

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 SEYMOUR PROFESSIONAL POLICE OFFICERS :
 UNION LOCAL 455-A, AFSCME, AFL-CIO : Case 16
 : No. 46363
 and : MA-6958
 :
 CITY OF SEYMOUR (POLICE DEPARTMENT) :
 :

Appearances:

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, appearing on behalf of the City.
Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

ARBITRATION AWARD

On October 7, 1991, the City of Seymour, hereinafter City, and the Seymour Professional Police Officers Union, Local 455-A, AFSCME, AFL-CIO, jointly requested the Commission to appoint Mr. Thomas L. Yaeger to serve as Arbitrator for the grievance pertaining to the three-day suspension of Officer John D. Seefeldt. A hearing in the matter was held on January 28, 1992, at which time the parties were afforded the opportunity to adduce testimony and introduce documentary evidence. A transcript of those proceedings was taken. Initial posthearing briefs were filed by March 27, 1992, and reply briefs were received by April 14, 1992.

ISSUE:

At the commencement of the hearing, the parties stipulated to the following statement of the issue to be resolved by the undersigned:

Did the City have just cause to suspend the grievant, John Seefeldt, for three days in May, 1991?
 If not, what is the appropriate remedy?

Further, the parties stipulated that there were no procedural arbitrability issues.

PERTINENT CONTRACT LANGUAGE:

ARTICLE 3

MANAGEMENT RIGHTS

3.01 -Except as otherwise provided in this Agreement, the management of the City and its business and the direction of its work force is vested exclusively in the Employer. Such rights include, but are not limited to, the following:

. . .

- d. To discipline or discharge employees for just cause.

. . .
ARTICLE 10

DISCIPLINARY PROCEDURE

10.01 - Purpose - Disciplinary actions taken by the Employer shall be for just cause and are intended to correct unacceptable conduct by bargaining unit employee.

10.02 - Progression of Discipline - The usual progression of discipline shall be:

- 1) oral reprimands (with written notation in the employee's file)
- 2) written reprimands
- 3) suspension
- 4) discharge

Such sequence shall not be required when the conduct involves gross negligence or similar serious infractions.

10.03 - Union Representation - Union representation shall be offered to employees whenever discipline is discussed with an employee. It shall be the responsibility of the employee to arrange for such Union representation, and the claim that a Union representative is unavailable, after reasonable opportunity to secure the same, shall not be grounds for delay of the imposition of any appropriate disciplinary action. If it is not reasonably possible for Union representation to be present, the employee may choose a third party to be present for the limited purpose of witnessing the proceedings at the disciplinary meeting. The Union shall be provided with a copy of any discipline recorded in an employee's personnel file provided the Union designates to the Police Chief in writing the name of the Union officer or representative who shall receive such notice. The disciplinary notice shall clearly state the level of discipline and the reason(s) for such discipline.

10.04 - Additional Authority of Police Chief - Nothing contained in this Article shall be construed as limiting the authority of the Police Chief to take appropriate action to temporarily relieve an officer from duty in the event of an occurrence where the officer is physically or mentally unable to perform his duties. The Chief may take such action in circumstances including, but not limited to, physical illness, injury or intoxication. If an employee is subsequently disciplined for such an

occurrence, the disciplinary procedure set forth in this Article shall be utilized, and the Police Chief, in imposing such discipline, shall not be limited to suspension coinciding with the period that an employee was relieved of duty.

BACKGROUND

The grievant, John Seefeldt, is employed by the City of Seymour as a Police Officer. The Police Department is comprised of three full-time police officers and the Police Chief, Don Raymakers.

On or about April 23, 1991, the grievant's wife, Karen Seefeldt, went to the City Clerk's office and requested a Variance Protest form and was told by the City Clerk, Garsow, that she did not have such a form. The Clerk then asked Mrs. Seefeldt if she was asking about "the situation that was pertaining to something in their neighborhood and that was going on which was a special exception which is not a re-zoning issue," and she told her that she did not have the type of protest form she was seeking. At that point, Mrs. Seefeldt checked out the "comprehensive plan" for the City and left.

Sometime prior to April 29, grievant Seefeldt entered the City Clerk's outer office outside of the Clerk's office normal business hours, but while the grievant was on duty. All officers had access to keys to the Clerk's office, and had historically been allowed to go into the Clerk's office to, among other things, make copies on the Clerk's copying machine. Once in the City Clerk's outer office, the grievant removed a "Protest Against Re-Zoning" form from an unlocked filing cabinet located in the outer office. Once the form was obtained by Officer Seefeldt it was signed by several citizens in his neighborhood who were opposed to the proposed construction of a duplex in their neighborhood that is comprised of single family dwellings.

Officer Seefeldt, along with several citizens, attended the April 29 public hearing of the Seymour Planning Commission which was presided over by the Mayor, Judith Schuette. During the course of the meeting, the Protest Against Re-Zoning form was offered to the Commission, but the Mayor refused to process the form stating that it was the wrong form because the meeting was concerned with a "special exception," and further, was addressed to the Common Council of the City of Seymour instead of the Planning Commission. The next morning, the Mayor went to the City Clerk's office to inquire who had issued the Protest Against Re-Zoning document because she didn't want citizens coming to meetings with the wrong documents, and she wanted to discuss that problem with the Clerk. The Clerk informed her that neither she nor any of her employees had issued the document, but that she was pretty sure the document had come from her office. At that point, the Mayor went to the Chief's office, explained to him what had happened and told him that she wanted to know how the document was obtained. She had also advised the Chief that she was upset that Officer Seefeldt had come into the meeting and sat through the entire meeting while on duty. Prior to the meeting, Officer Seefeldt had asked the Chief if he could attend the meeting at 7:00 p.m. on the evening of the 29th and was told by the Chief that he could attend, but if the meeting became lengthy, not to stay because he was the only officer on duty. According to the Police Department daily log, Officer Seefeldt indicated that he was in the meeting from 6:00 p.m. until approximately 7:40 p.m.

After his meeting with the Mayor on the morning of the 30th, the Chief went to the City Clerk's office to see if she or her assistants had given out the Protest Against Re-Zoning form. They advised him that they had not given out such a form, but the Clerk did advise the Chief that Mrs. Seefeldt had been in sometime prior to the meeting asking for a similar type form. The Chief then reviewed the petition form which had been presented to the Mayor and

concluded from looking at the names contained on the form that the only individual who had access to the Clerk's office to obtain the form outside of the Clerk's office hours, was the grievant. The Chief then contacted Officer Seefeldt at home and asked him to report to his office.

Officer Seefeldt reported to the Chief's office on the morning of April 30th and was told by the Chief that he was investigating a complaint by the Mayor concerning the use of the form. Initially, in the response to the Chief's questions, the grievant stated that he had no knowledge of where the form originated. At that point, the Chief said to him that his name was on the form and the Chief assumed that he would know where the form had come from or who presented it to him to have him sign it. At that point, Officer Seefeldt indicated that he had looked up the format in the Chief's office in the state statute books and that someone had typed it up. The Chief did not find that explanation believable and continued asking further questions of the grievant.

In the course of these additional questions, the grievant finally said "Well that isn't really how I got this form. I did get it from the Clerk's office after hours." He admitted getting into the Clerk's office by use of the keys that are always contained in the squad. The grievant told him that he had gone into the Clerk's office to get the form because his wife had previously asked the Clerk for such a form and was told that one did not exist; and Mr. Seefeldt felt that the Clerk had been lying to his wife, and he took it upon himself to look through the files himself to try and obtain the proper form. At the end of the conversation, the Chief asked Officer Seefeldt if he would write up how he had obtained the form as he had indicated in their discussion. The grievant said he would not provide such a write-up, and the Chief then prepared a written statement summarizing his investigation. Upon completion of his write-up, he showed it to the grievant who reviewed it and made a correction concerning obtaining permission to attend the Zoning Commission meeting.

Thereafter, on May 13, 1991, the Chief orally advised the grievant that he was being suspended for three days without pay for the reasons enumerated in the following letter which the Chief gave the grievant at the same time.

May 13, 1991

Officer John Seefeldt
Seymour Police Department
306 N. Main Street
Seymour, WI 54165

Re: Three-Day

Suspension

Dear Officer Seefeldt:

This is notice of a three (3) day suspension I am imposing on you for unauthorized entry into the City Clerk's office and removal of information from a file cabinet in that office. I spoke at length with you on this matter on April 30, 1991.

First, your unauthorized entry in to the Clerk's office and removal of documents is a serious violation of the public trust you are sworn to uphold in your position as a police officer. The public relies on you to act in accordance with expectations of respect for privacy and personal property - your action totally violates that trust for you are engaged in the type of conduct from which you are expected to protect citizens in the community.

Second, your actions are also a violation of the Code of Ethics for Officers and Employees of the City of Seymour.

**Chapter XXIV, Code of Ethics
for Officers and Employees Of
The City of Seymour**

24.04. Disclosure Requirements. (4)
Special privileges. No public officer or employee shall use or attempt to use his/her official position to get secure unwarranted privileges or exemptions for himself/herself or others.

You used the privilege of having access to the Clerk's office to secure for yourself a perceived advantage in a manner not related to your employment.

Third, you lied to me when I first questioned you about this matter, stating you obtained the document in question by another means. Once again, integrity is an essential part of the expectation of a law enforcement officer and it was not exhibited by you in my investigation of this matter.

Under Article 10 of the Collective Bargaining Agreement is found a progressive disciplinary procedure setting forth the appropriate steps to be taken in disciplining employees covered under the Collective Bargaining Agreement. Your personnel file reveals a number of disciplinary reprimands demonstrating a continued recurrence of improper and unprofessional behavior as an officer since your employment began with the City. You have had five written reprimands in the last nine years, two within the last four years. Suspension is the normal progression of discipline after a written reprimand has been given and accordingly, the three-day suspension is in accordance with the dictates of Article 10.02.

Even if there had been no prior incidents in your personnel file, this incident is an infraction serious enough to warrant a suspension on its own merits. Please be advised that any further incident of improper or unprofessional behavior by you as an officer shall subject you to more severe discipline, including suspension or discharge.

Because the City of Seymour has less than 4,000 population, and there is no prior review mechanism on discipline in the labor agreement, Wisconsin Statutes, Section 62.13(6m) (a) or (b) applies in this case.

Please be advised that the City will appoint a person pursuant to Wisconsin Statutes 62.13(6m)(b) to act in the place of a board of police and fire commissioners according to Wisconsin Statute 62.13(5) if you wish to have a hearing before such person. Please advise me within ten (10) days from receipt of this letter whether you wish to invoke your rights under the statutes noted above. It is the City's position that the choice to avail yourself of the

statutory remedy set forth above precludes you from seeking arbitration on the decision of the appointed person acting in place of the board.

If you have any further questions regarding this matter, please feel free to contact me at your convenience.

Very truly yours,

Donald F. Raymakers, Chief

Subsequent to being told by the Chief of his suspension and receipt of the May 13 letter confirming same, the grievant, on May 16, 1991, filed the grievance which is the subject of this arbitration.

DISCUSSION

The Union contends that the City did not have just cause to discipline the grievant, Seefeldt. With regard to the first charge of unauthorized entry and removal of documents, the Union notes the Chief admitted that there was no written policy regarding officers' access to the Clerk's office. Thus, the Employer has failed to prove that any employe with a key to the Clerk's office needed authorization to use it and consequently, for doing so without such authorization, does not warrant discipline. Concerning the second charge, removal of documents, the City Clerk acknowledged in her testimony that the document which the officer removed from the outer Clerk's office was not confidential, and if it had been it would have been kept in a filing cabinet in the Clerk's inner office. Further, the former City Clerk, Zueske, testified that during her tenure there were no restrictions regarding employes going into the files in the Clerk's office. In fact, she acknowledged knowing of and allowing such actions. Thus, if the City desired to change this long term practice of liberal access, it was incumbent upon the City to do so in clear and unambiguous terms, such as issuing a work rule under the parties' collective bargaining agreement. Also, the Chief's claim that the removal of a nonconfidential form from a filing cabinet in the Clerk's outer office for which he had a key and routinely entered was a serious violation of the public trust it is unsupported by any evidence or testimony in the record. Finally, with respect to the charge that the grievant violated the City's Code of Ethics providing that "no public officer or employe shall use or attempt to use his/her official position to get (sic) secure unwarranted privileges or exemptions for himself/herself or others" is not supported by the record. The Union believes it is unclear what unwarranted privilege Officer Seefeldt received as the result of obtaining the blank form in the matter in which he did. The Chief acknowledged that it was okay for officers to go into the Clerk's office to obtain a map for a citizen while the Clerk's office was closed. The Union believes that there can't be a distinction made between obtaining a map during nonoffice hours and going into the Clerk's office to obtain a blank form.

The third charge against the grievant is that he lied to the Chief during the Chief's investigation. The grievant acknowledged that he was evasive in initially responding to the Chief's questions, but within three or four minutes did answer the Chief in a direct and honest manner. On cross examination, his explanation for being evasive in responding to how he obtained the form was because he thought that his manner of obtaining the form was less than proper and when one senses danger it is normal to take evasive action while assessing the situation. However, these facts do not warrant discipline of the grievant. Therefore, the Union requests the undersigned uphold the grievance, overturn the suspension and make the grievant whole.

The City, to the contrary, believes that it did have just cause to suspend the grievant for his conduct in the subject matter. It contends that a police officer is held to a higher standard of conduct than the general population and because of his position as a police officer, is held to a higher degree of accountability and must abide by all rules and regulations to set an example for the community. In this case, the grievant allowed his own personal pursuits to interfere with his duties as a police officer and breached this expectation when he, without justification, entered the City Clerk's office and obtained the document for personal use unrelated to his employment as a police officer. Further, the other two officers in the department testified that they were not aware of any policy verbal or written which would allow a police officer to go into the Clerk's office and go through filing cabinets for personal reasons. Also, the Chief, because of an earlier incident involving the grievant, advised the grievant that he should not be going into the Clerk's office other than to use the copying machine and he should not be rummaging through the Clerk's or Assistant Clerk's desk drawers and filing cabinets. The City, therefore, concludes that the grievant's actions in this case were improper and warranted disciplinary action.

The City also charged the grievant with a violation of the ethics code. The grievant admitted at hearing that he had obtained the form from the City Clerk's office while on duty in his capacity as a police officer. Thus, he used his official capacity to obtain the form. Further, the City contends that the facts establish that the grievant did obtain an unwarranted privilege not available to the general public in that he was legally able to gain access to the City Clerk's office when the office was closed. Further, he was able to obtain a form, although it was the wrong form, for his and others' use in trying to influence the City's Planning Commission relative to a matter pending before it. Thus, the City concludes that disciplinary action was appropriate in that there were other avenues available to him to properly obtain the form rather than resort to the improper self-help that he ultimately used to obtain the form.

Lastly, the City believes that there was just cause to suspend the grievant for his lying to the Chief during the Chief's investigation. The City points to the fact that the grievant acknowledged in his testimony that he was evasive in answering the Chief's questions, and the City concludes therefrom that the police officer's "evasive" conduct equates to lying. The City believes that this conduct is unacceptable. The City also believes that there is substantial precedent for holding officers to a higher standard of conduct and that numerous court cases have upheld the dismissal of police officers for lying. In this case, the officer knowingly gave false information to the Chief during his investigation, yet only received a three-day suspension without pay. Because in many instances lying by police officers have resulted in termination, the Employer believes that the three-day suspension given in this case is appropriate. Further, it believes that because of the seriousness of the infractions in this instance, progressive discipline was not required. For all the above reasons the City believes that the Arbitrator should find that it had just cause to suspend the grievant for three days without pay, and deny the grievance.

The undersigned is satisfied from his review of the record testimony and documentary evidence adduced in this case that the City has met its burden of proof with respect to establishing that it had just cause to suspend the grievant without pay for three days. There is no dispute that the grievant's purpose in entering the Clerk's office was to obtain a form to be used by the grievant, his wife, and/or other individuals to register their protest to the construction of a duplex in the grievant's residential neighborhood. The grievant's purpose in going into the Clerk's office was to go through the Clerk's files to locate a form that would be appropriate to register their objection before the Planning Commission. His wife had previously attempted to

obtain such a form, but was advised by the City Clerk that no such form existed. He obviously was not satisfied with the answer that his wife had been given by the City Clerk's office, and took matters into his own hands to determine whether in fact there was an appropriate form. As a consequence of his going into the Clerk's office, he did locate a form in one of the Clerk's filing cabinets and that form was ultimately utilized by himself, his wife and other concerned neighbors. As it turns out, the form used was not the correct form, and that the Clerk had correctly advised the grievant's wife.

Clearly the grievant's action in going into the Clerk's office, after hours, and going through the Clerk's filing cabinet was inappropriate. If he did not accept the answer his wife was given when she went to the Clerk's office to obtain the same information, he could have easily called or gone into the Clerk's office himself during normal working hours and made the same inquiry. He did not do this, for whatever his reasons. Obviously, a police officer, better than anyone, should know that going through the filing cabinets of another government official/employee whether they be confidential or not, for purely personal reasons without that individual's prior permission is wrong. In defending his actions it is claimed that the grievant's conduct was not offensive to the prior City Clerk, and therefore, it was incumbent on the City to establish a work rule prohibiting such activity in the future if the new Clerk found the prior Clerk's policies unacceptable. The undersigned does not agree. Obviously, this was an issue personal to each City Clerk. The generally accepted unwritten rule in the work place is that one employee does not go into another employes' desk or filing cabinets without permission. It was clearly presumptuous on the grievant's behalf to presume because it was okay with Zueske that it would be okay with Garsow and he took great risk in so presuming. Thus, the grievant's conduct in this regard was inappropriate, and the City, as it did, had just cause to take some disciplinary action against the grievant in order to impress upon him the inappropriateness of his conduct so that hopefully he would not engage in such conduct in the future.

Making matters worse for himself, the grievant when initially questioned by the Chief, first told him that he had copied the form from the statute books located in the Chief's office, which was obviously a lie. It wasn't until the Chief continued questioning the grievant that he finally acknowledged how he had obtained the form. In his defense, the claim is made that it was only natural for the grievant to be as he stated "evasive" in the face of danger. The undersigned does not find this explanation persuasive. I have no doubt that as a police officer, the grievant would find equally as unacceptable, a suspect lying to the officer upon being questioned in an investigation. Had the Chief not sensed, based upon his long term relationship with the grievant and the grievant's answers to his questions, that the grievant was holding back, the investigation might have concluded with the Chief believing that the grievant had copied the form from the statute books located in his office. It's anyone's guess where the investigation would have gone then. Clearly, the grievant was being "evasive," as he described it, because he believed he might be in trouble for how he obtained the form. As most of us have been told since early childhood, by parents and law enforcement, as difficult as it is to do, be honest when you find yourself in trouble for to do otherwise only makes matters worse. Clearly, the grievant forgot that lesson. 1/ The undersigned believes this conduct by the grievant is a "serious infraction," within the meaning of Section 10.02 of the parties' collective bargaining agreement, warranting disciplinary action.

The undersigned is also satisfied that the grievant did use his position as police officer in an attempt to gain an advantage or privilege for himself

1/ Also, in the undersigned's opinion, the grievant continued to be "evasive" and less than forthcoming in his testimony at the hearing in this case.

or others. As far as the grievant or anyone else knew, based upon the grievant's wife's inquiry of the City Clerk, there was not an appropriate form to present to the Planning Commission to register a protest against the construction of a duplex in his residential neighborhood. However, he did not accept that explanation, and took it upon himself to attempt to locate an appropriate form in the Clerk's office. He was successful in obtaining a form relative to the protesting of zoning, but as it turns out, that form was not appropriate for the matter in which it was used; and that is why his wife had been advised that there was no such form. Clearly, the grievant could have gone to the Clerk's office and/or to the Planning Commission or the Mayor and inquired as to the appropriate means by which to present their protest to the Planning Commission. This he did not do, but rather, obviously presumed that because he had access to the Clerk's office, he could go in, go through the Clerk's files and find a form which he believed appropriate for his purposes. Based on these facts, the undersigned believes there can be no doubt but that the grievant was technically in violation of the City's ethics code. The undersigned, however, does not find that violation to be nearly as serious as the other two charges leveled against him by the City and discussed above.

Because the undersigned is satisfied that the City has proven by a preponderance of the evidence that the grievant did inappropriately enter the City Clerk's office outside the office's normal working hours, wrongfully went through filing cabinets to obtain a form for his personal use; violated the City's ethics code; and thereafter, initially lied to the Chief upon being questioned as to how the form was obtained. This misconduct by the grievant provided the City with just cause to take disciplinary action against him. Further, the undersigned believes that the City had just cause to impose a three-day disciplinary suspension for this misconduct. Therefore, the undersigned believes the grievance must be denied.

AWARD

Based upon the foregoing and the record as a whole, the City did have just cause to suspend the grievant, John Seefeldt, for three days in May, 1991. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 22nd day of July, 1992.

By _____
Thomas L. Yaeger, Arbitrator