

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 WISCONSIN PROFESSIONAL POLICE :
 ASSOCIATION : Case 13
 : No. 44637
 and : MA-6367
 :
 CITY OF BLOOMER :
 :

Appearances:

Mr. Gordon E. McQuillen, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of the Wisconsin Professional Police Association, referred to below as the Association.
Mr. Gregory Dowling, Dowling & Dowling, Attorneys at Law, 1416 Larson Street, P.O. Box 65, Bloomer, Wisconsin 54724, and Mr. James M. Ward, Ward, Riley, Prenn & Ricci, Attorneys at Law, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the City of Bloomer, Wisconsin, referred to below as the City.

ARBITRATION AWARD

The Association and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a complaint filed by Donald G. Grady II against Joseph Wymko. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held in Bloomer, Wisconsin on December 3, 4, and 5, 1990, and on January 28, 1991. Each day of hearing was transcribed, and the parties filed briefs and reply briefs by April 10, 1991.

ISSUES

The parties stipulated the following issues for decision:

1. Did Joseph Wymko engage in any or all of the acts alleged in the Complaint filed by City of Bloomer Chief of Police Donald Grady on August 24, 1990?
2. If so, did any or all of the alleged acts give the City of Bloomer just cause to discharge Joseph Wymko from his employment as a police officer for the City pursuant to the recommendation of Chief Grady?
3. If the answer to question 1 above is "yes," but the answer to question 2 above is "no," what penalty, if any, is appropriate?

RELEVANT CONTRACT PROVISIONS

ARTICLE V - DISCIPLINE AND DISCHARGE

Section 5.01 - Just Cause: No employee covered by this Agreement shall be disciplined or discharged without just cause.

BACKGROUND

The Complaint

The body of the Complaint, as amended, reads thus:

Now comes Donald Grady II, Complainant herein, and alleges as follows:

1. My name is Donald Grady II, I reside at Martin Road in the City of Bloomer, Wisconsin, and my

occupation is Chief of Police FOR the City of Bloomer, Wisconsin.

2. Joseph Wynimko, the Respondent, is, and at all times referred to herein was, a police officer employed by the City of Bloomer with a grade of Patrolman II.

3. The following allegations are made on information and belief, except where otherwise stated.

4. The Respondent did, on or about the 23rd day of July, 1990, willfully, knowingly and without authorization, access computer data and did, willfully, knowingly and without authorization, take possession of computer data, in violation of sec. 943.70(2)3. and 943.70(2)4., Wis. Stats. (Class A Misdemeanors), and did, on said date, intentionally perform an act which he knew to be in excess of his lawful authority or which he knew he was forbidden by law to do in his official capacity, in violation of sec. 946.12(2), Wis. Stats. (Class E Felony), in that:

a. On a date in July, 1990, the Respondent asked one Roger Kunsman to obtain, while on duty as a police or sheriff's dispatcher, a Criminal History Record Information relating to Complainant; such information to be obtained from the TIME computer system of the Crime Information Bureau of the State of Wisconsin, Department of Justice.

b. On or about the 23rd day of July, Kunsman obtained the Criminal History Record Information (the Report) relating to complainant while on duty as a dispatcher for the Chippewa County Sheriff's Department; the Report was obtained under the fictitious name of "Schmidt."

c. Complainant knows of his own knowledge that the Report disclosed a trespass to land which occurred in 1975, and for which Complainant paid a fine.

d. On or about the 24th day of July, 1990, Kunsman gave the Report to the Respondent.

e. On or about the 24th day of July, 1990, Respondent gave the Report to Alderman Dale Berg, who, on the same day, gave the Report to Mayor Robert J. Gwidt.

f. When the Respondent gave the Report to Alderman Berg, the Respondent represented that the Report had been obtained by someone in Hudson, Wisconsin in connection with Complainant's application for a job there.

g. Over a period of several months before obtaining the Report, Respondent, from time to time, urged Alderman Berg to obtain such a report and to contact Complainant's former employer.

h. On several occasions after July 23, 1990, Respondent contacted Alderman Berg and asked what, if anything, the Mayor was doing with the report.

i. Neither Respondent nor Kunsman had a valid law enforcement purpose for requesting the Report through the TIME system.

j. Neither Respondent nor Kunsman had a valid non-law enforcement purpose for requesting the Report through the TIME system.

k. Neither Respondent nor Kunsman had authority or authorization to request the Report through the TIME system.

l. Further, Respondent, in his capacity as a police officer, for the City of Bloomer, intentionally falsified a report in a material respect in violation of sec. 946.12 (4), Wis. Stats. (Class E Felony), in that when requested by Complainant to prepare a report detailing his knowledge of an unauthorized Crime History Record Information report, Respondent filed a report stating he had never asked anyone to obtain such a report.

m. The foregoing conduct of Respondent also constitute violations of Bloomer Police Department Policy and Procedure Manual:

Section II: I. A. (page 5)
 II. A. (page 5)
 II. C. (page 5)
 II. E.1. (page 5)
 IV. A. (page 8)
 VIII. B. (page 9)
 XIII. A. (page 10)

Section III. III. B.1. (page 2)
 III. B.2. (page 2)
 III. D.7. (page 3)
 III. E.1. (page 4)
 III. K.1. (page 7)
 III. K.2. (page 7)

Section IV. II. (page 30)
 III. (page 30)

5. The Respondent did, on or about the 20th day of August, 1990, in his capacity as a police officer for the City of Bloomer, intentionally fail or refuse to perform a known, mandatory, nondiscretionary, ministerial duty of his office or employment within the time or in the manner required by law in violation of sec. 946.12(1), Wis. Stats. (Class E. Felony), and Respondent did fail after striking an unattended vehicle, to immediately stop and locate or notify the operator or owner thereof or to leave in a conspicuous place therein, a written notice giving his name, address and other required information in violation of sec. 346.68, Wis. Stats., and Respondent did fail to report an accident in violation of sec. 346.70, Wis. Stats., in that:

a. On that date, while backing the squad car out of a driveway, at approximately 5:10 a.m., Respondent struck an unattended vehicle owned by one Thomas P. Moyer.

b. Respondent got out of the squad car and examined the damage.

c. Respondent then got in the squad car and drove away.

d. Respondent did not leave a message or otherwise contact Moyer.

e. Respondent made no written or oral report of the accident before Moyer arrived at the Bloomer Police Department between 6:30 a.m. and 6:48 a.m. on August 20, 1990.

f. Of his own knowledge, Complainant states Respondent did not inform his shift supervisor of the accident at any time on August 20, 1990; Complainant was the shift supervisor.

g. Of his own knowledge, Complainant states that he first heard of the accident when Moyer called Complainant at his residence at approx-imately 6:10 p.m. on August 20, 1990.

h. Of his own knowledge, Complainant states that Respondent did not file an internal

accident report until told to do so by Complainant on August 21, 1990.

i. The foregoing conduct of Respondent also constitutes violations of the Bloomer Police Department Policy and Procedure Manual:

Section II: I.A. (page 5)
II.A. (page 5)
VI.A.1. (page 8)
VIII.D. (page 9)
XIII.A. (page 10)
XIII.B. (page 10)

Section III: III.B.1. (page 2)
III.B.2. (page 2)
III.E.1. (page 4)
III.Q.4. (page 9)

Section IV: II. (page 30)
III. (page 30)

6. Complainant states of his own knowledge that he suspended Respondent with pay, effective August 23, 1990 at 5:00 p.m., pending determination of these charges.

WHEREFORE, Complainant requests and recommends, based upon all of the aforementioned violations of Wisconsin law and the Policy and Procedure Manual, that the Respondent be permanently removed as a law enforcement officer of the City of Bloomer.

. . .

The Criminal History Record Information (CHRI) Check
And Wynimko's Report

The Transaction Information for Management of Enforcement (TIME) system is maintained by the Wisconsin Department of Justice to provide law enforcement agencies with access to data maintained by a number of agencies, including the State, the National Crime Information Center in Washington, D.C., and the National Law Enforcement Telecommunications System. Each Wisconsin county must maintain a computer terminal through which this system can be drawn upon. Operators of the TIME system must be certified, and the Department of Justice oversees and enforces the security of the system.

The TIME system is accessed by law enforcement personnel through three major purpose codes: C, E and J. The C code is used by officers in obtaining data relevant to criminal investigations. The E code refers to authorized employment or licensing purposes. The J code is for background or pre-employment checks. The J code is used for background checks on applicants for law enforcement positions.

Roger Kunsman is a certified TIME operator who serves as a Dispatcher for the Chippewa County Sheriff's Department, and who served, until late August of 1990, 1/ as a dispatcher for the Bloomer Police Department. On July 22, Kunsman, from the terminal at the County Sheriff's Department, ran an information check through the TIME system under Purpose Code E on Chief Grady. Kunsman entered the person requesting the check as "Schmidt," and gave the printed CHRI report to Wynimko. Wynimko gave the report to Dale Berg, an alderman for the City of Bloomer, who eventually gave it to Robert Gwidt, the Mayor of Bloomer.

Kunsman highlighted certain information contained on the report, which indicated that Grady had been convicted of a criminal trespass under Sec. 943.13(1)(b), Stats., and had paid a fine.

Adult CHRI is a matter of public record, available, for a \$10 fee, on written request by an individual to the Crime Information Bureau. Neither Wynimko, Kunsman, Berg nor Gwidt was aware of this in July.

Chippewa County Sheriff Alfred Dachel ultimately learned of the TIME check run by Kunsman, discussed the matter with him, and issued him an oral reprimand. As of July, the Sheriff's Department had no policy regarding how CHRI requests were to be processed. In a letter dated August 7, Dachel advised Grady that the Sheriff's Department was adopting the following policy regarding CHRI checks:

1/ References to dates are to 1990, unless otherwise noted.

Because of a recent incident where a Criminal History Check was requested using a non existing officer, this agency will make these requests ONLY with the Chief's authorization.

This request must be in written form, on Department letterhead and signed by the chief.

Criminal History Checks will only be requested during normal business hours, Monday through Friday.

. . .

After some discussion within the Sheriff's Department, the policy was modified. The modified policy, published August 27, reads thus:

TO FACILITATE THE INTEGRITY OF THIS AGENCY AND ITS EMPLOYEES, WE WILL UTILIZE THE FOLLOWING PROCEDURE.

WHEN AN OFFICER REQUESTS A CRIMINAL HISTORY CHECK AN ICR (CODE#87) WILL BE FILLED OUT.
WHO REQUESTED THE CRIMINAL HISTORY CHECK.
WHO THE CHECK WAS ON NAME
THE PURPOSE OF THE CRIMINAL HISTORY CHECK.

The Department of Justice has not taken action to deny Chippewa County access to the TIME system based on the CHRI check run on Grady, and has not referred the matter for enforcement action against Kunsman, Wynimko, or Chippewa County.

Grady did not learn that the criminal check which prompted the policy changes noted above had been run on him, until Dachel so informed him on August 21.

After meeting with Dachel in the afternoon of August 21, Grady asked Wynimko about the CHRI check, and ultimately asked Wynimko to make out a report on the matter. Wynimko submitted the following written response:

I did not request or did I ask anyone to run a background check on Donald Grady.

That evening, Grady discussed the incident with the City Council, the Mayor and the City Attorney.

Grady also called Kunsman and asked him to discuss the check with him. He and Kunsman met on August 22 to discuss the incident. Grady ultimately sought, and received Kunsman's resignation from the Bloomer Police Department.

This completes a sketch of a core of undisputed fact against which the more personal, and often disputed, testimony of individual witnesses can be viewed.

Roger Kunsman

Kunsman testified that he ran the CHRI check on Grady at Wynimko's request. Kunsman stated that the request emerged from two on-duty conversations between himself and Wynimko at the Bloomer Police Department. During the first conversation, Wynimko asked him general questions about how a CHRI check was run, and what type of information could be obtained through it.

The second conversation occurred about two weeks after the first, and Kunsman testified he interpreted the two conversations as a request from Wynimko that a CHRI check be run on Grady. Kunsman ran the check during his next shift at the Sheriff's Department, about a week after his second conversation with Wynimko.

He gave the print-out of the CHRI check to Wynimko while each of them were on duty at the Bloomer Police Department. Kunsman testified he, alone, chose to run the check under the name "Schmidt" and chose to run it as an E code request. Kunsman testified that Wynimko never directly asked him to run the check.

Kunsman stated that after he had discussed the CHRI check with Grady, he was given an ultimatum to either resign within a two hour period ending at 5:00 p.m., "or else." 2/ Kunsman testified he phoned Grady at 5:00 p.m., and asked what the "or else" was. Grady informed him that: "I'll have to terminate you if you don't." 3/ Although he wished to remain as a Dispatcher, Kunsman resigned.

2/ Transcript (Tr.) at 423.

3/ Ibid.

Joseph Wynimko

Wynimko testified that as early as January, rumors were circulating through the law enforcement community that Grady had a criminal record. At roughly the same time, the Bloomer City Council was debating whether to abolish the Police Commission. Wynimko believed that the Police Commission was refusing to turn over certain documents to the City Council, including Grady's application for employment. He stated that, through an informant, he had learned the Police Commission never ran a criminal check on Grady. While the controversy surrounding the abolition of the Police Commission was ongoing, Wynimko anonymously called Alderman Dale Berg, to determine what documents the Police Commission was withholding and why. It was against this background, Wynimko testified, that he had his conversations with Kunsman to determine "why couldn't the Bloomer Police Commission run a background check if this was pertinent to -- to the hiring process." 4/

Wynimko acknowledged that he asked Kunsman a series of questions about how to run a criminal check, but denied that he ever specifically asked Kunsman to run the CHRI check on Grady. He acknowledged that he received the print-out from Kunsman while on duty. He acknowledged that he gave the print-out to Berg, and repeatedly asked Berg what Berg was doing about it.

On August 21, Grady summoned Wynimko to his office to discuss the CHRI check. Wynimko detailed the discussion thus:

Don Grady closed the door, and he asked me, "Did you run a background check, criminal background check on me?" I told him, "No." We sat down, and we started to discuss the matter. As he went along during the discussion voices started rising, and it went from everything to my personal records to the accident to that he knew that -- that Alderman Berg and Alderman -- correction, Mayor Gwidt received the criminal background check from him that I had run. 5/

The discussion ended with Grady asking him "to write down what -- what I had -- we talked about in there." 6/ He then submitted the report set forth above.

Sometime after this conference, Wynimko called Berg to determine what was going to happen. Wynimko was, at this point, "despondent," 7/ but Berg informed him Berg could not talk to him.

It is undisputed that Wynimko is a close friend of Wayne Geist, a Detective with the Bloomer Police Department, who unsuccessfully competed against Grady for the position of Police Chief.

Donald Grady II

Grady detailed his discussion with Wynimko on August 21 thus:

I called him in, and I asked him, "Do you have any knowledge of a Criminal History Check that was run on me through the Sheriff's Department?" His response was, "No, I do not." I asked him again if he had any knowledge and told him that I had information that says that he actually requested a check be run. He says, "No, I have no knowledge of that." 8/

Grady further explored the point, with Wynimko denying any knowledge of the CHRI check. Grady then stated that he asked Wynimko to fill out a report "letting me know exactly what your involvement is or isn't in this matter and to just outline the facts." 9/ Grady stated he admonished Wynimko thus:

(B)e careful because I've been told that you were involved, and I want you to be sure that you don't lie

4/ Tr. at 661.

5/ Tr. at 662-663.

6/ Tr. at 663.

7/ Tr. at 667.

8/ Tr. at 454.

9/ Tr. at 455.

in this report because it's an official police document, and if you lie in that report, you'll be guilty of falsifying the report and that's a felony.
10/

Grady stated that Wynimko then asked: "Are you trying to burn me?" 11/ Grady responded that he was not, but was trying to determine who was responsible for the CHRI check.

Grady then called Kunsman, and made arrangements to discuss the matter with him the following day. That evening, Grady discussed the CHRI check with the Bloomer City Attorney, the Mayor and the City Council at a closed session. Grady stated he asked if any one present had authorized the check or knew anything about it. He received no positive response, and then advised the Council thus:

I told them and I do recall telling them that there is a possibility that there have been incidents of harassment and if that harassment were to continue, that they were treading dangerously close . . . To possibility of litigation. 12/

After the meeting, Grady returned to his office. Berg called him, and let him know that Wynimko had called Berg, and that Wynimko stated he was afraid of losing his job. Ultimately, the City Attorney, Gwidt and Berg came to Grady's office. At that meeting, Gwidt informed Grady that he had a copy of the CHRI check, and how he had received it. Grady stated Gwidt gave him the print-out the following day, and that he stored it in the evidence locker.

The then incumbent District Attorney determined that no charges would be brought against Wynimko regarding the CHRI check. Grady stated he viewed this as an abuse of the District Attorney's discretion.

Dale Berg

Berg is an Alderman and President of the City Council. Berg stated Wynimko called him several times during the period in which the Council considered abolishing the Police Commission. Wynimko did not identify himself until he asked Berg to check into the legality of the hiring process regarding two officers. Once Wynimko had identified himself, Berg believed he recognized Wynimko as the source of a series of calls concerning the operation of the Police Department. Berg stated that Wynimko asked him several times to have the City run a check on whether Grady had a criminal record. On one of these occasions, Wynimko was on duty.

Berg stated that while Grady was attending an inservice course, Wynimko, while off duty, came to Berg's house and gave Berg a copy of the CHRI check run by Kunsman. Berg stated Wynimko offered no suggestions on what Berg should do with the document:

He just said do what I want to do with it. He said he just wanted to prove what he heard from Hudson was true. 13/

A number of times after this conversation, Wynimko asked Berg what had been done with the document. Berg stated two of these inquiries came while Wynimko was on duty.

Berg testified that Wynimko called him on August 21, distressed to the point of tears, and told him that Grady knew about the CHRI check, and that Wynimko was scared.

Berg stated that the City Attorney and Grady advised the Council in closed session on August 21 that the CHRI check had been illegally performed, and that possession of the document could subject an individual to legal sanctions. Berg stated he had given the document to Gwidt because he thought Gwidt should be aware of it "in case he had anything to do . . . (w)ith Grady's employ." 14/

10/ Ibid.

11/ Ibid.

12/ Tr. at 558.

13/ Tr. at 334.

14/ Tr. at 352.

Robert Gwidt

Gwidt has been Mayor of Bloomer since April. He testified that Berg gave him the CHRI check run by Kunsman. Gwidt understood the information to have come from Hudson. Gwidt reviewed the document, decided Bloomer had enough problems to face without that, and filed it in a file for matters requiring no action. He showed the document to no one until he gave it to Grady.

Gwidt testified that the check was discussed in closed session on August 21. Gwidt understood the essential point of that discussion to be that the CHRI check had not been appropriately authorized, and that this might subject the City or City officials to liability. He stated he was asked if he had a copy of the check, and that he acknowledged that he did have a copy, which he ultimately gave to Grady.

Wynimko's August 20 Accident

Shortly before 5:00 a.m. on August 20, Daniel Marcell was ending his tour of duty and Wynimko was starting his. Marcell picked Wynimko up at his home, and the two officers drove to Marcell's apartment. They talked briefly about the events of Marcell's shift, and Marcell left the car to mount the stairs to his apartment. At 5:05 a.m., Wynimko received a message from the Dispatcher to return to the Police Department to respond to a call from the Chippewa County Sheriff's Department. Wynimko backed the squad car up and collided with a parked pickup truck owned by Thomas Moyer, who lived at the same apartment building as Marcell. Wynimko, with his flashlight, inspected the damage to both vehicles, and drove back to the Police Department. He did not leave a message on the truck, and did not report the accident to Moyer or anyone else.

Upon returning to the Police Department, Wynimko called the Sheriff's Department and learned that the County had a warrant for Elmer Shilts, who had failed to pay a fine. The fine was roughly \$400. Wynimko was asked to watch Shilts' apartment until a Deputy Sheriff could arrive to take Shilts into custody. Wynimko did so, observed Shilts leave his apartment, and arrested him, informing him "Elmer, I have a warrant for you and unless you have \$400, you're going to be going to jail." 15/ Shilts and Wynimko returned to Shilts' apartment to determine if Shilts had enough money to pay the fine. He did not, and Wynimko brought him to the Police Department. Deputy Sheriff William Kelly picked Shilts up, and took him into custody, leaving the Bloomer Police Department at about 5:47 a.m. Shortly before that, Wynimko left the Police Department to inform Mrs. Shilts of what would happen to her husband. Wynimko returned to the Police Station at about 5:50 a.m.

Moyer had heard the collision involving his truck, and had observed that a Bloomer squad car was involved. He had waited to hear from the Department, and having heard nothing by 6:30 a.m., drove to the Police Department to report the accident. He approached the Dispatcher, and was referred to Wynimko. Wynimko inspected the damage to the truck, phoned the Chippewa County Sheriff's Department to investigate the matter, and started filling out the necessary paperwork.

Deputy Jeffery Soppeland was dispatched by the County to investigate the accident. He spoke first to Moyer, then inspected the damage to both the truck and the squad car. The pickup truck, which was black, had a dent extending over the panel and molding over the left rear wheel. The squad car had damage to the right tail lens and had black scuff marks on the right rear quarter panel. Soppeland then spoke to Wynimko. Soppeland found Wynimko cooperative, and did not believe Wynimko was avoiding responsibility for the accident. Wynimko did not, however, inform Soppeland that he had not notified anyone of the accident until he called the Sheriff's Department. Soppeland believed that the damages involved would be less than \$500 to the truck and less than \$200 to the squad. It was, in his opinion, not a reportable accident. He informed Moyer the City of Bloomer would be responsible for the damages, and that Moyer should obtain estimates of the damage. Soppeland did not issue any citation.

Wynimko left a report on the accident in the box of Sergeant Bungartz, who was not on duty that day. Grady was the shift supervisor on August 20. He reported for work at about 8:00 a.m., and left work about 4:00 p.m. Wynimko did not inform Grady of the accident.

Moyer called Grady on the evening of August 20, and asked if anyone had informed Grady of the accident. Grady informed him that no one had contacted Grady regarding the matter, and asked him to describe the circumstances. Grady ultimately informed Moyer the City would be responsible for the damages, and asked Moyer to obtain three written estimates of the damage.

Grady discussed the matter with Wynimko the following day.

Grady ultimately read Soppeland's report on the accident and, concerned that the report did not indicate the matter had been a hit-and-run, phoned Dachel. On August 25, Soppeland returned to the Bloomer Police Department to investigate the accident further. Soppeland eventually cited Wynimko for hit-and-run. He stated he reached this conclusion on his own, with no pressure from any other source.

Grady performed his own investigation of the accident, which included two written statements by himself, two written statements from Marcell and one from Moyer.

The lowest of the three estimates obtained by Moyer was \$1,055.25. Each estimate assumed the dented panel and molding would be replaced, not repaired. On the morning of August 20, the Bloomer Police Department had only one squad car in operation, and that was the car Wynimko was driving.

This completes a sketch of the undisputed factual background. The balance of the background to this incident will be stated as a summary of individual witness testimony.

Donald Marcell

Marcell filed two written reports on the accident. He filed the first on August 25, and, on Grady's instructions, filed a more detailed report on August 28. In the second of those reports, Marcell noted that Wynimko received a call from the dispatcher "(a)s I exited the vehicle." His statement continues thus:

While I climbed the stairs to my apartment, Wynimko moved from the passenger position on the front seat to the drivers position.

He testified he heard the sound of the collision as he attempted to unlock his door. He did not report the accident, but left his portable radio on, to listen for Wynimko's response. He did not hear any before he fell asleep about one-half hour later. He was not on duty that evening, but contacted Todd Swartz, another Bloomer Police Officer, and told Swartz of the accident. Swartz and Marcell drove to the accident scene during the early morning hours of August 21, and observed the damage to Moyer's truck. Swartz advised Marcell to give Wynimko twenty-four hours to report the accident. Both Swartz and Marcell considered the damages to the truck to reflect a reportable accident.

Joseph Wynimko

Wynimko stated that he received the call from the Dispatcher as he was backing the squad car up. He stated he did not know, at the time, if the call was an emergency or not. He stated he knew only that the County wished to talk to him about an unspecified situation. As he was talking to the Dispatcher, he backed the squad into Moyer's truck. After he had finished the call, he stopped the squad, got out and inspected the damages. He stated he felt the accident was non-reportable, and that he drew the following conclusion:

I felt at 5:00 in the morning that I could reasonably get back after I completed the task the County wanted me to complete and get back and face the person face to face, and that would take care of the requirements of the statute . . . 16/

He stated he responded to the County's request, and in arresting Mr. Shilts, promised Mrs. Shilts he would return and let her know what had happened. He testified he walked to her apartment after turning her husband over to the County, and let her know what was happening with her husband. He described his actions after that thus:

After that I walked out and back to the police station and talked to the dispatcher . . . and after a short while Mr. Moyer came in. 17/

Wynimko did not at that point inform Moyer he had struck Moyer's car. Rather, Wynimko assumed Moyer knew that, since he was the sole officer on duty.

Wynimko acknowledged that he never reported the accident, and that he was aware of the legal duty to report an accident before leaving the scene. He noted that he had once backed a squad car into a pole in front of the Police Department. He did not report that accident until "a couple of days after,"

16/ Tr. at 675.

17/ Tr. at 676-677.

18/ by filing a report with the Sergeant then on duty. He received no discipline for that accident.

Donald Grady II

Grady detailed the substance of his conversation with Wynimko on August 21 thus:

. . . Officer Wynimko was asked several times about the accident. He had -- he indicated to me he had a bad memory, and I told him I was in the office all day when that accident occurred and that was eight hours and he could have mentioned to me at some point that he had been involved in an accident, and he says, "I have a bad memory."

I asked him about the radio in the vehicle and whether or not he had a radio. Officer Wynimko indicated that he had a bad memory and didn't feel that that was a crime to have a bad memory, and I says, "No, Joe, it's not a crime to have a bad memory, but it just seems to me if your memory is that bad, you probably shouldn't even be a police officer" . . . Joe's response was a shrug . . . 19/

Grady testified that termination was appropriate for the hit-and-run incident alone, since that incident compromised both Wynimko's and the Department's credibility. He did not discipline any other officer because the duty to report the accident was, principally, Wynimko's.

Wynimko's Work Record

Wynimko testified that his performance has never been formally evaluated during Grady's tenure. Wynimko acknowledged that he once received a letter of reprimand from a prior police chief for not exercising sufficient diligence in performing his duties. He visually, but not physically, checked the doors of a locker plant which was later burglarized. This was expunged from his file after one year of satisfactory work performance. He stated he has received no other reprimands, and has never received a suspension from work.

Grady testified that he had put a letter of reprimand in Wynimko's file when Wynimko used a Police Department phone for a job inquiry to another city. Grady also testified he had issued Wynimko a letter of reprimand for using his nightstick to kill a badly injured stray cat. Grady did not issue these letters to Wynimko, but "put (them) in the file to refresh my memory at the time of review for any evaluations that would be done on Officer Wynimko . . . " 20/

Wynimko acknowledged he issued a parking citation to Junior Rubenzer, early in Grady's tenure. He did so knowing that Rubenzer had been known to aggressively assert his opinions with prior Police Chiefs. Wynimko characterized the action as a "Welcome to the City of Bloomer" 21/ for Grady. Grady stated the ticket had been written the weekend before his arrival in Bloomer. Grady testified he discussed the matter with Wynimko and told Wynimko:

(A)s far as I was concerned, the matter was resolved, but that it was inappropriate, that I had taken a test in order to get the job and that I didn't feel that I should be tested by him any further, and as far as I was concerned, I hold no grudges. 22/

Grady also testified that Wynimko had issued a ticket to a former member of the Police Commission, Donnie Rihn, for arguably political purposes, since the Police Commission had selected Grady over Geist. Wynimko acknowledged giving Rihn the citation for driving a vehicle with expired registration, but denied any political motivation. Grady testified he did not dispute the legitimacy of the Rihn ticket.

18/ Tr. at 716.

19/ Tr. at 456-457.

20/ Tr. at 505.

21/ Tr. at 671.

22/ Tr. at 494.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Association's Initial Brief

The Association characterizes this matter as "an action to correct an abuse of authority by the Chief of Police of Bloomer, Wisconsin."

The propriety of Wynimko's discharge should be assessed, according to the Association, under the seven standards established by Arbitrator Daugherty in Enterprise Wire Co., 46 LA 359 (1966). The just cause standard thus defined is set both by the parties' labor agreement and by the provisions of Sec. 62.13, Stats., the Association contends. It follows, the Association argues, that whether the discipline is viewed as a matter of statute or of contract, no cause analysis less rigorous than Daugherty's seven standards should be applied to assess its propriety.

The first relevant standard concerns the advance warning afforded the disciplined employe, and, in this case, such warning was, according to the Association, totally lacking. Asserting that the City did not "for all intents and purposes, introduce a single rule, departmental policy, departmental procedure, or any kind of any order into the record", the Association concludes that the City can not persuasively assert Wynimko was given "any kind of warning." Beyond this, the Association contends that the City can not rely on the fact that Wynimko was charged with violating the law, since Wynimko was never "charged with any kind of computer crime"; since there is no evidence Wynimko ever falsified a report regarding the computer check; and since there is no persuasive evidence Wynimko intentionally refused to report an accident.

Noting that two of the City's lines of argument focus on Wynimko's alleged violation of a traffic statute, the Association asserts that it "would be somewhat absurd to suggest that a police officer would believe that violating traffic laws are likely to lead to his termination." Beyond this, the Association notes that the Chief himself has a criminal record, and concludes that this makes any assertion that Wynimko, who has yet to be convicted of a crime, should have been aware his job was at risk for the conduct alleged here, untenable.

The second Daugherty standard focuses on "the reasonableness of a rule or order." Reasserting that no relevant rule or order was in effect at the time of the conduct at issue here, the Association concludes that "there can be no reasonable relatedness between the rule and the conduct." While acknowledging that police officers are subject to the rule of law both on and off duty, the Association contends that the City has failed to demonstrate "some relationship between the particular laws cited by the Chief and the operation of the Department." More specifically, the Association contends that had Wynimko run a criminal history record check on any person other than the Chief, no discipline would have followed, and thus that there is no relationship between the operation of laws governing access to computer data and the operation of the Bloomer Police Department.

Turning to the third Daugherty standard, the Association argues that Grady disciplined Wynimko before he had made any effort to investigate whether any rule violation had occurred. More specifically, the Association contends that Grady compiled information regarding Wynimko's conduct, but refused to consider any data which conflicted with his "preconceived conclusions."

The Association asserts that the City's discipline of Wynimko will not survive scrutiny under the fourth Daugherty standard because "(a)ny investigation that was conducted in this matter was unfair and subjective." Noting that the Chief had an interest in the outcome of the investigation regarding Wynimko, the Association asserts that "the objective and fair method would have been to have some person (other) than the Chief investigate." Beyond this, the Association asserts that the Chief took an active interest in the investigation, requiring Berg and Marcell to submit more detailed statements than those they initially submitted, and directing Moyer to submit a written report. That the Chief "made no effort to modify the charges in any material way" after discovering mitigating information establishes, according to the Association, that his investigation was biased. Although the Chief can not be faulted for not being objective in this matter, the Association contends that he can be faulted for relying on a subjective investigation into the underlying events.

The Association next contends that the City has failed to produce substantial evidence that Wynimko was guilty as charged, thus failing to meet the fifth of the Daugherty standards.

Asserting that Wynimko has been disciplined discriminatorily, the Association contends that the City has failed to meet the sixth Daugherty standard. Because there is "a scant record of discipline within the Bloomer Police Department," the Association urges that "it is important to concentrate on this incident as opposed to others." Noting that Swartz, Marcell and Wynimko were all aware of the accident and that only Wynimko was disciplined, the Association concludes that Wynimko was discriminatorily treated. Similarly, the Association urges that the Chief's assertion that only Wynimko should be held responsible for possible criminal sanctions due to the criminal history check inappropriately focused on Wynimko alone.

Finally, the Association asserts that discharge was a grossly inappropriate sanction in light of Wynimko's conduct and in light of Wynimko's work record. Wynimko's conduct after receiving the criminal history check, according to the Association, manifests, at worst, poor judgement and more probably "the most public spirited of reasons in seeking this information." His failure to promptly report the accident is more problematic, according to the Association, but can be accounted for by his desire to execute the arrest warrant, and, in any event, manifests a negligent response to a minor traffic matter. The Association characterizes the record on these points thus:

Thus, Wynimko seems to have been caught between the proverbial rock and a hard place. With respect to the

computer record check, he exercised his law enforcement sense and tried to find out what was going on in the Chief's background that might be of harm to the public.

On the other hand, with respect to the traffic matter, he had a momentary lapse in failing to report the accident for about 90 minutes.

Even if this conduct warrants discipline, the Association contends that discharge was inappropriate in light of the conduct involved and in light of his past work record.

Viewing the record as a whole, the Association concludes that the City has failed to meet its burden to prove it had just cause to discharge Wynnimko.

The evidence demonstrates, according to the Association, "that the Chief engaged in a personal campaign to eliminate a troublesome officer." It follows, the Association argues, that Wynnimko should not receive any discipline or, in the alternative, that he should return to work "subject to some minor penalty."

The City's Initial Brief

The City prefaces its brief by addressing certain jurisdictional issues.

First, the City notes that "the parties mutually agreed to expedite this matter by bypassing the ad hoc disciplinary committee that had been established initially," and that "no final action has been taken in regard to Officer Wynnimko's employment status." It follows, the City concludes, that after the issuance of an award, "the City will be free to impose disciplinary action against Officer Wynnimko consistent with the terms of any such award," including any level of discipline up to that found appropriate by the Arbitrator. Beyond this, the City "views the primacy of the contractual just cause standard as being fundamentally unassailable." In contrast, the City finds Sec. 62.13, Stats., to be "completely immaterial here."

The City argues initially that "(t)hree incidents led to Chief Grady's discharge recommendation": the hit-and-run accident; the computer check into Chief Grady's criminal record; and the falsified police report. The first incident, according to the City, "readily lends itself to a traditional just cause analysis." That analysis, the City contends, is embodied in the Daugherty standards. 23/

Acknowledging that the City has not promulgated a rule covering hit-and-run accidents, the City argues that Sec. 346.68, Stats., states conduct Wynnimko could be expected to know is punishable without advance warning. In fact, according to the City, Wynnimko "was fully aware of that statutory requirement." It follows, the City argues, that the first Daugherty standard has been met.

The City then asserts that "(t)he relationship between the hit-and-run statute and the orderly, efficient and safe operation of the City's business is so self-evident that little more needs to be said." Section 346.68, Stats., is "designed to deter drivers from taking flight to avoid financial responsibility for accidents they have caused," and the City's collateral enforcement of that statute "by way of disciplinary action against an offending police officer is integral to the orderly operation of any police department," according to the City.

The City next argues that the third Daugherty standard can be proven to have been met by retracing the chronology of the events following the accident.

The City notes that the Chief did not learn of the accident until Moyer called him on the evening of August 20. On confronting Wynnimko, the Chief was afforded no satisfactory explanation for the incident, and brought the matter to the attention of the Sheriff's Department. Soppeland then determined to issue Wynnimko a citation for violating Sec. 346.68, Stats. It follows, according to the City, that the third Daugherty standard has been met.

Noting that Grady was unaware of the criminal history check at the time Moyer informed him of the accident, the City asserts that Grady's objectivity in investigating the accident can not persuasively be questioned. Since Soppeland, not Grady, "concluded that Officer Wynnimko was guilty of violating the hit-and-run statute," the City contends that it is beyond question that the investigation was fair and objective.

The fifth Daugherty standard focuses on the obtaining of substantial proof of guilt, and, according to the City, "must be answered at two levels." The City contends that the first level is Wynnimko's indisputable technical violation of the hit-and-run statute. The next level, according to the City,

23/ The City cites Grief Bros. Cooperage Corp., 42 LA 555 (Daugherty, 1964). The seven standards stated there are not, verbatim, the seven standards of Enterprise Wire Co.. The differences are, however, insignificant. The questions cited below have been drawn from Enterprise Wire Co.

implicates "something far more serious than a mere technical violation of the law." That something is that "substantial evidence further establishes that he never intended to notify the owner at all." The City concludes that a review of the evidence establishes beyond doubt that Wynimko would never have notified Moyer of the accident if Moyer had not directly confronted him.

The sixth Daugherty standard, according to the City, can be "answered rather summarily," since the hit-and-run accident "is a matter of first impression for the City." That Marcell and Swartz were not disciplined is irrelevant here, the City contends, since Grady accepted their explanation that "it was appropriate to afford Officer Wynimko ample opportunity to report the accident and thereby remove any suspicion that he was the perpetrator of a hit-and-run accident."

The City next contends that Grady's eloquent testimony establishes that police officers are held to a higher standard of conduct than other citizens, and from this concludes that the sanction of discharge has been proven to be appropriate under the final Daugherty standard. Viewing the accident from Moyer's point of view, the City concludes: "To refrain from discharging Officer Wynimko would only serve to reinforce the unfortunate but widely held public perception that the first inclination of police officers is to take care of their own." The higher standard appropriate to judging police conduct is amply demonstrated in arbitral and administrative precedent, according to the City. Beyond this, the City argues that Wynimko's prior employment history is less than exemplary, and is marred by his concurrent involvement in the improper criminal history check. It follows, the City concludes, that the final Daugherty standard has been met.

The "free speech rights" of Wynimko, according to the City, "impede the application of the traditional just cause analysis." The City contends that the most "useful analytical model" is the six standards established in Town of Plainville, 77 LA 161 (1981). Application of these standards "obviates the need for the Arbitrator to determine whether Officer Wynimko violated Section 943.70(2), Stats.," in the City's opinion.

The first standard focuses on the significance of the "activity exposed by the whistleblowing." The City contends that Wynimko's conduct can not withstand close scrutiny under this criterion, since he was aware Grady "had to undergo the same background check as do all police officers," and was aware, or should have been aware, that the "infraction was a minor one."

The second standard focuses on Wynimko's motivation, and this, according to the City, "is the paramount consideration in regard to this entire incident." The City contends that the evidence "suggests a racial motivation," and demonstrates Wynimko "may have had other personal reasons for wanting to damage Chief Grady's career." A review of the evidence establishes, according to the City, that without regard to Wynimko's motivation, his opposition to Grady "long predated the time when the issue of his criminal record came to the fore."

The third standard focuses on the truth of the information given and Wynimko's "state of mind" regarding the truth of that information. Under this standard, the City asserts that Wynimko deliberately "turned a blind eye toward the nature of Chief Grady's criminal record," and "perverted the truth to achieve his own selfish ends."

Beyond this, the City asserts that Wynimko's conduct can not withstand scrutiny under the fourth Plainville standard, since he chose to ignore any direct means of communicating his information, and acted as "a self-appointed committee of one."

The City next contends that Wynimko sought to, and did, cause embarrassment to both the City and to Grady. From this, the City concludes that Wynimko sought and achieved the goal of harming the City and its Police Chief for no better end than his self-serving desire to see the Chief's termination.

The City next argues that Wynimko was "at all material times, trying to further his own private interests" and concludes that "his actions do not rise to the dignity of free speech entitled to constitutional protection." This point is amply supported, according to the City, in federal and in arbitral precedent. The City concludes that Wynimko's motives, coupled with his conduct regarding the criminal history check and regarding the hit-and-run accident warrant discharge, and do not merit serious constitutional consideration.

While asserting that either or both of the incidents discussed above warrant discharge, the City "(a)t the risk of overkill," contends that the falsified police report also warrants significant discipline. Dismissing Kunsman's testimony as "an eleventh hour creation," the City concludes that the evidence establishes that Wynimko requested the criminal history check and then lied about it when confronted by Grady.

Viewing the record as a whole, the City concludes that the discharge recommendation must be upheld.

The Association's Reply Brief

After a review of those facts the Association contends the City has misstated, the Association contends that the City has failed to prove discharge is an appropriate sanction under a traditional just cause analysis. The Association dismisses the contention that Wynimko can be presumed to have had notice of the implications of the hit-and-run statute by contending: "If it is true that a police officer could be fired for committing a traffic violation with a possible \$200.00 forfeiture, what is to be made of a police chief who committed a Class C misdemeanor?"

The Association next argues that it can not be accepted that the policies of Sec. 346.68, Stats., somehow translate directly into City policies, enforceable against Wynimko.

Beyond this, the Association challenges the City's analysis of the third Daugherty standard, by noting that the investigation required under a just cause analysis is an employment, not a traffic, matter. No such investigation or any weighing of Wynimko's traffic accident against his employment rights occurred, according to the Association.

The Association next argues that because no investigation has taken place, it can not be persuasively contended that a fair and objective investigation occurred.

The Association, while acknowledging that Wynimko left the scene of an accident, challenges the City's contention that he sought to "prevent disclosure of the accident," since "there isn't even one iota of evidence to prove the City's contention in this regard."

The Association contends that the City's position on Wynimko's discipline, in light of its treatment of Marcell and Swartz, "defies logic."

Contending that the City has failed to establish the final Daugherty standard, the Association argues that if Grady's testimony regarding the higher standard applied to a police officer is taken seriously, "then Grady's integrity is certainly in question and his own effectiveness is equally lost." Asserting that there is no persuasive evidence that Wynimko has lost his effectiveness as an officer, and distinguishing each of the administrative precedents cited by the City, the Association concludes that the City has failed to establish discharge is appropriate in light of Wynimko's conduct. The Association adds that an accurate assessment of Wynimko's work record only underscores this point.

Turning to the City's analysis of the criminal history check, the Association argues that "the analytical framework is simply wrong," and "even if the framework were correct, the City reaches the wrong conclusion at the end of its analysis." The seven standard Daugherty test remains the appropriate framework, according to the Association, and the City's attempt to apply a different framework seeks, in effect, to focus on one of those criteria to the derogation of the others.

The Association next contends that the result in Plainville should guide the analysis of Wynimko's case. After a review of the remaining cases cited by the City, the Association contends that the authority is either inapposite, or supports the Association's position.

The Association's final major line of argument is that the record will not support any conclusion that Wynimko falsified a report.

Viewing the record as a whole, the Association concludes:

(T)he Arbitrator should conclude that the City lacks just cause to discipline Officer Wynimko. Even if the City does have just cause for discipline, termination is an excessive penalty.

The City's Reply Brief

The City opens its reply brief by declining to address point-by-point the arguments raised in the Association's initial brief, since "most of those arguments had been anticipated, and have therefore already been addressed." The City then contends that "(r)educed to its essence, this case hinges on only one thing -- Officer Wynimko's credibility." That one thing, according to the City, can not be considered seriously in doubt given the totality of Wynimko's conduct in the three incidents: "The City cannot imagine how Officer Wynimko is to be believed."

More specifically, the City contends that Wynimko's assertion that he "forgot" the accident violates logic and common sense. Nor can this offense be trivialized by being branded a "traffic violation," according to the City:

A hit-and-run accident by an on-duty police officer is altogether different, especially where it is clear that no innocent mistake was made. That infraction speaks volumes about a person's character. Such a person does not belong in law enforcement.

The City then notes that Wynimko's falsified report must be added to this, as must his motivation in seeking an unauthorized criminal history check on Grady. The City concludes that this conduct, viewed as a whole, manifests conduct unworthy of a police officer.

Beyond this, the City contends that the procedural aspects of the Daugherty analysis must not be elevated to the point that "(f)orm becomes elevated over substance, and the real significance of the events giving rise to disciplinary action becomes obscured." More specifically addressing procedural points, the City contends that the Association can not persuasively attack Grady for being too aggressive in seeking information from Berg and Marcell, and then claim he did not investigate the matter rigorously enough. Beyond this, the City challenges the relevance of the discipline Kunsman received from the Sheriff's Department for running the unauthorized computer check, as well as the significance of the District Attorney's decision not to prosecute Wynimko.

The City summarizes the evidentiary record thus:

. . . Officer Wynimko instigated an unauthorized check of Chief Grady's criminal record in hopes of effectuating his demise, and then lied about it to save his own hide. This has created an untenable employment situation entirely of Officer Wynimko's own creation. No one in Chief Grady's position should be expected to tolerate such an egregious affront by a subordinate.

With this as background, and again emphasizing the significance of Wynimko's failure to report the accident, the City contends that the sanction of discharge is appropriate.

DISCUSSION

The stipulated issues focus on Section 5.01. The first issue questions whether Wynimko committed the acts alleged in the complaint. The latter two issues question the disciplinary significance of his conduct.

Section 5.01 provides that "(n)o employee shall be disciplined or discharged without just cause." The parties agree that the Daugherty standards define the just cause analysis. Those standards cover about three pages, and only the seven questions defining the standards are listed below.

As preface to resolving the seven questions, it is necessary to touch upon the parties' contentions regarding the impact of constitutional and statutory law on this matter. Constitutional and statutory issues, in my opinion, should be addressed by an Arbitrator only if the labor agreement expressly incorporates those sources of law, or if the parties mutually seek the Arbitrator's view of the law. The parties' agreement is the source of an Arbitrator's authority, and a court owes no deference to an Arbitrator's legal conclusions. Unless the parties mutually seek those conclusions, the exercise is academic. The parties have not, in this case, mutually put constitutional law at issue.

Nor are statutory issues requiring separate discussion posed here. That the alleged conduct may violate Wisconsin Statutes is subsumed in the application of the Daugherty standards.

The final prefatory point to resolving the seven questions is to isolate the conduct to be evaluated. The August 24 complaint sets forth a number of specific instances of conduct, but the complaint essentially turns on three allegations. The first is that Wynimko "willfully, knowingly and without authorization" used the TIME system to obtain the CHRI check on Grady. The second is that Wynimko "intentionally falsified a report in a material respect" regarding the CHRI check. The third is that Wynimko "did . . . intentionally

fail or refuse to perform a known, mandatory, nondiscretionary, ministerial duty of his office or employment" by failing to report his collision with the Moyer truck.

I.

Did the (City) give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?

With one exception, this question requires little discussion. That the City has no rules covering the three major areas of conduct at issue here does not resolve this question, since "certain offenses . . . are so serious that any employee . . . may properly be expected to know already that such conduct is offensive and heavily punishable." 24/

It would be a sad commentary on Wisconsin police work if a municipal employer had to have an express rule to advise its officers that filing false reports or leaving the scene of an accident without making a report are disciplinable offenses. Beyond this, Wynimko testified that he was aware of his duty to report the accident. In sum, whether he was on notice that the complained of conduct was disciplinable can not be considered in doubt regarding two of the three central allegations.

That Wynimko was forewarned regarding the possible disciplinary consequences of the CHRI check can not, with one exception, be assumed. There was no formal Bloomer or Chippewa County policy on the point. The testimony of the Dispatchers and Deputies who testified regarding access to the TIME system indicates that an officer's request, standing alone, could be sufficient to initiate a CHRI check. Those witnesses who balked at the propriety of the check run by Kunsman focused not on the legality of such a request, but on the implications of running, without supervisory approval, a check on a command officer. This is not to say the Kunsman check was appropriate. It does, however, point to the fact that access to the TIME system turns on the discretion of individual officers and dispatchers. The limits of that discretion as of July were vague and informal. The policy adopted by the Sheriff after the Kunsman check brought uniformity to the system, but still turns on the discretion of individual officers. Wynimko can not be said to have been on notice in July that the type of check run by Kunsman put him in jeopardy of discipline.

The fact remains that Kunsman ran the check using a fictitious name, and gave the check to Wynimko, on duty. Whether Wynimko requested the check or not, the City can not be faulted for not advising him that the on duty use of a CHRI check run under a fictitious name might subject him to discipline.

II.

Was the (City's) rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the (City's) business and (b) the performance that the (City) might properly expect of the employee?

Having concluded that the City need not have promulgated a specific rule to put Wynimko on notice that reports should be filled out truthfully, he should not leave the scene of an accident without reporting it, and that he should be aware that on duty use of a CHRI check run under a fictitious name may subject him to discipline, it is impossible to conclude here that the absence of such rules dooms the City's case.

Nor can the direct relationship of these potential sources of discipline to the Department's efficient operation or to the proper performance of its officers be considered in doubt. Grady testified that the officers who enforce the law must be perceived to abide by it, and that a Department which relies on public trust is compromised when an officer is perceived not to abide by the law. This general statement of principle can not be considered in doubt. What can be considered in doubt is whether the principle is implicated on the present facts. This point is addressed by the application of the remaining standards.

III.

Did the (City), before administering discipline to (Wynimko), make an effort to discover whether (Wynimko) did in fact violate or disobey a rule or order of management?

Grady suspended Wynimko on August 23. By that time, he had discussed the CHRI check with Dachel, Kunsman and Wynimko, and had Wynimko's report on the

24/ Enterprise Wire Co., 46 LA at 363.

matter. He had discussed the accident with Moyer, Wynimko, Marcell and others. It can not be said that Grady failed to make an effort to discover whether Wynimko had committed disciplinable offenses. The disputed point here is not whether an investigation was conducted, but the quality of that investigation. That issue must now be addressed.

IV.

Was the (City's) investigation conducted fairly and objectively?

With this question, the closely disputed points in this case start to come into focus. The BACKGROUND section of this decision artificially separated a series of events that flowed together from August 20 through August 21. This discussion will continue that separation by focusing first on the CHRI check and the related report, and then on the hit-and-run incident.

Grady's investigation of the CHRI check is the least satisfactory aspect of the City's conduct in this matter. Grady, from the onset of his knowledge of the CHRI check, took the matter personally and politically. This colored each aspect of the resulting investigation.

The speed and the content of Grady's response to learning of the CHRI check on August 21 manifests a response better characterized as a counter-attack than as an investigation. Grady spoke with Dachel at 3:15 p.m. By the close of the shift, Grady had called Wynimko into his office, and had arranged a meeting with Kunsman. By that evening, Grady had discussed the matter with the City Attorney, among others, and was prepared to, and did, interrogate the Mayor and City Council regarding their involvement in the matter. More significantly, Grady confronted the Council with the possibility of discharging Wynimko. The speed of this response does not manifest an even arguably disinterested search for information.

Nor does the content of Grady's response indicate an objective investigation. After learning of the CHRI check from Dachel, Grady summoned Wynimko. Although their accounts of this conversation vary, this is not a case in which one account must be credited over the other. Neither account betrays any evident misrepresentation. The variances more probably reflect Wynimko's and Grady's perception filtered through the history of their turbulent relationship, their personal interest in the outcome of this proceeding and the stress of the conversation itself. Wynimko's account unpersuasively ignores whether Grady asked him questions beyond whether he had actually requested the CHRI check. Grady's account includes such questions, and this is most probably true. His questioning of Kunsman and other individuals manifests an attention to detail lacking in Wynimko's account. On the other hand, Grady's account understates the scope of the conversation and its emotional content. Each witness testified that the conversation closed with Wynimko openly worrying that his job was at risk. Grady's account points to a dispassionate search for information, which can hardly account for Wynimko's concern. It is more probable that tempers flared, and Wynimko accurately perceived his job was at risk. Wynimko's later conversation with Berg bears this out. Wynimko was, by either Wynimko's or Berg's testimony, despondent. Viewed as a whole, the conversation indicates Grady was searching for detail, but that this search suffered irreparably from his intense personal stake in it.

The closed session with the City Council was an even less dispassionate search. After asking if anyone had knowledge of the matter, Grady, by any account, assumed the offensive and strongly implied that anyone involved might be legally liable to him for harassment. No mention was made of the fact that the information being discussed was a matter of public record. Gwidt and Berg both left the meeting believing they, and the City, were at risk of legal sanction. Their testimony at hearing establishes that they were, and continue to be, uneasy about the content and context of that meeting.

The following day Grady interviewed Kunsman. Throughout the taped portion of that interview, it appears that Grady consistently probed Kunsman for detail on the matter. There were no flare-ups at that interview. However, it must be noted that Kunsman stated the same enigmatic responses regarding Wynimko's request as he gave at hearing. It is not evident from that interview whether Wynimko specifically requested the CHRI check, or whether Kunsman so interpreted their conversation. This point is crucial to determining whether Wynimko's report was false, since that report asserts only that Wynimko neither requested nor asked that the check be run. There is, however, no persuasive evidence that Grady weighed this point at all. Kunsman was ultimately issued an ultimatum -- to resign or be fired within two hours. The lapse of time between the taped conversation and the ultimatum is not clear. There is, however, no indication Grady wished to, or did, evaluate the content of the conversation to assess the role of either Wynimko or Kunsman in determining whether to run the CHRI check.

The points made above are procedural. It may well be that Grady correctly perceived the CHRI check as a personal and political attack. However, he chose to take the investigation on himself, and the point at issue

here is whether that investigation was fair and objective. It was neither.

Although Grady also chose to take the employment-related aspects of the accident investigation on himself, the concerns raised above do not carry over into this aspect of the City's investigation. By the time of his conversation with Wynimko, Grady had acquired information indicating that Wynimko had withheld the reporting of the accident until confronted by the owner of the vehicle. Grady further personally knew that Wynimko had withheld any report of the incident from his shift supervisor. Grady confronted Wynimko with this knowledge, and afforded Wynimko the opportunity to account for the incident. Wynimko's response was, by any account, meaningless. That Grady asked the Sheriff's Department to further investigate the matter can not be faulted. Nor can Grady's request of Marcell to make a more detailed account of the incident be faulted. There is no persuasive evidence Grady applied undue pressure on any person involved in his own, or the County's investigation. That Grady chose to conduct the investigation himself at a time when he had an active personal dispute with Wynimko is troublesome. This consideration must, however, be tempered with the fact that the unfolding problems occurred within a small police department, with limited personnel resources. The point at issue here is not whether the investigation was conducted by an interested party. Rather, the issue is whether that investigation was fair and objective, within the limits of the Daugherty standards. It was both.

V.

At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

This question, as stated by Daugherty, focuses on the knowledge of the employer at the time of the investigation. The question in fact serves to preface the final three standards which weave together the evidence revealed at the investigation and at hearing. The parties took four days to submit evidence focusing not just on the knowledge Grady had at the time of the discipline, but also on whether Wynimko committed the acts he is accused of. The fifth standard can not reasonably be interpreted to ignore the evidence adduced at hearing. It must be determined if Wynimko did commit the acts alleged against him to evaluate whether Grady had obtained substantial evidence of his guilt at the time of the investigation.

Neither the evidence available to Grady during the investigation, nor the evidence adduced at hearing will support a conclusion that Wynimko filed a false report.

The weakness in the City's evidence on this point flows from the charge itself. Paragraph 41, implies the report was incomplete. The major conclusions stated in Paragraph 4 do not, however, draw on this implication by accusing Wynimko of sloppy or incomplete work. Rather, Paragraph 4 charges Wynimko with willfully accessing and possessing improperly obtained computer data. The evidence will not support the former aspect of the charge at all, and will only support the latter aspect in part.

Kunsmann denied that Wynimko directly asked him to run the check, and further denied Wynimko did anything to advise him how to run the check. There is no persuasive evidence to indicate Wynimko sought that Kunsmann run the check under a fictitious name. Beyond this, Kunsmann's enigmatic account of the request was consistent through his one-on-one discussion with Grady and through his testimony at hearing. That the testimony was enigmatic does not make it false. That Grady sought, or the hearing process tends to seek, hard and fast answers to factual issues should not be taken to obscure that day to day life, filtered through an individual's recall, is far more soft and elusive. Kunsmann's testimony persuasively depicts an officer and a dispatcher discussing widely circulated and troubling rumors of Grady's alleged criminal record. Wynimko pestered Kunsmann sufficiently that Kunsmann decided that an E check could put the matter to rest, one way or another, and that Wynimko would like to see it done. Kunsmann questioned the wisdom of the request, but did not doubt it fell within the discretion of a police officer. This view better fits within the fabric of the testimony viewed as a whole than does the more conspiratorial view advanced by the City. Wynimko does appear to have been acting on his own, with no certain support from others, other than a commonly shared concern about the widely circulating rumors regarding Grady. The record supports the Association's contention that Wynimko never specifically asked for the check, but was grateful that it had been run.

Kunsmann's depiction of Wynimko's conduct is consistent with that of the other individuals whom Wynimko chose to contact. In each case, with rare exception, Wynimko chose to badger an individual in the hope the individual would independently take action consistent with Wynimko's interests. Berg, whose credibility can not be doubted, testified that Wynimko simply gave him the CHRI check and left it to him to decide what to do. Wynimko did badger

Berg on what was being done, but he consistently left Berg alone to determine what to do with the information. Wynimko's phone calls to Berg detail a similar pattern. Even with his final, despondent phone call to Berg after the CHRI check had been discovered by Grady, Wynimko stopped short of directly seeking Berg's intercession on his behalf. This pattern is repeated in Wynimko's indirect approach to Alderman Bleskacek on departmental problems. The pattern can even be seen in Wynimko's response to being confronted by Moyer -- he never directly acknowledged his role in causing the accident.

Against this background, the context of the report must be viewed. Wynimko, after his confrontation with Grady, believed Grady was after his job. He responded by writing a report with no detail, which stated only the bare minimum Wynimko felt he could truthfully state -- that he never directly asked Kunsman to run the check.

Little, if any, of the evidence available to Grady or at hearing points to a direct request from Wynimko to Kunsman to run the check or to run it under a fictitious name. The charges could have focused on sloppy or incomplete reporting. They do not. Grady chose to allege Wynimko had filed a false, not an incomplete, report. This charge, as written, is unsubstantiated.

A number of the remaining subparagraphs have been proven and do establish that Wynimko took possession of the data and chose to disseminate it. The allegations regarding the authorization for the search are problematic, as has already been discussed. For purposes of this standard, it is sufficient to note the evidence establishes that Wynimko chose the wrong means to obtain publically available information. This is, at best, an indirect portion of what Grady chose to charge him with.

What weakness there is regarding Grady's allegations concerning Wynimko's conduct after the accident also flows from the charge itself. Within two days of the accident Grady had overwhelming proof that Wynimko had left the scene of an accident without reporting it.

The sole weaknesses of the charges relate to Paragraph 5h and to the allusion to Wynimko's intent in Paragraph 5. It does appear Wynimko filed an internal report of the accident on August 20. This is, however, only a technical point.

The reference to intent is more troublesome due to arguments advanced by the City regarding the disciplinary significance of this charge. This point must be deferred to the application of the final standard.

Characterizing the proof of Wynimko's guilt on this aspect of the charges as "substantial" is an understatement.

VI.

Has the (City) applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

The CHRI check and the allegedly falsified report were unprecedented in the Department and merit no discussion under this standard.

While there have been past accidents involving Bloomer squad cars, there is no persuasive evidence any such accident involves unreported damage to a squad car and a privately owned vehicle. Wynimko once hit a pole and did not formally report the matter for "a couple of days," but this shows, at most, the Department was lax regarding the timing of the report of a one-car incident.

The more significant point here is the Department's treatment of Marcell and Swartz, who chose not to immediately report the Wynimko accident, yet received no discipline of any kind.

