BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SOUTH MILWAUKEE PROFESSIONAL POLICE ASSOCIATION	Case 71 No. 46820 MA-7078
and	
CITY OF SOUTH MILWAUKEE (POLICE DEPARTMENT)	

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, appearing on behalf of the Association.

Mr. Joseph G. Murphy, City Attorney, City of South Milwaukee, 1334 Milwaukee Avenue, P.O. Box 308, South Milwaukee, Wisconsin 53172, appearing on behalf of the City.

ARBITRATION AWARD

The South Milwaukee Professional Police Association, hereafter the Association, and the City of South Milwaukee, hereafter the City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association, with the concurrence of the City, requested the Wisconsin Employment Relations Commission, hereafter the Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On January 22, 1992, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held in South Milwaukee, Wisconsin on June 4, 1992. The record was initially closed on May 20, 1992, reopened on May 27, 1992, and closed on June 4, 1992.

ISSUE:

At hearing, the Association framed the issue as follows:

> Did the Employer violate the contract by refusing to comply with the mandates of Section 15.05?
>
> If so, what is the appropriate remedy?

In written argument, the Association framed the issue as follows:

> Did the City violate the Collective Bargaining Agreement by refusing to participate in negotiations regarding the change in the seat belt policy by adding a mandatory two day suspension without pay and, after the parties were not able to come to a voluntary solution to the change in the policy, did the employer violate the terms of the Collective Bargaining Agreement by refusing to participate in the interest arbitration process pursuant to 111.77 Wisconsin Statutes as set forth in the Collective Bargaining Agreement?

The City, which did not frame an issue at hearing, framed the following issue in written argument:

Did the City of South Milwaukee violate the collective bargaining agreement between the parties by refusing to negotiate a penalty for a violation of a longstanding departmental policy pertaining to the use of seat belts?

The undersigned frames the issue as follows:

Did the Employer violate Section 15.05 of the collective bargaining agreement when the Chief of Police issued a roll-call report advising all Officers that anyone driving a SMPD vehicle without using seat belts faces a mandatory two day suspension without pay?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE XIV - GRIEVANCE PROCEDURE

Section 14.01 - Matters Subject to Grievance Procedures: Only matters involving interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below. Should differences arise between the Municipality and the Association or any employee, an earnest effort shall be made to settle such differences promptly at the lowest step. Matters pertaining to discharge and disciplinary action imposing suspension of time or wages pursuant to 62.13, Wis. Statutes are excluded from the grievance procedure and the employee who is disciplined may appeal the discipline through the City of South Milwaukee Police and Fire Commission pursuant to Section 62.13 of the Wisconsin Statutes. Provided, however, if the Police and fire Commission refuses to hear an appeal of a written reprimand such reprimand shall be grievable.

ARTICLE XV - EMPLOYEE RIGHTS

. . .

Section 15.05 - Department Rules, Regulations, Policies and Procedures: The Association recognizes the employers (sic) right to promulgate reasonable rules and regulations from time to time. However, any changes in the rules and regulations as presented in the Departmental General Order 88-5 entitled "General Rules of Conduct" or any changes in the policies and procedures as presented in the Department General Orders Manual pertaining to wages, hours and conditions of employment which are mandatorily bargainable shall be transmitted to the Association in writing and the impact thereof shall be subject to negotiations between the parties. When negotiations are required, this Agreement shall be amended or modified to incorporate the agreement(s) reached in said negotiations.

If said negotiations result in an impasse, the impasse shall be resolved pursuant to provisions of

Section 111.77 Wisconsin Statutes.

BACKGROUND

On August 1, 1984, the South Milwaukee Police Department adopted Department General Order 88-4, which provided, in part, as follows:

> II. Use of Seat Belts
>
> a. Officers are required to utilize seat belts when operating any emergency vehicle, in accordance with the provisions of the Wisconsin Statute, 347.48(2m).

The roll call report dated May 7, 1991, contained the following:

> 3. Attn. All: Per Wisconsin State Law and SMPD Policy, seat belt use is mandatory. As of now, anyone driving an SMPD vehicle without using seat belts faces a mandatory two day suspension without pay.

In a letter dated May 9, 1991, Association Representative Patrick Coraggio advised Police Chief Erick Slamka of the following:

> It is my understanding that on Tuesday, May 7, 1991, you issued a memorandum to all members of the Association in regards to seat belt usage. It is further my understanding that you have advised the members of the Association that if they are observed not using their seat belt they will face a mandatory two day suspension without pay. Please be advised that the Association does not agree with your mandatory suspension policy of two days loss of pay. A clarification is needed of whether or not this is a new policy, rule, or regula-tion. The Association takes the position that this is a mandatory subject of bargaining and can not (sic) be implemented without going through the negotiation process.

