

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION

and

TOWN OF BLOOMFIELD

Case 9
No. 55347
MA-9989

Appearances:

Mr. Richard Thal, WPPA General Counsel, Wisconsin Professional Police Association/LEER Division, 7 North Pinckney Street, Suite 220, Madison, Wisconsin 53703, for the Association.

Mr. Steven R. Wassel, Wassel Law Offices, 1034D Ann Street, P. O. Box 524, Delavan, Wisconsin 53115-0524, for the Town.

ARBITRATION AWARD

The Association and the Town 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 and the Town jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned as Arbitrator to resolve a dispute as set forth below. By letter dated July 29, 1997, the Commission appointed the undersigned as Arbitrator. Hearing on the matter was held on September 30, 1997, in the Bloomfield Town Hall, Pell Lake, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by January 6, 1998.

STIPULATED ISSUES

1. Did the Town of Bloomfield violate Article IV, Section 4.02 when it terminated Dennis Makola's employment?
2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND

Dennis Makola, hereinafter Grievant, began his employment with the Bloomfield Police Department on March 15, 1996, as a full-time police officer. Pursuant to Section 4.02 of the parties' collective bargaining agreement, the Grievant would serve a probationary period of one year. As a full-time police officer, albeit a probationary officer, the Grievant was charged with all the duties and responsibilities of a patrol officer. Although the Grievant met all the State of Wisconsin requirements to be a police officer at the time he was hired, he had little actual experience.

As a probationary officer, the Grievant was paired with a more experienced officer. Probationary officers are paired with more experienced officers to allow them time to learn the job. The pairing, however, is to cease as soon as the officer is able to perform on his or her own.

Although the time for pairing is different in each case, it is anticipated that an officer will be able to function on his or her own as soon as possible. This is particularly true in the Town of Bloomfield because the Town consists of roughly 36 square miles or 112 miles of road and because at the time the Grievant was employed by the Town, the Police Department was understaffed with seven full-time positions authorized, but only five filled including the Grievant's.

On May 6, 1996, Chief Mark G. Manthei spoke with the Grievant about his problems with the radio. (On simple traffic stops the Grievant would tie up the radio and the dispatchers for long periods of time, which irritated the Walworth County Dispatch.) Chief Manthei put the Grievant "on notice to straighten up or be removed."

The Town formally evaluated the Grievant on three separate occasions. In an evaluation dated May 10, 1996, Chief Manthei rated the Grievant as unsatisfactory. This evaluation covered the period from March 15, 1996 to May 8, 1996. In his evaluation, Chief Manthei noted the Grievant was satisfactory in the quality and quantity of his work, his work habits and attitude, but unsatisfactory in his job knowledge. Chief Manthei also noted a number of deficiencies in the Grievant's performance. These included not being sufficiently knowledgeable about the job and Town ordinances, such as when a resident phoned inquiring as to whether he could bury his pet on his property, and the Grievant informed the caller to phone back two days later rather than having known the answer or offering to find the answer. Other deficiencies noted included improper radio procedures, lack of communication skills, and unsatisfactory uniform neatness. Chief Manthei, however, noted that he felt that the Grievant had "the potential to do the job but may be focusing on other things then (sic) the job."

Prior to the Grievant's second evaluation, there were a number of complaints about the Grievant's performance. On May 13, 1996, in response to an emergency call, the Grievant, in a squad car, pulled up to his personal vehicle, got out of his squad car without putting it in park, causing the squad car to proceed backward. When the Grievant realized that the squad car was moving, he jumped back in and put the squad car into park without applying the brake. Chief Manthei spoke to the Grievant about this matter after having heard the grinding noise in the transmission from inside the Police Department. Chief Manthei was not happy about this

incident since this squad car "was just returned to the P.D. with a new transmission." On the same day, the Grievant pulled over a group of juveniles near Lake Geneva. The Grievant, although in no danger, called in an emergency call, "officer needs assistance," to Walworth County Dispatch. This call caused three jurisdictions to be dispatched. The Grievant parked his squad car in a lane of traffic causing a half mile backup in traffic. The reason for this "emergency" was nothing more than a group of teenagers cutting through a business owner's parking lot to avoid a stop sign, and resulted in no citations. When Chief Manthei arrived on the scene, he cancelled the aforesaid call and sent the Grievant back to the Police Department. Later, Chief Manthei told the Grievant that "he was going to pull the tapes from Walworth and I should write a detailed report and that I was going to be fired." The Grievant wrote in his letter dated July 23, 1996, to Sergeant Ted Lightfield that "For over 2 hours I had no contact with the Chief and sat in the PD under the assumption I would be fired."

In addition to the above two incidents, Chief Manthei received three separate driving complaints from citizens and/or Board members in the Town. In particular, the driving complaints stated that whether the Grievant was engaged in an emergency or a domestic, he would drive too fast and would "fly over" the railroad tracks on Clover Road.

On the Grievant's second evaluation, which covered the period from May 8, 1996 to June 13, 1996, Chief Manthei again rated the Grievant's performance as unsatisfactory. The Grievant's accuracy dropped from satisfactory to weak because he was still not operating the radio properly. The Grievant's deficiencies included radio procedures and communication skills, not focusing on the job task, driving too fast, and overreacting to calls. As an example of overreacting to calls, Chief Manthei testified that the Grievant phoned the Walworth County Sheriff's Department and requested evidence technicians and detectives to investigate what amounted to a minor burglary. Chief Manthei intercepted the officers and technicians before they arrived on the scene. In the event the Sheriff's Department had come to the scene, it would have been embarrassing to the Town and would have given the Town a reputation for overreacting causing the Town problems in the future for getting such assistance.

