has those powers expressly conferred or necessarily implied from the statutory language of the enabling legislation. *Grafft v. DNR*, 2000 WI App. 187, ¶ 6, 238 Wis. 2d 750, 618 N.W.2d 897. In order for the Board's adoption of Rule XVII to be a valid exercise of administrative power, it is necessary that such action: (1) be based upon a proper delegation of power by the legislature, and (2) not constitute an administrative action in excess of that statutorily conferred authority. *State Department of Administration v. DILHR*, 77 Wis. 2d 126, 133-34, 252 N.W.2d 353 (1977).

One looks to the plain language of the statute to determine the extent of the agency's power. *Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d N.W.2d 211, 612 N.W.2d 659. *State v. Delaney*, 2003 WI 9, ¶ 14, 259 Wis. 2d 77, 658 N.W.2d 416, *VanCleve v. City of Marinette*, 2003 WI

2, ¶ 17, 258 Wis. 2d 80, 655 N.W.2d 113. If the language of the statute is clear and unambiguous, it is necessary to apply the language to the facts at hand. *State v. Polashek*, 2002 WI 74, ¶ 18, 253 Wis. 2d 527, 646 N.W.2d 330. A statute is "read in the context in which it appears in relation to the entire statute so as to avoid an absurd result." *Wisconsin Citizens Concerned for Cranes & Doves* at ¶ 6. Even if a dictionary is used to help define terms, that does not *ipso facto* mean the statute or rule is ambiguous. *State v. Sample*, 215 Wis. 2d 487, 573 N.W.2d 187 (1998).

B. The Board's express rule-making authority for the "government of the members" allows it to promulgate rules for the administration of Wis. Stat. § 62.50(19)

Wis. Stat. § 62.50(3)(a) provides that the Board can promulgate rules for the government of departmental members. The Board is charged with the responsibility of conducting disciplinary appeal hearings when the discipline

imposed by the chiefs of the respective departments on a member exceeds a five-day suspension. Wis. Stat. §§ 62.50(11), (13), (17), and (19). The term "government" is defined in Webster's Dictionary as "authoritative direction or control." *Webster's New Collegiate Dictionary*, 7th ed. In terms of discipline, it is the Board that has ultimate control, or authority, to impose discipline on members in excess of a five-day suspension. It stands to reason that the ultimate authority to discipline a member constitutes "government" of the member. Thus, the grant of rule-making authority in Wis. Stat. § 62.50(3)(a) extends to disciplinary proceedings before the Board.

Long ago, this Court came to the same conclusion, i.e., that the term "government of the members" includes the power to regulate discipline. *Kasik v. Janssen*, 158 Wis. 606, 149 N.W. 398 (1914). In *Kasik*, the issue before the Court was whether the Milwaukee Police Chief could, under his

rule-making authority "for the government of the members," require police officers to purchase (with their own money) their uniforms from a specific tailor. This Court determined that the rule was a valid exercise of the chief of police's administrative power of the "government of the members." In doing so, the court explained the broad scope of the authority to govern the members as follows:

> We have, however, in the instant case express authorization to 'prescribe rules for the government of' the members of the police force. Subdivision 23, § 959—46d, St. 1913. This statute does not describe the nature or kind of rules, which the chief of police is empowered to prescribe, further than that they be for the government of the members of the police force. But from the rule as stated in Throop, *supra*, and the language of the statute, we must infer that the authority covers all those disciplinary regulations which experience has shown to be valuable and to promote obedience and efficiency.

Kasik at 610-611. (Emphasis added).

Wisconsin Statute § 62.50(19) does not require the Board to conduct a trial on all citizen complaints which it

receives regarding a member. Rather, Wis. Stat. § 62.50(19) limits trials on citizen complaints to only those in which the "verified charges" of a citizen set forth "sufficient cause for the removal" of the member. Thus, the trials contemplated under Wis. Stat. §62.50(19) are trials which will lead to the imposition of discipline on the member. Indeed, much of Wis. Stat. § 62.50(19) addresses the standard the Board must follow for determining whether discipline should be imposed and the standard to be applied in determining the appropriate discipline.

Based on the statutory requirement that trials only be conducted on citizen complaints which allege grounds for removal, Wis. Stat. § 62.50(19) can be viewed as a disciplinary statute. Because imposition of discipline involves "government of the members," the Board is expressly authorized under Wis. Stat. § 62.50(3)(a) to promulgate administrative rules for processing, investigating,

and adjudicating citizen complaints filed under Wis. Stat. § 62.50(19).

In the proceedings below, Castaneda argued, and the trial court agreed, that because Wis. Stat. § 62.50(19) addresses citizen complaints, the statutory section does not implicate "government of the members" and therefore no rule-making authority is authorized for the processing of citizen complaints. It is respectfully submitted that this conclusion places form over substance and ignores the responsibilities placed on the Board by Wis. Stat. § 62.50(19).

The title of the section, "CHARGES BY AGGRIEVED PERSON" does not override the substance of Wis. Stat. § 62.50(19), which is to process citizen complaints and conduct disciplinary hearings on those complaints that meet the statutory criteria. The relevance of the title of the section is that it defines from whom the charges originated. Regardless of the source of the charges, the Board's

responsibility under Wis. Stat. § 62.50(19), like its responsibility under Wis. Stat. § 62.50(17), is to hold a just cause hearing and determine the appropriate discipline. There is no difference in the substance of the two hearings; the only difference between a discipline hearing under Wis. Stat. § 62.50(19) and Wis. Stat. § 62.50(17) is the person who originated the charges – an aggrieved citizen versus the chief. This difference does not create any distinction in the adjudicatory function the Board has under Wis. Stat. § 62.50(19) as it has under Wis. Stat. § 62.50(17). Indeed, Wis. Stat. § 62.50(19) requires that the just cause standard of Wis. Stat. § 62.50(17) be applied, and the two sections set forth the same standard that the Board must apply to determine whether discipline should be imposed, and the same limitation on the extent of discipline which the Board can impose. Thus, because Wis. Stat. § 62.50(19) requires the Board to conduct disciplinary hearings on citizen

complaints that meet the statutory criteria, the statutory section implicates "government of the members."[3]

Under Wis. Stat. § 62.50(3)(a), the Board can enact rules which establish the conduct by which a police officer must conduct himself or herself in their professional life. Yet, under the trial court decision, the Board is prohibited from establishing rules of administration in order to process, investigate, and adjudicate, within the framework of Wis. Stat. § 62.50(19), citizen complaints against members of the department, which allege violations of these very rules. The impact of the trial court's decision is that a just cause trial must be conducted on every citizen complaint. This result ignores the specific language of Wis. Stat. § 62.50(19), that

[3] Although the trial court did not address the Board's rule-making authority for administering Wis. Stat. §§ 62.50(11) through (17), the rationale of the trial court decision could be construed as to prohibit administrative rules for these sections as well. The Board has promulgated rules governing disciplinary appeals originating from disciplines imposed by the chiefs. It is the Board's position that these rules are a valid exercise of its administrative powers.

requires a hearing only on those complaints which allege sufficient cause for removal. In construction of a statute, a court cannot ignore the express language of the statute. "Where the meaning [of the statute] is plain, words cannot be read into it or out of it for the purpose of saving one or other possible alternative" interpretations. *General Casualty Co. v. Wisconsin Dept. of Revenue*, 2002 WI App 248, ¶15, 258 Wis. 2d 196, 653 N.W.2d 513.

The trial court erred when it concluded that the Board had no express authority to enact administrative rules for the processing of citizen complaints on the basis that Wis. Stat. § 62.50(19) did not involve "government of the members." Nevertheless, even if Wis. Stat. § 62.50(3)(a) does not provide express rule-making authority for Wis. Stat. § 62.50(19), promulgation of Rule XVII is a valid exercise of the Board's implied power under Wis. Stat. § 62.50(19).

C. Administrative rules are necessary for the Board to carry out its investigatory and adjudicatory responsibilities imposed on it by Wis. Stat. § 62.50(19).

"In addition to powers expressly conferred upon him by statute, an officer has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or such as may be fairly implied from the statute granting express powers." *Kasik* at 609-610. Although this statement was made by the Court in reference to the implied powers of a municipal officer, it applies to the Board, which is charged with general oversight of the fire and police departments and empowered to enact rules for the "government of the members." This statement by the Court embodies the rationale for implied powers. It also recognizes that express powers (in this case, the responsibilities the Board is charged with fulfilling under Wis. Stat. § 62.50(19)) cannot be effectuated in the absence

of an implied grant of that degree of authority necessary for the implementation of those powers. Otherwise, the grant of power would be meaningless because the administrative agency would have no means to execute it. "The very delegation of power to administer a statute carries with it the power to adopt such procedures as are necessary or proper in carrying out its administrative tasks." Bernard Schwartz, *Administrative Law* § 4.6, at 158, n. 3 (2nd ed. 1983) (citing 1 Cooper, State Administrative Law 176 (1965).

Rule XVII is not a substantive rule, nor is it an interpretive rule; it is a rule of administration that establishes the method of operation by which the Board carries out its functions under Wis. Stat. § 62.50(19). Not only do the Board's investigatory and adjudicatory functions require such a rule, the Board was duty-bound to promulgate Rule XVII because it tells the citizens of the City of Milwaukee what is

required of them in order to avail themselves of the provisions of Wis. Stat. § 62.50(19).

Sections one through four of Rule XVII notify the public who has the right to seek redress, where to seek redress, and how to seek redress. These provisions are for the benefit of the citizens. Given that the purpose of Wis. Stat. § 62.50(19) is to provide a means by which the public can lodge complaints against members of the police or fire department, it is not only expected that the Board would have a rule that sets forth the precise method for pursuing such a claim, but the Board has a responsibility to enact a rule which notifies the public of the provisions of the statute.

Sections five and six establish the procedure by which the Board will process and investigate the complaint to determine whether is has jurisdiction under Wis. Stat. § 62.50(19). A screening process by which the Board determines whether or not the alleged conduct gives rise to

rule violations is a necessary tool for the proper and efficient administration of Wis. Stat. § 62.50(19). The alternative is for the Board to conduct a just cause hearing on every complaint filed with it, which is the effect of the trial court decision in this case. Not only does Wis. Stat. § 62.50(19) not require this, but this alternative presents an unworkable situation.

Citizens who encounter police officers and firefighters can become disgruntled for a whole host of reasons. This is particularly true with police officers who are often responding to a volatile situation. Wisconsin Statute § 62.50(19) does not contemplate a just cause hearing every time a disgruntled citizen lodges a complaint with the Board. If that were the case, then every response call would potentially give rise to a just cause hearing based on the citizen's subjective understanding of the conduct of the police officer or firefighter in a particular situation. Wisconsin Statute §

62.50(19) limits just cause hearings to those citizen complaints which allege conduct serious enough to warrant severe discipline. A determination as to which complaints meet the "sufficient cause for removal" must be made by the Board because it has the requisite knowledge to make that determination.

Furthermore, in *Conway v. Board of Police and Fire Commissioners*, 2003 WI 53, 262 Wis. 2d 1, 662 N.W.2d 335 this Court noted that statutes which control disciplinary proceedings against police officers and firefighters (Wis. Stat. § 62.13(5), applicable to cities not of the first class and Wis. Stat. § 62.50 §§ (12)–(17), applicable to the City of Milwaukee) demonstrate a "legislative intent to provide due process protections to police officers and firefighters subject to disciplinary proceedings." "Efficiency and fairness are the purposes for the disciplinary hearing process." *Conway* at ¶ 12 (citing *State ex rel. Kaczkowski v. Bd. of Fire & Police*

Comm'rs, 33 Wis. 2d 488, 148 N.W.2d 44, *rehearing denied*, 33 Wis. 2d 488, 149 N.W.2d 547 (1967)). Conducting disciplinary hearings on citizen complaints that do not meet the statutory requirement alleging cause for removal not only subjects members of the department to unnecessary hearings, but runs counter to the legislative intent of "efficiency and fairness."

Without a screening process for the Board to investigate and determine which complaints meet the statutory criteria, the term "setting forth sufficient cause for removal" becomes a nullity. As such, to the extent Rule XVII provides a method by which the Board investigates and determines whether it has jurisdiction to hold a just cause hearing, it is a necessary and valid exercise of implied power.

Sections seven through twenty-one address the adjudicatory process and, for the most part, establish procedure for the just cause hearing, including presentation of

evidence, burden of proof, and the disposition that may occur. It is difficult to imagine how an administrative body can adjudicate matters without rules of procedure. It is even more difficult to imagine such a case here in a citizen complaint matter where the citizen has the burden of proof under the just cause standard and generally is not even represented by an attorney.

A just cause hearing is a "quasi-judicial proceeding with all the elements of 'fair play' fundamental to due process in an administrative law setting." *Conway* at ¶ 12 Rule XVII, sections eight to twenty-one, govern trial procedure. These sections serve two purposes vital to due process. First, they notify both of the parties, the citizen and the accused, of the type of hearing that will be conducted. Second, they assure uniformity in the hearing process. The quasi-judicial function imposed on the Board under Wis. Stat. 62.50(19)

requires that the Board enact an administrative rule governing trial procedure in order to satisfy fundamental fairness.

Finally, as a basis for its decision that the Board had no authority to promulgate Rule XVII, the trial court concluded that the legislature's use of the term "following the procedure under this section" in Wis. Stat. § 62.50(19) prohibited the Board from promulgating any administrative rule. The Board disagrees with this conclusion.

The phrase "following the procedure under this section" refers to the process of imposing discipline, up to and including removal. The process is subject to the requirement of a just cause hearing, the standard the Board must apply to determine if the discipline should be imposed (the good of the service), and the limitation placed on the Board on the extent of discipline it can impose (removal, suspension no longer than 60 days, or demotion). This is the same process the Board must follow when it conducts

disciplinary appeal hearings originating from discipline imposed by the respective chiefs. This process is substantive; Rule XVII is not substantive and does not address this process.

Rule XVII, as a rule of administration, only addresses the operational means by which the Board will carry out the responsibilities imposed on it by Wis. Stat. § 62.50(19). The fact that the statute sets forth a substantive process which the Board must follow in determining discipline does not divest the Board of its implied authority to enact necessary rules of procedure to accomplish this process. Therefore, the trial court erred when it concluded that the language "following the procedure under this section" prohibited the Board from enacting rules of administration that are necessary in order to carry out the responsibilities imposed on it by Wis. Stat. § 62.50(19).

II. Rule XVII, particularly subsections 4(a) and 6(b)i., are consistent with Wis. Stat. § 62.50(19).

Rule XVII, particularly subsections 4(a) and 6(b)i., are consistent with Wis. Stat. § 62.50(19). To determine whether an agency, such as the Board, has exceeded its authority in promulgating a rule, one must examine the words of the statute to determine if the action of the agency exceeds the statutory authority and thus conflicts with the statute or the statute's intent. *Smits v. City of DePere*, 104 Wis. 2d 26, 37, 310 N.W.2d 607 (1981).

Rule XVII of the Board is not contrary to the legislative discretion given to the Board, but indeed, consistent with it. By adopting Rule XVII as it did, the Board was effectuating the purpose of the powers delegated to it under Wis. Stat. § 62.50(19). *Brown County v. Department of*

Health and Social Services, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981).

It is elemental that nothing in Rule XVII of the Board is inconsistent with Wis. Stat. § 62.50(19). There is nothing inconsistent with broadly defining who is an "aggrieved person" for purposes of filing such complaints. (Section 1). There is nothing inconsistent about requiring that the complainant be "an aggrieved person," since that is the language of the statute itself. (Section 2). There is nothing inconsistent about informing potential complainants where to file such complaints. (Section 3). Indeed, one would expect that such rules would explain such an elemental necessity to a potential complainant. There is nothing inconsistent about setting forth the form and contents of the complaint, since such complaints must allege a cause sufficient for removal of the officer. (Section 4(a)). Indeed, that follows the statute exactly.

There is nothing inconsistent with a process for setting the complaint on the agenda of the Committee on Rules and Complaints for a determination of whether the Board even has jurisdiction over the Complaint. (Sections 5 and 6). As has been noted, the Board must be able to determine its own jurisdiction. If a complaint filed under Wis. Stat. § 62.50(19) does not allege facts which could give rise for removal of the accused officer, the Board has no jurisdiction of the matter under Wis. Stat. § 62.50(19).

Section 7 allows for settlement of cases and the remaining sections deal with the hearing process and procedure. As noted above, rules of trial procedure are necessary to assure a fair hearing process.

The trial court specifically invalidated subsections 4(a) and 6(b)i. of Rule XVII as being inconsistent with the legislative intent of Wis. Stat. § 62.50(19). Subsection (4)(a) requires that if the citizen complaint is filed under Wis. Stat. §

62.50(19) it "must describe individual acts of each accused member which would constitute grounds for removal (firing) of the member(s) from the department." Subsection 6(b)i., which requires the Committee to report to the Board with recommendations regarding provisional jurisdiction, provides for the following recommendation:

> . . . that the complaint be dismissed for lack of prosecutorial merit or for such other reason as may be determined by the Committee, or that the complaint be dismissed and referred to the Milwaukee Police or Fire Department for investigation and disposition; or . . .

Bd. App. at 102.

The trial court concluded that because Wis. Stat. § 62.50(19) allowed the Board to impose a discipline of less than removal from office, it was "not persuaded that citizens cannot complain if they are seeking something less than removal of an officer."[4] Bd. App. at 130 (R. 27 at 16).

[4] Under Milwaukee City Charter § 22-10, citizens can complain and seek redress for conduct that does not give rise for removal.

Therefore, the trial court invalidated Rule XVII "[t]o the extent that it precluded citizen complaints that fail to state cause for removal but may state cause for other disciplinary action, it is in direct contradiction with § 62.50(19)." Bd. App. at 130 (R. 27 at 16).

Subsection (4)(a) mirrors the language of the statute and is therefore consistent with the statute. Subsection (4)(a) requires the complaint to state the conduct that "would constitute grounds for removal." The citizen has to describe what happened; the Board, in its screening process, determines whether the conduct would lead to removal. However, by putting the language of the statute in the Board rule, the citizen is put on notice that the alleged misconduct must be severe in order to avail himself or herself of Wis. Stat. § 62.50(19). If the Committee determines that the conduct alleged in the complaint does not meet the statutory requirement of Wis. Stat. § 62.50(19), the complaint can be

processed under Rule XVII 4(b), which provides for complaints to be filed under Milwaukee City Charter § 22-10. Under subsection 4(b) the complaint only needs to allege conduct that would give rise to discipline.

It is respectfully submitted that the trial court misinterpreted Wis. Stat. § 62.50(19) when it invalidated subsection (4)(a). The fact that Wis. Stat. § 62.50(19) allows the Board, after a just cause hearing, to impose a discipline of something less than removal does not eliminate the requirement that the conduct complained of, and which would trigger the just cause hearing, must be severe enough that the member could be removed. The legislature has bifurcated the disciplinary hearings of police officers and firefighters. In the first phase the Board must determine whether just cause exists to find the member guilty of the alleged misconduct. The second phase is the imposition of discipline. In the disciplinary phase, factors other than the misconduct must be

considered because the standard governing the imposition of discipline is "the good of the service." In other words, it would not be inconsistent for the Board to process a citizen complaint under Wis. Stat. § 62.50(19), find the member guilty of the charges under the just cause standard, but in the disciplinary phase determine that the "good of the service" requires that a discipline less than removal be imposed.

The trial court invalidated subsection 4(a) by eradicating the term "sufficient cause for removal" from Wis. Stat. § 62.50(19). A construction of a statute that results in a portion of the statute being superfluous should be avoided. *County of Columbia v. Bylewski*, 94 Wis. 2d 153, 164, 288 N.W.2d 129 (1980). In construing statutes, "effect is to be given, if possible, to each and every word, clause and sentence in a statute." *Id.*

The trial court's interpretation of Wis. Stat. § 62.50(19) is incorrect because it renders the term "sufficient

cause for removal" a nullity. Therefore, the trial court erred when it invalidated subsection 4(a) based on its incorrect construction of Wis. Stat. § 62.50(19). Because subsection (4)(a) utilizes the language of Wis. Stat. § 62.50(19), it is consistent with the statute and therefore valid.

The trial court also erred when it invalidated subsection 6(b)i. as being in violation of Wis. Stat. § 62.50(19) because it allows the Board to refer the matter to the Chief after the Board has determined that it does not have jurisdiction over the matter. Bd. App. at 134; (R. 27 at 20).

In this case, the Board followed the recommendation of the Committee and did not take jurisdiction. Under subsection 6(b)i., when the Committee recommends to the Board that it does not have jurisdiction over the complaint, the matter is either dismissed or dismissed and referred to the Chief for "investigation and disposition." The latter is what occurred here.

The trial court was troubled with the Board's action of referring the matter to the Chief because under 62.50(19) the Board "is charged with the responsibility to investigate a citizen complaint, not the Chief." Bd. App. at 135 (R. 27 at 21). It is again respectfully submitted that the trial court misconstrued subsection 6(b)i. of Rule XVII. At the point the complaint is referred to the Chief, Wis. Stat. § 62.50(19) is not implicated because the Board has dismissed the complaint. Therefore, the trial court's invalidation of subsection 6(b)i. on the basis that Wis. Stat. § 62.50(19) requires the Board, not the Chief, to investigate the complaint is wrong. The Committee of the Board did investigate and it determined that 23 of the complaints did not allege any violations of disciplinary rules and two did. However, regarding the two complaints that did allege violations, Board staff could not determine which officers were involved.

Therefore, the Committee recommended that the complaints be dismissed, but referred them to the Chief of Police.

The trial court incorrectly stated that Rule XVII allows the Board to "abdicate its responsibility and abandoned its ultimate decision making authority." Bd. App. at 135; (R. 27 at 21). As evidenced by the August 20, 2003 memorandum of Board staff, the Board did not abdicate its investigatory responsibility; nor did it abandon its decision making authority because it determined, based on its investigation, that there was no basis to take jurisdiction.

Referring the matter to the chief of police after the Board's investigation and determination that it does not have jurisdiction cannot be inconsistent with Wis. Stat. § 62.50(19) because the Board is not required to take any action on complaints that do not meet the statutory requirements. Regardless, not only is subsection 6(b)i. consistent with the legislative intent of Wis. Stat. § 62.50(19), but it provides a

forum less constrained by statutory limitations, i.e. a requirement that a citizen's complaint must show there is cause to remove/dismiss a police officer. More particularly, a citizen with a complaint arguably not meeting the statutory requirement is not simply relegated to a dismissal of his or her complaint. Rather, the Board rule affords the citizen an opportunity to have his or her complaint further investigated.

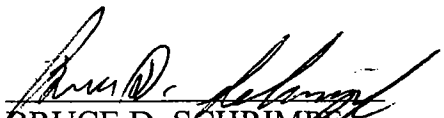
It appears from the trial court's decision that, based on the allegations in the joint complaint, the trial court considered the Board's determination that it lacked jurisdiction incorrect. However, the trial court's disagreement with the Board's jurisdictional determination is not a proper basis upon which to invalidate Rule XVII. As demonstrated above, Rule XVII is consistent with Wis. Stat. § 62.50(19) and is therefore valid.

CONCLUSION

Based on the foregoing, the trial court's decision and order invalidating Rule XVII should be reversed.

Dated and signed at Milwaukee, Wisconsin this 6th day of December, 2006.

GRANT F. LANGLEY
City Attorney



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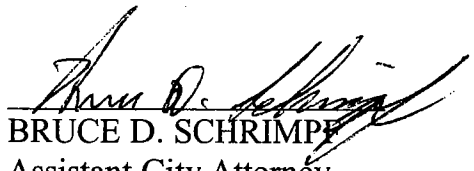
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 7,792 words.



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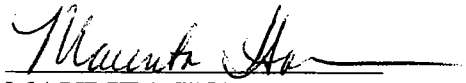

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1095-2003-3198.003/112448

SUPREME COURT
STATE OF WISCONSIN
Case No. 04-3306

STATE EX REL. JOSE CASTANEDA,

Plaintiff-Respondent,

v.

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID L. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION,

Defendants-Appellants.

APPENDIX OF DEFENDANTS-APPELLANTS

APPEAL FROM DECISION OF THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE PATRICIA D. McMAHON, CASE NO. 03-CV-008737, UPON ACCEPTANCE OF THE CERTIFICATION OF THE COURT OF APPEALS

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RULE XVII.

CITIZEN COMPLAINT PROCEDURE

Section 1. CITIZEN COMPLAINT DEFINED. A citizen complaint is any written communication received by the Fire and Police Commission which alleges a violation of rules or standard operating procedures by a member of either the Fire or Police Department, which meets the requirements of Sections 2, 3 and 4 below. (Rev. 7/26/01)

Section 2. WHO MAY FILE A CITIZEN COMPLAINT. Any aggrieved person may file a written complaint alleging misconduct by a member of either the Fire Department or Police Department. An aggrieved person is someone who is directly affected by the alleged misconduct, or the parent or legal guardian of a minor who is directly affected by the alleged misconduct. (Rev. 7/26/01)

Section 3. WHERE AND HOW TO FILE. A complaint alleging misconduct by a member of either the Fire or Police Department must be filed by mailing or delivering a properly executed complaint to the Board of Fire and Police Commissioners, City Hall, 200 East Wells Street, Room 706, Milwaukee, WI, 53202. (Rev. 9/2/03)

Section 4. CONTENTS AND FORM OF COMPLAINT. The complaint must state, in plain language, the full name, address and telephone number of the complainant; the name, badge number or other identification of the accused member(s); the date, approximate time and location of the incident; and a description of the alleged misconduct. (Rev. 7/26/01)

The complainant (aggrieved person) must specify whether the complaint is being filed pursuant to Section 62.50(19) of the Wisconsin Statutes or the City of Milwaukee Charter Ordinances. (Rev. 7/26/01)

(a) If the complaint is filed under the State Statute, the complaint must describe individual acts of each accused member which would constitute grounds for removal (firing) of the member(s) from the department. The complaint must be signed by the aggrieved person, or the parent or legal guardian of an aggrieved minor, in the presence of a notary. The person signing the complaint must, upon oath or affirmation, declare that the contents of the complaint are true and correct to the best of that person's knowledge. The complaint must also be signed and dated by a notary. (Rev. 7/26/01)

(b) If the complaint is filed under the Charter Ordinance, the complaint must describe individual acts of each member accused which would be grounds

EXHIBIT 7

for discipline. The complaint must be signed by the aggrieved person or the parent or guardian of an aggrieved minor. (Rev. 7/26/01)

The Fire and Police Departments shall permit the Executive Director, or designee, to access all department records other than personnel records which are relevant to the incident stated in the complaint, as may be necessary to determine the identity of the officer(s) involved. Any records reviewed are for this limited purpose only. Should provisional jurisdiction be granted, the accused member(s) shall, upon request, be provided with copies of documents used to establish identity. (Rev. 7/26/01)

Section 5. RECEIPT OF COMPLAINT AND TRANSMITTAL TO BOARD. Upon receipt of a complaint at the Fire and Police Commission, a docket number will be assigned. The complaint will then be given to the Committee on Rules and Complaints and placed on the Rules and Complaints Committee agenda. (Rev. 7/26/01)

Section 6. PROVISIONAL JURISDICTION AND FURTHER APPROPRIATE ACTION.

(a) The Committee on Rules and Complaints will review all complaints and determine whether the Board has jurisdiction over both the accused member and the subject matter of the complaint. (Rev. 7/26/01)

(b) The Committee will report to the Board recommendations regarding provisional jurisdiction and will recommend one of the following alternatives: (Rev. 7/26/01)

(i) that the complaint be dismissed for lack of prosecutorial merit or for such other reason as may be determined by the Committee, or that the complaint be dismissed and referred to the Milwaukee Police or Fire Department for investigation and disposition; or (Rev. 7/26/01)

(ii) that the matter be referred to the Board, or to a Hearing Examiner to be designated by the Board, for conciliation, pretrial and trial; or (Rev. 7/26/01)

(iii) that the complaint be held in committee to give staff an opportunity to obtain additional information; or (Rev. 7/26/01)

(iv) other such actions as the Committee may deem appropriate. (Rev. 7/26/01)

(c) Upon receipt of the recommendation of the Committee, the Board, by majority vote in open session, will make and announce its decision

regarding whether provisional jurisdiction will be granted and how the matter is to proceed. (Rev. 7/26/01)

(d) If provisional jurisdiction is not granted, the Board will dismiss the complaint and will advise the complainant in writing of the denial and the reason(s) for such denial. (Rev. 7/26/01)

(e) If the Board grants provisional jurisdiction, the complainant will be notified in writing of such action. A copy of the complaint and a Notice of Complaint will be served upon the accused member(s) and the Chief of the department, with a statement indicating the department rule which is alleged to have been violated. (Rev. 7/26/01)

Section 7. REFERRAL FOR CONCILIATION, PRETRIAL AND TRIAL. PROCEDURE.

(a) Any complaint which is recommended for trial pursuant to Section 6 (b)(ii) above may be referred for conciliation. Written notice of a conciliation conference, to take place within thirty (30) calendar days of referral, will be sent to both the complainant and the accused member, or their counsel. The notice will indicate the date, time and place of conciliation conference and will advise the parties that the attendance of both the complainant and the accused member is required. (Rev. 7/26/01)

(b) The conciliation conference will be conducted by a member of the Board or the Board's designee. The conference will be informal, with both parties encouraged to discuss the matter in an attempt to resolve it short of trial. Either party may be accompanied by legal counsel, but counsel may act as an observer only. The purpose of the conciliation conference is to seek resolution, not pretrial discovery, and statements made at the conciliation conference will not be admissible at time of trial. Any Board member who participates in the conciliation conference will not, unless both parties agree in writing, participate in any subsequent trial on the complaint. No individual who participates in the conciliation conference may sit as Hearing Examiner (see Section 10 below), unless both parties agree in writing. (Rev. 7/26/01)

(c) If either party fails to appear at the conciliation conference without good cause, the Committee on Rules and Complaints may schedule the matter for trial or recommend to the Board that the matter be dismissed. (Rev. 7/26/01)

(d) If a mutual agreement is reached at the conciliation conference, both parties will be asked to sign a statement of resolution stating that the dispute has been resolved and that the matter may be dismissed. If the resolution requires any further action by either party, the statement of

resolution will specify the action required and state that, upon completion of the action required, the matter is to be dismissed. A copy of the signed statement of resolution will be given to each party. When the complainant and accused notify the Board that all necessary action has been completed, the matter will be recommended for dismissal, based upon successful conciliation, at a meeting of the Board. (Rev. 7/26/01)

(e) If no conciliation agreement is reached, the matter will be returned to the Committee on Rules and Complaints for dismissal or scheduling of a pretrial conference or other action as the Committee deems appropriate. (Rev. 7/26/01)

(f) The purpose of the pretrial conference is to attempt a final settlement effort, narrow the issues to be tried, and shorten the length of time necessary to complete presentation of evidence at trial. To accomplish these tasks, the pretrial conference will include: (Rev. 7/26/01)

(i) Final settlement negotiations; and, (Rev. 7/26/01)

(ii) Establishment of dates for the exchange and filing of witness and exhibit lists; and, (Rev. 7/26/01)

(iii) Establishment of dates for the exchange of accurate copies of exhibits; and, (Rev. 7/26/01)

(iv) Determination of the issue(s) to be addressed at trial; and, (Rev. 7/26/01)

(v) Execution of a Pretrial Order by the Hearing Examiner, with a copy supplied to parties, setting forth the trial date and any remaining requirements for trial preparation by the parties, with deadlines for such activities. (Rev. 7/26/01)

(g) A request for postponement of the conciliation conference or pretrial must be submitted in writing to the Board at least five (5) working days prior to the scheduled conciliation or pretrial date. The Board will decide whether to allow the postponement. (Rev. 7/26/01)

(h) Both parties must provide witness and exhibit lists to the Board and the opposing party. Copies of all proposed exhibits will be supplied to the opposing party according to the schedule determined at the pretrial conference. Actual copies of proposed exhibits need not be filed with the Board until they are introduced at trial. (Rev. 7/26/01)

(i) Failure of either party to exchange witness lists, exhibit lists or copies of proposed exhibits according to the scheduling order, unless an extension is granted in writing by the Board or its designated Hearing Examiner, may result in denial of the right to call any witness or present any exhibit not supplied in a timely fashion pursuant to this section. Denial may be made, at the discretion of the Board, either prior to trial or at time of trial upon the motion of opposing party or counsel. (Rev. 7/26/01)

Section 8. TRIAL DATES AND ADJOURNMENTS. The Hearing Examiner will set the date and time of trial and will notify the complainant and the accused by mail, at least fourteen (14) calendar days before the trial. The accused and the complainant have the right to an adjournment of the trial date not to exceed fifteen (15) calendar days provided that a written request for adjournment is received by the Board at least five (5) working days before the scheduled trial date. Any subsequent request for adjournment of the trial date must be in writing and received by the Board at least five (5) working days prior to trial and must state the reasons for the request. The Board may grant any adjournment request upon a proper and timely showing of good cause. The Board may adjourn any trial at its own volition. (Rev. 7/26/01)

Section 9. TRIAL PROCEDURE. WITNESSES. Witnesses may be required to attend any scheduled trial and give testimony when served with a Board subpoena. Preparation and service of a subpoena is the responsibility of the party desiring attendance of the witness. (Rev. 7/26/01)

Section 10. TRIAL BEFORE THE EXAMINER. PROCEDURE. The Hearing Examiner will preside over any trial and is authorized to make any and all evidentiary rulings necessary during the trial. Procedural and evidentiary rules governing trials before the Board will also apply to trials before the Hearing Examiner. Within twenty (20) calendar days after the close of the proceedings, the Hearing Examiner will provide to the Board a transcript of the proceedings and a report summarizing the evidence presented, and containing proposed findings of fact, conclusions of law and a recommended disposition. At the same time, a copy of the report only will be mailed to all parties or their respective counsels. Within twenty (20) calendar days of mailing the report to the parties, the parties may file written briefs with the Board setting forth their respective positions. Any reference to the transcript of the proceedings must be accompanied by pertinent portions of the transcript. Within ten (10) calendar days of the filing of the briefs, the Board may, at its option, schedule the matter for oral argument. The Board will meet on the date scheduled for disposition and, after receiving oral argument, if necessary, deliberate in closed session. The Board shall then, in open session, render a decision, which will either accept the Hearing Examiner's report or will make appropriate modifications to it. If the Board determines that the charges are

sustained, it will then proceed to the dispositional phase in accordance with Section 20 of this Rule. (Rev. 7/26/01)

Section 11. TRIAL BEFORE THE BOARD. PRESIDING OFFICER. The Hearing Examiner will preside at a trial before the Board, and shall be responsible for conducting the trial. The Hearing Examiner will rule upon all matters arising in the course of the trial provided Fire and Police Commission members are in attendance and all decisions, determinations and dispositions are made by the Board members. (Rev. 7/26/01)

Section 12. GENERAL CONDUCT OF TRIAL. DECORUM.

All trials conducted under this rule will, to the extent possible, be informal. Testimony may be elicited either through interrogation or in narrative form. The Wisconsin Rules of Evidence will apply in the same manner that they apply in a civil case. The Board may relax the rules of evidence if it deems the interests of justice to be served thereby. The trial shall be conducted to assure fundamental fairness to the parties. Objections to evidentiary offers and offers of proof regarding evidence ruled inadmissable may be made and incorporated into the record. Witnesses may be sequestered at the request of either party or upon motion of the Board. (Rev. 7/26/01)

Section 13. INADMISSABLE EVIDENCE. Evidence resulting from personnel investigations of the Fire Department or Police Department, or from an investigation by the City Attorney for the purpose of a civil action, or gathered ex parte regarding the specific citizen complaint by investigation of the Board, is not admissible. (Rev. 7/26/01)

Section 14. EVIDENCE ADMISSIBLE BY NOTICE. The Board may take official notice of, and accept as evidence without additional foundation, the constitutions of the United States and the State of Wisconsin, the laws of the State of Wisconsin, applicable case law interpreting relevant legal issues, the Charter of the City of Milwaukee, ordinances of the City of Milwaukee, Fire and Police Commission Rules and By Laws, applicable Fire Department or Police Department rules and regulations, and previous written decisions of the City of Milwaukee Board of Fire and Police Commissioners. (Rev. 7/26/01)

Section 15. DOCUMENTARY EVIDENCE ADMISSIBLE VIA CERTIFICATION OR REASONABLE VERIFICATION. Relevant information or records which are either certified or contain reasonable guarantees of trustworthiness through questioning of the proponent under oath, may be admissible without the necessity of presenting direct testimony from the source of such records. (Rev. 7/26/01)

Section 16. TRIALS OPEN TO PUBLIC. All trials are open to the public. (Rev. 7/26/01)

Section 17. PRESENTATION OF EVIDENCE AT TRIAL. BURDEN OF PROOF. The complainant must prove the charges by a preponderance of the evidence. (That is, the complainant must show that it is more likely than not that the charges are true.) The complainant will make the first presentation of witnesses and exhibits, after which the accused will have a similar opportunity. Cross examination of all witnesses is permitted. Either party may be called as a witness by the other party. (Rev. 7/26/01)

Section 18. TRIAL SUMMATION AND DECISION OF THE BOARD. After presentation of evidence regarding the charges filed against the accused member, each party will be permitted to offer a five (5) minute summation of the evidence. The Board will then deliberate in closed session to consider the testimony and evidence received. Upon reaching a decision by majority vote, the Board will announce its decision on the record, in open session. (Rev. 7/26/01)

Section 19. TRIAL PROCEDURE. FAILURE TO MEET BURDEN TO RESULT IN DISMISSAL. If the Board determines that the complainant has not met the burden of proof, the matter will immediately be dismissed and proceedings terminated. A summary of proceedings, findings of fact and decision will be prepared by the Hearing Examiner and signed by a Board member within three (3) working days after such decision is made. A copy of the written decision will be mailed to each of the parties. (Rev. 7/26/01)

Section 20. TRIAL PROCEDURE. BURDEN MET. DISPOSITIONAL PHASE AND DECISION. At the beginning of the trial, the department will provide the Hearing Examiner with a sealed copy of the employment history and performance records of the accused member(s). These file(s) will be retained by the Hearing Examiner, and will not be opened or viewed by Board members, unless a determination has been made that the charges have been sustained. If the Board finds that the accused violated a department rule or procedure, the Board will review the employment history and performance records of the member(s) or such other personnel records as the Board may request. The Board will then receive testimony, exhibits, and oral argument from each party concerning disposition. Oral argument will be limited to five (5) minutes for each party. After hearing testimony and argument, the Board will deliberate in closed session until a decision is reached by majority vote. The Board will then announce its decision to the parties and the public. A written summary of proceedings, findings of fact and decision will be prepared by the Hearing Examiner and signed by a Board member within three (3) working days after the decision is announced. A copy of the decision will be mailed to all parties. (Rev. 7/26/01)

Section 21. DISPOSITIONAL OPTIONS. Upon a finding of guilt, the Board has the following dispositional options: (Rev. 7/26/01)

(a) Suspension without pay for a set period not to exceed the equivalent of 60 working days; or, (Rev. 7/26/01)

(b) Demotion to a lesser rank within the department, with a corresponding decrease in pay and benefits; or, (Rev. 7/26/01)

(c) Discharge from the department; or, (Rev. 7/26/01)

(d) Other such dispositions as permitted by law. (Rev. 7/26/01)

Appeal No. 2004AP3306 Cir. Ct. No. 2003CV8737

WISCONSIN COURT OF APPEALS
DISTRICT I

STATE EX REL. JOSE CASTANEDA,

PLAINTIFF-RESPONDENT,

V.

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, DAVID L. HEARD, EXECUTIVE DIRECTOR AND MILWAUKEE FIRE AND POLICE COMMISSION,

DEFENDANTS-APPELLANTS.

FILED

SEP 28, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

We certify this appeal, which will determine the scope of the Milwaukee Fire and Police Commission's rule-making authority.

FACTS

This case concerns the rule-making authority of a commission with authority over the largest contingent of police officers and firefighters in the state, the Milwaukee Fire and Police Commission. At stake is the ability of that commission to promulgate rules that affect whether citizen complaints against police officers and firefighters will be processed in a fair manner. If the commission's view of its authority is correct, a complaint against a police officer

must be dismissed if it fails to identify the officer, even if the officer conceals his or her identity. If the citizen complainant in this appeal is correct, the commission has no authority to adopt rules that screen out meritless complaints and the commission can be compelled to conduct a trial in virtually every instance in which a complaint is made.

The underlying incident involved several police officers who executed a search warrant at a grocery store. The complainant, Jose Castaneda, alleged police misconduct, but did not identify individual officers because the officers' badges and name plates were concealed. The police department supplied the commission with the names of all officers involved in the incident, but the commission took no action on the complaints because none of the complainants could associate a particular officer with a particular act of misconduct. In its decision not to proceed, the commission relied on the administrative rules it had enacted for handling citizen complaints. The commission's rules, among other things, required that citizens must identify the accused officer or officers in complaints.

Complainant Castaneda commenced this action and moved for a judgment declaring invalid the commission's citizen complaint rules because the commission lacked the statutory authority to enact them. The trial court granted judgment to Castaneda on his claim, holding that the commission had no authority to enact rules regarding citizen complaints. The court also held that even if the commission had authority to enact such rules, they were invalid because they conflicted with the legislative intent to facilitate rather than impede the filing and disposition of citizen complaints. The trial court's decision has resulted in this appeal.

DISCUSSION

An agency's rule-making authority must be expressly conferred or necessarily implied by the statutes under which it operates. ***Citizens Concerned for Cranes and Doves v. DNR***, 2004 WI 40, ¶14, 270 Wis. 2d 318, 677 N.W.2d 612. We strictly construe the agency's enabling statutes, and resolve reasonable doubts concerning implied powers against the agency. ***Id.*** A rule that conflicts with the legislative intent is invalid. ***Id.***

[1]
WISCONSIN STAT. § 62.50 (2003-04) contains legislative provisions concerning the operation of fire and police departments in first-class cities, and the operation of the fire and police commissions that supervise them. Section 62.50 contains no express, unambiguous grant of authority to make rules regarding disciplinary proceedings, whether initiated within the department, by complaint to the chief, or by citizen complaint to the commission. Subsection 62.50(12) provides that on a complaint of a member's misconduct made to the chief, the commission must schedule a trial on the complaint, "under this section." Subsections 62.50(13), (14), (15) and (16) set forth, in detail, the procedures the commission must follow in its trials and on member appeals of discharges, or suspensions imposed within the department, and the standards for imposing discipline on a member. With regard to citizen complaints to the commission, subsec. 62.50(19), provides in relevant part:

> CHARGES BY AGGRIEVED PERSON. In cases where duly verified charges are filed by any aggrieved person with the board of fire and police commissioners, setting forth sufficient cause for the removal of any member of either of the departments, including the chiefs or their assistants, the board or chief may suspend such member or officer pending disposition of such charges. The board shall cause notice of the filing of the charges with a copy to be served upon the accused and shall set a date for the trial and investigation of the charges, following the procedure under this section.

The legislature has expressly granted rule-making authority to fire and police commissions in first-class cities to make rules for the "government of the members of each department." WIS. STAT. § 62.50(3)(a). The commission contends that this authority, to make rules for the government of the fire and police department members, must necessarily include the authority to make rules for receiving and processing complaints about them. But if the commission's rule-making authority is as broad as it contends, it seems odd that the legislature would permit it to delegate that authority to chiefs who could use it to screen out complaints that might result in their own dismissal or suspension. Additionally, if the legislature intended a broad application of the rule-making authority under para. 62.50(3)(a), to all aspects of a commission's supervisory operations, there was little need to enact other specific grants of rule-making authority to the commissions, such as para. 62.50(3)(b), regarding hiring and

appointments, and subsec. 62.50(7), concerning promotion to vacant positions. It would seem that if discipline falls within the category of "government," as para. 62.50(3)(a) uses that term, so would hiring and promotion, thus rendering the latter provisions superfluous.

Perhaps a better argument for the commission's rule-making authority lies in the fact that, despite the detailed procedural rules for conducting trials on complaints, WIS. STAT. § 62.50 provides little or no guidance on how to resolve frivolous or unfounded allegations against department members short of a full trial of the matter. Nor does it provide any guidance on how to address the precise problem here, which is the fact that the alleged misconduct included concealment of the offending officers' identities. The commission contends that the logical extension of Castaneda's argument would bar implementation of any type of screening procedure, and require the commission to try every single complaint made to the chiefs and commission.

A primary argument in support of the trial court's ruling is the fact that the legislature has granted fire and police commissions in other than first-class cities express and unequivocal authority to enact rules governing "disciplinary actions against subordinates," with "subordinates" meaning all departmental members except chiefs. *See* WIS. STAT. § 62.13(5)(g). That is by no means the only difference between the statutory schemes for disciplinary and complaint procedures for first-class city commissions and those for second-, third- and fourth-class city commissions, and it is not immediately clear why the enabling statutes are so different. However, the existence of express rule-making authority for disciplinary proceedings for one set of cities and the absence of it for another might indicate a deliberate legislative choice. *See* ***State v. Polashek***, 2002 WI 74, ¶30, 253 Wis. 2d 527, 646 N.W.2d 330.

We believe that this appeal raises a significant issue of statutory construction, and policy, of considerable importance to the citizens, fire and police departments and fire and police commissions of Milwaukee, Wisconsin's, largest city. It is an appropriate case for supreme court resolution.

Appendix Page 112

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 18 MILWAUKEE COUNTY

STATE EX REL. JOSE CASTANEDA,

Plaintiff,

v. Case No. 03-CV-008737

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID L. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION

Defendants.

FILED
JUL 15 2004

DECISION

This action is before the court on plaintiff's motion for declaratory judgment seeking a determination that Rule XVII of the Milwaukee Fire and Police Commission is invalid as not authorized by Wis. Stats. §62.50. The court has had the opportunity to review the written submissions of the parties, the presentations upon oral argument, and the record in the case. For the reasons set forth herein, plaintiff's motion for declaratory judgment is granted.

BACKGROUND

Section 62.50 of the Wisconsin Statutes applies to cities of the first class and requires the establishment of a board of fire and police commissioners. This statute sets forth the composition of the board, its duties and responsibilities, and its powers.

The rulemaking power of the Milwaukee Fire and Police Commission (FPC) is set forth in Wis. Stats., §62.50(3):

> (a) The board may prescribe rules for the government of the members of each department and may delegate its rulemaking authority to the chief of each department. The board shall prescribe a procedure for review, modification and suspension of any rule which is prescribed by the chief, including, but not limited to, any rule which is in effect on March 28, 1984.
>
> (am) The common council may suspend any rule prescribed by the board under par. (a).
>
> (b) The board shall adopt rules to govern the selection and appointment of persons employed in the police and fire departments of the city. The rules shall be designed to secure the best service for the public in each department. The rules shall provide for ascertaining, as far as possible, physical qualifications, standing and experience of all applicants for positions, and may provide for the competitive examination of some or all applicants in such subjects as are deemed proper for the purpose of best determining the applicants' qualifications for the position sought. The rules may provide for the classification of positions in the service and for a special course of inquiry and examination for candidates for each class.
>
> (c) The rules of each department shall be available to the public at a cost not to exceed the actual copying costs.

Section 62.50(19), Wis. Stats., entitled Charges by Aggrieved Person, sets forth the procedure for citizen complaints to the FPC:

> In cases where duly verified charges are filed by any aggrieved person with the board of fire and police commissioners, setting forth sufficient cause for the removal of any member of either of the departments, including the chiefs or their assistants, the board or chief

may suspend such member or officer pending disposition of such charges. The board shall cause notice of the filing of the charges with a copy to be served upon the accused and shall set a date for the trial and investigation of the charges, following the procedure under this section. The board shall decide by a majority vote and subject to the just cause standard described in sub. (17) (b) whether the charges are sustained. If sustained, the board shall immediately determine whether the good of the service requires that the accused be removed, suspended from office without pay for a period not exceeding 60 days or reduced in rank. If the charges are not sustained, the accused shall be immediately reinstated without prejudice. The secretary of the board shall make the decision public.

The rule at issue in this case is FPC Rule XVII, entitled Citizen Complaint Procedure, relevant sections of which are as follows:

Section 1. CITIZEN COMPLAINT DEFINED. A citizen complaint is any written communication received by the Fire and Police Commission which alleges a violation of rules or standard operating procedures by a member of either the Fire or Police Department, which meets the requirements of Sections 2, 3 and 4 below.

Section 2. WHO MAY FILE A CITIZEN COMPLAINT. Any aggrieved person may file a written complaint alleging misconduct by a member of either the Fire Department or Police Department. An aggrieved person is someone who is directly affected by the alleged misconduct, or the parent or legal guardian of a minor who is directly affected by the alleged misconduct.

Section 3. WHERE AND HOW TO FILE. A complaint alleging misconduct by a member of either the Fire or Police Department must be filed by mailing or delivering a properly executed complaint to the Board of Fire and Police Commission, City Hall, 200 East Wells Street, Room 706, Milwaukee, WI 53202.

Section 4. CONTENTS AND FORM OF COMPLAINT. The complaint must state, in plain language, the full name, address and telephone number of the complainant; the name, badge number or other identification of the accused member(s); the date, approximate time and location of the incident; and a description of the allege misconduct.

The complainant (aggrieved person) must specify whether the complaint is being filed pursuant to Section 62.50(19) of the Wisconsin Statutes or the City of Milwaukee Charger Ordinances.

(a) If the complaint is filed under the State Statute, the complaint must describe individual acts of each accused member which would constitute grounds for removal (firing) of the member(s) from the department. The complaint must be signed by the aggrieved person or the parent or legal guardian of an aggrieved minor, in the presence of a notary. The person signing the complaint must, upon oath or affirmation, declare that the contents of the complaint are true and correct to the best of that person's knowledge. The complaint must also be signed and dated by a notary.

(b) If the complaint is filed under the Charter Ordinance, the complaint must describe individual acts of each member accused which would be grounds for discipline. The complaint must be signed by the aggrieved person or the parent or guardian of an aggrieved minor.

The Fire and Police Departments shall permit the Executive Director, or designee, to access all department records other than personnel records which are relevant to the incident stated in the complaint, as may be necessary to determine the identity of the officer(s) involved. Any records reviewed are for this limited purpose only. Should provisional jurisdiction be granted, the accused member(s) shall, upon request, be provided with copies of documents used to establish identity.

Section 5. RECEIPT OF COMPLAINT AND TRANSMITTAL TO BOARD. Upon receipt of a complaint at the Fire and Police Commission, a docket number will be assigned. The complaint will then be given to the Committee on Rules and Complaints and placed on the Rules and Complaints Committee agenda.

Section 6. PROVISIONAL JURISDICTION AND FURTHER APPROPRIATE ACTION.

(a) The Committee on Rules and Complaints will review all complaints and determine whether the Board has jurisdiction over both the accused member and the subject matter of the complaint.

(b) The Committee will report to the Board recommendations regarding provisional jurisdiction and will recommend one of the following alternatives:

(i) That the complaint be dismissed for lack of prosecutorial merit or for such other reason as may be determined by the Committee, or that the complaint be dismissed and referred to the Milwaukee Police or Fire Department for investigation and disposition; or

(ii) That the matter be referred to the Board, or to a Hearing Examiner to be designated by the Board, for conciliation, pretrial and trial; or

(iii) that the complaint be held in committee to give staff an opportunity to obtain additional information: or

(iv) other such actions as the Committee may deem appropriate.

(c) Upon receipt of the recommendation of the Committee, the Board, by majority vote in open session, will make and announce its decision regarding whether provisional jurisdiction will be granted and how the matter is to proceed.

(d) If provisional jurisdiction is not granted, the Board will dismiss the complaint and will advise the complainant in writing of the denial and reason(s) for such denial.

(e). If the Board grants provisional jurisdiction, the complaint will be notified in writing of such action. A copy of the complaint and a Notice of Complaint will be served upon the accused member(s) and the Chief of the department, with a statement indicating the department rule which is alleged to have been violated.

In this action, plaintiff contends that Rule XVII as adopted and applied exceeds the statutory authority of §62.50, Wis. Stats., because it contradicts the language of the statute and is inconsistent with the legislative intent.

This action arose from a police raid at the El Rey grocery store and tortilla factory on September 18, 2002, at approximately 9:00am. The police were executing a search warrant to investigate the sale of prescription drugs.

According to the allegations in the complaint, plaintiff and others were working at these locations when a large number of men entered, with weapons drawn, including handguns, shotguns and rifles. They were yelling and shouting in English, however, many of the workers present at the time spoke only Spanish. The men were wearing blue jackets or vests with no badge numbers or nameplates, identifying information had been concealed. Individuals were detained for hours and forced to lie on the floor or stand with their hands raised over their heads for extended periods of time.

On November 7, 2002, plaintiff, Jose Castaneda, and 24 other employees, filed a joint complaint with the FPC pursuant to §62.50(19), Wis. Stats. In their joint complaint, they describe the incident in detail, refer to the Milwaukee Police Department rules and regulations they allege were violated, and request that the FPC "investigate the actions of all police officers in any way related to and/or involved in the above-described events, including the police chief, his command and supervisory officers, detectives and patrol officers." [A copy of the Joint Complaint is attached to this decision as Exhibit A.]

On September 30, 2003, after the FPC had taken no action on the complaint, plaintiff commenced this action seeking mandamus relief.

On October 2, 2003, the FPC met and decided that the complainants had not complied with FPC Rule XVII. The FPC voted to refer the joint complaint to then Chief Arthur Jones to investigate and to "take appropriate action." The FPC stated that it was not dismissing for lack of prosecutorial merit because that would be "sweeping the matter under the rug." The FPC stated that the basis for the action was that the complaint failed to identify specific acts by specific police officers. The transmittal letter to then Chief Jones, from David L. Heard, the Executive Director of the FPC, stated:

> The complaints allege numerous and often broad allegations of misconduct, but do not identify specific department members who are alleged to have committed any such act(s) of misconduct. The Board of Fire and Police Commissioners did not take provisional jurisdiction over these matters and have referred them to your office for a full investigation and appropriate disposition.
>
> Upon completion of your investigation, it is anticipated that a report concerning your findings will be generated and that a copy of such report will be provided to each of the complainants and to this office.

Plaintiff argues that the hurdles set forth in Rule XVII are too restrictive and act as a barrier for citizens to complain against the police or fire department. Plaintiff also

argues that Rule XVII is in violation of the authority granted to the FPC under Wis. Stat. § 62.50. Plaintiff contends that Wis. Stat. § 62.50(3) which gives the FPC rulemaking authority limits the FPC to two areas: (1) rules for the government of its members, and (2) rules governing the selection and appointment of persons employed in the police and fire departments. FPC Rule XVII concerns neither of these areas but addresses the procedure for a citizen to complain to the FPC and is not authorized under §62.50(3). Moreover, FPC Rule XVII (6) which permits the referral of a citizen complaint to the Chief of Police for resolution is in direct contravention of the intent of the legislature in enacting §62.50(19).

Defendants argue that Wis. Stat. §62.50(17) gives the FPC authority to enact Rule XVII. According to defendants, subsections (17) and (19) need to be read together. Subsection (19) allows an aggrieved person to file a complaint, while subsection (17) sets forth standards to be applied when reaching a decision about charges against a member of the fire or police department. When these two provisions are read together, they authorize the enactment of FPC Rule XVII.

In addition, defendants contend that subsection (19) does not instruct the Commission on how to investigate a complaint so that the FPC has the authority to refer the citizen complaint to the Chief. In the instant case, defendants contend plaintiff did not set forth sufficient information in accordance with subsections (17) and (19) for the Board to take provisional jurisdiction.

On October 8, 2003, plaintiff filed an amended complaint with this court adding a claim for Declaratory Judgment. The mandamus issue is not before the court at this time.

The only issue before the court is plaintiff's declaratory judgment claim that:

> (1) FPC Rule XVII Citizen Complaint Procedure is invalid because it is inconsistent with Wis. Stats §62.50 and because the FPC had no authority under Wis. Stats. §62.50 to promulgate said rule; and
>
> (2) The Milwaukee Police Department policy and practice that permits police officers, when conducting the people's business, to hide their identities from the people so as to render impossible the investigation of charges filed under Wis. Stats. §62.50(19), is unlawful as a violation of Wis. Stats. §62.50(19).

ANALYSIS

This is a case of first impression addressing the power of the City of Milwaukee Fire and Police Commission to promulgate FPC Rule XVII. The issue presented is whether the FPC acted within its statutory authority in promulgating Rule XVII which sets forth specific requirements for the filing and reviewing of citizen complaints. The issue presented involves the interpretation of Wis. Stat. §62.50 to determine whether Rule XVII is a valid exercise of the FPC's authority. The parties do not dispute that the FPC is to be treated as an administrative agency. Nor do the parties dispute that the purpose of §62.50(19) is to enable citizens to file complaints concerning the conduct of members of the fire or police department and have them heard by an independent body outside of the department.

In Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Department of Natural Resources, 2004 WI 40, ¶ 14, the Supreme Court established the methodology for courts to follow to determine whether an agency has overstepped its rulemaking authority:

> In determining whether an administrative agency exceeded the scope of its authority in promulgating a rule, we must examine the enabling statute to ascertain whether the statute grants express or implied authorization for the rule. . . . [A]n agency's enabling statute is to be strictly construed. We resolve any reasonable doubt pertaining to an agency's implied powers against the agency. Wisconsin has adopted the "elemental" approach to determining the validity of an administrative rule, comparing the elements of the rule to the elements of the enabling statute, such that the statute need not supply every detail of the rule. If the rule matches the elements contained in the statute, then the statute expressly authorizes the rule. However, if an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid. (Citations omitted)

As stated in Conway v. Board of Fire and Police Commissioners of the City of Madison, 2003 WI 53, ¶30:

> We should first look to the plain language of the statute. If the language of the statute is clear and unambiguous, we apply the language to the facts at hand. In addition we consider the sections of the statute in relationship to the whole statute and to related sections. Generally, we construe words and phrases according to common and approved usage, and if necessary may consult a dictionary. However, such reliance on a dictionary does not mean that the statute is ambiguous. (Citations omitted)

Applying these concepts, the court first examines §62.50 to determine what rulemaking authority was granted to the FPC by the legislature. The plain language of §62.50 demonstrates that it is not a statute which sets forth an agency's general duties and responsibilities and leaves the rest to agency rulemaking. The language used in §62.50 demonstrates that the legislature intended that any rulemaking be limited to certain prescribed subjects.

Section 62.50(3) sets forth the FPC rulemaking authority. This grant of rulemaking authority is limited to rules for the government of the members of each department and to govern the selection and appointment of persons employed in the police and fire departments of the city. There is no authority for rulemaking in other

areas, specifically in the area of citizen complaints under §62.50(19). The only other subsections making reference to rules have a direct correlation with subsection (3), by subject matter and by the inclusion of the language "in accordance with such rules and regulations."

For example, subsection (4) relates to the publication and distribution of the rules and states that the selection of persons for employment, appointment or promotion shall be made "in accordance with such rules and regulations." Subsection (4) does not expand on the rulemaking authority granted in §62.50(3). Subsection (5) refers to the rules and regulations in the context of examinations for employment. This section does not expand on the rulemaking authority granted in §62.50(3). Subsection (7) refers to the rules and regulations in the context of vacancies in specific positions. This section does not expand on the rulemaking authority granted in §62.50(3).

It is significant to note that the phrase "in accordance with such rules and regulations" is not used in other subsections of the statute. Instead, the term "under this section" is used which is a clear expression of legislative intent to not authorize rulemaking authority in those areas. Consistent with the dictates of Conway, 2003 WI 53, ¶30, one must "consider the sections of the statute in relationship to the whole statute and to related sections."

Qualifying language such as "under this section" which is found in various subsections reflects the intent of the legislature to "occupy the field" of regulation. For example, subsection (7)(b), refers to filling the vacancy of the office of the inspector of police or captain of police, subject to suspension and removal "under this section;" subsection (8), refers to vacancies of the first assistant engineer, subject to suspension

and removal "under this section;" subsection (11), refers to the discharge and suspension of members "under this section;" subsection (12), refers to the ordering of a trial "under this section;" and subsection (16), refers to "any trial or investigation under this section." When read together, these provisions indicate the legislature intended to delineate all necessary procedures and not grant additional rulemaking power with respect to disciplinary procedures. Other examples of legislative intent to limit agency authority are found in subsections (13) and (20) which specify in extensive detail the appeal process for the discharge or suspension of a member. These sections set forth the format, including the specific language, to be used in requesting an appeal. This specificity evinces a clear intent to preclude general rulemaking authority in the area of suspension or removal of members.

In addition, some subsections, such as (7)(a), (15), and (16) refer to other statutes and require that the FPC comply with those provisions. For example, subsection (7)(a) requires that the removal of the assistant chief shall be pursuant to section 17.12(1)(c), Wis. Stats. and subsection (16) refers to the law governing trials before municipal judges. Again, such detailed procedures in the statute itself evidence intent to preclude general rulemaking authority.

Limiting language is found in §62.50(19). This subsection directs the FPC to "set a date for the trial and investigation of the charges, following the procedure "*under this section.*" (Emphasis supplied) Subsection (19) also requires that the board decision shall be subject to the just cause standard described in subsection (17). The legislature intended to occupy the field with respect to citizen grievances.

Defendants cite the reference in subsection (19) to subsection (17) to support their position but that reference is to the "just cause" standard that must be applied by the board before any police officer may be disciplined whether the charges originate with the board, the chief, or an aggrieved person. Nothing in that reference supports FPC Rule XVII. Moreover, subsection (19) contains the limiting "under this section" language rather than the more expansive "in accordance with such rules and regulations." Given that citizen complaints could lead to disciplinary action, this distinction is consistent with the statutory framework of the statute.

Defendants rely on Conway v. Board of Police & Fire Commissioners, 2003 WI 53, in support of their statutory analysis. Conway involved an analysis of §62.13, concerning the Fire and Police Commissions in certain cities not of the First Class. In Conway, the Supreme Court rejected a challenge to Rule 7.20 which was adopted by the Madison Fire and Police Commission. Rule 7.20 authorized the Madison FPC to delegate certain proceedings to a hearing examiner. The Supreme Court in Conway applied the same methodology of examining the plain language of the legislation as this court is applying in the instant case. Although the subject matter in each statute is the same, the authority of a fire and police commission, there are significant differences in the language used by the legislature that compels a different result as to rulemaking authority.

There are significant differences between these two statutory provisions. Section 62.13 contains broad language with rulemaking powers referred to in several areas throughout the statute. This is in sharp contrast with §62.50 which has the limited reference to rulemaking in §62.50(3) and contains the restrictive language "under this

section" throughout the statute. Of particular relevance to the instant case is the difference between the statutes in the area of disciplinary actions and the investigation and trial of charges against members. Section §62.13(5) which governs disciplinary actions against subordinates contains the following language in (5)(g): "Further rules for the administration of this subsection may be made by the board." In Conway, the Court found that §62.13(5)(g) provided express authority to the Madison FPC to adopt Rule 7.20 given the use of the expansive term "administration."

Section 62.50 contains no such broad language. Rather, the limiting language throughout §62.50 as described above reflects the intent not to provide such broad authority. The rulemaking authority of the Milwaukee FPC is limited to rules for governance and selection only. It does not grant authority for rules with respect to investigation and trial procedures.

Defendants contend that the language in §62.50(3) "for the government of the members" is equally expansive language and should be interpreted to include the disciplinary process. But the plain language of the statute does not support this interpretation. The dictionary defines "government" in this context as "direction, control, management, rule." This definition is consistent with the limited interpretation as discussed above, not an expansive one to cover areas such as investigation and trials. In addition, the statute as a whole does not support an expansive interpretation.

Rather than use the language "in accordance with such rules and regulations" when reference is made to disciplinary proceedings, there is definite shift in the language used to the phrase "under this section." If the legislature had intended the board to have rulemaking authority in this area, it would have used the phrase "in accordance with such

rules and regulations" but it did not do so. In addition, the fact that the statute spells out the process for investigation and trial with respect to disciplinary proceedings evinces the legislative intent to preclude additional rulemaking.

Another significant difference between the statutes is the expansive statement of legislative intent applicable to §62.13 and its interpretation. Section 62.04, Wis. Stats., provides:

> For the purpose of giving to cities the largest measure of self-government compatible with the constitution and general law, it is hereby declared that ss.62.01 to 62.26 shall be liberally construed in favor of the rights, powers and privileges of cities to promote the general welfare, peace, good order and prosperity of such cities and the inhabitants thereof.

This legislative directive was a significant factor to the Court in upholding the rulemaking authority of the Madison FPC. In the instant case, there is no similar statement of legislative intent. The language of §62.50 is narrowly drawn; it is specific; it contains no broad grant of rulemaking authority; it contains no statement of legislative intent that such broad authority be granted.

Even if one could find that §62.50 provided broad rulemaking authority, the rules as adopted and implemented by the Milwaukee FPC have served to frustrate rather than further the intent of the legislature. In Conway, much weight was given to the finding that the rule adopted by the Madison Board of Police and Fire Commissioners was a reasonable means of carrying out the intent of the legislature. The Court held that Rule 7.20 was a "rational and efficient means of carrying out the board's duties under 62.13." Conway, 2003 WI. 53, ¶3.

FPC Rule XVIII has been shown to have no such effect. Rather than facilitate the processing of citizen complaints, the rule has served as a barrier to citizens seeking

redress from their government. Here, citizens, represented by counsel, filed a complaint in November 2002, a complaint which is detailed and specific as set forth in Exhibit A. To date the FPC has not set a date for investigation and trial.

Defendants contend that the reason for the delay in the investigation and trial is complainants' failure to identify the officers as required by Rule XVII. They cite Rule XVII (4) that requires the complainant to specify the identity of the accused and the particular acts that would constitute grounds for removal of a particular member. This argument ignores the complainants' allegation that the officers deliberately concealed their identities on September 18, 2002, thus precluding their identification. The complainants did state the date, time and location of the incident and sufficient other information that the FPC could obtain the names of those officers assigned to execute the search warrant from the department records. Indeed much of that information has been obtained although it is not clear to what extent the FPC assisted in obtaining that information or whether complainants had to file open records requests. But according to the defendants, the joint complaint is still insufficient even if the names of all of the involved officers are now known. The complaint failed as not being sufficiently specific as to which officer is alleged to have violated which specific rule.

Again, this fails to respond to the allegation that identities were deliberately concealed. For the purpose of this motion, if the facts in the joint complaint were presumed to be true, defendants' position is that despite abusive conduct and numerous violations of department regulations, there is no recourse in the FPC. The FPC position is that even those officers who may have planned or approved of this conduct could not be held accountable. It is surprising that the FPC, the agency responsible for providing

citizen oversight of the police department would affirmatively condone the conduct described in the joint complaint by taking the position they are powerless to review these allegations. This conclusion is not consistent with the legislative intent to provide a forum for citizen grievances.

Defendants contend that another reason for delay is that complainants have not stated sufficient basis for the removal of any officers. Defendants contend that an aggrieved person can only seek a remedy under subsection (19) when they are seeking the removal of an officer, pointing to the language: "In cases where duly verified charges are filed by any aggrieved person with the board of fire and police commissioners, setting forth sufficient cause for the removal of any member of either of the departments . . . ." This argument fails to consider subsection (19) in its entirety. Subsection (19), requires the board to make a decision whether the charges are sustained and if sustained, determine if the accused is to be "removed, suspended from office without pay for a period not exceeding 60 days or reduced in rank." If only complaints which set forth sufficient cause for removal were to be permitted, the language as to the board's decision would not be necessary. As directed by Conway, the language of the statute must be considered as a whole.

This Court is not persuaded that citizens cannot complain under §62.50(19) if they are seeking something less than removal of an officer. To the extent Rule XVII precludes citizen complaints that fail to state cause for removal but may state cause for other disciplinary action, it is in direct contravention with §62.50(19). Moreover, in the instant case, this was not the stated reason the FPC declined to set a date for investigation and trial for the plaintiff's complaint.

Section 62.50(19) is a clear expression of legislative intent that citizens be provided the opportunity to file citizen complaints and to have a review of the conduct to which they object. The intent is to provide citizens, generally unrepresented by counsel, with a means to complain to the FPC, the body charged with the responsibility to investigate and determine such complaints. In adopting Rule XVII, the FPC has engrafted a complex layer of requirements onto §62.50(19) that was not contemplated by the legislature and which serves to frustrate the legislative purpose.

Citizens should be able to articulate their concerns that an officer abused them and describe the time, place, location and circumstances which gives sufficient notice to the FPC. To add the requirement that the citizen set forth the specific violation serves only to frustrate and discourage such complaints. This may be the intent of the FPC, but this certainly was not the intent of the legislature.

Nor is there any merit to the argument that without Rule XVII there would only be trials by ambush. The plain language of the statute does not support such an extreme position. The FPC has the authority for "trial and investigation." Trial by ambush is not the logical or necessary result if there is no Rule XVII. Nor is having such a requirement necessary to ensure the rights of the officers. The right of an officer to due process protections is ensured in §62.50. Section 62.50(19), requires that with respect to any citizen complaint the "just cause" standard would still apply, as well as all the due process protections delineated in the statute, before any action could be taken against any specific officer. The efficiency and fairness of the disciplinary hearing process is not adversely affected by ensuring an efficient and fair process for citizen grievances.

Defendants contend that complainants must not only identify particular officers but they must specify whether the complaint is being filed pursuant to §62.50(19) or the City of Milwaukee Charter Ordinances and specify the rule violation.

Rule XVII would require a citizen to find out what all the rules of the department are, determine which rule applies to the harm they wish to complain about and determine whether this is a violation of the statute or the City Charter. Then the citizen would have to prepare a complaint setting forth with specificity the rule violation alleged. This would be a difficult task for anyone especially given the reality that most persons would not have access to counsel.

In those instances in which the citizen is able to name an officer, the next hurdle would be to locate the rules. In response to the plaintiff's argument that the rules were not only difficult to obtain but were daunting to the average citizen, the defendants responded that the rules were available in all the public libraries. Counsel for defendants offered to provide the court with a copy. Shortly after oral argument, counsel filed a stack of documents over three inches high. These are the rules and regulations and standard operating procedures of the Milwaukee Police Department. Copies are available at the library, however, counsel for defendants candidly admitted that the copies in the library are from 2000 and do not reflect the most current updates.

To require a citizen to comb through these rules and determine which one or ones are applicable and whether their complaint implicates the state statute or the City Charter is unreasonable and not consistent with the intent to give the citizen access to government. There is no basis to conclude that Rule XVII is a "rational and efficient means of carrying out the board's duties."

The instant case is a prime example why Rule XVII is a violation of §62.50 as the Rule has operated to defeat the complaint of 25 citizens seeking an investigation of alleged police misconduct. The joint complaint filed by the plaintiff and others contains specific allegations concerning the incident on September 18, 2002. Some of the allegations cite specific rule violations. For example, a portion of the complaint states:

> 2. That police improperly and unreasonably executed the search warrant by engaging in excessive force and violence against innocent employees, customers and others lawfully present on the premises, and causing fear in such innocent persons by, among other things:
>
> a. Entering the premises screaming and shouting in English only, and manhandling and frightening people who didn't understand their orders;
>
> b. Entering the premises with their police identities hidden, so that employees and customers could not determine whether they were in fact law enforcement officials;
>
> c. Entering the premises with guns drawn, including handguns, shotguns, and semiautomatic rifles, and pointing and waving them at persons;
>
> d. Pointing guns directly in the faces of persons;
>
> e. Jabbing guns hard into the bodies of employees;
>
> f. Forcing pregnant women to lie on their stomachs, then jerking them hard to their feet;
>
> g. Pushing or otherwise forcing employees at the tortilla factory to lie on the ground;
>
> h. In violation of MPD Policy 3/360.15(f), bringing in large and frightening police dogs to the general area where employees were herded together in close confinement;

Despite this extensive and detailed complaint, and despite the efforts of counsel, the FPC has declined to set a date for "trial and investigation of the charges." Instead the FPC applied Rule XVII (6)(b)(i). Under this section, the FPC Committee on Rules and Complaints will report to the board recommendations regarding provisional jurisdiction and may recommend that the complaint be dismissed and referred to the Milwaukee Police or Fire Department for investigation and disposition. In the instant case, the FPC

dismissed the complaint and referred it to the Chief of Police for resolution. Plaintiff contends that Rule XVII, Section 6(b)(i) is in violation of §62.50. This court agrees.

Again, the court looks to the language of the statute. Subsection 62.50(19) addresses charges by an aggrieved person. This section states that the board is to take action with regards to a complaint by an aggrieved person. Throughout subsection (19), the legislation requires the board to take action:

> In cases where duly verified charges are filed by any aggrieved person with the board of fire and police commissioners, setting forth sufficient cause for the removal of any member of either of the departments, including the chiefs or their assistants, the board or chief may suspend such member or officer pending disposition of such charges. The board shall cause notice of the filing of the charges with a copy to be served upon the accused and shall set a date for the trial and investigation of the charges, following the procedure under this section. The board shall decide by a majority vote and subject to the just cause standard described in sub. (17) (b) whether the charges are sustained. If sustained, the board shall immediately determine whether the good of the service requires that the accused be removed, suspended from office without pay for a period not exceeding 60 days or reduced in rank. If the charges are not sustained, the accused shall be immediately reinstated without prejudice. The secretary of the board shall make the decision public. [Emphasis supplied]

All responsibility is placed on the board, not the chief. In this subsection, where the legislature intended the Chief to play a role, for example with respect to decisions on suspension, the legislature stated the "board or chief." There is no legislative intent for complaints to be referred to the Chief for investigation and trial. No other provision of §62.50 provides support for Rule XVII (6)(b)(i).

In other subsections, the legislative intent for the involvement and responsibility of the Chief is specifically set forth. In oral argument, defendants conceded that everything in §62.50 is driven by the Chief, except subsection (19).

Finally, subsection (12) provides:

> Trial to be ordered. Whenever complaint against any member of the force of either department is made to the chief thereof, the chief shall immediately communicate the same to the board of fire and police commissioners and a trial shall be ordered by the board under this section.

Complaints to the Chief are to be referred to the FPC, not from the FPC to the Chief. Rule XVII flies in the face of this legislative directive. Under Rule XVII the FPC has abdicated its responsibility and abandoned its ultimate decision making authority. This court is encouraged by the response of the current Chief of Police to the concerns expressed in the joint complaint and knows that discussions continue. But the issue before this court is whether complainants are entitled to have an investigation and trial by the FPC.

Despite this clear legislative mandate, the FPC referred the joint complaint to the Chief. Given the language of the letter of referral, this was not a request to obtain information to assist the FPC in the investigation and trial of this complaint, this was a dismissal of the complaint and referral to the Chief for resolution. The FPC is charged with the responsibility to investigate a citizen complaint, not the Chief. If the legislature had intended that the citizen complaint be resolved by the Chief then subsection (19) would not have been included in the legislation. Section 62.50(19) is in the legislation and must be given its plain meaning. Moreover, Rule XVII (6) which authorizes referral to the Chief does not "ensure that the ultimate decision-making authority remains with the board." See Conway, at ¶59. The referral to the Chief contains no time limit and no requirement of any response, but sends it to the Chief to take action or not take action. Moreover, in the instant case, such a referral ignores the fact that the complaint identifies the Chief as one of the individuals complained against.

Defendants cite Conway to support their position that the FPC can use agents as investigators and contend that the FPC is using the Chief as its agent. If the FPC intended the Chief to act as its agent, it should have set specific expectations for the investigation and a date certain for a report, but it did not do so. Rule 7.20, at issue in Conway, requires the hearing examiner, the agent used by the Madison FPC, to provide the board a comprehensive report, including an evaluation of witness credibility and demeanor, and recommendations for disposition. Proceedings before the hearing examiner must be recorded. Additional proceedings before the hearing examiner or the board may be ordered. These protections were essential in the Court's finding that the "board remains the ultimate decision-making authority, and, therefore, has not impermissibly abdicated its duties to a hearing examiner." Conway, ¶50.

In the instant case, the joint complaint was filed on behalf of 25 citizens relating to a specific event, the execution of a search warrant. The names of the officers assigned to execute on the warrant is certainly information that the FPC could obtain in a reasonable amount of time. The allegations against the individuals are specifically stated and in some instances reference is made to specific rule violations. The complainants are represented by attorneys and yet there is still no response. There is no evidence that in adopting §62.50(19), the legislature intended that citizens would have to negotiate such complex procedural requirements and administrative hurdles to have their complaints heard. Rule XVII, rather than provide an efficient and fair process for citizen complaints has served as a way to avoid the requirements of §62.50(19). Rule XVII is inconsistent with the intent of the legislation and the FPC in adopting Rule XVII has acted in excess of its authority.

The FPC contends that it needs some sort of prescribed format for citizens so proper notice can be given to the FPC as to the nature of the complaint and the relief requested. But that is not what the FPC did in enacting Rule XVII and certainly not how the FPC is interpreting this rule.

Plaintiff also seeks to have the court declare invalid the practice of officers intentionally concealing their identities while on official business. On this record, especially in light of the submission of the current Chief of Police with respect to the policy, this matter is not properly before this court. Rule XVII exacerbates the problems inherent with a policy that permits the concealing of identities. With Rule XVII, when a citizen seeks to file a complaint that the officer deliberately concealed his or her identity, there is the Catch-22 response that the person must provide the name of the officer and there is no review of that conduct. Section 62.50(19) contemplates that if sufficient information is given as to the time, place, and circumstances of the event, the FPC could readily ascertain the identity of the officer and possible rule violation. Any rule that precludes review for such a complaint would be inconsistent with the intent §62.50(19). Therefore, given this court's ruling with respect to Rule XVII, the court declines to reach the issue of concealed identities at this time.

CONCLUSION

In summary, this court finds that the City of Milwaukee Fire and Police Commission exceeded its authority in enacting Rule XVII with respect to complaints by aggrieved persons. Section 62.50 provides no general rulemaking authority for enacting such a rule. Section §62.50(19) occupies the field with regards to complaints by an

aggrieved person and leaves no room for rules by the FPC. In addition, as adopted and implemented, Rule XVII frustrates the intent of the legislature in enacting §62.50(19). The purpose of Section 62.50(19) is to give citizens the ability to complain against a fire or police department. Therefore, plaintiff's motion for declaratory judgment declaring FPC Rule XVII invalid as inconsistent with §62.50 and declaring that the FPC had no authority to promulgate the rule is granted.

Dated this 15th day of July, 2004.

BY THE COURT:

Honorable Patricia McMahon
Circuit Court Judge
Branch 18

1045-2003-3198 DV

STATE OF WISCONSIN CIRCUIT COURT BRANCH 18 MILWAUKEE COUNTY

State ex rel.

Jose Castaneda,

Plaintiff,

v.

Woody Welch, Chairman, Milwaukee Fire and Police Commission, Eric Mandel Johnson, Vice Chair, Milwaukee Fire and Police Commission, Carla Y. Cross, Leonard J. Sobczak, Ernesto A. Baca, Members of the Milwaukee Fire and Police Commission, and David E. Heard, Executive Director, Milwaukee Fire and Police Commission,

Defendants.

ORDER

Case No. 03CV008737

The Court having reviewed, relating to plaintiff's motion for declaratory judgment, the written submissions of the parties, the presentations upon oral argument, and the record in the case, and having issued a written decision in this matter on July 15, 2004, now, pursuant to that decision:

IT IS HEREBY ORDERED ADJUDGED and DECREED that:

1. Milwaukee Fire and Police Commission Rule XVII is invalid as inconsistent with §62.50, Wis. Stats.;

2. Milwaukee Fire and Police Commission Rule XVII is invalid because the Milwaukee Fire and Police Commission did not have authority to promulgate it;

3. The Court declines to reach the issue of concealed identities at this time; and

4. Plaintiff's request that the Court enter a writ of mandamus directing the defendants to set a date for the trial and investigation of the charges in plaintiff's joint complaint will be held in abeyance pending the outcome of discussions between the parties and the Milwaukee Police Department regarding search warrant execution procedures.

AUG 16 2004

Dated this _____ day of August, 2004.

BY THE COURT:

Honorable Patricia McMahon
Circuit Court Judge
Branch 18

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE EX REL. JOSE CASTANEDA,

Plaintiffs,

v.

FILED
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JOHN BARRETT
Clerk of Circuit Court

Case No. 03-CV-008737

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID L. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION,

Defendants.

STIPULATION AND ORDER TO DISMISS WITHOUT PREJUDICE

The parties to this action, by their attorneys, hereby stipulate to dismiss, without prejudice and without costs to either party, the following claims of plaintiff:

1. Claim for a writ of mandamus directing defendants to set a date for the trial and investigation of the charges in plaintiff's joint complaint to the Milwaukee Fire and Police Commission;

2. Claim for a declaratory judgment declaring that the Milwaukee Police Department policy and practice that permits police officers, when conducting the people's business, to hide their identities from the people so as to render impossible the investigation of charges filed under Wis. Stats. § 62.50(19), is unlawful as a violation of Wis. Stats. § 62.50(19).

The plaintiff agrees to the dismissal of the above claims on the grounds that the attached Search Warrant Execution Procedure, No. 3/970.25, has been made a part of the written Milwaukee Police Department Standard Operating Procedures. The plaintiff also agrees to the dismissal of the above claims based on the defendants' Stipulation that the Board of Fire and Police Commissioners will require the Chief of the Milwaukee Police Department to report to the

Fire and Police Commission any material change to the attached Search and Warrant Execution Procedure, that the Commission will notify plaintiff's counsel of any material change to the attached Procedure, and that the Commission will discuss said change with plaintiff's counsel. If agreement cannot be reached regarding the change, this dismissal may, on motion of the plaintiff, be vacated and this action may be reinstated in order that plaintiff may seek whatever relief is then appropriate.

Dated: December 7, 2004

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ORDER

Pursuant to a Stipulation to Dismiss Without Prejudice, executed by the parties on December 6, 2004, and the plaintiff appearing by Attorney John Ebbott, Legal Action of Wisconsin, Inc., and Ness Flores of Flores & Reyes, S.C., and the defendants appearing by Grant F. Langley, Milwaukee City Attorney, represented by Bruce D. Schrimpf, Assistant City Attorney, Bruce D. Schrimpf.

The court hereby enters as an order of the court, the foregoing Stipulation for Dismissal Without Prejudice executed by the parties.

Dated and signed at Milwaukee, Wisconsin this ____ day of DEC - 7 2004, 2004.

BY THE COURT:

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

Hon. PATRICIA D. McMAHON
Circuit Judge

1095-2003-3198/86643

SEARCH WARRANTS

3/970.20 SEARCH WARRANTS FOR DRUGS

As previously written

3/970.25 SEARCH WARRANT EXECUTION

A. PLANNING

1. The commanding officer of the bureau/division that obtains a search warrant shall, as soon as practicable, contact the Tactical Enforcement Unit (TEU) shift commander to conduct a risk assessment and coordinate execution of the search warrant.

2. To facilitate the risk assessment, the commanding officer of the bureau/division that obtains a search warrant shall provide the TEU shift commander with all necessary intelligence for an effective evaluation. Where feasible, the commanding officer should consult with investigating officers, and the community liaison officer(s) familiar with the neighborhood where the warrant is to be executed.

3. The commanding officer of the bureau/division that obtains a search warrant shall as soon as practicable inform the TEU shift commander of the anticipated date of execution.

4. In cases where officers or detectives have already secured a scene, and a search warrant is needed to further the investigation, the scene shall be "frozen" and a CIB supervisor contacted to obtain a search warrant. In such cases, as the scene is already secure, no further risk assessment is necessary, and a TEU supervisor need not be contacted. The CIB supervisor shall document such instances on the risk assessment form to be attached to the after action report.

B. RISK ASSESSMENT

1. The risk assessment for the execution of a search warrant shall be based upon "risk factors" determined from intelligence provided by the bureau/division that obtained the warrant.

2. The TEU shift commander shall, prior to the execution of the warrant, complete a "risk assessment" form based upon available intelligence. The risk assessment form shall set forth the factors taken into consideration in determining the level of risk. Warrants shall be assigned to one of the following "risk" categories:

High Risk

Search warrants deemed to be "high risk" includes those search warrant executions, which the TEU shift commander reasonably believes will involve a high degree of danger to police officers and citizens. Reasonable belief shall be based upon risk factors which include, but are not limited to, the presence of weapons; vicious dogs; numbers of persons present at the scene; location; time of day; and dangerous nature of criminal activity or suspected offenses.

Medium Risk

Search warrants deemed to be "medium risk" includes those search warrant executions, which the TEU shift commander reasonably believes include some of the risk factors set forth above in the "high risk" category, but not at a level commensurate with a "high risk" assessment.

Low Risk

Search warrants deemed to be low risk includes those search warrant executions, which the TEU shift commander (or CIB supervisor in instances of secured scenes) reasonably believes lacks sufficient risk factors to the extent that the warrant execution is unlikely to pose a danger to police officers or citizens.

3. The TEU supervisor in charge of executing the search warrant has the authority to raise or lower the risk category, based upon on scene intelligence at the time of warrant execution.

C. EXECUTION

1. Briefing

Prior to the execution of a search warrant the supervisor in charge of the operation shall ensure that there are personnel appropriate to the risk category assigned to execute the warrant. The supervisor in charge of executing the warrant shall conduct a pre-entry briefing with all personnel. During this briefing all participating personnel shall be informed of the level of assessed risk and the guidelines for executing a search warrant consistent with the assessed risk.

2. Execution

During the execution of high and medium risk search warrants entry team members shall be deployed in full tactical gear with department insignia prominently displayed. Entry team members shall have their names clearly displayed on the front and back of their tactical vests.

High Risk: An entry team consisting of a full TEU complement and equipment shall execute high-risk search warrants. High-risk search warrants shall be executed in accordance with TEU procedures for a full tactical entry.

Medium Risk: An entry team consisting of a partial TEU complement and equipment (based upon nature of the warrant and pre-search intelligence) shall execute medium-risk search warrants. Medium-risk search warrants shall be executed in accordance with TEU procedures for a limited deployment entry.

Low Risk:

Low risk search warrants shall be executed with the minimal amount of intrusion necessary to accomplish the search. In general, low risk search warrants should be executed in a non-confrontational manner by members of the bureau/division that obtained the warrant. TEU is not
required to execute low risk search warrants. All uniformed police officers shall be identifiable at all times during the execution of low risk search warrants. Officers in plainclothes shall provide proper identification.

Persons on the scene of a low risk search warrant who are not the focus of the warrant shall be free to leave the location without unnecessary interference by the officers executing the warrant. This is subject to a determination by the supervisor in charge of executing the warrant, based upon on scene evaluation, that no security issues exist in their departure (e.g., that persons leaving are not the focus of the warrant, that they are not taking with them materials described in the search warrant, etc.).

3. Debriefing

A debriefing shall occur at the conclusion of the search warrant execution.

The supervisor in charge of executing the search warrant, and the supervisor of the bureau/division, which obtained the search warrant, shall complete an after action report, containing the initial risk

assessment form, and detailing statistical information from the execution of the warrant. If the risk category, at the time of warrant execution, was raised or lowered from the initial risk assessment, the after action report shall also explain the basis for revising the risk category, and indicate that the warrant was executed in accordance with the revised risk category.

D. NOTIFICATION

1. In the event of material change to this SOP the Board of Fire and Police Commissioners shall be notified.

87986

TACTICAL ENFORCEMENT UNIT

Warrant Risk Assessment

This assessment check-off list is not intended to be used rigidly without discretion and is to be completed prior to executing a search warrant pursuant to Milwaukee Police Department Standard Operating Procedure 3/970.25. All supervisors are to use this as a gauge, and shall add their experience and training when assessing any of the risk factors and risk levels set forth below. If the Operation Risk Level is raised or lowered at the time of warrant execution, document the new level and articulate basis for the revision in the notes below.

Location Factors	
Additional persons on site	
Armed counter surveillance	
Chemicals/Lab	
Children on site	
Counter surveillance	
Dogs	
Fortifications	
Geographic barriers	
Locked perimeter/Gate	
Possible booby traps	
Security gate	
Use of undercover personnel	
Video surveillance	
Suspect Criminal History	
Assault w/deadly weapon	
Assault on police	
Drug lab	
Firearms	
Homicide	
Probation/Parole	
Robbery	
Sexual assault	
Unknown:	

Weapons Factors	
Assault weapons	
Explosives	
Fully automatic	
Pistol	
Revolver	
Rifle	
Shotgun	
Stabbing instrument	
Unknown:	
General Risk Factors	
Drug/Alcohol abuse	
Gang association	
Hate group	
Mentally unstable	
Military experience	
Paramilitary	
Police experience	
Religious extremist	
Suicidal	
Terrorist	
Unknown:	
Operation Risk & Concern Level	
Low Level	
Medium Level	
High Level	

Brief summary of Operation Risk Level & Other Notes:_____

_____

_____

_____

Warrant Location:_____

Reviewing Supervisor:_____ Date:_____

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

State ex rel.

Jose Castaneda,

Plaintiffs,

v. Case No. 03-CV-008737

Woody Welch, Chairman, Milwaukee Fire and Police Commission, Eric Mandel Johnson, Vice Chair, Milwaukee Fire and Police Commission, Carla Y. Cross, Leonard J. Sobczak, Ernesto A. Baca, Members of the Milwaukee Fire and Police Commission, and David E. Heard, Executive Director, Milwaukee Fire and Police Commission,

Defendants.

COPY

FILED
OCT 3 2003
JOHN BARRETT
Clerk of Circuit Court

AFFIDAVIT OF DAVID HEARD

STATE OF WISCONSIN)
)ss.
MILWAUKEE COUNTY)

1. Your Affiant is currently employed as Executive Director of the Board of Fire and Police Commissioners of the City of Milwaukee ("Board") and has been so appointed since April 15, 2003. Prior to that time your Affiant has been employed as a staff member of the Board. Under your Affiant's care, custody and control are documents and records of the Board kept in the ordinary conduct of business. Your Affiant makes this affidavit upon personal knowledge and information or personal knowledge and information refreshed from documents and records kept in the ordinary course of business of the staff of the Board.2.

Annexed hereto and incorporated herein by reference as Exhibit No. 1 is Rule XVII of the Board last amended on July 26, 2001.

EXHIBIT
2

3. Your Affiant is aware of the fact that the plaintiffs in this action filed citizen complaint forms with the Board. Those complaint forms were filed on November 7, 2002 and are annexed hereto and incorporated herein by reference as Exhibit No. 2.

4. The Board staff reviewed these complaint forms as well as videos that were taken from the grocery store ("El Rey"). There was no video from the tortilla factory. Thereafter, the Board staff requested and received from the Milwaukee Police Department a list of all personnel that were present during the execution of the search warrant that is the subject of the complaint of the complainants.

5. In January of 2003, the Board staff requested from the individual complainants that each complainant attempt to identify the specific rule violation that related to each of the officers complained against. Eventually, in approximately June of 2003, the Board staff received information from the complainants. As a result of that information, the staff was able to identify specific rule violations in only two of the complaints. However, after reviewing and assessing each complaint, although a rule violation was identified, the individual officers that could have been charged with such a rule violation were not otherwise identified. Nor, did the complainants identify any individual officers. The court is reminded that there were 21 police officers involved in the execution of the search warrant at the El Rey grocery store and the attached tortilla factory.

6. Annexed hereto and incorporated herein by reference as Exhibit No. 3 is a true and correct copy of the memorandum that was sent to your Affiant dated August 20, 2003 from a staff member of the Board detailing the events transpiring after the receipt of the citizen's complaints, and the effort to identify specific rule violations chargeable against individual officers.

7. As of the date of the execution of this affidavit, no further progress has been made at identifying specific rule violations chargeable to specific officers.

8. The Board met on the evening of Thursday, October 2, 2003 and, pursuant to Board Rule XVII, declined to take provisional jurisdiction of this matter and referred the matter to the Chief of Police for investigation pursuant to Rule XVII, § 6(b)(i). Annexed hereto and incorporated herein by reference as Exhibit 4 is a true and correct copy of the notification to the complainants regarding the Board's action of October 2, 2003.

Further your Affiant sayeth naught.

Dated and signed at Milwaukee, Wisconsin this 3 day of October, 2003.

DAVID L. HEARD, Executive Director
Board of Fire and Police Commissioners

Subscribed and sworn to before me
this 3rd day of October, 2003.

Notary Public, State of Wisconsin
My Commission: expires 7-23-06

1095-2003-3198:73132
BDS:kef

RULE XVII.

CITIZEN COMPLAINT PROCEDURE

Section 1. CITIZEN COMPLAINT DEFINED. A citizen complaint is any written communication received by the Fire and Police Commission which alleges a violation of rules or standard operating procedures by a member of either the Fire or Police Department, which meets the requirements of Sections 2, 3 and 4 below. (Rev. 7/26/01)

Section 2. WHO MAY FILE A CITIZEN COMPLAINT. Any aggrieved person may file a written complaint alleging misconduct by a member of either the Fire Department or Police Department. An aggrieved person is someone who is directly affected by the alleged misconduct, or the parent or legal guardian of a minor who is directly affected by the alleged misconduct. (Rev. 7/26/01)

Section 3. WHERE AND HOW TO FILE. A complaint alleging misconduct by a member of either the Fire or Police Department must be filed by mailing or delivering a properly executed complaint to the Board of Fire and Police Commissioners, City Hall, 200 East Wells Street, Room 706, Milwaukee, WI, 53202. (Rev. 9/2/03)

Section 4. CONTENTS AND FORM OF COMPLAINT. The complaint must state, in plain language, the full name, address and telephone number of the complainant; the name, badge number or other identification of the accused member(s); the date, approximate time and location of the incident; and a description of the alleged misconduct. (Rev. 7/26/01)

The complainant (aggrieved person) must specify whether the complaint is being filed pursuant to Section 62.50(19) of the Wisconsin Statutes or the City of Milwaukee Charter Ordinances. (Rev. 7/26/01)

(a) If the complaint is filed under the State Statute, the complaint must describe individual acts of each accused member which would constitute grounds for removal (firing) of the member(s) from the department. The complaint must be signed by the aggrieved person, or the parent or legal guardian of an aggrieved minor, in the presence of a notary. The person signing the complaint must, upon oath or affirmation, declare that the contents of the complaint are true and correct to the best of that person's knowledge. The complaint must also be signed and dated by a notary. (Rev. 7/26/01)

(b) If the complaint is filed under the Charter Ordinance, the complaint must describe individual acts of each member accused which would be grounds

EXHIBIT 7

for discipline. The complaint must be signed by the aggrieved person or the parent or guardian of an aggrieved minor. (Rev. 7/26/01)

The Fire and Police Departments shall permit the Executive Director, or designee, to access all department records other than personnel records which are relevant to the incident stated in the complaint, as may be necessary to determine the identity of the officer(s) involved. Any records reviewed are for this limited purpose only. Should provisional jurisdiction be granted, the accused member(s) shall, upon request, be provided with copies of documents used to establish identity. (Rev. 7/26/01)

Section 5. RECEIPT OF COMPLAINT AND TRANSMITTAL TO BOARD. Upon receipt of a complaint at the Fire and Police Commission, a docket number will be assigned. The complaint will then be given to the Committee on Rules and Complaints and placed on the Rules and Complaints Committee agenda. (Rev. 7/26/01)

Section 6. PROVISIONAL JURISDICTION AND FURTHER APPROPRIATE ACTION.

(a) The Committee on Rules and Complaints will review all complaints and determine whether the Board has jurisdiction over both the accused member and the subject matter of the complaint. (Rev. 7/26/01)

(b) The Committee will report to the Board recommendations regarding provisional jurisdiction and will recommend one of the following alternatives: (Rev. 7/26/01)

(i) that the complaint be dismissed for lack of prosecutorial merit or for such other reason as may be determined by the Committee, or that the complaint be dismissed and referred to the Milwaukee Police or Fire Department for investigation and disposition; or (Rev. 7/26/01)

(ii) that the matter be referred to the Board, or to a Hearing Examiner to be designated by the Board, for conciliation, pretrial and trial; or (Rev. 7/26/01)

(iii) that the complaint be held in committee to give staff an opportunity to obtain additional information; or (Rev. 7/26/01)

(iv) other such actions as the Committee may deem appropriate. (Rev. 7/26/01)

(c) Upon receipt of the recommendation of the Committee, the Board, by majority vote in open session, will make and announce its decision

regarding whether provisional jurisdiction will be granted and how the matter is to proceed. (Rev. 7/26/01)

(d) If provisional jurisdiction is not granted, the Board will dismiss the complaint and will advise the complainant in writing of the denial and the reason(s) for such denial. (Rev. 7/26/01)

(e) If the Board grants provisional jurisdiction, the complainant will be notified in writing of such action. A copy of the complaint and a Notice of Complaint will be served upon the accused member(s) and the Chief of the department, with a statement indicating the department rule which is alleged to have been violated. (Rev. 7/26/01)

Section 7. REFERRAL FOR CONCILIATION, PRETRIAL AND TRIAL. PROCEDURE.

(a) Any complaint which is recommended for trial pursuant to Section 6 (b)(ii) above may be referred for conciliation. Written notice of a conciliation conference, to take place within thirty (30) calendar days of referral, will be sent to both the complainant and the accused member, or their counsel. The notice will indicate the date, time and place of conciliation conference and will advise the parties that the attendance of both the complainant and the accused member is required. (Rev. 7/26/01)

(b) The conciliation conference will be conducted by a member of the Board or the Board's designee. The conference will be informal, with both parties encouraged to discuss the matter in an attempt to resolve it short of trial. Either party may be accompanied by legal counsel, but counsel may act as an observer only. The purpose of the conciliation conference is to seek resolution, not pretrial discovery, and statements made at the conciliation conference will not be admissible at time of trial. Any Board member who participates in the conciliation conference will not, unless both parties agree in writing, participate in any subsequent trial on the complaint. No individual who participates in the conciliation conference may sit as Hearing Examiner (see Section 10 below), unless both parties agree in writing. (Rev. 7/26/01)

(c) If either party fails to appear at the conciliation conference without good cause, the Committee on Rules and Complaints may schedule the matter for trial or recommend to the Board that the matter be dismissed. (Rev. 7/26/01)

(d) If a mutual agreement is reached at the conciliation conference, both parties will be asked to sign a statement of resolution stating that the dispute has been resolved and that the matter may be dismissed. If the resolution requires any further action by either party, the statement of

resolution will specify the action required and state that, upon completion of the action required, the matter is to be dismissed. A copy of the signed statement of resolution will be given to each party. When the complainant and accused notify the Board that all necessary action has been completed, the matter will be recommended for dismissal, based upon successful conciliation, at a meeting of the Board. (Rev. 7/26/01)

(e) If no conciliation agreement is reached, the matter will be returned to the Committee on Rules and Complaints for dismissal or scheduling of a pretrial conference or other action as the Committee deems appropriate. (Rev. 7/26/01)

(f) The purpose of the pretrial conference is to attempt a final settlement effort, narrow the issues to be tried, and shorten the length of time necessary to complete presentation of evidence at trial. To accomplish these tasks, the pretrial conference will include: (Rev. 7/26/01)

(i) Final settlement negotiations; and, (Rev. 7/26/01)

(ii) Establishment of dates for the exchange and filing of witness and exhibit lists; and, (Rev. 7/26/01)

(iii) Establishment of dates for the exchange of accurate copies of exhibits; and, (Rev. 7/26/01)

(iv) Determination of the issue(s) to be addressed at trial; and, (Rev. 7/26/01)

(v) Execution of a Pretrial Order by the Hearing Examiner, with a copy supplied to parties, setting forth the trial date and any remaining requirements for trial preparation by the parties, with deadlines for such activities. (Rev. 7/26/01)

(g) A request for postponement of the conciliation conference or pretrial must be submitted in writing to the Board at least five (5) working days prior to the scheduled conciliation or pretrial date. The Board will decide whether to allow the postponement. (Rev. 7/26/01)

(h) Both parties must provide witness and exhibit lists to the Board and the opposing party. Copies of all proposed exhibits will be supplied to the opposing party according to the schedule determined at the pretrial conference. Actual copies of proposed exhibits need not be filed with the Board until they are introduced at trial. (Rev. 7/26/01)

(i) Failure of either party to exchange witness lists, exhibit lists or copies of proposed exhibits according to the scheduling order, unless an extension is granted in writing by the Board or its designated Hearing Examiner, may result in denial of the right to call any witness or present any exhibit not supplied in a timely fashion pursuant to this section. Denial may be made, at the discretion of the Board, either prior to trial or at time of trial upon the motion of opposing party or counsel. (Rev. 7/26/01)

Section 8. TRIAL DATES AND ADJOURNMENTS. The Hearing Examiner will set the date and time of trial and will notify the complainant and the accused by mail, at least fourteen (14) calendar days before the trial. The accused and the complainant have the right to an adjournment of the trial date not to exceed fifteen (15) calendar days provided that a written request for adjournment is received by the Board at least five (5) working days before the scheduled trial date. Any subsequent request for adjournment of the trial date must be in writing and received by the Board at least five (5) working days prior to trial and must state the reasons for the request. The Board may grant any adjournment request upon a proper and timely showing of good cause. The Board may adjourn any trial at its own volition. (Rev. 7/26/01)

Section 9. TRIAL PROCEDURE. WITNESSES. Witnesses may be required to attend any scheduled trial and give testimony when served with a Board subpoena. Preparation and service of a subpoena is the responsibility of the party desiring attendance of the witness. (Rev. 7/26/01)

Section 10. TRIAL BEFORE THE EXAMINER. PROCEDURE. The Hearing Examiner will preside over any trial and is authorized to make any and all evidentiary rulings necessary during the trial. Procedural and evidentiary rules governing trials before the Board will also apply to trials before the Hearing Examiner. Within twenty (20) calendar days after the close of the proceedings, the Hearing Examiner will provide to the Board a transcript of the proceedings and a report summarizing the evidence presented, and containing proposed findings of fact, conclusions of law and a recommended disposition. At the same time, a copy of the report only will be mailed to all parties or their respective counsels. Within twenty (20) calendar days of mailing the report to the parties, the parties may file written briefs with the Board setting forth their respective positions. Any reference to the transcript of the proceedings must be accompanied by pertinent portions of the transcript. Within ten (10) calendar days of the filing of the briefs, the Board may, at its option, schedule the matter for oral argument. The Board will meet on the date scheduled for disposition and, after receiving oral argument, if necessary, deliberate in closed session. The Board shall then, in open session, render a decision, which will either accept the Hearing Examiner's report or will make appropriate modifications to it. If the Board determines that the charges are

sustained, it will then proceed to the dispositional phase in accordance with Section 20 of this Rule. (Rev. 7/26/01)

Section 11. TRIAL BEFORE THE BOARD. PRESIDING OFFICER. The Hearing Examiner will preside at a trial before the Board, and shall be responsible for conducting the trial. The Hearing Examiner will rule upon all matters arising in the course of the trial provided Fire and Police Commission members are in attendance and all decisions, determinations and dispositions are made by the Board members. (Rev. 7/26/01)

Section 12. GENERAL CONDUCT OF TRIAL. DECORUM.

All trials conducted under this rule will, to the extent possible, be informal. Testimony may be elicited either through interrogation or in narrative form. The Wisconsin Rules of Evidence will apply in the same manner that they apply in a civil case. The Board may relax the rules of evidence if it deems the interests of justice to be served thereby. The trial shall be conducted to assure fundamental fairness to the parties. Objections to evidentiary offers and offers of proof regarding evidence ruled inadmissable may be made and incorporated into the record. Witnesses may be sequestered at the request of either party or upon motion of the Board. (Rev. 7/26/01)

Section 13. INADMISSABLE EVIDENCE. Evidence resulting from personnel investigations of the Fire Department or Police Department, or from an investigation by the City Attorney for the purpose of a civil action, or gathered ex parte regarding the specific citizen complaint by investigation of the Board, is not admissible. (Rev. 7/26/01)

Section 14. EVIDENCE ADMISSIBLE BY NOTICE. The Board may take official notice of, and accept as evidence without additional foundation, the constitutions of the United States and the State of Wisconsin, the laws of the State of Wisconsin, applicable case law interpreting relevant legal issues, the Charter of the City of Milwaukee, ordinances of the City of Milwaukee, Fire and Police Commission Rules and By Laws, applicable Fire Department or Police Department rules and regulations, and previous written decisions of the City of Milwaukee Board of Fire and Police Commissioners. (Rev. 7/26/01)

Section 15. DOCUMENTARY EVIDENCE ADMISSIBLE VIA CERTIFICATION OR REASONABLE VERIFICATION. Relevant information or records which are either certified or contain reasonable guarantees of trustworthiness through questioning of the proponent under oath, may be admissible without the necessity of presenting direct testimony from the source of such records. (Rev. 7/26/01)

Section 16. TRIALS OPEN TO PUBLIC. All trials are open to the public. (Rev. 7/26/01)

Section 17. PRESENTATION OF EVIDENCE AT TRIAL. BURDEN OF PROOF. The complainant must prove the charges by a preponderance of the evidence. (That is, the complainant must show that it is more likely than not that the charges are true.) The complainant will make the first presentation of witnesses and exhibits, after which the accused will have a similar opportunity. Cross examination of all witnesses is permitted. Either party may be called as a witness by the other party. (Rev. 7/26/01)

Section 18. TRIAL SUMMATION AND DECISION OF THE BOARD. After presentation of evidence regarding the charges filed against the accused member, each party will be permitted to offer a five (5) minute summation of the evidence. The Board will then deliberate in closed session to consider the testimony and evidence received. Upon reaching a decision by majority vote, the Board will announce its decision on the record, in open session. (Rev. 7/26/01)

Section 19. TRIAL PROCEDURE. FAILURE TO MEET BURDEN TO RESULT IN DISMISSAL. If the Board determines that the complainant has not met the burden of proof, the matter will immediately be dismissed and proceedings terminated. A summary of proceedings, findings of fact and decision will be prepared by the Hearing Examiner and signed by a Board member within three (3) working days after such decision is made. A copy of the written decision will be mailed to each of the parties. (Rev. 7/26/01)

Section 20. TRIAL PROCEDURE. BURDEN MET. DISPOSITIONAL PHASE AND DECISION. At the beginning of the trial, the department will provide the Hearing Examiner with a sealed copy of the employment history and performance records of the accused member(s). These file(s) will be retained by the Hearing Examiner, and will not be opened or viewed by Board members, unless a determination has been made that the charges have been sustained. If the Board finds that the accused violated a department rule or procedure, the Board will review the employment history and performance records of the member(s) or such other personnel records as the Board may request. The Board will then receive testimony, exhibits, and oral argument from each party concerning disposition. Oral argument will be limited to five (5) minutes for each party. After hearing testimony and argument, the Board will deliberate in closed session until a decision is reached by majority vote. The Board will then announce its decision to the parties and the public. A written summary of proceedings, findings of fact and decision will be prepared by the Hearing Examiner and signed by a Board member within three (3) working days after the decision is announced. A copy of the decision will be mailed to all parties. (Rev. 7/26/01)

Section 21. DISPOSITIONAL OPTIONS. Upon a finding of guilt, the Board has the following dispositional options: (Rev. 7/26/01)

(a) Suspension without pay for a set period not to exceed the equivalent of 60 working days; or, (Rev. 7/26/01)

(b) Demotion to a lesser rank within the department, with a corresponding decrease in pay and benefits; or, (Rev. 7/26/01)

(c) Discharge from the department; or, (Rev. 7/26/01)

(d) Other such dispositions as permitted by law. (Rev. 7/26/01)

PLEASE PRINT IN BLUE OR BLACK INK

Complaint No. _____

CITIZEN COMPLAINT FORM

CITY OF MILWAUKEE FIRE AND POLICE COMMISSION
809 N. Broadway, Room 104 Milwaukee, WI 53202
(414) 286-5000

IMPORTANT NOTE: The Fire and Police Commission's citizen complaint process is designed to address allegations of intentional acts of misconduct by specific department members which are violations of Department rules and which, if proven, would justify disciplinary action against that department member. The Fire and Police Commission is not authorized by law to award money damages. If you feel that you were injured as a result of actions by a Police or Fire Department member and seek money damages, you must file a Notice of Claim with the City Clerk's office within 120 days of the date on which the injury took place. If you have questions regarding filing such a claim, contact the City Clerk's office at 200 East Wells Street, Milwaukee, WI 53202. Their telephone number is 286-2221.

NAME: EVANGELINA (First) E (Initial) ESPARZA (Last) Birth date: _____

BUSINESS ADDRESS: 1530 S. MUSKEGO AVE CITY: MILWAUKEE ZIP: 53204

TELEPHONE NUMBER – ~~RESIDENCE~~: Contact my attorney: ~~BUSN~~
(Notify the Commission office [286-5000] promptly of any change in residence or telephone number.)

IF FILING ON BEHALF OF MINOR, GIVE NAME: _____ BIRTH DATE: _____
(If minor is 14 years of age or over, the minor must complete the following:)

I have read this complaint consisting of _____ pages. The contents are true to the best of my knowledge.

_____
Minor

I am represented by counsel and request that all contact be through my attorney.

DATE AND TIME OF INCIDENT: SEPTEMBER 18, 2002 (MORNING)

LOCATION: EL Rey TORTILLA FACTORY

ACCUSED MEMBER NO. 1:

Name _____ Race ____ Sex ____ Uniformed (Yes/No) Badge No. _____

ALLEGED MISCONDUCT: (Give specific facts below–state exactly the individual acts of the accused member that causes you to complain. Continue on the reverse side or attach additional pages, if necessary.)

The alleged misconduct is set forth in the attached joint complaint.

I verify that those acts and incidents which I observed are true.

I am not verifying that acts or incidents which I did not observe are true.

(Attach additional pages if necessary)

- PLEASE CONTINUE ON REVERSE SIDE -

EXHIBIT 2

Fire and Police Commission Citizen Complaint Form - Page 2 (Rev. 2/01)

ACCUSED MEMBER(S)

Name(s) Race Sex Unknown (Yes/No) Badge

ALLEGED MISCONDUCT: (Give specific facts below–state exactly the individual acts of the accused member that causes you to complain. Continue on the reverse side or attach additional pages, if necessary.)

The alleged misconduct is set forth in the attached joint complaint.

I verify that those acts and incidents which I observed are true.

I am not verifying that acts or incidents which I did not observe are true.

(Attach additional pages if necessary)

You must choose one of the two options listed below:

OPTION 1: If proceeding according to State Statute 62.50(19), check here X and sign below in the presence of a Notary Public. *By choosing this option, you are stating that you believe the department member(s) is/are guilty of misconduct which should result in the removal (termination) of the member(s) from the department.*

You must sign below in the presence of a Notary Public if you chose Option 1.

OPTION 2: If proceeding according to Charter Ordinance Section 22.10, check here ___ and sign and date on the following lines. *By choosing this option, you are stating that you believe the department member(s) is/are guilty of misconduct which should result in suspension without pay, demotion in rank, or termination. (See Section 4(a) and (b) of Fire and Police Commission Rule XXV.)*

Date Complainant's Signature

STOP HERE IF YOU CHOSE OPTION 2.

STATE OF WISCONSIN)
)
CITY OF MILWAUKEE)

EVANGELINA ESPARZA being first duly sworn on oath, deposes and says that SHE is the complainant in the above entitled action; that SHE has read the foregoing complaint and knows the contents thereof, that the same is true of SHE own knowledge, except as to those matters stated therein on information and belief and as to those matters SHE believes them to be true.

Evangelina Esparza
Complainant

Subscribed and Sworn to before me
this 31 day of OCTOBER, 2002.

Notary Public, Milwaukee County, Wisconsin

My Commission Expires PERMANENT

RECEIVED
NOV 7 2002
FIRE AND POLICE COMMISSION

Joint Complaint to the Milwaukee Fire and Police Commission

Pursuant to §62.50(19), Stats., the signatories to the complaint forms appended to this complaint hereby complain against, and request that the FPC investigate and discipline, any responsible members of the Milwaukee Police Department, including Police Chief Arthur Jones and all command police officers, detectives and patrol officers for their improper, violent, and intimidating actions in executing a search warrant against the El Rey grocery store and tortilla factory on September 18, 2002. Those actions aggrieved the complainants, and were improper and cause for discipline in that:

1. The police, in violation of the United States Constitution and laws of Wisconsin, far exceeded the scope of their narrow warrant, which was to search the premises of El Rey grocery store and tortilla factory for the following objects:

   a. prescription drugs; Ampicillin, Naproxen, etc.
   b. sales receipts
   c. order forms
   d. invoices
   e. containers for re-packaging prescriptions
   f. labels and label-makers
   g. shipping containers

   and instead engaged in a general search and overbroad search for nonprescription drugs, including narcotics and other controlled substances, not only of the El Rey grocery store, but also of the tortilla factory and of delivery trucks, which was unreasonably beyond the scope of the warrants issued by the court.

2. The police improperly and unreasonably executed the search warrant by engaging in excessive force and violence against innocent employees, customers and others lawfully present on the premises, and causing fear in such innocent persons by, among other things:

   a. Entering the premises screaming and shouting in English only, and manhandling and frightening people who didn't understand their orders;

   b. Entering the premises with their police identities hidden, so that employees and customers could not determine whether they were in fact law enforcement officials;

   c. Entering the premises with guns drawn, including handguns, shotguns, and semiautomatic rifles, and pointing and waving them

EXHIBIT A

at persons;

d. Pointing guns directly in the faces of persons;

e. Jabbing guns hard into the bodies of employees;

f. Forcing pregnant women to lie on their stomachs, then jerking them hard to their feet;

g. Pushing or otherwise forcing employees at the tortilla factory to lie on the ground;

h. In violation of MPD Policy 3/360.15(f), bringing in large and frightening police dogs to the general area where employees were herded together in close confinement.

3. The police improperly and unreasonably detained and imprisoned employees and other persons by, among other things:

a. In violation of Police Department Rules 3/730.00, 3/730.05 and 3/730.15, handcuffing all the employees at the tortilla factory for one or more hours.

b. In violation of Police Department Rules 3/730.00, 3/730.05 and 3/730.15, handcuffing pregnant women.

c. Blocking all exits so that no employees could leave of their own free will;

d. Forbidding employees and other persons lawfully present to speak or to depart the premises;

e. At the grocery store, ordering employees to raise their hand to request something to drink or to go to the bathroom, and accompanying employees to the bathroom;

f. Detaining employees and other persons for hours;

g. At the grocery store, forcing employees and other persons to stand with their hands above their heads for extended periods of time.

4. The police improperly and unreasonably executed a narrow search warrant covering the sale of prescription antibiotics by searching not only the area of the El Rey grocery where medicine was sold, but also

searching:

a. All delivery trucks

b. A lunch box in a truck cab

c. The lockers of employees at the tortilla factory

COMPLAINANTS REQUEST that the Fire and Police Commission:

1. Investigate the actions of all police officers in any way related to and/or involved in the above-described events, including the Police Chief, his command and supervisory officers, detective and patrol officers;

2. Investigate whether the Milwaukee Police Department members have filed all necessary reports on this incident, including the Form PF-10 required by MPD Policy 3/460.30(c) when firearms are pointed at persons;

3. Hold a hearing to take evidence related to the above-described events, which all involved police officers are required to attend;

4. Impose appropriate discipline on all officers involved, including suspension or termination; and

5. Pursuant to §62.50(1m), Wis. Stats., conduct a policy review of the Milwaukee Police Department search warrant execution policy and procedure; and

6. Order the Milwaukee Police Department to issue a public apology to the El Rey employees and customers and to the South Side community.

Respectfully submitted on behalf of the Complainants who have signed the appended forms,

by:

Attorney Micabil Diaz-Martinez
Attorney Karyn Rotker
American Civil Liberties Union of Wisconsin Foundation Inc.
207 East Buffalo Street, Suite 325
Milwaukee, WI 53202
(414) 272-4032

Attorney Peter G. Earle
Attorney Ellen Brostrom
Law Offices of Earle & Brostrom, LLP
111 East Wisconsin Avenue, Suite 1650
Milwaukee, WI 53202
(414) 276-1076

Attorney John F. Ebbott
Attorney Ness Flores
Legal Action of Wisconsin, Inc.
230 West Wells Street, Rm 800
Milwaukee, WI 53203
(414) 278-7722

Attorney Neifor Acosta
McNally, Maloney & Peterson, S.C.
2600 North Mayfair Road, Suite 1080
Milwaukee, WI 53226-1309
(414) 257-3399

Memorandum

To: Fire and Police Commissioners

CC: David Heard

From: Judith Andrade-Altoro

Date: August 20, 2003

Re: El Rey Joint Citizen Complaint

September 18, 2002
Police raid El Rey grocery store and tortilla factory.

October 2, 2002
Fire & Police Commissioner Ernesto Baca convened a special community meeting at United Migrant Opportunity Services (UMOS) to elicit comment from citizens concerning the raids.

November 7, 2002
We received the joint complaints in our office. The complainants are represented by Attorneys Micabeil Diaz-Martinez, Karyn Rotker, Peter G. Earle, Ellen Brostrom, John F. Ebbott, Ness Flores, and Neifor Acosta.

We received and reviewed the El Rey videos from the grocery store raid, but there was no video from the tortilla factory.

December 2002
We received our identification request back from the Milwaukee Police Department. This list identified all personnel that were present during the execution of the search warrant on September 18, 2002.

Mr. Heard and I met with some of the officers involved in the execution of the search warrant. They also gave us insight on how they execute search warrants and the standard operating procedures that govern search warrants.

January 2003
We requested individual complaints from each complainant in order to identify the specific rule violations that relate to each accused.

EXHIBIT

Mid-February to Mid-June 2003
We received the information we requested from all the complainants. We were able to identify specific rule violations in only two of the complaints. After a review and assessment of each complaint, I was unable to identify the officers involved. The complainants did not identify an individual officer; therefore, it made it difficult to relate the specific complaint to any of the 21 officers involved in the raid at the tortilla factory.

June to July 2003
Various conversations took place between Attorney Neifor Acosta and I, in which we discussed the possibility of a community meeting with the complainants, the attorneys and a few Milwaukee Police Department personnel. The Chief of Police indicated he would attend the meeting and represent the department. After speaking with Attorney Acosta, it was decided to explore other possible options.

August 2003
Commissioner Ernesto Baca and FPC Chairman Robert "Woody" Welch conferred and then engaged Executive Director David Heard, Staff Attorney Steven Fronk and myself in a series of conferences regarding procedural options (not specific facts regarding individual complaints). The consensus was that due to the inability to identify the accused officers, the only alternative available to the Commission is to forward the complaints to the Chief of Police, at which time the matter is no longer under the jurisdiction of the FPC. After discussion, we agreed to suggest the following course of action to Attorney Acosta.

The Commission would hold complaints in abeyance rather than dismiss them or refer them to the Chief. Mr. Acosta would provide a letter to the Commission listing what he believes to be the essential questions regarding search warrant policies and other matters related to the El Rey raids. The FPC would then forward the letter to the Chief of Police with a request for a response in writing. The FPC Chair has appointed Commissioner Ernesto Baca and me to a special committee on the execution of search warrants with the intent of holding a hearing once the response from the Chief is received.

Further, the FPC will make available to the candidates for the position of Police Chief the letter, response and any relative written materials regarding the raids. Applicants will be advised that they may be questioned regarding this matter at both the September 18th public hearing and in subsequent interviews with the Fire and Police Commission. Efforts will be made to determine prospective polices and the manner in which the city's next police chief will address the concerns of the community regarding the raids and the previous incidents which occurred during the Mexican Independence Day celebration.

It is the specific intent of the Fire and Police Commission, staff and members, to affirmatively address the concerns expressed by Mr. Acosta and others while providing a public forum to allow the community to be heard.

JAA/rk

Woody Welch
Chairman

Eric Mandel Johnson
Vice-Chairman

Carla Y. Cross
Leonard J. Sobczak
Ernesto A. Baca
Commissioners

David L. Heard
Executive Director

Cassandra K. Scherer
Examinations Supervisor

Steven Fronk
Hearing Examiner

City of Milwaukee

Department of Employee Relations
Fire and Police Commission

October 3, 2003

Arthur L. Jones, Chief of Police
Milwaukee Police Department
749 W. State St.
Milwaukee, WI 53233

Dear Chief Jones:

Enclosed please find copies of twenty-four (24) complaints which were filed as a result of the execution of search warrants on September 18, 2003 at the Mercado El Rey, 1023 S. Cesar Chavez Drive, and a wholesale/production facility affiliated with El Rey located at 1530 S. Muskego Avenue. The complaints allege numerous and often broad allegations of misconduct, but do not identify specific department members who are alleged to have committed any such act(s) of misconduct. The Board of Fire and Police Commissioners did not take provisional jurisdiction over these matters and have referred them to your office for a full investigation and appropriate disposition.

Also enclosed is a letter dated September 9, 2003 (with several attachments) from Attorney Neifor Acosta of McNally, Maloney & Peterson. It is my belief that Attorney Acosta's letter may be helpful in understanding and investigating the complaints.

Additional material in the Fire and Police Commission file related to these complaints may be helpful in your investigation. It should be noted that several of the complainants are represented by legal counsel. Please have your designee contact Steven Fronk at 286-5062 if a review of the Commission file is desired or if additional contact information for the complainants' attorneys is needed.

Upon completion of your investigation, it is anticipated that a report concerning your findings will be generated and that a copy of such report will be provided to each of the complainants and to this office. Thank you for your anticipated cooperation.

Very truly yours,

David L. Heard
Executive Director

DLH:rk

Enc.

cc: Attorney Neifor B. Acosta
Attorney Karyn Rotker
Attorney John F. Ebbott and Attorney Ness Flores
Attorney Peter Earle and Attorney Ellen Brostrom

Appendix Page 170

200 East Wells Street, Room 706, Milwaukee, Wisconsin 53202. Phone (414) 286-5000
Fax (414) 286-5050 Testing Fax (414) 286-5059 E-Mail fpc@milwaukee.gov
www.milwaukee.gov/fpc

1095-2003-3148 DV

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE EX REL. JOSE CASTANEDA,

Plaintiffs,

V. Case No. 03-CV-008737

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID E. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION,

Defendants.

FILED
CAL
NOV 10 2003
CAL
JOHN BARRETT
Clerk of Circuit Court

SUPPLEMENTAL AFFIDAVIT OF DAVID L. HEARD

STATE OF WISCONSIN)
)ss.
MILWAUKEE COUNTY)

Comes now David L. Heard being first duly sworn and upon his oath who deposes and states as follows:

1. Your Affiant is currently employed as Executive Director of the Board of Fire and Police Commissioners of the City of Milwaukee ("Board") and has filed a previous affidavit in this proceeding. To the extent necessary, your Affiant restates and reasserts those matters previously stated under oath relative to this matter.

2. Annexed hereto and incorporated herein by reference as Exhibit No. 1 is true and correct copy of the minutes of the Board for the date of October 2, 2003. Under item number 2 "Committee Reports", appears the item relative to the El Rey complaints.

Further your Affiant sayeth naught.

Dated and signed at Milwaukee, Wisconsin this 10th day of November, 2003.

DAVID L. HEARD, Executive Director
Board of Fire and Police Commissioners

Subscribed and sworn to before me
this 10th day of November, 2003.

Notary Public, State of Wisconsin
My Commission: 8/29/2004

74605

1095-2003-3198

I.C.

October 2, 2003

A Regular Meeting of the Board of Fire and Police Commissioners was held on the above date, commencing at 7:06 P.M.

PRESENT:	Commissioners:	Woody Welch, Chair Leonard J. Sobczak Ernesto A. Baca
ABSENT:	Commissioners:	Eric Mandel Johnson (Excused) Carla Y. Cross (Excused)

ALSO PRESENT: William Wentlandt, Chief, Milwaukee Fire Department; and Edward M. Stenzel, Assistant Chief, representing the Milwaukee Police Department.

Steven Fronk, Hearing Examiner, conducted the meeting in the absence of the Executive Director and announced that the minutes had been removed from the agenda.

1. NEW BUSINESS:

a) Mr. Fronk presented a staff request to revoke the temporary residency exemption granted by the Board to Police Officer Ricardo Cardenas on October 18, 2001. The exemption had been granted to allow Officer Cardenas to live outside the City of Milwaukee as long as his sons attended the Wisconsin School for the Deaf. As a condition of the exemption, Officer Cardenas was required to file regular reports as to his residency status. Since Officer Cardenas did not file several reports, a letter was sent to him on August 12, 2003 requesting one. He did not respond to that letter. His attorney was contacted and indicated that the sons have graduated from the school. Another letter was sent to Officer Cardenas on September 4, 2003, informing him that staff intends to recommend revocation of the exemption and asking for his input if he objected to that recommendation. Once again, no response was received from Officer Cardenas.

Assistant City Attorney Bruce Schrimpf asked that the letters of September 4 and August 12 be made a part of the record and received as exhibits. He then asked questions of Mr. Fronk which provided the following information: The letter of September 4 had been sent to the Mallory Avenue address in Milwaukee since Officer Cardenas apparently never made use of the exemption granted him and did not move out of the City of Milwaukee; and the letter was sent via regular U.S. mail and was not returned. Assistant Chief Stenzel indicated that Officer Cardenas was still a current member of the Milwaukee Police Department (MPD). Attorney Schrimpf stated that sending the letter via regular U.S. mail is better than sending it registered, because under State law, if a letter sent via regular mail is not returned, it is a legal presumption that the letter was received. That presumption is not made if a letter is sent registered.

Commissioner Baca moved to revoke the residency exemption. The motion was seconded by Commissioner Sobczak and carried unanimously.

2. COMMITTEE REPORTS:

a) Commissioner Sobczak presented the report of the Committee on Rules and Complaints and moved approval of the following two recommendations: Complaints No. 03-55 of Louis Glenn and No. 03-56 of Marcus Glenn, grant provisional jurisdiction and move the complaints forward for conciliation.

Commissioner Baca then read the following statement regarding a group of complaints that have not been assigned individual complaint numbers but are referred to collectively as the El Rey complaints: "On September 18, 2002 warrants were executed by the Milwaukee Police Department at the El Rey Grocery Store and the El Rey Tortilla factory on the near south side of the City of Milwaukee. In November 2002, this Board received a total of 24 complaints which alleged that the actions taken by the Milwaukee Police

EXHIBIT 1

Department on September 18, 2002 were improper. Neither the individual complaints nor a joint complaint attached thereto identified any member of the Milwaukee Police Department by name, badge number or other means of identification. In January 2003, Commission staff contacted the attorneys who represented the complainants. It was made clear to the attorneys at that time that it was necessary for each complaint to set forth specific act(s) of alleged misconduct by specific department members if those complaints were to go forward pursuant to Fire and Police Commission Rules. Between February 2003 and June 2003, revised complaints were received which contained additional information relative to the events of September 18, 2002. Fire and Police Commission staff reviewed all 24 of the complaints together with the additional information supplied by the complainants and/or their attorneys. No complaint identifies a specific act by a specific identified department member which could serve as a basis for finding a department member guilty of misconduct.

"The Committee on Rules and Complaints has considered all of the foregoing as well as the options available under Fire and Police Commission Rule XVII. We could recommend that the Board refer the matters for conciliation, pretrial and trial, but we do not believe that this is appropriate given the fact that none of the complaints identify specific acts of alleged misconduct by specific department members. The likelihood of the matter ever proceeding to trial, given the apparent inability to identify any alleged guilty party, is extremely slim.

"We could recommend that the Board dismiss each of the complaints for lack of prosecutorial merit. If a complainant is unable to identify the individual who may have committed an act of misconduct, there is little likelihood of that complainant being able to prove that a specific department member in fact committed misconduct. If this option is chosen, we would be doing nothing more than "sweeping the matter under the rug", and this we do not want to do and will not do.

"Our final option is to refer these matters to the Chief of Police with a firm recommendation from the Board that each complaint be fully investigated and appropriate action taken. The Chief has reassured this Board and this community on numerous occasions that any and all allegations of misconduct which are brought to his attention will be fully investigated and acted upon in an appropriate manner. We take the Chief at his word in this regard, and trust that he will do his best to see that justice is done as concerns complainants and department members alike.

"The Committee on Rules and Complaints, having met previously on these matters more than once, and having fully explored those options which are available to us, does hereby recommend that all 24 of the complaints filed by individuals as a result of the execution of search warrants at the El Rey Grocery Store and El Rey Tortilla Factory on September 18, 2002 be referred to the Chief of Police for appropriate investigation and disposition."

Commissioner Baca then moved approval of all three recommendations of the Committee on Rules and Complaints. Commissioner Sobczak seconded the motion, which carried unanimously. The Chair stated that Commissioner Baca and staff member Judy Andrade-Altoro had been asked to chair a special committee to examine MPD search procedures. Ms. Andrade-Altoro has left the Commission staff, so the Chair will join Commissioner Baca to look at issues of risk assessment and the manner in which search warrants are executed. A meeting will be held on Wednesday, October 8, 2003 at 1:30 p.m. in the conference room of the Wisconsin Hispanic Scholarship Foundation located at 1220 West Windlake Avenue. The Director will ask Chief of Police Arthur L. Jones for a representative of the Department to give input on search warrant procedures.

b) Commissioner Sobczak presented the report and recommendations of the Ad Hoc Committee on Lesbian, Gay, Bi-sexual, and Transgender Issues, which the Chair designated as the Sobczak Report. Commissioner Baca moved formal acceptance of the report, seconded by Commissioner Welch. The motion carried unanimously. The Chair stated that additional material would be formally added at the October 16 meeting, at which time the full Board will adopt the recommendations of the committee.

Commissioner Sobczak commended the committee members and went through the attached report. Commissioner Baca opined that adopting the recommendations of the committee would make it easier for an affinity group to form. Commissioner Sobczak reviewed how the departments in other cities handle these issues. The Chair commended Commissioner Sobczak and the work of the committee. He also stated that the Board takes these recommendations seriously and takes responsibility for changing the work environment in regard to these issues. Chief Wentlandt stated he also takes the recommendations seriously and accepts responsibility for the environment in the Fire Department. Assistant Chief Stenzel stated the Police Department looks forward to working with the Commission to implement the recommendations. Commissioner Baca moved to approve the recommendations of the report, seconded by Commissioner Sobczak. The motion carried unanimously.

3. FIRE DEPARTMENT:

a) The following promotions, as presented by Chief Wentlandt, were approved by the Board:

TO FIRE LIEUTENANT, on a waiver basis, from eligible list established November 1, 2001, effective October 12, 2003:

#26 – RONALD L. JOHNSON, JR. and #27 – JERRY L. MOES.

b) Mr. Fronk presented a letter dated August 26, 2003, from Probationer Firefighter Warren Price, who requests an extension of the temporary City residency exemption. Firefighter Price is required to move into the City by October 14 and requests an extension until October 31. He has an accepted offer on a house, but the sellers may not be able to move out right away if the construction of their new condo is delayed. Firefighter Price was present and stated that the seller will not be able to vacate until October 12. Staff recommends that an extension be granted until November 6, 2003. Commissioner Sobczak moved to grant an extension until November 6, 2003. The motion was seconded by Commissioner Baca and carried unanimously.

4. POLICE DEPARTMENT:

a) The following promotions, as presented by Chief Jones, were approved by the Board:

TO PROGRAMMER II (Pay Range 556), from Administrative Assistant IV, an underfill for Programmer Analyst, effective October 12, 2003:

NECIA E. HOOVER.

TO ADMINISTRATIVE ASSISTANT IV, from Administrative Assistant II, effective October 12, 2003:

PEGGY A. KOCEJA.

TO PERSONNEL PAYROLL ASSISTANT I, from Office Assistant II, effective October 12, 2003:

LAURIE C. HASSEL.

b) Mr. Fronk presented a letter dated September 23, 2003, from Chief Jones, wherein he notifies the Board that Probationary Police Officer Ryan M. Flejter has been terminated under Personnel Order 2003-376 dated September 17, 2003.

c) Mr. Fronk presented a letter dated September 23, 2003, from Chief Jones, wherein he presents a request for reappointment to the position of Identification Technician from Bridget O. Schuster. Ms. Schuster was appointed on August 14, 1995, and resigned in good standing on June 8, 2003. Ms. Schuster was present

and stated that she had to resign due to child and family care reasons. Subsequent to her resignation, she has been able to make other care arrangements and wishes to be reinstated. She is aware that she would be returning as a new employee, in accordance with the labor contract. Chief Jones recommends that her request be approved. Commissioner Baca moved approval of the request, seconded by Commissioner Sobczak. The motion carried unanimously.

d) Mr. Fronk presented an undated letter from Probationer Police Officer David A. Ligas, Jr., who requests a one-month extension of the temporary City residency exemption. Officer Ligas is currently required to move into the City by October 28. He has an accepted offer on a house, but the sellers do not close on their new house until October 28. He will need time to move in. Staff recommends that an extension be granted until December 4, 2003. Commissioner Baca moved to grant an extension until December 4, 2003. The motion was seconded by Commissioner Sobczak and carried unanimously

Commissioner Baca moved to adjourn the meeting, seconded by Commissioner Sobczak. The motion carried unanimously.

The meeting concluded at 7:57 P.M.

Respectfully submitted,

David L. Heard
Executive Director

DLH:REK:rk

1095-2003-3198

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

RECEIVED
SEP 30
FIRE AND POLICE COMMISSION

State ex rel.

Jose Castaneda,

Plaintiff,

v.

Woody Welch, Chairman, Milwaukee Fire and Police Commission, Eric Mandel Johnson, Vice Chair, Milwaukee Fire and Police Commission, Carla Y. Cross, Leonard J. Sobczak, Ernesto A. Baca, Members of the Milwaukee Fire and Police Commission, and David E. Heard, Executive Director, Milwaukee Fire and Police Commission,

Defendants.

ORDER

Case No. 03CV008737

EXHIBIT 1

FILED
SEP 30 2003

Upon reading and filing the verified complaint, and upon motion of the attorneys for the Plaintiff, let an alternative writ of mandamus issue out of, and under the seal of, this court to Woody Welch, Chairman, Milwaukee Fire and Police Commission, Eric Mandel Johnson, Vice Chair, Milwaukee Fire and Police Commission, Carla Y. Cross, Leonard J. Sobczak, Ernesto A. Baca, Members of the Milwaukee Fire and Police Commission, and David E. Heard, Executive Director, Milwaukee Fire and Police Commission, commanding them, and each of them, to set a date for trial and hearing of the charges set forth in the joint complaint filed by the Plaintiff and 24 others with the Fire and Police Commission on November 7, 2003 or, in default, to show cause before the Circuit Court for Milwaukee County, to be held at the Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin, at COURTROOM 415 a.m. on October 15.

2003, or as soon thereafter as counsel can be heard, why respondents have not done so, by return to the writ, and let a copy of the Complaint be served on Defendants, with the writ.

Dated September 30, 2003.

By the Court:

Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE EX REL. JOSE CASTANEDA,

Plaintiffs,

V. Case No. 03-CV-008737

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID E. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION,

Defendants.

ORDER

Pursuant to the schedule in this matter, this matter came on for hearing before the court on Monday, November 17, 2003. The plaintiff Jose Castaneda appeared in person and by Attorney Ness Flores and Attorney John Ebbott. The defendants appeared by Milwaukee City Attorney Grant F. Langley, by Assistant City Attorney Bruce D. Schrimpf. In court also was Attorney Steven Fronk, Hearing Examiner to the Board of Fire and Police Commissioners

Based upon the proceedings had and the matters on file herein, together with the briefs of counsel and the affidavits of David L. Heard, the following is:

ORDERED

1. This matter is set for a status conference on December 22, 2003 at 2:00 p.m.

2. David L. Heard and the Board of Fire and Police Commissioners are directed to send a letter to the new Chief of Police not later than the 24th of November, 2003. That letter shall address the following:

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NOV 26 2003
CLERK OF CIRCUIT COURT

a. The fact that this matter is set for a status conference at 2:00 p.m. on December 22, 2003.

b. That the investigation of the 24 complaints in this matter shall be done by the Milwaukee Police Department on a priority basis, and that on or before December 19, 2003 the new Chief of Police is to report to the Board of Fire and Police Commissioners the status of the investigations to that point in time.

c. A copy of the letter referenced above shall be forwarded to the court and to counsel of record.

3. That on December 22, 2003, the court will entertain the possibility of setting a date for the investigation to be completed or tried under § 62.50(19), Stats., as only one option. The court will further consider other options depending on the report received by the Board of Fire and Police Commissioners from the new Chief of Police. Among matters the court will consider, is the issue of whether the writ of mandamus sought in this action is an appropriate remedy, or if such a writ should be denied.

4. The court will not consider any matter relative to the plaintiff's motion for a declaratory judgment. on 12/22/03 LEW 11/26/03

Signed and dated this 26 day of November, 2003.

BY THE COURT:

Honorable LEE E. WELLS

75057
1095-2003-3198

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE ex rel. JOSE CASTANEDA,

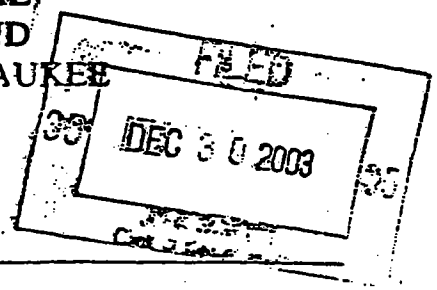
Plaintiffs,

v.

Case No. 03-CV-008737

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID L. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION,

Defendants.



ORDER

The above-captioned matter came on for hearing pursuant to order of the court. The plaintiffs appeared in person and by Attorney John Ebbott, Legal Action of Wisconsin, Inc., and Attorney Ness Flores, the defendants appeared by Grant F. Langley, Milwaukee City Attorney, represented by Bruce D. Schrimpf, Assistant City Attorney, with Attorney Steven Fronk of the Board of Fire and Police Commissioners.

Based upon the proceedings had and the submissions on file herein, the following is:

ORDERED:

1. The court, having been significantly impressed by the letter of Police Chief Nanette H. Hegerty dated December 16, 2003, desires greatly that an opportunity be made to the parties to have a productive meeting as referenced in Chief Hegerty's letter of December 16, 2003.

2. The court declines to make any rulings on the pending prayers for relief or cross motions for dismissal and recesses this matter to March 29, 2004 at 1:30 p.m. for further proceedings.

Dated and signed at Milwaukee, Wisconsin this 30 day of December, 2003.

BY THE COURT:

Hon. Lee E. Wells
Circuit Judge, Branch 35

1095-2003-3198:76196

IN SUPREME COURT
STATE OF WISCONSIN

State ex rel. Jose Castaneda,

Plaintiff-Respondent,

v.

Woody Welch, Chairman, Milwaukee Fire and Police Commission, Eric Mandel Johnson, Vice Chair, Milwaukee Fire and Police Commission, Carla Y. Cross, Leonard J. Sobczak, Ernesto A. Baca, Members of the Milwaukee Fire and Police Commission, and David E. Heard, Executive Director, Milwaukee Fire and Police Commission,

Defendants-Appellants.

Case No. 04-3306

Circuit Court Case No. 03 CV 008737

APPEAL FROM CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE PATRICIA D. MCMAHON, PRESIDING UPON ACCEPTANCE OF THE CERTIFICATION OF THE COURT OF APPEALS

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

John F. Ebbott
State Bar No. 1012871

Ness Flores
State Bar No. 1011658

Attorneys for Plaintiff-Respondent

Legal Action of Wisconsin, Inc.
230 W. Wells Street, Room 800
Milwaukee, Wisconsin 53203
414/278-7777

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MILWAUKEE CITY CHARTER

OTHER AUTHORITIES

I. STATEMENT OF THE ISSUES

A. Whether Rule XVII of the Milwaukee Fire and Police Commission, (hereafter "Board")[1] with respect to complaints by aggrieved persons, is invalid because Wis. Stat. §62.50 does not provide general rulemaking authority to the Board to adopt such a rule.

The trial court answered this "yes."

B. Whether Rule XVII of the Board, with respect to complaints by aggrieved persons, is invalid because, as adopted and implemented, it is in conflict with Wis. Stat. §62.50(19).

The trial court answered this "yes."

Defendants-Appellants (hereafter "Appellants") misstate the issues. As to their first issue, this statement assumes that the sole purpose, and effect, of the stricken Rule XVII is "the processing of citizen complaints." This is disputed, and is not in evidence. And, the Circuit Court's decision was based on all of Wis. Stat. §62.50. It did not limit its analysis to §62.50(3)(a).

Appellants' second issue also misstates the Circuit Court's decision by setting up a question – "are administrative rules . . . necessary" – which was neither tried nor decided. The Circuit Court decided that, even if Wis.

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[1] We use "Board" in this brief to make our terminology consistent with that of the Defendants-Appellants. In other documents in this case, we have used "Commission" and "FPC."

Stat. §62.50 provided broad rulemaking authority, the Board's Rule XVII was not a rational and efficient means of carrying out the Board's duties. To the contrary, the court determined that, rather than facilitate the processing of citizen complaints, the rule has served as a barrier to citizens seeking justice. Record 27, pp. 14-15 (hereafter cited "R.27:14-15").

II. STATEMENT AS TO WHETHER ORAL ARGUMENT IS NECESSARY

Oral argument is not necessary because the trial court rendered a comprehensive decision amenable to review and because the issues can be fully developed through the briefs.

III. STATEMENT AS TO WHETHER THE OPINION SHOULD BE PUBLISHED

The opinion should be published because it will provide guidance as to which statutory language permits and which prohibits general administrative rulemaking.

IV. STATEMENT OF THE CASE

A. Description of the nature of the case

This case was originally a mandamus and declaratory judgment action seeking action by the Board to hear the complaints of "aggrieved persons" against the Milwaukee Police. The mandamus claim asked the Circuit Court, pursuant to Wis. Stat. §62.50(19), to order the Board to set a date for trial and investigation of Plaintiff-Respondent (hereafter "Respondent") Jose Castañeda's "aggrieved person" complaint to the Milwaukee Board. The declaratory judgment claims asked the Circuit Court (1) to declare the Board's Rule XVII invalid as not authorized by and contrary to Wis. Stat. §62.50, and (2) to declare the Milwaukee Police Department practice of concealing the identity of officers to be contrary to Wis. Stat. §62.50. The Circuit Court declared Rule XVII invalid, and the Appellants appeal that declaratory judgment. The mandamus claim and the second declaratory judgment claim have been settled and dismissed without prejudice. R.46.

B. The Procedural Status of the Case Leading up to the Appeal.

This case began with the filing by 25 aggrieved persons of a joint administrative complaint with the Milwaukee Board, alleging multiple acts of police misconduct in the execution of search warrants at the El Rey grocery and tortilla factory. One of the principal persons complained against was the Chief of Police. The joint administrative complaint was filed on November 7, 2002. The police action occurred on September 18, 2002.

On September 30, 2003, after nearly a year during which the Board took no action, Respondent Jose Castañeda filed this mandamus and declaratory judgment action in the Circuit Court for Milwaukee County. Just two days later, on October 2, 2003, the Board took up the joint administrative complaint, declined to take "provisional jurisdiction", and referred it to the Chief of Police for investigation and disposition. R.5, ¶8 and Ex. 4.

Following this referral, on October 7, 2003, Respondent Jose Castañeda filed an amended complaint challenging the validity of Board Rule XVII, under the authority of which the Board had failed to act and

then had referred the administrative complaint to the Chief. R.6. On October 8, 2003, Appellants moved to dismiss the amended complaint. R.7; Respondent's Supplemental Appendix (hereafter "R.S.A.") pp. 6-10. On May 24, 2004, the court heard oral argument. R.53.

On July 15, 2004, the Circuit Court issued a declaratory judgment declaring Rule XVII invalid as not authorized by and contrary to Wis. Stat. §62.50. R.27. On August 16, 2004, the court issued an order of declaratory judgment. R.33. On August 20, 2004, Appellants moved for a stay of the Circuit Court's order, R.34, which was denied. On August 30, 2004, Appellants filed in the Court of Appeals a petition for a permissive appeal and a request for a stay of the trial court's order. On September 1, 2004, the Court of Appeals granted a stay pending further order. R.41. On September 10, 2004, Respondent moved for a reconsideration of the Court's stay. On October 7, 2004, after briefing, the Court of Appeals denied the Appellants' petition for a permissive appeal, denied their motion for stay, and vacated the temporary stay of the Circuit Court's order.

On December 7, 2004, the parties settled the mandamus and "concealed identity" declaratory judgment claims, and dismissed those

inconsistent with §62.50 and declaring that Appellants had no authority to promulgate Rule XVII. *Id.* at 24.

D. Statement of Facts Relevant to the Issues Presented for Review.

The Circuit Court, in the context of a motion to dismiss,[2] found as the underlying facts those recited in its Decision. R.27:5-7. Significant among these facts are:

- The men [police officers] were wearing blue jackets or vests with no badge numbers or nameplates; identifying information had been concealed. R.27:5.

- On November 7, 2002, Plaintiff Jose Castañeda and 24 other employees filed a joint complaint with the FPC[3] pursuant to Wis. Stat. §62.50(19). *Id.* at 6.

- The complaint requested that the FPC investigate the actions of all police officers in any way related to and/or involved in the events described in the complaint, *including* the police chief, his command and supervisory officers, detectives and patrol officers. *Id.* (Emphasis supplied.)

- The FPC had taken no action on the complaint by September 30, 2003. *Id.*

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2 "For the purpose of this motion, if the facts in the joint complaint were presumed to be true . . ." R.27:15. *See Falk v. City of Whitewater*, 65 Wis. 2d 83, 85, 221 N.W. 2d 915 (1974).

3 The court in its decision uses "FPC" for the Fire and Police Commission.

- On October 2, 2003, the FPC met and decided that the complaint had not complied with FPC Rule XVII. *Id.*; R.11:Ex. 1, Item 2; R.S.A.:2-5.

- The FPC voted to refer the joint complaint to Chief Arthur Jones to investigate and to "take appropriate action." R.27:6; R.11:Ex. 1, Item 2; R.S.A.:2-5, Item 2.

- The FPC stated that it was not dismissing for lack of prosecutorial merit because that would be "sweeping the matter under the rug." R.27:6; R.11:Ex. 1, Item 2; R.S.A.:2-5, Item 2.

- The FPC stated that the basis for the action was that the complaint failed to identify specific acts by specific police officers. R.27:6; R.5:¶¶ 5-7, Exs. 3 and 4; R.11:Ex. 1, Item 2; R.S.A.:2-5, Item 2.

- The FPC stated that it did not take "provisional jurisdiction" of the complaint and had referred the complaint to Chief Jones ". . . for a full investigation and appropriate disposition." R.27:6; R.5:Ex. 4; R.11:Ex. 1, Item 2; R.S.A.:1.

- The FPC requested only a report from Chief Jones. R.27:6; R.5:Ex. 4; R.S.A.:1.

The Circuit Court also found *as facts*:

- Rule XVII, rather than facilitate the processing of citizen complaints, has served as a barrier to citizens seeking redress from their government. R.27:14-15.

- While citizens represented by counsel in the instant case had filed a detailed and specific complaint in November 2002, as of July 15, 2004 (date of Decision), the FPC had not set a date for investigation and trial. *Id.* at 15.

- The complainants, in their complaint, stated the date, time and location of the incident and sufficient other information that the FPC could obtain the names of those officers assigned to execute the search warrant from department records; much of that information had been obtained, but was still insufficient under Rule XVII. *Id.*

- The FPC, the agency responsible for providing citizen oversight of the police department, affirmatively condoned the conduct described in the joint complaint by taking the position that the FPC was powerless to review those allegations. *Id.* at 15-16.

- Failure to state a cause for removal was not the reason the FPC declined to set a date for investigation and trial for the Plaintiff's complaint. *Id.* at 16. *See also* R.5:¶¶5-7, Exs. 3 and 4; R.11:Ex. 1, Item 2; R.S.A.:2-5, Item 2.

- In adopting Rule XVII, the FPC has engrafted a complex layer of requirements onto §62.50(19) which serves to frustrate the legislative purpose. R.27:17.

- To add a requirement that the citizen set forth the specific rule violation frustrates and discourages citizen complaints. *Id.*

- Rule XVII would require a citizen to find out what all the rules of the police department are, determine which rule applies to the harm he wishes to complain about, determine whether this is a violation of the statute or the City Charter, then prepare a complaint setting forth with specificity the rule violation alleged; this is difficult for anyone, especially given the reality that most persons would not have access to counsel. *Id.* at 18.

- The rules and regulations and standard operating procedures of the Milwaukee Police Department comprise a stack of documents over three inches high. *Id.*

- The copies of the rules and regulations available in the library are from 2000, and do not reflect the most current updates. *Id.*

- To require citizens to comb through the Milwaukee Police Department rules and determine which one or ones are applicable, and whether their complaints implicate the state statute or the City Charter, is unreasonable and not consistent with the intent to give the citizens access to government. *Id.*

- Despite the extensive and detailed complaint, which cites specific rule violations and alleges, *inter alia,* that police forced pregnant women to lie on their stomachs, then jerked them hard to their feet, and that they jammed guns hard into the bodies of employees, the FPC applied Rule XVII in dismissing the complaint and referring it to the Chief of Police for resolution. *Id.* at 19-20.

- Under Rule XVII, the FPC has abdicated its responsibility and abandoned its ultimate decisionmaking authority. *Id.* at 21.

- The referral of the joint complaint was a dismissal of the complaint and a referral to the Chief for resolution; it was not a request to obtain information to assist the FPC in the investigation and trial of the complaint. *Id.*

- The referral to the Chief contains no time limit and no requirement of any response, but sends it to the Chief, one of the individuals complained against, to take action or not take action. *Id.*

- Rule XVII, rather than providing an efficient and fair process for citizen complaints, has served as a way to avoid the requirements of §62.50(19). *Id.* at 22.

- With Rule XVII, when a citizen seeks to file a complaint that the officer deliberately concealed his or her identity, there is the Catch-22 response that the person must provide the name of the officer and there is no review of that conduct. *Id.* at 23.

These findings of fact by the Circuit Court are entitled to deference on appeal, especially considering that the Circuit Court's findings were strongly reinforced by the evidence submitted by *Appellants* in seeking a stay of the Circuit Court's order. That evidence showed that, since 1998, of 847 complaint entries, or 491 complaints, *only 4 hearings were held, all in 1999, and not one case resulted in discipline by the Board.* R.36:Ex. 11. And, on a motion to dismiss, R.7; R.S.A.:6-10, the allegations in the Respondent's amended complaint must be taken as true.

In their Statement of Facts, Appellants imply that it was impossible for them to identify from the complaints the officers or the rule violations involved in the El Rey search warrant executions. Appellants' Brief, pp. 14-17. This is not accurate. As the Circuit Court found:

> The joint complaint filed by the plaintiff and others contains specific allegations concerning the incident on September 18, 2002. Some of the allegations cite specific rule violations . . .

R.27:19. Indeed, the joint complaint itself set forth, in addition to actions which surely constituted rule violations, seven specific instances *with citations to the rules* which had been violated:

1. MPD Policy 3/360.15(f) - bringing in large and frightening dogs to the general area where employees were herded together in close confinement;

2. Rules 3/730.00, 3/730.05 and 3/730.15 - handcuffing all employees at the tortilla factory for one or more hours;

3. Rules 3/730.00, 3/730.05 and 3/730.15 - handcuffing pregnant women.

R.1; R.6; Appellants' Appendix, (hereafter "A.App.") p. 164.

Among the actions spelled out in the complaint which surely constituted rule violations were:

a. Entering the premises screaming and shouting in English only, and manhandling and frightening people who didn't understand their orders;

b. Entering the premises with their police identities hidden, so that employees and customers could not determine whether they were in fact law enforcement officials;

c. Entering the premises with guns drawn, including handguns, shotguns, and semiautomatic rifles, and pointing and waiving them at persons;

d. Pointing guns directly in the faces of persons;

e. Jabbing guns hard into the bodies of employees; and

f. Improperly and unreasonably detaining employees and other persons;

A.App.:163-165.

The Board obviously had this information as of November 7, 2002, the date the joint administrative complaint was filed. The Board also knew at that time that concealing nameplates was a violation of Rule 2/900.15. R.30:3; R.31; R.S.A.:11-13.

Much officer identity information was known by the Board long before it dismissed the complaints on October 2, 2003. As early as December of 2002, the Board had a list of "all personnel that were present during the execution of the search warrant on September 18, 2002." R.5:Ex. 3; R.S.A.:14. "All personnel" obviously included those police officers who had handcuffed pregnant women and those who were in charge of the operation and thus ultimately responsible for the abuses, and who were the subjects of the complaint. And, the Board's staff actually ". . . met with some of the officers involved in the execution of the search warrant . . . ." and had in November ". . . received and reviewed the El Rey

videos from the grocery store raid . . .". *Id.* There is no record evidence showing that Board staff asked the police who handcuffed the pregnant women. The evidence is that the Board preferred to employ Rule XVII to impose on the complainants the entire burden of matching specific officers to specific violations -- officers who had concealed their identities during the raid. As the Circuit Court found:

> In adopting Rule XVII, the FPC has engrafted a complex layer of requirements onto §62.50(19) that was not contemplated by the legislature and which serves to frustrate the legislative purpose.

R.27:17.

V. STANDARD OF REVIEW

The standard for appellate review of a circuit court's decision whether to permit or deny declaratory relief was set forth in *Putnam v. Time Warner Cable*, 2002 WI 108 ¶40, 255 Wis. 2d 447, 472 (2002):

> A decision to grant or deny declaratory relief falls within the discretion of the circuit court. The circuit court's decision to grant [or deny] declaratory relief will not be overturned unless the circuit court erroneously exercised its discretion. This court will uphold a discretionary act if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge would reach.

The Circuit Court in this case examined the relevant facts, as shown in its written opinion. It also applied a proper standard of law, R.27:8-9 – one on which both Respondent and Appellants agreed. R.53:41, beginning line 24, p. 42 and p. 43 through line 15; R.S.A.:17-19. The Circuit Court used a rational process in reaching its conclusion, which is demonstrated and articulated in the comprehensive and thorough written opinion underlying its order. And, it certainly cannot be maintained that no reasonable judge would reach the conclusion reached by the Circuit Court in the instant case.

A second standard of review is that findings of fact made by a trial court sitting without a jury shall not be set aside unless they are clearly erroneous. *Mentzel v. City of Oshkosh*, 146 Wis. 2d 804, 808, 432 N.W. 2d 609 (Wis. App.1988). When more than one inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. *Id.* The appellate court will search the record for evidence to support the trial court's findings of fact. *Id.*

A third standard of review is that used in determining whether an administrative rule exceeds statutory authority. The Court in *Conway v. Bd. of Police and Fire Commrs.*, 2003 WI 53, 262 Wis. 2d 1, enunciated this

standard as ". . . de novo, although we benefit from the analyses of the circuit court and the court of appeals." *Id.* at ¶19.

There is no dispute between the parties as to the law governing review of administrative rules. That law is succinctly stated in *Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Department of Natural Resources*, 2004 WI 40, ¶¶13-14 and *Conway*, *supra*, ¶¶27-31, and includes the following principles:

If a rule contradicts the language of a statute or the statute's legislative intent, the rule is not reasonable, exceeds the agency's statutory authority and must be invalidated. *Seider v. O'Connell*, 2000 WI 76, ¶¶26-28, 236 Wis. 2d 211, 226. To determine whether an agency has exceeded its statutory authority in promulgating a rule, this Court first examines the enabling statute. The enabling statute indicates whether the legislature expressly or impliedly authorized the agency to create the rule. An administrative agency exceeds statutory authority if its rule conflicts with the language of the statute or the statute's intent. *Conway, supra.* In order for the Board's adoption of a rule to be a valid exercise of administrative power, it is necessary that such action: (1) be based upon a proper

delegation of power by the legislature, and (2) not constitute administrative action in excess of that statutorily conferred authority. *State Department of Administration v. DILHR*, 77 Wis. 2d 126, 133-34, 252 N.W. 2d 353 (1977). It is necessary to consider the sections of the statute in relationship to the whole statute and to related sections. *State v. Sweat*, 208 Wis. 2d 409, 416, 561 N.W. 2d 695 (1997).

VI. ARGUMENT

A. Rule XVII of the Milwaukee Board, with respect to complaints by aggrieved persons, is invalid because Wis. Stat. §62.50 provides no general rulemaking authority to the Board to adopt such a rule.

Wis. Stat. §62.50 is not among those statutes which set forth an agency's general responsibility, provide some basic elements to guide the exercise of that responsibility, and leave the rest to agency rulemaking. Quite the contrary, in § 62.50 the legislature sharply limited the Board's rulemaking authority to two narrow areas, and detailed all other areas of Board operation in the statute itself. The *only* part of §62.50 which authorizes Board rulemaking is subs. (3), and subs. (3) does *not* authorize Board Rule XVII.

§62.50(3) provides, in relevant part:

> *Rules. (a) . . . The board may prescribe rules* ***for the government of the members of each department****, and may delegate its rule-making authority to the chief of each department. . . .*
>
> *(am)* ***The common council may suspend any rule prescribed by the board*** *under par. (a).*
>
> *(b) The board shall adopt rules to* ***govern the selection and appointment of persons employed*** *in the police and fire departments of the city. . . .*

(Emphasis supplied). Rules "for the government of the members of each department" are those which relate to the conduct and working conditions of police officers, similar to personnel policies. By the express language of the statute, they relate only to "the members of each department," and do not involve the general public, as do complaint procedures. Citizen complainants are not "members of each department." These are the rules and regulations and standard operating procedures of the Milwaukee Police Department, comprising a stack of documents over three inches high, R.27:18, which the Board submitted to the Circuit Court.

Even this limited authority, to prescribe rules for the government of department members, was circumscribed by the legislature, as in subs.

3(am)[4] it gave the common council the power to suspend *any rule* "governing the members." And, this authority does not even extend to all aspects of the "government of the members": items such as salaries and pensions, subs. (10), and "rest days", subs. (10m), are reserved for the common council or for the statute itself.

The Circuit Court's carefully reasoned decision stated:

> Defendants contend that the language in §62.50(3) "for the government of the members" is equally expansive language and should be interpreted to include the disciplinary process. But the plain language of the statute does not support this interpretation. The dictionary definition defines "government" in this context as "direction, control, management, rule." This definition is consistent with the limited interpretation as discussed above, not an expansive one to cover areas such as investigation and trials. In addition, the statute as a whole does not support an expansive interpretation.

R.27:13; A.App.:127.

The Court's construction here is perfectly consistent with the requirement of the Police Chief that police officers purchase their own uniforms in the 92-year-old case of *Kasik v. Janssen*, 158 Wis. 606, 149 N.W. 398 (1914), relied on, for the first time in this case, by the Board.

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[4] Where "subs." is used henceforth, it refers to a subsection of Wis. Stat. §62.50.

Wis. Stat. §62.50, Wis. Stats., contains a statutory scheme which is as follows:

Board Can Rulemake	Statute Only - No Rulemaking
(3)(a) Government of members	(10m) Rest days
(3)(b) Selection and appointment	(11) Discharge or suspension
(4) Same	(12) Trial ordered
(5) Examinations	(13) Discharge or suspension; appeal
(7) Ass't. Chief reinstatement	(14) Complaint
	(15) Notice of Trial
	(16) Trial
	(17) Decision; standards to apply
	(19) Charges by aggrieved person

Subs. (4) contains a key phrase which the legislature uses throughout §62.50 to indicate when Board rules are authorized: **"in accordance with such rules and regulations"**:

> (4) . . . *The rules and regulations shall specify the date when they take effect, and thereafter all selections of persons for employment, appointment or promotion, either in the police force or the fire department of such cities except the chief of police, the inspector of police, the chief engineer and the first*

> *assistant of the fire department, shall be made* ***in accordance with such rules and regulations.***

(Emphasis supplied). Subs. (5), governing the "examinations for candidates for each class," contains a similar express reference to Board rules:

> *(5) Examinations. The examinations* ***which the rules and regulations provide for*** *shall be public . . .*

(Emphasis supplied). The same is true of subs. (7)(a), which relates to the "government of the members" in that it governs the reinstatement of assistant chiefs to previously-held positions:

> *(7) Assistant chiefs, inspectors and captains; vacancies. (a) . . . subject thereafter to reinstatement to a previously held position on the force* ***in accordance with the rules prescribed by the board.***

(Emphasis supplied). However, in subs. 7(a), the *removal* of an assistant chief is not within Board rulemaking authority. That is to be done " . . . *pursuant to s. 17.12(1)(c),"* rather than "in accordance with the rules prescribed by the board." Similarly, suspension and removal of an inspector or captain of police in subs. (7)(b) is to be done "***under this***

section,[6]*"* not "in accordance with the rules prescribed by the board." This is a critical distinction which the legislature makes throughout §62.50.

None of the ensuing subsections, which relate to *trials*, contain the phrase *"in accordance with the rules prescribed by the board,"* or any similar reference to Board rules. Subs. (9) provides: "*subject to trial* ***under this section.***" Subs. (11), relating to discharge or suspension for more than 30 days, contains the same phrase: " . . . *except for cause and after trial* ***under this section.***" Subs. (12) governs trials where a complaint is made to the chief: " . . . *and a trial shall be ordered by the board* ***under this section.***" Subs. (16), the primary subsection of §62.50 which governs trials and investigations, provides "*[i]n the course of any trial or investigation* ***under this section.***"

The subsections of §62.50 which govern police and fire department operation which do not authorize Board rulemaking thus do not contain the phrase "*in accordance with the rules prescribed by the board*"; rather, they contain other phrases making clear that rulemaking is *not* authorized, such as "*under this section*" or "*pursuant to s. 17.12(1)(c).*"

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6 Emphasis throughout on this phrase is supplied; it is not emphasized in the statute.

In addition to the difference in these key phrases, the lack of Board authority to make rules has been made clear by the legislature in that it sets forth the governing procedures in the statute itself, or refers to rules of procedure found in other statutory sections. Subs. (13), governing discharges or suspensions and the appeal therefrom, sets forth specific procedures which must be followed by the Chief, and includes *a specific sample form* which the department member can use to appeal to the Board. Subs. (14), governing complaints generated under subss. (12) and (13), sets forth specific service and notice procedures, with specific deadlines:

> *(14) Complaint. The board, after receiving the notice of appeal, shall, within 5 days, serve the appellant with a copy of the complaint and a notice fixing the time and place of trial, which time of trial may not be less than 5 days nor more than 15 days after service of the notice and a copy of the complaint.*

The legislature clearly did not leave this process to the rulemaking authority of the Board under subs. (3).

Similarly with the notice of trial. The manner of service is not left to Board rule, but is to be done pursuant to the rules of civil procedure:

> *(15) Notice of trial. Notice of time and place of the trial, together with a copy of the charges preferred shall be served*

upon the accused ***in the same manner that a summons is served in this state.***

(Emphasis supplied).

Subs. (16), the investigation and trial section, provides detailed investigatory and trial procedures, including a contempt procedure which is not left to Board rule, but is to be the same as that followed in municipal courts:

> *(16) Trial; adjournment. The accused and the chief shall have the right to an adjournment of the trial or investigation of the charges, not to exceed 15 days. In the course of any trial or investigation* ***under this section****, each member* ***of the fire and police commission*** *may administer oaths, secure by its subpoenas both the attendance of witnesses and the production of records relevant to the* ***trial and investigation****, and compel witnesses to answer and may punish for contempt* ***in the same manner provided by law in trials before municipal judges*** *for failure to answer or produce records necessary for the trial. The trial shall be public and all witnesses shall be under oath. The accused shall have full opportunity to be heard in defense and shall be entitled to secure the attendance of all witnesses necessary for the defense at the expense of the city. The accused may appear in person and by attorney. The city in which the department is located may be represented by the city attorney. All evidence shall be taken by a stenographic reporter who first shall be sworn to perform the duties of a stenographic reporter in taking evidence in the matter fully and fairly to the best of his or her ability.*

(Emphasis supplied). In providing this extremely detailed procedure, which incorporates by reference municipal court contempt procedures, it was clearly the legislative intent that subs. (16) should "occupy the field" of investigation and trial procedure. It was *not* the legislative intent to authorize the Board to govern the investigation and trial through its own rules.

Subs. (17) is yet another section in which the legislature provides its own procedures and standards, rather than delegating them to the Board for rulemaking:

> *(17) Decision, standard to apply. (a) Within 3 days after hearing the matter the board shall, by a majority vote of its members and subject to par. (b), determine whether by a preponderance of the evidence the charges are sustained. If the board determines that the charges are sustained, the board shall at once determine whether the good of the service requires that the accused be permanently discharged or be suspended without pay for a period not exceeding 60 days or reduced in rank. If the charges are not sustained the accused shall be immediately reinstated in his or her former position, without prejudice. The decision and findings of the board shall be in writing and shall be filed, together with a transcript of the evidence, with the secretary of the board.*

Subs. (17)(b) prohibits discipline unless there is "just cause"[7] to sustain the charges, and sets forth seven specific standards which, "to the extent applicable," the board must apply in making its determination.

The critical subsection in our case, subs. (19), is of a piece with the foregoing sections. The Board does not have authority to promulgate rules governing charges by aggrieved persons. The legislature intended, as it clearly stated in subs. (19), that charges made against police officers by aggrieved persons should be investigated, and trial had thereon, "***following the procedure under this section***." That is, the procedure under §62.50, particularly subsections (16) and (17), *not* "in accordance with rules prescribed by the board." Subs. (19) provides:

> *(19) Charges by aggrieved person. In cases where duly verified charges are filed by any aggrieved person* ***with the board of fire and police commissioners****, setting forth sufficient cause for the removal of any member of either of the departments,* ***including the chiefs or their assistants****, the board or chief may suspend such member or officer pending disposition of such charges. The* ***board*** *shall cause notice of the filing of the charges with a copy to be served upon the accused and* ***shall set a date for trial and investigation of the***

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[7] The Board uses this phrase to name the trial a "just cause hearing," as though it is some kind of elaborate special proceeding. This phrase is not used in the statute; presumably, there must be "just cause" for any consequence which is visited on a person following trial.

> ***charges, following the procedure under this section.*** *The* ***board*** *shall decide by a majority vote and subject to the just cause standard* ***described in sub. (17)(b)*** *whether the charges are sustained. If sustained, the* ***board*** *shall immediately determine whether the good of the service requires that the accused be removed, suspended from office without pay for a period not exceeding 60 days or reduced in rank. If the charges are not sustained, the accused shall be immediately reinstated without prejudice. The secretary of the* ***board*** *shall make the decision public.*

(Emphasis supplied). Subsection (19) contains its own detailed procedures, contains the phrase "under this section," and refers to another subsection (subs. (17)(b)) in "this section." It does not refer to Board rules. Board rules governing charges by aggrieved persons are, therefore, not authorized, particularly where they conflict with the statute.

In the "Rule XVII" section of its brief, the Board claims that it promulgated Rule XVII "in order to fulfill its duties." Appellants' Brief at 7. This is a disputed contention. Mr. Castañeda contends, and the Circuit Court found, that Rule XVII permits the Board to *avoid* fulfilling its statutory duties. This is borne out by the evidence showing but 4 hearings for 491 complaints since 1998. R.36:Ex. 11. Given this, it can be just as readily asserted that the purpose of the rule was to protect the police from accountability. Moreover, the motive of the agency in promulgating a rule

is irrelevant as to whether it has the power to issue that rule. *Peterson v. Natural Resources Board*, 94 Wis. 2d 587, 598-599, 288 N.W. 2d 845, 851 (1980).

In justifying Rule XVII, the Board speaks of sec. 22-10 of the Charter of the City of Milwaukee. Appellants' Brief, pp. 45-47. That section is completely irrelevant to this case, as Mr. Castañeda and his fellow complainants proceeded under Wis. Stat. §62.50(19), *not* Sec. 22-10 of the Charter. Nor did the Board claim to act under Sec. 22-10. Even if the Board has the authority to promulgate a rule to carry out Sec. 22-10 of the city charter, it still cannot apply that rule to §62.50(19) complaints unless the rule is authorized by §62.50.

In discussing Section 6(a) of Rule XVII, the Board has apparently abandoned the case law which it cited at the Court of Appeals for the principle that administrative determinations made without "subject-matter jurisdiction" are void. Defendants-Appellants' Brief to Court of Appeals, pp. 8-9. It is the statute, not the rule, that confers jurisdiction. Obviously, the DNR does not have jurisdiction to decide aggrieved-person complaints

against Milwaukee Police. The Board *does* have that jurisdiction, but courtesy of §62.50(19), not Rule XVII.

The authority cited by the Board in its brief to the Court of Appeals, pp.8-9, reinforces our argument that, in order for a rule to be valid, the governing statute must authorize the agency to promulgate that rule. In *Peterson v. Natural Resources Bd., supra*, 94 Wis. 2d at 592, the Court stated:

> *It is the general rule that an administrative agency has only those powers which are expressly conferred or which are fairly implied from the statutes under which it operates . . . An administrative agency may not issue a rule that is not expressly or impliedly authorized by the legislature.*

The Court in that case held that the relevant statutes authorized the DNR to issue the rule being challenged by Peterson. Those statutes were very similar to §62.13(5)(g), Wis. Stats., but quite different from §62.50(3). They conferred on the DNR a grant of general rulemaking authority in language such as: "*The department may make such rules . . . as it deems necessary to carry out the provisions and purposes of this section . . .*", *id.* at 592, and ". . . *the Department shall make such rules as it deems necessary for the protection, development and use of fish . . .*" and its

actions in so doing shall be valid ". . . *all other provisions of the statutes notwithstanding.*" *Id.* at 594, 596.

The second case cited to the Court of Appeals by the Board at p. 9, *Village of Silver Lake v. Department of Revenue*, 87 Wis. 2d 463, 275 N.W. 2d 119 (1978), and now abandoned, contained a subsection in the authorizing statute which, by its dissimilarity from §§62.50(16) and (19), Wis. Stats., undercuts the Board's argument. That subsection, Wis. Stat. 70.57(2) provided:

> (2) The department shall have the power to make such rules, orders and regulations for ***making and filing complaints*** by counties, ***the attendance of witnesses, the production of books, records and papers and the mode of procedure*** as may be deemed necessary, not inconsistent with the laws of the state.

Id. at 468, n. 1 (Emphasis supplied). The difference between that section and §§62.50(16) and (19) is striking and compelling. And, the court's recitation of the law supports Mr. Castañeda, not the Board:

> *. . . It is the general rule that an agency or board created by the legislature only has the powers which are either expressly conferred or necessarily implied from the four corners of the statutes 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.*

Id. The power to promulgate Rule XVII was not expressly granted.

Although a third case cited by the Board to the Court of Appeals at p. 9, *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 545, 309 N.W. 2d 366 (1981), involved a unique statutory scheme quite different from §62.50, that case nevertheless stands for the proposition that it is the *statute* which confers subject matter jurisdiction, not the agency through a self-help rule. The Court held:

> *. . . the administrative agency cannot conclusively settle the question of its jurisdiction, thereby endowing itself with power other than that granted by statute.*

Id. at 553. Thus, the Board cannot, by issuing Rule XVII, endow itself with power which the statute does not give it.

The Board in its current brief cites *Brown County v. Department of Health and Social Services*, 103 Wis. 2d 37, 43, 307 N.W. 2d 247 (1981), as purported authority for the following proposition: "By adopting Rule XVII as it did, the Board was effectuating the purpose of the powers delegated to it under Wis. Stat. §62.50(19)." Appellants' Brief at 42-43. But the authorizing statute in *Brown County* was quite different than §62.50(3). That statute provided: "*The department shall make suitable*

rules and regulations governing the administration of temporary assistance under §49.01(7) including . . . " and was characterized by the Court as ". . . *on its face a broad grant of rule-making authority . . .* ". *Brown County, supra* at 48, n. 5 and 49. §62.50(3) is, by contrast, a very restricted grant of authority.

The Board also abandons its earlier reliance on *Conway v. Board of Police and Fire Commissioners, supra*, to support Rule XVII 6(b) (ii), (iii) and (iv), in which it claimed that allowing "the matter to be referred to a hearing examiner for hearing or for further investigation or other actions as may be appropriate to the unique facts of each case" is "specifically allowed by the holding in *Conway* . . .". Appellants' Court of Appeals Brief at 9-10. The Board also seemed in that brief to claim that *Conway* authorizes its referral of Mr. Castañeda's joint complaint to Chief Jones for investigation and disposition. *Id.* at 33.

First of all, the rule at issue in *Conway* did not permit the Madison Police and Fire Commission hearing examiners the unlimited latitude of taking whatever actions they thought would be "appropriate to the unique facts of each case." *Id.* at 9. Rather, that rule was upheld in large part

because it constrained the hearing examiners in numerous ways, including, *as the Circuit Court in the instant case observed*, requiring them to prepare a comprehensive report containing an evaluation of witness credibility and demeanor for the commission's review *and disposition*. R.27:22. Compare the Milwaukee Board's total abdication of the disposition of the complaint through its referral to the very Police Chief complained against. The Board attempted, and now apparently abandons, a completely insupportable extension of authority from a hearing examiner's power to hear evidence under §62.13 to the referral to the Police Chief for disposition under §62.50(19). There are obvious differences in role and function between hearing examiner and police chief, especially where the chief is a primary person complained against.

The most important reason that *Conway* is not authority for Rule XVII is that it involved a *completely different statute*. *Conway* construed Wis. Stat. §62.13, which has the aforementioned language expressly authorizing the Board to issue rules, and which contains language directing that it be liberally construed. §62.50, as we have shown, is completely different: it contains an express *limitation* on the Board's rulemaking

authority and does *not* have this language in 62.13(5)(g): "Further rules for the administration of this subsection may be made by the board." The Court in *Conway* found this language critical in determining that the Board had express authority to issue its rule. 2003 WI 53 at ¶ ¶33, 35, 37, 46.

While the *Conway* Court viewed §62.13 as regulating cities of 4,000 or more, in fact §62.13 does not apply to cities of the first class, of which there is but one – Milwaukee.[8] Section 62.03, Wis. Stats., provides:

> *First class cities excepted. (1) This subchapter, except ss. 62.071, 62.08(1), 62.09(1)(e) and (11)(j) and (k), 62.175, 62.23(7)(em) and (he) and 62.237, does not apply to 1st class cities under special charter.*

Section 62.13 is not included in the named exceptions, which *do* apply to first class cities. Section 62.03(2) permits first class cities to adopt all or part of Subchapter I, General Charter Law:

> *(2) Any such city may adopt by ordinance this subchapter or any section or sections thereof, which when so adopted shall apply to such city.*

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[8] Chapter 62 is divided into two subchapters: Subchapter I "General Charter Law" and Subchapter II "First Class Cities."

Milwaukee did not adopt §62.13(5)(g), but instead adopted §62.50. The current Charter contains this language:

> *It is the intention of the common council that the procedures, processes, and trial under this section shall be conducted in the same manner as provided in s. 62.50, Wis. Stats. (1983). (Ch. Ord. 341, File #68-453-b, June 25, 1968; formerly s.21-14-2.)*

Charter of the City of Milwaukee, §22-10.2. "Charges Against Subordinates," p. 137 (6/7/94), R.S.A.:22-23.

The Board has never in this litigation, including its brief on this appeal, claimed that Rule XVII is authorized by §62.13(5)(g), and any such argument which may be inserted in its reply brief is not properly before this Court. The Board has throughout based its claim of authority on §62.50(3). R.7:1-2, including n. 1; R.S.A.:7-8. *Conway* and §62.13(5)(g), Wis. Stats., are not authority for Rule XVII.

B. Rule XVII of the Milwaukee Board, with respect to complaints by aggrieved persons, is invalid because it is in conflict with Wis. Stat. §62.50, and thus frustrates the intent of the legislature in enacting Wis. Stat. §62.50(19).

The legislature, in enacting §62.50(19), gave to the citizen who believes that he has been abused by the police a means to petition for

redress of his grievance to a part of government *other than the Police Department* – to the Board of Fire and Police Commissioners. The legislature gave the citizen a chance to be heard, a way to call the police to account before a tribunal outside the Police Department. At oral argument, the Board agreed that this was the legislative purpose:

> *Mr. Schrimpf: That is the whole purpose of the process because I suppose the Legislature contemplated the reality that an event could happen – let's take the El Rey event where there were situations where people honestly and truly believed there had to have been a violation of rules and regulations, there was excessive force used or inappropriate conduct, either hurting people unnecessarily, whatever there may have been.*
>
> *And I think the Legislature said yes, for these purposes, there must be some way that outside of the normal command chains of the department, the person can bring a Complaint.*

R.53:49; R.S.A.:20.

The legislature did this in a simple and straightforward manner – the aggrieved person simply files a complaint with the Board and, if the complaint sets forth sufficient cause for removal, the Board investigates, holds a trial, and metes out appropriate discipline, if any is warranted. The Board in Milwaukee acted contrary to this simple process and set up a series of hurdles for the complainant to leap. It issued, and follows, Rule

XVII, which makes it extremely difficult for a citizen to get the complaint heard and, where the police hide their identities, makes it impossible.

On the border between Virginia and North Carolina lies 750 square miles of swamp called the "Great Dismal Swamp." In the 18th and 19th centuries, slaves escaping bondage disappeared into that swamp. Many were never heard from again.[9] Rule XVII is the "Great Dismal Swamp" for citizen complainants who wish to have their grievances heard. Their complaints disappear into Rule XVII, and are never heard from again.

We see this from the Board's overall record: 4 hearings and no discipline in 491 complaints since 1998; no hearings since 1999. R.36:Ex. 11. And we see it in what happened in the instant case – The Board sat on Mr. Castañeda's complaint for almost a year, and when it did act, merely sent it to Chief Arthur Jones, one of the primary subjects of the complaint, for final disposition. It did this on the ground that Mr. Castañeda couldn't do the impossible – identify the police involved.

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[9] Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America*, 121, 261 (Belknap 1998); Harding, *There Is a River: The Black Struggle for Freedom in* America, 73 (Harcourt Brace 1981); World *Book Encyclopedia*, Vol. 5, p. 237 (1988).

The El Rey incident happened on September 18, 2002. R.5:Ex. 3; R.6:¶1. Police officers deliberately hid their identities, making it impossible for complainants, including Jose Castañeda, to identify them. R.6:¶21. Jose Castañeda and 24 others filed a verified joint complaint under Wis. Stat. §62.50(19) on November 7, 2002. R.5:Ex. 3. The Board failed to act on the complaint for almost a year. R.5:Ex. 3; R.6:¶¶17-21.

This lawsuit was filed on September 30, 2003. R.1. Two days later, on October 2, 2003, the Board voted to refer the joint complaint to Chief Arthur Jones to investigate and to "take appropriate action." R.5:Ex. 4; R.11:Ex. 1, Item 2; R.S.A.:2-3. At its October 2 meeting, the Board stated that it was *not* dismissing for lack of prosecutorial merit ("sufficient cause for removal") because that would be "sweeping the matter under the rug." R.11:Ex. 1, Item 2; R.S.A.:2-3. At that meeting, the Board stated five times that the basis for its action was that no complaint had identified a specific act by a specific police officer. R.11:Ex. 1, Item 2; R.S.A.:2-3. At that meeting, the Board stated that it would take the Chief at his word "and trust that he will do his best to see that justice is done . . ." R.11:Ex. 1, Item 2; R.S.A.:2-3. At that meeting, the Board at no time stated that its basis for

referral to Chief Jones was that the charges set forth in the joint complaint did not set forth sufficient cause for removal. R.6:¶20; R.11:Ex. 1, Item 2; R.S.A.:2-3. On October 3, 2003, the Board's Executive Director, David Heard, sent a letter to Chief Jones stating:

> *. . . the complaints allege numerous and often broad allegations of misconduct, but do not identify specific department members who are alleged to have committed any such act(s) of misconduct. The Board of Fire and Police Commissioners* ***did not take provisional jurisdiction*** *of these matters and have referred them to your office* ***for a full investigation and appropriate disposition*** *. . .*

R.5:Ex. 4; R.S.A.:1. (Emphasis supplied).

Rule XVII enabled all of this. As to the length of time before the Board acted: Rule XVII enables this because it permits the Board to hold a complaint in committee with no deadline for action. Rule XVII enables the Board to refer the complaint to the Chief of Police for disposition. Rule XVII enables the Board to decline "provisional jurisdiction." And Rule XVII enables the Board to require complainants to identify police officers who have concealed their identities.

Board Rule XVII is not only not authorized by §62.50; it is, in significant respects, in conflict with that statute, and it is on this second

ground invalid. *Seider v. O'Connell, supra.* In the following areas of conflict with the statute, Board Rule XVII imposes barriers to citizen complaints that are not found in the statute:

> Section 1 of Rule XVII defines a citizen complaint:
>
> *A citizen complaint is any written communication received by the Fire and Police Commission which alleges a violation of rules or standard operating procedures by a member of either the Fire or Police Department, which meets the requirements of Sections 2, 3 and 4 below.*

§62.50 does not require that an aggrieved person allege a specific rule violation or a violation of "standard operating procedures." Section 1 sets up a barrier to aggrieved persons. The police rulebook is very hard to come by. How is an aggrieved person to know the specific departmental rule that was violated? The Board submitted to the Circuit Court, as the publicly-available rules, a three-inch stack of documents which were four years out of date. R.27:18; R.53:48; R.24. This is what is available to the citizen. And are the "standard operating procedures" different from the "rules"? How is a lay person, especially one who is not represented by counsel, to know this?

Section 4 of Rule XVII requires the complaint to state "*the name, badge number or other identification of the accused member.*" §62.50 does not require this. It is not in subs. (19) or anywhere else. If the officer hides his name and badge number, and the aggrieved person is not otherwise acquainted with the officer, how is the aggrieved person to provide the name or badge number? This is impossible, and made so by the "accused member." Even if there is a name plate or badge, in cases like the El Rey raid where there are a large number of police officers engaged in the abuse and where they handcuff the aggrieved persons, R.6, if an aggrieved person *can* read the name and he is handcuffed, he can't write the name down. If he *can* read the badge number and is handcuffed, he can't write the badge number down. If there are twenty-one officers doing this to him, R.5:¶3, he will probably not remember all the names. And, if the situation is as traumatic as El Rey, he might read the names and not remember them. This requirement in Section 4, which exceeds §62.50, is a very effective way to shield police officers from responsibility, and is completely contrary to the legislative intent underlying §62.50(19). Section 4 of Rule XVII is invalid because it violates Wis. Stat. §62.50.

Section 4 also requires the aggrieved person to "... *specify whether the complaint is being filed pursuant to Section 62.50(19) of the Wisconsin Statutes or the City of Milwaukee Charter Ordinances.*" Even the city cannot complain against the Chief under the ordinances. In our case, the aggrieved persons had lawyers who researched whether to file under the statute or ordinances. How is an unrepresented aggrieved person, one who cannot afford an attorney, to know this? Yet if he doesn't specify, his complaint is inadequate. This is not required by §62.50, and it defeats that statute. It is one more barrier erected by the Board to bar the aggrieved person from having his complaint heard.

Section 6 provides for "*provisional jurisdiction.*" This concept is nowhere to be found in §62.50. The Board made it up out of whole cloth. Furthermore, Section 6 makes no mention whatsoever of the statutory procedure in §62.50(19). The Board, in Section 6, is operating completely independently of, and contrary to, the statute.

Section 6(b) of Rule XVII sets forth various alternatives for the Board. These alternatives go far beyond the action permitted the Board by §62.50(19). Section 6(b)(i) permits the complaint to be dismissed *"for such*

other reason as may be determined by the Committee [not the Board]." This is not authorized by §62.50(19). Section 6(b)(ii) permits the matter to be referred "*for conciliation.*" Conciliation is not authorized by §62.50(19); conciliation is completely the child of the Board rule. Section 6(b)(iii) permits the complaint to be "*held in committee.*" This procedure is also not authorized by §62.50(19). "*Held in committee*" sounds a bit like an investigation, but the rule does not state that this *is* part of a Board investigation. Indeed, in our case, the joint complaint appears to have been "held in committee" for eleven months, with no investigation occurring.[10] Section 6(b)(iv) permits "*other such actions as the Committee* [not the Board] *may deem appropriate.*" This latitude is not provided the Board by §62.50(19). That statute is very specific as to the actions which the Board may take where duly verified charges are filed by aggrieved persons, and "other such actions as deemed appropriate" are not included. In all of these respects, Board Rule XVII is contrary to §62.50, and is thus invalid.

In our case, two days after this action for mandamus was filed, the Board voted not to take "provisional jurisdiction" and to refer Mr.

---

[10] Board staff insisting that complainants resubmit their complaints, and ignoring specific alleged rule violations, is hardly an "investigation."

Castaneda's joint complaint to Police Chief Arthur Jones "*for a full investigation and appropriate disposition.*" R.5:Ex. 4; R.S.A.:1. Board Rule XVII, Section 6(b)(i), sets forth as one permissible alternative " . . . *that the complaint be dismissed and referred to the Milwaukee Police or Fire Department for investigation and disposition* . . . " This course of action is completely unauthorized by, and is in conflict with, §62.50. At no place in §62.50 is this referral permitted. Indeed, all of the language in that statute argues *against* this referral.

§62.50 is quite clear that the Board, not the Chief, is to investigate and try complaints from aggrieved persons. *Even where the complaint is made first to the Chief*, the Board is to hear it. Complaints from aggrieved persons are to be referred from the Chief to the Board, not from the Board to the Chief:

> *§62.50(12) Trial to be ordered. Whenever complaint against any member of the force of either department is made to the chief thereof, the chief* ***shall immediately communicate the same to the board of fire and police commissioners and a trial shall be ordered by the board under this section.***

(Emphasis supplied). This is quite plain. The Chief is *not* to investigate, dispose of, or in any other way handle the complaint. He (when Arthur

Jones was Chief; the Chief is now Nanette Hegerty) is to *immediately* send it to the Board, which then *must* order a trial under §62.50. If the Chief is not authorized to retain a complaint made directly to him, how is it that he is authorized to accept for investigation and disposition a complaint made to the Board? He is not. Nor is the Board authorized to refer the complaint to him, *particularly for disposition.*

§62.50(16) gives the Chief, together with the accused, the right to an adjournment of the trial or investigation of the charges:

> *The accused and the chief shall have the right to an adjournment of the trial or investigation of the charges, not to exceed 15 days.*

This clearly implies that the Chief is not to be investigating or trying the charges. Subs. (16) also gives all of the powers of investigation and trial to the members of the Board, *not to the Chief*:

> " . . . *In the course of* ***any trial or investigation*** *under this section* ***each member of the fire and police commission may*** . . . "

(Emphasis supplied). Subs. (16) is the "procedure under this section" referred to in subs. (19). Subs. (16) clearly does *not* provide to the Chief of Police the power to administer oaths, issue subpoenas, compel witness

answers and punish for contempt. These powers are possessed by *each* member of the Board, and it is the Board which is to investigate and try the charges under subs. (19). Why would the legislature arm *each* Board member with these tools if it is the Chief who is to investigate and conduct the trial?

§62.50(17), too, makes it clear that it is the Board that is to make the decision, not the Chief. There can be no doubt:

> " . . . *Within 3 days after hearing the matter* ***the board*** *shall, by a majority vote of its members . . . determine . . .* "

(Emphasis supplied). The decision is to be made by at least three members of a board appointed by the mayor, not by one person - the police chief. There is simply no room in subs. (17) for the "referral to the Milwaukee Police Department for investigation and disposition" permitted by Board Rule XVII, Section 6(b)(i), or for the Board's referral of Mr. Castaneda's joint complaint. That referral, on October 2, 2003, was unlawful.

Subs. 62.50(19) permits the Chief only one action: the suspension of the officer pending disposition of the charges *by the Board.* It does not permit the Chief to make an "appropriate disposition," as the Board requested in its October 3 letter to Chief Jones. R.5:Ex. 4; R.S.A.:1. Where

charges are filed with the Board under subs. (19), just as where they are filed with the Chief under subs. (12), they are to be investigated and tried by the Board. Under subs. (19), the *board* shall cause notice of the filing of the charges to be served on the accused; the *board* shall set a date for the trial and investigation of the charges; the *board* shall decide by a majority vote whether the charges are sustained; the *board* shall, if sustained, determine the discipline; and the *board* shall make the decision public. As with subs. (17), there is simply no room in subs. (19) for the referral to the Milwaukee Police Department for investigation and disposition permitted by Board Rule XVII, Section 6(b)(i), or for the Board's referral of Mr. Castañeda's complaint. The rule and the referral are contrary to statute.

C. The Circuit Court's decision should not be overturned on the basis of facts not supported by the record.

We should not be reading the law of administrative rulemaking in the shadow of imagined administrative paralysis. In the face of the Circuit Court's findings, both the Board and the Court of Appeals conjure up a litany of dire consequences which they believe will result from the Circuit

Court's decision, none of which are based on record facts. They are mere surmise.

As to the Board's argument, there was no evidence before the Circuit Court, and the Board makes no record citations for, any of the following:

- The impact of the trial court's decision is that a "just cause" trial must be conducted on every citizen complaint. Respondent's Brief, pp. 31, 36.
- The Board's investigative and adjudicative functions require Rule XVII. *Id.* at 34.
- The provisions of Rule XVII are for the benefit of the citizens. *Id.* at 35.
- The Court's decision presents an unworkable situation. *Id.*
- Citizens who encounter police officers and firefighters can become disgruntled for "a whole host" of reasons, particularly as to police officers who are often responding to a volatile situation. *Id.*
- If a hearing were required every time a "disgruntled citizen" lodges a complaint with the Board, then every response call would potentially give rise to a "just cause hearing" based on the citizen's subjective understanding of the conduct of the police officer. *Id.*
- Rule XVII assures uniformity in the hearing process. *Id.* at 39.

The Board is quite solicitous of the police and their rights, but pays little heed to Milwaukee residents and their rights. Indeed, the Board surmises that those residents will complain about every little thing. One can just as easily surmise, and with more evidence, that they will rarely complain because it does them no good: 4 hearings out of 491 complaints since 1998, none since 1999 – and *no* discipline. But we shouldn't surmise. We should examine the record *in this case*.

The Court of Appeals appears to have accepted some of the Board's conjecture as established fact. It stated in its certification:

> If the citizen complainant in this appeal is correct, the commission has no authority to adopt rules that screen out meritless complaints and the commission can be compelled to conduct a trial in virtually every instance in which a complaint is made.

Certification, p. 2. There is simply nothing in the record to support this conclusion.

If such statements by the Board are entitled to decisive credibility, then Mr. Castaneda would have to be believed if he asserted that, in the years in which the Board operated without Rule XVII, it proceeded with efficacy and did not hold a trial on other than serious complaints.

In response to the specter which the Board raises: Rule XVII is not essential for the Board to permit citizens to be heard. All that is necessary is that, when the Board receives a citizen's complaint, it decides whether the complainant sets forth sufficient cause for removal. If it does not, the Board dismisses it. If it does, the Board interviews the key persons involved, such as the police, reviews relevant documents and schedules a trial. The hearing can be run by a hearing examiner or a Board member, as long as the Board hears the evidence and decides. Many people have the ability to run such hearings. Administrative hearings like this are conducted routinely by other agencies and organizations, and without the constraining inhibitions of procedures like those that comprise Rule XVII. The foregoing is not record evidence, but neither is the specter of a paralyzed Board which the Board persistently raises.

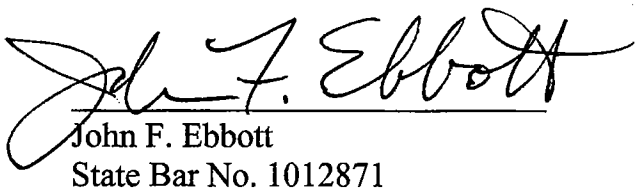
VII. CONCLUSION

The Circuit Court did not erroneously exercise its discretion in issuing a declaratory judgment declaring Board Rule XVII invalid, and this Court should affirm the Circuit Court's declaratory judgment under the

standard of review of *Putnam v. Time Warner Cable, supra.* Rule XVII is invalid because Wis. Stat., §62.50 provides no general rulemaking authority to the Board to adopt Rule XVII, and because Board Rule XVII is contrary to Wis. Stat., §62.50, and frustrates the intent of the legislature in enacting that statute.

Dated: December 21, 2006

Respectfully submitted,



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Milwaukee, Wisconsin 53203
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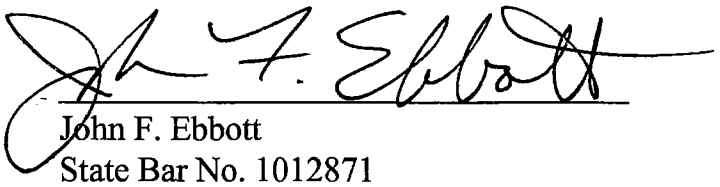
FORM and LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 10,602 words.



John F. Ebbott
State Bar No. 1012871

Attorney for Plaintiff-Respondent

RESPONDENT'S SUPPLEMENTAL APPENDIX

APPENDIX

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Woody Welch
Chairman

Eric Mandel Johnson
Vice-Chairman

Carla Y. Cross
Leonard J. Sobczak
Ernesto A. Baca
Commissioners

David L. Heard
Executive Director

Cassandra K. Scherer
Examinations Supervisor

Steven Fronk
Hearing Examiner

City of Milwaukee

Department of Employee Relations
Fire and Police Commission

October 3, 2003

Arthur L. Jones, Chief of Police
Milwaukee Police Department
749 W. State St.
Milwaukee, WI 53233

Dear Chief Jones:

Enclosed please find copies of twenty-four (24) complaints which were filed as a result of the execution of search warrants on September 18, 2003 at the Mercado El Rey, 1023 S. Cesar Chavez Drive, and a wholesale/production facility affiliated with El Rey located at 1530 S. Muskego Avenue. The complaints allege numerous and often broad allegations of misconduct, but do not identify specific department members who are alleged to have committed any such act(s) of misconduct. The Board of Fire and Police Commissioners did not take provisional jurisdiction over these matters and have referred them to your office for a full investigation and appropriate disposition.

Also enclosed is a letter dated September 9, 2003 (with several attachments) from Attorney Neifor Acosta of McNally, Maloney & Peterson. It is my belief that Attorney Acosta's letter may be helpful in understanding and investigating the complaints.

Additional material in the Fire and Police Commission file related to these complaints may be helpful in your investigation. It should be noted that several of the complainants are represented by legal counsel. Please have your designee contact Steven Fronk at 286-5062 if a review of the Commission file is desired or if additional contact information for the complainants' attorneys is needed.

Upon completion of your investigation, it is anticipated that a report concerning your findings will be generated and that a copy of such report will be provided to each of the complainants and to this office. Thank you for your anticipated cooperation.

Very truly yours,

David L. Heard
Executive Director

DLH:rk

Enc.

cc: Attorney Neifor B. Acosta
Attorney Karyn Rotker
Attorney John F. Ebbott and Attorney Ness Flores
Attorney Peter Earle and Attorney Ellen Brostrom

200 East Wells Street, Room 706, Milwaukee, Wisconsin 53202. Phone (414) 286-5000
Fax (414) 286-5050 Testing Fax (414) 286-5059 E-Mail fpc@milwaukee.gov
www.milwaukee.gov/fpc

EXHIBIT 4

I.C.

October 2, 2003

A Regular Meeting of the Board of Fire and Police Commissioners was held on the above date, commencing at 7:06 P.M.

PRESENT:	Commissioners:	Woody Welch, Chair Leonard J. Sobczak Ernesto A. Baca
ABSENT:	Commissioners:	Eric Mandel Johnson (Excused) Carla Y. Cross (Excused)

ALSO PRESENT: William Wentlandt, Chief, Milwaukee Fire Department; and Edward M. Stenzel, Assistant Chief, representing the Milwaukee Police Department.

Steven Fronk, Hearing Examiner, conducted the meeting in the absence of the Executive Director, and announced that the minutes had been removed from the agenda.

1. NEW BUSINESS:

a) Mr. Fronk presented a staff request to revoke the temporary residency exemption granted by the Board to Police Officer Ricardo Cardenas on October 18, 2001. The exemption had been granted to allow Officer Cardenas to live outside the City of Milwaukee as long as his sons attended the Wisconsin School for the Deaf. As a condition of the exemption, Officer Cardenas was required to file regular reports as to his residency status. Since Officer Cardenas did not file several reports, a letter was sent to him on August 12, 2003 requesting one. He did not respond to that letter. His attorney was contacted and indicated that the sons have graduated from the school. Another letter was sent to Officer Cardenas on September 4, 2003, informing him that staff intends to recommend revocation of the exemption and asking for his input if he objected to that recommendation. Once again, no response was received from Officer Cardenas.

Assistant City Attorney Bruce Schrimpf asked that the letters of September 4 and August 12 be made a part of the record and received as exhibits. He then asked questions of Mr. Fronk which provided the following information: The letter of September 4 had been sent to the Mallory Avenue address in Milwaukee since Officer Cardenas apparently never made use of the exemption granted him and did not move out of the City of Milwaukee; and the letter was sent via regular U.S. mail and was not returned. Assistant Chief Stenzel indicated that Officer Cardenas was still a current member of the Milwaukee Police Department (MPD). Attorney Schrimpf stated that sending the letter via regular U.S. mail is better than sending it registered, because under State law, if a letter sent via regular mail is not returned, it is a legal presumption that the letter was received. That presumption is not made if a letter is sent registered.

Commissioner Baca moved to revoke the residency exemption. The motion was seconded by Commissioner Sobczak and carried unanimously.

2. COMMITTEE REPORTS:

a) Commissioner Sobczak presented the report of the Committee on Rules and Complaints and moved approval of the following two recommendations: Complaints No. 03-55 of Louis Glenn and No. 03-56 of Marcus Glenn, grant provisional jurisdiction and move the complaints forward for conciliation.

Commissioner Baca then read the following statement regarding a group of complaints that have not been assigned individual complaint numbers but are referred to collectively as the El Rey complaints: "On September 18, 2002 warrants were executed by the Milwaukee Police Department at the El Rey Grocery Store and the El Rey Tortilla factory on the near south side of the City of Milwaukee. In November 2002, this Board received a total of 24 complaints which alleged that the actions taken by the Milwaukee Police

EXHIBIT 7

Department on September 18, 2002 were improper. Neither the individual complaints nor a joint complaint attached thereto identified any member of the Milwaukee Police Department by name, badge number or other means of identification. In January 2003, Commission staff contacted the attorneys who represented the complainants. It was made clear to the attorneys at that time that it was necessary for each complaint to set forth specific act(s) of alleged misconduct by specific department members if those complaints were to go forward pursuant to Fire and Police Commission Rules. Between February 2003 and June 2003, revised complaints were received which contained additional information relative to the events of September 18, 2002. Fire and Police Commission staff reviewed all 24 of the complaints together with the additional information supplied by the complainants and/or their attorneys. No complaint identifies a specific act by a specific identified department member which could serve as a basis for finding a department member guilty of misconduct.

"The Committee on Rules and Complaints has considered all of the foregoing as well as the options available under Fire and Police Commission Rule XVII. We could recommend that the Board refer the matters for conciliation, pretrial and trial, but we do not believe that this is appropriate given the fact that none of the complaints identify specific acts of alleged misconduct by specific department members. The likelihood of the matter ever proceeding to trial, given the apparent inability to identify any alleged guilty party, is extremely slim.

"We could recommend that the Board dismiss each of the complaints for lack of prosecutorial merit. If a complainant is unable to identify the individual who may have committed an act of misconduct, there is little likelihood of that complainant being able to prove that a specific department member in fact committed misconduct. If this option is chosen, we would be doing nothing more than "sweeping the matter under the rug", and this we do not want to do and will not do.

"Our final option is to refer these matters to the Chief of Police with a firm recommendation from the Board that each complaint be fully investigated and appropriate action taken. The Chief has reassured this Board and this community on numerous occasions that any and all allegations of misconduct which are brought to his attention will be fully investigated and acted upon in an appropriate manner. We take the Chief at his word in this regard, and trust that he will do his best to see that justice is done as concerns complainants and department members alike.

"The Committee on Rules and Complaints, having met previously on these matters more than once, and having fully explored those options which are available to us, does hereby recommend that all 24 of the complaints filed by individuals as a result of the execution of search warrants at the El Rey Grocery Store and El Rey Tortilla Factory on September 18, 2002 be referred to the Chief of Police for appropriate investigation and disposition."

Commissioner Baca then moved approval of all three recommendations of the Committee on Rules and Complaints. Commissioner Sobczak seconded the motion, which carried unanimously. The Chair stated that Commissioner Baca and staff member Judy Andrade-Altoro had been asked to chair a special committee to examine MPD search procedures. Ms. Andrade-Altoro has left the Commission staff, so the Chair will join Commissioner Baca to look at issues of risk assessment and the manner in which search warrants are executed. A meeting will be held on Wednesday, October 8, 2003 at 1:30 p.m. in the conference room of the Wisconsin Hispanic Scholarship Foundation located at 1220 West Windlake Avenue. The Director will ask Chief of Police Arthur L. Jones for a representative of the Department to give input on search warrant procedures.

b) Commissioner Sobczak presented the report and recommendations of the Ad Hoc Committee on Lesbian, Gay, Bi-sexual, and Transgender Issues, which the Chair designated as the Sobczak Report. Commissioner Baca moved formal acceptance of the report, seconded by Commissioner Welch. The motion carried unanimously. The Chair stated that additional material would be formally added at the October 16 meeting, at which time the full Board will adopt the recommendations of the committee.

Commissioner Sobczak commended the committee members and went through the attached report. Commissioner Baca opined that adopting the recommendations of the committee would make it easier for an affinity group to form. Commissioner Sobczak reviewed how the departments in other cities handle these issues. The Chair commended Commissioner Sobczak and the work of the committee. He also stated that the Board takes these recommendations seriously and takes responsibility for changing the work environment in regard to these issues. Chief Wentlandt stated he also takes the recommendations seriously and accepts responsibility for the environment in the Fire Department. Assistant Chief Stenzel stated the Police Department looks forward to working with the Commission to implement the recommendations. Commissioner Baca moved to approve the recommendations of the report, seconded by Commissioner Sobczak. The motion carried unanimously.

3. FIRE DEPARTMENT:

a) The following promotions, as presented by Chief Wentlandt, were approved by the Board:

TO FIRE LIEUTENANT, on a waiver basis, from eligible list established November 1, 2001, effective October 12, 2003:

#26 – RONALD L. JOHNSON, JR. and #27 – JERRY L. MOES.

b) Mr. Fronk presented a letter dated August 26, 2003, from Probationer Firefighter Warren Price, who requests an extension of the temporary City residency exemption. Firefighter Price is required to move into the City by October 14 and requests an extension until October 31. He has an accepted offer on a house, but the sellers may not be able to move out right away if the construction of their new condo is delayed. Firefighter Price was present and stated that the seller will not be able to vacate until October 12. Staff recommends that an extension be granted until November 6, 2003. Commissioner Sobczak moved to grant an extension until November 6, 2003. The motion was seconded by Commissioner Baca and carried unanimously.

4. POLICE DEPARTMENT:

a) The following promotions, as presented by Chief Jones, were approved by the Board:

TO PROGRAMMER II (Pay Range 556), from Administrative Assistant IV, an underfill for Programmer Analyst, effective October 12, 2003:

NECIA E. HOOVER.

TO ADMINISTRATIVE ASSISTANT IV, from Administrative Assistant II, effective October 12, 2003:

PEGGY A. KOCEJA.

TO PERSONNEL PAYROLL ASSISTANT I, from Office Assistant II, effective October 12, 2003:

LAURIE C. HASSEL.

b) Mr. Fronk presented a letter dated September 23, 2003, from Chief Jones, wherein he notifies the Board that Probationary Police Officer Ryan M. Flejter has been terminated under Personnel Order 2003-376 dated September 17, 2003.

c) Mr. Fronk presented a letter dated September 23, 2003, from Chief Jones, wherein he presents a request for reappointment to the position of Identification Technician from Bridget O. Schuster. Ms. Schuster was appointed on August 14, 1995, and resigned in good standing on June 8, 2003. Ms. Schuster was present

and stated that she had to resign due to child and family care reasons. Subsequent to her resignation, she has been able to make other care arrangements and wishes to be reinstated. She is aware that she would be returning as a new employee, in accordance with the labor contract. Chief Jones recommends that her request be approved. Commissioner Baca moved approval of the request, seconded by Commissioner Sobczak. The motion carried unanimously.

d) Mr. Fronk presented an undated letter from Probationer Police Officer David A. Ligas, Jr., who requests a one-month extension of the temporary City residency exemption. Officer Ligas is currently required to move into the City by October 28. He has an accepted offer on a house, but the sellers do not close on their new house until October 28. He will need time to move in. Staff recommends that an extension be granted until December 4, 2003. Commissioner Baca moved to grant an extension until December 4, 2003. The motion was seconded by Commissioner Sobczak and carried unanimously

Commissioner Baca moved to adjourn the meeting, seconded by Commissioner Sobczak. The motion carried unanimously.

The meeting concluded at 7:57 P.M.

Respectfully submitted,

David L. Heard
Executive Director

DLH:REK:rk

CITY OF MILWAUKEE

Form CA-43

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City Attorney

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THOMAS J. BEAMISH
MAURITA F. HOUREN
JOHN J. HEINEN
MICHAEL G. TOBIN
DAVID J. STANOSZ
SUSAN E. LAPPEN
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
KURT A. BEHLING
GREGG C. HAGOPIAN
ELLEN H. TANGEN
MELANIE R. SWANK
JAY A. UNORA
DONALD L. SCHRIEFER
EDWARD M. EHRLICH
LEONARD A. TOKUS
MIRIAM R. HORWITZ
MARYNELL REGAN
G. O'SULLIVAN-CROWLEY
DAWN M. BOLAND

Assistant City Attorneys

October 8, 2003

Honorable Lee E. Wells
Milwaukee County Courthouse, Branch 35
901 North Ninth Street, Room 415
Milwaukee, WI 53233

Re: *State ex rel. Jose Castaneda v. Woody Welch, et al.*
Case No. 03-CV-008737

Dear Judge Wells:

Enclosed please find a Memorandum requesting dismissal of plaintiffs' most lately filed amended complaint, which was served upon the undersigned late on the afternoon of October 7, 2003. By copy of this letter we are serving attorneys for the plaintiffs a copy of these documents today. I recognize that this memorandum is filed less then five days of the hearing in this matter. However, it was filed as rapidly as I could consistent with the late serving of the amended complaint upon the undersigned.

Thank you.

Very truly yours,

BRUCE D. SCHRIMPF
Assistant City Attorney

Enclosure
c: Attorney Ness Flores
Attorney John F. Ebbott
Mr. David Heard
Mr. Steven Fronk
1095-2003-3198:73360

OCT - 9 2003

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE EX REL. JOSE CASTANEDA,

Plaintiffs,

v. Case No. 03-CV-008737

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID E. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION,

Defendants.

MEMORANDUM

On October 3, 2003 the defendants filed a Notice of Motion and Motion to Dismiss supported by a brief in support thereof and an affidavit of David Heard seeking dismissing of the above-captioned action.

In response thereto, the plaintiffs have filed an amended complaint (served on defendants late the afternoon of October 7, 2003) seeking *mandamus* and declaratory judgment, essentially seeking the same relief they had in the original complaint. Now, however, they also seek to have declared that Rule XVII entitled Citizen Complaint Procedure is invalid and inconsistent with § 62.50, Wis. Stats. The plaintiffs claim that the Board of Fire and Police Commissioners had no authority to promulgate the rule in question! No facts are pled and no law is cited for that astounding proposition.[1]

[1] The defendants concede that ¶¶ 9 and 10 of the amended complaint in conclusionary fashion allege that § 62.50(3) does not allow for the creation of rules to be governed when an aggrieved person files a complaint under § 62.50(19). Once again, no facts are pled and no law is cited for such a proposition. A review of § 62.50(3)

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 subordinate's record of service with the chief's department. (Emphasis supplied).

It is clear, therefore, where it is impossible to determine whether a rule was violated, and who was the person violating it, the citizen complaint cannot begin to set forth a basis for discipline under § 62.50(17)(b).

Accordingly, it was perfectly appropriate to refer this matter to the chief of police who might be in a better position to undertake the investigation necessary. In any event, such a determination was and is well within the discretionary authority of the Board of Fire and Police Commissioners.

Accordingly, it is respectfully submitted that the court should exercise its discretion to dismiss even this, lately filed, amended complaint.

Dated and signed at Milwaukee, Wisconsin, this 8th day of October, 2003.

GRANT F. LANGLEY
City Attorney

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1095-2003-3198

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE EX REL. JOSE CASTANEDA,

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v. Case No. 03-CV-008737

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID L. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION,

Defendants.

AFFIDAVIT OF VALARIE WATSON

STATE OF WISCONSIN)
)ss
MILWAUKEE COUNTY)

Valarie Watson, being first duly sworn upon oath, deposes and states as follows:

1. Your Affiant is presently employed in the capacity of Police Personnel Administrator. Your Affiant has been so employed since March 21, 1999. Prior to that time your Affiant was employed by the Milwaukee Police Department ("MPD") in various positions. Your Affiant has been an employee of the MPD since March 29, 1987. As Personnel Administrator of the MPD, your Affiant has under her care, custody, and control, all personnel records of MPD personnel as well as the rules, regulations and standard operating procedures of the MPD. Unless otherwise stated, your Affiant makes

this affidavit upon personal knowledge and information or personal knowledge and information refreshed from records and files kept in the ordinary conduct of your Affiant's office. Your Affiant is fully competent to execute the following affidavit.

2. Annexed hereto and incorporated herein by reference as Exhibit 1 is a true and correct copy of Rule 9 of the MPD Rules and Regulations and specifically § 2/900.15 – Uniform Standards, A. Nameplates. This was the Rule and Regulation regarding the wearing of nameplates in force at the time of the events material to this action.

Further your Affiant sayeth naught.

Dated and signed at Milwaukee, Wisconsin this 9th day of August, 2004.

VALARIE WATSON

Subscribed and sworn to before me
this 9th day of August, 2004.

Notary Public, State of Wisconsin
My Commission Expires: 6/19/05

PARIS T. DOFFEK NOTARY PUBLIC STATE OF WISCONSIN

1095-2003-3198:83816
BDS:kef

C. MOTORCYCLE OFFICERS

For Motorcycle Officers and Motorcycle Sergeants - the leather motorcycle jacket, or all weather coat, or lightweight jacket; breeches (or trousers when permitted), leather cycle boots, military round top cap, motorcycle helmet, and Sam Browne belt. All regularly assigned motorcycle operators are required to wear the regulation city-owned crash helmet at all times when operating Department cycles.

D. BICYCLE OFFICERS

1. Bicycle patrol officers shall wear a uniform shirt, uniform trousers, badge, bicycle glasses, bicycle gloves, black shoes, and Sam Browne belt with accessories. While riding a bicycle on duty, they shall wear the Department issued bicycle helmet.

2. Bicycle patrol officers may wear the following:

   a. Lightweight jacket
   b. Approved bicycle shorts with black ankle socks
   c. Chamois lined undershorts
   d. Nylon Sam Browne belt with accessories
   e. Cycling pants

3. In addition, bicycle patrol officers must maintain a full seasonal regulation uniform at their work location while on duty.

2/900.15 UNIFORM STANDARDS

A. NAMEPLATES

All uniformed Department members shall wear a metal nameplate, bearing the wearer's correct last name. This nameplate is a part of the required uniform and will be worn during regular uniformed duty in plain view on the outside of the outermost garment (except rainwear). The nameplate shall be affixed on the same plane as the bottom edge of the badge and centered above the right pocket. Shirt and jacket breast pocket flaps shall be closed and buttoned at all times.

B. UNIFORM SHIRTS

1. Shirts of navy blue, long or short sleeve, shall be worn by sergeants and police officers. All shirts shall be in conformity with Department specifications.

2. Members occupying the ranks of Lieutenant of Police and above shall wear a regulation white uniform shirt, long or short sleeve. Lieutenants and higher ranks, when on field duty only, shall have the option of wearing the navy blue uniform shirt, light weight jacket, or all-weather coat. The white shirt with black four-in-hand necktie shall be worn with the dress blouse and overcoat.

3. Nothing shall be placed in a uniform shirt pocket except a pen and pencil.

4. A clean white T-shirt shall be worn underneath the short sleeve uniform shirt. Sleeveless undershirts are not permitted.

Memorandum

To: Fire and Police Commissioners

CC: David Heard

From: Judith Andrade-Altoro

Date: August 20, 2003

Re: El Rey Joint Citizen Complaint

September 18, 2002
Police raid El Rey grocery store and tortilla factory.

October 2, 2002
Fire & Police Commissioner Ernesto Baca convened a special community meeting at United Migrant Opportunity Services (UMOS) to elicit comment from citizens concerning the raids.

November 7, 2002
We received the joint complaints in our office. The complainants are represented by Attorneys Micabeil Diaz-Martinez, Karyn Rotker, Peter G. Earle, Ellen Brostrom, John F. Ebbott, Ness Flores, and Neifor Acosta.

We received and reviewed the El Rey videos from the grocery store raid, but there was no video from the tortilla factory.

December 2002
We received our identification request back from the Milwaukee Police Department. This list identified all personnel that were present during the execution of the search warrant on September 18, 2002.

Mr. Heard and I met with some of the officers involved in the execution of the search warrant. They also gave us insight on how they execute search warrants and the standard operating procedures that govern search warrants.

January 2003
We requested individual complaints from each complainant in order to identify the specific rule violations that relate to each accused.

EXHIBIT

Mid-February to Mid-June 2003
We received the information we requested from all the complainants. We were able to identify specific rule violations in only two of the complaints. After a review and assessment of each complaint, I was unable to identify the officers involved. The complainants did not identify an individual officer; therefore, it made it difficult to relate the specific complaint to any of the 21 officers involved in the raid at the tortilla factory.

June to July 2003
Various conversations took place between Attorney Neifor Acosta and I, in which we discussed the possibility of a community meeting with the complainants, the attorneys and a few Milwaukee Police Department personnel. The Chief of Police indicated he would attend the meeting and represent the department. After speaking with Attorney Acosta, it was decided to explore other possible options.

August 2003
Commissioner Ernesto Baca and FPC Chairman Robert "Woody" Welch conferred and then engaged Executive Director David Heard, Staff Attorney Steven Fronk and myself in a series of conferences regarding procedural options (not specific facts, regarding individual complaints). The consensus was that due to the inability to identify the accused officers, the only alternative available to the Commission is to forward the complaints to the Chief of Police, at which time the matter is no longer under the jurisdiction of the FPC. After discussion, we agreed to suggest the following course of action to Attorney Acosta.

The Commission would hold complaints in abeyance rather than dismiss them or refer them to the Chief. Mr. Acosta would provide a letter to the Commission listing what he believes to be the essential questions regarding search warrant policies and other matters related to the El Rey raids. The FPC would then forward the letter to the Chief of Police with a request for a response in writing. The FPC Chair has appointed Commissioner Ernesto Baca and me to a special committee on the execution of search warrants with the intent of holding a hearing once the response from the Chief is received.

Further, the FPC will make available to the candidates for the position of Police Chief the letter, response and any relative written materials regarding the raids. Applicants will be advised that they may be questioned regarding this matter at both the September 18th public hearing and in subsequent interviews with the Fire and Police Commission. Efforts will be made to determine prospective polices and the manner in which the city's next police chief will address the concerns of the community regarding the raids and the previous incidents which occurred during the Mexican Independence Day celebration.

It is the specific intent of the Fire and Police Commission, staff and members, to affirmatively address the concerns expressed by Mr. Acosta and others while providing a public forum to allow the community to be heard.

JAA/rk

THE COURT: Back up on the certiorari. An aggrieved person files a Complaint. It gets shipped over to the Chief. Where does the certiorari come in?

MR. SCHRIMPF: In the hypothetical case, the chief of police determines that there is not cause for sufficient -- or there is not cause for discipline. That decision itself could be the subject of certiorari by review.

THE COURT: What is the record?

MR. SCHRIMPF: It would be the record of the Board of Fire and Police Commissioners remanding it to the chief of police and whatever report the chief of police gave back to the Commission.

THE COURT: Are there time limits on that?

MR. SCHRIMPF: There are not time limits.

THE COURT: So the Commission could send it to the Chief. The Chief could sit on it for years?

MR. SCHRIMPF: But then you have the relief that was sought in this case, your Honor; mandamus.

THE COURT: So -- Okay. Go ahead.

MR. SCHRIMPF: The question that was presented was what kind of review was available in the Conway case to the plaintiffs.

And then this is the part where I think Mr. Ebbott and I agree. To determine whether agency

has exceeded its authority in promulgating a rule, the Court examines the enabling statute which indicates whether there is authority expressly or impliedly authorized. An administrative agency exceeds authority if it conflicts with the language of the statute or the statute's intent.

Now I think we also agree the Board of Fire and Police Commissioners, as was the Board of Fire and Police Commissioners in the Conway case, must be viewed and treated as an administrative agency. Smits v. City of DePere.

An administrative agency only has those powers expressly conferred or necessarily implied from the statutory language. That is hardly new Wisconsin case law.

Now in order for the Board's adoption of a rule to be a valid exercise of administrative power, it is necessary that the action be based on proper delegation of power and not constitute an administrative action in excess of the conferred authority. State Department of Administration v. DILHR.

First, one looks to the statute and examines the plain language of the statute. If the language of the statute is clear and unambiguous, it

is not -- it is simply necessary to apply the language to the facts at hand. And again, Counsel and I agree on this.

In addition, it is necessary to consider the whole statute; not 62.50(19) by itself, but 62.50(19) as part of 62.50.

It is also necessary to identify the elements of the enabling statute and match the rule against those elements. If it matches the statutory elements, the statute expressly authorizes the rule.

The enabling statutes need not spell out every detail of a rule in order to expressly authorize it; otherwise, no rule would be necessary.

And the fact that you may have to turn to a dictionary does not amount to an ambiguous statute.

Now, 62.50(3)(a) we maintain clearly provides the Board can create rules for the government of the members of the force.

Government of the members of the force must include the discipline of the members and the trial and all the due process rights that attenuate that.

That is because 62.50(11), (13), (17) and (19) specifically contemplate the use of suspension, demotion, a combination of demotion and suspension,

THE COURT: Aggrieved person is clearly a citizen.

MR. SCHRIMPF: Correct.

THE COURT: Is the purpose of this statute to enable citizens to file a Complaint?

MR. SCHRIMPF: I don't think there is any doubt about it.

THE COURT: Okay.

MR. SCHRIMPF: That is the whole purpose of the process because I suppose the Legislature contemplated the reality that an event could happen -- let's take the El Rey event where there were situations where people honestly and truly believed there had to have been a violation of rules and regulations, there was excessive force used or inappropriate conduct, either hurting people unnecessarily, whatever there may have been.

And I think the Legislature said yes, for these purposes, there must be some way that outside of the normal command chains of the department, the person can bring a Complaint.

THE COURT: The language here setting forth sufficient cause for the removal of any member, why put any road blocks there?

'Come in, tell us what happened and we'll

CHAPTER 22
POLICE AND FIRE DEPARTMENTS

TABLE

22-03. Police Force. 1. The police force of every city of the first class, however incorporated, shall consist of one chief of police, one inspector, one captain of detectives, and such number of captains of police, lieutenants, detectives, sergeants, roundsmen, patrolmen and other members as the common council shall from time to time by ordinance determine and prescribe.

2. In addition to the positions enumerated in sub. 1, the police force of the city of Milwaukee shall consist of and include the following positions, the number of which shall be determined by the salaries and positions ordinance:

a. Administrative assistants.
b. Deputy inspectors of police
c. Garage supervisor, assistant.
d. Garage supervisor, police.
e. Handwriting technician.
f. Jail matron.
g. Police alarm, assistant chief operator.
h. Police alarm, chief operator of.
i. Police communications, assistant superintendent of.
j. Police communications, superintendent of.
k. Police identification, superintendent.
l. Police identification, supervisor.
m. Police identification, technicians.
n. Police property and stores, custodian of.
o. Police property and stores, assistant custodian of.
p. Policewomen.
q. Radio mechanics.
r. Secretary of police department.
s. Traffic accident investigator.

3. All other positions in the police department shall constitute and be considered as civilian employe division of the police department without police powers.

4. All members or employes of the police department who are not members or employes of the police force shall be known as civilian employes or members of the police department.

5. All members or employes of the police force of the police department shall be known as police officers. *(S. 1, Ch. Ord. 150, Apr. 25, 1949.)*

22-04. Witness Fees. Any and all witness fees paid to any member or employe of the police department of the city of Milwaukee for attendance or testifying in any court where the information or knowledge testified to or sought to be elicited has been acquired by said member or employe of the police department in the performance of his official duty or employment, shall be immediately paid over by said member or employe to the chief of police who in turn shall pay over such witness fees to the city treasurer. All such witness fees received by the city treasurer shall be credited to the general city fund. *(S. 3, Ch. Ord. 49, Nov. 16, 1931.)*

22-05. Police Detail. The mayor or common council may direct the chief of police to detail any of the policemen to perform such official duties as he or they deem proper, and no extra compensation shall be allowed therefor. *(S. 3, Subch. 15, Ch. 184, L. 1874.)*

22-06. Rewards. Any and all property, money, gifts or things of value, other than salaries, received by the police department of the city of Milwaukee, or by any member or employe thereof, as reward or compensation in the performance of official duties or special

services in said department, shall become the property of the city of Milwaukee. All money so received or realized from any property so received shall be paid over by the chief of police to the city treasurer and all money so received by the city treasurer shall be credited to the general city fund. *(S. 3, Ch. Ord. 52, Jan. 25, 1932.)*

22-07. Police Powers of City Officers. The mayor, the harbor master and bridge tenders of the city, and the commissioner of health and his assistants, the meat inspector, and the special assistants appointed by said commissioner of health for quarantine service while engaged in such service, shall severally and respectively have and exercise, within said city, all the powers of policemen of said city, and the powers granted to the above mentioned shall be without any compensation or claim to compensation therefor. *(Am. Ch. Ord. 543, File #84-948, Nov. 13, 1984.)*

22-08. Police; Powers and Duties. The members of the police force shall perform such duties as shall be prescribed by the common council for the preservation of the public peace, and the good order and health of the city; they shall possess the powers of constables at common law; and all powers given to constables by the law of this state. The chief and each policeman shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables; shall arrest with or without process and with reasonable diligence take before a magistrate or other proper court every person found in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state or ordinance of such city, and may within the county of Milwaukee execute all process issued by the courts of said county in criminal cases, but shall not serve civil process except when the city is a party. *(S. 26, Ch. Ord. 323, Oct. 21, 1966.)*

22-09. Authority Within the County. 1. EXTENDED. The authority of the police department of the city of Milwaukee, is hereby extended so as to embrace the county of Milwaukee, and policemen of said city shall have the like authority to make arrests and serve process within the county of Milwaukee as are now possessed by them within the city of Milwaukee.

2. BY MILWAUKEE COUNTY. In order to facilitate the transactions of business and performance of duty by policemen in the county of Milwaukee, beyond the limits of the city of Milwaukee, the county board of supervisors of the county of Milwaukee may supply the police department of the city of Milwaukee with sufficient authority and conveyance to travel through the county of Milwaukee. *(S. 1, 2, Ch. 204, L. 1875.)*

3. SERVICE AND RETURN OF PROCESS. The officers and members of the police force shall have authority to serve and return process returnable in any court in the county of Milwaukee, in cases in which the city of Milwaukee or the state of Wisconsin is plaintiff or prosecutor, with the same force and effect as the same may be done by the sheriff of said county or his deputies. *(S. 5, Ch. 308, L. 1882.)*

4. OFFICERS OF THE PEACE; PENALTY FOR DISOBEYING. The mayor or acting mayor, the sheriff of Milwaukee county, and each justice of the peace, policeman, constable and watchman, shall be officers of the peace and may command the peace, and suppress in a summary manner all rioting and disorderly behavior within the limits of the city; and for such purposes they may command the assistance of all bystanders, and, if need be, of all citizens and military companies; and if any person, bystander, military officer, or private, shall refuse to aid in maintaining the peace when so required each such person shall forfeit and pay a fine of fifty dollars and in cases where the civil power may be required to suppress riotous and disorderly behavior, the superior or senior officer present, in the order above mentioned in this section, shall direct the proceedings. *(S. 6, Subch. 15, Ch. 184, L. 1874, as affected by 1983 Wisconsin Act 210.)*

22-10. Charges Against Subordinates. 1. Charges may be filed against a subordinate by the chief, by a member of the fire and police commission, by the board as a body, or by an elector of the city. Such charges shall be in writing and shall be filed by the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

2. It is the intention of the common council that the procedures, processes, and trial under this section shall be conducted in the same manner as provided in s. 62.50, Wis. Stats. (1983). *(Ch. Ord. 341, File #68-453-b, June 25, 1968; formerly s. 21-14-2.)*

22-13. Fire Chief; Deputies. 1. Effective May 1, 1928, the position of first assistant engineer of the fire department of the city of Milwaukee be and hereby is abolished.

2. Effective May 1, 1928, there are hereby created two positions in the fire department of said city, each to be known as deputy chief engineer.

3. All appointments of deputy chief engineers, whether original or to fill a vacancy, shall be made by the chief engineer of the fire department, with the approval of the board of fire and police commissioners.

4. They shall be subject to suspension or removal in accordance with the laws and ordinances which may be applicable to the case of other members of the fire department at the time of such suspension or removal.

5. During the absence or disability of the chief engineer, or during a vacancy in that office, the deputy chief engineers shall in the order of their rank, have full power and authority and it shall be their duty to do all the acts required by law to be done by the chief engineer or imposed upon him by law or the ordinances of the city, and shall be subject to the same liabilities and penalties. This provision shall have reference to those duties which are required by law to be done by the chief engineer including ministerial acts only and the chief engineer shall have authority to assign any of the other duties of the department as he sees fit.

6. The rank of said deputy chief engineers shall be determined by the order in which their names are submitted by the chief engineer to the board of fire and police commissioners for approval. *(S. 1 thru 6, Ch. Ord. 26, Jan. 30, 1928.)*

22-14. Fire Department Organization. The common council shall have power to purchase fire engines and other fire apparatus, and to organize a fire department, composed of a chief engineer and such other officers and men as shall be required and employed in the management and conduct of such fire engines and apparatus, and to establish rules and regulations for such department. *(S. 23, Ch. Ord. 326, Nov. 29, 1966.)*

22-15. Fire Department Personnel. In addition to the officers and men now authorized to be employed in the fire department of the city of Milwaukee, including the assistant superintendent of fire-alarm telegraph, the superintendent of machinery and apparatus and the secretary now appointed and employed under ordinances of said city; and which several officers last named are hereby constituted and confirmed as officers of the department; there may also be appointed hereafter by the chief, with the approval of the board of fire and police commissioners, as provided by law, a third assistant engineer, a chief operator of fire-alarm telegraph and two assistant operators of fire-alarm telegraph. *(S. 1, Ch. 336, L. 1887.)*

[Pages 138 to 140 are blank]

SUPREME COURT
STATE OF WISCONSIN
Case No. 04-3306

STATE EX REL. JOSE CASTANEDA,

Plaintiff-Respondent,

v.

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, AND DAVID L. HEARD, EXECUTIVE DIRECTOR, MILWAUKEE FIRE AND POLICE COMMISSION,

Defendants-Appellants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

APPEAL FROM DECISION OF THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE PATRICIA D. McMAHON, CASE NO. 03-CV-008737, UPON ACCEPTANCE OF THE CERTIFICATION OF THE COURT OF APPEALS

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I. RESPONSE TO CASTANEDA'S STATEMENT OF THE ISSUES

Castaneda's response brief sets forth two issues. Brief at 1. Issue number one is a restatement of the holding of the trial court that the Board has no general rule-making authority and therefore Rule XVII is invalid. The Board does not disagree that the issue of whether the Board has rule-making authority to administer Wis. Stat. § 62.50(19) is before this court; the court of appeals certified the issue and this Court accepted the certification to decide this issue.

Castaneda's second issue, as stated, is broader than the second holding of the trial court. Castaneda claims that the trial court also invalidated Rule XVII "because, as adopted and implemented" it is in conflict with Wis. Stat. § 62.50(19). Brief at 1. In its decision, the trial court only addressed, and invalidated as conflicting with the intent of Wis. Stat. § 62.50(19), subsection (4)(a) and subsection (6)(b)i. Although

this ruling was unnecessary based on the trial court's determination that the Board had no rule-making authority, nevertheless, because the trial court did not specifically address whether other subsections or sections of Rule XVII were consistent with Wis. Stat. § 62.50(19), no other subsection of Rule XVII was invalidated on this basis.

Castaneda claims that the Board has misstated two of the issues it raises in its brief. Regarding the Board's first stated issue, whether it has express rule-making authority under Wis. Stat. § 62.50(3)(a) to enact an administrative rule to process citizen complaints, Castaneda "disputes" and claims it is "not in evidence" the Board's characterization of Rule XVII as an administrative rule for the processing of citizen complaints. Brief at 1. This contention is without merit. The language of Rule XVII makes it clear that Rule XVII is an administrative rule which governs the processing of citizen complaints. Based on the language of Rule XVII,

this Court can determine the type of rule it is (administrative) and its purpose.

Castaneda also claims that the Board's second issue, that Rule XVII is valid because it is necessarily implied from its authority under Wis. Stat. § 62.50(19), is a misstatement of the trial court's decision because this issue "was neither tried nor decided" by the trial court. Brief at 1. The Board agrees that the trial court failed to address and decide whether Rule XVII was a valid exercise of the Board's implied power; the trial court only addressed and decided that the Board had no express rule-making authority to enact Rule XVII. The trial court's failure to fully apply the correct law constituted reversible error.

The law is that an administrative agency has those powers that are expressly conferred **or necessarily implied** from the statutory language of the enabling legislation. *Grafft v. DNR*, 2000 WI App 187, ¶ 6, 238 Wis. 2d 750, 618 N.W.2d

897. The Board did not misstate the issue; the trial court erred as a matter of law by failing to apply the law.

II. THE TRIAL COURT'S DECISION IS OWED NO DEFERENCE; LEGAL DETERMINATIONS ARE REVIEWED *DE NOVO*

Pages fourteen to seventeen of Castaneda's brief sets forth various standards of review. Castaneda claims that the standard of review applicable to a circuit court's determination to decide a declaratory judgment action (discretionary) is pertinent to the legal issue before this Court, i.e, whether the Board has either express or implied rule-making authority in order to administer Wis. Stat. § 62.50(19). Brief at 52-53. It is not. Only one standard of review is applicable - *de novo*.

As noted by this Court in *Loy v. Bunderson*, 107 Wis. 2d. 400, 320 N.W.2d 175 (1982), in addressing a declaratory judgment a trial court is confronted with two issues. *Loy* at 416; *Bence v. City of Milwaukee*, 84 Wis. 2d 224, 267

N.W.2d 25 (1978). First, does the complaint give rise to a justiciable controversy under Wis. Stat. § 806.04. Regarding this issue, the trial court has discretionary authority to grant or deny relief under Wis. Stat. § 806.04. *Theis v. Midwest Security Ins. Co.*, 232 Wis. 2d 749, 754, 606 N.W.2d 162 (2000) If the trial court allows the declaratory judgment action to proceed, then it decides the merits of the controversy, which presents a separate and distinct issue from whether or not a justiciable controversy exists. *Loy* at 416; *Bence* at 229-230. When the issue decided on the declaratory judgment is a legal determination, this Court's review of the legal issue is independent of the trial court. *Theis* at 754.

On this review, the Board does not challenge the trial court's discretionary decision to decide the matter. The basis for the appeal and this review is the trial court's decision on the merits, which involves only legal determinations. The trial court determined that the Board had no rule-making

authority and therefore Board Rule XVII was void. The trial court also determined that subsections (4)(a) and (6)(b)i. of Board Rule XVII were invalid because they were inconsistent with Wis. Stat. § 62.50(19). As set forth in the Board's initial brief in this Court, these two conclusions are legal determinations, which this court reviews *de novo*. *Wisconsin Citizens Concerned for Cranes & Doves*, 2004 WI 40, ¶¶ 6, 12, 270 Wis. 2d 318, 677 N.W.2d 612.

At pages 15 and 16 of his brief, Castaneda acknowledges that the issues of whether an administrative agency has rule-making authority and the scope of the agency's rule-making pose legal questions. This acknowledgement makes Castaneda's citation to the discretionary review standard superfluous since this court owes no deference to a trial court's determination of a legal issue. Regardless, a trial court's erroneous interpretation of

the law constitutes an erroneous exercise of discretion. *Theis* at 754.

III. THE TRIAL COURT DID NOT ENGAGE IN FACT FINDING AND THE LEGAL DETERMINATION OF WHETHER THE BOARD HAS RULE-MAKING AUTHORITY DOES NOT INVOLVE FACT FINDING

Pages seven to thirteen of Castaneda's brief are devoted to a recitation of facts alleged in the underlying joint complaint filed with the Board and purported facts found by the trial court (pages 8 to 11), as gleaned from its decision. Castaneda argues that the trial court's findings of fact should be afforded deference. While the trial court record established some undisputed facts, the trial court did not engage in fact finding and thus no deference is owed. Most of the purported facts stated in pages eight to eleven of Castaneda's brief are not facts; they are reasons provided by the trial court in support of its legal conclusion that the Board had no authority to enact Rule XVII. Brief at 8-11.

The trial court's invalidation of Rule XVII, on the basis that the Board had no rule-making authority, was not based on factual findings. No hearing, in which testimony was taken, was conducted; nor does the trial court decision set forth specific findings of fact. It is clear from its decision that in invaliding Rule XVII as being *ultra vires*, the trial court was interpreting, albeit incorrectly, Wis. Stat. § 62.50(19). This was a legal determination. Fact finding was not, and is not, necessary for a court to decide the legal issue of whether the Board has express or implied power to enact Rule XVII.

Since the alleged findings of fact are immaterial to the legal issue before this Court, it is unnecessary for the Board in this brief to specifically address each statement contained on pages eight through eleven of Castaneda's brief and respond to whether the statement could be an undisputed fact based on the record before this Court or whether the statement is a reason proffered by the trial court in support of

its legal determination that the Board has no rule-making authority. Nonetheless, the Board disagrees with Castaneda's third statement on page 9 of its brief that "[f]ailure to state a cause for removal was not the reason the FPC declined to set a date fore investigation and trial for the Plaintiff's complaint." This is erroneous. The trial court on page 16 of its decision acknowledged that the Board did not take jurisdiction of the complaints because the Board determined that the complaints did not state "sufficient basis for the removal of any officers." Bd. App. at 130; R. 27 at 16. The trial court countered the Board's determination with an erroneous legal conclusion, not a finding of fact, that Wis. Stat. § 62.50(19) does not require the citizen complaint to allege cause for removal. Bd. App. at 130; R. 27 at 16.

IV. THE FACTS ALLEGED IN THE JOINT COMPLAINT CANNOT PROVIDE A BASIS FOR INVALIDATING SUBSECTIONS (4)(a) and (6)(b)i. AS INCONSISTENT WITH WIS. STAT. § 62.50(19)

As argued in its initial brief, it is the Board's position that the trial court erred as a matter of law when it invalidated subsections (4)(a) and (6)(b)i. because it interpreted Wis. Stat. § 62.50(19) as requiring the Board to hold a hearing regardless of whether the citizen complaint gives rise to removal. In invalidating these subsections, the trial court noted that it presumed the facts alleged in the joint complaint to be true. Based on the trial court's interpretation of Wis. Stat. § 62.50(19), the trial court's presumption of truthfulness of the joint complaint was not pertinent to the Board's claim of legal error. This is because subsection (4)(a), which requires that the complaint gives rise to removal, and subsection (6)(b)i., which allows the Board to dismiss complaints that do not give rise to removal, are inconsistent

with the holding of the trial court that the citizen complaint need not satisfy the removal requirement.

In his brief, Castaneda argues, based on the facts of the joint complaint, that subsections (4)(a) and (6)(b)i are inconsistent with Wis. Stat. § 62.50(19). Invalidating subsections (4)(a) and (6)(b)i of Rule XVII on the basis of the joint complaint would be improper.

Wis. Stat. § 62.50(19) requires that an aggrieved person file "verified charges." The joint complaint does not constitute a verified complaint. *Black's Law Dictionary* defines verify as "to confirm or substantiate by oath." *Black's Law Dictionary*, 4th ed. Wisconsin Statutes § 706.07(1)(e) defines "verification upon oath or affirmation" as "a declaration that a statement is true made by a person upon oath or affirmation." The joint complaint, which sets forth the alleged misconduct, was signed by the attorneys

representing the 25 complainants, not the complainants themselves.

Since it could not be determined from the joint complaint what alleged misconduct each citizen was claiming, as part of the initial investigation, Board staff requested that each complainant submit individual complaints. The individual complaints submitted were the Board's form complaints, which require verification. Bd. App. at 161-162. However, none of the individual complaints signed under oath by any of the complainants alleged any specific facts; the complaints merely refer to the alleged misconduct set forth in the joint complaint. Bd. App. at 39-40. Each complaint states: "I verify that those acts and incidents which I observed are true. I am not verifying that acts or incidents which I did not observe are true." Bd. App. at 161-162. Even if there were no statutory requirement that the complaint allege cause for removal, no hearing is required

because these individual complaints do not provide verified factual information upon which the Board could find any rule violation.

Castaneda argues that subsection (4)(a) is onerous because it requires a citizen to know all the rules of the police department in order to comply with subsection (4)(a). While subsection (4)(a) does mirror the statutory language of Wis. Stat. § 62.50(19) regarding removal, it is evident from the Board's form complaint that knowledge of police rules is not necessary. The complainant asks the aggrieved person to state, by giving "specific facts" the alleged misconduct. Bd. App. at 161-162. The form complaint asks the citizen to check whether he or she is proceeding under the state statute or the charter ordinance. The fact that subsection (4)(a) states the statutory requirement that the complaint must state grounds for removal serves as notice to the citizen as to what the statute requires in order to proceed to hearing.

Castaneda's claim that this requirement is onerous should not be directed to the Board, it should be directed to the legislature for limiting the type of disciplinary proceedings that can be initiated by an aggrieved citizen under Wis. Stat. § 62.50(19).

To initiate a citizen complaint, Wis. Stat. § 62.50(19) requires that an aggrieved person state under oath the information that they personally know, which gives rise to serious misconduct of a member of the police or fire department. The joint complaint does not fulfill this requirement. The individual complaints, while verified, do not state any specific personal information upon which any rule violation could even be alleged. Because the alleged facts in the joint complaint have never been adjudicated or attested to by a person with person with knowledge as required by Wis. Stat. § 62.50(19), the joint complaint cannot serve as a basis for invalidating subsections (4)(a) and (b)(b)i.

V. IT IS PRECISELY BECAUSE WIS. STAT. § 62.50(19) DOES NOT CONTAIN ANY PROCEDURE FOR ADMINISTERING CITIZEN COMPLAINTS THAT RULE XVII IS NECESSARY

Castaneda argues all the procedure necessary for the Board to investigate and adjudicate citizen complaints is contained in Wis. Stat. § 62.50(19) and the Board need not go beyond that subsection in its administration of a citizen complaint. (Though Castaneda concedes, as he must, that Wis. Stat. § 62.50(19) must be read with reference to Wis. Stat. § 62.50(17)(b)1.-7. for determining just cause. Brief at 29). Relying on the trial court opinion, Castaneda further asserts that Rule XVII, rather than aiding the Board in fulfilling its responsibilities under 62.50(19), "permits the Board to *avoid* fulfilling its statutory duties." Brief at 29. [1]

[1] At pages 29, 39, and 40 Castaneda argues that from the statistics there is an inference the Board is not fulfilling it's duties under Wis. Stat. § 62.50(19). However, no evidence was presented as to the nature of those cases, and, whether or not the complainants in those cases, if they believed that the decision of the Board to dismiss their case was in error, could not have sought review of the decision of the Board to dismiss by

This argument belies the language of Wis. Stat. § 62.50(19); the statutory section contains no procedure at all for handling the complaints. It does not state who is an "aggrieved person," where to file the complaint, how to file the complaint, or what the complaint should contain, other than to state it must allege cause sufficient for removal of the member. Wis. Stat. § 62.50(19) provides nothing by way of guidance as to how the Board should determine if the allegations in the complaint meet the jurisdictional requirement of stating cause sufficient for removal of the member. Finally Wis. Stat. § 62.50(19) is completely silent on how the hearing will be conducted in terms of taking evidence, etc.

The omission of any procedural direction in Wis. Stat. § 62.50(19) was acknowledged by the court of appeals in its certification of the appeal to this Court.

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certiorari, *Gentilli v. Board of Police and Fire Commissioners of the City of Madison*, 2004 WI 60, 272 Wis. 2d 1, 680 N.W. 2d 335.

> Perhaps a better argument for the commission's rule-making authority lies in the fact that, despite the detailed procedural rules for conducting trials on complaints, WIS. STAT. § 62.50 provides little or no guidance on how to resolve frivolous or unfounded allegations against department members short of a full trial of the matter. Nor does it provide any guidance on how to address the precise problem here, which is the fact that the alleged misconduct included concealment of the offending officers' identities. The commission contends that the logical extension of Castaneda's argument would bar implementation of any type of screening procedure, and require the commission to try every single complaint made to the chiefs and commission.

Certification of Wisconsin Court of Appeals at 4; Bd. App. at 112.

The clear lack of any procedural guidelines in Wis. Stat. § 62.50(19) makes an administrative rule imperative.

By focusing solely on whether the Board had express rule-making authority, the trial court and Castaneda have failed to correctly analyze the statutory responsibilities of the Board. A correct analysis of Wis. Stat. §62.50(19) requires

acceptance of the statutory limitation placed on the citizen complaints that proceed to hearing. Both the trial court and Castaneda refuse to accept this limitation. Once it is accepted that Wis. Stat. § 62.50(19) does not authorize a hearing on all citizen complaints, it is clear that an administrative rule is necessary to screen complaints in order to effectuate the statutory requirement that hearings be held on only those complaints that give rise to removal. Furthermore, the trial court failed to consider whether the quasi-judicial function imposed on the Board by Wis. Stat. §62.50(19) necessitated a rule of administration in order to conduct hearings. Had the trial court considered whether an administrative rule was necessary in order for the Board to fulfill its responsibilities under Wis. Stat. § 62.50(19), rather than focusing solely on whether the Board had express rule-making authority, Rule XVII should have been held valid as a proper exercise of the Board's implied power.

VI. "GOVERNMENT OF THE MEMBERS" INCLUDES DISCIPLINE OF THE MEMBERS

Castaneda argues that the Board's express authority to enact rules for the "government of the members" under Wis. Stat. 62.50(3)(a) allows the Board to regulate "the conduct and working conditions of police officers, similar to personnel policies." Brief at 18. Castaneda claims this express rule-making authority does not extend to Wis. Stat. § 62.50(19) because the statute concerns citizens, not police officers.

Police conduct, as well as working conditions, includes discipline. Therefore, discipline of the members is included in Castaneda's definition of "government of the members." Regardless, it was established in *Kasik v. Janssen*, 158 Wis. 606, 149 N.W. 398 (1914) that the authority to regulate "government of the members" includes the authority to discipline. Rule XVII does not regulate or govern citizens. It

regulates the administrative process by which an aggrieved citizen can seek redress against a police officer under Wis. Stat. § 62.50(19) and Milwaukee City Charter § 22-10.

Dated and signed at Milwaukee, Wisconsin this 10th day of January, 2007.

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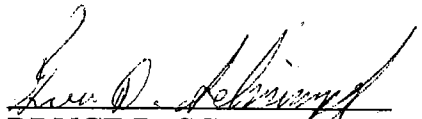
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 2,939 words.



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SUPREME COURT OF WISCONSIN

STATE EX REL. JOSE CASTANEDA,
Plaintiff-Respondent,

v.

Appeal No. 2004AP3306
Circuit Court Case No. 2003CV8737

WOODY WELCH, Chairman, Milwaukee Fire and Police Commission, ERIC MANDEL JOHNSON, Vice Chair, Milwaukee Fire and Police Commission, CARLA Y. CROSS, LEONARD J. SOBCZAK, and ERNESTO A. BACA, Members of the Milwaukee Fire and Police Commission, and DAVID E. HEARD, Executive Director, Milwaukee Fire and Police Commission,

Defendants-Appellants.

NON-PARTY BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, INC., MILWAUKEE BRANCH OF THE NAACP AND MILWAUKEE INNER CITY CONGREGATIONS ALLIED FOR HOPE

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ARGUMENT

This case raises the issue of whether and when the Milwaukee Fire and Police Commission (FPC) is obligated to investigate citizen complaints against police officers. Amici request that this Court uphold the express language of state law, which imposes upon the FPC a legal duty to investigate complaints of "aggrieved persons." This Court's affirmation of the circuit court decision is not only necessary as a matter of law but also as a matter of public policy.

I. INDEPENDENT REVIEW IS IMPORTANT TO PROMOTE PUBLIC TRUST IN THE POLICE.

The FPC is a civilian review board consisting of five citizen members appointed by the mayor. Wis. Stat. §62.50(1). As such, the FPC could and should play an integral role in police-community relations in Milwaukee.

> [C]ivilian review boards are critical to the success of external controls over police misconduct. Civilian review boards provide a means of maintaining internal regulation of police practices and evaluating a police officer's performance. Regardless of whether a civilian's complaint is valid, a system of review for allegations of misconduct can affect the public's perception of a police department's efficiency and its reputation.

U.S. Commission on Civil Rights, *Revisiting "Who Is Guarding the Guardians?"* (2000) at Ch. 4 (internal citations omitted). The U.S. Department of Justice agrees.

> Law enforcement agencies . . . should provide a readily accessible process in which community and agency members can have confidence that complaints against agency actions and procedures will be given prompt and fair attention. Such investigations will not only provide for corrective action when appropriate, but also will protect against unwarranted criticism when actions and procedures are proper. A fair and thorough investigation further serves to protect the community, the agency and its personnel from complaints that are based on misunderstandings or invalid information.

U.S. Department of Justice, *Principles for Promoting Police Integrity: Examples of Promising Police Practices and Policies* (2001) at 7.

Positive police-community relations are essential for any police department to succeed in its fundamental missions of preserving public order and ensuring public safety. Despite some limitations, such boards provide significant benefits for complainants, law enforcement officials, and elected and appointed officials. Peter Finn, National Institute of Justice, *Citizen Review of Police: Approaches and Implementation* (2001) at *x-xi.*

Complainants, for example, feel validated not only when an oversight body agrees with their allegations, but even when it disagrees if it gives them an opportunity to be heard. They appreciate the ability to express concerns in person to officers, and feel that they contribute to holding the department and officers accountable. *Id.*, at *x,* 7-8*; see also,* Mayor's Citizen Commission on Police-Community Relations, *A Report to Mayor John O. Norquist and the Board of Fire and Police Commissioners* (1991) at 35 ("most complainants indicated that they simply wanted an apology from the offending officer and an assurance of future dignified and respectful treatment.") Police officials report that citizen review improves community relations, strengthens internal investigations, vindicates innocent officers, and reassures the public that processes for addressing misconduct allegations are thorough and fair. Officials also find that reviews often result in valuable recommendations for improving police policies and procedures. *Citizen Review of Police* at *xi,* 8-10. In addition, elected and appointed officials report that citizen review boards enable them to publicly demonstrate their desire to end police misconduct and lessen the costs

and other risks of potential litigation. *Id.* at *xi,* 10-12*; see also*, Richard Jerome, Police Assessment Resource Center, *Promoting Police Accountability in Milwaukee* (2006) at 8.

In establishing the Fire and Police Commission, the Wisconsin legislature recognized the value of having an independent body with control over police operations. In 1885 it established the FPC, the first police commission in the United States, to avoid abuses of discretion and "remove 'cronyism' and politics from the hiring and firing of police and fire personnel." *Police Accountability* at 12.

> This effectively dealt with the problem of improper accountability by the police, *i.e.*, to special political interests, by insulating the department personnel from economic pressure through the manipulation of hiring and promotions.

Matthew Flynn, *Police Accountability in Wisconsin*, 1974 Wis. L. Rev. 1131, 1134 (1974).

Initially, however, the FPC did not have the authority to address concerns regarding police behavior. In 1911, the legislature expanded the FPC's authority to encompass citizen complaints.

> In cases where duly verified charges shall be filed by any reputable freeholder of any such city with such board of

> fire and police commissioners, setting forth sufficient cause for the removal of any member of either of said departments, including the chiefs or their assistants, it shall be the duty of such board to immediately suspend such member or officer and cause notice of the filing of such with a copy thereof to be served upon the accused as herein provided and to set a date as herein provided for the trial and investigation of such charges, and the same procedure shall be followed as herein provided.

1911 Wis. Laws §959-46d.19. Although over the years the legislature has made some changes, including, significantly, opening up the complaint process to "any aggrieved person" and making suspension optional instead of mandatory,[1] its core elements - investigation and trial of complaints of police misconduct - remain the same. *See*, Wis. Stat. §62.50(19).

II. THE FPC SHOULD BE, BUT HAS NOT ACTED AS, AN INDEPENDENT CIVILIAN REVIEW BOARD.

The "FPC's citizen complaint process is badly broken." *Police Accountability* at 1. It long has been so, largely due to the FPC's continuing failure to fully or adequately exercise its authority over citizen complaints. At the same time, "Milwaukee, like most large cities

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[1] 1977 Wis. Laws Ch. 20, § 2.

in the United States, has a history of troubled relations between the Police Department and the African-American Community, and a similarly troubled relationship between the Police Department and Milwaukee's Latino population." *Police Accountability* at 3. This problem also has existed for decades. *See, e.g., The State of Police-Community Relations - A Report to the Milwaukee Fire and Police Commission* (1981) at 12 ("The most important finding of the entire study is the degree and depth of Black alienation from the Milwaukee Police Department."); Wisconsin State Committee to the U.S. Commission on Civil Rights, *Police Isolation and Community Needs* (1972) at 10 ("Many poverty area residents are dissatisfied with police performance in their areas, and this discontent, whether justified or not, is a major factor in creating urban racial tensions.")

Thirty-five years ago, the Wisconsin State Committee to the U.S. Commission on Civil Rights evaluated the record of FPC responses to police misconduct. Although the obligation to address citizen complaints had existed since 1911, the FPC "did not exercise its powers to hear citizen complaints for nearly sixty years." *Police*

Isolation and Community Needs at 77. Further, "the FPC routinely handed over to the department the responsibility for investigating citizen complaints of police misconduct." *Id.* at 77-8. In 1969 it discontinued that practice and began to investigate complaints itself, which the community saw as an improvement. *Id.* at 78-80.

Those improvements did not continue. The complaint process remained onerous, in no small part because the FPC placed much of the onus of submitting acceptable complaints on complainants themselves. *Report to Mayor Norquist* at 32, 36. In 1991, a commission established by Milwaukee's mayor recommended that the FPC improve its complaint process by, *inter alia*, providing information in ordinary language, referring complainants for legal assistance, developing a process to allow citizen complaints against policies as well as against specific acts of misconduct by officers, and reviewing "complaints to identify patterns of behavior, officers complained against, or situations which seem to give rise to complaints" so that corrective action could be taken. *Id.* at 37-8.

Instead of implementing these recommendations, the FPC failed to meaningfully address community concerns. *See, e.g.*, Wisconsin Advisory Committee to the U.S. Commission on Civil Rights, *Police Protection of the African American Community in Milwaukee* (1994) at 77-8. Its failures worsened with the city's 2003 decision to fold FPC staff into its department of employee relations, thereby reducing the FPC's autonomy, budget, and morale. *Police Accountability* at 34-5.

> The FPC does no investigation of complaints, and if a complaint does get to trial, the complainant has to present his or her own case. Few cases get to trial and even fewer result in sustained findings of officer misconduct. Of cases filed from 2000 to 2005, only eight of 437 complaints have gone to trial, and only two have been sustained. In 14 years (1992-present), there have been only eight sustained complaints, involving 10 officers. Citizens and officers alike are frustrated by long delays in the complaint process.

Police Accountability at 2. Similarly, the FPC failed to develop a method to allow citizen complaints about police policies, or even to meaningfully exercise its obligation under Wis. Stat. §62.50(1m) to review those policies. *Police Accountability* at 74.

The FPC's failure to investigate complaints, its insistence on placing that burden on complainants, and its adoption of rules like Rule

XVII has created a system that is not only working poorly in practice but also suffers from deeper defects.

> The FPC complaint process is structurally flawed in ways that make it very difficult for a citizen to establish a claim of misconduct, even if meritorious. The civilian is required at every stage to be able to articulate (sometimes in writing and sometimes orally) the claim of misconduct against the accused officer, generally without any investigative or representational assistance. Officers, on the other hand, are almost always represented by counsel. If the complainant does not specifically identify the misconduct alleged, as well as the officers who were alleged to have engaged in the misconduct, then the complaint is often dismissed by the FPC[2]. . .
>
> While the citizen completes the complaint form setting forth the factual allegations, it is the FPC staff. . .who choose the charges they believe are made out by factual allegations. The selection of charges by staff is sometimes flawed and may lead to the dismissal of charges that might well have been sustained, had the correct rule violation been alleged.
>
> The FPC has no investigators. If the case needs investigation, it is the complainant's responsibility to conduct the investigation on his or her own. There are some cases where the FPC determines that investigation is needed, and dismisses the case but refers it to the

[2]This is true even in cases such as the present one, where the officers violated department rules by concealing their identities so that the complainants could not identify them. Resp. Br. at 7, 11-13.

> Police Department. This is often the case in complaints that allege potential criminal violations.

Police Accountability at 47-49.

Thus even if a complainant is able to overcome the obstacles to make an acceptable report to the FPC, it is virtually impossible to get that complaint investigated by a body other than the Milwaukee Police Department itself- the very entity whose officers are the subject of the complaint.[3] This creates the appearance if not the fact of bias, and can put the even the most impartial police chief in an unfair and untenable position. It is also not what the law requires.

III. COMPLIANCE WITH STATUTORY PROCESSES WOULD HOLD POLICE OFFICERS ACCOUNTABLE FOR ACTS OF MISCONDUCT AND ENHANCE PUBLIC TRUST.

The law is clear: when "duly verified charges are filed by any aggrieved person with the board of fire and police commissioners, setting forth sufficient cause for the removal of any member of either of the departments, . . .[t]he board. . . ***shall*** set a date for the trial and

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[3]Indeed, in this case, the "FPC voted to refer the joint complaint to [the Police] Chief . . . to investigate and 'to take appropriate action.'" Resp. Brief at 8.

investigation of the charges . . ." Wis. Stat. §62.50(19) (emphasis added). Legislatively-prescribed processes such as this one hold police officials accountable for acts of misconduct by requiring that those acts be investigated and, where appropriate, tried by a body independent of the police department. They are critical elements in the public service and public safety missions of the department.[4]

Independent civilian review boards can provide an effective tool for people who allege official misconduct by members of police departments to have their claims heard in a timely, thorough, and fair manner that increases public confidence in the police. While it can and should function as such a body, the FPC has abdicated its responsibilities, in part because of administrative changes and inadequate staffing and funding, but also because of its creation of and preference for the use of Rule XVII rather than the procedures prescribed by the Legislature in Wis. Stat. §62.50(19). These flaws are

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[4]A recent evaluation recommends replacing the FPC complaint process with an independent monitor model. *Police Accountability* at 23-33. While such a process might be effective, it has not been adopted and is not what the law currently requires. As long as the existing complaint system exists, it is crucial to ensure that the FPC operates it in a manner that will fulfill its obligation to address citizen complaints.

compounded by the FPC's self-imposed reticence under its own rules to investigate even those complaints over which it asserts jurisdiction.[5]

The history of the FPC shows that the primary concern should not be frivolous complaints. As the respondent notes, the appellants' fears of being inundated with bogus, vindictive or otherwise unsubstantiated claims are not based on any evidence in the record. Resp. Brief at 50. Moreover, other communities do investigate civilian complaints against the police, showing that models for doing so exist and are feasible. For example, in Berkeley, California, a civilian review board and the police internal affairs department simultaneously, but separately, investigate complaints. *Citizen Review of Police* at 21-25. Flint, Michigan first seeks to resolve complaints informally (such as by obtaining information on a particular policy from the Internal Affairs division of the police department) or by mediation, but it also has formal investigators on staff if informal resolution is unsuccessful. *Id.* at 27-30. San Francisco assigns all complaints to an investigator. *Id.* at

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[5]Although the FPC refers complaints for conciliation if it determines that it has "provisional jurisdiction," and although complaints that are not conciliated are set for trial, even in those situations "the FPC does not conduct *any* investigation." *Police Accountability* at 49 (emphasis added).

55-58. Minneapolis first tries to resolve concerns informally by providing information on police procedures or calling officers' supervisors, but paid staff investigate formal complaints that are made and that are within its jurisdiction.[6] *Id.* at 30-36. When informal methods of resolving complaints fail, these civilian review boards interview the complainant early in the process - a mechanism that could help screen out improper complaints.[7]

Further, the history of the FPC shows that its primary problem is the failure to investigate potentially meritorious complaints, not inundation with false claims. Permitting the Board to make rules that allow it to routinely refuse to exercise its investigative functions renders Wis. Stat. §62.50(19) meaningless and leaves persons who have been victims of police abuse without an effective independent remedy short of litigation. It also undermines public support of the police

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[6]For example, the Minneapolis civilian review board does not have jurisdiction over allegations of criminal conduct, cases that could lead to firing, and high profile cases. *Id.* at 32.

[7]While *amici* are not necessarily recommending that the FPC adopt one of these models, their existence belies defendants' assertions that requiring the FPC to comply with its explicit statutory duty to investigate complaints is unduly burdensome.

department, particularly among racial and ethnic minorities, where such confidence and support are already low.

Were the FPC to properly exercise its investigatory functions, there are methods that exist or could be created for efficient disposition of those complaints rather than creating a system of rules outside of the statutory framework. Such a system must operate within the parameters of Wis. Stat. §62.50(19), *i.e.*, after the FPC files notice of the charges, provides a copy of such notice to the accused, and sets a date for the trial and investigation of the charges. It should not be too difficult to create such a system. Indeed, Wisconsin's rules of civil procedure provide a ready model, allowing for a trial date to be set but also providing the opportunity for a defendant to have unmeritorious or otherwise insufficient claims dismissed or subjected to summary judgment. *See,* Wis. Stat. §§802.06(2)(a), 802.08.

CONCLUSION

Through its adoption of Rule XVII and other procedures outside of the statutorily prescribed framework, the FPC has abandoned its responsibilities to the public. Affirming the circuit court's ruling in this

case will help ensure that the FPC fulfills its role as an independent civilian review board, as required under Wis. Stat. §62.50(19). It will thus provide an effective means for holding members of the Milwaukee Police Department who commit misconduct accountable for their actions and increase the public confidence in the department that is essential for it to achieve its mission to serve and protect the people of Milwaukee.

Dated this 5th day of February, 2007.

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CERTIFICATE OF LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2838 words.

Dated this 6th day of February, 2007.

Karyn L. Rotker

CERTIFICATE OF FILING AND SERVICE

I certify that on February 7, 2007, I caused 22 copies of the Nonparty Brief of the American Civil Liberties Union of Wisconsin Foundation, Inc., Milwaukee Branch of the NAACP and Milwaukee Inner City Congregations Allied for Hope to be deposited in the United States mail for delivery to:

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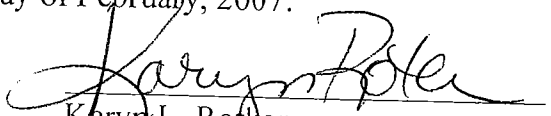

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