

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**THE CITY OF RHINELANDER**

and

**RHINELANDER PROFESSIONAL POLICE ASSOCIATION,  
LOCAL 38 - WPPA/LEER**

Case 103  
No. 60305  
MA-11574

*(Thorpe Grievance)*

and

Case 104  
No. 60374  
MA-11594

*(Eichman Grievance)*

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**Appearances:**

**Mr. Richard Thal**, General Counsel, Wisconsin Professional Police Association/LEER Division, 340 Coyier Lane, Madison, Wisconsin 53713, appearing on behalf of the labor organization.

**Mr. Philip I. Parkinson**, City Attorney, City of Rhineland, Rhineland City Hall, P.O. Box 658, Rhineland, Wisconsin 54501-0658, appearing on behalf of the municipal employer.

**ARBITRATION AWARD**

The City of Rhineland and the Rhineland Professional Police Association Local 38 – WPPA/LEER are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide two grievances over the interpretation and application of the terms of the agreement relating to opportunities for overtime and the selection of shifts. The City concurred, and the

commission appointed Stuart D. Levitan as the impartial arbitrator. A consolidated hearing in the matter was held in Rhinelander, Wisconsin, on November 14, 2001. 1/ The parties filed written arguments by November 21.

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*1/ Unless otherwise indicated, all dates herein are 2001.*

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### **STATEMENT OF THE ISSUES**

The Association states the issues as follows:

**Case 103:** “Did the City violate Section 9.01 of the parties’ collective bargaining agreement when it denied Officer James Thorpe the opportunity to work overtime on the third shift because of his personal relationship with Officer Sara Eichman, a third-shift-officer? If so, what is the appropriate remedy?”

**Case 104:** “Did the City violate Section 8.02 of the parties’ collective bargaining agreement when it denied Officer Sara Eichman the opportunity to bid on a second shift opening because of her personal relationship with Officer James Thorpe, a second-shift officer? If so, what is the appropriate remedy?”

The City states the issues as follows:

”Did the adoption of City-wide policy restricting employee relationships involving supervisors and the employees they supervise, which affects Section 9.03 of the parties’ collective bargaining agreement regarding selection of shift by seniority, violate the collective bargaining agreement, and, if so, what is the appropriate remedy?”

I believe the Association’s statement of the issues accurately conveys the questions before me.

### **RELEVANT CONTRACTUAL LANGUAGE 2/**

#### **ARTICLE 2 – RECOGNITION**

##### **Section 2.01 – Recognition**

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The Association recognizes the Rules and Regulations compiled, adopted and published by the Rhinelander Police & Fire Commission for the guidance and government of the Rhinelander Police Department members. The Association further recognizes the right of the Police & Fire Commission to promulgate new Rules & Regulations from time to time provided that any mandatorily bargainable subject shall first be presented to the Association for their review.

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#### ARTICLE 8 – HOURS OF WORK

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##### Section 8.02 – Shifts

Shifts as defined in this Agreement shall not rotate and are 6:30 AM to 3:00 PM , 2:30 PM to 11:00 PM and 10:30 PM to 7:00 AM. *Officers shall be allowed to pick their shift annually, by seniority. Officers shall be able to select open or vacant shifts by seniority.* When a temporary vacancy occurs on any shift, for whatever reason, the Sergeant on duty for that shift shall assume the duties of the absent Patrolman. If a permanent vacancy occurs on a shift, an officer may, by seniority, be moved to that vacancy from one of the other shifts having greater manpower levels. At all other times, the Sergeant on duty shall perform those duties as directed by the Chief of Police, Captain or Lieutenant, including foot patrol and motor pool.

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#### ARTICLE 9 – OVERTIME

##### Section 9.01 – Overtime

Upon approval of the Chief, when a Police Officer is required to work in excess of their normal work day or work schedule as set out in Section 8.01, they will be granted time and one-half their normal rate of pay for every hour working excess of their normal tour of duty or work period.

. . .

*A rotational sheet, listed by an officer's seniority, will be kept for the purposes of attempting to allocate voluntary overtime. The rotation sheet will be maintained by an administrative staff officer. Voluntary opportunities will be allocated to the officers on the top of the list, and will continue to rotate through the entire department, both patrol and sergeants. This rotational sheet does not in any way modify the Chief of Police's present power to assign particular officers to a duty when he deems it appropriate.*

## **OTHER RELEVANT PROVISIONS PROMULGATED BY THE CITY**

### **EMPLOYEE RELATIONSHIPS AUGUST 2001**

Romantic and/or sexual relationships between City employees are to be avoided, as they may cause problems for employees and the Employer. These relationships are discouraged, as they can be distracting to effective management relations, undermine production and efficiency, diminish employee morale, and may lead to claims of sexual harassment. As such, romantic and/or sexual relationships between a supervisor/management employee and an employee who is directly supervised and/or evaluated by the supervisor employee are particularly problematic and strongly discouraged. Such relationships, if they occur, between supervisor/management and subordinate employees, must be reported to the manager's supervisor, either the City Administrator or the Mayor. *Supervisor/management and non-management employees who are involved in a romantic and/or sexual relationship may be transferred from one department to another, or their responsibilities regarding supervision of the affected employee or co-workers of the affected employees may be modified or transferred to another supervisor.*

### **POLICY NUMBER 7.3 RHINELANDER POLICE DEPARTMENT CITATIONS AND OFFENSE REPORTS FEBRUARY 16, 2000**

#### **PURPOSE**

The purpose of this policy is to provide guidelines for processing citations, accident reports, offense and arrest records within the Rhineland Police Department.

## **POLICY**

It is the policy of the Rhinelander Police Department to have all citations and reports reviewed by a supervisor, or an officer working in the role of a shift supervisor, prior to the citation or report being forwarded to the Case Management desk. *Daily, on each shift, the Sergeant, or in his/her absence the Officer-in-Charge, shall review all reports and citations in the shift basket located in the Sergeant's office. The Sergeant, or Officer-in-Charge, is responsible for ensuring citations and signed offense reports are reviewed and forwarded.* Reports that require further investigation or signature of investigating officers shall be brought to the attention of those officers for timely completion.

## **PROCEDURES**

### **I. Warning Citations**

- A. *Original citation is to be reviewed by the shift supervisor, or Officer-In-Charge, and then forwarded to Data Entry. Issuing Officer is responsible for recording the appropriate Department case number on the citation.*

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### **II. Ordinance and Traffic Citations**

- A. *Original citation is to be reviewed by the shift supervisor, or the senior officer on-duty, and is then forwarded to the file basket (sic) labeled "Citations" in the records room. Citations must be filed with the Clerk of Courts within 72 hours of being issued. Issuing Officer is responsible for recording the appropriate Department case number on the citation.*

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### **III. Accident Reports**

- A. Accident reports are to be completed in a timely manner by the investigating officer(s). Investigating Officer is responsible for recording the appropriate Department case number on the report in the space labeled "Police No."

- B. The shift supervisor, the Officer-In-Charge, is responsible for reviewing the report and forwarding the report to the file basket labeled "Accidents" in the Records Room.*

. . .

#### IV. Offense/Arrest Reports

. . .

- E. Officers shall review and sign their offense reports before forwarding them to a supervisor, or Officer-In-Charge. The Supervisor, or Officer-In-Charge, is responsible for reviewing and signing the report before forwarding the report for disposition to the Case Management desk.*

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*2/ Passages with emphasis added are the specific sentences at issue in the statement of and resolution of the grievances.*

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### **BACKGROUND**

James Thorpe and Sara Eichman are patrol officers with the Rhinelander Police Department (RPD) currently maintaining a romantic and/or sexual relationship. This grievance concerns the relationship of their relationship to the contractual provisions for shift selection and opportunities for overtime.

Thorpe has been with the department for about eight years, the past three years or so on the second shift; Eichman has served a little over two years, following about three years as a telecommunicator/dispatcher for the city and Vilas county. This past spring she was moved from the second to the third shift.

For several years, the RPD has had a policy on preventing sexual harassment in the workplace, which policy predates that applying to the city workforce in general. On June 17,

1999, Rhinelander Police Chief James C. Sebestyen issued its most current iteration, Policy Number 3.4, "Harassment in the Workplace," declaring that it was "the policy of the Rhinelander Police Department to provide a professional, businesslike and productive work environment free from any form of employee discrimination or any types of harassment, including sexual harassment." This policy defines sexual harassment as including "unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature," and provides that "supervisors shall have the responsibility to assist any employee of this agency who comes to that supervisor with a complaint of harassment, in documenting and filing a complaint."

Notwithstanding the existence of this policy, in about 2000, a former employee, a lieutenant, had a romantic and/or sexual relationship with a dispatcher under his supervision. This relationship, which was widely known in the department, did not end amicably, and caused certain disruptions of the workplace. Both the lieutenant and the dispatcher soon left the city's employment, and the city transferred supervision of the dispatch personnel from the lieutenant to Capt. Glen Parmeter.

In January, 2001, Eichman was one of the three patrol officers assigned to the second shift, along with Thorpe, Ofc. Kurt Helke and two sergeants; the normal staffing levels provide for any three to be on duty. Thorpe was the most senior patrol officer, and in the absence of the sergeants, he served as officer-in-charge (or OIC), a supervisory position as discussed below. Thorpe served as officer-in-charge over Eichman on six occasions between January 2001 and April 2001. Starting in 2002, this shift will have one sergeant and four officers, increasing the frequency with which Thorpe serves as OIC to approximately twice a month, or about once every ten shifts.

On March 8, Parmeter, in charge of departmental operations, wrote Eichman as follows:

On April 1<sup>st</sup>, 2001 your shift will be changed to the 3<sup>rd</sup> shift. This shift has a permanent opening and your scheduled work days and off days remains the same. If you have any questions, please feel free to contact me.

Parmeter later added a handwritten postscript, noting that "shift not actually changed until May 1<sup>st</sup>. Eichman needed time to arrange child care." Eichman is the single parent of a young child. She was married when she joined the police department.

The third shift roster includes three patrol officers and one sergeant; normal staffing levels provide for any two to be on duty.

At some point by the spring or summer of 2001, line and command personnel in the department became aware that Thorpe and Eichman had developed a romantic relationship. 3/ Bothered by the whispers, Thorpe voluntarily disclosed to Sebestyen that he and Eichman “were seeing each other,” a relationship which he said constituted a “romantic and/or sexual relationship” as used in the Employee Relationships policy. “I didn’t feel I had to” make the disclosure, he testified at hearing, “but I was upset with the talk in the department, all that kind of garbage.”

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*3/ Readers may wish for more precise data about the time, place and manner of the Thorpe/Eichman affair. However, the parties chose to be vague about the specifics of the relationship, leading to a pronounced imprecision about dates and details.*

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Sebestyen was aware of Thorpe’s relationship with Eichman by July 20, when the Department needed to fill a vacant position on third shift, to work the two-officer shift alongside Eichman. Thorpe, who had been contacted by the department pursuant to section 8.02 of the collective bargaining agreement, signed for the shift. Chief Sebestyen thereupon denied Thorpe this overtime opportunity, informing him that he could not work the shift because it would have meant working the same shift as Eichman. Thorpe and the Association promptly grieved this matter, unsuccessfully.

Beyond the organizational impact of changing dispatcher supervision from the lieutenant to the captain, the department also by early August 2001 promulgated the “Employee Relationships” policy, as quoted above. By August 29, both Thorpe and Eichman had signed a roster sheet showing they had received and read this policy, which, among other elements, provides that:

Supervisor/management and non-management employees who are involved in a romantic and/or sexual relationship may be transferred from one department to another, and their responsibilities regarding supervision of the affected employee or co-workers of the affected employees may be modified or transferred to another supervisor.

Department personnel conduct their annual bidding for shifts in the fall. 4/ As noted above, shift selection is by seniority. Based on the current workforce, Eichman and Thorpe have sufficient seniority for second shift, with Thorpe remaining as primary officer-in-charge.



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*4/ It is in recognition of the imminence of that exercise that the parties and I have undertaken an expedited schedule for briefing and deciding these grievances.*

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On August 1, purportedly acting pursuant to the Employee Relationships policy, Sebestyen preemptively informed Eichman that she was unable to bid on Thorpe's second shift, writing:

As you are undoubtedly aware, Officer Robert Amundson will soon complete his field training program. Based on that fact, under normal circumstances a second shift opening would then become available. However, based on the fact that a personal relationship has existed for some time between yourself and Officer James Thorpe of this department, it is a city policy not to create circumstances where in Officer Thorpe would be your supervisor.

Should you desire be (sic) to bid on a second shift opening, clearly this would create circumstances contrary to city policy. Additionally, recent sexual harassment training through our current insurance carrier, "Cities and Villages Mutual Insurance Company," also reflect these types of relationships when coupled with supervision by one of the parties to the other carries enormous liability.

Therefore, based on your seniority, you may bid on any shift other than the second shift where Officer James Thorpe is assigned.

If you have any questions regarding this matter, feel free to contact me.

Eichman and the Association grieved this matter on August 10. Sebestyen denied the grievance on August 20.

As indicated in Policy Number 7.3, the RPD regards the senior patrol officer on duty in the absence of a sergeant to be the Officer-in-Charge (OIC). The published duties of an OIC include reviewing warning, ordinance and traffic citations, reviewing and forwarding accident reports, and reviewing, signing and forwarding offense/arrest reports. An OIC may also exert command of a crime scene, including exercising the authority to direct and deploy other officers. The existence and treatment of the position of officer-in-charge is entirely by

administrative policy and practice; the position is not mentioned in the collective bargaining agreement. Patrol officers serving as officer-in-charge receive no additional pay for their assignment.

The grievants made a determined showing of how little significance they and the department gave to the details of being an office in charge. "I don't know what that means," Thorpe said, adding, "no one's really told me," about the duties. "I guess I would be the office in charge" when there was no sergeant on his shift, he acknowledged under cross examination, even though "I've never been trained how the work was done." He agreed that the position entailed reviewing reports and directing other officers to complete them "if need be." Thorpe testified he could not order a junior officer to make changes in a report, and that a junior officer may deploy the officer in charge, especially at an accident scene or for traffic control in the junior officer's duty sector. Eichman testified that no officer in charge had ever given her a direct order, and that she will sometimes tell a senior officer "what to do." Parmeter, however, testified that "every shift has a supervisor, either the sergeant or senior patrol officer."

### **POSITIONS OF THE PARTIES**

In support of its position that the grievances should be sustained, the Association asserts and avers as follows:

The City violated the parties' collective bargaining agreement when it denied Thorpe the opportunity to work overtime and when it denied Eichman the opportunity to bid on a second-shift opening.

While the need for some response to inappropriate personal disruptions of the workplace is understandable, the employee relationship policy that the city promulgated was so broadly written that it should be struck down as unreasonable. Even if it were reasonable, however, the policy does not apply to Eichman and Thorpe because Thorpe would not be Eichman's supervisor as long as they both maintain their patrol officer rank.

By applying to both a love affair without sexual intercourse and a one-night stand of sex with no other relationship, the city's policy is so overly broad it should be struck down as unreasonable. Like all other public employees, police officers have constitutional privacy rights and freedom of association that prohibits their employer from penalizing them for personal relationships that have not affected their job performance. While narrowly drawn anti-nepotism

rules have generally been upheld, broad anti-nepotism rules have been struck down when the employer has not produced any evidence that the relationship between the employees would adversely affect job performances.

The city's policy might pass scrutiny if applied only to employees who are married or living together. But because it discourages romance or sex between city employees, it is much broader than that. A policy that discourages romance and sex among city employees is unenforceable, and should be struck down because it is not reasonably related to a legitimate management objective. Perhaps a more narrowly drawn policy would be reasonable, but the city's current policy is both unreasonable and unenforceable.

Even if Eichman and Thorpe worked on the same shift, Thorpe would not be Eichman's supervisor; therefore, the city may not prohibit the grievants from working on the same shift.

Clearly, Thorpe is not a supervisor as that term is defined in the Municipal Employment Relations Act. But because Thorpe would serve occasionally as Office In Charge, and because the city contends that an OIC should perform the same duties as a sergeant when no sergeant is on duty, the city contends that Thorpe would in these instances function as Eichman's supervisor.

But OICs do not function as supervisors. Sergeants have the authority to issue direct orders which subordinates must follow; Thorpe and Eichman both testified that they were not aware of a single instance when an OIC has ordered a junior patrol officer to do something. Indeed, OICs have no indicia of supervisory authority; they receive no supplemental pay; they cannot hire, transfer, promote, assign or discipline other employees, and have no authority to adjust grievances. While it is true that an OIC must review the citation and offense reports completed by a junior officer and ensure reports are forwarded to the proper file basket, these duties are ministerial matters that merely require an OIC to follow established policies and guidelines. These functions do not require an OIC to act as a supervisor.

The city's anticipated argument about a concern that Thorpe would show favoritism – or would be perceived as showing favoritism – might be compelling if Thorpe were a supervisor, but he is not. The possibility that Thorpe might show Eichman favoritism does not make him a supervisor, and there is no evidence he showed her any favoritism when they did work together.

Arbitrators have subjected rules that discourage or prohibit relationships among employees to close scrutiny and have held that such rules are not enforceable when the employer cannot show that the relationship will adversely affect job performance. Here, the city presumes that Eichman and Thorpe will disturb the operations of the police department as did former Lt. Johnson and a dispatcher; but there is no reasonable basis for making Eichman and Thorpe pay for the sins of Lt. Johnson.

The grievances should be sustained, and Thorpe awarded eight hours of overtime pay and Eichman allowed to select her shift based on seniority, even if such a selection results in being on the same shift as Officer Thorpe.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

Sexual harassment complaints are issues are a growing concern for municipal employers, with a continuing trend of escalating claims and damages. In response, the city of Rhinelander and its police department both adopted sexual harassment policies.

The Rhinelander Police Department had suffered through a difficult incident in about 2000, in which a supervisor had a romantic relationship with a police dispatcher, one of the employees he supervised. Despite the city's acting to remove his supervisory responsibilities over that employee, the incident ended very badly, causing great problems both for the individuals and the department.

By August 2001 the department's Employee Relationship Policy had been read and acknowledged by all department personnel, including the grievants. To the grievants' credit, they reported to the Chief of Police that they had a relationship that met the terms of that policy.

Although Office Thorpe is not a sergeant, as Officer-In-Charge he often acts as a supervisor. Every warning citation, every ordinance or traffic citation, every accident report and every offense or incident report must be reviewed by the sergeant, or in the absence of the sergeant, by the office in charge. The sergeant or officer in charge decides which reports or citations need additional information, requiring additional work by the officer. The officer in charge is also responsible for the actions of the shift; while many patrol decisions are by

general consensus, when push comes to shove, the officer in charge must decide who does what, including some of the more subjective decisions of deployment. It is the city's position that these types of decisions and the obligation to review a patrol officer's work are all supervisory in nature, and can lead to claims of favoritism or bias in situations in which the supervisor and the supervised employee have a romantic and/or sexual involvement.

The city has an obligation to comply with federal and state law, and to protect its employees. Under current U.S. Supreme Court law, employers in general should be liable when a supervisor or employee creates a hostile work environment, even if the supervisor stops short of affecting an employee's pay, benefits, job opportunities or job responsibilities. The Wisconsin Employment Relations Commission has also states that "an employer is obligated to promulgate policies with respect to sex discrimination. State and federal law, as well as a clearly understood strong public policy, forbid sexual harassment in the work place and subject employers to substantial penalties for their violation."

The city's policy to prohibit a supervisor from having a relationship with an employee that they supervise is valid, and supercedes the contractual provision of officers to select shifts solely upon seniority, where that selection would place the city and its employees in a vulnerable legal position.

### **DISCUSSION**

The city says those who share love and sex should not share a supervisory relationship, especially in the protective services. It has used that understanding, codified in its Employee Relationships policy, to justify superseding the collective bargaining agreement's provisions for bidding by straight seniority, from which acts the employees and association grieve.

I agree with the city that love and sex are primal experiences, marking a relationship in a profound and permanent way. And I agree with the city that it should seek to prevent love and sex between a supervisor and subordinate, especially in the protective services.

The question is whether I agree with the steps the city took to implement its policy.

There is neither indication nor allegation that Officers James Thorpe or Sara Eichman have let their personal relationship interfere with the performance of their duties on the job. But the Rhinelander Police Department is worried that they might, and so has acted to prevent

them from working on the same shift. It has stopped Eichman from serving under Thorpe as OIC on second shift, and prevented Thorpe from taking an overtime vacancy alongside Eichman on third shift.

The Association presents two arguments in support of the grievances: that the city's Employee Relationships policy is overly broad and should be struck down as unreasonable and unenforceable, and that its application to Eichman and Thorpe's situation is wrongful because Thorpe does not function as a supervisor. The city rebuts that the application is tailored to meet a legitimate interest, and that Thorpe functions as a supervisor when serving as an OIC.

I address these issues in turn.

**The city may regulate the assignments of employees undertaking a romantic and/or sexual relationship.**

As was evident in the Background section, the record provides no evidence of the nature of the grievants' relationship, other than that it is of a "romantic and/or sexual" nature, short of cohabitation or marriage. But that is enough for us to know to analyze the grievances.

The Association asserts that the grievants, like all other public employees, have constitutional privacy rights and freedom of association that bar the city from penalizing them for their relationship in the absence of evidence that it has affected their job performance.

But all employees, including public, may have their most intimate personal relationships *reasonably* regulated; arbitrators have long included marriage and other levels of relationship as legitimate issues for employer regulation, consistent with the collective bargaining agreement and standards of reasonableness.

In UNITED AIR LINES, INC., LA 48 727 (Kahn, referee, 1967) the system board of adjustment denied a grievance challenging the company's policy that required that stewardesses be single when hired and remain single as a qualification for retaining employment as a stewardess.

In NATIONAL TEA CO., 69 LA 509 (Kelliher, 1977), the company had a company-wide policy of at least 17-years' standing against spouses and relatives working in the same retail store. Upholding the company's transfer of a clerk to another store four miles away following his marriage to a co-worker, the arbitrator explained:

The testimony here of Company witnesses was not rebutted that this rule is based upon prior experiences and problems encountered in the management of the stores. It is highly unlikely that one spouse would report or testify against another spouse where the matter of removing Company property was involved.

If a married couple works in a small store and there is a death in the family, this can cause time off problems. If both employees desire to take vacations at the same time, this can result in difficult scheduling. The company also fears that should marital disharmony develop, this could carry over into the store premises. The Arbitrator notes here that each employee can be assigned to handling cash because Clerks do function as Cashiers. This is a recognized basis for a transfer. 69 LA at 511.

In DUQUESNE LIGHT CO., 87 LA 420 (HANNAN, 1986), the company had a policy preventing spouses from working under the same supervisor. "The Company presents an excellent, extensive and persuasive argument as to the reasonableness of the policy, and I concur in the conclusion of reasonableness," the arbitration board chairperson wrote, even as the board sustained the grievance due to the employer's "complete failure of dissemination" of the policy.

In INDIANAPOLIS POWER & LIGHT CO., 73 LA 512 (KOSSOFF, 1979), the company had a policy of restricting and/or prohibiting the employment of relatives of current employees. Finding this to be "a rational policy," and that "most arbitrators who have considered the question hold that an employer has the right to adhere to a policy of not hiring relatives of present employees," the arbitrator sustained the discharge of an employee who falsified her application to hide such consanguinity.

In FLORIDA POWER & LIGHT CO., 90 LA 195 (SLOANE, 1987), the arbitration board upheld the discharge of a 7 ½-year employee with a good record when it learned that he was in violation of the company's anti-nepotism rule. "Any conscientious assessment of the bases for the no-relative policy," the arbitrator wrote, "must lead to a finding that these were rational ones and therefore that the policy itself has been reasonable." 90 LA at 198.

Arbitrators have even upheld work rules in this regard even if they do not necessarily support such policies. In STUDEBAKER CORP., 49 LA 105 (Davey, 1967), the union grieved the company's policy of not hiring spouses of bargaining unit employees for bargaining unit positions as a violation of the collective bargaining agreement's non-discrimination clause. Denying the grievance, the arbitrator held that the "burden of showing unreasonableness rests on the Union as the challenging party," and that "such burden was not sustained." 49 LA at 110.

It is important to note that the city's concern over workplace romance is far from theoretical; as the city delicately noted, it had "suffered through a difficult incident" last year, both during the romantic relationship between the lieutenant and the dispatcher and after the

affair went bad. Eichman was particularly candid in acknowledging that their affair had created problems at the department, stating that “everybody in the department was aware” of the affair, that “there was favoritism,” and that this “caused problems with morale.” She said she had personally witnessed a situation “of a violent nature,” and that this relationship “could have created problems in the operations of the department.” The fact that Officers Thorpe and Eichman have to date behaved appropriately while on duty is an important consideration, but it does not negate the fact that the city’s experience has not always been so positive, and in fact has been affirmatively negative.

**The terms of the Employee Relations policy are neither unreasonably broad nor unreasonably vague.**

In addition to general concerns about regulating private life in this way, the Association also raises a definitional issue – the possible breadth of “romantic and/or sexual” relationships, including love affairs without sex or one night of sex without love. To counter what a policy that it considers unreasonably broad and vague, and yet meet legitimate interests, the Association suggests it might approve of certain regulation of employees who are married or cohabitating.

Without addressing the potential anti-discrimination issues that could arise from such a policy, I agree that the city could have made marriage or cohabitation the bright lines. But because the parties stipulated that Eichman and Thorpe were having a “romantic and/or sexual relationship,” the definition of those terms is not before me. And because no evidence was taken on the precise nature of the grievants’ relationship, it is impossible for me to offer any guidance on how that term is properly understood and applied. All that matters is that, for the purpose of this proceeding, the grievants met its definition.

Further attempting to show the unreasonableness of the application of the policy, the Association sought to portray other, male officers with relationships which were close and meaningful but not, to anyone’s knowledge, of a romantic or sexual nature. It offered testimony about male relationships which included being bowling partner, traveling companion and best man. That these relationships go unregulated, it says, underscores the unreasonableness of the regulations the employer does impose.

Without minimizing the important social and cultural role of athletics, ceremonies, travel and I cannot equate bowling together with sleeping together. Friendship is friendship and love is love and there’s a difference between the two, and engaging in a romantic and/or sexual relationship with a coworker will justify greater workplace regulation than just being friends. On this record, the phrase “romantic and/or sexual relationship” is not so unreasonably broad and/or vague to invalidate the department’s Employee Relationships policy.



**The regulation of assignments in the Employee Relationships policy are reasonable.**

The city's Employee Relationships policy says that romantic and or sexual relationships between City employees "are to be avoided," as they can adversely affect the workplace and its productivity, diminish employee morale, and risk claims of sexual harassment. The policy also provides that:

Supervisor/management and non-management employees who are involved in a romantic and/or sexual relationship may be transferred from one department to another, or their responsibilities regarding supervision of the affected employee or co-workers of the affected employees may be modified or transferred to another supervisor. 5/

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*5/ The Employee Relationships policy went through at least two iterations, with the city specifically amending the policy to include the explicit reference to supervisory personnel in addition to those in management.*

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The Employee Relationships policy properly distinguishes between relationships between general city employees and those between supervisory or management personnel and non-management employees. That portion of the policy which applies to two non-management employees is not before me, because the employer expressly acted in regard to Thorpe's purported supervisory status as the OIC.

The policy applying where one is a supervisor, which is before me, allows the employer to transfer one or more employees to another department, or to modify or transfer the supervisory duties themselves. These are reasonable alternatives for the employer to pursue to balance the several public and private rights at stake.

**The city is correct that an Officer-in-Charge is a supervisor.**

The city has premised its regulation of the Eichman and Thorpe assignments on Thorpe's purported supervisory status as an OIC. It has stated that, but for the OIC duties, it would allow Eichman to exercise her seniority to bid for the coming vacancy on second shift, and Thorpe to bid on overtime vacancies on the third shift while Eichman was also on duty. If Thorpe isn't acting as a supervisor when he's OIC, both grievances must prevail.

As a senior patrol officer in the Rhinelander Police Department, Thorpe serves as Officer-in-Charge frequently. In just four months earlier this year, Thorpe served as Eichman's OIC on six shifts. When the second shift loses one of its two sergeants next year, Thorpe will serve as OIC more frequently, about twice a month or once every ten shifts.

The Association is correct that the assignment carries few of the indicia of supervisory status that would be relevant in a unit clarification before the Wisconsin Employment Relations Commission. I would neither expect the city to bring such a petition nor the commission to support it. But that is not the standard to apply in this proceeding.

The department has here given the position of OIC specific and explicit supervisory responsibilities. Policy 7.3, which far predates this controversy, identifies the position by name and requires it to review warning citations, review and forward accident reports, and review, sign and forward offense/arrest reports. These are significant procedural steps the department has established for the proper handling of critical elements of the criminal justice system. They constitute legitimate supervisory duties even when performed by employees who otherwise might not be held as supervisory employees in a unit clarification proceeding.

The status of these duties, however, is unusual, in that they exist entirely by administrative policy manual and practice; indeed, the collective bargaining agreement itself is silent on the issue of the very existence of the position of officer-in-charge. Further, as noted above, while the position carries with it added duties and responsibilities, it brings no stipend or other supplemental benefits.

The grievants testified to a certain collegiality in the Rhinelander Police Department, whereby junior officers with on-site sector responsibility are as likely to control and direct a scene as senior officers. That may well be.

But no matter how collegial or informal the Rhinelander Police Department may be, it, like all paramilitary organizations, ultimately operates by a chain of command. An OIC is just that – the officer in charge. This includes the authority to direct and deploy personnel, a critical consideration in the protective services. During the time that Thorpe serves as officer-in-charge, he is a supervisor.

**The city did not violate the collective bargaining agreement when it denied Officer James Thorpe an overtime vacancy on July 20.**

Well-settled public policy, understanding of human affairs, specific harmful experience borne by this employer and realistic concerns of legal liability all support the city's legitimate interest in regulating shifts and assignments when there are romantic and/or sexual relationships between supervisory and non-supervisory personnel.

The mandates of Policy 7.3 plus deployment authority make the Office-in-Charge a supervisor. Thus, during his tours as officer-in-charge, Officer Thorpe serves as a supervisor.

As of July 20, Thorpe was having a romantic and/or sexual relationship with Eichman. Accordingly, the city had a legitimate interest in keeping him from assuming a supervisory position over her. For him to have assumed the third-shift overtime vacancy on July 20 would have created just such a supervisory relationship.

The city's Employee Relationships policy provides that "supervision of the affected employee or co-workers of the affected employees may be modified or transferred to another supervisor." But there is no way to address the supervisory issue on a two-person shift where both employees are in the same relationship, other than denying the joint service or adding a third position to supervise both. Certainly, the city cannot be required to add a third, supervisory position to the third shift just so Thorpe can take an occasional overtime vacancy. Thus, its only alternative is to deny two officers engaging in a romantic and/or sexual relationship from working together as the only officers on duty during a two-officer shift.

Therefore, the city did not violate the collective bargaining agreement by applying its Employee Relationships policy to deny Thorpe the third-shift overtime vacancy on July 20 when to grant such a bid would have placed him on a shift as Officer-in-Charge over someone with whom he was having a romantic and/or sexual relationship.

**The city violated the collective bargaining agreement when it forbade Eichman from bidding on the second shift.**

It is true that Sebestyen's ban on Eichman's bidding for second shift was also in keeping with the policy statements the department and city had made and showed a strong concern and sensitivity to issues of sexual harassment at the workplace.

But it is not true that barring Eichman's seniority-based bid is the proper way to apply that policy or protect against sexual harassment.

The terms of the policy authorize management to take certain personnel transactions. One or both of the officers "may be transferred from one department to another," an unworkable solution since they both work for the same department. The only other option authorized by the policy is that "supervision of the affected employee or co-workers of the affected employees may be modified or transferred to another supervisor."

Nowhere does the policy speak to affecting the assignment rights of the non-supervisory employee – only that of the "supervisory/management" employee.

The city has said it cannot modify or transfer Thorpe's OIC duties to the other, far more junior patrol officer on second shift. The city says replacing the veteran, qualified Thorpe as OIC would be inappropriate, inasmuch as Helke has substantially shorter tenure with the department. I accept this as a good-faith argument on what is the right thing to do for the professional operations of the department. I also accept Parmeter's analysis that, given the shift from a second sergeant to another patrol officer on the second shift, Thorpe will be officer-in-charge when Eichman is also on duty about twice a month, or once every ten days.

As explained above, the department has a legitimate interest in preventing Thorpe from serving as OIC over Eichman. But Eichman has an absolute contractual right to an annual shift selection by seniority, while Thorpe has no contractual right to the position of OIC. Indeed, as noted above, the position itself exists only through administrative policy and practice, and none of the OIC rights and responsibilities flow from the collective bargaining agreement. 6/

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*6/ Given that the position entails significant responsibility with no dedicated training or supplemental pay, it could be argued that the OIC designation brings far more responsibilities than rights.*

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The department may take steps to prevent Thorpe from serving as Officer-in-Charge over Eichman. But it cannot do so by denying Eichman her contractual bidding rights.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

### **AWARD**

1. That the grievance in Case 103, No. 60305, MA-11574 (the Thorpe grievance) is denied;
2. That the grievance in Case 104, No. 60374, MA-11594 (the Eichman grievance) is sustained. As remedy, the department shall allow Eichman to exercise her right to shift selection by seniority, pursuant to section 8.02 of the collective bargaining agreement.

3. I shall retain jurisdiction to address any issues arising from issuance of this award, such jurisdiction to lapse on December 20, or when both parties request in writing that I surrender such jurisdiction, whichever is earlier.

Dated at Madison, Wisconsin this 30<sup>th</sup> day of November, 2001

Stuart Levitan /s/

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Stuart Levitan, Arbitrator

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