On the second evaluation, Chief Manthei clearly stated things that the Grievant needed to work on to improve his skills. In particular, Chief Manthei listed the following items (also listed in the first evaluation) that the Grievant needed to work on: improve on radio and communications; speak clearly; and uniform needs improvement. On this evaluation, it was also noted that the Grievant needed "work on improving knowledge of Dept. Policy and Procedures when responding to calls." In the prior evaluation, the Grievant was told to improve on his knowledge of Town Ordinances.

On July 1, 1996, Sergeant Ted Lightfield evaluated the Grievant's performance. This evaluation covered the period from March 15, 1996 to June 30, 1996. Because Sergeant Lightfield worked directly with the Grievant he had more opportunities to evaluate the Grievant than did Chief Manthei. Sergeant Lightfield rated the quality and quantity of the Grievant's work performance, his job knowledge and attitude as satisfactory and his work habits as highly satisfactory. Sergeant Lightfield noted a number of job strengths and superior performance

incidents as follows: arrives for work on time; displays avid willingness to learn

the job; learns from his mistakes; strong willingness to succeed; has learned the area and state laws well; and his reports are done in a timely manner. Regarding deficiencies requiring correction, Sergeant Lightfield noted the Grievant's continuing problems with the use of the radio and knowledge of Town ordinances but felt that these would be overcome "with time." Regarding the Grievant's progress, Sergeant Lightfield stated that since the Grievant "was hired his radio procedures have greatly improved, but he still needs to polish them a little." Sergeant Lightfield advised the Grievant not to let the Dispatchers make him nervous and to "use the stop and think before you talk theory" in order to improve his communications. Overall, Sergeant Lightfield rated the Grievant as a satisfactory employe.

In addition to the above three evaluations, the Grievant was also evaluated by two officers who had been paired with him and had trained him. The first evaluation, done in late June, was done by Officer Keith Mulhollon. In that evaluation, it was noted that the Grievant still needed assistance in doing his reports, still had difficulty using the computer, still had problems with the radio, needed to improve his driving skills and needed to better understand the proper response to calls. One instance, in particular, that led to Mulhollon's marks of deficiency involved the Grievant's issuance of a criminal complaint against an individual through the Walworth County District Attorney's Office without having stopped or even positively identified the individual. As it turned out, the Grievant had been mistaken as to the identity of the individual and in effect put the Bloomfield Police Department in the position of potential liability by charging someone with a crime that they had not committed. However, the complaint was never served. Later, Chief Manthei spoke with the Grievant about the incident and the Grievant stated that he felt he had the right guy. Chief Manthei did not recall whether or not the Grievant told him that there had been a witness and that the person in the car had been the person that he wrote up in the report.

Mulhollon also recorded a number of good things about the Grievant's performance including a strong interest and dedication to the law enforcement field, tries very hard to accomplish the tasks that are presented to him, has shown the ability to find his way around the township effectively, has shown some improvement in his radio skills, works effectively with people his own age (but needs to work on his communication skills with the younger generations) and is self motivated and aggressive in performing his job. In summary Mulhollon noted:

Officer Makola has proven to have the skills to become a Law Enforcement Officer. He gets along well with the officers of the department and shows that he is compassionate towards others. Officer Makola, however, seems to be having great difficulty understanding and completing proper procedures that have been explained to him.

Officer Strohbusch did an evaluation of the Grievant about a week later. In his evaluation, Strohbusch noted a number of areas where the Grievant functioned in a satisfactory manner including interacting with people, obtaining information and interviewing people,

becoming familiar with the Township roadways and features and managing his paperwork and completing assignments in a timely fashion. Strohbusch also stated that the Grievant needed to improve his radio skills as well as read department memos and become more familiar with events occurring in the Department. In conclusion, Strohbusch noted that the Grievant had "improved since he went to night shift," but that he needed to continue to improve and function better on his own. Strohbusch recommended that the Grievant "still be scheduled with another officer until he becomes more confident."

Following this evaluation, Chief Manthei had a conversation with Officer Strohbusch at a Highway 12 rest stop where according to the Chief "Strohbusch related to me that he was very concerned about his safety as well as Dennis"; that the Grievant was not performing to standards; and that he did not want to work with him any more. Officer Anthony Bertram testified that upon returning from a shift paired with the Grievant, Strohbusch stated that he did not want to train anyone else, "since Officer Makola had pushed him over the edge." Officer Bertram added that he had not heard any specific comments from other officers concerning the Grievant's performance as an officer.

At or about this same time, Chief Manthei began expressing his concerns over the Grievant's performance to the Town Chairman and Police and Fire Committee member Robert Tilton. Chief Manthei testified that he had made a determination to terminate the Grievant prior to the Grievant's complaint coming in but that the Town Chairman "was consulting with the township attorney on it, and I was advised to hold off."

On July 23, 1996, the Grievant wrote a memo to Sergeant Lightfield in which he complained that Chief Manthei had been inappropriately harassing and demeaning him and insulting his wife. Among his numerous complaints of Chief Manthei's conduct, Makola described:

Chief Manthei referring to Makola and his co-worker Officer Kreitlow as "dumb and dumber." Chief Manthei made such derogatory references about Makola to Makola's fellow officers.

Chief Manthei physically touching Makola with the pretense of adjusting Makola's uniform so to degrade and embarrass Makola in front of his fellow officers.

Chief Manthei repeatedly and without justification reminding Makola that he has the authority to fire Makola at any time and for any reason.

Chief Manthei altering Makola's work schedule for no legitimate purpose and assigning calls to Makola after his shift has ended while other officers on duty were idle.

Chief Manthei asking about a dog hair on Makola's uniform. When Makola explained he had recently had his dog in his car, Chief Manthei replied "you mean you had your wife in the car."

The Grievant also gave the memo to Town Board members Kenneth Monroe and Kenneth Robinson on July 24, 1996. In addition to being a Town Board member, Ken Robinson was chairperson of the Town Police and Fire Committee, a Committee whose function was to work with the Police Department and improve communication between the Department and the Town Board. Robinson assumed that Makola presented Monroe and him with the complaint so that Makola's allegations of the Chief's misconduct would be considered by the Town Board, and "not get just side stepped."

By letter dated July 28, 1996, to Town Chairman Tilton, Chief Manthei responded to the Grievant's complaint. In this response, Chief Manthei denied referring to the Grievant as "dumb and dumber." Chief Manthei noted that it was the Grievant's peers who referred to him "as dumb and dumber," but that he did not take their remarks to heart, instead feeling that "they were only saying this in jest." In addition, Chief Manthei responded to the Grievant's other allegations and listed numerous examples of what he considered to be poor performance on the part of the Grievant. Chief Manthei also informed Town Chairman Tilton that on June 10, 1996, the Grievant mistakenly identified the driver of a vehicle as the driver's brother. Chief Manthei acknowledged that this error had been corrected, but he wrote that this case of mistaken identity could have resulted in a lawsuit against the Town. Chief Manthei concluded his response with the following recommendation:

. . . It is this event and also others that I now make this recommendation to the Township Board. Per the union contract it is my recommendation that Officer Dennis Makola be terminated from his position as a Police Officer for the Town of Bloomfield Police Department. This recommendation has nothing to do with this grievance and has been under consideration prior to it ever being filed.

Following the above, the Town Board scheduled a closed session for July 31, 1996, to review the Grievant's allegations. At its July 31, 1996 meeting, the Town Board went into executive closed session to review both the Grievant's complaint and Chief Manthei's response and recommendation. Chief Manthei was present at the meeting and was allowed to respond to the accusations the Grievant had made against him. Chief Manthei again informed the Town Board of the Grievant's inadequacies as a police officer. Chief Manthei, however, did not provide Town Board members with the formal evaluations of the Grievant or with any other documents concerning the Grievant's performance at this time. The Town Board then determined that the Police and Fire Committee should look into both the Grievant's complaint and the Chief's response and recommend procedures for resolving these matters.

Also at this July 31 meeting, Ken Robinson consulted with Town Attorney Kirt J.E. Ludwig regarding the establishment of procedures for evaluating Chief Manthei's conduct and job performance. It was "agreed that we should interview past and present officers and employees of the Town. And I had asked Attorney Ludwig to put together questions that we could ask these officers." Attorney Ludwig subsequently compiled a list of questions for the interviewees which he communicated to Robinson by letter dated August 2, 1996.

At its August 7, 1996 meeting, the Police and Fire Committee discussed Chief Manthei's recommendation that Makola be terminated. Chief Manthei was present at that meeting. He provided Committee members with copies of the formal probationary period evaluations of the Grievant that had been completed by him and by Sergeant Lightfield. He also provided some evaluations of the Grievant by other departments as well as "the recommendations." Committee Chair Robinson recommended that the Grievant be given an extra month (August) to prove himself and then be reevaluated by Sergeant Lightfield with the Committee making a determination at that point. Chief Manthei, on the other hand, told the Committee that the Grievant should be immediately discharged because he put other officers in danger, he was a detriment to the Department, and it would be easier to get rid of him while he was on probation.

After hearing this argument, the majority of the Committee agreed with Chief Manthei. The Committee voted 5 to 1 to recommend termination of the Grievant, but decided that he should not be discharged until the first Town Board meeting in the month of September. This decision was reached despite the fact that it was Chairperson Robinson's opinion that those voting to recommend termination were biased because they were not able to hear Officer Makola's side of the story.

On the day following the August 7 Police and Fire Committee meeting, Chief Manthei drafted the following termination letter:

Dear Officer Makola:

This letter is to inform you that you are here by (sic) suspended with pay until August 31, 1996. At (sic) which time your status as a probationary officer with the Town of Bloomfield Police Department will be terminated. You are also ordered to turn in at this time all property owned by the Town of Bloomfield Police Department.

This letter was not sent because Sylvia Yakowenko, a Department Secretary, contacted a member of the Police and Fire Committee to ask whether it was true that the Grievant had been terminated. Town Board Chairman Tilton, Town Board members Robinson and Monroe, and Police and Fire Committee member Bill Markut subsequently discussed the contents of Chief Manthei's termination letter. In these discussions, Town Chairman Tilton informed the others that he (Tilton) and Chief Manthei had talked to Town Attorney Ludwig and Ludwig told them that the

Town should "just get rid of him. Why wait?" Nevertheless, Town Chairman Tilton

agreed with Town Board member Robinson's statement that the Chief's termination letter could not be sent because the Town Board, not the Chief, had the authority to terminate the Grievant. Town Board Chairman Tilton then contacted Sergeant Lightfield and directed him "to retype the letter." The letter was subsequently retyped and signed for Chief Manthei by Yakowenko. According to this second letter, the Grievant was informed that he was "suspended with pay until August 31, 1996. At (sic) which time your status as a probationary officer with the Town of Bloomfield Police Department will be determined by the Town Board." This second letter was served on the Grievant.