In a letter dated May 18, 1991, Chief Slamka advised Association Representative Patrick Coraggio of the following:

> In response to your May 9th letter regarding seat belt usage by members of the South Milwaukee Police Department, allow me to clarify the communication you refer to.
>
> There was not a memorandum issued, rather a notation was made for roll call by Lt. Danek, at my direction, to remind all members of the department of the current policy and state law requiring seat belt usage, and to further inform all members that noted violations would result in a two day unpaid suspension.
>
> No reference was made to any change in the existing policies, rules or requirements of the appropriate state statutes. The purpose of the notice was simply to serve as a reminder to follow safety procedures and a warning of the consequences should violations occur.

In a letter dated June 17, 1991, Association Representative Coraggio advised Chief Slamka of the following:

> As of this date I have not heard from you regarding the seat belt issue. In order to clear the air and put this in the proper prospective, the Association would like to have you advise us whether or not this rule regarding seat belt usage and the two day suspension is a rule that you have promulgated. Furthermore, the Association would like to know whether or not after the correspondence that has gone back and forth, you are still looking at a two day suspension as a penalty. The Association has not and is not prepared to accept this type of a rule with such a severe penalty. Your prompt attention to this matter in clarifying the issue will be greatly appreciated.

In a letter dated July 1, 1991, Association Representative Coraggio advised Employer Representative Karen Sostarich of the following:

> There have been several pieces of correspondence that have gone back and forth between the Chief of Police and the undersigned regarding seat belts. On June 17, 1991, I sent the Chief a certified letter asking him to respond to the Association membership as to whether or not the directive that was put out by him regarding seat belts constituted a rule that was in effect. As of this date I have not had a response from the Chief of Police. Therefore, I respectfully request that you look into this matter and provide the undersigned with an answer. Enclosed is a copy of the June 17th letter.
>
> Your prompt attention to this matter in clarifying the issue will be greatly appreciated. Thank you in advance for your cooperation.

In a letter dated July 17, 1992, Employer Representative Sostarich advised Association Representative Coraggio of the following:

> I received your letter regarding the seat belt issue and due to vacations it has taken me this long to be able to get back in touch with you. Please accept my apology for the delay.
>
> I have reviewed the correspondence between Chief Slamka and yourself, letters dated May 18, May 21, and June 17, 1991. My understanding is that Chief Slamka responded to your initial request for clarification. The corres-pondence from Chief Slamka dated May 18, 1991 seems to respond to the concerns you may have.

In a letter dated July 22, 1992, Association Representative Coraggio advised the City's Mayor, Chester Grobschmidt, of the following:

> Enclosed you will find copies of letters dated May 18, May 21, June 17, and July 17. As you will determine by reading the letters, the Chief of Police indicated in a log book that officers had to wear a seat belt or would be suspended for two days. The Chief of Police has never provided the undersigned, nor has he answered the question, as to whether or not this is a new rule and regulation that he has promulgated. On July 19th I

> received a letter from Karen Sostarich, who does not clear the air on the question either. Therefore, the Association has no alternative but to assume that the entry in the day book is a new rule that the Chief of Police has promulgated and as such, the Association is not in agreement with the rule and believes it is an unreasonable exercise of management rights. Pursuant to Article XV, Section 15.05 - Department Rules, Regulations, Policies, and Procedures, the Association hereby makes a demand to bargain. This is a separate and distinct demand to bargain from contract negotiations and it is related to the rule on seat belt usage. It is also my opinion that the Chief of Police has violated the terms of this section which reads in pertinent part, "However, any changes in the rules and regulations as presented in the Department General Order 88-5 entitled 'General Rules of Conduct', or any changes in the policies and procedures as presented in the Department General Orders manual pertaining to wages, hours, and conditions of employment which are mandatorily bargainable, shall be transmitted to the Association in writing and the impact thereof, shall be subject to negotiations between the parties." As of this date nothing has been transmitted to the undersigned in writing even though a request has been made of both the Chief of Police and Karen Sostarich.
>
> Accordingly please have your representative contact the undersigned so that we can commence bargaining on this issue pursuant to the Association's rights under Section 15.05.

Thereafter, Association Representative Coraggio was advised that the seat belt issue had been referred to City Attorney Joseph G. Murphy and that all further correspondence should be directed to Attorney Murphy. In a letter dated October 2, 1991, Association Representative Coraggio advised Attorney Murphy of the following:

> I have been advised by Karen B. Sostarich, Chairperson for Wages, Salaries and Welfare Committee for the City of South Milwaukee that the issue of the Chief of Police promulgating a rule pertaining to seat belt usage has been turned over to you and that all further correspondence on this matter should be referred to your office.
>
> Some time ago, it was brought to the attention of the Association that the chief of Police had issued a rule regarding the use of seat belts, and had added a penalty section to the rule. It is unknown when the Chief of Police instituted this rule or established the penalty section. However, Article XV, Section 15.05 of the Collective Bargaining Agreement in full force and effect reads as follows:
>
> > "The Association recognizes the employers right to promulgate reasonable rules and regulations from time to time. However, any changes in the rules and regulations as presented in the Departmental General Order 88-5 entitled "General Rules of Conduct" or any changes in the policies

> and procedures as presented in the Department General Orders Manual pertaining to wags, hours and conditions of employment which are manda-torily bargainable shall be transmitted to the Association in writing and the impact thereof shall be subject to negotiations between the parties. When negotiations are required, this Agreement shall be amended or modified to incorporate the agreement(s) reached in said negotiations.
>
> If said negotiations result in an impasse, the impasse shall be resolved pursuant to provisions of Section 111.77 Wisconsin Statutes."

> Accordingly, the Chief of Police has never provided The Association with a copy of the rule and after several requests, the City has refused to go to the bargaining table to negotiate on the rule pursuant to the mandates of Section 15.05 of the Collective Bargaining Agreement. Therefore, The Association is making one final request to negotiate on this rule and respectfully request to be provided with a copy of same. If I do not hear from you by October 11, 1991, The Association will have no alternative but to file for final and binding arbitration.

In a letter dated October 29, 1992, Attorney Murphy advised Association Representative Coraggio of the following:

> You have your facts wrong. Attached hereto you will find a copy of the Department general order 88-4, which was issued back in August of 1984, wherein the Department issued a rule making use of seatbelts (sic) mandatory.
>
> There was no change in this policy. The only thing that occurred this year was the Chief advised the Officers that in the event he found them violating this policy, he intended to impose a two-day suspension. Since the Chief's disciplinary decisions are not subject to negotiation, there is no reason to negotiate any aspect of this matter. After reviewing this material if you believe that there has been a violation of the contract, please pursue the remedy that you believe the contract gives you. This matter is not open to negotiation at this time.

Thereafter, the Association filed with the Wisconsin Employment Relations Commission a Petition for Final and Binding Arbitration on the "seat belt policy and discipline imposed for non-compliance". In a letter dated December 17, 1991, Commission Investigator David Shaw advised the parties of the following:

> Based upon the conference call of December 16, 1991, it is my understanding that the City of South Milwaukee does not agree to participate in the petition for interest-arbitration filed by the Association at this time and that there is a dispute at this point as to the City's legal and/or contractual duty to do so. Therefore, I will hold the instant MIA petition in abeyance pending a resolution of the dispute as to the City's obligations in that regard and/or notification that the petition is withdrawn or that the parties agree to proceed on the petition.
>
> If you have any questions, feel free to contact me.

On December 28, 1991, the Association filed grievance No. 91-105 alleging that the City violated the collective bargaining agreement by refusing to participate in negotiations pursuant to 111.77 Wisconsin Statutes when it unilaterally changed the policy of the use of seat belts and provided a mandatory punishment for not using a seat belt. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Association

The Chief of Police changed the seat belt policy as set forth in the Department's General Orders by imposing a mandatory two day suspension without pay for being observed without wearing a seat belt. This change triggered a Section 15.05 obligation on the part of the Employer to engage in negotiations regarding the change in policy.

The Employer's claim that the change relates to discipline and, therefore the City has no obligation to engage in collective bargaining, is without merit. The language relied upon by the Employer, Section 14.01, is not applicable because the grievance is not about discipline, but rather, is about a change in policy.

The Employer, by its own admission, has refused to engage in negotiations regarding the change in policy. Section 15.05 is clear and unambiguous and must be given effect herein.

The Employer has violated the terms of this agreement in that it did not submit a written change in the policy to the Association's recognized collective bargaining representative; refused to negotiate on the change in the policy; and refused to resolve the dispute by participating in the interest arbitration process. The grievance must be sustained.

City

The role call notice did not constitute a change in policy or procedure of the permanent manual of rules. The role call notice was intended to remind officers of the existence of the seat belt policy, which had been in effect from August of 1984 and the admonition that violators of this policy would be subject to a two day suspension without pay. The roll call notice did not constitute any change which required negotiations pursuant to Section 15.05 of the contract.

Section 15.05 refers to "Department General Orders Manual." The general orders in this manual are formally drafted and reviewed prior to being placed in the manual. The role call memo was not a general order and did not modify any general order. Such a conclusion is consistent with a recent arbitration award of Arbitrator Jane Buffett.

Section 14.01 specifically exempts all disciplinary matters from the contractual grievance procedure. Arbitrator Jane Buffett has interpreted the same contract involved in this dispute and ruled that matters pertaining to discipline are not arbitrable by virtue of Section 14.01 of the contract.

The penalty to be imposed for violation of rules and procedures is not a mandatory subject of bargaining. Discipline covered by Section 62.13, Wisconsin Statutes, is not only not mandatorily bargainable, but also its negotiation in contravention of the Statute is prohibited by the doctrine of statutory preemption. Under Section 62.13, the Police Chief's disciplinary decisions are reviewable only by the Board of Police and by their Commission. The City has not violated the collective bargaining agreement.

DISCUSSION

Departmental General Order 88-4 became effective on August 1, 1984 and provides as follows:

> II. Use of Seat Belts
>
> a. Officers are required to utilize seat belts when operating any emergency vehicle, in accordance with the provisions of the Wisconsin Statute, 347.48(2m).

The roll call report dated May 7, 1991, which precipitated this grievance, contained the following:

> 3. Attn. All: Per Wisconsin State Law and SMPD Policy, seat belt use is mandatory. As of now, anyone driving an SMPD vehicle without using seat belts faces a mandatory two day suspension without pay.

The Association, contrary to the Employer, argues that the Employer violated Section 15.05 of the collective bargaining agreement when it issued the roll call report of May 7, 1991. Section 15.05 recognizes that the Employer has the right to "to promulgate reasonable rules and regulations from time to time." When these "rules and regulations" involve a change in the "rules and regulations as presented in the Departmental General Order 88-5 or any changes in the policies and procedures as presented in the Department General Orders Manual pertaining to wages, hours and conditions of employment which are mandatorily bargainable", then the Employer has a Section 15.05 duty to transmit the change to the Association in writing and to bargain the impact of the same. If such bargaining produces an impasse, then the Employer has a Section 15.05 duty to resolve the impasse pursuant to the provisions of Section 111.77, Wis. Stats.

The portion of the roll call report of May 7, 1991 which states "Per Wisconsin State Law and SMPD Policy, seat belt use is mandatory." does not modify General Order 88-4, but rather, reflects the content of General Order 88-4. It is true that General Order 88-4 does not contain the sentence "As of now, anyone driving an SMPD vehicle without using seat belts faces a mandatory two day suspension without pay." Nor does General Order 88-4 contain any penalty for violating General Order 88-4.

It is not reasonable to conclude that the absence of a denominated penalty means that the Employer can not impose a penalty for the violation of General Order 88-4. Rather, the failure to denominate a penalty for a violation of General Order 88-4 indicates that the Employer retains the

discretion to determine which penalty, if any, is appropriate. 1/ By providing notice of an intent to impose a mandatory two day suspension for violation of General Order 88-4, the Employer did not change General Order 88-4, but rather, exercised the discretion which is contemplated by General Order 88-4.

General Order 88-4 was the only General Order which was introduced into evidence. Accordingly, the undersigned has no basis to conclude that there has been a change in General Order 88-5, or that there has been any other "changes in the policies and procedures as presented in the Department General Orders Manual."

For the reasons discussed above, the undersigned rejects the Association's assertion that the Employer's notification of its intent to impose a mandatory two day suspension without pay for anyone "driving an SMPD vehicle without using seat belts" is a change which triggers the Section 15.05 negotiations procedure. Contrary to the assertion of the Association, the Employer did not have a Section 15.05 duty to (1) transmit the content of the roll call report of May 7, 1991 to the Association in writing, (2) bargain the impact of this roll call report, or (3) resolve any disputes concerning this roll call report pursuant to Sec. 111.77, Wisconsin Statutes.

The language of Section 15.05 recognizes that the Employer may promulgate rules or regulations which do not involve either a change to Departmental General Order 88-5 or changes in the policies and procedures as presented in the Department General Orders manual pertaining to wages, hours and conditions of employment. Given the language of Section 14.01 of the collective bargaining agreement, an arbitrator has authority to rule upon the reasonableness of such rules and regulations, unless the rule or regulation involves "Matters pertaining to discharge and disciplinary action imposing suspension of time or wages pursuant to 62.13, Wis. Statutes...". By the express language of Section 14.01, such matters are "excluded from the grievance procedure".

1/ An Officer who receives a penalty for violating General Order 88-4 would, of course, retain any statutory or contractual right to contest the discipline.

Assuming arguendo, that the notice of the Chief's intent to suspend Officers who violate General Order No. 88-4 is a "rule or regulation" within the meaning of Section 15.05, the provisions of Section 14.01 would preclude the undersigned from reviewing the reasonableness of the notice. The reason being that the notice involves matters pertaining to a "disciplinary action imposing suspension of time or wages pursuant to 62.13, Wis. Statutes." 2/

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate Section 15.05 of the collective bargaining agreement when the Chief of Police issued a roll-call report advising all Officers that anyone driving a SMPD vehicle without using seat belts faces a mandatory two day suspension without pay.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 2nd day of September, 1992.

By _____
Coleen A. Burns, Arbitrator

2/ Of course, once the suspension is imposed, the affected employe retains the right to contest the suspension in accordance with his/her statutory or contractual rights.