

## BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

WISCONSIN RAPIDS PROFESSIONAL  
POLICEMEN'S ASSOCIATION LOCAL NO. 16,  
WPPA

and

THE CITY OF WISCONSIN RAPIDS

Case 122  
No. 51926  
MA-8778

### Appearances:

Mr. Jeffrey P. Sweetland, Shneidman, Myers, Dowling and Blumenfield, Attorneys at Law, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appeared on behalf of the Union.

Mr. Kenneth M. Hill, City Attorney, City of Wisconsin Rapids, Wisconsin Rapids City Hall, 444 West Grand Avenue, Wisconsin Rapids, Wisconsin 54495, appeared on behalf of the City.

### ARBITRATION AWARD

On December 9, 1994, the Wisconsin Employment Relations Commission received a joint request from the Wisconsin Rapids Professional Police Association, Local 16, WPPA and the City of Wisconsin Rapids to appoint the undersigned to hear and decide a grievance pending between the parties. On December 23, 1994, the Commission appointed me as the impartial arbitrator to hear and resolve this dispute. An evidentiary hearing was conducted on February 16, 1995 in Wisconsin Rapids. The matter was not transcribed. Post-hearing briefs were submitted and exchanged by March 3, 1995.

This arbitration addresses the discharge/resignation of Police Officer Douglas Wagner. The initial issue for determination, and the subject of this award, is whether Wagner resigned, or was discharged.

### BACKGROUND AND FACTS

Employee Douglas Wagner was hired in October of 1991 as a Police Officer by the City of Wisconsin Rapids Police Department. During the initial period of his employment, Wagner served as a probationary employee. For a number of reasons, including but not limited to an intemperate remark uttered by Wagner, Chief Robert A. Ziegert determined to terminate Wagner during his probationary period. That termination was accomplished by a June 5, 1992 letter, the terms of which are set forth below.

Officer Wagner:

On October 4, 1991, you were hired as a probationary Patrol Officer with this Department. Per Rule 68, PROBATION, of the Departmental Rules, and Article 4, SENIORITY, covers the conditions of probationary officers.

This letter is intended to provide official notice that your employment with the Wisconsin Rapids Police Department is hereby terminated. This termination is effective upon the completion of Shift 2 (10:30 P.M.) on Friday, June 5, 1992.

You will return to the Wisconsin Rapids Police Department all equipment, weapons, uniforms, and materials that were issued to you by this Department no later than Monday, June 8, 1992, before noon on that date. You are to return such property to Lieutenant Schuetz.

So ordered on this date,

Robert A. Ziegert /s/  
Robert A. Ziegert  
Chief of Police

This matter found its way into the Mayor's Office. Following review and discussion the Mayor overturned the Chief's decision, by the following memo:

June 25, 1992

Chief Robert A. Ziegert  
Wisconsin Rapids Police Department

Dear Chief:

Based upon my review of the circumstances surrounding the termination of probationary police officer Douglas J. Wagner, I hereby order you, Police Chief Robert A. Ziegert, to do the following:

You are ordered to amend the disciplinary termination of Douglas J. Wagner to a disciplinary suspension of 30 calendar days and to reinstate Officer Wagner to his regular patrol schedule on July 6, 1992. You are further ordered to change any reference to termination of employment to suspension without pay due to comments made to the shift commander regarding his personal opinion of the department rules. A new twelve-month probationary period is to be established and run through July 5, 1993. Officer Wagner, along with other probationary officers, are to receive regular monthly performance reviews, counseled on their job performance, and given an opportunity to correct any deficiencies.

I expect my order to be carried out in a timely manner and for Officer Wagner to be notified of his reinstatement not later than Tuesday, June 30, 1992.

Sincerely,

Carl G. Greenway /s/  
Carl G. Greenway  
Mayor

Chief Ziegert believed the Mayor was without authority to direct him to reinstate a probationary police officer. The Chief made his feelings in this regard well-known, and he solicited support from a variety of sources to challenge the Mayor's authority. Notwithstanding the Chief's misgivings, he and the Mayor entered into an "agreement". That agreement, which included a withdrawal of the Mayor's letter, is set forth in this letter:

July 14, 1992

Mr. Robert Kryshak, President  
Police and Fire Commission

444 West Grand Avenue  
Wisconsin Rapids, WI 54494

President Kryshak and Commissioners:

This is to inform you that Mayor Greenway and I have had several meetings regarding Mr. Douglas Wagner. At the insistence of the Mayor, the following has been agreed to:

Mr. Wagner, a probationary Patrol Officer with the Wisconsin Rapids Police Department, will be reinstated as such and the order of dismissal dated June 5, 1992, will be reversed.

The time between June 6, and July 20, 1992, will be considered as a forty-five (45) day suspension - without pay.

A new, one (1) year probationary period is to begin on July 21, 1992. This is an issue to be agreed upon with the Wisconsin Rapids Professional Police Association, the Mayor, and Mr. Wagner. It is outside of the scope of my authority to deal with. Furthermore, under section 3.10 and 7.01 of the Policy and Procedure Manual for the Police and Fire Commission, there is a distinct conflict as to the length of probation stated and what is desired by the Mayor.

I have communicated with Mr. Wagner as to the above, and he is scheduled to report to the Department at 8:00 a.m., Tuesday, July 21, 1992.

Robert A. Ziegert /s/  
Robert A. Ziegert  
Chief of Police

cc: Commissioners

Wagner was reinstated with a new probationary period beginning July 1, 1992 running

through July 20, 1993.

On March 10, 1993, the Chief sent Officer Wagner the following letter:

March 10, 1993

Officer Douglas Wagner  
Wisconsin Rapids Police Department  
444 West Grand Avenue  
Wisconsin Rapids, WI 54494

Officer Wagner:

The term of your probationary period expires on July 20, 1993. In keeping with the standards set out in Wis. Ss 62.13(4)(a), (c), "to secure the best service in the department," it is my intention to inform you at this time, that I have a very strong inclination not to recommend the granting of "permanent status" at the end of your probationary period.

It might well be in your best interest for you to seek other employment, in order to perhaps better prepare you and your family for this distinct possibility.

Robert A. Ziegert /s/  
Robert A. Ziegert  
Chief of Police

Notwithstanding the Chief's concerns, the Police and Fire Commission took up Officer Wagner's employment status at its July 19, 1993 meeting. The following notes of the Commission meeting serve as background to its decision to confirm permanent status on Officer Wagner:

The following motion was made by Francis Daly, seconded by Sylvia Stephens:

I would like to move that the Wisconsin Rapids Police and Fire Commission approve the appointment of probationary Police Officer Douglas J. Wagner to permanent status with that Department with

the following qualification, which is part of my motion. We have received Police Chief Ziegert's recommendation, and have concerns about Officer Wagner's attitude and performance as demonstrated in late 1991 and early 1992. Those concerns were addressed in 1992 through action from the Chief and the Mayor, resulting in Officer Wagner being given a new 12-month probationary period beginning July 21, 1992. His performance during the last year has been more than satisfactory, and we hope that the attitude and performance difficulties that arose in 1991 and early 1992 will not reoccur. Based then primarily upon Officer Wagner's performance in the line of duty over the last 12 months but with some reservation over the problems that arose early in his initial probationary period, I would move to appoint Douglas J. Wagner to permanent status with the Wisconsin Rapids Police Department effective July 21, 1993. Motion carried.

The events leading to the discharge addressed in this proceeding occurred on September 24, 1994. On that day, Wagner was scheduled to work a shift beginning at 7:45 p.m. He and his family were invited to attend a birthday party of an extended family member beginning at approximately 1:30 in the afternoon. The party was regarded as a family gathering as well as a birthday party. Wagner planned to go out that evening with his wife. In order to free himself up, Wagner arranged with a co-worker, Officer Krukowski, to work the first two and one-half hours of his shift. The balance of his shift Wagner intended to cover with compensatory time. That morning, the morning of the 24th, Wagner spoke with Sergeant Ostrum, indicated that Krukowski would replace him for a portion of his shift, and that he wanted to use compensatory time for the balance. Ostrum advised him to fill out the paperwork and put it on his desk. Later that day, Krukowski called Wagner and advised him that another officer had called in sick, that Krukowski had been called to cover for that officer, and was therefore unable to fill in for Wagner. Wagner thereafter contacted Officer Randall Jahns, and asked Jahns to cover for him. Jahns indicated that he would do so if Wagner was unable to find anyone else. Wagner then left for his sister's house and the party.

Departmental protocol required Wagner to either come into work, or secure his own replacement. In either event, it was his obligation to physically appear at the work site to make sure that the correct paperwork was submitted. This was not done.

Lieutenant Rude had replaced Sergeant Ostrum as Officer in Charge. Ostrum had never calendared Wagner's paperwork. Rude realized that there was no coverage for Wagner's position, and advised Union President Wesener of that fact. Wesener called Wagner's home and left a message. Wagner contacted Jahns again, to confirm that Jahns would work the first portion of his shift. Wagner thereafter returned Wesener's phone call. The two men talked, Wesener advised Wagner that he (Wagner) had to appear to correct the paperwork. Wagner responded that he was

three hours out of town. (Wagner's sister lives approximately 15 minutes from the police station.) Following their conversation, Wesener, who was in the police department, passed the phone to Rude. Rude advised Wagner that he was responsible for his tour of duty. Wagner told Rude that he was three hours away and asked Rude if he could take care of the paperwork in the morning. Wagner asked, "Is this going to be a big deal?" Rude responded that the paperwork was no big deal and that they could take care of it in the morning. Wagner did not work his scheduled shift on September 24.

Chief Ziegert regarded Wagner's behavior as disciplinable. He proposed a two-day suspension for Wagner's being absent without leave. A meeting was convened on October 11 to discuss the two-day suspension. In attendance were the Chief, Lieutenant Rude, Wagner, Police Officer Tasch, a Union representative representing Wagner, and Inspector Kreckler. The Chief outlined the facts as he knew them and indicated that he believed it was appropriate to invoke a two-day suspension. The Chief then turned to Officer Wagner and offered Wagner an opportunity to explain his side of the story. During the course of his explanation, Wagner, without prodding, volunteered the fact that he had lied about the amount of time it would take him to return to the Department, and apologized for his behavior. In response, the Chief indicated that "Rule 10" (the absent without leave provision) was no longer the issue. The issue was now untruthfulness. The Chief explained that he could not and would not tolerate untruthfulness, and proceeded to lecture Wagner as to the ethical standards expected of a police officer. In conclusion, the Chief advised Wagner that he could either resign his position or the Chief would file charges with the Police and Fire Commission seeking Wagner's discharge. Conversation and negotiation ensued. Officer Tasch suggested a longer suspension, made reference to the damage to Wagner's career that discharge would bring about. Tasch further reminded the Chief that Wagner was married with two small children and had recently purchased a new home. Further discussion ensued. The resolution to the give and take was an undated letter of resignation. That letter is set forth in its entirety:

Chief Robert A. Ziegert  
Wisconsin Rapids Police Department

Police and Fire Commission  
444 West Grand Avenue  
Wisconsin Rapids, WI 54494

Chief Ziegert and Commissioners:

It is with full knowledge and understanding of the consequences involved with the submission of this letter to you, and I hereby resign my position as a police officer with the Wisconsin Rapids Police Department. This resignation will become effective on this date, as signed and witnessed below.

I anticipate that I shall receive all severance pay due me as the result of any unused vacation, holidays, and compensatory time that I have accumulated.

Respectfully submitted,

Doug Wagner /s/  
Douglas J. Wagner

Witness:

Anthony Tasch  
Anthony M. Tasch /s/

Edward J. Kreckler  
Edward J. Kreckler /s/

The letter was drafted by the Chief and signed by those whose signatures appear, on October 11. All meeting attendees remarked that it would be appropriate for Wagner to begin seeking alternative employment.

The issue in this proceeding relates to the differing views as to what the letter represented. Chief Ziegert indicated that it was his understanding that the letter was intended to permit Wagner to seek alternative employment. Its purpose was to allow a continuum of employment, and to avoid the black mark on Wagner's record that a discharge for lying would create. The Chief regarded the timeline for execution of the letter as relatively short-term, four to six weeks. From the Chief's perspective, this was not an open-ended arrangement. He also advised Wagner that if the latter man "screwed up" he would date the letter. Lieutenant Rude essentially corroborated the testimony of the Chief. It was his understanding that the undated resignation letter was no more than a device to transition Wagner out of his job. While the Chief was having the letter prepared, Rude met with Wagner and Tasch and advised Wagner that it would be a good idea for that man to begin seeking a new job. It would show good faith. Rude did not understand the time horizon to be unlimited. He did not understand this to be a "last chance" agreement.

Officer Anthony Tasch testified. Tasch understood this letter to constitute a last chance agreement. It was his understanding that if Wagner committed a violation of departmental protocol, the letter would be dated. Tasch admitted that when he left the October 11 meeting the guidelines defining the last chance agreement were unknown. It was his testimony that no timetable (i.e., 4 to 6 weeks) was discussed on October 11. Officer Wagner testified. He indicated that at some point in the conversation Tasch had asked about a last chance agreement. It was his testimony that the letter was drafted as a response to Tasch's inquiry as to a last chance agreement. His testimony as to the nature of the letter and the absence of a timetable corroborates that given by Tasch.

The next day, October 12, Officer David Wesener, Union president, and Randall Jahns, Union vice-president, met with the Chief. In the course of their conversation, Jahns asked the Chief what kind of violation would trigger the Chief's dating the letter. All parties indicate that the Chief answered nothing minor, for instance, if he was late to work. According to Jahns, Wesener asked about what would happen if Wagner went some number of months without a screw-up. The Chief is alleged to have replied that he had no doubt Doug would screw-up again. Jahns asked how long the letter would remain in Wagner's file, and was told it would remain as long as Zeigert was Chief. The Chief's version of the conversation is different in that he believes he advised Jahns and Wesener that he was looking at a four to six-week timetable. Jahns denied that any reference to 4-6 weeks was made.

On October 17, the Chief met with Wagner and Tasch. The men once again discussed the purpose of the resignation letter. It appears that the theme that this was intended to allow Wagner to seek alternative employment was raised. It further appears that Zeigert advised Wagner "I don't want you to have any misconceptions; you have four to six weeks and you're done." According to Union witnesses, this was the first time a four to six-week horizon was discussed or was raised.

On October 24, Zeigert called Wagner into a meeting at which Wesener and Sergeant Patrick Lauby were also present. At that meeting, the Chief advised Wagner that "I can't have you on the streets; you are a liability". He then suspended Wagner for 14 days and indicated that he would date the letter of resignation 11-9-94. Wagner was directed to clear out his locker, and, accompanied by Sergeant Lauby, did so.

Wagner prepared a letter rescinding his resignation and gave it to Officer Jahns on October 26. In the afternoon of October 26, Jahns placed the following letter in the Chief's mailbox:

To Chief Ziegert:

As of this date I am rescinding the letter of resignation I signed under duress. I am rescinding this letter of resignation under advice of counsel.

Witness: Randall Jahns /s/

Douglas J. Wagner  
Douglas J. Wagner /s/

The Chief was not in his office on October 26, but received the letter from Wagner the next morning, October 27. On October 27, the Chief dated the resignation letter October 25, 1994, and sent it along with the following letter, also dated October 25, to the Police and Fire Commission:

Mr. Robert Kryshak, President  
Police and Fire Commission  
444 West Grand Avenue  
Wisconsin Rapids, WI 54495

Dear President Kryshak and Commissioners:

Enclosed find a certified copy of a letter of resignation received from OFFICER DOUGLAS WAGNER. This letter of resignation has been accepted by me and has been forwarded to the Personnel Department for processing. The original letter shall remain in my possession unless the Commission requests possession of it.

The resignation has been made effective October 25, 1994.

Respectfully submitted,

Robert A. Ziegert /s/  
Robert A. Ziegert  
Chief of Police

Officer Wagner had already been on paid suspension on October 25 and 26. A consequence of the Chief's letters was that he was deemed resigned as of October 25 and was not paid for the two days.

ISSUE:

The threshold issue in this proceeding is whether Officer Wagner resigned, or was discharged.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT:

ARTICLE 3  
RESERVATION OF RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistent with the other provisions of the labor agreement. These rights, which are normally exercised by the Chief of Police, include, but are not limited to, the following:

. . .

- B. To hire, promote, transfer, assign and retain officers in positions with the City and to suspend, demote, discharge and take other disciplinary action against officers, pursuant to the authority and under the rules and regulations of the Department and the Wisconsin Rapids Police and Fire Commission. No officer shall be disciplined or discharged without just cause and without the right to proceed under Article 24 (Grievance Procedure) of this Agreement.

. . .

ARTICLE 4  
SENIORITY

Seniority will be lost and the employment relationship shall be broken if the employee:

- a. Voluntarily quits or retires;
- b. Is discharged for just cause;

. . .

ARTICLE 24  
GRIEVANCE PROCEDURE

- D. The grievance shall be presented in writing to the Personnel Committee of the Police and Fire Commission, whichever authority has jurisdiction on any particular grievance.

1. If the grievance shall be deemed under the jurisdiction of the Police and Fire Commission, the grievance shall thereby be governed by Section 62.13 of the Wisconsin Statutes. The Police and Fire Commission shall within five (5) days set up an informal meeting with all parties involved up to this point, and schedule a meeting within ten (10) days of the date the grievance is brought to its attention. Within seven (7) days (Saturdays, Sundays and holidays excluded) after this meeting a determination shall be made and reduced to writing and copies submitted to all parties involved.

2. All other grievances relating to wages, hours and working conditions or any other matter under the jurisdiction of the Personnel Committee shall be directed to the Employee Relations Department. The Director of Employee Relations shall, within five (5) days, set up an informal meeting with the Personnel Committee and all parties involved up to this point, and shall schedule a meeting within thirty (30) days of the date the grievance is brought to its attention. Within seven (7) days (Saturdays, Sundays and holidays excluded) after this meeting a determination shall be made and reduced to writing and copies submitted to all parties involved.

E. If the grievance is not settled at the fourth step of the grievance procedure, the aggrieved party within five (5) days (Saturdays, Sundays and holidays excluded) of the decision of either the Police and Fire Commission or the Personnel Committee, shall submit the determination made in the preceding step of the grievance procedure to the Wisconsin Employment Relations Commission for arbitration. The arbitrator shall be selected by the Wisconsin Employment Relations Commission. The decision of the arbitrator will be final and binding on all parties except for judicial review. The cost of the arbitration will be borne equally by the City and the Association.

F. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract. The arbitrator shall not modify, add to, or delete from the express terms of the

Agreement.

POSITIONS OF THE PARTIES:

It is the City's contention that Wagner resigned with full knowledge of the consequences of his actions. His decision was made after lengthy discussion and after negotiation with his Union representative. All parties agree that the letter of resignation knowingly left the effective date to the discretion of the Chief. The Employer quotes the Grievant "I understood the letter of resignation to be a letter of resignation." All parties agree that there was a discussion about the wisdom of Wagner applying for other jobs. He acknowledged that discussion and indicated that it was urgent that he look for work because "I didn't know how long it would be before it would be dated." All parties acknowledge that the choice presented to Wagner was to "resign or take charges".

The City cites a series of labor arbitrations which support its contention that a resignation is effective upon submission. That is, it requires no acceptance to take effect. The City argues that the fact that the resignation contained no specific departure date did not negate its voluntary effect. "The mere submission of a resignation terminates the employment relationship".

The Union contends that Officer Wagner was terminated by Chief Ziegert's actions, and did not voluntarily resign. The timing of the effective date of the resignation letter was left entirely to Ziegert. After October 11, Wagner served at Ziegert's pleasure. After that date, it was Ziegert, not Wagner, who determined when Wagner would be terminated. The next day, October 12, Ziegert boasted to Wesener and Jahns his complete confidence that "Doug will screw up again." This was a clear implication that Ziegert was simply waiting for Wagner to commit another infraction so that he could take the one remaining step necessary to terminate Wagner without the need of proceeding before the Police and Fire Commission.

It was Ziegert who, on October 24, unilaterally decided that the effective date of the letter would be November 9. Even after Wagner had manifested a clear intent not to resign through his October 26 letter, Ziegert manipulated the date on the resignation letter to create the appearance that Wagner had voluntarily resigned by his own actions on October 25.

The Union contends that Officer Wagner did not voluntarily sign the letter of resignation of October 11. Wagner was presented with a "Hobson's Choice" of "quit or be fired". The Union cites arbitral authority for the proposition that a resignation is effective only if it is voluntary; that is, if it reflects the actual will of the employe. Given a choice between discharge and resignation, the resignation so procured is not voluntary. The Union contends that Wagner was given no real choice since the filing of charges for untruthfulness with the Police and Fire Commission could ruin Wagner's career. Either way, as far as Ziegert was concerned, Wagner's career in the Department was done.

The Union contends that Wagner and Tasch properly understood the ambiguous resignation letter to be a last chance document which would be dated and forwarded to the Police and Fire Commission only if Wagner committed another rule violation. Conversations between all parties indicated that the document would be signed or would be dated if Wagner "screwed up again". This is consistent with a last chance understanding. The Union contends that ambiguity should be construed against the drafter, in this case, the Chief. The Union attacks the resignation letter as obscure, contending that the date is left completely open. The Union notes the Chief's testimony that the letter is not "open-ended", is consistent with its contention that the document is, on its face, obscure. Advice that Wagner should look for another job is as consistent with a last-chance agreement as with an express requirement that he do so.

The Union contends that Ziegert unilaterally imposed a four to six-week time limit on dating the resignation letter after the October 11 meeting. The Union contends that it is undisputed that nothing was said on October 11 about a four to six-week time frame. It contends that Wagner did not voluntarily consent to resign within four to six weeks after October 11, since nothing about such a time frame was said when he signed the resignation letter.

#### DISCUSSION:

This can only be regarded as a discharge.

As of October 11, the parties had entered into an "agreement", reflected as the undated letter of resignation. The parties disagree as to what their agreement constituted. Their competing stories are both credible. It is not hard to envision a conversation involving the parties who testified in this proceeding, where each side emerged with what it believed to be that which it now claims to be the deal. Certainly the parties emerged with an arrangement that placed Wagner's future with the Department in the Chief's hands, and did so in a form which would have eliminated Wagner's appeal rights.

Whatever the October 11 deal was, there is no indication that at the time it was struck it contained a four to six-week horizon. To the contrary, according to the Union, it was a "last-chance" agreement. According to the City, it was a resignation whose purpose was to provide an unbroken continuum of employment and clean work record for Mr. Wagner. No one testified that a four to six- week period was included in the discussions occurring on October 11.

There is somewhat conflicting testimony as to when the four to six-week timetable first surfaced. The Chief testified that on October 12, he told Jahns that the letter would stay undated for a reasonable time, to allow Wagner to seek work. The Chief also indicated that he believed he made reference to a four to six-week period. Jahns testified that there was no reference to a four to six-week period at the October 12 meeting. He indicated that the Chief advised him that the letter would remain in Wagner's file as long as he was the Chief. Tasch testified that the first reference to four to six weeks occurred one week later, on October 17. Wagner, who did not

attend the October 12 meeting, testified that there was no reference to a four to six-week time limit at the October 11 meeting. He first became aware of the existence of a time line on October 17 when advised by the Chief "I don't want you to have any misconceptions, you have four to six weeks and you're done." Based on the totality of the testimony, I believe the first time a four to six-week period was raised was on October 17, one week after the "deal" was cut.

Whatever the "deal" was, the Chief modified it by establishing a four to six-week horizon. I regard this as a significant modification, regardless of whose understanding of this agreement is more accurate. If the purpose of this agreement was to create a last-chance arrangement, the Chief's setting a four to six-week horizon was a substantive breach. During the period October 11 through October 17, Wagner did nothing to bring about the dating of the letter, if viewed as a last-chance agreement. If the purpose of the agreement was to permit a continuum of employment, I believe the Chief's actions materially breached that agreement. It was the Chief's testimony that the purpose of the letter was to leave a "clean slate", and to provide "no lapse in employment". Assuming that to be its purpose, the Chief's action put Wagner on the street before he could realistically hope to get a job. There was no reasonable way to avoid a lapse in employment. One week later, on October 24, the Chief advised Wagner he was suspended. This occurred two weeks after the October 11 meeting, and well before Wagner was positioned to secure alternative employment. This suspension would form a part of Wagner's work record, readily available to prospective future employers. As such, it is on its face inconsistent with the "clean record" testified to by the Chief. It seems to me that Wagner was left to explain his suspension and lapse in employment to prospective future employers.

It is in the context described above that I view the events of October 26 and 27. The question raised in this proceeding is whether Wagner's rescission was effective. I believe it was. As of October 26, the Chief had not dated nor accepted the resignation. His action in so doing, occurred on October 27, the day after the resignation was withdrawn. The manipulation of dates does not alter the fact that the resignation was made effective after it was withdrawn.

Wagner's October 26 rescission of his resignation repudiated the October 11 "deal". The City essentially argues that having chosen the voluntary resignation route, and placed the timing of the dating of the letter in the Chief's hands, Wagner was in no position to repudiate the agreement he entered into. However, it is my view that Wagner's repudiation of the agreement was a reaction to the Chief's breach of that same agreement. However viewed, I regard the Chief's actions as having materially altered the agreement the parties entered into on October 11. The Chief's actions in this regard were unilateral. Having materially altered the agreement himself, the Chief was in no position to hold Wagner to its now altered terms.

Both parties cite arbitral authority relative to the effectiveness of the resignation. The Union contends that acceptance was necessary to make the resignation effective, and that acceptance occurred too late. The City argues that the resignation is effective upon its tender, since the Employer is thereafter powerless. The Employer neither initiates nor is in a position to

prevent a resignation. The Employer's argument ignores the facts of this case. Here, the Employer did initiate the resignation. It was the Chief who gave Wagner the option to resign or face charges. The Employer was not a powerless bystander in this proceeding. Had the Employer invited Wagner to remain a part of the Department there would have been no resignation. Wagner made it clear he wanted to stay. All of the authority cited by the City notes the voluntary nature of a resignation. This resignation can hardly be viewed as voluntary in the sense of an employee-initiated action, the product of his own free choice.

As a practical matter, this resignation was not intended to take effect upon signing (10/11). All parties agree to that fact. All parties agreed that Wagner would continue on the police force for some period of time. The letter was deliberately left undated to provide for that. There is no evidence to support the Employer contention that the resignation was effective upon its execution.

This is not a reliance case. The Chief offered two options. After the deal fell apart, the Chief still had his alternative option, that is, to bring charges before the Police and Fire Commission. The Chief's ability to do that was not altered or modified by Wagner's behavior. The option to go before the Police and Fire Commission was available to the Chief on October 27. He chose not to exercise that option.

My conclusion that this was a discharge is supported by the conversation that occurred on October 12. During the course of that meeting, all parties testified that they talked about the kind of event that would trigger the Chief's dating of the letter. Discussion of this kind is meaningful, if viewed as part of a discussion relative to a "last-chance" agreement. It is hardly meaningful in the context of an understanding that Wagner had less than two weeks to work.

I also believe my conclusion in this regard is supported by Article 4(a). That article provides for a loss of seniority if an employee "voluntarily quits". This, in contrast to the simple use of the term "quits". The parties' use of the term "voluntary" to modify "quit" must be held to have a meaning in the context of this relationship, and this contract. While Wagner tendered his resignation (or quit) I do not regard it as voluntary.

In conclusion, I do not believe that Wagner resigned as the term is conventionally used, or voluntarily quit, within the meaning of the collective bargaining agreement. As a consequence, Officer Wagner has employe status absent his discharge for cause.

Dated at Madison, Wisconsin this 10th day of March, 1995.

By William C. Houlihan /s/  
William C. Houlihan, Arbitrator