On August 10, 1996, the Town Board met to make a final determination on the Police and Fire Committee's recommendation concerning the Grievant's status. The Town Board reviewed the Police and Fire Committee's recommendation for termination, heard from Police and Fire Committee Chairman Robinson and Committee member Tilton who informed the Board members that Town Attorney Ludwig advised the Board not to drag the matter out, but to terminate the Grievant at the meeting. Chief Manthei was present at the meeting but did not speak. Except for the Grievant's complaint and Chief Manthei's response, the Town Board had no other written evidence upon which to evaluate the Committee's recommendation. Nevertheless, the Town Board adopted the Police and Fire Committee's recommendation that the Grievant be fired.

In addition to terminating the Grievant on August 10, 1996, the Town Board also decided to place a letter in Chief Manthei's personnel file, dated August 12, 1996, which provides in relevant part:

On August 10, 1996 the Bloomfield Town Board met in closed session for the purpose of reviewing and making a final determination on the Police & Fire Committee recommendation with regard to Officer Makola that was recently brought before the Board. All members of the Board were present.

As a result of this meeting the determination was made by a majority vote that he did not successfully complete his probationary period. . . .

With regard to your involvement in the above matter it was also determined that you misrepresented a verbal directive from the Town Chairperson as well as a verbal recommendation from the Town Clerk.

Also by letter dated August 12, 1996, Chairperson Tilton informed the Grievant as follows:

On August 10, 1996 the Bloomfield Town Board met in closed session for the purpose of reviewing and making a final determination on the Police & Fire Committee recommendation that was recently brought before the Board. All

members of the Board were present.

As a result of this meeting the determination was made by a majority vote that you did not successfully complete your probationary period. It was also determined that effective August 10, 1996 you are suspended from active duty through September 10, 1996 with full pay and benefits. Termination shall be effective September 11, 1996. Your insurance will continue through September 30, 1996 at which time you may choose to continue your coverage through Pekin Insurance by completing the appropriate application which is available through the Clerk's office.

PERTINENT CONTRACTUAL PROVISIONS

1994-1996

ARTICLE IV SENIORITY

. . .

Section 4.02 - All new full-time appointees to the Department shall be on probation for a period of one (1) year. All new part-time appointees shall be on probation for a period of 600 hours. If the appointee proves unsatisfactory or unfit for continuance in the service during the probationary period the appointee shall be terminated on recommendation of the Chief of Police to the Town Board.

. . .

ARTICLE V GRIEVANCE PROCEDURE

Section 5.01 - Definition: A grievance is a formal claim in writing that the Employer, the Association or an employee has not complied with some specific provision of this Agreement. "Days" shall mean Monday through Friday excluding holidays.

. . .

Section 5.04 - Any arbitrator appointed hereunder shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement and shall be limited in authority to determining whether or not the offense has been committed and the remedy for the offense.

. . .

ARTICLE VI DISCIPLINE

Section 6.01 - Any employee who is disciplined shall be disciplined for just

cause only. The Employer grants limited disciplinary powers to the Chief of Police or his designated representative as listed below.

Section 6.02 - A supervisor has to consider many things when he/she takes disciplinary action against a subordinate, therefore the below listed classification shall not be considered as a sequential order and can commence at any level.

(a) Disciplinary Steps

(1) Verbal Reprimand with a notation made in the employee's personnel file and removed after six (6) months if no further violation.

(2) Written Reprimand with a copy placed in the employee's personnel file, and removed after eighteen (18) months if no further violation;

(3) Up to Five (5) Days Suspension without pay with a letter of request sent by the Chief of Police to the Town Board for full Board action on request;

(4) Fifteen (15) Days Suspension without pay with a letter of request sent by the Chief of Police to the Town Board for full Board action on request.

(5) Indefinite Suspension without pay pending completion of an outside investigation or court hearing with a letter of request sent by the Chief of Police to the Town Board for full Board action on request.

(6) Termination with letter of request sent by the Chief of Police to the Town Board for full Board action on request.

Section 6.03 - Disciplinary Hearing: A hearing for review of discipline, suspension or termination shall be held by the Town Board only upon request of the disciplined employee made within ten (10) days, or such right of hearing shall be waived. This review or hearing shall take place not more than twenty (20) days after the request for the hearing has been received by the Town Board unless the deadline is mutually extended by the parties. The hearing on the charges shall be public by mutual agreement of both parties. The accused and the complainant may be represented by an attorney or person of their own choice and may compel the attendance of witnesses by subpoena which shall be issued by the Chairman of the Town Board upon request and served pursuant to Chapter 885, Wisconsin Statutes. The hearing shall be duly recorded and a copy of the transcript provided to both parties. No person shall be deprived of compensation while suspended pending the disposition of the charges. The Town Board shall make a written determination within five (5) days of the hearing and provide a copy to both parties. A review of the decision of the Town Board may be appealed through the grievance procedure directly to the arbitration step or to the Circuit Court as provided in Section 62.13 (5i), Wisconsin Statutes. The decision of the arbitrator or judge shall be final and binding upon both parties.

Section 6.04 - The full Town Board shall have the authority to suspend with pay, or without pay, provided the suspended employee be provided with a written copy of the specific charges, length of suspension and any other pertinent data relevant to the suspension. If the suspended employee requests a hearing as set forth herein, he shall be maintained on duty with pay or shall be suspended with pay pending the outcome of the hearing.

. . .

1997-1999

ARTICLE IV - Seniority

. . .

Section 4.02 - All new full-time appointees to the Department shall be on probation for a period of one (1) year. All new part-time appointees shall be on probation for a period of 600 hours.

. . .

PARTIES' POSITIONS

Association's Position

The Association in its brief basically argues that the Town violated the parties' collective bargaining agreement when it terminated the Grievant. The Association notes that under the parties' agreement discharging the Grievant requires proof that he is an unsatisfactory or unfit employe. The Association takes the position that the Town did not prove that the Grievant was an unsatisfactory police officer or otherwise unfit to continue working as a probationary officer.

In support of the above, the Association maintains that the Town violated the aforesaid agreement when it terminated the Grievant "for alleging that Chief Manthei harassed him." The Association points out that Section 4.02 of the parties' agreement provides:

If the appointee proves unsatisfactory or unfit for continuance in the service during the probationary period the appointee shall be terminated on recommendation of the Chief of Police to the Town Board.

According to the Association this contractual provision provides that the Town may not terminate a probationary officer unless two conditions are met: first, there must be a fair and objective

showing that the probationary officer proved to be an unsatisfactory or unfit employe; and secondly, the Chief must initiate the termination by submitting to the Board a recommendation

that the probationary employe be discharged. The Association believes that the Town failed to comply with the first requirement when it terminated the Grievant based on the Chief's recommendation without conducting a fair and objective review of the basis for the Chief's decision that the Grievant should be terminated.

The Association concedes that the above-mentioned restrictions on the Town's right to terminate a probationary employe place a type of limitation on the Town that is not commonly found in public sector collective bargaining agreements. However, the Association argues that changes in the disputed contract language support the above approach. In this regard, the Association points out that effective January 1, 1997, the parties eliminated the aforesaid restrictions when they agreed to amend "Article IV - Seniority" language to simply provide for a one-year probationary period. The Association notes that under the current agreement there is no longer a contractual provision requiring the Town to prove unfitness before it discharges a probationary officer. In the Association's opinion, under the amended (new) language, "the parties' contractual probationary period provision is now the kind of provision that gives the employer broad discretion to discharge probationary employees." See Elkouri & Elkouri, How Arbitration Works, at 892-93 (5th Ed. 1997) The Association believes that prior to 1997 the Town did not have "such broad discretion." To the contrary, the Association opines, "the Section 4.02 language applicable in this grievance places explicit contractual limitations on the right of an employer to discharge a probation employee citing Elkouri & Elkouri, SUPRA AT 893 and PHOENIX TRANSIT SYSTEM, 70 LA 395, 397 (HAYES, 1978).

The Association believes that PHOENIX TRANSIT SYSTEM is applicable herein because the arbitrator in that case found while applying probationary period language that the employer's right to terminate during the probationary period was not absolute but subject to the test of fairness and reasonableness. Applying this test, the Association notes said arbitrator "found that the employer unfairly terminated the probationary employee when it failed to fully investigate and obtain all of the facts with respect to the allegation of employee wrongdoing. SUPRA AT 398. The Association concludes that in the instant grievance, like PHOENIX TRANSIT SYSTEM, the Town's right to terminate a probationary employee is not absolute. Although the Grievant did not have the "just cause" protections available to non-probationary employes, the Association contends that the Town is required to adhere "to the explicit Section 4.02 limitations that require it to conduct a fair and objective investigation of whether Makola was an unfit or unsatisfactory employee."

The Association next maintains that since the Town did not conduct a fair and objective investigation it failed to prove that the Grievant was an unsatisfactory police officer or otherwise unfit to perform his job duties. In this regard, the Association points out that the Police and Fire Committee "rubber-stamped Chief Manthei's recommendation that Makola be discharged" without first reviewing the Grievant's job performance and hearing his side of the story. The Association argues that this violates well-established labor relations principles including a requirement that an investigation of alleged wrongdoing or unsatisfactory performance must take place before any disciplinary or discharge decision is made by an employer and a requirement that a fair and objective investigation requires that the management representatives responsible for evaluating a discharge recommendation must be provided with complete and accurate information concerning

the case. The Association argues that the latter standard requires that

management representatives responsible for evaluating the discharge recommendation hear information favorable to the person facing discharge. The Association cites Elkouri & Elkouri, SUPRA AT 919 and OLIN MATHIESON CHEM. CORP., 51 LA 97, 98 (DAUGHERTY, 1968) in support of the aforesaid labor principles.

The Association further maintains that the Town violated the aforesaid standards because neither the Town Police and Fire Committee nor the Town Board conducted an independent evaluation of Chief Manthei's opinion that the Grievant was an unsatisfactory and unfit employe; because the Town's action ignored the fact that Chief Manthei's discharge recommendation was made within several hours of his receiving the Grievant's complaint on July 28, 1996; because an independent evaluation would have demonstrated that the Grievant was not an unsatisfactory employe; because such an evaluation would have shown that the Chief had a pattern of untruthfulness and misrepresentations thus undermining Chief Manthei's recommendation that the Grievant be terminated based on his evaluation of complaints made against the Grievant and the Grievant's work performance; and because an investigation would have proved that the Chief's articulated reasons for recommending that the Grievant be discharged were pretextual - that the Chief's real reason for recommending discharge of the Grievant was that Makola complained of inappropriate conduct by the Chief.

Based on all of the above, the Association requests that the Arbitrator sustain the grievance and order the Town to reinstate the Grievant and make him whole for all lost wages.

In its reply brief, the Association repeats its claim that the timing of Chief Manthei's termination recommendation makes it clear that the Town did not terminate the Grievant because of an unsatisfactory job performance, but in retaliation for the Grievant's report complaining of inappropriate conduct by the Chief. In support thereof, the Association points out that the Town has not identified any job deficiencies or problems that occurred after the Grievant's June 30, 1996 evaluation wherein Makola was rated as a satisfactory probationary employe with an "avid willingness to learn the job" and the Chief's July 28, 1996 termination recommendation.

The Association next reiterates its claim that under Section 4.02 of the agreement the Town was contractually obligated to prove unfitness before terminating the Grievant. The Association again notes that the process of proving unfitness requires that the employe must be provided with the right to be heard and the right to an objective and fair investigation before being terminated citing Elkouri & Elkouri, How Arbitration Works, SUPRA, AT 918-919; MCCARTNEY'S INC., 84 LA 799, 802-04 (NELSON, 1985); and ADRIAN COLLEGE, 89 LA 857, 861 (ELLMANN, 1987) in support of this position. Regarding MCCARTNEY'S INC., the Association notes that the Elkouris cite Arbitrator Nelson's decision as one of many examples of cases where arbitrators have reinstated discharged employes because management violated basic notions of fairness or due process. The Association points out that Arbitrator Nelson reinstated the grievant because management failed to give him an opportunity to be heard in his own defense before the decision to discharge was made. The Association adds that it was the "process," not the "result," which was at issue in that case because the employer failed to provide the grievant with the basic due process right to be heard. The Association cites with approval Arbitrator Nelson's reasoning in

that case:

The grievant was entitled to an opportunity to present his side. He never got that opportunity, and the failure on the part of the Company to provide it both establishes the discharge as not for just cause and demands a remedy. The remedy provided is intended as a make whole remedy for the grievant -- to compensate him for the loss which he suffered as a result of his being denied due process. We hope it may serve an additional purpose: to impress upon the Company the importance of that minimal due process requirement. MCCARTNEY'S INC., SUPRA, AT 804

Regarding ADRIAN COLLEGE, the Association points out that Arbitrator Ellmann also reinstated the grievant because the employer failed to provide him with basic due process rights, including the right to a fair and objective investigation and the right to respond to allegations of wrongdoing before being discharged. ADRIAN COLLEGE, SUPRA, AT 861

Applying the above standards, the Association argues that while the Grievant was not entitled to full just cause protection, he was entitled to minimal due process rights by virtue of the Section 4.02 requirement that the Town prove that he was unsatisfactory or unfit. The Association adds that the majority of the Town Board erroneously ignored Town Police and Fire Committee Chair Ken Robinson's attempt to convince them that they could not terminate the Grievant unless they first gave him a chance to tell his side of the story. The Association also adds that the Town's attempt to minimize the significance of Robinson's testimony regarding same by asserting that Robinson was a "personal friend of Makola" must fail because Robinson was simply "an elected Town official doing his job well." In contrast, according to the Association, the majority of Town Board members improperly allowed the Chief to retaliate against the Grievant "even though Makola's complaint about the Chief's conduct truthfully described the Chief repeatedly making inappropriate sarcastic remarks about Makola and other officers" - allegations that would have been substantiated by other employees if the Town had conducted a fair and independent investigation of said charges.

The Association concludes by noting that just as the grievants in MCCARTNEY'S INC. and ADRIAN COLLEGE were entitled to due process protections, so was the Grievant. Consequently, in the opinion of the Association, "just as the grievants in those cases were reinstated with back pay because the employers failed to provide basic procedural protections, Dennis Makola" also should be reinstated and made whole for all lost compensation.

Town's Position

The Town in its brief argues that it did not violate Section 4.02 when it terminated the Grievant. In support thereof, the Town first cautions that the Arbitrator should not add to or amend the aforesaid contractual provision in deciding this grievance. In this regard, the Town claims that there is only one way to interpret Section 4.02 when deciding the instant dispute; namely, a probationary employe like the Grievant shall be terminated if there is proof that he is an unsatisfactory or unfit officer and once the Chief has proof that the employe is in fact performing

unsatisfactorily or is unfit, termination should be recommended to the Board and

based on a vote, the Board shall terminate the employe. The Town adds that the plain language of the clause as well as the contract as a whole supports its interpretation, not the one offered by the Grievant, i.e. that the Chief must prove to the Board that an officer is unsatisfactory or unfit. In any event, regardless of the interpretation, the Town concludes that there is ample evidence for the Arbitrator to find that the Town complied with the aforesaid contractual provision by its termination of the Grievant.

In support of the above, the Town argues that a number of principles of contract interpretation support its position that the Town did not violate the provisions of Section 4.02 herein. In this regard, the Town claims that if the Association's interpretation of Section 4.02 is correct there is no need for said section because Article VI already gives the due process rights to other employes that the Grievant claims are his as a probationary employe. The Town also points out that the disputed contract language was deleted from the 1997-1999 contract. The Town asks who benefits from the deletion concluding that it is the Association "since without the language, termination of probationary employees too would be governed by Article VI, the same as other employees." Thus, according to the Town, "it is only reasonable to conclude that the correct interpretation of Section 4.02 is that put forth by the Town." Finally, the Town argues that the Arbitrator must give words their ordinary and popular meaning while claiming that the disputed contract language clearly states that a probationary officer shall be terminated by the Town Board on recommendation of the Chief that the probationary officer is unsatisfactory or unfit for continuance in the service. (Emphasis supplied) Based on the foregoing standards, the Town concludes that the Chief, as the contract language states, is the logical person to make the determination that the Grievant is unsatisfactory or unfit for continuance in the service, and that the Chief had ample evidence that the Grievant was not performing adequately.

In support of the above claim that the Grievant was not performing his work satisfactorily, the Town maintains that the Grievant's performance as a police officer did not meet any reasonable standards citing numerous citizen complaints, poor evaluations, negative feedback from other people in the Department, the Grievant's inability to function on his own as well as negative feedback from other departments.

Contrary to the Association's assertions, the Town maintains that Chief Manthei did disseminate ample proof to the Town Board and its Police and Fire Committee of the Grievant's unsatisfactoriness or unfitness to perform as a police officer. The Town cites a number of examples of the information that the Chief offered to the appropriate Town representatives and citizen bodies.

Finally, although the Town does not believe that the Grievant is entitled to a remedy, "if it is found that a remedy is appropriate," the Town believes the only appropriate remedy, if termination is found not proper, is for the Arbitrator to reinstate the Grievant "conditioned on Makola's successful completion of a twelve month probationary period." The Town adds that since the Grievant had been suspended prior to his termination, he is not entitled to back pay if he in fact is reinstated.

Based on all of the foregoing, the Town requests that the grievance be denied and the matter dismissed.

In its reply brief, the Town argues that it was not obligated to conduct any further investigation than that which was done by the Chief. In support thereof, the Town points out that the weight of arbitral authority supports the proposition that management has broad, if not almost unlimited, discretion where probationary employees are involved. Elkouri & Elkouri, How Arbitration Works, at 892-893 (5th Ed. 1997) and BRIDGESTONE (U.S.A.), INC., 88 LA 1314, 1316 (NICHOLAS, 1987) The Town adds that the Association's reliance on PHOENIX TRANSIT SYSTEM is misplaced for the following reasons: one, the termination clause in said case required the employer to judge a number of things to determine whether the employee was able to perform the work for which she was employed unlike the instant dispute which gives the Chief broad discretion to determine the probationary employee's satisfactoriness or fitness; two, the fact that the disputed language herein is much broader than the language cited in PHOENIX TRANSIT SYSTEM is extremely important since the record indicates that in addition to the Grievant not being fit to continue as an officer he was not a satisfactory employee because the Town needed an officer who could work independently; three, contrary to the Association's insinuation the arbitrator in PHOENIX TRANSIT SYSTEM did not require any specific investigation or hearing, but rather, only required that the Company act in a fair and responsible manner which the Town did herein; and four, although the Association attempts to read a "fair and objective investigation" clause into the governing language, even the arbitrator in the aforesaid case did not require same, only that "the Company's right to terminate should not be based on whim or be arbitrary, capricious or unreasonable." (Emphasis supplied) Consequently, the Town states that it is "ludicrous" to say that it did not act in a fair and reasonable manner when it discharged the Grievant. To the contrary, the Town believes that it went beyond that required by the contract when it directed the Police and Fire Committee to review the Chief's recommendation, and then acted upon said Committee's recommendation of termination. The Town concludes that since it went beyond its contractual mandate and because the Chief's recommendation was well founded it did not act in an arbitrary or capricious manner but instead in strict compliance with the contract.

DISCUSSION

At issue is whether the Town violated Article IV, Section 4.02 when it terminated the Grievant. This contract provision provides that if an appointee proves unsatisfactory or unfit for service during the probationary period the appointee shall be terminated on the recommendation of the Chief to the Town Board. The Association argues that the Town violated same by terminating the Grievant while the Town takes the opposite position.

In support of its position that the Town improperly terminated the Grievant, the Association claims that the aforesaid contract provision requires a fair and objective showing that the probationary officer proved to be an unsatisfactory or unfit employee. In particular, the Association argues that the Grievant is entitled to some minimal elements of due process and fairness before being terminated including a fair and objective investigation, the right to present his

side of the story and an independent review by the Town Board of the Chief's allegations.

However, the parties' collective bargaining agreement does not explicitly contain such requirements. In addition, the Association offered no evidence of past practice or bargaining history which indicates that the parties agreed that probationary employees are entitled to such protections when terminated pursuant to the language of Section 4.02.

The Association also cites several arbitration cases including OLIN MATHIESON CHEM. CORP., SUPRA, MCCARTNEY'S INC., SUPRA, ADRIAN COLLEGE, SUPRA, as well as Elkouri & Elkouri, How Arbitration Works, at 918-919 (5th Ed. 1997) in support of its position that the Grievant is entitled to certain minimal due process protections as noted above. However, the due process protections described therein are all included as a component of the just cause standard, not the standard applicable to a probationary employee like the Grievant herein. Therefore, the Arbitrator rejects this claim of the Association.

