

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 2085-A, AFSCME, AFL-CIO

and

CITY OF RICHLAND CENTER
(POLICE DEPARTMENT)

Case 44
No. 51229
MA-8539

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 2085-A, AFSCME, AFL-CIO.

Boardman, Suhr, Curry & Field, Attorneys at Law, by Mr. Paul A. Hahn, on behalf of the City of Richland Center.

INTERIM ARBITRATION AWARD

Local 2085-A, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Richland Center, hereinafter the City, in accord with the grievance and arbitration procedures contained in the parties' labor agreement. Thereafter, the parties entered into settlement discussions. The City subsequently advised the Commission that a mutually-acceptable compromise was not reached and that, due to actions taken by the City during settlement efforts, the City's position is that the grievance is no longer arbitrable and that it requests a determination on that issue prior to a hearing on the merits of the grievance. The Union objected to bifurcating the hearing in the dispute for that purpose. The undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. In a conference call between the parties' representatives and the Arbitrator on March 24, 1995, the City's request for a bifurcated hearing was granted and hearing scheduled on the arbitrability issue and a date set for hearing on the merits if the grievance was held to be arbitrable.

A hearing was held before the undersigned with regard to arbitrability on April 10, 1995, in Richland Center, Wisconsin. There was no stenographic transcript made of the hearing, and the parties submitted oral argument at the close of the hearing in support of their respective positions on the issue of arbitrability. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Interim Award.

ISSUE

The issue before the Arbitrator at this point is limited to the following:

Is the grievance of Patrolman Vince Frawley (Grievance 94.01) arbitrable?

CONTRACT PROVISIONS

The parties' 1994-1996 Agreement, in relevant part, contains the following provisions:

ARTICLE II
MANAGEMENT RIGHTS

2.01 The Employer shall have the sole and exclusive right to determine the Table of organization, the number of employees to be assigned to any job classification and the job classification needed to operate the Employer's public jurisdiction, the duties of each of these employees, the nature, hours and place of their work, and all other matters pertaining to the management and operation of the City of Richland Center and Richland Center Police Department, including the hiring, promotion and transferring of employees. Employees shall be demoted, discharged or otherwise disciplined for cause. The Employer may establish and enforce reasonable work rules and regulations. To the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or employees such rights are retained by the Employer. It is agreed that the Employer shall not use these rights and powers in conflict with any provisions of this Agreement or for the use of undermining the Union or discriminating against its members.

ARTICLE III
GRIEVANCE PROCEDURE

3.01 For the purpose of this Agreement, the term "grievance" means a dispute between the Employer and an employee within the unit or the Employer and the Union relating to the interpretation, application, breach or violation of a provision of this Agreement or a matter relating to safety matters or work rules.

. . .

BACKGROUND

The Grievant, Vince Frawley, has been employed by the City as a Police Officer in the Richland Center Police Department since 1981. At all times material to this dispute, Craig Chicker has been the City's Chief of Police.

On January 21, 1994, Chief Chicker issued the Grievant a written reprimand as a result of an investigation of a complaint received from a citizen in December of 1993, and in which the Chief stated the written reprimand was issued on the basis of it being a first offense with regard to "non-compliance with the Duty Manual Section 100.02 #5 (abuse of authority) of the Richland Center Police Department. . ." The written reprimand was placed in the Grievant's personnel file.

Besides the written reprimand being placed in the Grievant's personnel file, Chief Chicker also made the following notation on the Grievant's "Employment History" in the latter's file:

12-26-93 citizen complt. - was filed with RCPD by a citizen of the City of Rich Ctr, this regarded abuse of authority. It was investigated by the Chief of Police. The investigation of the citizen complaint against Officer Frawley didn't result in disciplinary action against him, by the Chief of the City's P.F. Comm. though. He was duly advised to be aware in the future of Sect. 100.02 - 5 of the RCPD duty manual when conducting a police investigation.

Frawley filed a grievance regarding the written reprimand, which, in relevant part, asserted the following:

(Circumstances of Facts): (Briefly, what happened) Chief Chicker placed a letter of reprimand in Officer Frawley's personnel file charging Frawley with "abuse of authority" because Frawley "had no emergency, exigent circumstances; and no ranking officer gave . . . any permission to do any investigation/background or character check or had any knowledge that (frawley) was doing so until after it was done."

(The contention - what did management do wrong?) (Article or Section of contract which was violated if any)

Section 2.01 and any other applicable sections. Neither State law, Dept. rules, or past practice require permission of a ranking officer or exigent circumstances as prerequisites to investigation. Conversely, (sic) officers have been commended for self-initiated

field activity. The Union contends this reprimand is arbitrary and capricious; and contradicts several departmental rules - see attachments.

The Request for Settlement or corrective action desired):

The Union requests that the reprimand be removed from officer Frawley's file. Officer Frawley requests a letter of apology from Chief Chicker be posted on the Union bulletin board.

The Union subsequently filed a request for arbitration on behalf of the Grievant. Thereafter, the parties' representatives engaged in settlement discussions in an attempt to resolve the dispute. In the course of those discussions, the City offered to remove the written reprimand from the Grievant's personnel file and to not use it against him in the future in the collective bargaining context or under the labor agreement. That offer was not accepted by the Union or Grievant, however; the Chief did remove the written reprimand from the Grievant's file and send it to the Union's representative. The Chief also made the following notation on the Grievant's "Employment History" below the previous entry regarding the reprimand:

The aforementioned paragraph and any discipline resulting from this incident will not be used against Officer Frawley in any collective bargaining context or under the labor agreement between Local 2085-A and the City of Richland Center.

The Chief would not, and will not, concede that there was not just cause for the reprimand.

City

The City takes the position that the grievance is moot and, therefore, not arbitrable. By its actions in removing the written reprimand from the Grievant's personnel file and promising not to use it against him in the future in the collective bargaining context, or under the parties' Labor Agreement, it has effectively already done all that an arbitrator could do. The arbitrator draws his authority from the collective bargaining agreement and has no authority over the entries the Chief makes in an employee's personnel file. The notation the Chief has made in the Grievant's "Employment History" was made for the purposes of protecting the City from liability, which is especially important in a police department setting.

The Grievant is not without recourse with regard to what is placed in his personnel file. He can pursue the Chief's notation through the City's Police and Fire Commission, and beyond, if he wishes.

The City having already done all that an arbitrator could order as relief in this dispute

under the Labor Agreement, the grievance is moot.

Union

The Union takes the position that the City's actions do not render the grievance moot and that the grievance is arbitrable. The City unilaterally implemented its proposed settlement, which the Union had rejected, and then claimed that the dispute was settled.

There is a presumption of arbitrability under both state and federal law. In this case, the Arbitrator has the authority under the Labor Agreement to determine whether there was just cause for the written reprimand. The first issue is whether there was just cause for the discipline. It is only after that issue is decided that the issue of appropriate remedy is considered. It is the City's refusal to concede there was not just cause for the reprimand to which the Union objects, rather than the notation the City made in the Grievant's file. Further, whether there are other avenues of appeal for the Grievant is irrelevant. The issue of whether there was just cause for discipline is subject to grievance arbitration under the parties' Labor Agreement. Therefore, the grievance is arbitrable.

DISCUSSION

The City's assertion that the grievance is moot because it has already granted all of the relief the Arbitrator could order under the parties' Labor Agreement does not address the issue of whether there was just cause for the discipline in the first place. The evidence indicates that the City/Chief does not concede that there was not just cause for the written reprimand issued to the Grievant. The Chief's notation also does not address that point. The Union has indicated that one of the reasons it did not accept the City's proposed settlement was the City's refusal to concede on the issue of whether there was just cause.

The City correctly notes that the Arbitrator's authority is drawn from the Labor Agreement. In this case, Article II, Management Rights, of the parties' Agreement, authorizes the City to demote, discharge or otherwise discipline employees "for cause". Article III, Grievance Procedure, Section 3.01, of the Agreement, defines a "grievance" as "a dispute between the Employer and an employee within the unit or the Employer and the Union relating to the interpretation, application, breach or violation of a provision of this Agreement or a matter relating to safety matters or work rules."

The Grievant was issued the discipline for violation of a Department work rule and his grievance asserts that he did not violate the work rule by his conduct and that there was not just cause for the discipline. As noted above, the issue of whether there was just cause for the written reprimand has not been resolved and has not been conceded or addressed by the City's actions. That dispute still exists and is subject to grievance and to arbitration under the parties' Agreement.

Hence, the grievance is not moot and is arbitrable. 1/

Based upon the evidence and arguments of the parties, the undersigned issues the following

AWARD

The grievance is arbitrable.

Dated at Madison, Wisconsin this 24th day of April, 1995.

By David E. Shaw /s/
David E. Shaw, Arbitrator

1/ Whether the City has already done as much as an arbitrator could do with regard to remedying the dispute, if it is determined there was not just cause for the reprimand, remains open to argument. It is noted that many consider a finding that one is innocent of alleged misconduct to be the primary remedy desired.