

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

OSHKOSH PROFESSIONAL POLICE
ASSOCIATION

and

CITY OF OSHKOSH

Case 222
No. 50887
MA-8419

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, appearing on behalf of the Association.

Mr. William Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn,
S.C., appearing on behalf of the City.

ARBITRATION AWARD

The Association and the City named above are parties to a 1993-94 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Association and City asked the Wisconsin Employment Relations Commission to appoint an arbitrator, and the undersigned was appointed and held a hearing in Oshkosh, Wisconsin, on November 6, 1995, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by December 28, 1995.

ISSUE :

The parties did not agree on the framing of the issue. The Arbitrator frames the issue as:

Did the City violate the 1993-94 collective bargaining agreement when it issued a written reprimand to the Grievant, Thomas Lichtfuss, for his conduct on March 21, 1994? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE XIII

RULES & EVALUATION REPORTS

The Association recognizes that the employer may adopt and publish rules from time to time, however, the employer shall submit such rules to the Association for its information prior to the effective date.

For this purpose, rules shall be defined as any rules, regulations, policies, directives, and postings published by the Department or the city affecting the department. Such rules shall be submitted to the Wage Board Chairman and the Association President and shall also be posted for knowledge and record. All such rules shall bear the signature of the Chief of Police or his designee. In the event of a dispute to such rules, the Association shall have fifteen (15) days after inception to dispute such rules through the grievance procedure.

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ARTICLE XIV

PROGRESSION OF DISCIPLINARY ACTION

Progression of disciplinary action shall be as follows: First, oral reprimand or written reprimand. An Association representative may be present with the employee at the time (or at such time as) any oral or written reprimand, suspension or dismissal is registered with the employee.

The Association may be furnished a copy of any written notice of reprimand or suspension. A written reprimand sustained in the grievance or not contested shall be recorded.

An employee shall have the right to the presence of an Association representative when his work performance or conduct affecting his status as an employee are the subject of discussion for the record. The City shall, at all steps of this Article, affirmatively ask the

employee if he desires an Association representative to be present.

BACKGROUND:

The grievance is over a written reprimand issued to Officer Thomas Lichtfuss on March 24, 1994 for an incident occurring on March 21, 1994, involving Lichtfuss and Lieutenant Thomas Wilkinson. 1/ Wilkinson has been a lieutenant of police since 1989, and was previously a sergeant and patrolman. Wilkinson supervises the second shift, which runs from 2:15 p.m. until 10:30 p.m. and oversees 19 officers, two of whom are sergeants. Lichtfuss has worked on that shift for more than 13 years, and Wilkinson is his supervisor. Lichtfuss is the treasurer of the Association and the second shift representative.

Wilkinson issued a reprimand to Lichtfuss, which states:

Charge 214.30 Insubordination

When on duty, the act of ridiculing an officer or his orders where in or out of his presents (sic) is insubordination.

214.06 Conduct towards others

Officers and employees shall treat superior officers, subordinates, peers, with respect. They shall be courteous and civil at all times in their relationships with one another when on duty and in the presents (sic) of others.

After resume Officer Lichtfuss approached me, in the resume room, and in a very loud voice stated, "you changed my documents and I am filing a grievance." At this point, because of his demeanor, I told him that I was denying his grievance. Officer Lichtfuss was referring to his daily activity sheet from 3/18/94 and a note in reference to time taken by the officer also dated 3/18/94. Officer Lichtfuss had backed away and then lunged towards the podium, where I was standing, and began to shout at me once again. "You changed my documents, and you will never do that again. These are my documents and you are not allowed to change them," Lichtfuss said. His voice raised and his emotions were that of being irate and at this point was pointing his finger in the Lieutenant's face and pounding his other fist on the podium. Officer Lichtfuss continued to raise his voice and was now shouting at Lt. Wilkinson,

1/ All dates refer to the year 1994 unless otherwise stated.

"You changed my documents and you are not allowed to do that. You had better never do this again." It was at this point that Lt. Wilkinson informed Officer Lichtfuss that, "this is insubordination and we are going upstairs, now." Officer Lichtfuss replied, "That's right, I want to see the chief, I don't have to put up with this."

This incident was witnessed by Sgt. Dick Weck of Menasha PD and the following officers of the Oshkosh Police Dept.:
Officers Scovronski, Voelker, Dolan, Ott, Frey, Duff, and Foust.

At the start of the shift, there is a 15 minute briefing period called resume, during which officers are informed of events occurring during the last 24 hours and given assignments. The resume takes place in the resume room in the basement of the Police Department. While briefing officers, Wilkinson stands at a raised podium in the middle of the room. There are usually eight or ten officers there at a time.

On March 21st, before resume started, Lichtfuss went to his mailbox and found some papers from Wilkinson, including an overtime card that he had submitted a couple days previously when he went home early. When an officer goes home early, he or she submits an overtime card and the time not spent at work is then withdrawn from an overtime account. Lichtfuss found that his card had been changed, that Wilkinson added another 15 minutes onto it after Lichtfuss had signed and submitted it. There was also a note from Wilkinson indicating that Wilkinson had changed Lichtfuss' activity sheet to reflect that he had done less that day than was reported. Lichtfuss felt both of those changes were inappropriate.

After the briefing or resume period ended on March 21st, several officers approached Wilkinson at the podium. Lichtfuss approached Wilkinson, shook his finger at him, and told him that he had changed some documents and that he (Wilkinson) was not to change his documents ever again and that he was filing a grievance over it. Lichtfuss had raised his voice and was obviously angry, loud, red in the face, visibly upset.

Wilkinson responded by saying that the grievance was denied, and Lichtfuss again shouted that Wilkinson would not change his documents. Wilkinson raised his voice and told him that this was insubordination and they were going upstairs with it, meaning that they should go to the captain's office. Wilkinson testified that Lichtfuss slammed his fist on the table next to the podium and leaned toward him. Lichtfuss does not recall pounding on the podium.

The sergeant from the Menasha Police Department, Richard Weck, was visiting the Oshkosh Police Department for a training program on the day that the incident took place. Weck recalled that after Wilkinson finished briefing the evening shift, three or

four officers approached Wilkinson at the podium to get some paperwork or information that he had for them. Weck saw Lichtfuss approach the podium and shake his finger at Wilkinson in a defiant manner and state, "You'll never touch my punch card again," or something to that effect at least two or three times. Weck heard it clearly, as Lichtfuss was speaking loudly, and Weck was seated about eight or nine feet away. Weck did not hear or see Lichtfuss pound on the podium, nor did he see Lichtfuss lunge at Wilkinson. Weck did not hear all of the conversation, since Lichtfuss had his back to Weck, but he heard Wilkinson say, "This is insubordination," and the two of them went upstairs. Weck recalled that Wilkinson had raised his voice to get the attention of Lichtfuss, who looked angry and upset.

James Scovronski, one of the officers present at the scene, was somewhat embarrassed because the sergeant from Menasha was present. Scovronski has heard other officers raise their voices to Wilkinson and vice versa. Another officer present, Patricia Foust, testified that Wilkinson yells at people that he does not like and uses harsh and threatening language that's uncalled for. She has heard other people screaming and yelling back at him but knows of no one besides the Grievant that was disciplined for it. Foust noted that Wilkinson yelled at her and another officer when they came to resume on time, because Wilkinson starts resume a few minutes early.

When Wilkinson and Lichtfuss went upstairs, they met with Captain David Erickson (now Chief) in the conference room, along with Officer Thomas Ziebell, who came in as an Association representative. Erickson was Captain of Patrol and supervised Wilkinson. During the meeting with Erickson, Wilkinson told Lichtfuss, "Tom, if you're going to screw with me, I'm going to screw with you." Lichtfuss turned to Erickson and asked him if he heard that, but Erickson said he did not hear anything. Ziebell knew that Wilkinson and Lichtfuss were not getting along, and Ziebell thought it had something to do with Lichtfuss being an Association representative. Ziebell and Wilkinson have had their own shouting matches in the past, primarily in Wilkinson's office.

Both Wilkinson and Lichtfuss were still upset during this meeting. Erickson was concerned that Lichtfuss confronted Wilkinson in front of other officers and a guest, and that Lichtfuss, an officer giving orders to Wilkinson, a lieutenant, tended to ridicule Wilkinson. Erickson found the written reprimand to be an appropriate disciplinary measure. He would also agree with Lichtfuss that Wilkinson probably should not have changed the time card without talking to him first.

Wilkinson recommended that Lichtfuss receive a written reprimand because he thought it was inappropriate for Lichtfuss to confront him as he did, in front of other officers and a guest, and in an unprofessional and discourteous manner. Wilkinson felt that he was being ridiculed because Lichtfuss gave him orders in front of his officers and the guest. Wilkinson has not disciplined officers in the past for raising their voices when talking to him in his office. However, he felt that Association officials such as Lichtfuss

and Officer Al Perry talked to him in a demeaning manner, and he wanted to put them on notice that he was no longer going to stand for it. Wilkinson has disciplined other officers for insubordination.

Wilkinson was aware that Lichtfuss was an Association official and that he gave notice early on in the incident that he was filing a grievance. Grievances are not usually brought up during the resume time -- they may be brought up before or after. There is no standard place -- they can be brought up in an office, the hallway, and even the parking lot. Wilkinson has encouraged officers in the past to file grievances if they thought they were not being treated properly or there was a violation of the contract. Wilkinson has attended supervisory training in school which includes anger management. He admits that he has yelled at officers in the past.

Officer Perry is the Chairman of the Association and it is his responsibility to file grievances on behalf of the Association or individuals. Perry said that about 90 percent of the time, the initial step of filing grievances occurs right after the resume. Perry has normally brought up grievances then with other people around. Perry knows of no other officer disciplined for raising his voice to the Lieutenant, other than Lichtfuss.

Lichtfuss has filed several grievances -- about 30 in 1994 alone, predominantly on the second shift. Because Lichtfuss brings a lot of grievances at the first step to Wilkinson, their relationship is difficult. Lichtfuss usually brings up grievances on behalf of others or himself right after resume, and he makes it a point not to take a grievance into Wilkinson's office but to present them in front of others.

THE PARTIES' POSITIONS:

The City:

The City argues that it has complied with the express disciplinary provisions of the bargaining agreement and department policies. The determination of the penalty for misconduct is a function of management, and the Arbitrator should not substitute her judgment and discretion for that of management. The only time a penalty imposed by management can be rightfully set aside is where there has been an abuse of discretion.

Since there is no mention of the just cause standard for disciplinary matters in the master agreement or the rules, regulations and policies, the Arbitrator should use an arbitrary and capricious standard in reviewing management's decision. Even if the Arbitrator believes there is a "cause" standard, the City had cause to discipline the grievant for his conduct. The incident was observed by a neutral guest from another police department, and the Grievant does not deny that the incident for which he was disciplined took place.

While the City anticipates that the Association will argue that the Grievant was acting in his capacity as an Association representative when he confronted Lieutenant Wilkinson, the City does not believe that argument to be valid. The Grievant was personally affected by the altered time card in question, and was acting as an individual. Furthermore, he is not entitled to violate department rules regarding insubordination and conduct towards others when processing a grievance -- even his own -- especially when he does so in front of others. Being an Association representative does not shield him from being judged by the same standard that governs others. The City would not have issued any discipline if he had processed his grievance in a professional manner without becoming hostile, confrontational, insubordinate, and demeaning to management.

The City believes the discipline was warranted, where the Grievant argued and conducted himself in an unprofessional manner in front of other officers and a guest. Just as an employee would not like to be disciplined in front of others, so too should the Grievant not take it upon himself to issue orders in a loud and defiant manner to Lieutenant Wilkinson concerning his time card. While Wilkinson raised his voice, it was in response to the Grievant. Wilkinson was being ridiculed by the Grievant, who undermined his authority by telling him what he could or couldn't do in front of others.

The City contends that the Grievant violated Rule 214.06 and Rule 214.30. The verbal assault by the Grievant was loud, rude, threatening, harsh, insulting, insolent and demeaning. The City cannot tolerate emotional outbursts by an officer against a lieutenant in front of other officers and guests.

The Association's claim of anti-union animus is without merit, the City says. Wilkinson was an Association member for many years and held office in the Association. The discipline given to the Grievant would have been the same for any officer who acted in a similar manner. Wilkinson thought the Grievant was acting on his own, not as an Association official.

The written reprimand was appropriate for the offense. The labor agreement provides that the first step shall be an oral or written reprimand. The fact that the Grievant was an Association steward does not justify rude and insubordinate behavior, and union stewards have been discharged for insubordination and abusive language. The City submits that the grievance should be denied.

The Association:

The Association argues that there is no evidence that the Grievant violated Rule 214.30, which defines insubordination as a refusal to obey an order or the act of ridiculing an officer. Wilkinson acknowledged that the Grievant did not disobey any lawful order, and therefore, if the Rule were violated, it was because the Grievant ridiculed Wilkinson.

The word "ridicule" means to make fun of or speech or action intended to cause

contemptuous laughter. The Grievant told Wilkinson that he had changed his documents and he was filing a grievance, that Wilkinson would never do that again, that Wilkinson was not allowed to change his documents, that the Grievant wanted to see the Chief, that the Grievant did not have to put up with this. Those words do not ridicule Wilkinson. The Menasha sergeant did not find that the conversation he overheard ridiculed the lieutenant, just that the Grievant was defiant and upset.

The Association also finds no violation of Rule 214.06, the rule regarding conduct towards others. In Milwaukee Deputy Sheriff's Assoc. v. Milwaukee County (Sheriff's Department), Dec. No. 27664-A (WERC, 10/93), it was held that the employer could not discipline an employee for insubordination if the discipline tends to interfere with the exercise of protected activities unless the conduct is opprobrious.

Officer Lichtfuss was participating in concerted activity by filing his grievance. His conduct cannot be considered opprobrious. To uphold this discipline would have a chilling effect on members who desire to file a grievance. Lichtfuss used no profanity and made no threats, and his actions cannot be considered outrageous under any standard. He had to present his grievance orally to Wilkinson under the grievance procedure, and it was standard procedure to present grievances at the first level after resume.

However, the Association argues, Wilkinson's motivation was intended to cause a chilling effect. He admitted stating to Lichtfuss that: "If you're going to screw with me, I'm going to screw with you." He also admitted that he has not disciplined other officers for raising their voices to him, but he picked this incident because he thought Association officials were talking to him in a demeaning manner and he was not going to stand for it any longer. Lichtfuss had a right to pursue his grievance in the manner he did, and Wilkinson's threat to "screw with" Lichtfuss as a result of filing this grievance resulted in the discipline now under consideration. To uphold the discipline would have a substantial chilling effect on individuals participating in protected concerted activity. The Association asks that the discipline be expunged from the record.

In Reply:

The City takes issue with certain facts that the Association presented in its brief as well as the Association's framing of the issue. The City asks that the concept of insubordination be viewed broadly, as encompassing the whole notion of undermining a supervisor's authority, and the Grievant's insubordinate conduct violated Rule 214.30.

The City asserts that the Association's reliance on Milwaukee County (Sheriff's Department) is misplaced, because the instant case is not a prohibited practice complaint but a grievance alleging a contract violation. If the Association thought that the City interfered with the Grievant's right to process a grievance, it was free to file a prohibited practice claim. Even in Milwaukee County, the Examiner found that not all behavior is protected simply because an

employee is filing a grievance. The City finds the Grievant's behavior "opprobrious" because it was abusive, disrespectful and disgraceful. The U.S. Supreme Court has found limitations to an employee's protected status and that an employee loses protection when engaging in concerted activity in an abusive manner.

The City also objects to the Association's statement that Wilkinson's threat to "screw with" Lichtfuss as a result of filing a grievance resulted in this discipline. Wilkinson's comment is taken out of context, and he and the Chief have encouraged officers to file grievances. The reprimand here is for the specific conduct of the Grievant after resume.

In its reply, the Association rejects the City's argument that a just cause standard does not apply, because the parties have agreed to an elaborate disciplinary procedure and policy and the contract adopts a progressive disciplinary procedure. Police officers in Wisconsin are granted a just cause standard by statute. A just cause standard must be implied in the contract, the Association contends.

The Association also argues that Wilkinson's actions were motivated by anti-union animus. He picked this incident because he believed that Association officials were talking to him in a demeaning manner and he meant to put them on notice. Wilkinson admitted that he said he was going to "screw with" Lichtfuss, and Ziebell believed those comments were based on the Grievant being an Association representative. A strong inference must be drawn that Wilkinson's action to discipline the Grievant was based in part on anti-union animus.

The Association argues that the Grievant's conduct was not opprobrious -- he used no profane nor obscene language and did not ridicule, demean or degrade Wilkinson. He controlled his anger in an exemplary fashion, and to uphold the discipline would be a gross miscarriage of justice.

DISCUSSION:

There are, most likely, cases in which the standards used to judge a disciplinary action, such as the just cause standard versus the arbitrary and capricious standard, will affect the outcome. This is not one of them. This is a relatively simple case, and the main questions for the Arbitrator are: was discipline warranted -- it was -- and did the discipline fit the offense -- it did.

The reason that discipline was warranted is because Lichtfuss crossed the line between acceptable conduct and unacceptable conduct, even in the midst of filing a grievance, by yelling at a superior officer in front of others and giving that superior officer orders. It is those two elements -- doing this in front of others and giving orders to a superior officer -- that cross the line. Lichtfuss gave Wilkinson an order about not touching his overtime card, and this had a tendency to ridicule Wilkinson in front of other officers and a guest from another department. Even Officer Scovronski admitted to being somewhat embarrassed because the sergeant from Menasha was there.

If Lichtfuss had made all of the same comments to Wilkinson in private during the filing of a grievance, it might be a different matter. People often raise their voices in disagreement, and the changing of the overtime card understandably angered Lichtfuss. But he had several minutes to cool down, because he had received the overtime card before he went to the resume briefing session. Lichtfuss needed to confine his anger in that particular setting, after resume with several other people present. He still could have filed a grievance at that time, orally with Wilkinson, but to do so in the manner in which he did led to the disciplinary action.

Whether Wilkinson harbored anti-union animus -- by the "screw with you" remark and putting Association officials on notice that he would not tolerate their behavior toward him -- does not affect the outcome in this case. Milwaukee County is a good example of how different results may be obtained from the same set of facts, as the arbitrator and hearing examiner reached different results in that case. Whether or not there was anti-union animus, it is the conduct of the Grievant that is being scrutinized here, not the conduct of the Lieutenant. The conduct of the Lieutenant came after and in reaction to the conduct of the Grievant. The misconduct on the part of Lichtfuss is sufficient to uphold the disciplinary notice.

Lichtfuss received a written reprimand, a low level form of discipline which is entirely in line with the misconduct. I find no reason to overturn the City's disciplinary action.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 7th day of February, 1996.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator