

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF GREEN BAY

and

CITY OF GREEN BAY CITY HALL, TRANSIT &
PARKING UTILITY EMPLOYEES UNION LOCAL
1672-A, AFSCME, AFL-CIO

Helga Watson grievance
dated 9/9/92

Case 235
No. 48001
MA-7471

Appearances:

Ms. Judith Schmidt-Lehman, Assistant City Attorney, Law Department, City Hall,
100 North Jefferson Street, Green Bay, WI 54301, appearing on behalf of the City.

Mr. James E. Miller, AFSCME Council 40 Staff Representative, 936 Pilgrim Way #6,
Green Bay, WI 54304, appearing on behalf of the Union.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance under the grievance arbitration provisions of their 1991-93 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at Green Bay City Hall on November 5, 1992. The hearing was transcribed. Briefing was completed on January 13, 1993, marking the close of the record.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the City have just cause for termination of the Grievant?
2. If not, what shall the remedy be?

BACKGROUND

The Union represents a bargaining unit that includes certain civilian employees in the City's Police Department (herein Department). Article 16(B) of the parties' Agreement provides that "No employe shall be reprimanded, suspended or discharged except for just cause." Grievant has been employed by the City in bargaining unit Department positions since she was hired in April, 1989 as a Community Service Officer. Beginning sometime in 1990 she worked as a Civilian Communications Officer (CCO), receiving emergency and other calls from the public, dispatching field personnel and obtaining and communicating a variety of information to Department personnel.

On August 31, 1992, Grievant was notified in writing by Chief of Police Robert J. Langan that her employment was being terminated,

because of your violation of Section I, Chapter II of our policy manual which prohibits certain associations:

[Prohibited Associations and Establishments: . . .] Officers and/or employees shall avoid regular or continuous associations or dealings with persons whom they know or they have been advised are persons under criminal investigation or indictment, or who have a reputation in the community or the department for present involvement in felonious or criminal behavior, except as necessary to the performance of official duties while acting under proper and specific orders from a ranking officer or where unavoidable because of other personal relationships of the officer and/or employee.

On 12/8/91 you were informed by me to sever your relationship with Mr. Jeff Beardsley as it was a violation of our policy manual as stated above. On 1/14/92 you informed me Mr. Beardsley had moved out. On 8/24/92 I was told you and Mr. Beardsley were again living together at 805 Doty Street. I feel Mr. Beardsley's criminal history along with his continual associations with known felons directly violate our policy.

Therefore I am terminating your employment from the Green Bay Police Department as of 8/31/92.

The grievance giving rise to the instant proceeding was initiated and ultimately submitted

for arbitration as noted above.

POSITION OF THE CITY

The City terminated Grievant for just cause, specifically, for violating its prohibited associations policy. Grievant violated the policy by maintaining a relationship with Jeff Beardsley who gained and maintained a reputation in the Department for present involvement in criminal activity over a ten-month period by committing a drug offense, driving a vehicle (Grievant's) full of occupants involved in a reported theft, and engaging in disorderly conduct in a domestic dispute context (with Grievant). Grievant was aware of the policy at all material times, was notified following the drug use incident that she would have to terminate her relationship with Beardsley or give up employment in the Police Department, and was aware that she was not complying with the Chief's application of the policy to her. Management assumed Grievant was complying until subsequent events demonstrated otherwise. At that point, Grievant was again put to the choice of severing her association with Beardsley or her employment with the Department. When Grievant ultimately made it clear that she would not follow through on either of those alternatives voluntarily, her employment was properly terminated.

POSITION OF THE UNION

The City's suspension and termination of the Grievant were without just cause. Grievant's association with Jeff Beardsley did not violate the policy, especially in light of the City's inconsistent interpretations and applications of it in Grievant's case.

By permitting Grievant to live with Beardsley despite the latter's parolee status for a prior felony armed robbery conviction, the Chief and City rendered inconsistent and inappropriate the City's later reliance on Beardsley's admitted but comparatively minor marijuana use as a basis for finding Grievant in violation of the prohibited associations policy. The fact that Beardsley was driving individuals including one under investigation for another crime in a car that was reported (but never determined) to have been involved in the reported theft of a coat from a tavern establishes no additional basis on which to find Grievant in violation of the policy. Beardsley has not been charged with any criminal conduct since his conviction and parole, and he has not been otherwise linked with the other occupants of the car. The record does not establish that Grievant knew of Beardsley's drug use or associated the others with whom Beardsley was driving in her car. It is not Beardsley's associations that are properly at issue in this case, only Grievant's. The August 21 incidents involved a domestic argument after a night of entertainment and off-duty drinking; again there were no charges filed. None of the credible evidence about any of the incidents relied on by the City in any way calls into question Grievant's integrity or reliability as a Department employe. Rather, the record suggests that Grievant is a victim of growing but incorrect and unsubstantiated perceptions on the part of Department co-workers that her associations with Beardsley or others violated the Department's policy and/or that the Department

was taking no action on account of those associations.

