IN SUPREME COURT
STATE OF WISCONSIN

State ex rel. Jose Castaneda,

Plaintiff-Respondent,

v.

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

Case No. 04-3306

Circuit Court Case No. 03 CV 008737

Defendants-Appellants.

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

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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I. STATEMENT OF THE ISSUES

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

The trial court answered this "yes."

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

The trial court answered this "yes."

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

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

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

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

II. STATEMENT AS TO WHETHER ORAL ARGUMENT IS NECESSARY

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

III. STATEMENT AS TO WHETHER THE OPINION SHOULD BE PUBLISHED

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

IV. STATEMENT OF THE CASE

A. Description of the nature of the case

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

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

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

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

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

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

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

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

claims without prejudice. R.46. On December 15, 2004, Respondents filed their Notice of Appeal. R.49. On September 28, 2006, the Court of Appeals certified the appeal to the Supreme Court. The sole matter on appeal is the Circuit Court's issuance of a declaratory judgment declaring Rule XVII invalid.

C. The Disposition in the Trial Court.

The trial court declared that the Board exceeded its authority in enacting Rule XVII with respect to complaints by aggrieved persons, concluding that Wis. Stat. §62.50 provides no general rulemaking authority for enacting such a rule. R.27:23. The Court concluded that Wis. Stat. §62.50(19) occupies the field regarding complaints by an aggrieved person, and that it leaves no room for rules by the Board. *Id.* at 23-24.

The trial court further declared that Rule XVII, as adopted and implemented, frustrates the legislative intent of Wis. Stat. §62.50(19), which is to give citizens the ability to complain against a fire or police department. *Id.* at 24. The Court's disposition was to grant Respondent's request for a declaratory judgment declaring Rule XVII invalid as

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Circuit Court also found *as facts*:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Pointing guns directly in the faces of persons;

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

f. Improperly and unreasonably detaining employees and other persons;

A.App.:163-165.

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

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

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

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

R.27:17.

V. STANDARD OF REVIEW

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

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

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

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

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

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

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

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

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

VI. ARGUMENT

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

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

§62.50(3) provides, in relevant part:

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

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

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

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

The Circuit Court's carefully reasoned decision stated:

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

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

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

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

That case involved the *Chief's* authority over the work rules of his officers, not the Board's authority over public citizen complaint procedures. The Court clearly limited its discussion of "discipline" to these work rules:

> Discipline which is in itself a great thing and indispensable to efficiency is promoted by many small details. We know from observation that badges and epaulets and uniforms and other insignia of distinction and identification are useful in promoting and maintaining discipline.

149 N.W. at 400, ¶4. Ironically, it is this very kind of *authorized* work rule, issued by the police chief, that the complainants alleged was violated in the instant case:

> *2/900.15 Uniform Standards*
>
> A. NAMEPLATES
>
> > All uniformed Department members shall wear a metal nameplate, bearing the wearer's correct last name. This nameplate is a part of the required uniform and will be worn during regular uniformed duty in plain view on the outside of the outermost garment (except rainwear . . .

R.30; R.31; R.S.A.:13

The Board attempts to use *Kasik* as authority to amend §62.50(3) to substitute "discipline" for "government." *Kasik* doesn't stretch that far. If the Board is unhappy with the statutory scheme, if it desires to amend the

statute, the Board's recourse is to the legislature, not to this Court or to its own power.

The rules authorized by subs. 3(b) governing "the selection and appointment of persons" are clearly limited to that subject, and do not encompass complaint, investigation and trial procedures, particularly complaints made by aggrieved persons.

Subs. (3) is as noteworthy for what it does not say as for what it says. It does not have the language contained in Wis. Stat. §62.13(5)(g): "*Further rules for the administration of this subsection may be made by the board." This* language would have conferred the broad rulemaking authority claimed by the Board.[5] By contrast, subs. (3) authorizes the Board to promulgate rules only: 1) for the government of department members; and 2) for the selection and appointment of department members. It does not authorize rules for the complaint, investigation and trial procedures which affect persons who are not "members of the department."

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[5] Wis. Stat. §809.19(1)(i) requires that parties be referred to by name in the argument section. Since there are six named Appellants, we will refer to them collectively as "the Board."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis supplied).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> *. . . It is the general rule that an agency or board created by the legislature only has the powers which are either expressly conferred or necessarily implied from the four corners of the statutes under which it operates. The effect of this rule has generally been that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- The impact of the trial court's decision is that a "just cause" trial must be conducted on every citizen complaint. Respondent's Brief, pp. 31, 36.

- The Board's investigative and adjudicative functions require Rule XVII. *Id.* at 34.

- The provisions of Rule XVII are for the benefit of the citizens. *Id.* at 35.

- The Court's decision presents an unworkable situation. *Id.*

- Citizens who encounter police officers and firefighters can become disgruntled for "a whole host" of reasons, particularly as to police officers who are often responding to a volatile situation. *Id.*

- If a hearing were required every time a "disgruntled citizen" lodges a complaint with the Board, then every response call would potentially give rise to a "just cause hearing" based on the citizen's subjective understanding of the conduct of the police officer. *Id.*

- Rule XVII assures uniformity in the hearing process. *Id.* at 39.

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

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

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

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

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

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

VII. CONCLUSION

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

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

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