

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

## Respondents.

Case CLXVII  
No. 20786 MP-660  
Decision No. 14899-D

No. 14873-D  
No. 14875-D  
No. 14899-D

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO STRIKE  
CERTAIN FINDINGS AND RECOMMENDATIONS MADE BY FACT FINDER

As indicated in the preface to our Order, the Association has requested that the Commission set aside certain portions of the Fact Finder's Report and Recommendations relating to the termination of Judson Coleman by the Chief of Police of the City of Milwaukee. Said request, although in the form of a letter, has been considered by the Commission to constitute a motion. Copies of said letter were sent to the City Attorney as well as to the Fact Finder. The Association's letter succinctly sets forth the facts forming the basis for its motion. The body of said letter was as follows:

On August 26, 1980, the WERC issued a decision and order in the above-entitled matter. The Commission ordered the parties to proceed to fact finding with respect to, among others, Judson Coleman. The fact finder was to "conduct a hearing to adduce evidence relating to the charges leading to the penal(y) previously imposed on Judson Coleman . . . and upon completion thereof the fact finder shall make written findings of fact and recommendations to the Respondent Chief as to the appropriateness of the original penal(y) . . ."

The Hon. Frank P. Zeidler was appointed as the fact finder and issued his report and recommendations on July 10, 1981. (Copy enclosed) Zeidler found that Coleman was discharged for violation of Rule 39, Section 22 of the Departmental Rules, Absent without Leave, and that Coleman should not have been discharged on the grounds of absence without leave.

The fact finder then went beyond the issue before him and found that Coleman should have been dismissed on the grounds of lack of physical endurance and poor prospects for qualifying in the use of firearms. Zeidler recommended that Coleman's discharge for violation of Rule 39, Section 22 (AWOL) be rescinded; however, he exceeded his jurisdiction by further recommending that the dismissal be based on Rule 29, Section 73, as being unsatisfactory because of lack of physical fitness and endurance.

The fact finder exceeded the jurisdiction as defined by WERC and as agreed by the parties. The order issued by WERC on August 26, 1980 clearly limits the inquiry to the charges leading to the discipline. In Coleman's case, the Milwaukee Police Department charged him with only a violation of Rule 39, Section 22 (AWOL). Similarly, the City Attorney defined the issue at the hearing as follows: "the fact remains that the real issue here is, was this man absent without leave for three days. He didn't call in. He didn't come in. He wasn't there. That is the critical point. At this point, whether he could shoot or run is really immaterial because he was not charged with those charges in his termination. He was charged with AWOL." (Transcript of fact finding proceeding re Judson Coleman, 5/27-28/81, p.138)

The parties were not prepared to present evidence on the issue of whether Coleman lacked physical fitness and endurance, since Coleman was not discharged for that reason; that issue was not before the fact finder.

The fact finder exceeded the jurisdiction established by the order of the WERC dated August 26, 1980. The findings and recommendations which relate to the issue of Coleman's physical fitness and endurance should be stricken from the report and recommendations of the fact finder. The complainant respectfully requests that the Commission issue an order to that effect.

The pertinent portion of the response of the City Attorney is contained in his letter as follows:

In this particular case, the fact finder found that the patrolman was physically unable to meet the standards of the Department and could not meet the proficiency necessary for the handling of a weapon. To put him out on the street with a weapon and risk injury to another officer or a citizen of this community would have been unconscionable. When the officer was told he was not meeting the standards he walked out of the training school on December 5, 1975 and did not return on December 8, 9, 10 and 11. The officer was charged with being absent without leave for three or more days which constitutes a resignation and automatic termination from the service.

The fact finder felt that rather than charge him with this offense, he should be charged with being unsatisfactory because of lack of physical fitness and endurance. The result is obviously the same - the employee is terminated. If the Union wishes us to change the personnel card to indicate he was terminated for lack of physical endurance and inability to handle a weapon, I am sure the Department would do so; but to do so would probably hinder his opportunity for other employment more than the present reading of the record.

The second recommendation of the fact finder is that we check the records of the patrolman to ascertain if he had earned days of unused sick leave at the time of his termination. Such a search would be fruitless in that that issue has never been raised by the Union and the ordinance specifically set forth in the labor contract provides on termination one gets nothing for unused sick leave.

Under the circumstances, since the ruling of the fact finder by all definitions this writer can find is advisory, the Department has determined it unnecessary to make any changes in the records on the basis of this fact finding.

It should be noted that in the final paragraph contained in our memorandum attached to the original decision rendered herein, the Commission set forth the "purpose" of the fact finding hearing as follows:

. . . we have required that an impartial fact finder should conduct the proceeding, where the individuals involved may be represented by the Association or its attorney, and where the facts relevant to the incident leading to the dismissal involved can be established, in order that the fact finder can issue his recommendation, as to the penalty to be imposed, for the Chief's consideration.

In the "Background" portion of his Report and Recommendations, 1/ the Fact Finder discussed, in detail, the facts surrounding the termination of Coleman,

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1/ The full text of the Fact Finder's Report and Recommendations is attached hereto as Appendix A.

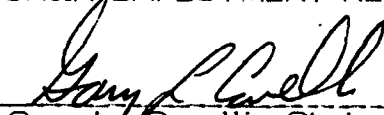
including the results of Coleman's evaluations during his training period, and the interviews of Coleman in regard thereto by superior officers. The Fact Finder set forth Findings of Fact based on said "Background" discussion. The Association contends that the parties, during the fact finding proceeding, "were not prepared to present evidence on the issue of whether Coleman lacked physical fitness and endurance, since Coleman was not discharged for that reason; that issue was not before the fact finder". Nowhere in the document issued by the Fact Finder is there any indication that either the Association, Coleman, or for that matter, the City or Chief, voiced an objection to the introduction of any evidence as to Coleman's fitness, and it appears, from the detail of the facts set forth by the Fact Finder, in both the "Background" and "Findings of Fact" portion of his recommendations, that such evidence was substantial, and thus did not casually become part of the record. Furthermore, it appears to the Commission, as it did to the Fact Finder, that matters relating to Coleman's fitness, and the discussions between Coleman and his superior officers regarding his evaluations pertaining to his fitness, led Coleman to believe that he was being terminated, and as a result Coleman did not report for duty, which under normal circumstances, constitutes a basis for termination.

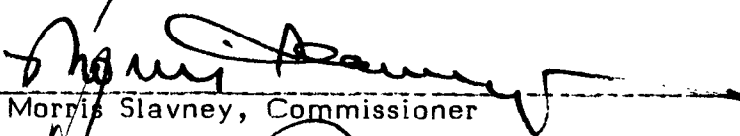
We conclude that the Fact Finder acted within the parameters set forth by the Commission to the effect that fact finding should be conducted "for the purpose of conducting a hearing to adduce evidence relating to the charges leading to the penalties previously imposed" on Coleman, and to make findings of fact and recommendations "as to the appropriateness of the original penalties imposed upon" Coleman - that of termination. The fact that the Fact Finder found a basis for Coleman's termination different than that previously relied on by the Chief does not warrant the setting aside of the Fact Finder's findings and/or recommendations. In addition, it should be noted the Commission's order did not grant the Fact Finder any authority other than to make recommendations to the City and Chief, and as such the Fact Finder's Report and Recommendations do not have any binding effect on any party involved.

Dated at Madison, Wisconsin this 9th day of December, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Gary L. Covelli, Chairman

  
Morris Slavney, Commissioner

  
Herman Torosian, Commissioner

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In the Matter of Fact Finding	:	WISCONSIN EMPLOYMENT
Between	:	RELATIONS COMMISSION
MILWAUKEE POLICE ASSOCIATION	:	REPORT AND RECOMMENDATIONS
and	:	OF THE
CITY OF MILWAUKEE	:	FACT FINDER
(Judson Coleman Discharge)	:	

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NATURE OF THE PROCEEDINGS

This is a proceeding in Fact Finding under an Order of the Wisconsin Employment Relations Commission of August 26, 1980, calling for fact finding in relation to the Discharge of Judson Coleman, a Patrolman (Recruit) of the Police Department of the City of Milwaukee. Hearings occurred on May 27, 1981, and May 28, 1981, in the office of the Milwaukee Police Association, 411 E. Mason Street, Milwaukee, Wisconsin.

The Order of Wisconsin Employment Relations Commission required the City of Milwaukee and the Chief of the Milwaukee Police Department to proceed to fact finding with respect to the matter of penalty imposed on Judson Coleman, among others; and for the fact finder upon completion of the proceedings to make written findings of fact and recommendations to the Chief as to the appropriateness of the original penalties imposed upon the Patrolman.

BACKGROUND. Judson V. Coleman was appointed a Patrolman (Recruit) in the Milwaukee Police Department on October 13, 1975, and was sent to the Police Academy, a police training school. He was 33 years old at the time, one year less than the maximum age for recruits. He was in a class of 49 to 50 people, and he was of minority ethnic stock. The training course takes sixteen weeks and evaluations are made every four weeks. Among the qualities and proficiencies required of a police officer at that time were ability to make reports, understanding of instructions, aggressiveness, initiative, attitude, judgment, punctuality, physical condition including endurance, and ability to use firearms. On November 6, 1975, the officer received a Recruit Evaluation Report which showed him to be on the middle or lower end of the scale in nine of twelve qualities measured. The evaluation form stated among other things that, "Officer displays lack of endurance and initiative in area of physical fitness, and is not improving at a satisfactory rate."

On December 5, 1975, the officer received another evaluation. In this report the officer received a rating in the middle or low end of the scale in seven qualities and in the upper end of the scale in five other qualities. The grievant was scored 86.4 in Criminal Law, 85 in Principles of Arrest and 94 in Rules of Evidence. However he was listed as having an average of 52.4 for use of firearms. The report said that the recruit was not improving at a satisfactory rate, and the report said that he should not be continued as a police officer. The report stated that "this recruit lacks physical endurance, very poor in running. His firearms proficiency is also poor." The report was signed by Sergeants Jos. Sutter and Orval A. Zellmer, and was also signed by the Patrolman himself.

No. 14873-D  
No. 14875-D  
No. 14899-D

APPENDIX A

Patrolman Rhodes reported that Patrolman Coleman had told him that he had been asked to resign and that he wanted to know if Patrolman Rhodes also had been asked to resign. He was told that Patrolman Rhodes had been asked to resign, but did not. Patrolman Rhodes in this report wrote, "I ask(ed) him why did he leave school early he said that he had to go up town and talk to someone, about the problem he was having. I then told him that Sergeant Zellmer knew that he had left, and that he should have went and ask Sergeant Sutter if he could leave. Coleman said he need(ed) someone to talk to. I told him make sure he don't talk to know one outside the Department."

Patrolman Rhodes reported that he told Patrolman Coleman to go back to school on Monday and show the Sergeant they could do the work, and he stated that Patrolman Coleman said "O.K.", and that if he heard anything to let him know.

Patrolman Rhodes said that he also had a telephone conversation with Patrolman Coleman on December 6, 1975, and again told him that they both should go back to the Academy on Monday.

Sergeant Zellmer says that another Recruit Officer told him on December 8, 1975, that Patrolman Coleman had called him on December 7, 1975, and this person, Patrolman Jives, was also instructed to file a report.

On December 9, 10, and 11, 1975, Patrolman Coleman was not present at the 7:30 a.m. roll call. On December 11, 1975, Deputy Inspector Ziolkowski filed charges against the Patrolman charging "Violation of Department Rules and Regulations as follows: Rule 39, Section 22; Absent from duty without leave." The specific charges were,

"That Recruit Patrolman Judson Coleman, Police Academy, absented himself from the Police Academy between the hours of 1:30 p.m. and 3:15 p.m. on December 5, 1975, without the permission of a superior officer and failed to report for duty at the Police Academy on December 8, 9, 10, and 11, 1975." A Police Department Board of Inquiry then conducted a trial at which the Patrolman was registered as entering a plea of "Not Guilty", but the Board heard the testimony and made a unanimous finding of "Guilty as Charged", and unanimously recommended dismissal. By Order No. 7227 of Harold A Breier, Chief of Police, dated December 16, 1975, the grievant was dismissed from the service.

Rule 39, Section 22 is as follows:

"Absence from duty without leave of any member of the Department shall be followed by forfeiture of pay for time absent, and charges shall also be preferred against him by his district commander or the head of his bureau, unless otherwise directed by the Chief of Police. An unexplained absence without leave of any member of the Department for three days shall be considered grounds for discharge."

There was an Agreement between the City of Milwaukee and The Professional Policemen's Protective Association (now the Milwaukee Police Association). This Agreement extended from November 3, 1974, through October 31, 1976. Part II, A of the Agreement states that:

"The Association is recognized as the exclusive bargaining agent for employes in the following classifications:

"\*\*\*\*\* Police Patrolman \*\*\*\*\*."

No. 14873-D  
No. 14875-D  
No. 14899-D

Part III, C. Management Rights, includes these sections:

"1. The Association recognizes the right of the City and the Chief of Police to operate and manage their affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes. The Association recognizes the exclusive right of the Chief of Police to establish and maintain department rules and procedures for the administration of Police Department during the term of this Agreement provided that such rules and procedures do not violate any of the provisions of this Agreement.

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"4. The Chief of Police and the Fire and Police Commission reserve the right to discipline or discharge for cause....."

A grievance procedure was provided which includes the following section which is pertinent here:

"Part III, Section I., A, 1. Differences involving the interpretation, application or enforcement of the provisions of this Agreement or the application of a rule or regulation of the Chief of Police affecting wages, hours, or conditions of employment and not inconsistent with the 1911 Special Laws of the State of Wisconsin, Chapter 586, and amendments thereto shall constitute a grievance under the provisions set forth below.

"Matters of departmental discipline involving application of the rules or regulations of the Chief of Police which are not subject to appeal to the Board of Fire and Police Commissioners, shall constitute a grievance under the aforementioned provisions and matters of departmental discipline involving application of the rules or regulations of the Chief of Police which are subject to appeal to the Board of Fire and Police Commissioners shall not constitute a grievance under the aforementioned provisions.

"Obligations of the City under Chapter 65, Wisconsin Statutes, and any pension matter under the exclusive jurisdiction or control of any duly constituted pension board shall not constitute a grievance under the provisions aforementioned.

"2. Grievances over discipline shall be initiated at the level of the Grievance Procedure immediately above the level of the chain of command at which the discipline was administered, except that in cases of discipline administered by the Chief of Police the grievance shall be initiated at step 4 of the Grievance Procedure and be reviewed by the Chief of Police."

Section 4 (a) of the Rules of the Fire and Police Commission is as follows:

"Original entrance appointees and persons not eligible for reinstatement who are re-employed in either department shall be on probation for an aggregate of one (1) year of actual active service unless the Board specifies a longer or shorter time for any position or group of positions. If during the probationary period the appointee proves unfit for the position, the Chief of the interested department may discharge said appointee. A full statement of the reasons for the discharge must be filed with the Board within five (5) days of said discharge. If the probationary period is completed in a satisfactory manner, the appointee shall then be classified as a regular employee."

No. 14873-D  
No. 14875-D  
No. 14899-D

Rule 17, Section 3 of the Departmental Rules is as follows:

"A probationary patrolman who proves unsatisfactory during his first year of service shall be subject to dismissal by the Chief of Police and he shall not be entitled to an appeal therefrom."

Rule 29, Section 73, is as follows:

"All original appointments to the Police Department shall be for a probationary period of one year, continuation in the service being dependent upon the conduct of the appointee and his fitness for the performance of his duties to which assigned, as indicated by reports of his superior officers and by reports of Department medical examiners. If, during the said year, the appointee proves unsatisfactory, his service from the Department shall be terminated, and he shall not be entitled to an appeal to the Board of Fire and Police Commissioners from such disposition."

Patrolman Coleman says that he was visiting at a friend's house when a detective came with a subpoena requiring him to be before a Board of Inquiry on charges of being absent without leave. The grievant said that he laughed and told the detective he had been fired on December 5, and could not understand how they would want to fire him twice.

The Patrolman says that when he joined the Department he was told by a member of the Association who addressed his class that there was no help to be expected from anybody if they were fired within the year, so he did not go to officials of the Association.

Concerning the interview that Patrolman Coleman had with the Deputy Inspector and the Sergeants, the Deputy Inspector states that he reviewed the evaluation and performance of the Patrolman and told him that he felt he was not suited for police work, but did not tell the Patrolman he was dismissed or terminated. The Patrolman was also told he had opportunity to resign if he wished. The Deputy Inspector states that the officials do not "pull any punches" in such interviews, but let the officer being interviewed know that the officer can continue and face dismissal, and that in most cases it's better if the officer resigns. Recruits who resign can come back later.

There are entry level tests of physical ability for a recruit to be accepted, but the test is administered by the Fire and Police Commission. The Patrolman passed these tests.

With respect to firearms skill, Patrolman Durrah states that it took almost to the end of his training period before he qualified for his firearms test and also that he had to go in for remedial shooting.

When the Patrolman was dismissed, he was given only his pay without other benefits. There is a provision in the Agreement about how sick leave is earned (Schedule A, Sick Leave, page 40).

#### FINDING OF FACT

From the foregoing, the Fact Finder finds that the following are matters of fact:

1. That Patrolman Judson V. Coleman was a Patrolman (Recruit) in the Police Department of the City of Milwaukee at all times material, and as such he was a member of the bargaining unit, The Professional Policeman's Protective Association and was covered by the Agreement between this Association and the City of Milwaukee which was effective November 3, 1974, to October 31, 1976.

No. 14873-D  
No. 14875-D  
No. 14899-D



2. That Patrolman Coleman as a recruit officer in the Police Academy for training, demonstrated a deficiency in skill in running and in the use of firearms over the first eight weeks of his training period.

3. That the Patrolman's deficiency was a cause for the Patrolman's instructors recommending that he not be continued as a police officer.

4. That the Patrolman was told of his deficiencies orally by several instructors and the Deputy Inspector in the presence of the instructors, who reaffirmed their position that the recruit patrolman would not qualify as a police officer.

5. That the administration's officials in the interview did not say that the Patrolman was being discharged at the time of the interview but very strongly emphasized that he was likely to be dismissed if he did not resign.

6. That the Patrolman as a result of the interviews was shaken and upset and felt he needed advice.

7. That the Patrolman at some time on the afternoon of December 5, 1975, had some kind of interview with Sergeant Neal Route, the result of which was that the Patrolman felt he was dismissed as of the time of that interview.

8. That it is established as a fact that the Patrolman turned in his equipment, but it is not established as a fact that he turned it in to Sergeant Route as a result of his conversation with Sergeant Route, nor is the time when the equipment was turned in established.

9. That the Patrolman thereafter left the Academy before the end of the day while class was still in session.

10. That the Patrolman did not thereafter return to the Academy and acted as if he had been discharged with no recourse for appeal, until he was summoned before the Police Board of Inquiry.

11. That the Patrolman did not appeal to the Association for a grievance hearing because it was the Association's understanding and the grievant's understanding that the grievant as a probationer had no right of appeal.

12. That under Section 4 (a) of the rules of the Fire and Police Commission the Chief of Police at that time had the authority to dismiss a probationary appointee as unfit for the service.

13. That under Rule 17, Section 3 of the Department Rules, the Chief had the right to dismiss a probationary employee who appears as unsatisfactory for the service.

14. That under Rule 29, Section 73 of the Police Department Rules of that time, the Chief could dismiss probationary employees if proven unsatisfactory, and conduct and fitness were factors upon which continuation in service depended.

15. That the Patrolman after having left the Academy on December 5, 1975, was not present for a 4 p.m. roll call of that date nor for a 7:30 a.m. roll call at the Academy on December 8, 9, 10, and 11, 1975.

No. 14873-D  
No. 14875-D  
No. 14899-D

16. That thereafter the Patrolman was charged with absence without leave for more than three days; and after a hearing before a Board of Inquiry consisting of three police officials and two Patrolmen, it was unanimously recommended that the Patrolman be discharged.

17. That the Chief of Police thereafter did discharge the Patrolman on December 16, 1975, under Rule 39, Section 22 which states that unexplained absence without leave for three days is grounds for discharge.

18. That although the Patrolman is of a minority race, no evidence was adduced to conclude that this was a factor leading to his discharge, but rather that he was considered a "nice guy", however physically without endurance and deficient in use of firearms.

#### CONCLUSIONS

The Fact Finder from the foregoing arrives at the following conclusions:

1. That Patrolman Coleman was seriously deficient in ability to meet the running test of the Department and that it was not likely that because of his age, he could have met the test even at 16 weeks in the course.

2. That Patrolman Coleman was seriously deficient in ability to meet the firearms test, but the possibility exists that he might have met this test.

3. That because of his lack of physical endurance, the instructors of the Academy were justified in recommending that he not continue.

4. That the interviews held with the Patrolman over his evaluation were such that while the grievant was not told by his higher superiors that he was being discharged then and there, the effect of the interviews was to amount to a constructive discharge. This effect was further reinforced by the discussion or interview the grievant had with Sergeant Route, and that the Patrolman was then justified in leaving the Academy believing that he had been effectively discharged as of December 5. Therefore the Patrolman should not have been discharged on the grounds of absence without leave.

5. That the evidence is that the Patrolman should have been dismissed on the grounds of lack of physical endurance and poor prospects for qualifying in the use of firearms.

6. That the absence of an Association spokesman at any stage after the interviews has been considered a defect in process by the Wisconsin Employment Relations Commission, but it is insufficient to justify reopening the whole matter since the evidence is that even with Association counselling in interviews with superior officers, the Patrolman would not likely have been able to meet the running test.

7. That the Patrolman on his discharge may have had earned days of unused sick leave which were owed to him but not paid.

RECOMMENDATIONS

The following recommendations are made in the above matter:

1. That the discharge of Patrolman Judson V. Coleman on December 16, 1975, for violation of Rule 39, Section 22 of the Departmental Rules be rescinded and that instead the dismissal be based on Rule 29, Section 73, as being unsatisfactory because of lack of physical fitness and endurance.
2. That the records of the Patrolman be reviewed to ascertain whether he had earned days of unused sick leave due him at the time of dismissal.

*Frank P. Zeidler*

FRANK P. ZEIDLER  
FACT FINDER

DATE July 1, 1981

No. 14873-D  
No. 14875-D  
No. 14899-D