The Association's reliance on PHOENIX TRANSIT SYSTEM, SUPRA, is a closer call. In PHOENIX TRANSIT SYSTEM the arbitrator found that the employer violated a contract provision requiring a fair and impartial hearing for an employee who was being disciplined when it discharged a probationary bus operator for failing to keep required eye examination appointments without investigating the employee's reasons for failing to keep the appointments. Contrary to the Town's assertion, the Arbitrator cannot find a significant difference between the criteria the employer in PHOENIX TRANSIT SYSTEM considered when determining whether said probationary employee was able to perform the work for which she was employed and the criteria applicable herein. In PHOENIX TRANSIT SYSTEM the employer had a ninety-day trial period during which it could judge the new employee's ability, competency, fitness, and other qualifications to perform the work for which he/she was employed. In the instant case, the Town may consider for a one-year probationary period whether a probationary employee is a fit or satisfactory employee. In the opinion of the Arbitrator, both contract provisions give the employer broad authority to review a probationary employee's work performance. Likewise, the Arbitrator rejects the Town's assertion that PHOENIX TRANSIT SYSTEM stands only for the proposition that a probationary employee's termination should not be based on whim or be arbitrary, capricious or unreasonable. (Emphasis supplied) The arbitrator in PHOENIX TRANSIT SYSTEM made it very clear that based on his reading of the contractual probationary and disciplinary clauses the employer's right to terminate during the probationary period was subject to a test of fairness and reasonableness which included in that case a hearing as required by the contract and a full and complete investigation into the facts surrounding the grievance. SUPRA AT 398. What distinguishes PHOENIX TRANSIT SYSTEM from the instant dispute, in the opinion of the Arbitrator, is the fact that the probationary clause in PHOENIX contained no standard to be applied to the discipline and discharge of probationary employees. Therefore, the arbitrator in PHOENIX found that the hearing required for "any employee" facing disciplinary action also applied to probationary employees. In the instant dispute, Section 4.02 provides a standard as noted above to be applied to probationary employees while the disciplinary clause (Article VI) provides for a different standard including a disciplinary hearing for non-probationary employees facing discipline or discharge. The arbitrator in PHOENIX TRANSIT SYSTEM also found that if a hearing had been held and if the employer had conducted a suitable investigation the company

would not have terminated the grievant because she was able to perform her job. For the reasons discussed later in this portion of the Award, this Arbitrator would not arrive at the same conclusion for the Grievant. Based on the foregoing, the Arbitrator also rejects this claim of the Association.

Likewise, the Arbitrator rejects the Association's argument that changes in the disputed contract language support its approach regarding minimum due process requirements. The Association is of the opinion that removal of the instant requirement that the Town prove unfitness before it discharges a probationary officer gives the Employer the kind of broad authority to terminate probationary employees in the successor agreement that management has traditionally enjoyed. The Association, however, offers no proof of same. Absent bargaining history or past practice to the contrary, the Arbitrator agrees with the Town's contention that removal of such language provides that "termination of probationary employees too would be governed by Article VI, the same as other employees." Such a result is consistent with the arbitrator's findings in PHOENIX TRANSIT SYSTEM.

The Town contends that the Grievant's performance as a police officer did not meet any reasonable standards citing numerous citizen complaints, poor evaluations, negative feedback from other people in the Department, the Grievant's inability to function on his own and negative feedback from other departments. The Arbitrator agrees. The Association claims that the Grievant's discharge was retaliatory, but offers no persuasive evidence of same. It is true, as pointed out by the Association, that the Chief's recommendation to terminate the Grievant followed almost immediately the Grievant's written complaint against him. However, the record indicates that the Chief warned the Grievant as early as May 6, 1996, to shape up or be terminated. In addition, Chief Manthei had been talking to Town officials prior to the complaint about his concerns over the Grievant's work performance and his desire to terminate him but was advised to hold off.

The Association is correct in pointing out that the record contains no evidence of problems with the Grievant's work record following his satisfactory evaluation on June 30, 1996, and prior to the Chief's recommendation to terminate him on July 28, 1996. However, there were serious concerns about his work performance prior to the Chief's determination in late June or early July that the Grievant should be terminated. In addition, Sergeant Lightfield, who was the only officer in the Department to give the Grievant a satisfactory evaluation, testified at hearing that the Grievant was fit for duty, but not with the Town. (Tr. 97)

Finally, the Association argues that there is ample evidence that the Grievant, not the Chief, is telling the truth as it relates to the Grievant's fitness for duty. Assuming arguendo that this is true, there is ample other evidence in the record to support the Town's contention that the Grievant was unfit and unsatisfactory for duty as a police officer for the Township.

Based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the answer to the issue as framed by the parties is NO, the Town of Bloomfield did not violate Article IV, Section 4.02 when it terminated Dennis Makola's

employment. In reaching this conclusion, the Arbitrator does not disagree with the Association's basic contention there was a better way for the Town to have proceeded. Specifically, the Town

Board could have conducted a thorough and independent investigation of its own and given the Grievant an opportunity to be heard prior to discharging him. However, there is no contractual requirement or basis in the record mandating that the Town proceed in this manner. Therefore, based on all of the foregoing, it is my

AWARD

That the grievance of Dennis Makola is hereby denied and this matter is dismissed.

Dated at Madison, Wisconsin, this 24th day of February, 1998.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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