BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
OCONTO CITY PROFESSIONAL POLICEMEN'S UNION LOCAL 778-C, AFSCME, AFL-CIO and CITY OF OCONTO	Case 37 No. 45447 MA-6603

Appearances:
Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1989-1990 collective bargaining agreement which calls for final and binding arbitration of certain disputes. The Union requested, with the concurrence of the City, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the dispute concerning the suspension of a police officer. The undersigned was appointed and held a hearing on July 18, 1991, in Oconto, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. The parties completed their briefing schedule on October 14, 1991.

ISSUE:

The parties stipulated that the following issue is to be decided:

> Did the City have just cause to suspend Mr. Van Hecke for eight days for his actions on May 20, May 23, and June 7, 1990? If not, what it the appropriate remedy?

The City raises an additional issue: Was the grievance appealed to arbitration in a timely manner under the collective bargaining agreement?

CONTRACT LANGUAGE:

ARTICLE III -- GRIEVANCE PROCEDURE

> Any difference of opinion or misunderstanding, which may arise between the Union and the City as to the meaning and application of this Agreement, shall be handled in the following manner:
>
> 1. The aggrieved employee shall present the grievance orally to his/her respective chief, either alone or accompanied by a representative of the Union.
> 2. If the grievance is not settled by the respective chief, the grievance shall be presented in writing to the Police and Fire Commission. The City shall, within seven (7) days of the receipt of such grievance, set up an informal meeting with designated representatives of the City, the aggrieved party, and representatives of the Union. Within seven (7) days after this meeting, a determination shall be made by the City and reduced to writing, and copies submitted to all parties involved.
>
> 3. The aggrieved party may, within five (5) days of

the receipt of the determination of the City, submit the grievance to an arbitrator. The arbitrator shall be selected by the Wisconsin Employment Relations Commission. The decision of the arbitrator shall be final and binding on all parties except for judicial review. The cost of arbitration shall be borne equally by the City and the Union.

4. The arbitrator shall have no power to add to, subtract from, or modify any of the provisions of this Agreement. He/she shall be authorized only to interpret the existing provisions of this Agreement and apply them to the specific grievance or dispute.

ARTICLE IV -- DISCIPLINARY PROCEDURE

Disciplinary and Discharge Procedure.

A) Disciplinary Action. It is the City's responsibility to offer and provide reasonable training and supervision and to establish reasonable work rules. Disciplinary action may only be imposed on an employee for failing to fulfill his/her responsibilities as an employee. Any disciplinary action or measure imposed upon an employee may be appealed through the regular grievance procedure.

If the City has sufficient reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public.

B) Just Cause Notification. Employees shall be not disciplined or discharged without just cause. If the City feels there is just cause for suspension or discharge, the employee and his/her steward shall be notified in writing within twenty-four (24) hours following the discharge or suspension that the employee has been discharged or suspended and the reasons therefor.

C) Procedure. The normal procedure for discipline and/or discharge shall include only the following:

a. Oral reprimand;
b. Written warning;
c. Suspension;
d. Discharge.

The number of written warnings and the length of suspensions shall be determined by the City in accordance with the gravity of the violations, misconduct, or dereliction involved, taking into consideration that such steps are intended as corrective measures. Warnings under "a" and "b" above shall only be valid for eighteen (18) months.

BACKGROUND:

The Grievant is Richard Van Hecke, a police officer with the City for 10 years. On June 9, 1990, 1/ Police Chief Oren Woodworth notified the Grievant that he was charged with conduct unbecoming an officer and was to be suspended for eight days. This grievance is about that suspension.

In December of 1989, the Police and Fire Commission voted to suspend Chief Woodworth for failing to take proper disciplinary action in the department. The suspension of the Chief was waived, but the PFC asked the Chief to take action with respect to the Grievant. The Chief had complaints that the Grievant was visiting a friend (apparently while on duty), and Chief talked to the Grievant, explaining that his own job was being jeopardized by the Grievant's behavior. The Chief described this conversation as a "man-to-man" talk, with the Grievant promising to be a "good Joe."

Jennifer Steier lives with her parents in the City and is employed at a local restaurant. On May 20th, she closed the restaurant about 10:00 p.m., and left it about 10:45 p.m. after clean up work. As she was going down the highway, she saw the Grievant motion her to stop. She did not stop but went home. The Grievant made a U-turn and followed her home and started talking to her. The Grievant asked her about David Saylor, an acquaintance of hers. She testified that the Grievant told her that he was on duty until 3:00 a.m. and that he wanted her to come with him to keep him company until he was done with his shift.

According to the Grievant, it was around 2:30 a.m. when he observed Jennifer 2/ and followed her to her house. He asked her about an incident with David Saylor because he was investigating an assault that had taken place across the street from the restaurant where Jennifer worked. He testified that he asked her whether another man, Dan Tappa, might have influence over the restaurant employees or try to intimidate them into not talking to police officers about the incident. According to the Grievant, Jennifer said they were all friends with Tappa and Saylor but that there was no influence on them. The Grievant testified that he did not ask Jennifer to go for a ride, but went back to the police department to file his paperwork and log, as he was getting off duty at 3:00 a.m. The Grievant recalls the time that he saw Jennifer as being 2:30 a.m. because he was heading into the police department and was in a rush to get there.

On May 23rd, Jennifer was working an early morning shift from 4:15 a.m. to 1:00 p.m. She testified that as she drove to work, a squad car followed her to the restaurant, and she saw the Grievant pull into a parking lot as she parked her car. She unlocked the doors of the restaurant, and the Grievant came in and she served him coffee.

The Grievant testified that he did not recall the incident on May 23rd, other than the fact that he has made it a practice to observe employees going into the restaurant if he were in the area, because he has been told by employees that it is "spooky" for them to go into the restaurant and open it up. The Grievant testified that he has done this for other employees at the restaurant, as well as for employees at another local restaurant.

On May 24th, Jennifer Steier signed the following statement and gave it to Chief Woodworth:

1/ All dates refer to the year 1990, unless otherwise stated.

2/ Ms. Steier's first name will be used in this Award to avoid confusion with the name of her mother, Shirley Steier.

> To Whom it May Concern:
>
> I've been having problems with Officer Richard VanHecke. For instance, on Sunday, May 20th, he motioned for me to stop. When I didn't, he made a U-turn in the middle of the Highway near Amores' gas station. He followed me home and pulled into the driveway. He claimed the stop was for business but then proceeded to ask me to go for a ride with him -- to keep him company.
>
> On the following Wednesday morning, May 23rd, I left home at 4:00 am to go to work. As I was leaving to go to work and pulled out on Pecor Street he was a block behind me as if he was waiting for me to go to work. He followed me to work, and before I got out of my car he had turned around and left.
>
> These are two of the major incidents that have happened in the last few days. I can't remember what has happened within the last month, but these are the most recent.

Jennifer let a friend, Chris Everard, borrow her car on the evening of June 6th. She wanted it back early the next morning, but when her car was not available, she got a ride to work. Everard came to the restaurant and told her the car was gone, and she reported it stolen to the police department. On the morning of June 7, Officer Thomas Shallow met with the Grievant at 5:50 a.m., and the Grievant informed Shallow that Jennifer's car had not been brought home, that it was not really reported as stolen, but that Shallow should keep an eye out for it. The missing car turned out to be a prank -- some people had hidden it in the woods. Jennifer let another friend, Ginny Monfort, use the car on the evening of June 7th.

Shirley Steier, Jennifer's mother, testified that in the middle of the night on June 7th -- or June 8th if it was after midnight 3/ -- Monfort pulled into her driveway with Jennifer's car and that a police car pulled in behind her and just sat there. Steier testified that she could not personally identify the officer in the car, but that Monfort told her it was the Grievant when Monfort came into the house. The Grievant testified that he did not spend 15 minutes in the Steiers' driveway on June 6, 7, 8, or any other night, and the only time he was in the driveway was on the evening of May 20th when he talked with Jennifer. At 12:40 a.m. on June 7th, the Grievant was involved in a chase of some suspects with Officer Richard Jacquart. Both officers logged the time of the chase as of 12:40 a.m. on June 7th.

In an undated letter, Shirley Steier signed the following note:

> On Thursday, June 7th, 12:30AM, Office VanHecke pulled into our drive way, right before this Ginny Monfort

---

3/ The date and time were given to Chief Woodworth as Thursday, June 7th, 12:30 a.m. A 1990 calendar shows that June 7th fell on a Thursday, and if the time were 12:30 a.m., the date should have been June 8th. Until the hearing in this case, the City assumed that June 7th was the correct date, and that the incident in Steier's complaint occurred about 1/2 hour after the end of the day on June 6th, or 12:30 a.m. June 7th.

> (who was staying at our place) had gotten home. She had just entered the house when the car pulled into the drive way. Ginny was driving my daughter Jennifer's car most of the night. Jennifer was home because she was sick. Officer VanHecke had remained in the driveway for approximately 15 minutes. When he left he pulled out on to Pecor Street. We were sitting at the kitchen table at the time as we just got home a little while before this.

The City has a published statement regarding the procedure for filing a complaint or accusation against a member of the police department. The procedure calls for the complainant to sign the complaint under oath in the presence of a notary public. The Chief testified that this was not done with the Steiers' complaints, because it has not been a practice to follow that procedure. When Jennifer came to the Chief's office on May 24th and made a verbal complaint, he asked her to put it in the form of a statement. When Shirley Steier called him by phone with her complaint, he directed her to write a statement.

On June 9th, Chief Woodworth sent the Grievant the following:

> You have been charged with conduct unbecoming an officer.
>
> I have recent complaints which have took place on May 20th and again on June 6th 1990.
>
> You have had a verbal and written warnings 4/ in the past. Therefore I have no choice, but to suspend you without pay for the next eight working days, which are June 14-15-16-17-22-23-24-25.
>
> If you wish to appeal this it must be done before June 14th. It must be turned in to me or the President of the Commission in writing, requesting a hearing with the Commission.

The Chief considered the complaints from the Steiers to be police harassment, a matter more serious than a departmental incident such as officers spending too much time at their homes. He determined that an eight-day suspension would be appropriate based on a four-day work period; in other words, it was a two-week suspension, or eight days total. The Chief also testified that the suspension was based in part on a mistaken belief that all prior discipline remained in the personnel file.

The Chief testified that he always investigates complaints like the kind from the Steiers, and in this case, he discussed it with other officers and asked them if they knew of anything going on between the Grievant and Jennifer. He found no further evidence relating to the events of May 20th when the Grievant talked with Jennifer at her home. The Chief did not talk to the Grievant about the incidents.

The Grievant did not serve the suspended time between June 14 and June 25 as stated in the Chief's June 9th letter to him. The Grievant filed a grievance on June 9th, and on June 13th, the Grievant made a request to the Chief and the PFC for a hearing in the matter. The grievance was presented to the PFC on June 19th and the PFC denied the grievance in a letter to the Grievant dated June 21st.

The Union appealed to the WERC for arbitration and dated its request to initiate arbitration as July 5th. The letter with the request for arbitration addressed to Ron Hayes, Chairman of the PFC, is postmarked July 9th and was received on July 13th. The WERC received the same form, the request to initiate arbitration, on July 11th. On July 17th, City Clerk Linda Belongia wrote to Attorney Dennis Rader asking for his opinion on the time limit for requesting a hearing.

