

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
CITY OF OSHKOSH (POLICE DEPARTMENT)

and

OSHKOSH POLICE OFFICERS' ASSOCIATION

Case 351
No. 64407
MA-12892

Appearances:

Andrea Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman Goldberg, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of the Association.

William G. Bracken, Labor Relations Specialist, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, on behalf of the City.

ARBITRATION AWARD

Pursuant to the 2004-06 collective bargaining agreement between the captioned parties, the parties jointly selected Arbitrator Sharon A. Gallagher to hear and resolve a dispute between them regarding whether the City violated the labor agreement when it required Grievant Chris Farrell to take personality tests and to consult with a psychologist in an effort to improve his on-the-job performance. Hearing was held at Oshkosh, Wisconsin on July 7, 2005. A stenographic transcript of the proceedings was taken and received by the Arbitrator on July 28, 2005.

The parties submitted their post-hearing briefs by September 6, 2005. The parties waived the right to file reply briefs. On November 29, 2005, the City sent the Arbitrator five of the cases¹ cited in its brief in response to the Arbitrator's written request therefor, sent on November 21, 2005, whereupon the record was closed.

¹ I have read the following cases sent to me by the City: MADISON METROPOLITAN SCHOOL DISTRICT, A/P M-04-388 (KNUDSON, 6/30/05); OZAUKEE COUNTY, A/P M-87-266 (MALAMUD, 1987); CITY OF OSHKOSH (POLICE DEPARTMENT), CASE 247, No. 51934, MA-8784 (McLAUGHLIN, 1996); CITY OF OSHKOSH (POLICE DEPARTMENT), CASE 222, No. 50887, MA-8419 (MAWHINNEY, 1996); and CHEQUAMEGON UNITED TEACHERS AND SCHOOL DISTRICT OF WEBSTER, CASE 29, No. 54370, MA-9656 (JUNE 1977).

ISSUES

The parties were unable to stipulate to the issues for determination herein but they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument as well as their suggested issues. The City² suggested the following issues:

- 1) Did the City violate the 2004-06 contract when it directed Officer Chris Farrell to take personality assessment tests and consult with Dr. James Fico in an effort to improve Officer Farrell's performance?
- 2) If so, what is the appropriate remedy?

The Union suggested the following issues for determination:

- 3) Did the City violate the collective agreement by requiring Chris Farrell to submit to personality assessments and consultations?
- 4) If so, what is the appropriate remedy?

Based upon the relevant evidence and argument the Arbitrator finds that the Union's issues reasonably state the dispute between the parties and they shall be resolved herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE 1

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains, solely and exclusively, all of its common law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wis. Stats. Sec. 111.70.

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² The Union contended that by its actions toward Farrell, the City had disciplined Farrell and therefore, the City should have the burden of proving it had cause to discipline Farrell by requiring him to take assessment tests and consult with Dr. Fico. The City argued that its actions toward Farrell were not disciplinary and therefore, the Union has the burden of proof in this case.

ARTICLE X

PREVIOUS BENEFITS

The Employer agrees to maintain in substantially the same manner, all benefits, policies, and procedures related to wages, hours, and conditions of employment that are mandatory subjects of bargaining not specifically referred to or altered by this Agreement.

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ARTICLE XIV

PROGRESSION F DISCIPLINARY ACTION

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

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

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

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ARTICLE XVI

GRIEVANCE PROCEDURE

Both the Association and the City recognize that grievances and complaints should be settled promptly and at the earliest possible stages and that the grievance process must be initiated within five (5) days of the incident or knowledge of the incident, whichever is the latter. Any grievance not reported or filed within five (5) days shall be invalid. A grievance is defined as any dispute or misunderstanding relating to employment between the City and the Association.

For the purpose of the final step of the grievance procedure, a grievance will be limited to the interpretation of (sic) application of the terms and conditions of

this agreement, including past practices and policies incorporated in this agreement by its terms, and shall be handled in the following manner:

1. The grieved employee shall present the grievance orally to his/her Supervisor, either alone or accompanied by an Association representative, or if the employee refuses to present the grievance, the Association may present the grievance. The supervisor shall, within three (3) days, excluding Saturdays, Sundays and holidays, provide a response to the employee.

2. If the grievance is not settled at the first step, the grievance shall be presented in writing to the Police Chief within five (5) days (Saturday, Sunday and holidays excluded). The Chief shall within five (5) days (Saturday, Sunday, and holidays excluded) hold an informal meeting with the aggrieved employee, and the Association representatives. The Chief's Response to the grievance shall be in writing. If the grievance is not resolved to the satisfaction of all parties within three (3) days (Saturday, Sunday and Holidays excluded), either party may proceed to the next step.

3. The grievance shall be presented in writing to the City Manager for disposition within five (5) working days (Saturday, Sunday and holidays excluded). Response to the grievance shall be in writing.

4. If the grievance is not settled under the provisions of paragraph 3 above and one of the parties deems the issue to be arbitrated, the party shall process the grievance within five (5) days (Saturday, Sunday and holidays excluded) of completion of the provisions of paragraph 3 to arbitration. Arbitration procedures shall follow that outlined in State statutes. The decision of the arbitrator shall be final and binding on the parties, subject to judicial review.

Expenses for the arbitrator's services and the proceedings shall be borne equally by the employer and the Association. However, each party shall be responsible for compensating its own representative and witnesses.

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RELEVANT POLICIES 103 AND 155:

103.01 GENERAL POLICY AND PURPOSE

The Oshkosh Police Department and its employees will be responsive to the needs and the concerns of the people it protects and serves. In order to accomplish this goal, the Department will courteously accept, impartially

investigate, and promptly respond to a complaint received from a citizen and/or employee about Department policies, procedures, and/or actions of its employees.

103.2 PURPOSE

The purpose of this policy is to establish a procedure that will be followed in handling complaints against Oshkosh Police Department policies, procedures, and/or actions of its employees.

Any time the Department determines that it is necessary to investigate events or circumstances that may lead to disciplinary actions, an internal affairs investigation shall be initiated. At the onset of any internal affairs investigation, the employee shall be presumed innocent and the examination of facts shall be conducted in accordance with the guidelines contained in this policy. (See Appendix H 103 for general flow chart.)

All internal affairs investigations are to be conducted in a fair and impartial manner and will not only provide for corrective action when appropriate, but will also protect the Department and its employees from unwarranted criticism when those procedures or action questioned are proper.

103.3 DEFINITIONS

- A. Complaint – A complaint is an act of expressed dissatisfaction that relates to Department operations, personnel conduct, or unlawful acts. Generally, complaints are based upon misconduct or procedure.

This policy is not related to employee misunderstandings or disagreements related to the routine and reasonable application of policies, directives or supervision. In cases of internal disagreements, the issue shall be taken to the next highest supervisor within the affected Bureau for resolution.

- B. Factual Dispute – Issues raised by the complainant relating to the validity of an arrest or the factual content of the report when there is no other alleged misconduct on the part of an officer, such as Unprofessional Conduct, Abuse of Force, Discrimination, Harassment, etc.
- C. Employee – Any and all persons employed by the Oshkosh Police Department.

- D. Supervisor – Those officers of the Oshkosh Police Department holding the rank of Sergeant and above.
- E. Department Complaint Form – Form used to record complaints from citizens and/or employees against Department policies, procedures, and/or actions of Department employees. (See Appendix A 103)

103.4 RECEIVING COMPLAINTS

The Oshkosh Police Department shall accept, record and investigate all complaints.

- A. Any employee who initially receives a complaint shall refer the complainant to a sworn supervisor, who will receive and record the complaint. In the event that the supervisor is not immediately available, the complainant shall be so told and asked to wait until a supervisor becomes available. If the complainant does not care to wait, but still wishes to file a complaint, the employee shall obtain the name, address, phone number and any other necessary information, and advise the complainant that he/she will be contacted by a supervisor.
- B. While the supervisor is interviewing the complainant, he/she shall observe the complainant's behavior, paying particular attention to whether he/she is in a state of intoxication, or whether there are any injuries or something of this nature that might be connected with the complaint.
- C. The supervisor shall make a note in writing of the complainants' demeanor and the appearance and include this information with the Department complaint form.

103.05 RECORDING COMPLAINTS

- A. All complaints shall be recorded on the Department complaint form. The complainant shall be asked to sign the complaint form. If he/she refuses, note it on the form and forward the form to the IA Investigator, and send copies of the form to the employee's shift supervisor or bureau supervisor.

B. Upon receipt of the complaint, unless otherwise directed, the IA investigator shall:

1. Classify the complaint as formal or informal.
2. Notify the complainant, in writing and as soon as possible, that the complaint has been received and is being investigated. Should the investigation of the complaint take longer than 21 days, the complainant shall be advised of the status of the complaint and the reason for delay in completing the investigation. The complainant will be informed that they will be advised in writing as to the outcome of the investigation.

The complainant will be informed that if they have any additional information, they should contact the Internal Affairs Investigator. Should the Internal Affairs Investigator wish to advise the complainant as to the status of the complaint, he/she will contact the complainant by correspondence, telephone, or in person.

3. Notify the employee who was the subject of the complaint in writing and as soon as possible, and send him/her a copy of the complaint, unless doing so may jeopardize an investigation.
4. Make the Chief of Police aware of the complaint.
5. Immediately investigate the complaint.

C. If the supervisor receiving and recording the complaint involving a minor act of misconduct or procedure can resolve the matter to the complainant's satisfaction, he/she shall do so and record this fact and the methods used to satisfy the complainant on the complaint form. The fact that the matter has been resolved shall not relieve personnel of the responsibility for completing the complaint form and forwarding the paperwork to the IA Investigator, while retaining a copy for himself/herself.

If the supervisor receiving and recording the complaint has reason to believe that the complaint involves a serious act of misconduct, procedural issue or an alleged unlawful act involving an employee of the department, the supervisor will complete the complaint form and forward it to the IA Investigator.

103.10 CASE DISPOSITION

- A. Upon completion of the investigation, the IA Investigator shall forward the case finding, including his recommendations, to the Chief of Police. The case finding shall be classified as follows:
1. Sustained – The allegation is supported by sufficient proof.
 2. Not Sustained – The evidence is not sufficient to prove or disprove the allegation.
 3. Unfounded – The allegation is false or otherwise not based on valid facts.
 4. Exonerated – The incident that occurred or was complained against was lawful and proper.
 5. Misconduct not based on the original complaint – The evidence supports the action for infractions discovered during the investigation of the complaint that may be sustained, not sustained, unfounded or exonerated.
 6. Factual Dispute – there is no misconduct on the part of the employee. The complainant's concerns are strictly related to the factual content of the report or to the validity of an arrest decision.
- B. The Chief of Police shall review the report and, in writing, either concur or not concur with the findings and the recommendations of the IA Investigator. If the Chief of Police concurs, he shall decide the appropriate disposition of a case. If the Chief of Police does not concur, he shall return the report to the investigator with his reasons for non-concurrence, and direct what further action should be taken in the case.
- C. Upon final disposition of the case, the Chief of Police shall notify, in writing, the complainant and the accused of the Department's findings.
- D. Upon completion of the investigation and the employee is not exonerated, the Chief of Police shall administer appropriate and final discipline that can range from training to dismissal from the department. If the disciplined employee wishes to contest the

Chief's action, he/she has the option of following the grievance procedure per the current labor agreement between the collective bargaining unit and the City of Oshkosh. In a case of suspension, demotion, and/or dismissal, if the employee is a sworn officer, the officer may appeal the action to the Police and Fire Commission.

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Policy 155

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155.07 PERSONNEL EARLY WARNING SYSTEM

A Personnel Early Warning System is an essential component of good discipline in a well-managed law enforcement agency. A Personnel Early Warning System is used to identify employees that may require agency intervention efforts. An early identification of employees that may be having difficulties or problems in the workplace and options for remedial action can increase agency accountability and offer employees a better opportunity to meet the values and mission statement of the Oshkosh Police Department.

Proactive early intervention from first line supervisors is a crucial element to a successful Personnel Early Warning System. Supervisors must be attuned to potential problems that may negatively effect (sic) an employee's work performance. Supervisors will use indicators to determine whether there is a pattern of activity that indicates the existence of a problem. These indicators may include, but are not limited to:

- A. Performance Evaluations
- B. Citizen Complaints
- C. Attendance or Sick Time use patterns
- D. Use of Force Incidents
- E. Preventable duty related vehicle accidents

Supervisors must constantly be aware of these indicators and other patterns of inappropriate conduct or behavior developing in the employees they supervise with the purpose of early intervention to correct the problem.

When a supervisor discovers a pattern of behavior that requires intervention efforts, the supervisor will discuss the matter with his/her immediate supervisor and the identified employee to develop a remedial action plan to correct the behavior. The Remedial Action Plan will be documented and provided to the Bureau Commander and the Chief of Police for feedback and approval before implementation. The Remedial Action Plan shall include:

- A. Details of the pattern of behavior that causes concern
- B. Recommended intervention actions, including but not limited to;
 - 1. Training
 - 2. Formal or informal counseling
 - 3. Referral to Employee Assistance Program (refer to Policy 122)

After implementation of the Remedial Action Plan, supervisors will monitor the employees actions for compliance to the intervention options and complete a follow up report to the Bureau Commander and Chief of Police. Indications of employee compliance or non-compliance to the remedial action plan may be kept for future references and/or performance evaluations.

Supervisors shall take appropriate action that is consistent with department policy and procedures whenever the supervisor observes inappropriate employee conduct. Actions that meet the criteria for formal discipline will be handled according to procedures outlined in Policy 115, Discipline.

An annual review of the Personnel Early Warning System will be conducted by the Lieutenant of Planning, Training and Research every January to determine the effectiveness of the system.

FACTS

Officer Chris Farrell (Farrell) has been employed by the Oshkosh Police Department (OPD or City) since September 1, 2000. Before his hire by the City, Farrell worked as a law enforcement officer for the Outagamie County Sheriff's Department from 1994 to 1997 and for the Phoenix Police Department in Phoenix, AZ from 1998 to 2000. Farrell has a B.S. degree in Criminal Justice and a Masters degree in Education

At the time of his hire, Farrell took pre-hire tests given by Dr. James Fico which were required for consideration for the position he was ultimately hired into at the OPD. Farrell began working as a patrol officer for the City in November, 2000. During all times relevant to this case, Farrell was assigned to the Community Policing Office (CPO). The CPO was a

governmentally funded program designed to put police officers into the community. The CPO was cancelled due to lack of funding in January, 2005, at which time Farrell and the other officers in the CPO went back to regular patrol duties. Farrell was then assigned to the third shift (10:15 pm to 6:30 am).

When he was assigned to the CPO, Farrell had a special assignment to patrol UW Oshkosh and his hours varied depending upon the needs of the Program and the events arising at UW Oshkosh, such as house parties, sting operations, off-campus situations, and landlord/tenant issues. The last evaluation done on Farrell's work performance was done in September, 2002, at which time he was ranked as "meets standards" or "exceeds standards" in all categories.

From February 2001 through mid-October, 2004, Farrell received 10 written personnel complaints.³ These complaints were filed by citizens with whom Farrell had had contacts as an OPD officer. All of these complaints were investigated pursuant to the OPD's Policies, including Policy 103 and 155 by Captain Van Ness. Joint Exhibit 5 contains the results of the internal investigations of the written complaints against Farrell.

Six of the ten complaints were "not sustained," one was "unfounded," two were "partially sustained."⁴ One complaint resulted in Farrell's being suspended for 3 days for Farrell's conduct (not related to the personnel complaint against him), for failure to generate a long-form complaint regarding an allegation he had investigated that two juveniles (15 years old) were having sex. On October 7, 2001, one of the fifteen year old juveniles filed a personnel complaint against Farrell for his handling of the incident on October 3rd. On November 6, 2001, Chief Erickson issued Farrell the following memo regarding "Disciplinary Action" against him concerning the incident on October 3, 2001:

- Christopher Farrell has been employed as a Police Officer by the Oshkosh Police Department for approximately 11 months. He has been previously provided with the policies, regulations, and rules of conduct of the Oshkosh Police Department. An officer with this officer's experience and discipline history is expected to be familiar with these documents and thus aware of the policies, procedures and responsibilities that are to be followed in reporting police contacts and possible crimes. He should be aware that allegations of juvenile sexual mis-conduct as reported to him in incident 01-7015, warrants thorough investigation and detailed reporting.

³ Officer Farrell received a tenth personnel complaint after October 15, 2004 before the instant grievance was filed. Captain Van Ness investigated that complaint as well and the results of his investigation are contained in Joint Exhibit 5.

⁴ One of the "partially sustained" complaints was rated as such, not based upon the complaint but because Farrell did not initiate a traffic stop at the time it occurred and chose to pull over the driver at a later time and location (Jt. Exh. 5g). The other "partially sustained" complaint was ruled such because Farrell had misused an anticipated OWI arrest in order to require all passengers in the car to identify themselves, which resulted in one passenger refusing to identify himself and Farrell arresting him for same (Jt. Exh. 5b).

- Rule of Conduct 228.35 requires that “Officers and employees shall submit all necessary reports on time and with complete information and in accordance with established department procedures.” Rule of Conduct 214.33 states, “Officers and employees in doubt as to the nature and detail of their assignment shall seek such information from their supervisors. Rule of Conduct 214.36 states, “Officers shall maintain sufficient competency to properly perform their duties and assume responsibilities of their positions...” Guidelines for handling juveniles are listed in Policy 411 with an incident report indicated for misdemeanor and felony crimes. Directive 227 requires supervisory approval for reporting an incident investigated in this matter as a short form. Officer Farrell’s initial short form report, after speaking with reporting parties for approximately one hour, was completely inconsistent with these rules and the welfare of the child involved. Officer Farrell has had clear and adequate training and notice of procedures for completing investigative reports. In addition, he has had previous discipline for inadequate reporting in February of 2001.
- A thorough investigation was conducted into this matter and the surrounding circumstances. On October Third, Officer Farrell was dispatched to 34 W 10th Ave. to talk with parents about sexual activity of a juvenile child. Officer Farrell remained at this location, talking with various persons for one hour. He documented the incident with a short form complaint. On October 7th, a personnel complaint was filed by a fifteen-year-old female who Officer Farrell encountered in this incident. She alleged rude and unprofessional conduct by the officer. Most of her allegations were not substantiated. However, investigation of the complaint revealed that the officer had been given considerable information regarding the sexual activity of another fifteen-year-old child.

It is our belief that instead of producing short form documentation of this incident, Officer Farrell should have done the following:

- More aggressively pursued the investigation of the alleged conduct of the juvenile girl.
- Determined the statutory proscriptions regarding the alleged conduct, either by researching the law or consulting a supervisor.
- Produced a long form complaint detailing his investigation.
- The investigation of this complaint was conducted in a reasonable, fair and impartial manner.

- Based upon the initial and follow up investigations, there is substantial evidence to demonstrate that Officer Farrell violated Rules of Conduct 214.33, 214.36 and 228.35, policy 411 and directive 227 as well as job responsibilities outlined in Job Description 100.23.
- After a review of prior, similar complaints, previous discipline, and following discussions relating to this complaint, it has been determined that a suspension of three days will be imposed in this matter. This suspension will be served on November 6, 10, and 11, 2001.
- This discipline is reasonably related to the seriousness of the offense. This type of conduct is such that a suspension is reasonable and appropriate. Future similar incidents involving this officer could result in more serious discipline.

The final item is that it is understood that any repeat of conduct found in this situation will result in further discipline that could include referral to the Police and Fire Commission for termination.

Significantly, based upon the record herein, Farrell did not grieve this 3-day suspension. As indicated above in the quoted policies, a finding of “not sustained” means that the OPD was unable to affirmatively prove or disprove that the citizen’s complaint was justified; an “unfounded” finding means that the complaint was found to be false; a “sustained” finding means that the complaint was proven to be true and accurate on some basis.

On October 14 2004, after the investigation of a September 2, 2004 personnel complaint was completed, Captain Van Ness (Van Ness) and Chief Erickson (Erickson) decided to meet with Farrell to discuss the nine personnel complaints the OPD had received and investigated as of October 14, 2004, to try to determine how to help Farrell draw fewer such complaints in the future. The testimony herein fully supports a conclusion that Van Ness’ October 15, 2004, memo fairly summarized what was said at the October 14th meeting between Farrell, his Union representative, Erickson and Van Ness, as follows:

. . .

It was then pointed out to Officer Farrell that in three and three quarters year (the length of his employment), he has been the subject of nine Personnel Complaints. He was informed that in reviewing Personnel Complaint data for other officers, one officer had six Personnel Complaints over this same three and three quarter year time frame. This officer, however has had eight Personnel Complaints in a ten-year period. One officer has five Personnel

Complaints in this three and three quarter year time frame and six Personnel Complaints over his nearly five years of employment with the Oshkosh Police Department. One additional officer has had four Personnel Complaints over the same three and three quarter year time period – but those were the only personnel Complaints over his six and one half years with the Oshkosh Police Department. All other officers have had three or fewer Personnel Complaints over the same three and three quarter year time period.

Chief Erickson pointed out the statistical significance of the number of Personnel Complaints accumulated by Officer Farrell and of the department's need to examine these complaints in an effort to reduce or eliminate additional Personnel Complaints. It was pointed out that these Personnel Complaints presented a possible liability issue for Officer Farrell as well as for the Oshkosh Police Department and the City of Oshkosh should there ever be future litigation involving Officer Farrell.

Chief Erickson pointed out that Officer Farrell was a good officer who has done an extra ordinary (sic) amount of good work. Specific instances were sighted in relation to Wisconsin Street Days and in the shutting down of a block party. Chief Erickson made it clear that in most all circumstances, Officer Farrell is a good, professional, and productive officer.

With that said, concerns were expressed over the frequency in which Personnel Complaints have been field against Officer Farrell. A brief review of each of the complaints was covered in an attempt to identify a common denominator. Chief Erickson pointed out that several of the complaints were related to identification issues (that escalated) and several others involved relatively minor contacts/incidents (that escalated). Chief Erickson noted that the nature of these contacts were generally not initially of a nature that should have escalated to the level that they did, and should not have resulted in a Personnel Complaint. It was pointed out that in many cases it appeared that when Officer Farrell's stress level, or the stress associated with the situation reached a certain point, Personnel Complaints resulted from these citizen contacts. Chief Erickson pointed out that in many instances other officers were present and were engaged in similar activities and noted that their actions and conduct did not result in the generation of Personnel Complaints.

Officer Farrell presented his case for each/most of the Personnel Complaints, indicating that he felt that his actions in each instance were appropriate and necessary. He did acknowledge that at times he could have said or done some things differently, but generally maintained that his actions and conduct were appropriate and necessary. Officer Farrell states that for whatever reason, he is a victim of circumstances (Murphy's Law) and does not feel that his conduct or actions are inappropriate. He states that he makes every effort to be appropriate

and professional and mentally critiques each contact that he has with citizens in an effort to learn and improve. Officer Farrell states that he is an aggressive officer in terms of the number and types of situations that he deals with and that it is likely this aggressiveness that generates a disproportionate number of Personnel Complaints.

Chie (sic) Erickson states that he and the department were at “a loss” as to identify the specific cause or behavior that was resulting in the generation of these Personnel Complaints. Chief Erickson acknowledged that Officer Farrell is an aggressive officer, but stated that it is unlikely that he is the most aggressive officer and that many other officers are equally or nearly equally as aggressive. Chief Erickson continued to state that the number of Personnel Complaints generated by Officer Farrell was a concern and was an issue that needed to be addressed and corrected.

Suggestions ranged from a review of the Personnel Complaints by Dr. Jim Fico and a follow-up interview with Dr. Jim Fico, to a review of the complaints by other police professionals. Chief Erickson stated that he would further discuss how to best address this situation and would seek advice and input from staff, city personnel, and other law enforcement professionals. Chief Erickson stated that he would keep Officer Farrell informed as to any review that might take place.

Chief Erickson reiterated that he did not feel that Officer Farrell was not (sic) a “rogue” cop and that the Personnel Complaints generally did not involve gross misconduct as related to Use of Force or Unprofessional Conduct.

. . .

After the October 14th meeting, Farrell received another personnel complaint (dated November 2, 2004) and Van Ness met again with Farrell and his Union Representative regarding that complaint on December 1, 2004, to discuss the results of the internal investigation of that complaint Van Ness’ memo regarding that meeting read in part as follows:

Captain Van Ness initially met with Officer Farrell on Wednesday, December 1st in relation to an additional personnel complaint that was filed with our department in early November - approximately three weeks after our initial meeting. I explained to Officer Farrell that the meeting was in reference to the latest personnel complaint and would involve the issuance of a Supervisor’s Log. After a brief discussion, Officer Farrell asked to have a union representative present, so the meeting was adjourned.

Approximately 30 minutes later, I again met with Officer Farrell, along with Sergeant Bakri, and Officer Kaiser. I explained to Officer Farrell our concerns as related to the disproportionate number of personnel complaints that have been filed against him since he went on the road in February of 2001. Of the eighty-four personnel complaints filed, ten, or roughly one in every eight have been filed against him. With a staffing of ninety-eight officers, at least seventy of whom have routine contact with the public – officer Farrell is having personnel complaints filed against him at a rate ten times that of the average officer.

I described our sense that there was a common theme in the personnel complaints – Officer Farrell frequently seems to overreact, to be offensive, rude, demeaning, overly aggressive and insensitive in his handling of certain types of calls. It appears that when the stress rises to a certain level or when Officer Farrell's authority is "challenged", that he reacts in a manner different to that of the average officer.

Officer Farrell continues to defend himself, stating that he does not believe that he is doing anything wrong, stating that he is an aggressive officer who has far more contacts and negative contacts than the average officer and that this is the reason for the number of personnel complaints – that it has nothing to do with his conduct or actions.

Officer Farrell was issued a Supervisor's Log in reference to this complaint and was also advised that we would be meeting with Doctor Fico – asking him to review the personnel complaints in an effort to see if he could better identify and articulate the reasons for these complaints and recommend a method for reducing or eliminating the number of these complaints.

On December 7, 2004, Van Ness issued the following memo to Farrell:

As a result of our meeting with Dr. Fico this past Friday (12/03/04) and of his pending review of your personnel complaints, we will need the following to occur:

Stop in to see me to arrange to take three Hogan Personality Assessments – these are to be taken at the department during work time. The Answer Sheets will be sent to Dr. Fico for scoring and review.

Call Dr. Fico's office at (715) 258-8080 to arrange to meet with Dr. Fico for a follow up (sic) meeting. This interview should be scheduled during your normal work hours (unless otherwise not possible).

. . .

Also on December 7, 2004, Farrell filed the instant grievance which read in relevant part as follows:

Statement of Grievance: The Chief is violating Articles X, XII, and XIV by requiring Officer Farrell to submit to a psychiatric evaluation. The requirement is a violation of Officer Farrell's privacy, is without just cause, and apparently represents a new departmental policy that is invalid because it is supported by neither past practice nor bargaining.

Facts of Incident: The Chief is requiring Officer Chris Farrell to submit to psychiatric testing because of unfounded and unsustained allegations against him.

Specific Wrongful Act and Resulting Harm: The wrongful act is the referral of Officer Farrell to psychiatric counseling. The resulting harm is: (1) invasion of Officer Farrell's privacy; and (2) generation of employment records prejudicial to Officer Farrell.

Remedy Sought: Refrain from requiring Officer Farrell to submit to a psychiatric evaluation, purge and destroy any records of the psychiatric evaluation, otherwise make Farrell whole, and declare that it is a contract violation to require an officer to submit to a psychiatric evaluation without clear objective evidence suggesting that the officer suffers from psychiatric problems that render him unfit for duty.

By memo dated January 4, 2005, Erickson ordered Farrell to participate in "personality assessment testing and consultation" as follows:

. . .

This memo is to inform you that you are ordered to participate in a series of three personality assessment tests. These assessments/tests will subsequently be sent to and evaluated by Dr. James M. Fico.

You are to report to Captain Van Ness' Office at 3:00 PM on Thursday January 6, 2005. I would anticipate that this initial testing process would not take more than an hour, however I cannot guarantee that time frame.

You may bring a union representative with you for this testing portion of the consultation process if you wish. However you should understand that they will only be allowed to observe and cannot participate in the testing.

. . .

Farrell took the required tests in accord with the above-quoted order. By memo dated January 21, 2005, Chief Erickson advised Farrell as follows:

. . .

This memo is to inform you that you are ordered to participate in a series of personality assessment tests. These assessments/tests will subsequently be sent to and evaluated by Dr. James M. Fico.

As a part of Dr. Fico's evaluation, you are to contact Dr. Fico's office to set up an appointment for the counseling sessions(s). This counseling session(s) is designed to identify behaviors and develop strategies to improve your performance when dealing with people in stressful situations and help to avoid future personnel complaints being filed against you.

Included in this order is the understanding that you will actively and cooperatively participate in all aspects of the testing and counseling.

Failure to participate will result in disciplinary action for insubordination, which could involve action before the Police and Fire Commission.

It is undisputed that Farrell met with Dr. Fico on two occasions, January 21 and February 4, 2005, and that Farrell was (admittedly) a reluctant participant in those sessions. Van Ness stated herein that Dr. Fico was used/consulted pursuant to Policy 155 as a third party neutral because the OPD did not want to discipline Farrell (who is generally a good officer), but the OPD wanted to assist Farrell to become a better officer without subjecting him to the trauma of imposing discipline on him. Van Ness admitted that Farrell never received any training/strategies from Dr. Fico regarding Farrell's interactions with citizens (as referred to in Dr. Fico's February 14, 2005 letter to the OPD). Finally, Van Ness stated that a supervisor's log generally contains comments that are not considered discipline although such comments may be considered at a later time if an employee is being considered for discipline.

On February 11, 2005, Erickson and Van Ness met with Dr. Fico regarding Farrell. Van Ness' February 14th memo accurately describes that meeting as follows:

. . .

Captain Vann Ness and Chief Erickson met with Dr. Fico on Friday, February 11th at 1:00 am in his Appleton Office to discuss testing and meetings that he had with Officer Farrell. This was in regards to our request that Dr. Fico "assess" Officer Farrell in an effort to identify behaviors that have led to a disproportionate number of personnel complaints and to identify strategies that can be used by Officer Farrell and his immediate supervisors to correct these behaviors.

In meeting with Dr. Fico, he indicates that Officer Farrell has high potential, but that he has to learn how to respond to a supervisor. He indicates that Officer Farrell “mulls” over supervisor’s instructions and self determines whether or not he is going to follow those instructions. He states that Officer Farrell needs a “strong” supervisor that will give him direct instructions that he is expected to follow and that failure to follow those instructions should result in discipline. He is in need of a supervisor that will be able to “tone him down” and one that will tell him what he needs to do. Dr. Fico states that without specific instructions we do not have accountability. He indicates that Officer Farrell needs direct, on the job (sic) feedback.

Dr. Fico further describes Officer Farrell as having a high profile, being high flying, but being arrogant, condescending and one who likes to “lecture” citizens. This condescending and arrogant attitude leads to an escalation that is not reasonable given the circumstances. Dr. Fico states that Officer Farrell honestly believes that he is “superior”, and notes that he needs to learn to keep that belief to himself. Dr. Fico states that Officer Farrell feels that he is smarter than others, that he has to “straighten out the lives of others” and the (sic) he needs to teach everybody how to live.

Dr. Fico states that Officer Farrell seems to feel that the department does not appreciate his perceived value. He also states that Officer Farrell does not accept or recognize his “failings” as related to the perception of others that he is arrogant and condescending. Dr. Fico indicates that Officer Farrell needs to reflect on how he talks to people, and to recognize the behaviors that have led to a disproportionate number of personnel complaints. Officer Farrell should look at examples of dialogue that has resulted in positive outcomes – what one should say, what one has said, and what gets people into trouble. There should be a “plan” and Officer Farrell should be held accountable. Dr. Fico states that we cannot change Officer Farrell’s personality, but that we can change his behavior (by holding him accountable). He indicates that the department (his supervisor) will need to take a dominant position with him (although he will not like that). Dr. Fico states that Officer Farrell does not understand that the department is larger than he is. Dr. Fico notes that his previous supervisor acted as a coordinator, not a supervisor. Dr. Fico states that Officer Farrell needs clear, non abstract (sic) examples of what he has to say to people (to avoid complaints).

Dr. Fico also expressed an interest in developing a supervisory training program. He sees this program as being a one-year project with series of training sessions that will result in real, concrete results. Dr. Fico envisions three first line supervisors participating in this training and that their experiences/successes can be exported to other supervisors/shifts. Dr. Fico estimated that the cost of this training would be \$5,000.

The letter Dr. Fico sent to Chief Erickson regarding Farrell dated February 11, 2005, read as follows:

. . .

Officer Chris Farrell has completed a career consultation at your request. He completed testing, I interviewed him on two occasions, and I also spoke with two of his supervisors.

Officer Farrell has a variety of talents, including a great deal of initiative, good relationships with many community professionals, and high recommendations by his supervisors. As you had mentioned prior to my assessment with him, Chris can be an exemplary officer. It is also true that he has had more citizen complaints, most of them unfounded, than is true for most officers with his level of experience.

I indicated to Officer Farrell that his greatest developmental challenge is to speak with citizens in a way that does not offend them. He probably speaks respectfully most of the time, but occasionally he gives the citizens the impression that he is "above" them and speaks with them in a condescending way. He gives the impression to some citizens that he is arrogant. The test results support both his many talents and also this suggested area for development. I advised him to be cautious not to lecture people who have no interest in it, and when they have stopped listening to him, he needs to change the subject.

I also advised him to take a pro-active approach by suggesting to the department that a team be created that looks in detail at how to speak with citizens, how complaints about Officer conduct should be investigated, and how the results of those investigations should be communicated.

. . .

POSITIONS OF THE PARTIES

Association:

The Association argued that the facts of record showed that the OPD intends to use Officer Farrell's psychological assessment and referral for consultation in considering future discipline against him. As the Department did not have just cause to discipline Farrell either for receiving 10 personnel complaints or based upon the complaints and the investigations in each case, the Arbitrator should sustain the grievance and expunge Farrell's record of all references to his psychological assessment and referral.

The Association argued that the OPD's actions regarding Farrell have been arbitrary and capricious. In this regard, the Association noted that none of the citizen complaints against Farrell was sustained; and the complaint files are one-sided, there being no officer or other statements in the files supporting Farrell's version of the complaint facts. On this point, the Association urged that ten unsubstantiated complaints do not become credible because of their sheer numbers unless the investigating officer (Van Ness) is prejudiced against Farrell and exhibits "a dangerous and inexplicable tendency to view a drunken stranger as more credible than his own officer" (U. Br. p. 8).

The Association also noted that Farrell has never been disciplined for improper use of force or misconduct in dealing with the public. Yet, based solely upon the number of personnel complaints Farrell had received, the OPD required him (over his objections) to submit to the assessment and consultation with Psychologist Dr. James Fico. The Association noted that in the past 10 years, the Farrell is the only officer who has been required to submit to such testing and consultation. However, Farrell never received any assessment from Dr. Fico: Dr. Fico sent his assessment/analysis to the Chief and Captain Van Ness, not to Farrell.

The Association therefore asserted that the OPD's actions regarding Farrell were "illogical, pointless and arbitrary" (U.Br. p.10). In this regard, the Association objected to the fact that Policy 155 was not applied to Farrell; that Farrell's testing and consultation were not kept confidential as would have been the case had Farrell been referred to an EAP; that Farrell was not free to select the psychologist to perform the testing and consultation; and that Farrell was offered no follow-up, no written recommendations, no training, no counseling, no supervisor monitoring/reporting and no strategies for improvement after he was assessed and required to consult with Dr. Fico.

In these circumstances, it is clear that the OPD failed to follow and apply its own policies to Farrell. Policy 103 also states that whenever an officer is not exonerated as the result of the investigation of a personnel complaint, "the Chief shall administer appropriate discipline that can range from training to dismissal from the Department." In the Association's view, the Chief's order that Farrell submit to psychological testing and consultation constituted discipline under Policy 103, which Farrell was entitled to grieve under the express terms of that Policy and for which the OPD was required to have just cause (and the burden of proof herein).