The basis of the charges was, as the City points out, aptly and eloquently spoken to by Grady:

Police officers, whether they like it or not, are held to a higher standard by the public, and it's a fact of life. We can argue that they shouldn't be, but the facts are that they are. The public expects a police officer to be above and beyond reproach. 25/

Grady's testimony accurately notes that Wynimko's reservation of an hour or more to report an accident which a citizen is obligated to report immediately creates an intolerable double standard.

Principles must, however, be given life in actual fact to have meaning.

25/ Tr. at 448.

In this case two police officers were aware of a potential hit-and-run, and deliberately chose to delay their response by at least twenty-four hours. Their sole rationale was that the person who caused the accident was another officer. Grady confirmed this rationale regarding Marcell:

Q So it's different because it's a police officer, right?

A Yes, because they have a higher level of integrity to maintain and I believe in my police officers, and I think that his actions in regard to that were wholly responsible. 26/

Grady again confirmed this rationale in discussing his decision not to reprimand Swartz:

What I'm telling you is there's a difference in status between police officers and civilians, and in this case I feel nothing inappropriate was done to allow the officer involved in the violation to report it himself without having another officer have to do it for him. 27/

No citizen of Bloomer who is not a police officer can reasonably expect the luxury of a police officer allowing them time to consider when to report their involvement in an accident. The double standard inherent in the rationale articulated above cuts directly against the standard advanced by Grady as the basis for charging Wynimko. This does not lessen the significance of Wynimko's conduct. Grady's treatment of Marcell and Swartz is, however, an example of disparate treatment relevant to the operation of the sixth standard.

VII.

Was the degree of discipline administered by the (City) . . . reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the (City)?

Turning to the latter of the two elements to this question, it can be noted that Wynimko has eleven years of satisfactory service with the City of Bloomer. He received one reprimand from a prior chief, but that reprimand has been expunged from his record. Significant potential flaws in his performance emerge with Grady's assumption of the role of Police Chief, but those flaws can not be meaningfully asserted by the City here. Wynimko, by his own admission, issued a ticket to a citizen for no better reason than to test Grady. Standing alone, this is a disciplinable abuse of the discretion of an officer. However, this fact does not stand alone, and can do no more than preface that Wynimko and Grady have had a turbulent relationship. Grady chose not to discipline Wynimko for the incident, and informed Wynimko the matter was closed, no grudges to be held. In addition, Berg's and Gwidt's testimony indicate that the issuance of citations as an adjunct to political controversy is part of a political scene in Bloomer in which Grady has played an active role.

That Grady has placed "reprimands" in Wynimko's file can play no role here. Those reprimands were not communicated to Wynimko. It is the essence of the progressive discipline system which underlies a just cause analysis that an employe be advised of conduct which must be modified, so that the conduct can be modified. Discipline must be more than retribution for improper conduct. It must also serve as the basis upon which proper conduct is created. In the absence of clear communication of a reprimand, the reprimand is only retribution.

Viewed as a whole, the evidence regarding Wynimko's work record points to a poor relationship between Wynimko and Grady. Wynimko set the stage for that relationship, and has done much to foster its decline. That part of his work record which can be considered relevant to the issuance of discipline is, however, long term and satisfactory. As of August, Wynimko's work record justified progressive discipline for conduct not sufficiently egregious to warrant immediate discharge.

The remaining issue is whether the conduct charged in the complaint, in whole or in part, warranted his immediate discharge. To preface a review of the seriousness of the CHRI check and the allegedly falsified report, it should be noted that neither the District Attorney nor the Department of Justice has sanctioned the County, Kunsman, or Wynimko. Beyond this, the Sheriff's Department sanctioned Kunsman with only an oral reprimand.

26/ Tr. at 526.

27/ Tr. at 543-544.

More significantly, the standard questions the employe's "proven offense," and the charges which seek discharge are based on willful conduct. Such conduct is unproven. The evidence does not establish that Wynimko intentionally or directly sought the CHRI check. Thus, the record establishes not that the Wynimko's report on the CHRI check was false, but that it was incomplete. Beyond this, a review of the CHRI check and the allegedly falsified report in light of the prior standards establishes that the investigation which preceded the discipline was flawed. It follows that immediate discharge can not be based on either the CHRI check or the allegedly falsified report.

The more difficult point is whether Wynimko should be discharged for his conduct following the August 20 accident. There is nothing in Wynimko's conduct which argues for leniency on this point. Wynimko was, by his own account, talking to the Dispatcher when the accident happened. The Dispatcher characterized the call as an emergency, but it is apparent that Wynimko soon realized this was not the case. He had ample opportunity to report the matter. He chose not to, allegedly to confront the owner personally. Inexplicably, he proceeded to display neither the personal decency nor the professional courtesy to explain the matter to the owner when the owner himself reported the accident.

The City seizes on these points, and asserts Wynimko deliberately did not report the accident to avoid detection. The charges, as touched upon above, allude to his intent. While the City has established gross negligence on Wynimko's part, the record will not support a conclusion he intentionally sought to cover the matter up. This conclusion flows less from Wynimko's conduct than from the fact that he was driving the only operating squad car, and that the squad car had a cracked tail lens and black scuff marks on its rear panel. However much a schemer the City may wish to portray Wynimko as, there would be few schemes available to a Bloomer Police Officer to cover up these facts in the course of a shift. More significantly, there is no evidence Wynimko engaged in any behavior to hide these facts.

Against this background, it must be noted that Wynimko's offense, as a civil matter, is punishable by a \$200 forfeiture. As an employment matter, the damage to the Department's general, or Wynimko's personal, integrity has been established only on a general level. To base a termination on this general level requires concluding that Wynimko's failure to follow a statutory duty permanently and irreparably compromised his own or the Department's integrity.

This conclusion is hardly tenable in light of the Departmental determination not to reprimand Marcell or Swartz in any way. In either case the message to the public is that the law applies differently to a police officer than to the public at large.

Finally it must be noted that Grady was willing to justify two officers affording another officer twenty-four hours to report an accident. It must be recalled that Grady afforded Wynimko roughly one and one-half hours. It is impossible to conclude that Grady based the sanction of discharge on the nature of the offense, and not on the officer who had committed it.

In sum, the record, viewed in light of the seven Daugherty standards, will not support the sanction of immediate discharge for any of the major allegations contained in the August 24 charges.

The final issue is what, if any, discipline is appropriate. Wynimko, through the August 20 accident and his conduct following it, has committed conduct in which the City has a substantial disciplinary interest. That conduct, flowing from his refusal to promptly report the accident, through his refusal to call it to the attention of his shift supervisor, solely because he does not enjoy a good relationship with that supervisor, warrants an unpaid suspension from work.

It should be added that his conduct in using a CHRI check obtained with dubious authorization, under a fictitious name, on work time, constitutes something less than a ringing endorsement for his judgement. The Association attempts to portray this as a public-spirited act to clear up the nagging rumors regarding Grady's criminal record. At best, it can be said that Wynimko's personal distaste for Grady happened to coincide with an arguable public interest. 28/ The fact remains that Wynimko never sought to obtain the public information through recognized channels. Rather, he consistently used the authority of his position as the vehicle to reach his own ends. This is conduct, to the extent it involved an improperly obtained document accepted and used on work time, in which the City retains a disciplinary interest. However, the City's conduct in investigating and in asserting that interest minimizes and virtually extinguishes the extent of that interest. If the CHRI check could be meaningfully separated from the accident, the check and Wynimko's

28/ It should be noted that the record manifests a troublesome undercurrent that Wynimko's difficulty with Grady is racially motivated. The evidence will not support a definitive conclusion on this point.

meaningless responses to his involvement in it would warrant no more than a written reprimand. Because the events became known virtually simultaneously with the August 20 accident, those events must serve only to faintly underscore the basis for suspending Wynimko without pay.

AWARD

Joseph Wynimko did engage in some of the acts alleged in the Complaint filed by City of Bloomer Chief of Police Donald Grady on August 24, 1990.

None of the alleged acts, viewed alone or in any combination have been proven to be sufficiently egregious to give the City of Bloomer just cause to discharge Joseph Wynimko from his employment as a police officer for the City pursuant to the recommendation of Chief Grady.

The City may, as the penalty for Wynimko's failure to properly report the August 20, 1990, accident, and for his on duty use of a CHRI check which was run under a fictitious name and without any clear authorization, suspend Joseph Wynimko without pay for a period of time not to exceed five work days. The City shall amend Wynimko's personnel file to reflect only that discipline which is imposed consistently with the terms of this decision.

Dated at Madison, Wisconsin, this 20th day of May, 1991.

By _____
Richard B. McLaughlin, Arbitrator