

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

OSHKOSH PROFESSIONAL POLICE
ASSOCIATION

and

CITY OF OSHKOSH, WISCONSIN

Case 247
No. 51934
MA-8784

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Suite 261, P. O. Box 1015, Green Bay, Wisconsin 54305, for Para-Professional Employees Association of the Brown County Department of Social Services, referred to below as the Association.

Mr. William G. Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn, S.C., 219 Washington Avenue, P. O. Box 1278, Oshkosh, Wisconsin 54902-1278, for City of Oshkosh, Wisconsin, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Association and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Patricia Foust, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 20, 1996, in Oshkosh, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by May 13, 1996.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

Did the Grievant's conduct on May 30, 1994, violate Rule 214.06?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association . . .

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 . . .

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 . . .

RELEVANT POLICIES AND WORK RULES

OSHKOSH POLICE DEPARTMENT POLICIES AND PROCEDURES

TITLE: DISCIPLINE

POLICY SERIES: 115

. . .

115.01 GENERAL POLICY

All formal organizations have rules, policies and procedures which guide members (sic) efforts to meet the goals and the purposes of that organization. Failure on the part of employees to work within the organization's rules, policies and procedures must be addressed by supervisory personnel. Corrective action or discipline can range from training, to dismissal from the Department.

The Oshkosh Police Department has rules of conduct, policies, procedures, directives and memoranda which must be followed. If violations occur, its supervisors will take fair, impartial, and timely corrective action.

. . .

115.18 APPEAL PROCEDURES FOR DISCIPLINARY ACTION

Any disciplined employee has the option to contest or appeal the sanctions imposed.

If an employee who received a verbal or written reprimand wishes to contest the actions of the supervisor, the employee has the option of using the grievance procedure per the labor agreement between the collective bargaining unit and the City of Oshkosh . . .

RULES OF CONDUCT MANUAL OSHKOSH POLICE DEPARTMENT

CHAPTER II

RULES AND REGULATIONS FOR ALL OFFICERS AND EMPLOYEES

214.00 PROFESSIONAL CONDUCT AND RESPONSIBILITIES

. . .

214.06 CONDUCT TOWARD OTHERS; The police department exists to serve the public safety needs of all persons within the jurisdiction of the City of

Oshkosh. Accordingly, it is the fundamental policy of the department that officers and employees so treat all persons with courtesy and respect.

Officers and employees shall perform their duties attentively and courteously, avoiding rude, threatening, harsh, insulting, profane, insolent, or demeaning language, and they shall maintain a professional bearing regardless of provocation to do otherwise . . .

BACKGROUND

The grievance challenges a verbal reprimand issued the Grievant on November 16, 1994. 1/ The Grievant has served the City as a Police Officer for roughly fifteen years. The department's written confirmation of the verbal warning lists Rule 214.06 as the basis for the discipline, and includes the following "Detailed comments on infraction" signed by Chief of Police James F. Thome:

On May 30, 1994, (the Grievant) arrested Susan Knippel for having a dog in Menominee Park. Mrs. Knippel and her husband filed separate personnel complaints on July 28, 1994. In the complaint Mrs. Knippel accused (the Grievant) of being belligerent, humiliating, rude and abusive toward her. Mr. Knippel said the Officer was rude and offered no explanation for her excessively forceful behavior. Other witnesses to the incident corroborate the allegation that the officer's behavior in this matter was harsh, discourteous and inconsistent with professional conduct. This is also inconsistent with departmental training and its intention to promote the most professional interaction between officers and citizens . . .

The Grievant filed a grievance challenging the reprimand as "groundless," and seeking to have the "reprimand withdrawn."

The parties dispute the circumstances surrounding this incident. The facts in dispute will

1/ References to dates are to 1994, unless otherwise noted.

be set forth in an overview of witness testimony. This overview will be prefaced by a sketch of the core of undisputed fact.

Susan Knippel, a Middle School Teacher for the Oshkosh School District, went for a walk with her sister and sister-in-law. She took with them, on a leash, her seventeen year old, slightly lame and deaf French Poodle. They walked from the Knippel's home, which is roughly one block from Menominee Park. They took a leisurely walk and were headed out to a point of land extending away from the nearest street. None of them was aware that the park was posted to exclude dogs. The Grievant was driving her car on the street behind the Poodle and its companions. She honked the horn to attempt to get their attention, but failed to get any of the walkers to hear her. She then left the squad, calling out to the walkers to stop.

The Grievant ultimately hailed Susan Knippel and directed the walkers to return with her to her squad car. When they approached the squad, the Grievant directed one of them to take the dog from the park. She then directed Susan Knippel to enter the back seat of the squad car through the rear door on the driver's side. Susan Knippel's sister, Amy Lee Wiley, remained by the squad car while her sister-in-law took the Poodle home. Wiley asked Susan Knippel if she should stay. Knippel asked that she do so, and entered the squad car. The Grievant repeatedly directed Wiley to stay away from the car.

The Grievant entered the squad car, and began, at 2:50 p.m., to report to the department the information necessary to issue Susan Knippel a citation. She asked Susan Knippel for identification, and discovered Knippel was not carrying any. She then asked the Dispatcher to send a photographer. Throughout this period of time, Susan Knippel questioned her on what was happening, why, and how long would it take. Knippel also attempted to talk, through the closed window, with her sister. After some time had passed, Knippel asked Wiley to go home and bring her husband and son-in-law. Before Wiley could do so, her sister-in-law arrived with the Poodle at the Knippel's home and informed Thomas Knippel of the arrest. At roughly this time, Knippel's son happened to ride by the park on his bike, observing his mother in the squad car. He ultimately saw his brother-in-law, David Pichette, and his sister returning from a walk. He informed them that his mother was under arrest and that he wanted them to help.

Thomas Knippel drove to the park, and located the Grievant's squad. He ultimately learned the Grievant was waiting to secure reliable identification for Susan Knippel. Thomas Knippel then drove home and returned with a photo ID his wife used at Sam's Discount Club. The Grievant informed him she would accept nothing less than Susan Knippel's driver's license. He then returned home, with his initial bemusement at the incident working into anger.

Before Thomas Knippel could return, Pichette, a Sergeant with the Wisconsin State Patrol, arrived at the Grievant's squad. He attempted to approach the Grievant while his wife attempted to approach Susan Knippel. The Grievant told Pichette not to interfere and directed his wife to stay away from the squad car. Sometime during this period, an irate Thomas Knippel returned

with his wife's driver's license. He gave the license to the Grievant, complaining about what "crap" the situation had become. The Grievant took the driver's license and compared it to Susan Knippel. She looked between the license and Susan Knippel for some time, then asked her to remove her sunglasses. Susan Knippel did so, satisfying the Grievant that she was the person pictured on the driver's license supplied by Thomas Knippel. While this was transpiring, Officer Nolte drove his squad car onto the scene. The Grievant finished the citation, and tried to hand the summons to Susan Knippel. Thomas Knippel grabbed the summons from the Grievant and started to walk away. Susan Knippel left the squad car, exchanging some comments with the Grievant. Pichette, in the meantime, had approached Nolte and had asked if Nolte was the Grievant's supervisor who could receive a complaint about the incident. Nolte responded he was not. Gradually, the participants left the park. As the Grievant closed the door of her squad, she heard someone ask her name. She responded, "It's right on the summons." 2/ The Grievant logged off the computer/dispatch system at 3:14 p.m.

The ordinance violation Susan Knippel was charged with was ultimately dismissed by a Court Commissioner.

Thomas Knippel contacted the Oshkosh Police Department on Memorial Day to complain about the incident. He and his wife documented his complaint, but did not file their written statements with the Department until sometime in July. Jay Puestohl, a Patrol Captain, took those complaints and investigated them. Puestohl secured written statements from Wiley and from Pichette. Puestohl ultimately concluded that the Grievant should be counseled through the Employee Assistance Program regarding her handling of the incident or should be issued a verbal reprimand for it. The Grievant was ultimately issued the verbal reprimand noted above.

The balance of the evidentiary background is disputed, and is best set forth as an overview of the testimony and statements of the various witnesses.

Susan Knippel

Knippel filed her written statement with the City on July 5. She noted she did not file the complaint sooner because she was "afraid of having to confront (the Grievant) again." 3/ She noted she first heard the Grievant shouting at her to stop. She turned to see the Grievant "running toward us, her hand clasping her revolver as she ran and screaming at us in a most agitated fashion." 4/ She noted she has two sons with hemophilia, and as the Grievant approached them,

2/ Transcript (Tr.) at 139.

3/ Tr. at 13.

4/ Employer Exhibit 1 at 3.

she worried that she was about to learn of a medical emergency. The Grievant communicated the reason for the stop, and Knippel was, initially, relieved.

As she walked back to the Grievant's car, she and her companion's talked. She directed her sister-in-law to take the dog home, and approached the squad car. She perceived the Grievant to be quite upset, and was growing afraid of her. The Grievant would not answer any of her questions on what the charge was, whether she would have to go anywhere or how long her detention would last. The Grievant instructed her to get into the back seat of the squad car. Knippel perceived her to be "belligerent, almost abusive in her questioning and directions." 5/ Because of her growing apprehension, she asked Wiley to stay with her. Wiley tried to stay close to the squad car, and was ordered by the Grievant to "'back away from the car, get away from the car,' in a very loud and forceful tone." 6/ The Grievant would permit no contact between Wiley and Knippel. Locked in the Grievant's squad and isolated from her family, Knippel became more apprehensive.

When the Grievant got into the car, she took the information she deemed necessary, but did not specifically ask Knippel for any ID. Knippel continued to ask questions of the Grievant, who either ignored them or offered curt, but meaningless, responses. From this point on, Knippel could do no more than observe as her husband came twice to attempt to get her released and as Pichette, her daughter and her son came by to offer what help they could. She stated the conclusions of her observations thus:

(The Grievant) humiliated me, was rude and abusive to me and others attempting to discuss the situation with her, and kept me for a prolonged period in the back of a hot patrol car. Please keep in mind that all of this occurred because of walking a dog in the park.
7/

She estimated the incident took about one-half hour.

She acknowledged she became impatient and agitated concerning the Grievant's handling of the matter. She also acknowledged that the language used by the Grievant toward her and her companions was not, in itself, objectionable. Rather, she was concerned with how the Grievant communicated and refused to communicate with her and her family.

5/ Ibid.

6/ Tr. at 16.

7/ Employer Exhibit 1 at 4-5.

Thomas Knippel

After learning of the arrest, Knippel drove to the park to find his wife locked in the back seat of the Grievant's squad car. His written statement details his observation of the incident thus:

I approached the car, and identified myself, and asked the officer what was going on and why she would not release Sue from the car (it was a hot (80 degree) and sunny day and the detention seemed excessive and inappropriate). The officer did not explain the situation or offer any resolution. She told me to back away from the car and said a backup was coming with a camera to photograph Sue. After several questions I realized that the officer was looking for I.D. I asked what would be required and she (the officer) said a picture I.D. or drivers license. I left to retrieve the I.D. and returned with a picture I.D. and gave it to the officer. She would not accept it and said I needed a drivers license. I returned again with a drivers license upon which the officer told Sue (through the closed window) to remove her glasses so she could compare the picture. Only then did she let Sue out of the car. This officer was rude, offered no explanation for her excessively forceful behavior, and escalated a simple unintentional act of walking a 17 year old deaf blind dog on a leash into a major incident . . .

Knippel noted the Grievant seemed defensive and offered curt responses to any questions. He acknowledged she did not yell at him. He noted he was initially amused by the incident, but by the time the Grievant had rejected the first piece of identification he offered, had lost his appreciation of the humor in the incident.

He testified that the Grievant angered him, and that he used "foul language" in addressing her, such as "I can't believe this crap." 8/

Amy Lee Wiley

Wiley noted that the Grievant informed Susan Knippel she was under arrest as she directed

8/ Tr. at 56.

Knippel into the back seat of the squad car. The Grievant also instructed her and her sister-in-law to take the dog home and get Thomas Knippel. Wiley did not, however, want to leave her sister and stayed. The Grievant told her there was no reason for her to stay and that she should leave. Wiley held her ground, only to find the Grievant repeatedly order her to back away from the car. She characterized the Grievant's demeanor as "a threatening tone . . . it was alarming." 9/ She stated the Grievant never asked her to get an ID for Susan Knippel.

She estimated she stood outside the car for one-half hour before Susan Knippel signalled, through the closed window, that she should get Thomas Knippel and Pichette. She then left the park, and returned to the Knippel's home.

David Pichette

Pichette noted he did not want to get involved in the incident when his brother-in-law first informed him of the arrest. He was concerned, however, that something more than a simple ordinance violation might be involved since Susan Knippel had been held in the squad car. As he and his wife first approached the car, they found the Grievant standing outside of the car. His wife went to the rear door of the squad. The Grievant, in a "domineering, forceful voice" 10/ told her to get away from the squad car. Shortly after this, Thomas Knippel arrived with a photo ID the Grievant would not accept.

By the time Knippel arrived with his wife's driver's license, he was visibly upset. Pichette noted he attempted to act as a peace-maker, ultimately counseling his father-in-law to handle the matter through official departmental channels. He assessed the Grievant's handling of the situation thus:

The officer didn't say anything to try to calm the situation. To me she almost appeared to be kind of making it worse. She didn't have any type of posture of trying to calm these people down and explain it to them. 11/

Pichette acknowledged that the Grievant neither swore at nor personally insulted any of the Knippel family. He noted that he was inclined to back up a fellow law enforcement officer, but

9/ Tr. at 61.

10/ Tr. at 78.

11/ Tr. at 80.

felt the Grievant's conduct caused the situation to become needlessly combative.

The Grievant

The Grievant, on May 30, filed the following narrative account of the incident:

. . .

I pulled up . . . near the girls, I beeped my horn several times, they didn't turn around. I got out of the car, after I parked it. I called to them, they still did not hear me . . .

I followed them, calling to them ever so often. Eventually the one with the dog turned around. I asked her to come over. As she approached me I informed her there was a city ordinance about having no dogs allowed in the park.

She immediately made some comment to her friends about the stupid ordinances in the city and made some comment about the people who work for the city. I asked her to come back to my car.

As I walked toward my car, with her following with her two friends, she made numerous other remarks, apparently trying to be insulting in regard to the city itself.

When I got back to my car I asked her to have a seat in the backseat of the car. She made a comment stating she didn't have to. I told her that she's being arrested for having her dog in the park. She then started arguing about that. I told her to have a seat in the back of the car. I asked one of the girls if they would be kind enough to take the dog out of the park.

One girl immediately took the dog and walked out of the park. The other girl stayed stating she didn't have to leave, it was her sister that was getting in the backseat of my car and she didn't have to go anywhere, she was going to stay by her sister. I told her to stay away from the car. The girl made some other comments and I don't recall at this time what they were.

The defendant did get in the backseat of the car. She continued complaining about the ordinance and she was not aware of the fact that there aren't any dogs allowed in the park. She stated she walks frequently along the park and has never seen one of the signs that say no dogs allowed.

I asked for her name, Dob, her address. She continued to complain and interrupt while I was trying to fill out the summons. She started complaining that I was just harassing her by detaining her and it did

not take that long to do whatever I was doing.

When I first asked her if she had any ID, she had stated no. I requested through Dispatch someone to bring a camera so I could take a photograph of her for the purposes of ID later.

As she continued to interrupt me while I was trying to write out the summons, she requested that I tell her sister to notify her company that she would be detained for quite some time apparently. I told her I wasn't sure how long it would take for the officer to bring the camera over. At this point he apparently had been on his way for 5 minutes already.

I did roll down my window and told the girl waiting outside my vehicle that it might be a few minutes and if she wanted to tell her relatives she'd be along shortly. At that time the female in the backseat of the car . . . started yelling to go get her husband and go get someone else . . . and to bring his cruiser.

I informed the girl that she doesn't need to bring anyone else. The girl then immediately left and came back a short time later and the husband came. As soon as the husband arrived he started complaining about how this was "bullshit", stating I should not be bothering to issue his wife a summons, that I should be out catching murderers and rapists.

At the time the husband arrived I had just finished writing out the summons and was awaiting Officer Nolte's arrival. The husband then stated he would go get her D.L. I told him that would be fine, that I either had to see her D.L. or we had to take a photograph of her prior to her being released.

He then left and as he came back into the park I could see Officer Nolte . . . After I positively identified her by her WI picture D.L. Susan was released. As I went to hand her her city summons for the dog in the park, her husband grabbed it out of my hand and crumpled it. At that time another male had already arrived and the defendant's two children, all of whom were complaining to me at the time Officer Nolte arrived.

I then informed Officer Nolte it wasn't necessary to take a photograph since the husband had just brought over the defendant's

D.L. The crowd that had gathered now, the relatives and friends of the defendant, continued to complain stating they were going to file a complaint against me.

The defendant then started complaining that I had not explained what the two pink slips of paper were. I then stated that I would explain it to her if she liked, but her husband had grabbed them out of my hand before I had a chance to explain it to her.

At that point she stated, "Oh we can probably figure it out for ourselves." She then turned and walked away making several comments about how she was afraid to be by me, she was afraid for her safety. The group all then left.

The Grievant testified that while she walked Susan Knippel and her friends toward the squad car, Knippel continued to make a series of snide comments about City ordinances and City employes. Upon arriving at the car, Knippel repeatedly refused to get into the car. She entered the car only after the Grievant opened the door and cautioned Wiley, who was moving toward her, to stay away from the car. After the Grievant got into the car, Wiley continued to try to approach the car, forcing the Grievant to direct her to back away.

The Grievant testified that Knippel repeatedly interrupted her as she attempted to get the information necessary for the citation. She noted Knippel badgered her to inform Wiley the detention would last for a while. The Grievant agreed, and while she was so informing Wiley, heard Knippel "yelling from the back seat of the car" that Wiley should get Thomas Knippel and Pichette, and that Pichette should "bring his squad." 12/ The Grievant then told Wiley: "Nobody else needs to come, but if you want to get her driver's license as identification, you can get that and come back." 13/

She noted that after this somebody else came up to the door and asked what was going on. She informed that person: "Don't interfere . . . (t)his is a police matter . . . (j)ust back off." 14/ She noted that Thomas Knippel then arrived, and became angry and confrontational. Pichette then arrived, and also became confrontational. She characterized the demeanor of the Knippel family as rude, harsh and insulting to her.

12/ Tr. at 136.

13/ Tr. at 136-137.

14/ Tr. at 137.

The Grievant noted that she has been party to three separate complaints against the City before the Equal Rights Division. She felt the Department had singled her out for discipline involving conduct she observed go unpunished when other Department employees were involved.

John Nolte

Nolte has worked for the City for sixteen years. He noted he was summoned to serve as a photographer regarding the Memorial Day incident. He learned, immediately before entering the park, that he would not be needed. He proceeded into the park anyway. Pichette then approached him, to determine if Nolte was the Grievant's supervisor. Nolte informed Pichette he was not. Pichette asked the name of her supervisor, and Nolte supplied it. Nolte described Pichette's tone of voice thus: "His voice was probably more elevated more than what you and I are talking here now . . . (a)s far as screaming at me, no . . ." 15/

Nolte stated the Grievant always conducted herself as a professional whenever he observed her.

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

THE PARTIES' POSITIONS

The City's Initial Brief

The City states the issues for decision thus:

Did the City of Oshkosh violate Article XIV of the 1993-94 Master Agreement when it issued a verbal reprimand to (the Grievant) for disrespectful conduct toward others? If so, what is the appropriate remedy?

After a review of the evidence, the City argues that its verbal reprimand is well-rooted in the labor agreement and in departmental policies which lodge "the sole right to discipline the workforce" in the City.

General arbitral precedent establishes that an arbitrator should not substitute his or her judgment for the employer's. More significantly here, the City argues that the contract and departmental policies do not state a just cause standard. Such a standard cannot, the City contends, be implied. Against this background, the City concludes that "(w)here a just cause standard does not exist the operative standard to be applied by an arbitrator is an arbitrary and

15/ Tr. at 160.

capricious standard." These points are, however, academic on these facts. The City urges that the Grievant's discipline meets any standard of arbitral review.

A review of the evidence establishes, according to the City, that "a simple and straightforward case . . . turned into a much more serious situation due to the grievant's behavior." That behavior violated Rule 214.06. The behavior was, the City asserts, sufficiently egregious to establish that "the discipline imposed was too lenient."

The City argues that since the Grievant has consistently insisted she did nothing wrong, it was left with no option but discipline. Puestohl testified that he had at first recommended counseling, but this recommendation was rejected by the Grievant. Her unwillingness to accept any fault for not tailoring her response to the situation left the City no choice but discipline.

The City then contends that a review of witness testimony establishes overwhelming evidence supporting its position. Each witness to the incident except the Grievant noted an underlying attitude of belligerence and rudeness. Each witness to the incident except the Grievant noted, according to the City, that her rudeness caused the simple ordinance violation to escalate into a larger conflict. That one of the witnesses was a fellow police officer is, the City contends, particularly significant. The City argues that against this evidence must be weighed the Grievant's testimony. The City characterizes that testimony as "not credible . . . the classic case of someone who believes that if they follow the procedures to the letter, he/she has fulfilled his/her professional duties and obligations."

Anticipating Association arguments, the City contends that any claim of retaliation is baseless. Such a claim, the City argues, presumes that the Grievant's blind following of procedures can defend her conduct; or that the City has retaliated against her for the filing of an Equal Rights complaint; or that the City has selectively applied its disciplinary power against her. None of these presumptions, according to the City, has merit. Regarding the first, the City notes that the violation of Rule 214.06 is apparent. Regarding the second, the City notes that there is no "solid evidence that links the equal rights complaint to this grievance" and that any such linkage would only weaken the City's defense against that complaint. Regarding the third, the City notes that "this is the first time the grievant was disciplined for this type of offense." Beyond this, the City notes that Puestohl credibly testified that any officer would have received the same treatment for this type of behavior.

The City concludes that "the grievance in this case should be denied and dismissed in its entirety."

The Association's Initial Brief

After a review of the evidence, the Association states the issue for decision thus:

Were (the Grievant's) actions on May 30, 1994, a violation of Rule 214.06?

A careful delineation of the statements alleged to have been made by the Grievant demonstrates, according to the Association, not a single action which "can be considered a violation of the Rule given the context in which they were made."

The "rudeness" the Grievant is charged with is, the Association argues, "a subjective matter" which constitutes an inappropriate basis for discipline. The Association argues that, viewed objectively, the Grievant's "actions were appropriate if not necessarily friendly." Contending that, as a female officer, the Grievant "encounters more difficulty in garnering the respect of the general populace," the Association argues that the Grievant appropriately perceived the Knippel's conduct toward her as "unruly and uncooperative."

More specifically, the Association contends that even without regard to the Grievant's testimony, it is apparent that Susan Knippel resisted being placed in the squad and verbally badgered the Grievant while she attempted to issue the citation. It is also apparent that Thomas Knippel "used foul language" and was "quite irate" with the Grievant. The Association acknowledges that Pichette viewed the Grievant's conduct as inappropriate, but contends his professional view of the situation is an unreliable guide:

In Pichette's opinion, (the Grievant) could have calmed the volatile situation down but instead took no effort to do so. What is noteworthy is that Pichette recognized the situation as volatile. Presumably, Pichette is well acquainted with his in-laws and understands that they may be non-violent people . . . On the other hand, (the Grievant) is not familiar with the other participants.

A review of the Grievant's testimony manifests a "significantly different view" of the incident than that of the Employer's witnesses. Underlying the conduct of each family member was, according to the Association, an uncooperative and combative attitude. The Association summarizes the point thus: "the Knippel family was loud, boisterous, profane and rude." The contrast is stark, and the Association urges that "(d)uring the entire time that this abuse was heaped upon her, (the Grievant) kept her cool."

The Association argues that the evidence fails to establish "an adequate basis to issue a verbal reprimand" to the Grievant. Such a reprimand is significant since it "can be used to

eliminate a promotional candidate or serve as a springboard to much harsher discipline." The City has, the Association concludes, "failed to sustain its burden to prove that discipline was warranted under these circumstances."

Continuum of force training permits an officer to use "harsh and threatening language" in responding to hostile and unruly citizens. The Association concludes that the Grievant's conduct was an appropriate expression of this training, and that her "grievance should be granted and the discipline against her removed."

The City's Reply Brief

Noting that the Association dropped any reference to just cause in its brief, the City urges that "the Arbitrator should simply use the arbitrary and capricious standard." Beyond this, the City asserts that the Association selectively cites portions of Rule 214.06 in a "sleight of hand" attempt to make the Grievant's statements seem more innocuous than the Rule attempts to regulate. A full citation of the Rule and a thorough examination of the Grievant's "entire conduct" establishes, according to the City, the precise disrespectful conduct the Rule seeks to eliminate.

Nor can the evaluation of the Grievant's behavior be dismissed as subjective:

While the definition of "rude" may vary among individuals, it does not follow logically that someone's rude behavior somehow ceases to exist. Besides, it is the Employer that decides (and ultimately the Arbitrator) whether an employee crosses the line into unacceptable behavior based on the facts and circumstances of each situation.

The evidence establishes, the City contends, that the Grievant's conduct crossed the line between appropriate and disrespectful behavior.

The City notes that the assertion that the Grievant faces difficulty with citizens because she is a female is unproven and ignores the possibility that it is her conduct rather than her gender which causes the difficulty. A review of the evidence establishes, according to the City, that the Association's attempt to call the Knippels' conduct into question is itself subjective but, in any event, is unfounded. The Association consistently fails, according to the City, to recognize the Grievant's fundamental failure to defuse the situation. She did not, the City contends, use the continuum of force. Rather, "(s)he did not do anything."

Noting that the Association has abandoned any claim of retaliation, the City urges that "the sole issue before the Arbitrator for resolution is whether the Grievant violated Rule 214.06." Because the Grievant "failed to treat persons with courtesy and respect," the City concludes that

"the Arbitrator uphold the City's decision to issue a verbal reprimand."

The Association's Reply Brief

The Association contends that "a just cause standard must be implied under the terms of the contract and Policy 115." The Union notes that Article XIII incorporates Departmental Rules and Regulations into the labor agreement which, at Article XIV "incorporates a progressive disciplinary system for the parties." The Association argues that Section 115.18 establishes an appeal procedure which requires the implication of a just cause standard to be meaningful. Such a conclusion is consistent, according to the Association, with arbitral precedent.

Because Policy 115 and the "progressive disciplinary procedure" do not differentiate "between the rights of an employee depending on the severity of discipline," and because Sec. 62.13(5), Stats., codifies just cause for "disciplines involving suspension, demotion or termination," the Association concludes that just cause must exist for any level of discipline. Any other conclusion would ignore that "lesser disciplines are a building block in the progressive disciplinary procedure." The Association contends that Rule 115.01 underscores the implication of a just cause standard, and concludes that "just cause is the standard to be applied in disciplinary actions."

DISCUSSION

I have adopted issues focusing on whether the Grievant violated Rule 214.06. Those issues underscore that an issue of remedy is posed only if no violation of the Rule is found. The Grievant received the lowest level of discipline possible. On this record, the issues are "either/or," turning on the application of Rule 214.06.

The stated issues ignore whether just cause governs the imposition of the reprimand. The City argues that it is not necessary to reach this point. The Union posed the issue at hearing, did not address the point in its initial brief but returned to the point in its reply brief. A grievance should be resolved on the narrowest contractual basis possible. The background sketched above indicates the parties do not see the cause determination as crucial to the grievance. Ignoring it leaves the point to more pressing facts or to the parties' bargaining. Either is preferable to an unnecessary third-party opinion. Adopting either an "arbitrary and capricious" or a "just cause" analysis would not alter the result here. Thus, the issue adopted above ignores the point.

The first sentence of the second paragraph of Rule 214.06 governs the grievance. More specifically, the discipline rests on whether the Grievant maintained, on May 30, "a professional bearing regardless of provocation to do otherwise." Her use of language can be considered at issue, and the Rule does refer to the avoidance of rude, threatening or harsh language. The

specific words she used cannot, however, be faulted. Rather, the issue is whether she acted in a sufficiently unprofessional manner to violate the Rule.

The evidence establishes a violation of Rule 214.06. It is neither necessary nor possible to precisely reconstruct the events of May 30 to conclude that the Knippel family reasonably perceived unresponsive and confrontational conduct from the Grievant. The conduct was sufficiently egregious to trigger the operation of Rule 214.06. The Grievant's conduct in significant part caused growing hostility from the Knippel family. She then failed to recognize the growing hostility in the situation, and failed to attempt to defuse that hostility.

The parties understandably view this conclusion to require a credibility determination. It should not, however, be overlooked that the Grievant's account, standing alone, affords reason to question her handling of the situation. Her account manifests no significant attempt to explain her actions to Susan Knippel or anyone who questioned her. By her own account, she made no attempt to secure a photo ID from anyone until Wiley left the scene. By that time, Susan Knippel's sister-in-law had already returned to the Knippel house and could have instructed Thomas Knippel to bring the ID that would eventually require two more trips to and from the park. Even without regard to other witness testimony, her responses to inquiries was, at best, curt. As noted above, she responded "(j)ust back off" to a person whom she could not identify beyond "somebody." Her account manifests no apparent provocation for this curtness. Rule 214.06 calls on an officer to maintain a professional bearing "regardless of provocation to do otherwise." Her response that anyone interested in her name could read the summons, standing alone, falls short of this standard.

A review of other witness testimony further undercuts the credibility of her account. Minor variances within witness testimony can be noted. Wiley and Susan Knippel differ on how close the Grievant came toward them before summoning them to her car. Similarly, their accounts differ on the time Knippel spent in the car. These minor variances cannot, however, obscure that the Knippel family offers a believable account of the events which is consistent with the core of undisputed fact noted above.

As preface to this point, it can be noted that the testimony of Susan Knippel, Thomas Knippel and Pichette offers candid self-evaluation lacking from the Grievant's. Susan Knippel noted her mood swung from relief to fear and frustration as the arrest played out. Her open acknowledgement of anger toward the Grievant lends credibility to her account. Thomas Knippel made no attempt to disguise the anger he felt or expressed to the Grievant. Pichette similarly noted his growing frustration with her conduct. Such honest self-evaluation is absent from the Grievant's testimony.

