

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 and Mr. Steven C. Zach, on behalf of the City of Richland Center.

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 was taking the position that the grievance was no longer arbitrable and requested 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. On April 24, 1995, the undersigned issued an Interim Award finding that the grievance is arbitrable. A hearing on the merits of the grievance was held before the undersigned on May 2, 1995, in Richland Center, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs by July 10, 1995.

Based upon the evidence and the arguments of the parties, the undersigned makes and

issues the following Award.

ISSUES

The parties stipulated to the following statement of the substantive issues:

Did the Employer have just cause to discipline the Grievant? If not, what is the appropriate remedy?

CONTRACT 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.

BACKGROUND

The Grievant, Officer Vincent Frawley, had been employed in that capacity by the Richland Center Police Department for approximately 14 years at the time of hearing and Chief Chicker heads the Department. The chain of command in the Department in descending order is the Chief, the Captain, the Lieutenant, the Sergeant, the Patrol Officers.

The instant grievance concerns a written reprimand issued to the Grievant by Chief Chicker on January 24, 1994 following the investigation of a citizen's complaint against the Grievant.

The citizen's complaint and resulting investigation stemmed from an incident that occurred at St. Mary's School in Richland Center. At the School's request, the Department had an officer assigned to be present at the School due to concerns about a possible abduction of a student who was the subject of a custody dispute. On approximately December 16, 1993, a playground monitor at the School reported to the School's Head, Sr. Felton, that a man was seen on the school grounds videotaping students. As it turned out, the man was Joel Rewald, a parent of one of the students, and his presence was not in any way related to the possible abduction. Lieutenant Schwanz and Patrolman Maxwell from the Department were present at the School at this time, and Sr. Felton advised Lt. Schwanz that she would handle the School's concerns regarding Mr. Rewald's actions through a letter to him. There is a dispute as to whether she also indicated she did not want the Police Department involved.

The Grievant stopped at St. Mary's on the afternoon of December 16th after the incident had occurred to see Officer Maxwell. The Grievant was in uniform, but it is not clear whether he was on duty at the time. There is some dispute as to what occurred at that point. The Grievant testified that Sr. Felton approached him about the videotaping incident and told him she was writing a letter, but asked if he could check out Mr. Rewald "very discreetly". Chief Chicker testified that he talked to Sr. Felton in the course of investigating Rewald's complaint and that she told him that there was no need for police action. The Chief also cited the report of Captain Bauer's interview of Sr. Felton on this matter wherein he reported that Sr. Felton told him that to the best of her knowledge neither she, nor anyone at St. Mary's, had made a complaint to the Department regarding the videotaping incident.

On the morning of December 20th, the Grievant went to a local business where a private citizen and a personal acquaintance of the Grievant, Mike Burns, worked and where the Grievant thought Burns' wife also worked. The Grievant was off duty at the time, but in uniform, and asked to speak with Burns in private. The Grievant knew Burns' wife had worked with Mr. Rewald at his former place of employment, and he asked Mr. Burns where his wife was and what he knew about Rewald. The Grievant indicated he was doing an inquiry regarding a complaint he had received regarding Rewald and asked Burns what kind of person Rewald is, where Rewald came from and why he had left his previous place of employment. The Grievant also mentioned he had previously received what he considered to be a strange letter from Mr. Rewald some four or five years before. Burns indicated he thought Rewald was a good person and a good family man. The Grievant indicated in his daily log that he had gone to that place of business, but did not indicate the reason he did so or mention that he was checking into the videotaping matter or Mr. Rewald.

Subsequent to the Grievant's talking to Mr. Burns, Mrs. Burns called the Department to speak to the Grievant, but he was not in and she left a message for him that she had called. The Grievant did not return her call and at the end of his shift that day he had a discussion with Lt. Schwanz about the videotaping matter and Lt. Schwanz indicated he had not yet done anything, but intended to look into it. The next day, Mrs. Burns again called the Department and

this time spoke to the Grievant. Mrs. Burns indicated she thought that Mr. Rewald was a good family man and that there was no need for concern. The Grievant did not pursue the matter further and did not report or advise his superiors of his actions in regard to the videotaping matter.

Sometime during these same 3-4 days, the Grievant, during a discussion with the District Attorney on another matter, posed a hypothetical to the District Attorney describing the situation. The Grievant also asked the Chief Investigator in the Sheriff's Department how to go about obtaining information on someone from their driver's license.

It appears Mrs. Burns contacted another citizen and told that person of the Grievant's asking questions about Mr. Rewald, and that person in turn advised Mr. Rewald in that regard. On December 22, 1993, Mr. Rewald called and spoke to Chief Chicker complaining about the Grievant's investigating him and comments that the Grievant was alleged to have made in the course of the investigation. The Chief met with Mr. and Mrs. Rewald the next day in person and was given a letter from them complaining about the Grievant's conduct. The Chief promised to investigate the matter and did so over the next several weeks with either he or Captain Bauer talking to the various individuals involved. There was a predetermination hearing held on January 13, 1994 at which the Grievant was present with his Union representative, David White, along with Chief Chicker and his secretary. The Grievant was asked questions and given an opportunity to add what he wanted.

On January 21, 1994, the Chief issued the Grievant the following memorandum as to the results of his investigation of the complaint against the Grievant and the following disciplinary action:

RICHLAND CENTER POLICE DEPARTMENT
Interoffice Memo

DATE: January 21, 1994

TO: Patrolman Vince Frawley

FROM: Chief Craig F. Chicker

SUBJECT: Investigation of Citizen Complaints

This information released to you is my investigatory results, the alleged charges, basis for determination and findings of alleged offense #1, alleged offense #2 and alleged offense #3. Also, you may request copies of investigative information.

The following offenses were alleged:

1. That an investigation/background/character check was publicly conducted on Mr. Joel Rewald without the department's knowledge or sanctions or permission.

Violation of Section 100 of Duty Manual, 100.01 #5, abuse of authority.

2. That non-factual statements were made by you toward Mr. Joel Rewald that could be considered improper misrepresentations at best defamatory at worst, in that these statements were made to a citizen in the public.

Violation of Section 100 of Duty Manual, 100.01 #7, conduct unbecoming an officer.

3. That other citizens may also have been questioned about Mr. Joel Rewald and were told of non-factual statements.

Violation of Section 100 of Duty Manual, 100.01 #7, conduct unbecoming an officer.

My investigation started December 22, 1993, and is concluded on January 21, 1994. It reveals the following: Ten persons were interviewed including the complainants and several were reinterviewed per your request. Also, you were afforded a pre-determination hearing on January 13, 1994, of which you attended and had union representation, Mr. David White, Local 2085-A, business representative. That you were given approximately five days to give to me a verbal or written response to the interview or the incident by January 17, 1994, of which I have received nothing from you. You have been afforded due process and just cause has been followed.

Alleged Offense #1 - that an investigation/background/character check was conducted on Mr. Joel Rewald without a complaint and without the department's permission or knowledge. This is sustained and the allegation is supported by proper and sufficient evidence.

Alleged Offense #2 - that of making non-factual statements about Mr. Joel Rewald that could be considered improper. This is not

sustained as there was insufficient evidence to prove or disprove the allegation.

Alleged Offense #3 - that other citizens may have been questioned about Mr. Joel Rewald and were told of these non-factual statements. This unfounded, the allegation was false as there was no credible evidence to support it.

Basis for Determination - on Offense #1. This was done through my investigation and interviews, statements of those involved, your daily log of 12-20-93, the original complaint, both the Duty Manual and the Policy & Procedure handbook.

Offense #1 - My findings are that the Richland Center Police Department never received any complaint from St. Mary's on Mr. Rewald's conduct, no ranking officer gave you any permission to do any investigation/background or character check or had knowledge that you were doing so until after it was done. That in fact while of your own, you went to a member of the public while on duty and did make these inquiries. This is learned from my interviews with all those involved.

I find no emergency, exigent circumstances or anything else here that would make you go to the public without cause to do so.

In reference to alleged offenses #2 and #3, again, #2 was not sustained and #3 was unfounded. If you have questions or concerns, you may contact me to discuss them.

Craig F. Chicker
Chief of Police

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RICHLAND CENTER POLICE DEPARTMENT
Interoffice Memo

DATE: January 21, 1994

TO: Patrolman Vince Frawley

FROM: Chief Craig F. Chicker

REFERENCE: Disciplinary Action

The investigation of your conduct pertaining to an alleged violations (brought by private citizens) on or about December 16 through December 20, 1993, has been reviewed.

It is the responsibility of every employee of the Richland Center Police Department to know and abide by general rules of conduct. A violation of these rules may be grounds for disciplinary actions within the department.

The actions surrounding your behavior do not reflect what is required of any employee of the Richland Center Police Department.

Because of your non-compliance with the Duty Manual Section 100.02 #5 (abuse of authority) of the Richland Center Police Department, you are given the following disciplinary action:

1. For a first offense, documented counseling with this letter written reprimand to your personnel file (Offense #1).

This discipline reasonably relates to the seriousness of the violation and to your record of service within the Richland Center Police Department.

This discipline is to correct an existing problem and to prevent future problems. It is administered fairly and impartially after a proper investigation. The discipline is consistent with this type of first offense and is not directed at you personally, but at your improper actions. The right of appeal granted by statute or contract applies.

Craig F. Chicker
Chief of Police
cc: Union President Lane
Personnel file

The Grievant subsequently filed a grievance on the discipline and there was a grievance

meeting before the City's Police and Fire Commission. The Police and Fire Commission sustained the Chief's discipline, denying the grievance. The parties continued to attempt to resolve the dispute, but were unsuccessful and proceeded to arbitrate the dispute before the undersigned.

POSITIONS OF THE PARTIES

City

The City takes the position that just cause exists for the discipline imposed on the Grievant for his conduct in the Rewald investigation. The Chief testified that investigations need to be cleared through supervising commanders when there are citizen complaints, however, there was no citizen complaint warranting an investigation in this case, and the Grievant did not inform his supervising officers that he was going to perform, or receive permission to perform, a background check on Rewald. Lieutenant Schwanz was the initial contact with the School regarding the incident and had discussed the situation with Sr. Felton to her satisfaction. The Grievant subsequently had a conversation with the Lieutenant regarding the incident and did not inform him of his activities, nor did he submit any written reports or documentation regarding his investigation so that Lieutenant Schwanz or other supervisors would be aware of his activity. The Grievant conceded the importance of keeping members of the Department informed regarding investigative activities so as not to interfere with ongoing investigations. Notwithstanding, he failed to advise Lieutenant Schwanz of his activities even though he knew the Lieutenant had been the initial contact with the School. The Grievant also conceded that care must be taken in investigating sensitive topics such as child abuse and child enticement due to the potential harm an unfair accusation could cause the person being investigated. Notwithstanding, the Grievant contacted a member of the public and inquired about Rewald and any propensity for child enticement. The Grievant took this action against a background of having had a dispute with Rewald regarding other matters, and the Grievant's having children attending St. Mary's School. The end result of the Grievant's actions demonstrates their inappropriateness. His indiscreet inquiry of a member of the public resulted in the nature of the inquiry spreading from that individual to his wife and eventually back to Rewald, who filed a complaint with the Department.

The Chief testified that it was unwritten departmental policy that background checks such as this be preceded by permission from a supervising officer before being undertaken. Since the Grievant investigated this incident on his own, without a formal citizen complaint, without permission from a supervising officer and without filing any written report regarding his activities, the Chief concluded that the Grievant abused his authority. Thus, there was just cause for the discipline imposed.

While the Union contends that neither state nor department rules require permission from a supervising officer before patrolmen may initiate an investigation, both the Grievant and the Union's President, Officer Lane, acknowledged that the scope of a patrol officer's unilateral

investigative power depends upon the circumstances. Lane indicated that in circumstances such as this, he would have sought permission from a supervising officer. The Grievant's testimony was marked by semantics and contradictions. He distinguished between "inquiries" and "investigations", asserting only the latter required the approval of a superior officer. The Grievant described his conduct as merely being an "inquiry" and therefore not requiring approval, while Lane conceded that the Grievant's conduct involved an "investigation". The Grievant admitted there were no emergency or exigent circumstances precluding him from obtaining permission or informing his superiors, and he also acknowledged that if he chose to exercise his discretion without supervisory approval, he bore the risk of whatever action he took.

Written warnings are issued for the purpose of instructing employees on errors they have made in order to avoid such problems in the future. Here, the Grievant abused his authority by proceeding without supervisory approval in a discreet matter, which a supervisory officer was already actively pursuing and his conduct resulted in a formal complaint being filed against the Department.

Even though there is a dispute as to whether supervisory approval is required in all cases, the Union witnesses conceded that discretion must be exercised by patrolmen as to when to obtain permission to pursue an investigation and that supervisory approval is needed in the more delicate investigations. Based upon the Chief's investigation and the facts conceded by the Union, there is no doubt that supervisory approval or contact ought to have been pursued by the Grievant before undertaking his investigation. Viewed in the light most favorable to the City, the evidence shows the Grievant's conduct occurred off-hours, was motivated by personal desires, was done without a formal complaint being issued and without permission, and was therefore clearly beyond the scope of permissible patrol officer responsibilities. Thus, the discipline imposed was warranted.

