

Board of Police & Fire Commissioners
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COMMISSION MEMBERS:
Helen Schumacher - *President*
Charles Bradley – *Vice President*
James Greco - *Secretary*
Richard H. Schend - *Commissioner*
Edward Kubicki - *Commissioner*

Kenosha Police and Fire Commission
SPECIAL MEETING AGENDA
Tuesday, March 11, 2014
8:00 a.m.
Municipal Office Building, Room 202
625 52nd Street, Kenosha, Wisconsin

1. Call to order.
2. Roll call.
3. Receive and file Jeremy Ryan's Reply Brief To City's Motion to Intervene. (enclosed)
4. Receive and file Fire Chief Thomsen's Brief in Support of the City's Motion to Intervene. (enclosed)
5. Oral argument by the attorneys for the parties on the City of Kenosha's Motion to Intervene in the matter of the Complaint against Fire Chief John Thomsen.
6. Motion to go into closed session. (action)

The Board of Police & Fire Commissioners will go into closed session under authority of Section 19.85 (1)(a) to:

- Deliberate with respect to the City's Motion to Intervene.

The Board will reconvene into open session. (action)

7. Decision on the City's Motion to Intervene. (action)
8. Set deadlines for filing briefs, oral arguments and hearing and decision on Motion to dismiss of City of Kenosha and Chief John Thomsen, on Motion to Strike of Jeremy Ryan and any other pending motions of parties in the Complaint against Chief thomsen.
9. Set next meeting date(s) and agenda items.
10. Adjournment.

If you are a person with a disability, please contact the Human Resources Department at the Municipal Office Building (262-653-4130), at least seventy-two (72) hours in advance of the Commission meeting to give them time to make any necessary accommodations for you.

BLUMENFIELD & SHEREFF, LLP

Attorneys at Law

A Limited Liability Partnership



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*Court Commissioner

*Also admitted in New York
Certified Civil Trial Advocate

February 26, 2014

VIA HAND DELIVERY

Board of Police & Fire Commissioners
Attn: Helen Schumacher, President
c/o Human Resources Department
625 52nd St., Room 205
Kenosha, WI 53140

IN RE THE MATTER OF:

DISCIPLINARY COMPLAINT AGAINST FIRE CHIEF JOHN THOMSEN

Dear President Schumacher:

Enclosed for filing are the original and seven (7) copies of Complainant's Reply Brief To City's Motion To Intervene. By copy of this letter, all counsel of record are being served with a copy of the same.

Very truly yours,

BLUMENFIELD & SHEREFF, LLP

By: _____

A handwritten signature in black ink, appearing to be 'Charles S. Blumenfield', written over a horizontal line. The signature is stylized and somewhat cursive.

Charles S. Blumenfield

CSB:cb

Enclosure

cc: Attorney Eugene Brookhouse (via e-mail)
Attorney Nicholas Infusino (via e-mail)
Attorney Joel S. Aziere (via e-mail)
Mr. Jeremy Ryan (via e-mail)
Pfc Commissioners

**BEFORE THE CITY OF KENOSHA
BOARD OF POLICE & FIRE COMMISSIONERS**

In The Matter Of:

**DISCIPLINARY COMPLAINT AGAINST
FIRE CHIEF JOHN THOMSEN**

COMPLAINANT'S REPLY BRIEF TO CITY'S MOTION TO INTERVENE

INTRODUCTION

The City of Kenosha (hereinafter "the city") has brought a motion to intervene in this matter involving Fire Chief John Thomsen (hereinafter "Thomsen"). The city has also filed a Motion to Dismiss, which will only need to be considered in the event the city is permitted to intervene. As discussed more fully below, there is no basis for the city to intervene in this matter, either by right or by permission. Accordingly, the city's motion to intervene should be denied.

SUMMARY

The city's basic contention is that if it is not permitted to intervene, Thomsen will suffer some harm because: (1) he has already been disciplined; and (2) he has a constitutional right to avoid the hearing before the PFC. Additionally, the city asserts Thomsen has threatened a lawsuit against the city if this matter is not dismissed. However, there is no basis for the requested intervention, there is no basis for Thomsen to avoid a hearing on the charges against him, and there is no basis for him to present a claim against the city in Circuit Court.

The various claims of the city are without support. There is no legal basis for the requested intervention, and the city has failed to cite any case law in support, instead setting forth cases which considered the issue before the Circuit Court, all of which are inapplicable to this

case. Further, the allegations before the PFC have not been decided by any hearing body. The allegations were not fully investigated because the effort to do so was thwarted by Thomsen's categorical denials and the city's flawed investigative effort.

One of the primary arguments set forth by the city is that Thomsen has already been disciplined for everything pending before the PFC, and any further action would implicate a violation of what the city refers to as "employment double jeopardy". First, it must be recognized that double jeopardy, as it is commonly understood, only applies in criminal cases. The concept of "employment double jeopardy" also does not apply here, because Thomsen has not been subjected to punishment by his employer for the same allegations of misconduct of which he stands accused before this Board. As such, as discussed below, there is no basis for the claim that employment double jeopardy applies in this matter.

Contrary to the contention of the city (set forth in paragraph 9 of the Amended Complaint; city's brief [hereinafter "Br."] at 6), the investigation into the allegations against Thomsen did not result in discipline on all charges but one. In fact, only one of the 23 allegations was used as a basis for imposing discipline. Accordingly, the concept of employment double jeopardy does not apply. To the extent any prior discipline has been imposed, the PFC will be able to consider that in order to avoid double punishment for the same misconduct.

The city also relies on the doctrines of *res judicata* and collateral estoppel in support of its assertion that the PFC proceedings should not continue. Those concepts, however, do not apply in this matter.

Finally, the city has advised it is in possession of "relevant and unique" information relating to this matter. It is unclear what this means. If the city has relevant information which

can assist Thomsen in this matter it should provide that to him at this time. Possession of such data, however, does not provide a reason for intervention.

I. NO STATUTORY BASIS

The city asserts it has the right to intervene in this matter based upon Wis. Stat. § 803.09(1). In the alternative, it asserts the city should be permitted to intervene pursuant to Wis. Stat. § 803.09(2). In fact, the city has neither the right nor any basis for permissive intervention.

Under Wis. Stat. § 801.01(2), Chapters 801 to 847 of the Wisconsin Statutes apply only to the Circuit Courts.

801.01. Kinds of proceedings; scope of chs. 801 to 847

...(2) Scope. Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule. § 801.01 Stats. (Emphasis supplied)

Thus, Wis. Stat. § 803.09(1), which forms the primary basis of the city's request to intervene, is wholly inapplicable to this non-Circuit Court proceeding. In fact, it appears the city agrees with this postulate. (Br. at 7) Accordingly, there is no basis for the city's various and sundry arguments regarding intervention as a matter of right, or by permission.

Since Wis. Stat. § 803.09(1) does not apply to the PFC proceedings, it is not necessary to consider the requirements for intervention contained in this section. However, the additional analysis is provided below to further demonstrate the lack of any basis for the request to intervene.

II. WIS. STAT. § 803.09 PROVIDES NO BASIS FOR INTERVENTION

In order to be permitted to intervene in a Circuit Court action as a matter of right, the moving party must meet four criteria, including "that the existing parties do not adequately

represent the movant's interest.” See *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 18, 745 N.W.2d 1, 9, (municipalities not permitted to intervene as an existing party could adequately protect their interests). In this matter, Thomsen is represented by counsel. The city has acknowledged its position is aligned with Thomsen’s. (Br. at 3, 12, 13) As such, even if Wis. Stat. § 803.09(1) applied, no basis would exist for the city’s requested intervention, because the city’s interest (protecting Thomsen) is fully and adequately represented by Thomsen and his counsel.

Recognizing the weakness of its argument, including the lack of any statutory or basis for its motion, the city seeks to create new law on permissive intervention under Wis. Stat. § 803.09(2). However, a careful reading of that statute demonstrates it does not apply here. Rather, it would only apply if, for example, a Circuit Court action involved a rule made by a particular agency, and that agency sought to intervene to help clarify the rule. In that event, the Circuit Court might consider that agency a necessary party. Not only is that not the case here, but again, this is not a Circuit Court matter, the statute does not apply, and the city cannot claim otherwise.

It should also be noted that the city has cited a number of cases in support of its permissive joinder arguments. None of those cases, however, apply to a PFC matter.

III. NO PFC STATUTE OR BYLAW PROVIDES ANY BASIS FOR INTERVENTION

The city has failed to cite any portion of Wis. Stat. § 62.13, which governs these proceedings, nor any PFC Bylaw, in support of its motion. The reason is simple – there is none. Nor is there any case law support for the request.

The Bylaws clearly set forth the parties who are entitled to appear in a proceeding before the Board. Article VI, specifically §6.10, reads as follows:

Both the Complainant and accused may be represented by an attorney.
The Board, in such proceedings, will be represented by an attorney.

As there is no precedent for the Board to permit the city to intervene in circumstances such as this, and the city has not cited any case in which any PFC has permitted such to occur, the Motion must be denied.

IV. PFC PRECEDENT PRECLUDES INTERVENTION

Despite the lack of any support for the city's Motion, in an effort to provide the PFC with guidance in the interpretation of this most unusual request, a search was conducted to identify whether any other such request had been made to any PFC in Wisconsin. The only relevant precedent applicable to the current PFC proceedings occurred in Madison. In *Amesqua v. Greer* (February 1997; copy of Decision and Order attached as Exhibit A), Madison Firefighters Local 311 sought to intervene. In denying the request, the Madison Police and Fire Commission noted there was no basis in the relevant statutes for the requested intervention. The PFC found that only one accused and one complainant were entitled to participate, and any others with interests would need to find an alternative forum or their claims would "go unexpressed." (Ex. A at 2)

When the matter was appealed to the Circuit Court, the PFC argued that the request for intervention was without proper basis, and characterized it as "unnecessary and redundant". (PFC Circuit Court Br. at 6; attached as Exhibit B.) The Circuit Court denied the motion to intervene.

The PFC decision made no reference to Wis. Stat. § 803.09. The first time it is mentioned was when the matter moved to the Circuit Court, likely because the statute did not apply until the case was presented to the Circuit Court.

V. THERE IS NO BASIS FOR THE CITY'S EFFORT TO DISMISS THIS ACTION

A. The Charges Have Not Been Resolved By Investigation or Hearing.

The city asserts the charges have been fully resolved and this proceeding should be dismissed. The assertion Thomsen has already been disciplined for all of the allegations but one is simply inaccurate.

The city has failed to provide any support for its claim the charges have all been the subject of prior discipline. (Br. at 5-6) In fact, it appears that only one or two of the charges were used as the factual predicate for the discipline previously imposed by the city. Thomsen denied all of the allegations, forcing the city to hire an outside investigator.

Attached as Exhibit C is the Summary and Conclusions section of the investigative report.¹ As clearly indicated therein, the only allegations which were able to be investigated pertained to the blood drive incident.² The present claims before the PFC were either not addressed at all, or were not fully investigated due to Thomsen's categorical, unsworn denials, as can be seen in the attached Table of Allegations. (Attached as Exhibit D).

¹ The investigation, the investigation faltered because Thomsen was never forced to testify under oath, and thus could reply that he did not use the exact words alleged. While it is common in disciplinary investigations, including those conducted by the Kenosha Fire Department, to place the individual accused of wrongdoing under oath before being interviewed, no explanation has been provided as to why Thomsen was accorded special treatment.

² At p. 20 of the investigative report:

The Chief violated the harassment policy when he made repeated slurs at the May 31, 2013, blood drive that indicated negative stereotyping regarding national origin and sexual orientation. The Chief's comments created an offensive environment for employees at a City-sponsored activity but did not interfere unreasonably with their work performance.

At p. 21:

...it is likely that the answers that the Chief provided to the undersigned respecting his comments at the blood drive were not truthful. The undersigned believes that the Chief's comments in the context of a blood drive must be understood as a slur against Haitians and gay males and an unseemly insinuation toward Police Chief Morrissey.

...There is also credible evidence that the Chief has violated the harassment policy by making jokes and stereo-typing comments about ethnic groups and older individuals.

B. The Memorandum of Discipline.

A review of the allegations pending before this Board demonstrates that of the 23 paragraphs which allege misconduct, 19 or 20 set forth specific instances of misconduct. Of those, only one was specifically found to have occurred and could therefore serve as the basis for discipline imposed. The Memorandum of Discipline, issued on January 24, 2014, the day *after* the original Complaint was filed, does not set forth any specific allegation which formed the basis of the discipline imposed. This is unusual. In light of the fact the Memorandum does not set forth the basis for discipline, the PFC should conduct a hearing considering all allegations.

The city concedes the Thompkins allegations were never presented to the investigator. (Br. at 6) But neither were the Meeker, Weidner, or Darby allegations. Nor were a number of others, all as set forth in Exhibit D. The investigator does not make mention of the Pacetti 2009 discipline letter, which set forth incidents relating to Thomsen's truthfulness. Even without that letter, the investigator observed that if Thomsen was not being forthright it would be "shocking".

In this case respondent Chief Thomsen not only denies having made certain statements, but denies that certain meetings at which the alleged statements were made even occurred. If such meetings in fact occurred and the Chief in fact made the statements alleged to have been made, the Chief's denial of those facts would constitute a shocking level of untruthfulness.

(Emphasis supplied.) (Summary and conclusions section of Report at 21; see Exhibit C attached hereto.)

The city would now have this Board believe this case is all done, despite the allegations which have never been considered, and despite the inability of the investigator to reach a conclusion as to most of the allegations considered. (See Exhibit D)

C. There is No Basis For the Claims of *Res Judicata* or Collateral Estoppel

The city has made reference to the legal concepts of *res judicata* and collateral estoppel. Neither is applicable herein, and it is of significance the city has failed to indicate how either

would apply. Without a court determination, the principle of *res judicata* does not apply, as it requires a final judgment, issued by a court, which is then binding on the parties to a lawsuit. None of those criteria apply.

The same is true for collateral estoppel, now often called issue preclusion. In order to be barred by the doctrine of collateral estoppel, there would need to have been a court ruling such that the issue cannot be litigated once again. There has been no court ruling in this matter.

D. There is No Basis For the Claim of Double Jeopardy

As previously discussed, double jeopardy only applies in a criminal case. This is an administrative proceeding in which double jeopardy does not apply.

Any claim that this is some kind of “employment-related” double jeopardy fails for several reasons. In order for double jeopardy to exist in the employment context, all of the following would need to be present:

1. The employer imposed discipline for a specific instance of clearly identified conduct;
2. The parties would have had to agree the discipline was to serve as a final sanction for the specified offense; and
3. The *employer* would then have to seek to increase the discipline for the same offense.

See Elkouri & Elkouri, *How Arbitration Works, 6th Ed.*, Alan Miles Ruben, Editor-In-Chief, American Bar Association Committee on ADR in Labor & Employment Law (2003).

Here, the investigator concluded one specific instance of misconduct was characterized as potentially forming the basis of discipline. However, the employer is not involved in this matter, and thus the principle of employment double jeopardy cannot apply, as the employer is not seeking to impose additional discipline. Rather, an aggrieved party is seeking the hearing.

Finally, no discipline has been imposed for the allegations the investigator either did not consider, or with regard to which he was unable to reach a conclusion.

E. Thomsen Has No Basis for a Circuit Court Lawsuit.

A further basis set forth by the city for its request to intervene is that Thomsen has threatened to sue the City. That threat is contained in a letter dated February 12, 2014. The claims set forth in the letter, however, are without basis in fact or law. Any lawsuit brought by Thomsen based on these proceedings would be improper as the PFC is the clearly recognized statutory entity for consideration of any allegations against a Fire Chief.

As demonstrated above, there has been no full airing of the myriad allegations against Thomsen. The due process afforded to Thomsen pursuant to Wis. Stat. § 62.13 provides ample protection to him, complete with the right to testify, present evidence, call witnesses in his own behalf, and, if the result is not to his liking, to seek review by the Circuit Court. There would, therefore, appear to be no basis for Thomsen to claim his rights are adversely impacted in this matter.

VI. THE CITY SHOULD BE ORDERED TO IMMEDIATELY TURN OVER A COPY OF ALL RELEVANT MATERIALS IT CLAIMS TO HAVE IN ITS POSSESSION

The city claims at several points in its brief that permitting its intervention will save time because it possesses “unique knowledge”. (Br. at 3) It then advises it has “relevant and unique information”. (Br. at 10) The PFC should order the city to immediately provide both parties with any of this so-called “relevant and unique information”.

CONCLUSION

The city has failed to provide any statutory, case law, or bylaw support for its request to intervene. Such a request is improper, as evidenced by the Madison Police and Fire Commission documents provided. The only proper parties in a PFC hearing, pursuant to Article VI, § 6.10 of the Kenosha PFC Bylaws, are the Complainant and the Accused. The city has chosen to ignore this section because it has no legitimate argument as to why it should not be followed.

The motion to intervene should be denied. This matter should then be set for hearing so the charges can be heard and a proper decision rendered by this Board.

Respectfully submitted this 26th day of February, 2014.

BLUMENFIELD & SHEREFF, LLP
Attorneys for Jeremy Ryan

By  _____
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BEFORE THE BOARD OF POLICE AND FIRE COMMISSIONERS
OF THE CITY OF MADISON

Debra H. Amesqua,
Complainant
vs.
Firefighter Ronnie B. Greer,
Respondent

DECISION AND ORDER
ON
MOTION TO INTERVENE

Background Local 311, IAFF, AFL-CIO ("Local 311") seeks permission to intervene in this matter. The request was anticipated in comments on the record during the course of our Initial Hearing on January 13, 1997, and takes the form of a motion set forth in a letter dated January 21, 1997, from SCHNEIDMAN, MYERS, DOWLING, BLUMENFIELD, EHLKE, HAWKS & DOMER, signed by Attorney Timothy E. Hawks. The motion is opposed by counsel for Complainant, A.C.A. Rick Petri, whose letter brief is dated January 27, 1997. Our counsel invited comment on six questions of interest to us by letter to parties and counsel dated January 23, 1997; we received a response from Atty. Hawks dated January 27 and a response from Atty. Michael D. Dean dated January 31.

Respondent Greer was present in person at our Initial Hearing. Atty. Hawks was present, apparently on behalf of Local 311, but did not recite his appearance on behalf of Respondent. Atty. Dean was not present but had reported by phone to our counsel earlier that day that he did have some professional relationship with Respondent and that he wished to avoid any possible prejudice to Respondent from an absence of counsel at the Initial Hearing. An Answer on behalf of Respondent has been filed under cover of Atty. Hawks' letter of January 21, 1997; the Answer is signed by Atty. Hawks and Atty. Dean and is not signed by Respondent. Atty. Dean advises us in his letter of January 31 that he is "appearing as co-counsel for respondent with respect to the pending motion," thereby implying that Atty. Hawks is also co-counsel for Respondent. Atty. Dean also indicates that he will appear for Respondent if we grant the motion to intervene, and that Respondent concurs in the motion.

In summary, at this point in these proceedings, no attorney has made an explicit statement of general appearance on behalf of Respondent, but Respondent has apparently been well represented to date. We have found the status of representation and appearances ambiguous and confusing, but we expect these matters to be resolved promptly and prior to our evidentiary proceedings, which convene February 6.

All motion papers have been reviewed by each Commissioner. This decision is the unanimous action of the Board, issued over the signature of the president only in order to facilitate timely notification of the parties prior to the scheduled hearing.

Motion to Intervene: Decision In his letter of January 27 Atty. Hawks states "The essence of Local 311's position is that it be permitted to take a position." We infer that Local 311 may wish to advance views, positions, or defenses which are distinct from and cannot be reconciled with those to be advanced by this Respondent, or perhaps that Local 311 may not wish to be associated with views, positions, or defenses to be advanced by this Respondent. Intervention would allow Local 311 to act, or perhaps refrain from acting, independently of Respondent, and subject in principle to opposition or objection by Respondent, as indicated by Atty. Hawks and Atty. Dean in their letters.

We have not previously been confronted with this issue. Respondent officers before us are customarily represented by legal counsel, whom we have understood generally and informally to be provided in some way by or through a collective bargaining agent or professional association; of course we have not been privy

EXHIBIT A

to the details of those arrangements. In our opinion, the quality and vigor of representation have always maintained a high standard and counsel have always been properly oriented to the defense of the individual respondents.

The Answer signed by Attorneys Hawks and Dean is thorough and well-drafted, reflecting a thoughtful defense concept. Although the formalities of representation and appearance are not yet sorted out, it seems clear that Respondent will be represented by competent counsel. The interests of this Respondent thus seem well protected, and indeed Local 311's motion is not premised on a need to protect or advance the interests of the Respondent.

We deny the motion of Local 311 to intervene. Our decision is based in large part on two principles.

First, we are not persuaded by Local 311's argument that its collective bargaining agreement provides a basis for standing. Our proceedings are statutory two-party hearings on charges brought by a complainant against a respondent police or fire officer, under WS 62.13. The disciplinary jurisdiction and authority of this Board and the conduct of our proceedings are not subject to collective bargaining. The City of Madison is not competent to use a collective bargaining agreement to affect our statutory jurisdiction, authority, or conduct, and any attempt to do so would be both regrettable and invalid. We act under the statute, not the collective bargaining agreement. We conclude that standing in our statutory proceedings cannot spring from a collective bargaining agreement. We believe this view is clearly the law of the State of Wisconsin, expressed or implied variously for example in *Durkin v Board of Police & Fire Commissioners for the City of Madison*, 180 N.W.2d 1, 48 Wis. 2d 112 (1970); *Racine Fire and Police Commission v Stanfield and others*, 234 N.W.2d 307, 70 Wis. 2d 395 (1975); and *City of Janesville v Wisconsin Employment Relations Commission*, 535 N.W.2d 34, 193 Wis. 2d 492 (WisApp 1995).

Second, both fairness and case management preclude intervention. Our proceedings focus on one individual respondent, with quite serious personal consequences at stake: suspension without pay, reduction in rank, and removal. The individual respondent in our proceedings is entitled to vigorous representation and defense, devoted with unitary professional zeal to the respondent's interests. Respondent should face only one opponent, the complainant.

In principle the intervention analysis in this case is indistinguishable from that in any and all other disciplinary matters that have or will come before the Board, including those against a chief. Many individuals and entities are affected by our interpretation of WS 62.13(5), including not merely Local 311, but also for example the Madison Professional Police Officers Association, the associations of management officers in both departments, the state-wide affiliates of our local unions, the Wisconsin Association of Chiefs of Police, the City of Madison (which is not a party in this case), the Wisconsin League of Municipalities, the Wisconsin Alliance of Cities, and the class of potential "aggrieved persons" entitled to file statements of charges under WS 62.13. But we hear cases -- charges and defenses -- not policy debates. If a collective bargaining representative, professional association, or other concerned party perceives that it has an interest or view related to a case before us which cannot be advanced by or on behalf of the respondent officer, then that interest or view must find expression outside our case or go unexpressed.

We respect the sensitivity of Atty. Hawks to his potential conflicts of professional interest or loyalty as between his client Local 311 and his potential client Ronnie B. Greer, and we appreciate his good faith in raising the question while it is still only hypothetical. However, we are a simple, adversary-based quasi-judicial tribunal for individual disciplinary cases; we are entirely open to orderly arrangements for the conduct of a defense by co-counsel for Respondent, but we do not provide a forum for cross-argument of inconsistent

positions held by our respondents and their unions, and we will not expose our respondents to any adverse claim or interest other than the statement of charges.

Motion to Intervene: Order On the entire record of these proceedings, it is ordered that:

1. The motion of Local 311, IAFF, AFL-CIO, to intervene is denied.
2. Attorneys Dean and Hawks are each directed to confirm the status of their respective representation and appearances in these proceedings by letter or other writing to be filed with the Board no later than 4:30 p.m. Wednesday, February 5, 1997.
3. Attorneys intending to appear as co-counsel are directed jointly to propose arrangements for the orderly and non-duplicative conduct of our hearings, including examination of witnesses and presentation of argument. If possible this proposal should be filed prior to hearing. Alternatively this proposal will be received and considered upon convening our first evidentiary session on February 6, 1997.

*Approved and filed with the Secretary
this 3rd day of February, 1997:*

MADISON BOARD OF POLICE AND FIRE COMMISSIONERS

By: _____
Commissioner Alan Seeger, President

distribution:

Ronnie B. Greer
Atty. Timothy E. Hawks
Atty. Michael R. Dean
ACA Rick Petri

In re. the charges of

Debra H. Amesqua
Chief, Madison Fire Department
325 West Johnson Street
Madison WI 53703,
Complainant

BRIEF OF PFC
OPPOSING MOTION TO INTERVENE
OF LOCAL 311, IAFF

vs.

Firefighter Ronnie B. Greer
5712 Clarendon
Madison WI 53711,
Respondent

Case No. 87 CV 1833
Administrative Agency Review:
30607

The Madison Board of Police and Fire Commissioners ("PFC") comes before this court under the appeal provisions set forth in 62.13(5)(i), Wis. Stats., following hearing on charges before the Board. Ronnie B. Greer has properly initiated this statutory appeal. Local 311 is neither a necessary nor an appropriate participant, and the Board opposes its intervention.

The motion is made under WS 803.09, although movant does not specify whether (1) or (2) are relied upon. The Board contends that neither subsection supports intervention.

WS 803.09(1) *mandates* intervention ("...shall be permitted...") when

1. movant "claims an interest"; and
2. movant's ability to defend that interest may "as a practical matter" be impaired; unless
3. movant's interest is adequately represented by the existing parties.

The decision to allow or deny intervention under this provision requires the exercise of substantial discretion by the trial court, although at least one case suggests that the sufficiency

of the potential intervenor's interest is a question of law. *State ex re. Bilder v. Delevan Tp.* (1983), 334 NW 2nd, 112 Wis 2nd 539.

1. *Claiming an interest* The Board concedes that movant Local 311 claims an interest. We dispute the sufficiency of that interest, because we dispute the attempt of Local 311 to impose itself into the statutory discipline process exclusively assigned to boards of police and fire commissioners. The claim of interest should be rejected by this court.

The PFC exercises exclusive statutory authority for the major disciplines enumerated in WS 62.13(5), namely suspension, reduction in range, and discharge. The PFC acts exclusively through statutory procedures set forth in WS 62.13(5), now applying the fairly recent articulation of "just cause" in WS 62.13(5) (em).

The scope and exclusivity of PFC authority is described, presumed, or alluded to in the great majority of all reported PFC cases; for example, *Durkin v. Board of Police & Fire Commissioners for the City of Madison*, 180 N.W.2d 1, 48 Wis. 2d 112 (1970); *State ex rel. Kaczowski v. Board of Police Commissioners of City of Milwaukee*, (1967) 33 Wis.2d 488, 48 NW2d 44, cert. den. 88 S.C. 91, reh. den. 88 S.Ct. 324; *State ex rel. Richey v. Neenah Police and Fire Commission*, (1970) 48 Wis.2d 575, 180 NW2d 743; *Racine Fire and Police Commission v. Stanfield and others*, 234 N.W.2d 307, 70 Wis. 2d 395 (1975). Movant has appropriately cited two additional cases, *Glendale* and *Janesville*, which have directly addressed the relationship of collective bargaining to PFC matters, without granting party status to a union. *Glendale* deals with entry-level hiring, not discipline. *Janesville* rejected a union's effort to subject suspension to conventional arbitration in lieu of PFC process.

There is no direct authority supporting this motion in the substantial body of general PFC case law and practice.

The authority and procedures of the PFC are not established by collective bargaining nor subject to collective bargaining, and it is notable that the most recent statutory revisions took the path of additional statutory enumeration, rather than subjecting some or all of the PFC's mandate to collective bargaining and related procedures. PFC's are not parties to collective bargaining agreements. Parallel language in such agreements to statutory provisions does not magically give unions legal standing in statutory proceedings.

WS 62.13(5) is precise and narrow as to the scope of PFC discipline and the procedures for review. The few Wisconsin PFC's exercising the administrative "optional powers" provided under WS 62.13(6) presumably have broader dealings with their unions, but the more conventional PFC's such as the Madison PFC do not have direct relationship with the union as such. PFC procedures and the collective bargaining process have easily been reconciled by the Wisconsin courts, without finding separate party status in disciplinary proceedings for collective bargaining agents.

The only basis for allowing Local 311 to intervene here is its claim for the bargainability of WS 62.13(5). To grant the motion to intervene is to grant the claim, and in effect to require the PFC and this court to deal with a union over disciplinary matters. WS 62.13 contains a clear, well-established, and well-understood plan for autonomous, non-political, civilian accountability of police and fire services; Local 311 seeks to erode the clear distinction in the statutory plan, consistently followed by Wisconsin courts, between collective bargaining issues and PFC discipline. The PFC will

be substantially and profoundly prejudiced in its statutory role by the recognition of Local 311's claim to an independent interest in non-bargainable statutory discipline. Therefore this court should exercise its discretion under Ws 803.09(2) to deny the motion.

2. *Impaired defense of the claimed interest* We dispute that Local 311 has been, is, or will be impaired or impeded in any degree or in any remotely practical sense in its ability to defend that interest. Local 311 has provided counsel for this respondent throughout these proceedings, as has been customary over the years in all cases brought by the Madison Fire Chief. (A parallel practice has been the custom in matters brought by the Madison Police Chief.) In this instance Local 311 for its own reasons made the unprecedented request to appear as a party to the charges, and upon denial of that request participated in an arrangement for co-counsel on the respondent's behalf, with an officer of the union officially present at counsel table. This arrangement, which is described in the record of proceedings certified to this court, has given Local 311 every reasonable opportunity to defend and advance its position with respect to the subject matter of the case, which is the disposition of charges against an individual firefighter. The Board welcomed Atty. Hawks as co-counsel for Mr. Greer and would not dispute the right of Mr. Greer to continue to appear by this co-counsel. No practical impairment of Local 311's interest has resulted or would result from this arrangement.

However, if the denial of party status to Local 311 by the PFC has prevented Atty. Hawks and his firm from presenting evidence and argument which is hostile to Mr. Greer, that result would further vindicate the PFC's decision and lend additional support to denial of the present motion.

3. *Adequacy of representation* By this same co-counsel arrangement the motion fails the third leg of the 803.09(1) test. The existing parties, specifically Mr. Greer, are fully capable of representing the interest claimed by Local 311, for two very good reasons: Mr. Greer is a member of Local 311; and Mr. Greer is, or has been, represented by Local 311's attorney, acting as co-counsel. Mr. Hawks and his firm could not improve on their very sound professional work in this case by the form of their appearance; Local 311 is well looked after.

The motion by Local 311 is not supported on any of the three legs of mandatory intervention.

WS 803.09(2) allows intervention ("...may be permitted...") when movant's claim or defense and the main action have a question of law or fact in common. We have concluded that intervention under this statutory provision is a matter for Circuit Court discretion, and that the decision is subject to review under an "abuse of discretion" standard. See *State ex rel. Jones v. Gerhardstein* (App.1986), 400 NW 2nd 1, 135 Wis 2nd 161, aff. 416 nw2nd 883, 141 Wis 2nd 710; *Sewerage Commission of City of Milwaukee v. State Dept. of Natural Resources* App 1981), 311 NW 2nd 677, 104 Wis 2nd 182; *Kornitz v. Commonwealth Land Title Insurance Co.* (1978), 260 NW 2nd 680, 81 Wis 2nd 322. In exercising its discretion the court "shall consider" possible delay or prejudice to the rights of the original parties.

The PFC opposes discretionary intervention by Local 311 for three reasons.

1. Discretionary intervention assumes two or more independent claims or defenses which overlap in some degree. This matter is best conceived as a single, unitary case. Local

311 has no "claim" or "defense" of its own, and would not be in this court or any other discipline forum but for its support of this or some other union member.

2. Local 311 should not be allowed to advance arguments or defenses which are incompatible with the primary defense and defense strategy of the individual whose discipline is at stake. To the extent that Local 311's policy, views, and participation are supportive of the primary defense, they may be advanced through that defense, especially through the vehicle of co-counsel representation. To any extent that Local 311's position is in conflict with the primary defense, Local 311 should not be allowed to express that position in these proceedings. This analysis was especially important at the evidentiary hearing level, and was a major component of the PFC's decision to deny the motion of Local 311 to intervene as a party, while allowing wide scope through appearances and testimony.

The individual whose job is at stake in PFC cases should have exclusive control over defense. If intervention is acceptable and consistent with the defense, it is unnecessary and redundant; if it is inconsistent, or potentially inconsistent, it should not be allowed.

3. We have already argued that the interest claimed by Local 311 does not have sufficient validity to trigger mandatory intervention under Ws 803.09(1). We do not repeat that argument but refer to it by reference in this context. That same analysis supports our view that this court should not allow discretionary intervention under WS 803.09(2).

In summary, the motion to intervene by Local 311 fails to qualify for intervention either on mandatory or discretionary grounds.

Dated this 15th day of September, 1997:
HERRICK, KASDORF, DYMZAROV & VETZNER

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Cases

Kornitz v. Commonwealth Land Title Insurance Co. (1978), 260
NW 2nd 680, 81 Wis 2nd 322 5

State ex re. Bilder v. Delevan Tp. (1983), 334 NW 2nd, 112
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1, 135 Wis 2nd 161, aff. 416 NW 2nd 883, 141 Wis 2nd 710

5

*Sewerage Commission of City of Milwaukee v. State Dept. of
Natural Resources* App 1981), 311 NW 2nd 677, 104 Wis 2nd 182

5

Statutes

809.03: referenced throughout

Section Five: Conclusions and Discussion

More so than other harassment complaints the undersigned has investigated, this situation lacks a solid foundation of evidence on which to form conclusions. Complainants and respondents in other cases have often differed about such things as what was said, whom it was said by and what meaning was intended. In this case respondent Chief Thomsen not only denies having made certain statements, but denies that certain meetings at which the alleged statements were made even occurred. If such meetings in fact occurred and the Chief in fact made the statements alleged to have been made, the Chief's denial of those facts would constitute a shocking level of untruthfulness. If the complainants have simply fabricated their highly detailed accusations against the Chief, their actions would be nothing less than nefarious. The situation suggests to the undersigned the existence of a deep, bitter adversity between the Chief and the complainants, who happen to be members of the Executive Board of Local 414.

A few facts have emerged in this investigation. There are documents (such as grievances and emails and rosters) and there are some events and statements that are agreed upon by complainants and respondent. However, the undersigned has had to base his conclusions on judgments about the credibility of witnesses and the evidence provided by them. The undersigned must try to see through a fog of "he said-she said" based on scant facts and witness statements from co-workers with limited knowledge of the situation and with fading memories of events they would probably prefer not to remember.

After carefully considering all the evidence and statements presented to him, the undersigned believes there is enough evidence of a convincing nature on which to base the following conclusion:

The Chief violated the harassment policy when he made repeated slurs at the May 31, 2013, blood drive that indicated negative stereotyping regarding national origin and sexual orientation. The Chief's comments created an offensive environment for employees at a City-sponsored activity but did not interfere unreasonably with their work performance.

The circumstances in which the blood drive was held indicate that it was, if not officially, by default a City-sponsored activity. The Red Cross promoted this event as a Battle of the Badges - Kenosha Police vs. Kenosha Fire and posted on its Facebook page photos of Police Department and Fire Department vehicles at the site of the blood drive. The Chief said he attended the blood drive and donated blood while on duty. Commissioner Schumacher stated that the Chief made comments that were substantially the same as those the complainants alleged he made. In the opinion of the undersigned, Commissioner Schumacher is an impartial witness. Commissioner Schumacher's position of trust on the Police and Fire Commission and her thirty years of service [21] as an agent of US Federal Bureau of Investigation give credibility to her statements. In the undersigned's opinion it is likely that the answers that the Chief provided to the undersigned respecting his comments at the blood drive were not truthful. The undersigned believes that the Chief's comments in the context of a blood drive must be understood as a slur against Haitians and gay males and an unseemly insinuation toward Police Chief Morrissey. The undersigned cannot construe the Chief's comments as simply a neutral comment referring to

Chief Morrissey visiting windmills and tulip fields with a young Caribbean friend. The Chief's own comments suggest awareness of a negative association when he said in interview, "Have you ever donated blood? Do you know about the questions they ask?"

There is also credible evidence that the Chief has violated the harassment policy by making jokes and stereo-typing comments about ethnic groups and older individuals. Statements of members of the Fire Department management/administrative staff, who have daily contact with the Chief, indicate that the Chief's comments take the form of mild or self-deprecating jokes and that the Chief never singles out individuals for disparagement on these bases. Although the occurrence in the workplace of an occasional mild ethnic joke or one about old people may not be frequent or severe enough to create a hostile work environment, such verbal acts have the potential to create problems. The same may be said about workplace comments that draw attention to women's (or men's) physical attractiveness. The risk with such comments is that they may get out of hand and create an atmosphere that can become offensive to someone. One would expect the head of a department to set an example in this regard rather than dally in prohibited conduct.

With respect to the accusation that the Chief retaliated against Jeremy Ryan when by denying him a WOOC assignment on July 29, 2013, the undersigned believes there is enough evidence of a convincing nature to conclude that:

The Chief did not retaliate against Jeremy Ryan when he instructed Ryan's officer to enforce the long-standing parameters for making WOOC assignments.

The decision to re-issue the policy regarding making WOOC assignments was prompted by legitimate business concerns related to an event some two weeks prior to the event Mr. Ryan is grieving. The fact that Jeremy Ryan's denial of a WOOC assignment was close in time to his filing of a complaint against the Chief does not indicate retaliation.

Although the undersigned has made strenuous efforts to discover evidence related to the other allegations, there is insufficient evidence of a convincing nature to support any conclusions related to the allegations that:

1. The Chief called Jeremy Ryan a "fag" at the Chutes and Ladders Pub and Restaurant. There were no witnesses to this event. Besides, the complaint lacks freshness, having occurred some two years ago.[22]
2. The Chief used violent and offensive language at a meeting regarding med unit relocation. The undersigned was unable to discover convincing evidence that this meeting occurred or that the Chief made the statements he was alleged to have made.
3. The Chief made jokes disparaging of members of ethnic groups, older people and dismissive of the Harassment Policy and Procedure on September 4, 2012 at Station 4. The undersigned was unable to

discover evidence that the Chief was present at the time and place where he allegedly made the offensive comments. The rosters and Deputy-Chief calendars for 6, provide somewhat contradictory information. However, such evidence as does exist indicates the Chief was not present at Station 4 on September 4, 2012.

4. The Chief asked questions regarding Abby Windus' sexual orientation during her employment interview. The evidence and the credibility of the complainant suggest that the Chief did ask Ms. Windus unusual and ambiguous questions of an insinuating nature during her employment interview. Ms. Windus is a probationary employee who may be discharged or disciplined at the discretion of the Chief without recourse to any grievance or appeal procedure. Fire Department performance evaluations of Ms. Windus provided by the HR Department indicate that her job performance is satisfactory or better. Ms. Windus confided to Kristin Kaminski that the Chief had asked her unusual questions during her employment interview. Ms. Kaminski verified in interview that Ms. Windus had in fact told her shortly after Ms. Windus' interview that the Chief had asked unusual questions. Given her status as a probationary employee Ms. Windus would have little to gain and much to lose by lodging a false accusation against the Chief. Ms. Windus' status as a probationary employee, her prompt reporting of her concerns about the employment interview to a fellow employee, and the Chief's lack of forthrightness regarding these accusations (as discussed above), tip the balance of credibility in favor of Ms. Windus. However, Ms. Windus did not ask the Chief what he meant by the possibly insinuating question he asked during the employment interview. Ms. Windus and Ms. Kaminski took the Chief's question to mean "Are you gay?" but neither of them was sure what the Chief actually meant. In light of this ambiguity the undersigned is unable to conclude that the Chief violated the Harassment Policy by asking Ms. Windus if she was like Ms. Kaminski during the employment interview.
5. The Chief referred to a lieutenant and his crew as pinheads. The undersigned does not believe the term "pinhead" has been used for decades in a medical sense to refer to individuals with microencephaly. The undersigned understands the term "pinhead" to refer to someone who is stupid or foolish. Complainant Ryan said in interview that he understood the term to mean "dumb, small brain, not very smart" and that he had never heard the term used by anyone to describe a disability. Although referring to subordinates as pinheads might be vulgar and unprofessional, the undersigned believes it would be caviling to characterize such statement as a violation of the Harassment Policy

Section Six: Recommendations [23]

1. The City should determine whether the Chief's conduct was serious enough to warrant corrective action and if so, what corrective action should be taken.
2. The City should review the adequacy of the Harassment Policy Complaint Procedure related to the reporting and investigation of violations when such complaints involve the Department Head.
3. The City should review the process and guidelines used by the Fire Chief for interviewing new hires to make sure they comport with all state and federal employment regulations including any regulations regarding confidentiality. The City should consider requiring at least two members of management with training in best interviewing practice to conduct the interviews.
4. The City should establish lines of communication between the Human Resources Department and all employees who cooperated in the complaint procedure to ensure that they do not become the objects of retaliation.

TABLE OF ALLEGATIONS

J	CHARGE	CHIEF'S RESPONSE TO PFC	CHIEF'S RESPONSE TO INVESTIGATOR	INVESTIGATOR REACHED CONCLUSION
J5	On August 16, 2010 the Kenosha Common Council publicly reprimanded Thomsen due to his failure to maintain "objectivity" which caused a Fire Department Division Chief Richard Meeker, to perceive that he was being persecuted.	Thomsen admits that a Resolution was passed; City Council lacks legal authority to reprimand Thomsen and Thomsen was never reprimanded based on the Resolution	Not Addressed	N
J6	Thomsen has repeatedly engaged in conduct unbecoming an officer.	Thomsen denies	Not Addressed	N
J7	Thomsen's actions demonstrate a lack of the requisite "good behavior" to continue in the role of chief of the Kenosha Fire Department.	Thomsen denies	Not Addressed	N
J8	On or about April 1, 2011, at a retirement party for Captain Greg Galich at the Chutes and Ladders Pub, 3812 60th Street, Kenosha, Wisconsin, Thomsen told Ryan, "You look like a fag."	Thomsen denies	Stated, "No. I do not believe I talked to him at all."	N
J9	In or about August and September, 2011, Thomsen harassed Timothy Thompkins.	Thomsen denies	Not Addressed	N
J10	In or about August or September of 2012, Thomsen told Captain Matt Loewen, that "as long as he is fire chief he will never transfer [Apparatus Operator Jeff Weidner] out of Station 7."	Thomsen denies	Not Addressed	N
J11	In or about October or November, 2012, Thomsen stated that Kenosha Police Chief John W. Morrissey told the Mayor that if he would not let Morrissey hire another three police officers, "By 5:00 P.M. tomorrow everybody in the City of Kenosha will have their throats slit and would be fucked up the ass."	Thomsen denies	Chief does not believe he ever said that; it is not in his vernacular	N
J12	In early December 2012, Thomsen asked applicant Abbie Windus whether she was "like (name withheld)," a known gay employee.	Thomsen denies	Chief said, "no"	N
J13	On or about February 27, 2013, at the Fire Department administrative offices, terminated the meeting, and ordered Fire Fighter Ray Tessman out of the office.	Thomsen admits he got upset and ordered firefighter Ray Tessman out of the office at the conclusion of the meeting	Chief ended the meeting because he felt Tessman and Ryan were disrespectful	N

J	CHARGE	CHIEF'S RESPONSE TO PFC	CHIEF'S RESPONSE TO INVESTIGATOR	INVESTIGATOR REACHED CONCLUSION
J14	On or about March 8, 2013 at 4902 7th Avenue, Kenosha, Wisconsin, Thomsen made inappropriate and personally embarrassing comments about each retiring captain. These comments included repeated references to Thomsen having transmitted "syphilis" to Captain Flasch on a trip to Florida, and that Captain Howland's wife must really like his "Fu Manchu".	Does not deny	He did use the word syphilis; meant it to be humorous; denies comment about Howland's mustache	Unclear
J15 (A)	First quarter of 2013, during harassment training, at Station 4, located at 4810 60th Street, Kenosha, Wisconsin, Thomsen referred to someone as being a "mick".	Thomsen denies	He might have been there; denies making statement	N
J15 (B)	"... who else I can offend?"	Thomsen denies	Chief stated, "No"	N
J15 (C)	Thomsen stated, "He is an old guy and should retire".	Thomsen denies	"Yes, I have said, hey you're pretty old, when are you retiring."	Y - perhaps
J15 (D)	Thomsen commented all harassment complaints would have to be brought to him.	Thomsen denies	The chief said he did not make a laughing comment	N
J16	On or about April 26, 2013, Thomsen told firefighter Kristin Kaminski, "I know you. I read your psych evaluation"; "I know I will never confuse you with being the brightest person on our job"; he knew so much about the "guys" because he reads their psychological evaluations.	Does not deny, therefore admits	Investigator confuses Windus for Kaminski	N
J17	On or about May 31, 2013, at a blood drive at Gateway Technical College, 3520 30th Avenue, Kenosha, Wisconsin, Thomsen, while on duty and in uniform stated in a loud voice, "I just got back from the Netherlands and had sex with a Haitian boy. Can I still donate blood?"; "I think Chief Morrissey is in the Netherlands with a Haitian boy, not sure what they are doing, but I think that's why he won't be here. Or maybe he's there with Michael Bell."	Thomsen denies making the exact comments; does acknowledge his comment and the intent of such could be misunderstood and construed to not be in good taste	Chief said, "No, I did not say that." Response to statement about Michael Bell, Chief states, "No, Absolutely Not." "No, I really do not believe so, no"	Y/N
J18	On or about June 6, 2013, Thomsen admitted he had referred to Schlereth and his crew as "pin heads".	Thomsen denies	Chief stated it was partially accurate	N

J	CHARGE	CHIEF'S RESPONSE TO PFC	CHIEF'S RESPONSE TO INVESTIGATOR	INVESTIGATOR REACHED CONCLUSION
J19	On or about July 1, 2013, Fire Station 4, located at 4810 60th Street, Kenosha, Wisconsin, stated to Firefighter Norman Hoening and other firefighters: "Fat guy, bald guy, fat guy, bald guy. Why do we have so many fat and bald guys?"	Thomsen denies	Not addressed	N
J20	In 2013, Thomsen told Firefighter Jake Waldschmidt, "The reason you didn't make lieutenant is because you didn't throw enough 'shits' and 'fucks' in your responses."	Thomsen denies	Not addressed	N
J21	Thomsen has stated to various firefighters he could have sex with the wife of anybody "on the job".	Thomsen denies	Not addressed	N
J22	In or about December 2013, Thomsen caused the termination of African-American firefighter Henderson Darby in a manner entirely inconsistent with actions taken involving other firefighters who had been on sick leave in the past.	Thomsen denies	Not addressed	N
J24	Upon being advised of many of the above allegations by the Mayor and/or HR Director Steven Stanczak in mid-2013, Thomsen denied he had engaged in any of the alleged conduct (reportedly stating "I wouldn't be so stupid to say those things", or words to that substantial effect).	Thomsen denies	Not investigated	N
J26	Neither the Meeker nor Thompkins matters were reviewed by the investigator; the discipline was imposed, in regard to unspecified conduct.	Thomsen denies the investigation and subsequent discipline failed to consider the requirement of "good behavior" as set forth in Wis Stat. 62.13 (3)	Not addressed	N

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Nicholas J. Infusino

February 26, 2014

Filed Via Email

Board of Police and Fire Commissioners
Attn: Helen Schumacher, President

**RE: FIRE CHIEF JOHN THOMSEN'S BRIEF IN SUPPORT OF THE CITY'S MOTION TO
INTERVENE**

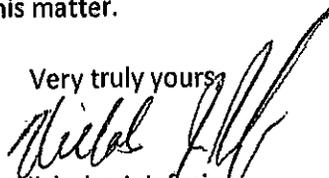
Dear President Schumacher:

Please find attached hereto for filing a Brief by Fire Chief John Thomsen In support of the City of Kenosha's Motion to Intervene.

By carbon copy of this email, a copy of John Thomsen's Brief is being served upon the Complainant, Jeremy Ryan, via his legal counsel Charles S. Blumenfield, Attorney Eugene Brookhouse, as attorney for the Commission, and Attorney Daniel Vliet, as attorney for the City of Kenosha.

Thank you for your attention to this matter.

Very truly yours,



Nicholas J. Infusino
Attorney at Law

Enclosures

cc: Attorney Charles S. Blumenfield for Jeremy Ryan (via email)
Attorney Eugene Brookhouse for the Commission (via email)
Attorney Daniel Vliet for the City of Kenosha (via email)
Helen Schumacher

**BEFORE THE CITY OF KENOSHA
BOARD OF POLICE & FIRE COMMISSIONERS**

**FIRE CHIEF JOHN THOMSEN'S BRIEF IN SUPPORT OF THE CITY OF
KENOSHA'S MOTION TO INTERVENE**

NOW COMES Fire Chief John Thomsen (hereinafter "Chief Thomsen"), through his attorneys, MADRIGRANO, AIELLO & SANTARELLI, LLC, by attorney Nicholas J. Infusino, and as and for his Brief in Support of the City of Kenosha's Motion to Intervene, Chief Thomsen states as follows:

FACTS

For purposes of this Brief in Support of the City of Kenosha's Motion to Intervene, Chief Thomsen adopts the facts as stated in the Fact Section of the City of Kenosha's Brief in Support of its Motion to Intervene.

ARGUMENT

The statute governing intervention provides both for intervention as a matter of right and for intervention which is discretionary with the court/commission. *Wis. Stat. § 803.09(1) & (2)*.

I. The City Meets the Requirements to Intervene As a Matter of Right.

Pursuant to *Wis. Stat. § 803.09(1)*, a party can intervene as a matter of right "upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties." Thus, under *Wis. Stat. § 803.09(1)*, a party must meet four requirements to intervene as a matter of right: 1) the motion to intervene must be timely; 2) the movant must

claim an interest in the subject of the action; 3) the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and 4) the existing parties do not adequately represent the movant's interest. City of Madison v. Wisconsin Employment Relations Com'n, 234 Wis.2d 550, ¶11, 610 N.W.2d 94 (Wis. 2000). "Courts have no precise formula for determining whether a potential intervenor meets the requirements of § 803.09(1)." Helgeland v. Wisconsin Municipalities, 307 Wis.2d 1 ¶40, 745 N.W.2d 1 (Wis. 2008). "The analysis is holistic, flexible, and highly fact-specific." Id. "A court must look at the facts and circumstances of each case against the background of the policies underlying the intervention rule." Id. "A court is mindful that *Wis. Stat. § 803.03(1)* attempts to strike a balance between two conflicting public policies." Id. "On the one hand, the original parties to a lawsuit should be allowed to conduct and conclude their own lawsuit.... On the other hand, persons should be allowed to join a lawsuit in the interest of the speedy and economical resolution of controversies." Id.

The City's brief in support of its motion to intervene focuses primarily on preventing a serious violation of Chief Thomsen's rights as well as avoiding potential litigation with Chief Thomsen. Chief Thomsen joins the City in these arguments. Yet, Chief Thomsen is submitting this brief to fully identify and illustrate the more global impact this case has on the City, current and future chiefs, and all current and future police officers and firefighters in the City of Kenosha.

This case is a high profile, highly emotional matter for the parties involved, which is masking the following very important practical and procedural questions raised by Jeremy Ryan's Amended Complaint that need to be addressed at the outset of this matter: (1) To what extent are police and firefighters subject to "double jeopardy"? (2) What rights do the chiefs

have to negotiate resolutions with accused subordinates pre-hearing and what rights does the Mayor have to negotiate resolutions with accused chiefs pre-hearing? (3) What are the City's obligations to investigate harassment complaints, ethics complaints and other complaints filed against City police officers and firefighters? (4) What ability does an accuser have to dictate the amount of investigation and/or punishment implemented by the City? and (5) When is an investigation deemed final and resolved? These are all very important procedural questions raised by Ryan's Amended Complaint. The City has a direct interest in and the resolution of these procedural questions since the rulings made by this Board will directly impair and impede the City's rights moving forward as it relates to future complaints against police officers and firefighters. Thus, the City meets the requirements to intervene as a matter of right since: 1) it is undisputed that their motion to intervene was made timely; 2) the City claims an interest in the subject of the action; 3) as explained in the City's Brief and further explained below, the disposition of the action may, as a practical matter, impair or impede the City's ability to protect its interest; and 4) the existing parties do not adequately represent the movant's interest.

1. *To what extent are police and firefighters subject to "double jeopardy"*

To some extent, the City's Motion to Intervene and Motion to Dismiss is an action to protect Local 414 members from themselves. The collective bargaining agreement between Local 414 and the City requires "just cause" for any disciplinary actions taken against Local 414 members. This "just cause" standard is the same standard as set forth in *Wis. Stat. § 62.13(5)* and is controlled by *Wis. Stat. §62.13(5)(em)*. The collective bargaining agreement between Local 414 and the City is silent as to any prohibition against "double jeopardy." This silence is likely the result of the fact that there is decades of arbitral precedent which define "just cause" to include a prohibition against double jeopardy. Therefore, Chief Thomsen and all other Local

414 members are on equal footing in that, per *Wis. Stat. §62.13(5)*, the discipline of suspension and/or termination can only be given provided there is “just cause” for such discipline. Jeremy Ryan, in his Amended Complaint, is now asking this Board to define “just cause” under *Wis. Stat. §62.13(5)* as permitting “double jeopardy.”¹

Attempting to overturn longstanding precedent interpreting “just cause” as protection against double jeopardy is short-sighted on Jeremy Ryan’s part because, if successful, he would open a Pandora’s box of exposure for Local 414 members and members of the police union to duplicative investigations and punishments for the same conduct. Such precedent would further expose the City and this Commission to not only a lawsuit by Chief Thomsen, but also to numerous future legal battles with police officers and firefighters attempting to restore the protections against double jeopardy in the definition of “just cause.” Therefore, this Board’s definition of “just cause” will have a direct impact on the legal exposure of the City to Chief Thomsen in this specific matter and will have a direct impact on the City’s legal exposure in

¹ At some point, Jeremy Ryan’s legal counsel will argue that the Independent investigator retained by the City to investigate the complaints against Chief Thomsen did not conclusively find Chief Thomsen innocent of the allegations brought against him and therefore, they will argue that double jeopardy does not apply to any allegation except for the alleged comment made at the blood drive. Such an argument would be wholly without merit since no judicial or quasi-judicial proceeding and no investigation ever categorically concludes that someone is innocent of the allegations made. Jeremy Ryan’s legal counsel will attempt to argue that even though the Independent Investigator spent over 120 hours investigating and analyzing the matter and found many allegations to “lack sufficient evidence to conclude wrongdoing,” that such lack of sufficient evidence, after an exhaustive investigation somehow opens the door to additional investigation. Such an argument is analogous to a criminal defendant continually being retried because he/she was repeatedly found to be “not guilty” as opposed to being found innocent. Further, such an argument assumes that the City did not consider all allegations when it gave Chief Thomsen a two week suspension, an assumption Jeremy Ryan cannot make because he was not directly involved in the disciplinary process and an assumption that is factually incorrect. Finally, such an argument contradicts *Wis. Stat. §62.13(em)(5)* which requires “substantial evidence” that an accused violated the rule alleged. After more than 120 hours of exhaustive investigation and analysis, the fact that an independent investigator could not even find “sufficient evidence of a convincing nature” (a lesser standard than substantial evidence) to support all but one of Local 414’s allegations is indicative of the weakness of Local 414’s allegations against Chief Thomsen.

disciplinary matters for police officers and firefighters moving forward. Neither Jeremy Ryan nor Chief Thomsen can adequately represent the City for these concerns.

2. *What Ability Does the Police Chief, The Fire Chief And The Mayor Have to Negotiate Resolutions with Accused Subordinates Pre-Hearing?*

Ryan's Amended Complaint further seeks to set precedent that any discipline imposed by a chief or the Mayor against an accused subordinate that is uncontested by such accused subordinate shall be of no force or effect. Ryan is seeking precedent that is contradictory to *Wis. Stat. §62.13(5)(c)*, which clearly and unambiguously states that "No hearing on such suspension shall be held unless requested by the suspended subordinate." Under Ryan's theory, it is for the person making the allegation and not City administration and the accused to determine outcomes of investigations and adequacy of punishment. Not only is Ryan's theory directly prohibited by statute, it creates an untenable disciplinary structure moving forward. Under Ryan's theory in which an accuser controls whether a matter gets to a hearing, nearly every allegation against a police officer or firefighter would require a hearing in front of the Commission since both the accuser and the accused could force a hearing. The odds of having satisfied both the accused and the accuser with an investigation and discipline are minimal. Therefore, a chief or the Mayor would have no incentive to investigate and negotiate discipline with a subordinate since the likely outcome is that the matter would be forced to a hearing by someone.² Eliminating or substantially reducing potential for resolutions of disciplinary matters short of full commission hearings has a direct impact on the City since it will incur the cost of the Commission's legal counsel to conduct such hearings and the cost of lost work time for City employees subpoenaed to testify in such hearings. Further, since Chief Thomsen is the accused in this matter, he is not

² This argument does not even get into the numerous and substantial standing issues with Ryan's Amended Complaint. Under the precedent that Ryan is attempting to set, any Wisconsin resident could file complaints with the Commission based on hearsay and innuendo even if such allegations lacked evidence supporting such.

in a position to argue for his statutory right as chief to manage, investigate and discipline his subordinates moving forward. The precedent Ryan is attempting to establish will severely curtail present and future chiefs' statutory rights to manage and discipline their subordinates. Therefore, the City has further interest in protecting the statutory rights of chiefs to manage and discipline subordinates.

3. *What Are The City's Obligations to Investigate Harassment Complaints, Ethics Complaints and Other Complaints Filed Against City Police Officers and Firefighters?*

The City has numerous ordinances that address misconduct by employees including the Harassment Ordinance (Code of General Ordinance 1.29) and the Ethics Ordinance (Code of General Ordinance Ch. 30). In this matter, Local 414 initially filed its allegations against Chief Thomsen indicating that they were being filed broadly under the statutes, ordinances and rules and regulations. These ordinances included the Harassment Ordinance and the Ethics Ordinance. Upon receipt of such allegations, the City acted prudently by hiring an independent investigator to investigate Local 414's concerns at a substantial expense to the City. Now, Local 414 is unsatisfied with the conclusions of the independent investigation and the discipline imposed as a result of their allegations filed with City administration in June 2013, so now Jeremy Ryan, in his personal capacity, is seeking to reset the process and have everything reinvestigated again via a Commission hearing. Thus, Ryan is requesting a duplication of efforts and costs on the City's part because he was not satisfied with the initial results. Ryan requests such even though Local 414's allegations received over 120 hours of an independent investigator's time and analysis. Under Ryan's theory, an accuser could always have the Commission reinvestigate, even after an exhaustive and expensive independent investigation simply because an accuser is not satisfied

with the results. Such a precedent is patently unfair to the City and the taxpayers because it results in needless expense to examine issues previously investigated and resolved.

Ultimately, the precedent that Ryan is attempting to set would provide a disincentive to City administration and/or any chief ever from investigating any allegation made against a police officer or firefighter since such investigation would be of no force or effect. Therefore, under Ryan's theory, when future harassment and/or ethics complaints are made against a police officer or a firefighter (whether by a coworker or a member of the public), the City should tell the accuser to file a complaint with the Commission as opposed to the City doing any independent investigation, since the accuser could always force the matter to the Commission thereby rendering the initial investigation superfluous. Setting such a precedent would not only be extremely taxing on the Commission's time and resources, it also impedes the City's ability to timely address legitimate harassment matters in the police and fire department since it would have to wait on the outcome of the Commission's hearing before resolving the issue. Further, Ryan's theory puts the City in the position of having to revise its Harassment Ordinance to exclude its application to police officers and fire fighters since Ryan's theory would render any investigation undertaken under the Harassment Ordinance meaningless.

4. *What Ability Does An Accuser Have To Dictate The Results of an Investigation and/or Punishment Implemented by the City?*

Jeremy Ryan's Amended Complaint is attempting to set precedent that the accuser always has the ability to force a concluded investigation and/or accepted punishment to a Commission hearing. Empowering an accuser to such an extent would create substantial potential for abuse of the hearing process by a meritless accuser at a substantial cost to the City and the accused. As with many civil legal proceedings, a substantial damage to an accused is

the cost incurred in defending the claims even if the accused prevails (i.e. one could maliciously file complaints with the Commission for the sole purpose of having an innocent accused incur costs of defense). In Commission matters, the City is also harmed by an abuse of the Commission process by an accuser since the City will ultimately incur the cost of legal counsel for the Commission.

Wis. Stat. §62.13(5) is established to give City administration (either chiefs or the Mayor) substantial authority in investigating matters and imposing punishment that they deem warranted. It is only if the accused deems such punishment excessive or unwarranted that a hearing is held before the Commission. Completely disregarding the procedures set up by *Wis. Stat. §62.13(5)*, Ryan is requesting that the Commission rule that the accuser controls the matter. Ryan's theory would wholly strip City administration's business judgment and ability to manage employees, conduct investigations, draw conclusions based on the investigation and to implement discipline that it deems just under the circumstances.

5. *When is an investigation deemed final and resolved?*

Ryan's Amended Complaint attempts to do away with concepts of res judicata and finality in favor of continually open investigations. All but one of the allegations in Ryan's Amended Complaint has been exhaustively investigated by the City. Now, Ryan is attempting to reset the investigation because Local 414 was unsatisfied with the results. Assuming, *arguendo*, that Ryan was afforded a hearing on the matter and the Commission concludes, consistent with the independent investigator, that there is a lack of sufficient evidence of a convincing nature to prove that Thomsen engaged in the conduct alleged, that ruling, under Ryan's theory, opens the door for additional complaints by other members of Local 414 again simply realleging the allegations made in Ryan's Amended Complaint. The City is directly impaired by a ruling that

an investigation is never final since it will incur the costs of multiple investigations and hearings in future matters if Ryan's theory is adopted.

The City is further impaired by the due process concerns that Ryan's proposed theory of continually open investigations raises. If the City commits substantial resources to exhaustively investigate a matter and then a hearing is held that results in findings contradictory to such investigation's conclusions, then the City is stuck defending a disciplinary action in which its own investigation did not warrant discipline yet discipline was ultimately imposed. This would raise substantial and material due process concerns for the City in this matter and in future matters and would expose the City to due process lawsuits.

II. The City Fulfills the Requirements For Permissive Intervention.

Even if it is determined that the City cannot intervene as a matter of right, the City still meets the requirements of permissive intervention. Pursuant to *Wis. Stat. §803.09(2)*:

Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

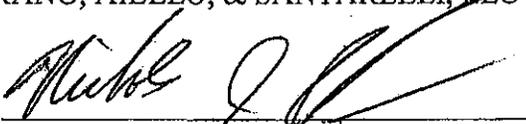
As detailed in the above analysis, it is clear that the City's interests has matters of law in common with this proceeding and that the results of such proceeding will materially impact the City moving forward. Therefore, based on the above analysis and the analysis in the City's brief in support of its Motion to Intervene, the City clearly meets the requirements for permissive intervention.

CONCLUSION

For the reasons stated herein and the reasons stated in the City of Kenosha's Brief in Support of its Motion to Intervene, the City of Kenosha's Motion to Intervene should be granted.

Dated this 26th day of February 2014.

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