

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS LOCAL UNION NO. 579**

and

**CITY OF EVANSVILLE  
(POLICE DEPARTMENT)**

Case 32  
No. 58243  
MA-10893

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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Ms. Naomi E. Soldon**, on behalf of Teamsters Local Union No. 579.

Anthony C. Kraujalis Law Offices, by **Mr. Anthony C. Kraujalis**, on behalf of the City of Evansville.

**ARBITRATION AWARD**

Teamsters Local Union No. 579, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Evansville, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on April 4, 2000, in Evansville, Wisconsin. There was no stenographic transcript made of the hearing. The parties submitted post-hearing briefs in the matter and by November 10, 2000, notified the undersigned that he could close the record. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

### ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issues:

Whether or not the Police Department had just cause to suspend the Grievant?  
If not, what is the appropriate remedy?

### CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

#### ARTICLE 7. DISCIPLINE

Section 7.01. The Chief or his/her designee (other than an employee of Teamsters Local Union No. 579) shall have the right to discipline employees for just cause.

Section 7.02 The City agrees that normally the discipline process shall follow the principle of progressive discipline with verbal warnings, written warnings, suspension(s) and discharge. Confirmation of verbal warnings and written warnings shall be removed from an employee file if a like incident does not recur within one (1) year. Notice of suspensions shall be removed after two (2) years if a like incident does not recur. Depending on the severity of an incident, the steps of verbal and written warnings may be bypassed in dispensing discipline. Employees shall have the right to appeal suspensions or discharge directly to Step 3 of the Grievance Procedure.

### EVANSVILLE POLICE DEPARTMENT POLICIES

The following Department policies are also cited:

**Sec. 1-6 Failure to Cooperate with Other Members of the Department in Performance of Official Duties.**

#### STATEMENT OF PURPOSE:

Cooperation by Department members is essential in the uniform attempt to reach Department objectives, conserve time, and prevent duplication of effort. Therefore, violation of the following policies may lead to disciplinary action.

POLICY:

...

- (b) No member of the Department shall fail to cooperate with all members of the Department by withholding information regarding any police matter for personal benefit, gain, or because of spite or selfishness.

...

- (d) No member of the Department shall fail to prepare required correspondence, reports and records relating to the activities of the Department prior to the end of that member's shift.

Sec. 1-7 Insubordination.

STATEMENT OF PURPOSE:

The fulfillment of duties, as well as the reputation of the Department and its members, should always be uppermost in the officer's mind. Personal disagreements and arguments between supervisors and subordinate members, especially in public, can only lead to a breakdown in discipline and efficiency. The failure to show proper respect for the authority and rank of commanding officers or officials constitutes insubordination as set forth by the following rules:

POLICY:

- (a) Disrespect, sarcasm, or rudeness displayed by action or language, written or verbal, toward any supervisory officer will not be tolerated. Officers shall address supervisors each other in a courteous, professional, & respectful manner at all times. Violations of this section are considered serious.
- (b) Criticism of a superior or of his/her orders shall not be made publicly, except as part of an official inquest or in a court of law.
- (c) Complaints regarding a supervisory officer shall be made through the proper chain of command for disposition.

- (d) Disobedience, or failure to follow a lawful order or directive, written or oral, constitutes insubordination.

...

#### **Sec. 1-11 Miscellaneous Prohibited Conduct.**

##### **POLICY:**

...

- (b) **Prohibited Conduct.** Violation of the following rules and duties may result in disciplinary action:
  - (1) Failure to follow a lawful, direct order from a supervisor.

...

#### **Sec. 1-12 Conflicting or Unlawful Orders**

##### **POLICY:**

No command or supervisory officer shall knowingly issue an order which is in violation of any law or ordinance or departmental rules, except as part of certain investigations.

##### **PROCEDURES:**

- (a) Officers who are given an otherwise proper order which is in conflict with a previous order, rule, regulation or directive shall respectfully inform the superior officer issuing the order of the conflict. If the superior officer issuing the order does not alter or retract the conflicting order, the order shall stand. Under these circumstances, the responsibility for the conflict shall be upon the superior officer. Officers shall obey the conflicting order and shall not be held responsible for disobedience of the order, rule, regulation or directive previously issued.
- (b) Officers shall not obey any order which they know, or should know, would require them to commit any illegal act. If in doubt as to the legality of an order, officers shall request the issuing order to clarify the order or confer with higher authority.

COMMENTARY:

Obedience to an unlawful order is never a defense for an unlawful action; therefore, no member or employee is required to obey any order which is contrary to Federal law, State law, or local ordinance. Responsibility for refusal to obey rests with the member. He/she shall be strictly required to justify such action.

**BACKGROUND**

The City maintains and operates the Evansville Police Department. Scott McElroy has been the Chief of Police since 1998 and has been a full-time officer in the Department since 1988. The Grievant, Michael Goetz, has been a full-time Police Officer in the Department since April of 1993 and was a part-time officer in the Department for approximately two years before that. Goetz's immediate supervisor is Lt. Arthur Phillips. Phillips has been a full-time officer in the Department since 1984 and was a part-time officer for two years prior to becoming full-time. He has held the Lieutenant position since March of 1998. The Lieutenant position was removed from the bargaining unit in September of 1999 as a supervisory position and Lt. Phillips is second-in-command in the Department.

On the evening of October 2, 1999, Goetz and another officer, David Rossmiller, responded separately to an alarm at the local Piggly Wiggly grocery store. Goetz filled out a "case card" on October 2 regarding the incident, which included the following:

"9210194 Alarm front entry motion. All secure upon arrival I1KH responded to reset alarm. No further action. Unfounded."

Case cards are placed in a box on the Department secretary's desk to be put on the computer and to be reviewed later by Lt. Phillips and Chief McElroy.

On October 4<sup>th</sup>, Lt. Phillips had a conversation with the keyholder in the October 2<sup>nd</sup> call, which he discussed with the Chief. As a result, he issued the following:

October 5, 1999

General Order

To: Officer Goetz & Officer Rossmiller

Re: Alarm at Piggly Wiggly Store

From: Lt. Phillips

On October 2, 1999 at 11:27 pm you responded to an alarm at the above location. The case card states that it was a "front entry motion" and all secure upon arrival. The card further indicates that the key holder responded to reset alarm, "No further action"

The key holder advised that she arrived and went inside to turn off the alarm. She advised that one officer came inside with her and that the other officer sat in his squad. She further stated that she suggested that the rest of the store be checked.

In addition, the key holder advised that she led the way through the store and that the officer inside with her followed behind her checking the store. She implied to me that she was concerned for herself and jokingly said "I should have asked him for his gun to use" while she checked the store.

I am requesting each of you respond to me in writing by October 9, 1999 at 7 am what actions you each did at this alarm call. I also request that you do not discuss this with anyone other than I.

If you have any questions, please contact me.

Respectfully,

Arthur E. Phillips  
Lieutenant of Police

Lt. Phillips testified that he put it in writing because he mistakenly believed Goetz and Rossmiller would be off duty until the following Monday and he would not see them before then.

Goetz responded to Lt. Phillips on October 6<sup>th</sup> by the following:

October 6, 1999

General Response

To: Lt. Phillips

Re: Alarm at Piggly Wiggly Store

From: Officer Goetz

In reference to your request for a response in writing regarding October 2, 1999 at 11:27 p.m., if my written response and/or any verbal discussion of said date/time could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I respectfully request that my union representative or steward be present at a meeting coordinated/scheduled by you to include yourself, me, Darrell Shelby, and/or Bill Fitters. Without representation, I choose not to answer any questions at this time or to provide any written response.

If you would supply a written statement promising absolutely no discipline will result from the above mentioned written response and/or verbal discussion, I would be more than happy to comply with your request.

Sincerely,

Michael Goetz /s/  
Officer Michael Goetz #5321

Lt. Phillips testified that he read Goetz's response and discussed it with him on October 6, 1999, both in the office and when taking Goetz home, telling Goetz he was making a mistake in responding in that manner. Goetz did not ask Phillips to clarify whether or not he could speak to his Union representative about the matter.

Lt. Phillips testified that he subsequently discussed the matter with Chief McElroy and then summarized his conversation with Goetz and put his concerns in writing to the Chief by the following:

October 6, 1999

To: Chief Scott McElroy

Re: Insubordination by Officer Michael Goetz

From: Lt. Phillips

On October 5, 1999, I wrote the attached General Order to Officer Michael Goetz. I had requested Officer Goetz to respond to me in writing by October 9, 1999 at 7:00 am what actions he did at a Burglar (sic) alarm call. I had also written the same General Order to the other officer that was on this same call.

I wrote the General Order to find out how the officers checked the building. The key holder of the store where the alarm was told me how the officers checked the building with her. I wanted the officers to tell me what they did since the case card the officers filed did (sic) provide this information.

I was concerned for the safety of the officers and of the key holder of the business. If the officers needed to be coached on a safer way of checking a building I would be able to do this.

The General Order was in a writing because both officers were not going to be working with me in the next couple of days. I wanted to check into this in a timely manor (sic) and correct any problems if they existed.

On October 6, 1999, Officer Goetz was working when I came into work. I commented to Officer Goetz that I thought he was not back into work until Friday night. I had misread the schedule. I asked Officer Goetz if he had received my letter to him. Officer Goetz said yes and that the reply was in my tray.

I opened the envelope addressed to me and read Officer Goetz's response (See attached copy)

I find that the response from Officer Goetz to be Disobeying a lawful order and unacceptable. Section 1-7(d) Insubordination, has clearly been violated by Officer Goetz. Section 1-11(b)(a) Miscellaneous Prohibited Conduct has been violated as well by Officer Goetz.



I advised Officer Goetz that I believed his written response to me was a mistake on his part. I said to Officer Goetz that all I wanted to know is what the officers did in response to this call. I asked Officer Goetz if this was his final written response to me and he said "yes".

I said to Officer Goetz If I was to ask you right now what you did on a call last night wouldn't you tell me what you did. Officer Goetz said I probably would if it was in idle conversation and was like a briefing. I said to Officer Goetz that I could not believe that you would not have to answer (sic) a supervisor after he asked you a question of what happened on a call. Officer Goetz said it look (sic) like an official letter that I gave to him and that he probably would have told me if it had been in person.

I said to Officer Goetz "How can I tell you that there would be no discipline to you or anyone else when I don't know what was done at the call" I said that the report does not indicate what officers did at the scene. I also said that the main concern is to find out what happened and if anything needs to be corrected or addressed that it could then be done.

Officer Goetz asked if this was a citizen complaint. I said no it was not. If this was a complaint a citizen complaint form would be filled out and we would proceed per our policy.

Officer Goetz said he did not mean to be disrespectful in anyway but he wanted to stay with the response he gave me in writing. I advised Officer Goetz that I was just trying to tell him I did not believe that he made the right decision of not answering my request. I said since this is your written response that I would talk to the Chief about his response.

I do not expect a response like this one from any officer of this department. I simply had a question on what officers did at a call with the purpose of correcting a problem if one existed.

After discussing this matter with you I would recommend discipline to Officer Goetz for the violations of the above policies.

Respectfully,

Arthur E. Phillips /s/  
Arthur E. Phillips  
Lieutenant of Police

By letter of October 7, 1999, Chief McElroy notified Goetz that he was to meet with the Chief on October 11, 1999, that the meeting would lead to Goetz' being disciplined, and that he was welcome to bring a representative to the meeting.

On October 11, 1999, Chief McElroy, Lt. Phillips, Goetz, and the Union's Business Agent, Darrell Shelby, met in the Chief's office. The City read Goetz the Department's "Internal Investigation Warning" and then summarized the allegations against Goetz that he had violated Department policies governing officer conduct and chain of command. The Chief then asked Goetz questions from a prepared list. Goetz indicated the following in response to the Chief's questions. Goetz believed that based on the formality of Lt. Phillips' communication of October 5, 1999, and the fact that a written response was being required, discipline was a possible outcome. Goetz acknowledged that Lt. Phillips did not say discipline was involved, and that he indicated it did not involve a citizen's complaint, but also noted that he did not state discipline would not be involved. Goetz also acknowledged that at least once before he had been required to respond in writing and it had not resulted in his being disciplined.

Goetz further testified at hearing that he believed that the last sentence of Lt. Phillips' letter of October 5<sup>th</sup>, in which he requested that the officers not discuss the matter with anyone but him, meant he could not discuss it with his Union representative. Given his belief that the matter involved potential discipline, he believed he had a right to discuss the matter with his Union representative before responding. Goetz testified he had been disciplined previously (January, 1999) for communicating information to his Union representative, and that no one told him he could communicate with Shelby in this instance, nor that discipline would result if he did not respond. Goetz conceded there was nothing illegal about Lt. Phillips' request and that Phillips had the authority to order him to provide the information, but that he felt he had the right to consult with his Union representative first, and no one told him he was mistaken in that regard. Goetz testified that he had previously received a request for a written response from Phillips when the latter was a sergeant, and had given a similar response asserting his "Weingarten" rights. Then Sergeant Phillips subsequently advised him that it was not a disciplinary matter and Goetz was not disciplined as a result of the nature of his response. In that regard, Lt. Phillips testified in rebuttal that he did not recall ever receiving such a response from anyone prior to this instance.

By letter of October 13, 1999, Chief McElroy advised Goetz that he was being given a three-day suspension. After summarizing what he believed to be the facts in the case, Chief McElroy stated in his letter:

**Decision:**

I strongly believe it is vital to the success of any organization, that the communication process remains open and uninterrupted to ensure the fulfillment of department goals & objectives in an efficient and professional manner. The ability to maintain established standard's is an ongoing and quite necessary process.

From time to time, management will request clarification of officer's (sic) actions both verbally and in written form. At times, it simply becomes an issue of "practicality". In this particular case, Lieutenant Phillips acknowledged that he misinterpreted the work schedule and did not anticipate seeing you until Monday, October 11, 1999. Therefore, Lieutenant Phillips requested both you and Officer Rossmiller provide a written response explaining each owns actions. Officer Rossmiller complied with the order.

In reference to your explanation that the "formality" of the letter suggested the potential for discipline, I could not disagree with you more. On several occasions in the past, Lieutenant Phillips (and myself) have issued written requests to all members of this department. They have been in such form as directives and orders. From case cards, follow up, to explanations of conduct while on a call, etc. Not one time has Lieutenant Phillips suggested disciplinary measures be taken against a subordinate in any of these cases. Your refusal to comply with his October 5<sup>th</sup>, 1999 order is the first occasion, which Lieutenant Phillips has ever recommended disciplinary against a subordinate.

In my opinion, an order is an order and a response is a response, irregardless of how it is communicated. It is clear to me that in this instance you violated an order from your immediate superior. Had you felt the order was conflicting or unlawful, you should have requested clarification from Lieutenant Phillips, or came to me as policy 1-12(a)(a) (sic) dictates. Although you indicated you did not feel it was unlawful or conflicting, Lieutenant Phillips did try to clarify to you that the issue was not a citizen complaint, and he suggested that you reconsider your actions. To me, I believe that you did in fact view the order as conflicting or you would have complied. Again, the only argument that you raise is that the "formality" of the letter implied discipline. However, there is no past practice, examples, or actions by Lieutenant Phillips that can substantiate your claim. In addition, all officers of this department at one time or another have provided written responses as ordered, including officer Rossmiller in this case. In this particular situation, Lieutenant Phillips did not request a meeting with you, nor did he suggest discipline either verbally or in

writing, and he clarified upon request that this was not a citizen complaint. In addition, you failed to provide one instance or example of past record or practice in which Lieutenant Phillips disciplined an employee either directly or indirectly as a result of a written request & subsequent response.

I am further disturbed by the fact that when I asked you if it was reasonable for management to request information or clarification from an officer regarding officer actions at a scene or complaint, you indicated that it depended on the nature of the complaint, and there were variables to consider. This answer clearly suggests that in your opinion, management has no responsibility to establish and maintain standards of expected officer conduct. I vehemently disagree with your observation.

The “formality” issue you raise is present and continuous in all aspect of our department from policies & procedures, to rules & regulations, to directives & orders. I expect unequivocal compliance from all members of this department. I believe that an officer does not have the prerogative of actively disobeying an order or directive from a superior while he/she subjectively determines whether the order is lawful or reasonable. Such a practice thwarts the respect and authority, which is the foundation of an effective, disciplined police department.

Therefore, in conclusion, I believe that your explanation is simply unwarranted, unacceptable, and clearly without merit. Most of all, I am extremely disappointed in your actions in this matter.

This conduct clearly violates various department rules/policies. Including, but not limited to:

Policy #1:

- \* Officer Conduct/Insubordination, section 1-7(a)(d) & section 1-11 (B)(1)
- \* Failure to Cooperate, section 1-6(b) and (d).
- \* Conflicting or Unlawful orders section 1-12, (a-b)

In addition, I believe you have undermined and displayed a complete lack of respect by shunning the integrity and authority of Policy #2, Chain of Command, sections A (1-2), B(1-5).

**Disciplinary action rendered:**

After careful consideration of the issues identified herein, I have come to the following conclusion:

I am suspending you without pay for a period of 3 days. Your suspension shall take effect Sunday October 17, Monday, October 18, & Tuesday October 19. You shall not return to these premises until Wednesday October 20<sup>th</sup> at 10:30 PM, which is when your tour of duty begins.

In addition, you shall complete a supplementary written explanation as originally requested by Lieutenant Phillips. This shall be done today, prior to the end of your tour. I would encourage you to utilize dictation, and secretarial staff will transcribe it for you.

In my view, failure to follow an order from superior is an extremely serious violation of department policy. I wish to remind you that subsequent violations of this nature shall result in escalating disciplinary measures, which may include suspension and/or termination proceedings.

Respectfully,

Scott A. McElroy /s/  
Scott A. McElroy  
Chief of Police

The suspension was served by Goetz, grieved and processed through the parties' grievance procedure. Being unable to resolve their dispute, the parties proceeded to arbitration of the dispute before the undersigned.

**POSITIONS OF THE PARTIES**

**City**

The City takes the position that it violated neither the law nor the parties' Agreement when it suspended the Grievant for three days without pay. Contrary to Goetz's assertions, the three-day suspension was neither contrary to the disciplinary procedure in the Agreement, excessive, nor was it inappropriate as violative of his "Weingarten rights".

Section 7.2 of the parties' Agreement provides that the normal disciplinary process shall include progressive discipline, however it also provides, "Depending on the severity of the incident, the steps of verbal and written warnings may be bypassed in dispensing discipline."

In this case, the Department followed the Agreement to the letter. Goetz had been previously given a written warning as recently as January, 1999. Further, Goetz's conduct was so serious as to justify bypassing the verbal and written warning steps, in that he refused to provide information as ordered. Thus, the three-day suspension was the next appropriate step. While the Union's representative, Shelby, asserted that the Union was to receive a copy of any written discipline in order for it to be effective, the parties' Agreement contains no such requirement.

Next, the City asserts that the three-day suspension was not excessive, given the seriousness of the policy violations committed by Goetz, which could have resulted in his termination.

Finally, the "general order" was neither a meeting nor an investigation for which Goetz was entitled to have union representation before responding. The "general order" was a common written format for management's obtaining further information concerning the activity of an officer. Here, management was seeking a supplemental incident report and Goetz had the duty under department policies to respond as ordered. Goetz's beliefs as to possible discipline based on the style and tone of the "general order" were not objectively reasonable, and he was not reasonable in conditioning his compliance with the order on a guarantee from management that no discipline would result from any response he made.

In its reply brief, the City disputes what it believes are erroneous factual assertions in the Union's brief. First, it disputes that Goetz verbally, or in his written response, sought a clarification of Lt. Phillips' general order. There is no request for clarification in the written response, only a refusal to comply with the order unless Phillips provides written assurance that there will be no discipline resulting from any response. Second, it is not true that use of a "general order" had not been communicated to the officers before this. Phillips testified that while his use of the "general order" was new, it had been used prior to this instance. He further testified that use of written communication to officers had been done for years. Further, it was not because he and Goetz could not get along that he used a written order in this case. Third, the assertion that the Chief took an unprecedented step in suspending Goetz without first giving him a written warning is contrary to the evidence. Goetz was given a written warning in January, 1999. Fourth, the testimony relied upon by the Union that another officer in the Department had received a written warning following being arrested in a domestic matter is not true. Union Representative Shelby asserted that he had a copy of that warning in his files, however, Chief McElroy testified that he had not sent any written warnings to Shelby and Shelby was never able to produce the document because none existed, as the officer was not disciplined.

Goetz admitted that Lt. Phillips had the authority to make the order, admitted the order was not illegal or immoral, however, he refused to comply unless his conditions were met. Thus, he wrongly refused to obey a lawful order. While he believed he had “Weingarten rights” he could exercise before being obligated to respond, the Union concedes he was mistaken and makes no claim that his “Weingarten rights” were violated by the City. Further, he sought no clarification either in writing or verbally. His refusal to comply with the written order constitutes clear insubordination under Department policies, which Goetz acknowledged he knew and understood. Policy 1-7 (d) states: “Disobedience, or failure to follow a lawful order or directive, written or oral, constitutes insubordination.” Chief McElroy testified that he considered insubordination to be the most serious infraction he had ever encountered in the Department, and Department policy states that insubordination is considered serious.

The Union attempts to deflect the seriousness of Goetz’s conduct by the testimony of its witnesses and attempts to mischaracterize the clear wording of the exhibits. Goetz had been previously disciplined within the year and suspension was the next appropriate discipline for his conduct; the seriousness of insubordination clearly warranting the suspension. The Union attempts to assert that Goetz’s conduct is less serious than the claimed conduct and incorrectly claimed discipline of another officer in the Department. This is an attempt to distort the heart of management rights, i.e., the expectation that employees will follow the lawful directions of the employer. In this case, the City followed the law to the letter, while Goetz began his grievance on the mistaken theory that his legal rights were violated by the City, a claim not asserted by the Union. The City concludes that the three-day suspension was in accord with the terms of the parties’ Agreement, was reasonable in fact, and the grievance should therefore be dismissed.

### Union

The Union takes the position that the three-day suspension issued to Goetz was not justified and that the grievance should be sustained and Goetz made whole for his losses resulting from the Department’s violation of the Agreement.

The Union notes that in his decision to suspend Goetz, Chief McElroy stated that if Goetz had felt the order was conflicting or unlawful, he should have requested clarification from Lt. Phillips or come to the Chief pursuant to Department policy. The relevant portion of the policy provides: “If in doubt as to the legality of an order, officers shall request the issuing officer to clarify the order or confer with higher authority.” Section 1-12(d). This is exactly what Goetz did when he received the order that he believed was in violation of his “Weingarten rights”. While Goetz was probably incorrect with regard to his “Weingarten rights”, he clearly was “in doubt as to the legality” of the order. Further, he believed that by the terms of the order, he was not allowed to speak to his Union representative in order to ascertain his rights or to determine whether he would be subject to discipline. Goetz simply

wanted to know whether, by using the term “general order”, Phillips was indicating he was investigating Goetz’s conduct in order to exercise his new authority to recommend discipline. While Phillips told Goetz that he was not investigating a formal citizen complaint, the latter is only one of many types of investigations that can lead to discipline in the Department. As was plain from Goetz’s written response and his testimony at hearing, all Phillips needed to have done was clarify the purpose of his request and Goetz would have complied, as he had done in the past.

Goetz had reason to be suspicious. He had never before seen a communication addressed to him entitled “general order”, nor had he ever been directed not to speak to someone about a simple request for information. Second, Phillips had only recently assumed the responsibility to recommend discipline and Goetz reasonably suspected that his use of the term “general order” indicated Phillips might be exercising his new responsibility. Further, Chief McElroy testified that Goetz and Phillips had not always seen “eye-to-eye”, which explains why Phillips was “obtuse and uncooperative” when Goetz sought clarification. Pursuant to Section 1-12(b) of Department policy, Phillips was required to clarify the meaning of his directive, and he did not. Thus, Goetz was improperly suspended for following the Department’s own rules.

Next, the Union asserts that the Chief’s “investigation” was inadequate and that he had prejudged Goetz’s guilt in the matter. The Chief failed to consider the fact that Goetz’s letter was merely a request for clarification of the purpose of Phillips’ request, and ignored the fact that he was aware that Phillips and Goetz did not always get along. The Union cites Elkouri and Elkouri, *How Arbitration Works*, (Fifth Edition) for the principle that, except in the most obvious situations, prior to assessing discipline, management must conduct a fair and impartial investigation of the incident, and that a sufficient quantum of evidence must be adduced by the accusing party in order to establish guilt. At p. 919. A review of the prepared questions the Chief asked Goetz at his interrogation reveals that the Chief had prejudged the issue. The interview only lasted 20 minutes and included three breaks. Clearly, the purpose of the interview was to establish the facts necessary to find Goetz guilty of insubordination and his explanation that he simply wanted the purpose of the request clarified before he responded was ignored by the Chief. Further, being aware that Goetz and Phillips did not always get along, the Chief still failed to explore the possibility that Phillips’ failure to clarify the purpose of his request was the cause of Goetz’s refusal to immediately comply. Instead, he accepted Phillips’ conclusion that Goetz was guilty of insubordination, thus supporting Phillips’ decision to merely state, “I think you’re making a mistake”, when Goetz was requesting a clarification. Also, when Goetz stated he felt Phillips’ unannounced decision to begin using the term “general order” in routine correspondence was inappropriate, the Chief responded sarcastically, and argued with Goetz, rather than exploring the merits of the remark.

“Insubordination” is defined in *Black’s Law Dictionary*, (Seventh Edition, 1999) as “willful disregard of an employer’s instructions.” All the City established in this case was that Goetz conditioned his response on Phillips’ clarifying the purpose of his request, which he



never did. While Phillips informed the Chief that the issue involved was simply one of reviewing performance in order to correct behavior, if needed, and that disciplinary measures were not being considered, he never informed Goetz that this was the case. While Goetz's letter may have been inartful, and somewhat unclear, it does not constitute the "willful disregard" of an order, which the Department was required to establish before it took the unprecedented step of suspending Goetz for three days.

Last, the Union asserts that the Chief improperly bypassed the progressive discipline procedure in the parties' Agreement. In order to justify bypassing the verbal and written warning steps before imposing a suspension, an infraction must be severe. All the Department established in this case was that Goetz was confused by Phillips' new manner of communication and his unannounced decision to assume a more "professional" posture in his communications with officers. Phillips did not adequately respond to the reasonable request for a clarification of the purpose of the "general order" and the directive not to speak with anyone about the request. Regardless, the Chief testified he felt Goetz's request was the most serious violation of Department rules he had ever encountered. While the Department may have been justified in bypassing the verbal and written warning steps had it established Goetz was guilty of insubordination, it did not do so. At best, it established that he may have violated Sections 1-6(b) and (d) which provide, respectively, that: "No member of this Department shall fail to cooperate with all members of the Department" and "No member of the Department shall fail to prepare required correspondence, reports, and records relating to their activities prior to the end of that member's shift." Unlike Section 1-7 which states that insubordination is considered "serious", Section 1-6 merely provides that violations "may lead to disciplinary action." Thus, violating the latter provision does not justify bypassing progressive discipline.

Further, arbitrators will ordinarily reduce or set aside a penalty when management is also at fault in connection with the conduct. Elkouri and Elkouri, at 938. Here, the "general order" was an unannounced new method of requesting routine information, and Phillips was not forthcoming with his reasons for using the term "general order" in his communications or in his decision to routinely direct officers not to speak to any individuals about his requests. Further, Goetz had recently been disciplined for speaking to his Union representative about an incident. This caused Goetz to consult with the only person he believed he was authorized to consult with, Phillips, who then did not clarify his purpose, resulting in Goetz's being unjustly punished. It was due to Phillips' failure to properly communicate that caused Goetz not to immediately respond to his request. Thus, the Department was not justified in finding Goetz guilty of insubordination, nor in bypassing the progressive discipline system to impose a suspension. At most, Goetz should have been given a verbal or written warning for not cooperating and preparing the required report.

### DISCUSSION

Contrary to the City's assertion, it was not unreasonable for Goetz to initially conclude from Lt. Phillips' "general order" of October 5<sup>th</sup> that disciplinary action against

either or both officers was a possible outcome. The order called for a written response from the officers and used a formal format. Phillips began the order by noting a discrepancy between the information on the case card that was filed on the October 2<sup>nd</sup> call and what he was told had occurred by the keyholder. His summary of what the keyholder said occurred at the least inferred that the keyholder was not pleased with the actions of at least one of the officers. Phillips concluded his order by requesting that the officers not speak to anyone but him about the matter.

It is clear from Goetz's response that he assumed that discipline was a possible outcome. Contrary to the Union's attempts to characterize the response as a request for a clarification, however, Goetz's response was an ultimatum. He assumed discipline was a possible, if not likely, outcome and conditioned his providing a written response with the information regarding the October 2<sup>nd</sup> call on his being assured in writing by Phillips that there would be no discipline.

We now come to the question of what occurred after Lt. Phillips read Goetz's response. Goetz subsequently told the Chief in the October 11<sup>th</sup> meeting that he was led to believe discipline was to result from the letter from Phillips, but when asked by the Chief if Phillips had said anything to him or given any indication that discipline was involved, Goetz responded that Phillips did not say it would not involve discipline, but also did not say that it would. Goetz testified that while the Lieutenant told him that he thought Goetz was making a mistake by responding as he did, he did not tell Goetz why. Goetz also testified that he asked Phillips if the matter involved a citizen's complaint, and was told by Phillips that it did not. Phillips, in turn, testified that he could not recall every thing that was said, but that he had summarized his conversations with Goetz in his letter to the Chief that he wrote the same day. In his October 6<sup>th</sup> letter to the Chief, Phillips states, in relevant part:

I advised Officer Goetz that I believed his written response to me was a mistake on his part. I said to Officer Goetz that all I wanted to know is what the officers did in response to this call. I asked Officer Goetz if this was his final written response to me and he said "yes".

I said to Officer Goetz If I was to ask you right now what you did on a call last night wouldn't you tell me what you did. Officer Goetz said I probably would if it was in idle conversation and was like a briefing. I said to Officer Goetz that I could not believe that you would not have to answer (sic) a supervisor after he asked you a question of what happened on a call. Officer Goetz said it look like an official letter that I gave to him and that he probably would have told me if it had been in person.

I said to Officer Goetz "How can I tell you that there would be no discipline to you or anyone else when I don't know what was done at the call" I said that the report does not indicate what officers did at the scene. I also said that the main concern is to find out what happened and if anything needs to be corrected or addressed that it could then be done.

Officer Goetz asked if this was a citizen complaint. I said no it was not. If this was a complaint a citizen complaint form would be filled out and we would proceed per our policy.

Officer Goetz said he did not mean to be disrespectful in anyway but he wanted to stay with the response he gave me in writing. I advised Officer Goetz that I was just trying to tell him I did not believe that he made the right decision of not answering my request. I said since this is your written response that I would talk to the Chief about his response.

. . .

Given that conversation between Phillips and Goetz on October 6<sup>th</sup>, at that point Goetz should have been sufficiently disabused of his assumption that the purpose of Phillips' order was to determine whether or not the officers should be disciplined. While Phillips could have been more clear when he told Goetz that he thought that he (Goetz) was making a mistake by not responding with the information Phillips had requested, he did also tell Goetz that he would be talking to the Chief about his response. While the words "insubordination" or "refusal to obey an order" were not used, certainly the implication was that Phillips did not believe that Goetz had the right to refuse to provide the information and that this was what he was going to be discussing with the Chief.

Much of what occurred here is due to Goetz's mistaken belief that he had the right to refuse to provide the information. Perhaps the misunderstanding could have been resolved if he had first spoken with his Union representative. However, because Phillips' order requested that the officers not speak to anyone but him about the matter, Goetz did not feel he could seek advice from that source. This would carry more weight, if it were not for the opportunity that Goetz had to clarify that point in his discussions with Lt. Phillips on October 6<sup>th</sup>. Although he sought clarification on Phillips' intentions with regard to discipline, and received such clarification from Phillips, albeit not a "promise" that there would be no discipline, Goetz did not bother to ask Phillips whether he could first speak to his Union representative before further responding. Instead, he chose to stay with his October 6<sup>th</sup> response. It is noted in that regard, that time was not of the essence in responding to Lt. Phillips' order. The order was issued on October 5<sup>th</sup> and gave the officers until the morning of October 9<sup>th</sup> to respond.

Based upon the foregoing, it is concluded that Goetz was adequately apprised of Lt. Phillips' intentions in seeking the information from the officers and that he was adequately put on notice that Phillips did not think he had the right to refuse to provide the information, and that discipline was a possible outcome for his refusal. Given the quasi-military nature of a police department, orders, and the consequences of refusing to obey an order, are not unfamiliar concepts to the individuals employed in the department. In this latter regard, Phillips' use of the term "general order" has little impact in this case other than to make clear that he expected the officers to comply with his "requests." As to whether or not use of the

term “general order” implied the possibility of disciplinary action, that was adequately addressed by Phillips in his discussions with Goetz on October 6<sup>th</sup> as to his purpose in seeking the information.

Chief McElroy’s letter of October 13, 1999, notifying Goetz of his three-day suspension, cites a number of department policies he feels were violated by Goetz’s refusal to provide the information. That may be the case, however, it remains that Goetz only engaged in one act of misconduct. 1/

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*1/ It does appear that Goetz did seek clarification regarding the order in his discussions with Phillips on October 6<sup>th</sup>, which clarification was provided. Thus, a finding of violations of Sections 1-12 (a) and (b) of Department policies would not be appropriate.*

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As both parties recognize in their briefs, the charge of “insubordination” is the most serious of the alleged violations. As Department policy Section 1-7, (a) through (h), define the conduct that will be considered “insubordination”, it is not necessary, nor appropriate, to seek external definitions of the term. In his letter, the Chief cites violations of Section 1-7 (a) and (d). Those sections provide, as follows:

- (a) Disrespect, sarcasm, or rudeness displayed by action or language, written or verbal, toward any supervisory officer will not be tolerated. Officers shall address supervisors each other in a courteous, professional, & respectful manner at all times. Violations of this section are considered serious.

...

- (d) Disobedience, or failure to follow a lawful order or directive, written or oral, constitutes insubordination.

With respect to Section 1-7 (a), Goetz made a point of stating in his discussions with Phillips that he did not intend any disrespect by his response. It is painfully clear that Goetz was basing his response on what he thought, albeit mistakenly, were his legal rights. Further, in his written response, Goetz offered to provide the information at a meeting with Phillips with a representative from the Union present. It is apparent that Goetz was basing his response on what he felt were his legal rights, and not out of disrespect, sarcasm, or rudeness toward Lieutenant Phillips. For these reasons, no violation of Section 1-7 (a) is found. That is not the case, however, as to Section 1-7 (d), as it is clear that Goetz failed/refused to follow Lt. Phillips’ “general order” of October 5<sup>th</sup>. There is no challenge to Lt. Phillips’ authority to

issue the order, nor to the propriety of the order itself. 2/ Thus, it is concluded that Goetz was guilty of “insubordination” in violation of Section 1-7(d) of Department policies.

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*2/ The Union concedes that, given that the purpose of the inquiry was not for the purpose of imposing discipline, Goetz was mistaken in his belief that he had the right to refuse to comply with the order.*

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In justifying foregoing progressive discipline and imposing a three-day suspension, the City asserts that Department policy notes that insubordination is “considered serious”. That is not quite accurate. Certain subsections of Section 1-7 note that “violations of this section are considered serious.” (Emphasis added). Both subsections 1-7 (a) and (h) contain that statement, however, the other subsections, including subsection (d), do not. By implication, the subsections not including that statement may be considered less serious, depending upon the pertinent facts of each situation.

For the following reasons, it is concluded that under the circumstances in this case, the violation was not of sufficient severity to justify the imposition of the three-day suspension. As noted previously, Goetz responded as he did based on his mistaken belief that he had the legal right to do so. This was exacerbated by Phillips’ directive to the officers not to speak to anyone but him about the matter, thus seemingly precluding Goetz from seeking the advice of his union representative. The latter could have advised Goetz as to his obligations to respond to Phillips’ order. Further, Goetz did offer to provide the information in a meeting with Lt. Phillips as long as he had a representative from his Union present. Thus, it was not an outright refusal to provide the information. Last, while it has been concluded that Lt. Phillips made sufficiently clear to Goetz what his intentions were in seeking the information, there is no evidence that it was made anywhere near as clear as the Chief stated in his suspension letter to Goetz, i.e. “Disciplinary measures were not even considered and would not have been an issue had Officer Goetz complied with the order as directed.” Had it been made that clear to Goetz, there might well have been a different end to this story or a different result in this case.

It is therefore concluded that the Evansville Police Department did not have just cause to suspend the Grievant. However, as it has also been concluded that Goetz was in fact guilty of insubordination in violation of Department policy 1-7 (d), some form of discipline is appropriate. The parties’ Agreement provides for progressive discipline beginning with a verbal warning, progressing to written warning, suspension, to discharge. However, it also provides that depending on the severity of an incident, the steps of verbal and written warnings may be bypassed. It is determined that Goetz’s refusal to comply with Lt. Phillips’ order, under the circumstances in this case, is of sufficient seriousness to justify foregoing the verbal warning step and imposing a written warning.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

**AWARD**

The grievance is sustained to the extent that the three-day suspension without pay is reduced to a written warning. Therefore, the Evansville Police Department is directed to immediately amend Officer Goetz's personnel records to reflect the imposition of a written warning, rather than a three-day suspension, and to make him whole for any wages and/or benefits lost as a result of the imposition of the three-day suspension without pay.

Dated at Madison, Wisconsin this 18th day of April, 2001.

David E. Shaw /s/

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David E. Shaw, Arbitrator