Union

The Union first notes that the only charge leveled against the Grievant by the Chief is that he abused his authority by initiating an investigation without the prior permission of a ranking officer, and undertook an investigation without a citizen complaint having been filed. The Chief found no credible evidence that the Grievant made "improper misrepresentations" to a citizen or that he made "non-factual statements" to citizens, and any evidence in that regard is irrelevant.

The Chief's main contention is that the Grievant initiated an investigation without the "permission or knowledge" of a ranking officer. According to the Chief, that constitutes "abuse of authority". The only exceptions, according to the Chief, are investigations of a routine or relatively minor nature, or in the event of "emergency or exigent circumstances". The testimony of the Grievant and the Union President, Lane, that they had never heard of such a requirement prior to the letter of discipline issued to the Grievant proves that the rule did not previously exist. That is further underscored by the fact that the Duty Manual makes no reference whatsoever to such a rule. In the absence of a rule, the Grievant had no notice that his conduct could lead to discipline. The requirement that an employee be given notice of the rules and possible

consequences for violation of the rules is considered a fundamental component of just cause, notice being the first of the famous "seven tests of just cause" set forth by Arbitrator Daugherty in Enterprise Wire, (46 LA 359). The Union also cites the following discussion of the notice requirement by Adolph Koven and Susan Smith in Just Cause: The Seven Tests:

A fundamental component of the just cause standard is that employees must be told what kind of conduct will lead to discipline. . .An employee can hardly be expected to abide by "the rules of the game" if the employer has not communicated those rules, and it is unrealistic to think that, after the fact, an arbitrator will uphold a penalty for conduct that an employee did not know was prohibited.

The Chief's assertion that another basis for the discipline was that the Grievant acted without a complaint is disproved by the weight of the credible evidence. The Grievant testified that Sr. Felton asked him to discreetly check on Mr. Rewald. The City's evidence to the contrary consists of the Chief's hearsay testimony regarding what Sr. Felton may have said to Lt. Schwanz. The consensus of arbitrators in such cases is that direct testimony is given the greater weight, "hearsay evidence will be given little weight if contradicted by evidence which has been subjected to cross-examination." Citing, Elkouri and Elkouri, How Arbitration Works, BNA, Fourth Edition, 1985, at p. 326.

The Union also disputes that the Grievant's brief questioning of a single citizen constitutes a "investigation" and asserts that to characterize it as such is to greatly abuse the term. Requiring officers to seek prior approval to do what the Grievant did in this case would serve to essentially handcuff the officers in the performance of their duties. To find the Grievant's conduct was an "abuse of authority" will result in officers second-guessing themselves, threatening their effectiveness.

The Union concludes that the policy or rule that the Grievant is alleged to have violated has never been enunciated. Both the Grievant and Lane testified they had never heard of the policy, nor had they or their co-workers conducted themselves in accord with such a policy in the past. In this case, the evidence establishes that the Grievant responded to a legitimate citizen request. The Chief's attempt to mollify an unhappy citizen hardly constitutes just cause.

In its reply brief, the Union disputes a number of the facts asserted by the City. Contrary to the City's assertion that the Grievant had a conversation with Sr. Felton during which he informed her that he would do a background check on Rewald, the Grievant's un rebutted testimony is that Sr. Felton requested that he conduct the background check. Further, the claim that the background check conducted by the Grievant included talking with the District Attorney's office is inaccurate. The only evidence in the record in that regard is the testimony of the Grievant that during a casual discussion with the District Attorney, he posed some hypothetical questions. The Union also disputes the City's characterization of the Chief's testimony that he "learned upon

investigation that Officer Frawley was not asked to perform an investigation by Sr. Felton." That was not the Chief's testimony, and even if it had been, the Chief was not a witness to any discussion between Sr. Felton and the Grievant. In that regard, it is the unrebutted testimony of the Grievant that Sr. Felton asked him to check on Rewald and there is no reason to question the veracity of the Grievant's testimony in this regard. The Union also disputes that the Grievant's activities were motivated by a dispute with Rewald over other matters and the fact that he has children at St. Mary's, asserting there is no evidence to support that claim. The fact that the Grievant's conversation with Mike Burns got back to Rewald also does not establish anything, as it is unrealistic to expect that the subject of an inquiry would not quickly learn that a police officer is asking questions about him. Further, the City's reliance on Lane's testimony is misplaced. While Lane testified that he might have handled the matter differently than the Grievant, it was due to having a difference in style, and not because of a concern that the Grievant's actions were improper. Lane's testimony further demonstrated that no one in the Department was aware of a policy requiring that investigations be approved in advance by a ranking officer. Finally, the Union asserts that the City's claim that the Grievant's conduct occurred off-hours is unproved.

DISCUSSION

The Grievant was found by Chief Chicker to have committed the following offense:

1. That an investigation/background/character check was publicly conducted on Mr. Joel Rewald without the department's knowledge or sanctions or permission.

Violation of Section 100 of Duty Manual, 100.01 #5, abuse of authority.

Chief Chicker described the basis for his conclusions as follows in his January 21, 1994 memorandum regarding his investigation of the complaint against the Grievant:

Basis for Determination - on Offense #1. This was done through my investigation and interviews, statements of those involved, your daily log of 12-20-93, the original complaint, both the Duty Manual and the Policy & Procedure handbook.

Offense #1 - My findings are that the Richland Center Police Department never received any complaint from St. Mary's on Mr. Rewald's conduct, no ranking officer gave you any permission to do any investigation/background or character check or had knowledge that you were doing so until after it was done. That in fact while of your own, you went to a member of the public while on duty and did make these inquiries. This is learned from my

interviews with all those involved.

I find no emergency, exigent circumstances or anything else here that would make you go to the public without cause to do so.

The Chief essentially has charged the Grievant with having violated a Department rule by conducting an investigation without a complaint having been received by the Department and without the knowledge and prior approval of a ranking officer in a non-emergency situation. The Union essentially argues that there was no rule requiring such prior approval at the time, that the Grievant's actions did not constitute an investigation at any rate, and that the Grievant acted at the request of a citizen, i.e., Sr. Felton.

As the Union asserts, in order to find just cause for discipline, it must be shown that the employe had been put on notice that engaging in the conduct in question could result in discipline. 1/ While the Chief conceded that the rule regarding the initiation of investigations was not in writing at the time, 2/ he testified that the officers had been made aware of the rule both verbally, through day-to-day discussions and training, and through it being the established practice in the Department. Conversely, both the Grievant and Officer Lane testified that they were not previously aware of a requirement of obtaining the prior approval of a ranking officer before initiating an "investigation" on the level such as was conducted in this case.

The City, as the employer imposing the discipline, has the burden of establishing that the Grievant had prior notice that his failure to obtain prior approval of a superior before starting his "inquiry" or "investigation" could be considered a violation of Department rules. The City has not met its burden. Although there is little purpose served in attempting to distinguish between an "inquiry" and an "investigation", it is appropriate to look at the level of the Grievant's activity in this case. After becoming aware of the videotaping incident, the Grievant briefly questioned two private citizens about the individual involved in it and had brief discussions with two County law enforcement officials about the matter over the course of 3-4 days. It also appears that after his discussion with Lt. Schwanz, the Grievant did not take any further action, other than receiving the call from Mrs. Burns the next day. It was not sufficiently demonstrated that the officers in the Department had been made aware that in the circumstances here an officer was required to first obtain approval from a ranking officer before engaging in investigative activity to that extent or they would be considered to have abused their authority as police officers.

1/ While some conduct is so obviously wrong that such prior notice is not required, e.g., theft, that is not the situation in this case.

2/ A review of the Department's Duty Manual (Jt. Exhibit 5) as it existed then shows that such a rule was not stated in writing in that text.

Although such a rule may serve useful purposes (avoiding duplication or interference with an already on-going investigation, as the Union's witnesses conceded) the reasonableness or practicality of the rule is not the issue in this case. As it is concluded that the officers, including the Grievant, were not adequately made aware of such a rule or requirement prior to the time in question, the Grievant could not be held responsible for failing to comply with the rule. Therefore, it is concluded that the City did not have just cause to issue the Grievant a written reprimand in this case.

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

AWARD

The grievance is sustained. The Chief is directed to immediately expunge the Grievant's personnel file of the written reprimand and any reference to said reprimand.

Dated at Madison, Wisconsin, this 21st day of December, 1995.

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