The Association contended that Farrell's referral to Dr. Fico constituted discipline because it was recorded in his file and because both the Chief and Captain Van Ness admitted that it could be used against Farrell as supporting documentation for future discipline of Farrell. The Association noted that an employment action need not result in lost wages to constitute discipline. The Association observed that had the OPD issued Farrell a verbal warning for receiving too many citizen complaints or if it had sent Farrell to Dr. Fico as part

of a verbal warning, Farrell could have grieved those actions and the City would have had to prove it had just cause for its actions against Farrell, citing CITY OF MAPLEWOOD, 108 LA 572 (DALY, 1997).⁵

As the evidence showed that verbal and written warnings are discipline, the testing and evaluation/consultation that Farrell was required to undergo had the same purpose and effect as discipline and they should be treated as such by the Arbitrator. The Association noted that Farrell stated that he has been stigmatized in the Department and that he has felt stressed by the OPD's actions against him.

In these circumstances, the Association urged the Arbitrator to sustain the grievance and expunge Officer Farrell's record of any and all references to his referral to Dr. Fico for assessment and consultation.

City:

The City argued that the Chief's order that Farrell go to Dr. Fico for assessment and consultation did not constitute discipline and it did not violate the labor agreement. The City noted that the assessment and consultation were intended "to identify behaviors and strategies that could be used by Officer Farrell to make him a better officer" (ER. Br. p 9). The City urged that counseling is not considered discipline by the OPD, just as supervisory log comments are not considered discipline in the Department.

The City pointed out that "Dr. Fico counseled Officer Farrell as set forth in his (Fico's) letter of February 11, 2005 to Chief Erickson" (ER Br. p 9); that "Chief Erickson desired to counsel Officer Farrell because of the perceived common theme of the citizen complaints...that in certain situations, he tended to debate with people, to say too much, to make people upset, to cause the encounter or escalate it more than other officers" (ER Br. p 10). The City observed that the Chief wanted Officer Farrell to go to Dr. Fico to get "an assessment on how Officer Farrell interacts with people, how people perceive Officer Farrell and what Officer Farrell could do to avoid confrontations by defusing situations rather than allowing them to escalate" (ER Br. p 10).

The City noted that Officer Farrell's promotional opportunities have remained unaffected by his referral to Dr. Fico and it denied that the assessment and consultation with Fico have become part of Farrell's personnel file. The City contended that the Chief wished to send Farrell to Dr. Fico to get him "to change his behavior," and "to assist Officer Farrell in improving his performance with citizens," not as a disciplinary "slap on the wrist." "Given the volume of citizens' complaints against Officer Farrell, sustained or not, the Department is obligated to

⁵ The MAPLEWOOD case cited by the Union was factually distinguishable. There, the grievant was issued a one-day suspension for using foul language in speaking to a City dispatcher, and the Chief ordered the officer to get a psychological evaluation as part of his discipline for using foul language. The Arbitrator held that the City had been lax in enforcing its rule against foul language, that the grievant was disparately treated, that no supervisor reasonably believed the grievant's fitness for duty was a concern before he was ordered to get a psychological assessment; and that there was not just cause for the suspension or the order for a psychological evaluation.

review the matters and counsel the officer in a proactive manner to avoid possible liability to the City in the future” (ER Br. p 12).

The City pointed out that in a prior case between the parties, Arbitrator Nielsen held that a supervisor’s log entry did not constitute discipline. City of Oshkosh (Police Dept.), Case 209 No. 4950 MA-7980 (11/93). 4/ As the referral of Farrell to Dr. Fico was akin to counseling or to a performance evaluation, it should not be found to constitute discipline. See, MADISON METRO. SCHOOL DIST., A/PM-04-388 (KNUDSON, 6/05); WEBSTER SCHOOL DIST., CASE 29, NO. 54370, MA-9656 (Crowley, 1997). Here, there was no reference in any documentation to a warning or the receipt of more severe discipline for future reoccurrences; no written discipline was issued to Farrell; and Farrell was never told that the assessment and/or the consultation with Fico were disciplinary. See OZAUKEE COUNTY, A/PM-87-8266 (MALAMUD, 1987).

Even if the Arbitrator finds that the City’s actions regarding Farrell constituted discipline, because there is no just cause provision in the labor agreement, the instant grievance must be dismissed. In this regard, the City noted that only Article XII Layoffs, refers to the term “just cause.” The City cited Arbitrator Mawhinney’s award in City of Oshkosh (Police Dept.), Case 22, No. 50887, MA-8419, (1996), for the proposition that no express just cause provision is contained in the parties’ labor agreement.

The City contended that although Captain Van Ness attempted to use City Policy 155 with Officer Farrell and create a remedial action plan for Farrell, Farrell “refused to recognize that ... he had interpersonal communication problems with the citizenry ...” (ER Br. p 18). In these circumstances, the City argued that it was appropriate for the Chief to take the action he took, citing Arbitrator McLaughlin’s award in CITY OF OSHKOSH (POLICE DEPT.), CASE 247, NO. 51394, MA-8784 (1996). The City noted that in today’s environment, consultation with a psychologist is so commonplace that it is no longer stigmatizing, contrary to the Association’s claims. The City therefore urged the Arbitrator to deny and dismiss the grievance and reaffirm the City’s reserved and implied management rights to send Officer Farrell to a psychologist for assessment and consultation.

DISCUSSION

The initial question that must be answered in this case is whether the Chief’s orders to Farrell constituted discipline. The burden of proof in this case as well as which party has the burden to proceed depends upon the answer to this question. Although this is a close case, I believe that based upon the facts of record, the Chief’s orders to Farrell to get a psychological assessment and to consult with Dr. Fico did not amount to discipline. Therefore, the burden of proof in this case lies with the Association and a just cause standard (if available) does not apply.⁶

⁶ In the circumstances, I need not and do not address the parties’ arguments regarding the availability of a just cause standard under this contract and I have not assessed the 10 personnel complaint investigations to see if they would meet a just cause standard.

Regarding my belief that the record facts do not support a conclusion that Farrell was disciplined by the Chief's orders, I note that on November 6, 2001, Farrell received a three-day suspension for failing to prepare and submit a long form report regarding his interaction with a family and two juveniles which occurred on October 3, 2001. The three-day suspension was written; it cited the facts found in the Departmental investigation of the October 3, 2001 incident; it cited the Departmental rules Farrell violated by his conduct, the actions he should have taken in the circumstances; it stated that a review was made of "prior, similar complaints (and) previous discipline. . ." and the suspension document also stated that any repetition of the conduct found inappropriate "will result in further discipline. . . ."

In contrast, Van Ness' memo dated December 7, 2004, and the Chief's order dated January 4, 2005, did not include any of the classic disciplinary provisions used in the above-described three-day suspension notice. Notably, the Chief's orders of January 4 and 21, 2005 to Farrell were not labeled as oral or written warnings, they did not include any detailed description of Farrell's past inappropriate conduct or any description of appropriate future conduct, and they did not threaten future discipline for Farrell's receipt of additional personnel complaints.

The fact that the Chief's order of January 21, 2005, directing Farrell to get assessed by and to consult with Dr. Fico also stated that Farrell's "(f)ailure to participate will result in disciplinary action for insubordination . . ." does not require a different conclusion. Rather, the January 21, 2005 order, by its terms, demonstrated that it was not discipline in itself, but that Farrell was being notified that he would be disciplined only if he failed/refused to participate in all aspects of testing and counseling.

In addition, it is significant that all City witnesses affirmed herein that Farrell's promotional opportunities have not been affected by his referral to Dr. Fico for testing and consultation and that the assessment is not referred to or maintained in Farrell's personnel file. Clearly, the City has waived any right it might have had to use Farrell's referral to Dr. Fico as discipline now and in the future. Also, all of the meetings held with Farrell showed that the Chief and Captain Van Ness made it clear to Farrell and his Association Representative that Farrell's referral to Dr. Fico for testing and counseling was not intended as discipline, but was being done to help Farrell improve his work performance, to find a method of reducing or eliminating the personnel complaints filed by citizens against Farrell and to understand why Farrell was drawing more such complaints than any other officer across the same 3.75 year period.

The Association has argued that the purpose and effect of the Chief's orders was disciplinary because City witnesses admitted herein that they intend to use Farrell's testing and consultation with Dr. Fico in considering future discipline of Farrell. In the circumstances of this case, I disagree. First, I note that the City did not send Farrell to Dr. Fico for fitness for duty testing and counseling. Second, the fact that the Chief's orders to Farrell were designed to help Farrell correct inappropriate behavior, as is true when discipline is issued, does not mean that the Chief's orders constituted discipline. In my view, Farrell's treatment by

Department managers showed that they were trying to notify him that they felt that the inordinate number of personnel complaints he had received indicated that he needed to change the way in which he interacts with citizens.

The question arises how, if at all, may an employer notify an employee that his/her conduct is inappropriate without disciplining the employee. Some labor relations professionals would take the position that an employer is never free to so notify an employee—that the employer must discipline the employee, as only discipline provides the employee with a right to grieve and with formal notice that his/her conduct is unacceptable. It appears that Farrell and the Association ascribe to this view. However, others engaged in labor relations would argue that an employer should be free to notify a good employee that his/her behavior is inappropriate in an effort to help the employee improve his/her performance, short of disciplining that employee. Clearly, the City would advocate this latter approach.

Both of these approaches have validity. However, I note that there is no evidence in this case that the City has negligently or intentionally avoided disciplining Farrell in order to deny him the right to grieve its actions against him. Also, here, the City had a reasonable basis for requiring Farrell to see Dr. Fico—Farrell had many more personnel complaints than did any other officer during the same 3.75 year period studied, which showed that he had some problems dealing with people. Furthermore, I note that the process of filing a personnel complaint in the City requires the complaining citizen to go to the Department and be interviewed in person by a supervisor who assesses their credibility (and sobriety) at the interview; that the citizen must assist the supervisor in filling out a detailed complaint and he/she is then asked to sign the complaint. This is not a summary process or one in which the complaining citizen can just “call it in.”

In all of the circumstances of this case, and given the fact that City managers have specifically stated (and there is no contradictory evidence of record) that they decided not to discipline Farrell because they did not want to traumatize him by disciplining him as he is a good and valued officer, I believe that the City acted reasonably in doing as it did. I am also aware that the Department has used non-disciplinary supervisory logs in the past to draw employees' attention to areas where they need to improve their performance.

The Association has argued that Farrell has been stigmatized by being sent to Dr. Fico. In this regard, I note that Farrell was not referred to Dr. Fico for fitness for duty testing and counseling and that this was made clear to him in all communications he had with Dr. Fico and Department managers on the subject. It is also significant that the officer that Farrell stated ridiculed him for being sent for testing and counseling (asking whether Farrell was crazy) was not called as a witness herein. I must agree with the City on this point that the use of psychological testing and consultation is now relatively commonplace in our society, making stigmatization much less likely to occur. In addition, there is no evidence on this record that City managers made public the fact that the Chief had issued Farrell orders to be tested and to consult with Dr. Fico. In these circumstances Farrell's assertion that he has been stigmatized falls rather flat.

There is no question that the City did not apply Policy 155 to Farrell's situation, as it could have done.⁷ No real explanation was given concerning this point except that City managers did not wish to discipline Farrell in any way. Having found that the City's actions toward Farrell were non-disciplinary, it is clear that no references thereto can be maintained in his personnel file for any use, i.e. in a future disciplinary case against him or in considering him for a promotion. However, my ruling should also be interpreted to mean that the City can use the fact that Farrell was referred to Dr. Fico for testing and counseling to show that the City attempted thereby to notify Farrell that his conduct needed improvement.

Based upon the above analysis, I issue the following

AWARD

The City did not violate the collective bargaining agreement by requiring Officer Chris Farrell to submit to personality assessments and consultations. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 5th day of December, 2005.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

⁷ I therefore do not reach the Association's contentions regarding City Policies. In addition, I note that the parties did not submit Policy 115 (referred to in Policy 155).