There was a concurrent petition for a hearing under Sec. 62.13, Stats. On September 11, the Grievant notified the City that he did not request a hearing under Sec. 62.13(5), Stats. On September 13, Chief Woodworth notified the Grievant that since he declined to have a hearing, he would be suspended for eight working days between September 13 and September 28.

In its bargaining proposals for a 1989-90 contract, the City proposed to

---

4/ During the hearing, the Chief stated that he was mistaken about written warnings being in the Grievant's record within the prior 18 months.

the Union that Article IV be changed to read: "Employees shall not be disciplined without just cause." The City further proposed that a new subsection D be added to state: "Suspension and discharge shall be governed by the provisions of Wisconsin Statutes, Section 62.13." The City continued to make this proposal into a final offer in an interest/arbitration petition to a WERC investigator. In its final offer, the Union included language in Article V dealing with hours of work, and the City filed a declaratory ruling asking that the WERC find that the City was not under a duty to bargain or proceed to arbitration on the subject of work shifts, the language in the Union's final offer on Article V. The dispute over that language was resolved by a subsequent change in the law related to hours of work.

On September 20, 1990, the City again petitioned the WERC for a declaratory ruling regarding the duty to proceed to grievance arbitration with respect to the grievance procedure and the disciplinary procedure (Article IV). On October 1, 1990, the WERC General Counsel advised the parties that a jurisdictional basis upon which the City was proceeding needed to be clarified, and that the Commission's exercise of jurisdiction over Sec. 227.41, Stats., petitions is discretionary. The Union filed a prohibited practice with the WERC due to the City's refusal to proceed to grievance arbitration. As of February 11, 1991, the City noted that the Union could withdraw its prohibited practice complaint with the understanding that the City would proceed to arbitration on the Grievant's discipline matter.

The Chief testified that there was considerable confusion over whether the parties were proceeding with an arbitration hearing or whether they were using procedures established by Sec. 62.13, Wis. Stats.

THE PARTIES' POSITIONS:

The City:

The City argues that the issue is not arbitrable because it was not filed in a timely manner and that the Arbitrator is without jurisdiction over this grievance. The City made its determination on June 21st, and the Union did not file for arbitration until July 9th at the earliest, which is well outside the five-day window of time allowed under the collective bargaining agreement. The City's concurrent pursuit of a declaratory ruling has no procedural bearing on the Union's obligation to file its grievance. The Union's speculation that the City had no intention of going to arbitration in a timely manner is flawed logic, as the City's objection to arbitration does not relieve the grievants of their responsibility to comply with the procedural deadlines.

The Union made a strategic choice to arbitrate the issue rather than proceed to a hearing under Sec. 62.13, Stats. The Union sought legal advice and looked at two options. One would be to proceed to the Sec. 62.13 proceeding, get a decision from the PFC, and be left with an appeal to circuit court which would have limited review of the case. The other option would be to withdraw the request for a Sec. 62.13 hearing and go to arbitration. The Grievant was not stuck with a lack of a remedy after the untimely grievance filing, but after consultation with Union counsel, the Union chose to risk arbitration rather than take a chance on the limited review of the PFC's decision under Sec. 62.13(5)(i).

The City contends that it has not waived its right to strict compliance with the terms of the contract. It raised the issue of timeliness as early as July 17th, a week after the filing of the grievance. The time limitations of the grievance procedure reflect an equitable compromise among competing policies. The contract seeks to preserve a grievant's opportunity to obtain arbitral review of a claim and to accommodate an employer's need to finality

and certainty in the administration of discipline.

In this case, a waiver of the filing deadline would be unjust, the City asserts, because time operates as a retrospective 18-month constraint upon the employer's ability to introduce evidence of prior misconduct on the part of the Grievant. Thus, the City should also be able to rely on the time limitations for filing grievances. If the Union would disregard the 18-month constraint on the admissibility of prior misconduct, the City would gladly drop its objection on the arbitrability issue. To stretch the time frame set forth for arbitration but to hold the City to the 18-month requirement would be unfair and selective injustice.

Turning to the merits, the City notes that police officers by trade are held to a higher standard of conduct than other citizens. The Grievant was expected to rise to a higher standard of conduct and not allow his personal amorous pursuits threaten Jennifer Steier by following her around in a squad car. This conduct warranted the eight-day suspension. The contract's progression of disciplinary sanctions does not apply to all disciplinary instances, and the Grievant's behavior was in clear violation of departmental rules, regulations, and policies. Article III, Section C, Paragraph 1 of the Department's policy manual refers to obsessive, unwarranted or unjustified conduct, and the Grievant's actions toward Jennifer Steier were obsessive, unwarranted and unjustified.

The Grievant's conduct occurred while on duty and while using a departmental squad car, which makes his indiscretions more troubling, the City states. The offer of a ride to Jennifer was in violation of department policies. When the Grievant's surveillance recurred and was reported, the Chief chose to send a strong disciplinary message to him. The City argues that the Grievant's harassment of Jennifer came less than seven months after he was verbally warned about harassing a female citizen. During the December 1989 warning, the Grievant promised that his behavior would improve. However, the May 1990 incidents are similar to the matter discussed in the December 1989 meeting, and the Grievant is a very slow learner.

In response to the Union's claim that it informed the PFC on June 19, 1990, that it intended to go to arbitration, the City asserts that the critical issue is not whether the Union notified the PFC of its intent to arbitrate, but whether the grievance was submitted to arbitration in a timely manner. The Union's complaint that it was forced to spend time and effort to determine the relationship between the statutes is immaterial, as is the bargaining history of the proposed language which was dropped. The City is forced to live up to the letter of the contract with respect to the use of information in the personnel file beyond the 18 month restriction, and if the Union is not held to the time requirements for filing for arbitration, the City would like a similar bending of the language of the 18 month restriction.

The Union:

The Union's brief focused only on the arbitrability issue, stating that it would not deal with the merits of the suspension as there are none. The Union points out that Article III, Section 1, has no time limits for presenting a grievance, and Section 2 talks about setting up an informal meeting between the parties. However, when the Chief issued his letter of suspension to the Grievant, he informed the Grievant that an appeal must be turned in to either the Chief or the President of the PFC before June 14th. This was the first indication the Union had that the City was preparing an argument involving Sec. 62.13, Stats. On June 13, the Grievant requested a Sec. 62.13 hearing and filed a grievance the following day.

During a grievance meeting with the PFC, the Union informed the Commission that it intended to proceed to arbitration over the suspension of the Grievant. When the Union asked the City if it intended to arbitrate or to engage in a legal battle over the relationship between Sec. 62.13 and Sec. 111.70, the City Attorney did not state the City's position on this matter. Consequently, the Union spent considerable time and effort to determine the relationship between the statutes, as an appeal in one forum would preclude appeal in the other. The Union asserts that it had good cause to be concerned that the City would refuse to arbitrate, as the City proposed that the labor contract be amended to reflect that suspensions and discharges would be governed by Sec. 62.13. Although all issues in the bargain were resolved by mutual agreement, the City Attorney was not able to commit the City to honoring its agreement when asked about proceeding to arbitration.

The Union states that it filed for arbitration on July 5, as it indicated in the June 19th meeting that it would. The Union has recently elected a new president who believed that the staff representative of AFSCME would file for arbitration, while the staff representative thought that the local president would do it. The initiation of arbitration was still a month before the Grievant's actual suspension. Then on September 20, the City filed a declaratory ruling with the WERC over the conflict with Sec. 62.13 and Articles III and IV of the bargaining agreement. The Union contends that while the City feels that the Union must live up to the letter of the bargaining agreement, the City is not required to live up to the agreement at all. After the Union filed a prohibited practice petition against the City for failure to arbitrate, the City settled the complaint by agreeing to submit the grievances to arbitration.

The Union calls the City's position the essence of hypocrisy, as the Union informed the City of its intent to arbitrate and submitted the grievance to arbitration over a month before his suspension, while the City signed the labor contract which it had no intention of honoring with respect to arbitration of suspensions and discharges. After agreeing to arbitrate in order to settle the prohibited practice complaint (some five months after refusing to abide by Article III which the City claims that Union must honor without delay), the City arrived at the hearing with the timeliness issue. The Union asserts that it is understandable that the City would be reduced to this argument, given the City's failure to produce a case based on the merits of the suspension. However, given the timely notice of intent to arbitrate and the City's agreement to arbitrate, the grievance should be decided on the merits.

The Union responds to the City by pointing out that the Chief was under threat of suspension unless he disciplined the Grievant, that there was no investigation by the Chief of the Steiers' allegations, and that the City did not follow its own procedures in taking statements from them. The verbal warning was not reduced to writing, and was for watching football games while on duty. The Union notes that the City does not know the date of the alleged incident that Shirley Steier testified to, or who was in the car, and it asserts that the evidence and investigation of the City do not meet the requirements of just cause. Regarding the timeliness issue, the Union finds the City's argument regarding the 18 month limitation unrelated to the timeliness argument, and the City refused to process the grievance to arbitration before it made its allegations of a timeliness failure on the Union's part.

DISCUSSION:

Procedural Arbitrability:

Both parties have made arguments that are somewhat irrelevant in

determining the issue of arbitrability and whether the Union's appeal to arbitration was untimely. For example, the confusion over whether the parties were proceeding to appeal the suspension of the Grievant under state law, Sec. 62.13, Stats., or proceeding to arbitration is irrelevant where the parties' collective bargaining agreement clearly states in Article IV, Section A, that "Any disciplinary action or measure imposed upon an employee may be appealed through the regular grievance procedure." The Union, while fearful that the City would protest an arbitration proceeding, had no reason not to follow the contract. The labor contract was in place and the Union could have and should have continued to follow it, rather than wait for the City to fail to follow it.

The City, however, would have the Union proceed with a perfect appeal to arbitration before the suspension was ever served. The Chief sent the Grievant a notice on June 9th stating that he would be suspended from June 14th through the 25th, and that an appeal to the PFC must be turned in to the President of the PFC before June 14th. However, the Grievant never served the suspension in June as stated in the June 9th letter. The Grievant filed a grievance and asked for a hearing in the matter. The grievance was presented at the June 19th meeting of the PFC, and denied on the 21st. Then the paper trail stops, up until September 11th, when the Grievant stated in writing that he did not request a hearing under Sec. 62.13(5), Stats., and that he understood the June 21st decision of the PFC denying his grievance to be on appeal to the WERC pursuant to the collective bargaining agreement. Two days later, on September 13th, the Chief replied as this: "Since you declined not to have a hearing, you will be suspended as was explained in the June 9th letter. You will be suspended for eight working days, starting September 13th-18-19-20-21-26-27-28th."

The record shows that the Chief did not suspend the Grievant in June as originally planned because he filed a grievance. The Chief also stated that there was considerable confusion over whether the parties were going to proceed to arbitration or go through a hearing under Sec. 62.13. When the Grievant declined a hearing under Sec. 62.13, the Chief imposed the suspension which was served in September. The appeal to arbitration was made by the WERC by July 11th.

Thus, the City apparently held the disciplinary action in abeyance pending a decision on whether or not the parties were proceeding to a Sec. 62.13 hearing. As stated in Elkouri & Elkouri, How Arbitration Works, 3rd Edition, page 151:

> A party sometimes announces its intention to do a given act but does not do or culminate the act until a later date. Similarly, a party may do an act whose adverse effect upon another does not result until a later date. In some such situations arbitrators have held that the "occurrence" for purposes of applying time limits is at the later date.

The Chief or the PFC could have, at any time between June and September, revoked the disciplinary action which had not been served. There is no logical reason that the Union would have to complete the process of Article III, Section 3, the appeal to arbitration, during a time when it had no knowledge when and if the suspension would be served. The contract refers to the "aggrieved employee" and the "aggrieved party" in Article III. The City would have the Union submit its appeal within five days from June 21st, the date the PFC denied the grievance. However, there was no determination of when the suspension was to be served, and with the matter held in abeyance for nearly two months, the employee involved was not yet "aggrieved" as he has suffered no

discipline until September. The grievance process is often started upon the notice of the intention to discipline, with hopes that discussions at the early steps of the procedure may resolve the matter. With the suspension held in abeyance, there was no disciplinary action imposed which to grieve. Thus, the Union cannot be held to be untimely in its appeal to arbitration where it filed for arbitration long before the disciplinary action was actually imposed. If anything, the appeal was premature.

Accordingly, I find that the appeal to arbitration was timely.

The Merits:

The City must have just cause to discipline, under Article IV, Section B. The allegations against the Grievant are for police harassment, a serious matter which, if proven, would warrant serious disciplinary action. However, the record in this case falls far short of demonstrating that the Grievant harassed anyone or that City had just cause for discipline.

The City states that the Grievant had been warned in December of 1989 for a similar matter, that the Grievant was verbally warned at that time about harassing a female citizen. The record does not bear this out. The Chief first testified that officers were spending more time at home than they should, and the PFC asked him to take action with respect to the Grievant. When asked what situation he was addressing when he spoke with the Grievant in December of 1989, the Chief replied: "I'm going to say that it was with a lady friend that he had which I had complaints where he was visiting her in the Abrams area." (TR-13.) That statement does not indicate that the Grievant was harassing a female citizen. The City was aware of concerns that officers were spending too much time at home, and the complaints regarding the Grievant that he was visiting a "lady friend." There is no indication that the woman the Grievant was visiting felt harassed.

However, the two-week suspension would be justified without prior disciplinary steps if the City could prove that the Grievant was harassing Jennifer Steier as alleged. The only thing the City is able to prove is that the Grievant had a conversation with Jennifer on the night of May 20th, during which the Grievant asked Jennifer about Saylor, an acquaintance of hers. The record fails to confirm that the Grievant asked Jennifer to ride around with him in the squad car. If he did, the matter is serious, as the City indicates. But this single allegation need some substantiation, which is lacking here. The record does not show that the Grievant was harassing Jennifer at any other time, such as the incident on May 23rd or June 8th. The City makes a leap of faith to find harassment on May 23rd and presumes that an officer's presence in the area of a restaurant as an employee opens the restaurant in the dark early morning hours is more harassment than reassurance. The Arbitrator is not prepared to make the same leap of faith without better evidence. The incident reported by Shirley Steier that occurred on June 8th must be disregarded, as Steier's testimony that the Grievant sat in her driveway relies on hearsay evidence.

An important element of the just cause standard is that a grievant be given rudimentary elements of due process. The City knows what just cause and due process mean -- it established an orderly procedure (Union Ex. #23) to see that employees of the Police Department are afforded the rights of just cause and due process, and then proceeded to ignore all of its own procedures.

Most damaging to the City's case is the fact that once the Steiers made their complaints to the Chief, there was little or no investigation of facts which would either substantiate or negate those complaints. The Chief asked other officers if they knew of anything going on between the Grievant and Jennifer, but the Chief did not ask the Grievant about the complaints made

against him.

The City's lack of investigation is shown by the fact that until the day of the hearing in this matter, the City thought that Shirley Steier's complaint was for conduct on the evening of June 6th and into the early morning hours of June 7th, when in reality, the date was 12:30 a.m. on June 8th. Even a cursory investigation would have turned up this discrepancy well into the grievance process, and yet the grievance proceeded with incorrect information. The first time the Union had notice of the different date of June 8th was during testimony at the arbitration hearing. The Union attempted to investigate the facts based on the information the City gave to it, that the driveway incident occurred on June 7th.

Another troubling matter in the investigation is the reliance on hearsay evidence. Shirley Steier never saw the Grievant parked in her driveway in a squad car -- she testified the Monfort told her that the person Monfort saw was the Grievant. This is classic hearsay evidence and must be disregarded. Given the lack of investigation, it is possible that the City did not realize that Steier never saw the Grievant, as this matter, along with the matter of the confused dates, appears to have been clarified for the first time during the arbitration hearing. However, it was up to the City to investigate the facts in the first place before bringing serious charges against an employee.

The charges against this police officer -- harassing a female citizen -- are most serious. If proven, the charges would warrant the discipline imposed. If anything, the City should have gone the extra mile to make certain its information was correct and that the charges had merit before bringing them. Instead, the City hardly took the first step. It's lack of investigation is somewhat shocking. One assumes that trained police departments know about something about investigations. But here, they ask a couple of officers if anything was going on, and finding no other information, bring charges against an officer, based partly on inadmissible hearsay evidence, unsworn statements, incorrect dates, as well as a mistaken belief that prior discipline remained on the record.

The City's case is also based partly on innuendo and conjecture. For example, the Chief alluded to something in the past in order to justify the two-week suspension. The Chief stated at hearing: "I based it on the prior relationship he had with another lady, and I felt as though this was starting all over again and with another young lady, and I just didn't want it to take place, so I felt -- that's the grounds I suspended him on." (TR - 32.) The City hints in its briefs that the Grievant has engaged in prior misconduct outside of the 18-month limitation period for disciplinary actions to remain in the record, and that if the Union were to allow such information into the record, the City would gladly drop its timeliness argument. The Arbitrator will not engage in speculation and innuendo, but will only rely on the facts before her. Those facts fail to show any evidence of wrongdoing or misconduct on the part of the Grievant.

The only way the record demonstrates any evidence of wrongdoing is for one to believe both Jennifer and Shirley Steier completely, and to disregard all other evidence. The Arbitrator cannot do this for the following reasons. Jennifer's complaint and her testimony show certain elements of weakness. For example, her complaint dated May 24th indicates that she had other problems with the Grievant in the last month, but she can only remember the incident of May 20th and May 23rd. Even the Chief noted that it would have been helpful if she could remember dates and times but that she could not. The complaint drafted by Jennifer does not tell the whole story, either. During her testimony, she admitted that the Grievant was questioning her about Saylor, although she made no mention of that in her written complaint. Jennifer could

not place the time of the conversation very well, and she and the Grievant differ on the time of the night by a few hours. The Grievant's testimony regarding the time was more detailed, as was his testimony regarding the conversation. Also, Jennifer's written complaint regarding the May 23rd incident failed to note, as later indicated by her testimony, that the Grievant came into the restaurant after she opened it and she served him coffee. The Chief found it odd that Mrs. Steier reported that the Grievant sat in her driveway for about 15 minutes but that she never went out to ask him what he was doing there. The Steiers' complaints have too many missing pieces, and the City's weak investigation of those complaints does not fill in the pieces.

Thus, the Arbitrator concludes that the City has failed to demonstrate that it had just cause to suspend the Grievant. The appropriate remedy is for the City to remove the suspension from his personnel record and to restore to him any loss of wages and benefits associated with the suspension.

AWARD

The grievance is sustained.

The grievance was appealed to arbitration in a timely manner, and the City did not have just cause to suspend Mr. Van Hecke for eight days for his actions on May 20, May 23, and June 7, 1990. The City is ordered to immediately remove the suspension from Mr. Van Hecke's personnel record and to restore to him any loss of wages and benefits associated with the suspension.

Dated at Madison, Wisconsin this 6th day of December, 1991.

By _____
Karen J. Mawhinney, Arbitrator