More significantly, the Knippel family testimony is consistent with, and can account for the core of undisputed fact. It is apparent the events of May 30 involved an escalating level of hostility between the members of the Knippel family and the Grievant. The Knippel family

testimony acknowledges and accounts for that growing level of hostility. As each family member's confusion grew regarding why Susan Knippel was being held, so did their anger and apprehension. The Grievant's account affords no explanation of this growing hostility. Under her account, Susan Knippel took umbrage at being stopped and became angry and abusive without any provocation beyond the ordinance itself. The same process occurred with Wiley, Thomas Knippel and Pichette. The depth of this unprovoked hostility was stark in the Grievant's account. By the end of the incident, Pichette was "right in my face," while other Knippel family members were "yelling" at her, Nolte and each other.

This level of unprovoked hostility is not, however, reconcilable to other testimony. Nolte's characterization of Pichette's tone of voice is noted above. It is reconcilable to Pichette's testimony, but not to the Grievant's. Pichette acknowledged and Nolte noted the presence of some degree of emotion in Pichette's voice. That level of emotion is considerably less than the Grievant's account points to. Beyond this, significantly absent from Nolte's testimony is any observation of the minor mob scene pointed to by the Grievant.

In sum, the evidence will support a conclusion that the Grievant failed to meaningfully explain Susan Knippel's detention to any of the Knippel family. Her failure to meaningfully communicate with any of the family delayed her receipt of Susan Knippel's driver's license and unnecessarily provoked Thomas Knippel. She failed to understand her conduct played a role in the growing hostility around her, and made no meaningful attempt to defuse that hostility. This conduct can reasonably be said to have violated Rule 214.06.

As noted above, the determination of this violation precludes the need to examine the level of discipline. Puestohl recommended a non-disciplinary option, but the record manifests no basis to believe the Grievant was receptive to this option. The reprimand is the lowest level of discipline called for in the progressive discipline system established in Article XIV.

Before closing, it is appropriate to touch upon certain arguments raised by the parties. The Association's contention that meaningful issues of proper police procedure are posed here is not supported by the evidence. The contention that the Grievant properly directed Wiley and others from the car to protect herself is unpersuasive. Even assuming the Grievant had a reasonable basis to be concerned, her conduct did nothing to address that concern. She did not put Wiley in a position to secure the situation. Rather, she kept Wiley from her sister. The car door was locked. This secured Susan Knippel, presuming she needed to be secured. More significantly, Wiley waited behind the Grievant.

Nor can the "continuum of force" be considered a meaningful consideration on these facts. This line of thought guides an officer's use of judgment in containing a situation. Where the use of force is at issue, the officer is not to permit an accused to use a level of force equal to or greater than that level of force employed by the officer. Because the officer is the last line of defense for the public, that line must be defended. It must be stressed that the continuum of force is a doctrine

designed to assist an officer's exercise of discretion. It is not a substitute for that discretion. Indiscriminate use of the doctrine yields absurd results. It does not follow that if an officer confronts someone who questions him/her, the officer must raise his/her voice or move to the next level of force to contain the questioning. This absurd result points not to reasoned use of discretion, but to indiscriminate provocation.

The issue in this case is the Grievant's exercise of judgment in responding to the Knippel family concerning walking a Poodle in the wrong area. That the hostility surrounding this incident escalated is the fundamental problem posed here. The Grievant's contribution to that escalation is the basis for the discipline. Her failure to acknowledge any responsibility for the escalation is the most troublesome aspect of this case. A police officer is valued for their sense of judgment. Any exercise of judgment can, and should be questioned. Her inability or unwillingness to question her own conduct establishes the need for the Employer to do so.

The allegation that the City has selectively disciplined the Grievant or has retaliated against her poses troublesome implications. The evidence on these points is, however, inconclusive. She has apparently succeeded in some of her Equal Rights Complaints and failed in others. There is, however, no demonstrated link between those actions and the discipline at issue here. That there appears to be difficulty between the Grievant and supervision also poses troublesome implications. If other officers could have handled the Knippels as the Grievant did and not faced discipline or counseling, then it is a sad commentary on the Department. That possibility is, however, speculative here and does not stand as a defense for her conduct.

AWARD

The Grievant's conduct on May 30, 1994, did violate Rule 214.06.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 20th day of June, 1996.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator