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Disciplinary Procedures for Law Enforcement Officers and Fire Fighters (Employment Relations Commission)

Bill Agency

[LFB 2007-09 Budget Summary: Page 140, #7]

CURRENT LAW

Under current law, a law enforcement officer or fire fighter employed by a city (other than the City of Milwaukee), village, town or county may not be suspended, reduced in rank, suspended and reduced in rank, or dismissed by a grievance committee, civil service commission, county board, or board of police and fire commissioners (a tribunal) unless the tribunal determines that there is just cause to sustain the charges that have been brought against the officer or fire fighter. If the charges are sustained and the officer or fire fighter is disciplined by the tribunal, he or she may appeal the order to circuit court, with one exception, noted below. The trial based on the appeal is before the court, which must determine whether there is just cause to sustain the charges against the accused officer or fire fighter and the tribunal's order. If the charges and the tribunal's order are sustained, the tribunal's order is final and conclusive but, if reversed, the officer or fire fighter is reinstated and entitled to pay as though he or she were in continuous service. Similar procedures, other than the just cause standard, apply to police officers employed by the City of Milwaukee.

The exception to this procedure, established under a decision of the Wisconsin Supreme Court (*Eau Claire County v. General Teamsters Union Local No. 662*, 2000 WI 57), is that a county law enforcement officer may proceed with either an appeal to circuit court or with the grievance procedures, including arbitration, in the officer's collective bargaining agreement.

GOVERNOR

Provide that appeal provisions in current law applicable to any law enforcement officer or fire fighter suspended, reduced in rank, suspended and reduced in rank, or removed by an authorized tribunal would not apply to any such person who is subject to the terms of a collective bargaining agreement that provides an alternative to the appeals procedure, unless the person chooses to appeal the order to circuit court. If the alternative to the appeals procedure includes a hearing, the hearing would be required to be open to the public with reasonable advance notice given by the employer. Specify that an accused person who chooses to appeal the decision of a tribunal through a collectively bargained alternative to the appeals procedure would be considered to have waived his or her right to circuit court review of the board decision. These provisions would not apply to City of Milwaukee law enforcement or fire fighting personnel. The provisions would first apply to a person who is suspended, reduced in rank, suspended and reduced in rank, or removed on the effective date of the provision.

DISCUSSION POINTS

1. The provisions under the bill have been introduced as both Senate bills and Assembly bills over the last four legislative sessions; the SB 40 provisions are identical to: 2007 SB 21 and 2007 AB 57; 2005 SB 82 and 2005 AB 185; and 2003 SB 48 and 2003 AB 128. In addition, 2001 SB 185 and 2001 AB 424 are nearly identical to the other bills. The only difference is that the 2001 bills did not include a provision that if the appeals procedure includes a hearing, the hearing would be required to be open to the public with reasonable advance notice given by the employer. None of these bills have been enacted, although 2005 AB 185 passed the Assembly and 2001 SB 185 passed the Senate.

Background

2. The Wisconsin Supreme Court decision in *Eau Claire County v. General Teamsters Union Local No. 662*, ruled that a county law enforcement officer may proceed either with an appeal to circuit court or with the grievance procedures, including arbitration, in the officer's collective bargaining agreement. In this case, the Supreme Court affirmed a ruling of the Court of Appeals that s. 59.52(8)(c) of the statutes, which relates to disciplinary procedures for law enforcement employees of a county, does not establish a circuit court as the exclusive forum in which an aggrieved county law-enforcement employee may challenge an order of a civil service commission to dismiss, demote, suspend, or suspend and demote the employee, and that the collective bargaining agreement providing for arbitration of such disputes is valid and enforceable.

3. Section 59.52(8)(a) of the statutes relates to a county civil service system and provides that a county board may establish a civil service system of selection, tenure and status, and the system may be made applicable to all county personnel, except the members of the board, constitutional officers and members of boards and commissions. The system may also include uniform provisions in respect to classification of positions and salary ranges, payroll certification,

attendance, vacations, sick leave, competitive examinations, hours of work, tours of duty or assignments according to earned seniority, employee grievance procedure, disciplinary actions, layoffs and separations for just cause, subject to approval of a civil service commission or the county board. It appears the county board may either establish a civil service commission to oversee its civil service system, or the county board, or a board committee, may supervise the system.

4. Further, s. 59.52(8)(b) of the statutes provides for disciplinary procedures of county law enforcement personnel. A law enforcement employee of the county may not be suspended, demoted, dismissed, or suspended and demoted by the civil service commission or the county board, based either on its own investigation or on charges filed by the sheriff, unless the civil service commission or the county board determines whether there is just cause to sustain the charges. In making its determination, the civil service commission or the county board must apply certain statutory standards.

5. Under s. 59.52(8)(c) of the statutes, a disciplined law enforcement employee may appeal from the order of the civil service commission or the county board to the circuit court. The court, upon application of the accused, or of the board, or the commission, must fix a date of trial in which the question to be determined by the court is the following: Upon the evidence is there just cause (based on the statutory standards) to sustain the charges against the employee? If the order of the board or the commission is reversed, the accused shall be immediately reinstated and entitled to pay as though in continuous service. If the order of the board or the commission is sustained, it shall be final and conclusive.

6. The Supreme Court's ruling that an aggrieved county law-enforcement employee may challenge a disciplinary order of a civil service commission or county board either in circuit court or under the grievance procedures of a collective bargaining agreement providing for arbitration of such disputes was based primarily on two factors. First, Eau Claire County (a party in the case) utilized a committee on personnel, whose members included county board members, as the review body for disciplinary actions. The Supreme Court concluded that the Eau Claire County Board appears to have an interest in the disciplinary dispute (as the employer) and is at the same time the decision-maker under the statute relating to a determination of just cause. Second, s. 59.52(8)(b) does not require a hearing to be held at which the county law enforcement employee could be represented by an attorney or call witnesses.

7. In light of these factors, the Supreme Count concluded that "… the legislature may very well have decided that a county law-enforcement employe should be given the choice of having a circuit court review the existence of 'just cause' on the paper record made by the civil service commission or having a disinterested arbitrator make a decision after hearing the facts."

8. In drawing this conclusion, the Court contrasted the provisions of s. 59.52(8) with those of s. 62.13(5), which governs disciplinary procedures for city police and fire fighters (excluding Milwaukee). [Section 62.13(5) is the provision that would be amended by the SB 40 proposal, as well as the administration's revised proposal.] Under s. 62.13(5), disciplinary reviews

are handled by a police and fire commission (PFC). Each city, with certain exceptions, must have a board of police and fire commissioners consisting of five citizens, three of whom constitute a quorum. The mayor is required to annually, between the last Monday of April and the first Monday of May, appoint one member for a term of five years. No appointment is permitted that would result in more than three members of the board belonging to the same political party. The structure and composition of a PFC is provided for in statute. In contrast, under s. 59.52(8), the county board itself may act as the disciplinary review body.

9. In addition, the disciplinary review under s. 62.13(5) is also more formal than that provided under s. 59.52(8). Under s. 62.13(5), following the filing of charges in any case, the PFC must set a date for a hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges must be public, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas, which must be issued by the president of the PFC on request.

10. If the PFC determines that the charges are not sustained, the accused, if suspended, must be immediately reinstated and all lost pay restored. If the commission determines that the charges are sustained, based on the statutory standards referred to above, the accused, by order of the PFC, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

11. Any person disciplined in this manner may appeal from the order of the PFC to the circuit court. The trial must be by the court and the question to be determined by the court is as follows: Upon the evidence is there just cause (based on the statutory standards) to sustain the charges against the accused? If the order of the commission is reversed, the accused must be reinstated and entitled to pay as though in continuous service. If the order of the commission is sustained it is final and conclusive.

12. In contrast to the decision in *Eau Claire County v. General Teamsters Union Local No. 662,* concerning county law enforcement employees, the courts concluded, in a separate case, that city police and fire fighters are limited in disciplinary disputes to a review by a PFC and an option to appeal to the circuit court. In a Court of Appeals decision (*City of Janesville v. Wisconsin Employment Relations Commission, No. 94-1606, April 13, 1995*), the court concluded that it is inconsistent with the statues to permit "a subordinate who is dissatisfied with a PFC decision to seek arbitration of essentially the same issue decided by the PFC." In this case, it appears the court viewed the PFC as an impartial body and the disciplinary review established under s. 62.13(5), which includes a mandatory public evidentiary hearing, as precluding the use of arbitration under a collective bargaining agreement. As a result, the Court of Appeals ruled that the arbitration of disciplinary disputes is not a mandatory subject of bargaining and, therefore, grievance arbitration relating to disciplinary actions under s 62.13(5) of the statutes is not an option.

Senate Bill 40 and Substitute Provisions

13. The Governor's SB 40 provision could be viewed as an attempt to conform current

law as it applies to law enforcement officers or fire fighters employed by a city (other than the City of Milwaukee), a village, or a town to the standard established under the Wisconsin Supreme Court for a county law enforcement officer. As noted above, under *Eau Claire County v. General Teamsters Union Local No. 662*, 2000 WI 57, a county law enforcement officer may proceed with either an appeal to circuit court or with the grievance procedures, including arbitration, in the officer's collective bargaining agreement.

14. However, on March 19, 2007, in a letter from Administration Secretary Morgan to the Joint Committee on Finance Co-Chairpersons, the Secretary indicated that the SB 40 provisions did not accurately reflect the Governor's intentions. Secretary Morgan states: "To achieve the Governor's intent, the bill needs to be modified to permit suspended, reduced or removed subordinates of police or fire chiefs to request a hearing before the Board of Police and Fire Commissioners or before an arbitrator appointed by the Wisconsin Employment Relations Commission and to permit new rules on disciplinary procedures to be collectively bargained with the representative of the collective bargaining unit of which subordinates are members. In addition, the suspended, reduced or removed subordinate, or the labor organization representing the subordinate may appeal the decision of the arbitrator or the board to the Circuit Court by filing a motion with the Circuit Court or to the secretary of the board."

15. On May 15, 2007, this office was provided with a draft of an amendment to SB 40 (LRBb0123/1), which reflects the Governor's intent on this issue. The amendment would authorize a suspended subordinate, as an option to a PFC hearing on a disciplinary matter, to instead request arbitration by WERC. This arbitration proceeding would then be subject to the same procedural requirements as exists under current law for a PFC hearing, except that the following modifications to current law would be made:

a. Under current law, the date for the hearing must be set not less than 10 days nor more than 30 days following the service of charges. Under the amendment, the hearing date would be set as soon as possible.

b. Under current law, there are no time requirements for the issuing of a decision by a PFC. Under the amendment, a PFC or the arbitrator (WERC) would be required to render a decision no later than 180 days after the hearing commences.

c. Under current law, if a PFC disciplinary decision is sustained by the Circuit Court, the order of the PFC is final and conclusive. Under the amendment, the provision that the order of a PFC is final and conclusive would be repealed.

The SB 40 provision itself would be retained under the amendment. Thus, the subordinate could either appeal the order of a PFC or the arbitration decision of the WERC to the Circuit Court, or pursue an alternative procedure such as arbitration under the terms of a collective bargaining agreement.

The provisions would first apply to any member of the police force or fire department who is covered by a collective bargaining agreement that contains provisions inconsistent with the modifications made under these provisions on the day on which the collective bargaining agreement expires or is extended, modified, or renewed, whichever occurs first.

In summary, under the SB 40 provision, the subordinate would be provided with one of two appeal options from a PFC order: (a) the Circuit Court, as provided under current law; or (b) an alternative procedure negotiated under a collectively bargained alternative.

Under the amendment, the subordinate would be provided with the option to have the disciplinary action arbitrated by WERC in lieu of a PFC hearing. Following a decision by either a PFC or WERC, the subordinate would have the option of appealing the decision to the Circuit Court or using procedures established under a collective bargaining agreement. Finally, because the amendment removes the current law provision that the order of a PFC is final and conclusive, if it is affirmed by the Circuit Court, it would allow a subordinate to appeal an affirmed order to the Court of Appeals and, potentially, to the Supreme Court.

16. According to administration officials: "This provision is necessary to ensure that law enforcement and firefighter personnel are afforded the same due process rights for disciplinary measures that currently exist for grievance resolution in collective bargaining agreements between labor and management."

17. In a memorandum, dated April 12, 2007, from the Wisconsin Chiefs of Police Association and the Wisconsin Fire Chiefs Association to the members of the Joint Committee on Finance, opposition was expressed against both the SB 40 provision and the revised provisions now before the Committee. The Associations oppose the SB 40 provision on the grounds that the option to appeal a PFC order to an arbitrator under the terms of a collective bargaining agreement would allow a disciplined officer to "forego a circuit court appeal and start over with an arbitrator. This language abandons the idea of statewide uniformity of public safety discipline and replaces it with local appeal arrangements negotiated between municipalities and unions which will inevitable vary from city to city." The Associations also oppose the new proposal stated by the Secretary of Administration in his March 19, 2007, letter on the grounds that PFCs will be bypassed in favor of arbitrators, effectively diminishing the authority of PFCs.

ALTERNATIVES TO BILL

1. Approve the Governor's Senate Bill 40 recommendation to provide that appeal provisions in current law applicable to any law enforcement officer or fire fighter suspended, reduced in rank, suspended and reduced in rank, or removed by an authorized tribunal would not apply to any such person who is subject to the terms of a collective bargaining agreement that provides an alternative to the appeals procedure, unless the person chooses to appeal the order to circuit court. If the alternative to the appeals procedure includes a hearing, the hearing would be required to be open to the public with reasonable advance notice given by the employer. Specify

that an accused person who chooses to appeal the decision of a tribunal through a collectively bargained alternative to the appeals procedure would be considered to have waived his or her right to circuit court review of the board decision. These provisions would not apply to City of Milwaukee law enforcement or fire fighting personnel. The provisions would first apply to a person who is suspended, reduced in rank, suspended and reduced in rank, or removed on the effective date of the provision.

2. Approve the Governor's recommendation under the bill, except for the initial applicability provision. In addition, provide that any law enforcement officer or fire fighter subject to discipline under s. 62.13(5) of the statutes would have the option of a hearing before a police and fire commission (PFC) or an arbitration hearing conducted by the Wisconsin Employment Relations Commission (WERC). Provide that this arbitration proceeding would be subject to the same procedural requirements as exists under current law for a PFC hearing, except that the following modifications to current law would be made: (a) provide that the PFC or WERC hearing date must be set as soon as possible; (b) provide that a PFC or WERC must render a decision no later than 180 days after the hearing commences; and (c) repeal the provision that an order of a PFC that is affirmed by the Circuit Count is final and conclusive. The provisions would first apply to any member of the police force or fire department who is covered by a collective bargaining agreement that contains provisions inconsistent with the modifications made under these provisions on the day on which the collective bargaining agreement expires or is extended, modified, or renewed, whichever occurs first. [Alternative 2 would conform to LRBb0123/1.]

3. Delete provision.

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