While the Chief told Grievant after the drug use incident both to stop living with Beardsley and to sever her relationship with him, the Department's actual follow-up enforcement was much less demanding both as to when Beardsley had to move out and whether his doing so would be enough to satisfy the Department. Thus, the Chief did not act either when Grievant wrote him saying only that Beardsley had moved out or later when someone told him that Beardsley was living with Grievant's mother.

After the April, 1992 incident involving Beardsley in Grievant's car, the Department's approach changed somewhat. Following discussions with Grievant and Beardsley at that time during which the Chief reiterated that Grievant could not both continue as a Department employee and maintain a relationship with Beardsley, the Chief confirmed in writing on May 4 that if Grievant would attempt to transfer to another City department when such job becomes available, "This should resolve the problems we have with the Policy manual issue of Prohibited Associations." This meant that for some unspecified time period beginning May 4, 1992, the Department would not be overly concerned that a relationship between Grievant and Beardsley continued, even if the stated position of the Department was that Grievant was thereby violating the policy. Thus, until the domestic argument incident in mid-August, there seemed to be tacit Department acceptance of a relationship between Grievant and Beardsley and no expressed concern about whether the two were living together, because there seemed to be an end date to the problem. Grievant kept her end of that understanding by checking postings until she was terminated. Her uncontradicted testimony establishes that no posting arose for which Grievant was qualified. After the domestic argument incident, however, the Department's approach changed yet again, such that Grievant was suspended and ultimately terminated on account of "Mr Beardsley's criminal history along with his continual associations with known felons."

For those reasons, the Arbitrator should conclude that the termination was without just cause and should order Grievant reinstated to her former position and made whole.

DISCUSSION

Because the Union is not challenging the reasonableness of the policy itself, the resolution of ISSUE 1 presents two basic questions: whether the City has satisfactorily shown that Grievant violated its prohibited associations policy; and, if so, whether the City's administration of that policy in Grievant's case excuses or mitigates Grievant's conduct in that regard.

The City has shown quite persuasively that Grievant violated the policy, reasonably interpreted.

It is not really disputed that Grievant maintained a regular and continuous association with

Jeff Beardsley during most or all of the period from his release from prison in mid-September, 1991 through her termination from employment on August 31, 1992. The record indicates that they lived together for parts of that period, and while the relationship may have become less close or even severed for a portion of that time period, the existence of a close personal relationship between the two for substantial portions of that time is well established in the record.

The evidence also shows that Beardsley was a person who had a reputation in the Department for present involvement in criminal behavior. That reputation did not arise immediately on account of Beardsley's status as convicted felon on parole (until the year 2000) after being incarcerated for about one-third of his 15 year sentence for armed robbery. It arose, instead, only after it came to the Department's attention that Beardsley's urine tested positive for marijuana, which he subsequently admitted having used on or about December 1, 1991. That use was violative not only of the criminal statutes but also of the terms of his parole, even though no charges were brought. While it resulted only in a warning from the parole agency, it was nonetheless shocking and disappointing to Grievant by her own testimony. In the context of Beardsley's prior criminal record and history of drug abuse, his use of marijuana, though comparatively minor, constituted a factual basis for a reputation within the Department for present criminal behavior that his record alone would not have warranted. Thereafter, in April of 1992, the Department learned that Beardsley was driving Grievant's car, the license number of which had been identified by a witness as the car into which a coat allegedly stolen at a tavern had been placed. Among the individuals with Beardsley in that car at that time was one Chris Yates. Chris Yates was then under Police Department investigation for, and was eventually charged, convicted and incarcerated for certain robberies. Then, in the early morning hours of August 21, 1992, Beardsley and Grievant, after an evening of drinking and entertainment, became engaged in a loud argument and skirmish on the street which was resolved by police officers called to the scene by neighbors. They were both interviewed at the police station, and the matter was referred to the District Attorney's office. While prosecutors ultimately decided not to file charges, Beardsley's conduct would nonetheless have constituted disorderly conduct under the criminal statutes. Those incidents, viewed in the context of Beardsley's prior record, were such as would provide a factual basis to support the Chief's testimony that Beardsley had a reputation in the Department for present involvement in criminal behavior after the drug use incident.

For those reasons, the Arbitrator concludes that the City has shown that Grievant violated the terms of the policy on its face. More specifically, the City has shown that Grievant failed to avoid regular associations with a person (Beardsley) who had a reputation in the Department for present involvement in criminal behavior. Moreover, there has been no contention or showing that Grievant's relationship with Beardsley fell within either of the policy exceptions for "performance of official duties while acting under proper and specific orders from a ranking officer or where unavoidable because of other personal relationships of the officer and/or employee."

The City has also shown both that Grievant was put on notice beginning in early December, 1991 that because of the drug use incident the Department considered her relationship with Beardsley to be prohibited by the policy, and that Grievant was made aware of the contents of that policy at that time and earlier when she read over the policy manual during her Department orientation.

There remains the question of whether the Department's responses to Grievant's violations render its termination of her employment violative of the requirements of just cause.

The fact that the Chief initially allowed Grievant to associate with and indeed reside with Beardsley upon his release from prison is not inconsistent with the terms of the policy. While Beardsley's prior conviction and parole status might render him suspect in the eyes of some, it would not establish the requisite basis for a Department reputation on his part for "present" criminal behavior referred to in the policy.

After the drug use incident, Grievant was allowed some time for Beardsley to move out in response to her request based on the holiday season, on the fact that Beardsley had been helping Grievant care for her children, and the difficulties Beardsley would have in finding another place to live on short notice. Grievant was also clearly given considerable benefit of the doubt when the Chief chose not to investigate whether the relationship had in fact been severed after receiving Grievant's January 14, 1992 note stating only that "the move has been made" and after being told that Beardsley was residing with Grievant's mother. However, in all of their interactions after the drug use incident, the Chief's position had been that Grievant could not remain employed in the Department unless she severed her relationship with Beardsley, even though the Department valued the quality of Grievant's work as a CCO. While Grievant no doubt wished that the Department could ultimately live with something less than total severance of her relationship with Beardsley, it was not reasonable for her in the circumstances to believe that the Department would in fact permit her to maintain both Department employment and an on-going relationship with him. The Chief's communications to her had been quite to the contrary until the May 4 memo.

On the other hand, the Chief's May 4 memo and the discussions leading to it did form a reasonable basis on which Grievant could believe that the Department would permit her to continue to associate with Beardsley on the basis of her agreement eventually to end her Department employment by transferring to a different City department in response to a posted vacancy notice. As the Union points out, Grievant's testimony, that no vacancy for which she qualified had ever been posted after May 4, stands uncontradicted in the record. It does not follow, however, that Grievant was holding up her end of the understanding reflected in the May 4 memo. For, Grievant admitted in her testimony that she had decided sometime after that memo was issued that she was no longer willing to post out of the Department. Indeed, at a meeting on August 31, 1992 with Union representatives present, and while she was under suspension on account of her relationship with Beardsley, Grievant told the Chief both that she did not intend to

take any other City job and that she did not intend to sever her relationship with Beardsley. She and the Union cannot now insist that the City be required to live up to an understanding which she admits she had no intention of honoring and which she so clearly repudiated during the August 31 meeting.

Grievant testified that at some point after the May 4 memo Assistant Chief Hintz told her that if she and Beardsley were not living together Grievant would not be in violation. (tr.134) However, any contention that she was relying as of at the time of the August 21 incidents on the idea that maintaining separate residences would keep her in compliance with the policy is wholly undercut by her admission at the same point in her testimony that Beardsley had moved back in with her a week or two before August 25, 1992.

Grievant's August 31, 1992 statements to management that she intended neither to sever her relationship with Beardsley nor to accept a position outside the Department constituted a legitimate basis on which to terminate her employment given Beardsley's above-noted existing Department reputation for present criminal behavior. In all of the circumstances of this case, Grievant was fairly presented with the choice between ending her employment in the Department and ending her relationship with Beardsley which has been shown to have been violative of the prohibited associations policy. When she ultimately made it clear that she was unwilling to end the prohibited relationship, the City was justified in terminating her employment.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. The City had just cause to terminate the Grievant.
2. The subject grievance is denied. No consideration of remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin
this 2nd day of April, 1993 by

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator