

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF ELKHORN

and

**ELKHORN POLICE OFFICERS' ASSOCIATION LOCAL 241
of the LABOR ASSOCIATION OF WISCONSIN, INC.**

Case 23
No. 68251
MA-14170

(Windler Discipline Grievance)

Appearances:

Ward D. Phillips, Attorney, Leece & Phillips, S.C., Six West Street, Elkhorn, WI 53121, appeared on behalf of the City of Elkhorn.

Benjamin M. Barth, Labor Consultant and **Jason E. Ganiere**, Labor Consultant, N116 W 16033 Main Street, Germantown, WI 53022, appeared on behalf of the Elkhorn Police Officers' Association Local 241 and the Labor Association of Wisconsin, Inc.

ARBITRATION AWARD

The City of Elkhorn, herein the City, and the Elkhorn Police Officers' Association Local 241 of the Labor Association of Wisconsin, Inc., herein the Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Association concerning the discipline of one of its members, Thomas Windler, herein Windler or Grievant. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on December 16, 2008 in Elkhorn, Wisconsin. No transcript was prepared. The parties filed briefs and reply briefs and the record was closed on March 5, 2009.

ISSUES

The parties did not stipulate to a statement of the issues. The Association states the issues as:

Did the Employer have just cause to issue the Grievant a written warning dated July 2, 2008?

If not, what is the appropriate remedy?

The City states the issues as:

Did Officer Windler have probable cause for an arrest of Amanda Bjork, based upon the facts and circumstances presented by the testimony and reports provided?

Is the level of discipline issued in this matter appropriate based upon the facts and circumstances?

This is a discipline case. The collective bargaining agreement between the parties requires just cause for discipline. While the City's statement of the issues goes to the details surrounding the discipline, the Association's statement goes to the ultimate issues to be decided and will be the one that is used in this case.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 – CITY RIGHTS

Section 3.01: The City shall have the right:

- a) to hire;
- b) to assign employees to different jobs and equipment;
- c) to assign overtime work;
- d) to schedule work;
- e) to affect the size and composition of the police force; and
- f) to relieve employees from duty because of lack of work or for any other legitimate reasons except as provided for in this Agreement.

Section 3.02: In the event of a changing of equipment or method of operation, the City shall have the right to reduce the amount of employees subject to this Agreement, if in the sole judgment of the city this reduction is necessary. Nothing in this Agreement shall be construed as to restrict the City from adopting, installing or operating new or improved equipment or methods of operation. If a new position is created, the City shall meet with the employees as soon as is reasonably possible to discuss a new wage rate for that position.

Section 3.03: This Agreement will not limit the City's rights in matters pertaining to the public health, safety, or general welfare except as specifically set forth in the labor agreement.

Section 3.04: The employees recognize the City's right to establish reasonable work rules. The reasonableness of work rules is subject to the employee grievance procedure. This shall include, but not be limited to the policies of the Elkhorn Police Department set forth by the Chief of Police.

Section 3.05: The employees recognize that the City has rights and obligations in contracting for matters relating to some municipal operations. The right of contracting or subcontracting is vested exclusively in the City, but no employee shall be laid off as the result of such action.

ARTICLE 6 – DISCIPLINE AND/OR DISCHARGE

Section 6.01: No employee who has completed his/her probationary period shall be disciplined or discharged except for just cause.

Section 6.02: Any and all disciplinary actions involving an employee shall be placed in the employee's personnel file. Written and oral reprimands placed in the employee's file shall be removed from the file following a period of twenty-four (24) consecutive months during which no additional disciplinary action occurs.

BACKGROUND AND FACTS

Grievant is a Patrol Officer for the City of Elkhorn Police Department and a member of the Association. On the evening of June 8, 2008 he arrested a young woman, Amanda Bjork, for a violation of §948.21, Wis. Stats., Neglect of a Child. He was later disciplined for having made the arrest without probable cause in violation of Department policy.

The Police Department has adopted several policies which it provides to its Officers, including the following:

Sec. 3-2-14 WARRANTLESS ARRESTS

GENERAL POLICY –

1. An arrest warrant should be obtained whenever possible.
2. An arrest may be made without a warrant when there are reasonable grounds to believe the person has committed or is committing a crime. A warrant is necessary to arrest an individual in his dwelling unless there are emergency circumstances.

COMMENTARY – This is based on Sec. 968.07, Wis. Stats. (1977).

SEC. 3-2-15 EVIDENTIARY CONSIDERATIONS

GENERAL POLICY – The officer must consider whether there are reasonable grounds to believe the person to be arrested has committed or is committing a crime.

PROCEDURES – In determining whether reasonable grounds exist, the officer must consider all the facts available at the time of decision, which are drawn from:

1. Personal observations, including inquiry after the officer's suspicions are aroused.
2. Informer's tips, whenever possible corroborated by independent inquiry.
3. Information from within the department and other police agencies, including that received over communication networks.
4. Past criminal activity by the suspect, which, however, may be used only in conjunction with other evidence.

5. Physical evidence at the scene.
6. Reports of victims or eyewitnesses.

COMMENTARY – The arresting officer, of course, does not need to establish guilt beyond a reasonable doubt. Although the officer needs evidence enough for probable cause only and not for conviction, the quality of the evidence establishing probable cause should be considered.

The Officers in the Department are trained on the requirements of probable cause for a warrantless arrest.

At all relevant times herein the following sections of the Wisconsin Statutes were in effect:

948.21 Neglecting a child. (1) Any person who is responsible for a child's welfare who, through his or her actions or failure to take action, intentionally contributes to the neglect of the child is guilty of one of the following:

- (a) A Class A misdemeanor.
- (b) A Class H felony if bodily harm is a consequence.
- (c) A Class F felony if great bodily harm is a consequence.
- (d) A Class D felony if death is a consequence.

(2) Under sub. (1), a person responsible for the child's welfare contributes to the neglect of the child although the child does not actually become neglected if the natural and probable consequence of the person's actions or failure to take action would be to cause the child to become neglected.

968.07 Arrest by a law enforcement officer. (1) A law enforcement officer may arrest a person when:

...

- (d) There are reasonable grounds to believe that the person is committing or has committed a crime.

...

Grievant was on duty the evening of June 8, 2008 when Roy Durham came to the Police station and requested that he be escorted by a Police Officer to his apartment while he packed his belongings to move, that evening, to New York. Durham lived in an apartment with Amanda Bjork. They are not married. Four young children live with them. The two oldest are about ages three years and two years. Durham acknowledges these are his and Bjork's children. The two youngest were, at the time, five month old twins. Durham did not

know if he was the father of the twins. Bjork is their mother. At the time there was a paternity test or determination underway. That evening at the Police station Durham stated he was tired of Bjork's attitude and her constantly not caring for the kids, and he was leaving. He was going to take the two eldest children with him, but not the twins. He was concerned that Bjork would become agitated, and wanted a Police Officer there to keep the peace. Grievant had been to their apartment on at least one prior occasion when Durham complained about Bjork sleeping on the couch while the children had spread food all over the apartment and made a mess of the apartment.

At about 7:00 p.m. Grievant went with Durham to the apartment and called Officer Croak, of the Elkhorn Police Department, to assist him. They arrived at the apartment at about the same time. Officer Croak informed dispatch¹ he was on scene and was on the scene approximately five to seven minutes. He was then called way on another matter and left before Grievant made the decision to arrest Bjork. Officer Croak did not note his presence there on any Department report, log, incident report or other records of the Department, and his presence there was not known to other members of the Department until he testified at the hearing in this case on December 16, 2008. Grievant had not mentioned to any other Officers or put in his incident report that Officer Croak had been at the scene.

While Officer Croak was at the scene they entered the first floor apartment and Durham told Bjork he was packing his things and leaving. Bjork told Durham "then you're taking care of these fucking kids" and started walking towards the front door. Grievant stopped her before she left the front door and told her not to leave before making arrangements for the children. Durham said to Grievant that she does this all the time and that she would refuse to care for the kids. Bjork continued throughout the incident to say "I'm not taking care of those kids, I can't take care of those kids, I'm not taking the fucking kids, I can't do it". Durham told her that he would take care of his two children, but he did not know who the other two belonged to as for parental rights, and he was not going to transport somebody else's kids to New York and care for them if they are not his kids. Bjork said she does not have a job or any money. Grievant offered to contact Human Services to arrange services if needed. She picked up her cell phone and began calling her family. Bjork eventually went out of the apartment and into the hallway. Grievant stopped her in the hallway and said we need to make some type of arrangements and asked what can we do, who can we call. He suggested maybe they should call her mother. She said we can't call her - she already has three children, I don't want to call my mother. She kept walking out to the parking lot while Durham was packing his belongings. At times she was highly agitated. She was crying and speaking very loudly. Grievant told her that Durham was ready to leave. Grievant told her to stop, come back here, let's talk about this, and asked if they could call a friend, a relative, somebody that could come to watch these kids. She said she'd just move from New York, had no friends in the area, and there was nobody to call. She began to walk away again. Grievant stopped her in the parking lot.

¹ Apparently County dispatch.

Grievant and Officer Croak were near Bjork, in the parking lot when Officer Croak was called away and left the scene. They were about 100 feet from the apartment at that time. After Officer Croak left, Bjork continued to walk out toward the street but did not leave the property. From the time she left the apartment until the time Grievant took her into custody, he asked her no less than four times to stop and said we need to make arrangements for your children. The first three times she would stop and tell him I don't have any arrangements for my children. She then waked away each time after saying that, or words to that effect.

Grievant said "let's contact Human Services, maybe Human Services can offer you some help". He then called Human Services on his cell phone. Human Services was reluctant to send anybody out at that time of the night to provide any type of assistance for her and said it was her responsibility to watch her children, she could watch them until morning and they would offer her services in the morning. Grievant advised Bjork of this and she was not happy with that. She was crying uncontrollably. She said he did not understand her and that she can not care for the children. She said when she gets angry with Roy she takes it out on the kids. She said she has post partum depression and will not take care of the kids tonight. She continued to walk away from Grievant and toward the street. Durham had packed his things in his truck by then and was at the truck with the two older children ready to leave. The two five month olds were in the apartment alone. Grievant told her to come back and talk to him and she said no, stopped, and then continued to walk away.

At that point Grievant took her into custody. He believed from her actions and statements that if not taken into custody she would have continued to leave the parking lot and leave the children alone or do harm to them. Durham was then in his truck with his belongings and the two older children, who were in car seats. Grievant saw Durham and the children inside the truck with Durham watching as he was putting handcuffs on Bjork. At that time Grievant was not aware if Durham would be willing to stay. After Grievant made the arrest he put Bjork in his squad car. She then stopped crying and became complacent.

Durham then came to him and said "it looks like you are in a pickle". Grievant said yes, I am. Durham then said, if it will help you I will reluctantly stay here with the children until she gets out of jail, but I cannot stay here when she is here - I have to leave. Grievant took Bjork to the County Jail and Durham stayed with the children. Human Services became involved with the children the following morning.

When Grievant got back to the Police station he briefed Sgt. Peterson as to what had happened. Sgt. Peterson advised him that he did not believe he had sufficient probable cause for the arrest. Grievant presented to him the statute, which he reviewed. Sgt. Peterson then advised Grievant that he would contact another person for a second opinion. Sgt. Peterson later reviewed Grievant's incident report and his opinion did not change as to probable cause.

At Sgt. Peterson's direction Grievant contacted Walworth County Deputy District Attorney Joshua Grube that evening for an opinion. Grievant contacted him by phone and reviewed the fact pattern and statute. According to Grube's hearing testimony, he spoke with Grievant about whether or not the facts would support a neglect situation and whether there

was potential disorderly conduct. Grube understood the purpose of the phone call was to see if, on the facts they were talking about, there was enough for his office to prosecute on a case for neglect. He understood Bjork was already custody. From Grube's discussion with Grievant, he didn't feel that there was enough for his office to prosecute a case for neglect. They also talked about disorderly conduct, and whether or not the initial call to the apartment rose to that level with an arrest for disorderly conduct being appropriate. At the end of the discussion, to Grube it did not seem likely that there was enough to prosecute for disorderly conduct.

Grube did not see a reason to hold her for neglect and disorderly conduct did not seem to apply. Grube felt that with the facts that they had it did not seem to fit with the first subsection of Section 948.21, Wis. Stats., that action or failure to take action would lead a child or children to be neglected or likely to be neglected. They did not talk about subsection (2) of the statute. Grube is of the understanding that under that subsection a child does not actually have to become neglected for a violation to occur. Grube's recollection of his understanding of the facts was that the male was packing to leave, at some point the female was taken away from the residence and made statements about not wanting to or not being able to care for the children, and the next day or maybe the day after the male was suppose to be moving out of state or leaving so that would eventually leave the female as the sole care provider for the kids. But at the time the incident was unfolding that night it looked like the kids were still being supervised or still with the male. When the woman made the statement and started to walk away when the arrest happened, it looked like the kids were still with the male, and had she walked off or gone someplace else they'd still be supervised. Although Grube and Grievant did not talk about how distraught or upset she was, Grube felt that obviously she was upset enough to make her statements about caring for the kids and their need for law enforcement to be a part of the moving out. Grube felt that on those facts he would not prosecute a case for neglect. Grube would consider it a neglect situation if the kids were left home alone uncared for and there is nobody else to provide them with food or care. Based on Grube's discussion with Grievant, he did not think that Grievant had described a situation where it appeared that the children were going to be left uncared for if she did walk away. To Grube, it appeared there would have been care for those kids, at least for the time being.

Grievant then informed Sgt. Peterson that Grube did not feel that Bjork's actions supported the arrest or met the neglect criteria for neglect, and had inquired as to possible disorderly conduct charges. Grievant did not feel Bjork was disorderly. After reporting back to Sgt. Peterson, Grievant had Bjork released from the jail. Grievant testified at the hearing that he did tell Grube that Durham was leaving that night.

Later that night Sgt. Peterson met Bjork at the jail to give her a ride home at her request. She then told him that, out of anger, she did tell the Officers that she was not able to care for the children, however she was frustrated and had no intentions of leaving them. She told Sgt. Peterson that she did walk away, but was returning when Grievant arrested her. Sgt. Peterson advised her that he was waiting for a verification call back from Human Services, which he did receive. He then asked Bjork why she did not want to stay home and help out with the kids. She indicated she felt it was best that she stay away for the night and

“cool down”. She was given a ride to the apartment to briefly gather a few belongings. While there Durham, who was with the four children, told Sgt. Peterson that he was fine with the kids for tonight and could take care of the kids for the day. Sgt. Peterson and Bjork then left.

Sgt. Peterson did not later question Grievant about Bjork’s statement that she had been returning when she was arrested.

Sgt. Peterson has, as an Officer, heard people make statements that if they were to carry their actions out would be crimes. It is part of his duty to discern whether or not those statements are ones he needs to act on or not. In most situations the statements alone are not enough to arrest somebody on. That is his opinion in this case as to Bjork’s statements.

Lt. Anzalon is an 18 year Department veteran. He learned of the incident the next day from Sgt. Peterson, who told him he thought there was not probable cause to make the arrest. Lt. Anzalon reviewed the reports and then spoke with Capt. Slattery and Chief Christensen about the concern. From the incident reports he did not feel that the probable consequences of Bjork’s statements would be that the children would be neglected. He believes that had Bjork left, that Durham, who had not left yet, would have taken care of the children.

Lt. Anzalon had previously spoken to Grievant about a charging decision. Concerning that incident, in April of 2008, Grievant received a verbal warning for confining a juvenile in jail for a municipal forfeiture matter inconsistently with Department policy and procedure and the state bond book preamble. He had received training on those policies and procedures before that incident. Sometime after June 9, 2008 Grievant received a verbal warning about a report filing matter that had occurred sometime before June 9, 2008.

Capt. Slattery, a 20 year veteran with the Department, is in charge of internal affairs. He was directed by Chief of Police Christensen to investigate this incident. Matters that could result in suspension or termination are subject to such investigations. Lesser matters are handled by supervisors. Capt. Slattery spoke with Grube, Sgt. Peterson, and Grievant, giving him a full opportunity to tell his side of the story. Capt. Slattery investigated the aspects of this case that he would normally investigate. The results were presented to Chief Christensen for his review and eventual discipline decision. Capt. Slattery’s own conclusion was that he did not feel there was enough probable cause for Grievant to make the arrest.

Chief of Police Christensen, as a result of the investigation, concluded that Bjork was arrested without probable cause that evening. This concerned the Chief as it harms the Department reputation, denies the individual their Constitutional rights, and exposes the City to potential liability. He thinks that in situations such as this one an Officer should expect that a person in Bjork’s position is going to say things they would not normally say, and act irrationally to a certain extent. The person should be given some time to collect their thoughts and reflect upon the totality of the circumstances.

The Chief looked at this matter in light of the prior verbal warnings and the matter when the juvenile had been detained. He was concerned that Grievant see more ways to solve problems other than jailing, and considered progressive discipline with a way for training, counseling and coaching to help Grievant and correct his behavior. He issued a written warning to Grievant dated July 2, 2008 signed July 9, 2008.

The written warning alleged violation of Department policy # 3-2-14 & 3-2-15. It stated in pertinent part:

. . .

Description of behavior:

On 06/08/08, at approximately 8:00PM, Officer Windler arrested Amanda E. Bjork for child neglect using Wisconsin Statute 948.21(2) and confined her in the Walworth county Jail. Windler's report was reviewed by Sgt. Peterson later that evening and Sgt. Peterson directed him to contact an assistant district attorney as he didn't believe there was probable cause for the arrest. Windler contacted ADA Grube who reviewed the circumstances and told Windler that the elements of the incident didn't rise to probable cause for an arrest of that statute. Windler contacted the jail and had Bjork released based on that information. In actuality Officer Windler arrested Amanda Bjork without probable cause and confined her. See incident report 08-2058!

Impact of the department and the city if allowed to continue:

There is no dispute that the arrest and confinement of an individual must be done in accordance with law to avoid the possible violation of a citizen's constitutional rights. If arrest/confinement is allowed without probable cause- the department and the city face serious potential civil liability for violating citizen's constitutional rights. It will also discredit the department and its' members affecting the general trust of the community toward the department.

Plan for improvement:

Remedial training including but not limited to:

1. Completion of Problem Solving Model
2. Review elements of criminal statutes
3. Completion of problem - solving exercises
4. Final review of further training needs

Consequences of Further Infractions:

Continued violations of this nature will result in progressive disciplinary action.

. . .

The Association grieved the discipline, contending that the written warning was issued without just cause, citing Section 6.01 of the collective bargaining agreement. During part of the process the Department asked Grievant as reflected in predetermined written questions: Does anyone else have first hand knowledge of any facts involved in the incident? Officer Croak's presence at the scene was not mentioned by Grievant. The City denied the grievance and this arbitration followed.

Further facts appear as are set out in the discussion.

POSITIONS OF THE PARTIES

City

In summary, the City argues that Bjork never left the premises but was walking back to Grievant when she was arrested, that Durham was still there and able to take care of the children, and that Grube had specifically stated to Grievant that "no probable cause existed for any criminal charge that he was aware of". The City argues that there was no probable cause for Grievant to have arrested Bjork and that he was properly disciplined for this. The issue in the case is probable cause to arrest, not whether a District Attorney later elects to use the discretion not to prosecute. It is highly unusual for a District Attorney to find there was no probable cause for an initial arrest. Charging decisions are often made on a number of factors unrelated to probable cause. It is not inconsequential that every other officer who reviewed the facts and spoke with Grievant came to the same conclusion.

The City sets out several state and federal definitions of probable cause, including §968.07(1), Wis. Stats., *LOVEDAY V. STATE*, 74 Wis.2d 503, (1976); *MOLLINA V. STATE*, 53 Wis.2d 662, (1972); *STATE V. DiMAGGIO*, 49 Wis.2d 565, (1971); *STATE V. LANGE*, No. 2008 App 882-CR (Wis. App. 10-02-08) and, *MARYLAND V. PRINGLE*, 540 US 366 (2003); *ORNELAS V. UNITED STATES*, 517 US 690 (1996).

The City argues that there was no probable cause to arrest Bjork. At no time were the elements of the crime all met, as was required in the *ORNELAS* case. Grievant did not wait for the outcome of the situation in order to determine whether or not this rather emotionally overwrought woman would, in fact, leave her children unattended. A mother who simply sates that she cannot care for her children, as was cited in Grievant's report, could be simply stating that she does not feel adequate as a mother at that particular moment. It could be that she is stating that she cannot care for the children adequately in her opinion. It could be that she is stating that she needs assistance. Bjork's statements alone fail to meet the requirement of the case law that a reasonable suspicion of each element of the crime must exist before probable cause to arrest is present.

The City argues that it is not sufficient that an officer hear a person threaten to commit a crime. With the exception of instances where making a threat is the crime itself, it is not a crime and it cannot create probable cause that a crime has been committed, to threaten to do something that if you completed the act would be illegal and an arrestable offense. The bright line rule is the constitutionally approved approach. It is a slippery slope to simply anticipate criminal activity and arrest.

The City also emphasizes that Grievant had past experience with Bjork and knew her to be the type of individual who made wild comments that she did not carry out. Durham was present, who stated that she makes statements such as this all the time. Bjork herself confirmed this as well while being questioned by Sgt. Peterson and stated she had no intention of not caring for her children. The City also emphasizes that she was walking back toward the children and the apartment when she was arrested.

The City further argues that the level of discipline issued in this matter was appropriate based upon the facts and circumstances. Grievant had been disciplined for similar prior actions. The Department provided him specific training on the issue to prevent an incident like this from reoccurring. No one involved attributes an evil intent to Grievant. The most sacred right we have is personal liberty as included in the first paragraph of the United States Constitution. If the City fails to discipline officers who arrest citizens without probable cause the City is subject to liability. According to the collective bargaining agreement an officer must be disciplined consistent with protecting the citizenry from such abuses, bearing in mind the obligation to use the least effective discipline needed to convey the message.² Grievant has previously been given an oral reprimand for an improper arrest. A second oral reprimand simply does not convey the seriousness of the violation. To do so on a second occasion would be entirely inappropriate.

The City argues that while Grievant was the only officer on the scene at the arrest and capable of making the decision, each of the other officers reviewing the facts, and had the benefit of Grievant's report, as well as Grube who spoke with him that night, and Grievant's own testimony contradicts his earlier statements which establish a lack of probable cause. A written reprimand is the next step in disciplinary process. The fact that Grievant at the hearing persisted in declaring a crime was committed, after hearing from the witnesses, other than Croak who did not take a position, all swear that not only was a crime not committed, no probable cause to arrest existed, underlies the need to discipline to break through to Grievant that his behavior was inconsistent with his duty.

The City further argues in reply to Grievant's arguments that the burden of proof necessary for a police officer to make an arrest and that of a prosecutor to file charges is different. However, Grube informed Grievant that Bjork's actions did not meet the statutory definition of neglect. Grievant reported this to Sgt. Peterson. Capt. Slattery contacted Grube who told him Grievant did not have probable cause for an arrest, citing Slattery's Report at page 6.³ Grievant admitted there was no probable cause for any other crime such as disorderly conduct. Grube confirmed that Grievant had no probable cause to arrest Bjork by Grievant's own admission.

² This particular legal argument is taken to mean that the discipline should be progressive, or commensurate with the nature of the violation, rather than be excessive.

³ This is an argument made by the City as to Slattery contacting Grube as contained in the cited reference to Slattery's report at p. 6. However, no such report was admitted into evidence at the hearing. The only exhibit in excess of 5 pages is the collective bargaining agreement. No references to the Slattery report will be relied on herein. Slattery did testify that he spoke to Grube as part of his investigation.

The City argues that the standard of just cause required for discipline under the collective bargaining agreement was met. Grievant could reasonably be expected to have knowledge of the probable consequences of the alleged conduct. He had been previously disciplined on this very issue. He had just been trained on this. Bjork's merely venting or threatening that she felt she was unable to care for her infant children does not constitute a crime. She did not leave the premises. She told Sgt. Peterson she had no intentions of leaving the children and was returning when arrested. Grievant did not contradict that fact. At all times Durham remained at the apartment and did not leave. At no time were the infant twins abandoned or neglected. Sgt. Peterson was informed that Durham was able and willing to care for the kids. There was no risk of harm even if Bjork had left. Grievant should have been acutely aware that he may be subject to discipline in the event he was to repeat his mistake of depriving a person of her civil liberties.

The City argues the rule or order Grievant allegedly violated is reasonable and was applied by the City in a reasonable manner. Supreme Court case law indicates that rumor, mere suspicion and even strong reason to suspect are not equivalent to probable cause. Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or is being committed, citing authorities. Since Grievant did not possess probable cause, he violated the warrantless arrest policy of the City. Such rule is reasonable and necessary to protect the civil liberties of the public. If the City fails to discipline officers who overstep their bounds the City is subject to liability. According to the collective bargaining agreement, an officer must be disciplined consistent with protecting the citizenry from such abuses.

The City also argues that the Chief, before filing the charge against Grievant, made a reasonable effort to discover whether Grievant did, in fact violate a rule or order. The City made a fair, objective and reasonable effort to investigate the rule violation. Peterson spoke with Grievant the night of the arrest and had him call Grube. Peterson arrived at the jail that night to take Bjork home. The next morning Capt. Slattery spoke with Chief Christensen regarding the incident. Slattery did an internal investigation. He spoke with Grube about Grube's conversation with Grievant the night of the arrest. He interviewed Sergeant Peterson. He met with Grievant and his Union representative. He again called Grube to clarify Grube's opinion as to the finding of probable cause – that he believed there was no probable cause to arrest. Officer Croak figures prominently in the Grievant's brief, but his name is on no reports. His presence was not revealed by Grievant in the investigation. An officer who withholds potential witness information so they can provide surprise testimony is in a poor position to object to the fairness of the process of the investigation. The Department conducted a complete and thorough investigation. It found that Grievant had no probable cause, and then issued a written warning.

The City also argues that the City's investigation was fair and reasonable, and far from lacking. The City interviewed every single person known to the department to have had any involvement in the situation and based its decision on all the facts and circumstances in the case. The Department was unaware that Officer Croak had been at the scene and could not have been expected to know he was at the scene. Grievant never mentioned him in his reports

or in the investigation. Croak never completed a report. Grievant was asked whether anyone else had knowledge of the incident, and replied no. At the hearing Croak took no position on whether probable cause existed. The City's decision was based on a full, fair and objective test, which failed to find probable cause.

The City further argues that the Chief discovered substantial evidence that Grievant violated the rule or order as described in the charges filed against Grievant. Citing the two policies, the Chief discovered clear and convincing evidence that Grievant violated the warrantless arrest rule and did not follow the Department's own policies and procedures regarding arrests. Grievant was to consider all the facts available at the time of decision, including those under policy Sec. 3-2-15:

1. Personal observation. He was responding to a keep the peace call, not a child neglect call. Bjork left the apartment to make calls, but she never left the premises. Durham remained in the apartment the entire time therefore Grievant did not observe child neglect.
2. Informer's tips. Durham told Grievant that Bjork does this all the time, suggesting that her statements that she will refuse to care for the kids were empty threats. There is no indication or allegation that Bjork had ever neglected her children in the past.
3. Information from within the department and other police agencies. Bjork has had no other complaints or charges of child neglect in her past.
4. Past criminal activity by the suspect. Bjork has no known prior criminal activity at all.
5. Physical evidence at the scene. There was no physical evidence of child neglect at the scene or elsewhere.
6. Report of victims or eyewitnesses. There were no victims as there was no crime committed.

The statements of Bjork, Durham and Grievant are referenced in Grievant's report. After being unable to find even one fact scenario that fit the threshold of probable cause, Grievant chose to arrest Bjork anyway. His concern that she would either leave them alone in the apartment or do harm to them does not constitute probable cause. Probable cause for an arrest without a warrant requires that an officer have more than a mere suspicion, the officer does not need the same quantum of evidence necessary for a conviction, but information that would lead a reasonable officer that guilt is more than a possibility, which information can be based in part on hearsay, citing authority. Therefore, Grievant violated the warrantless arrest rule, depriving Bjork of her civil liberties. In light of such substantial evidence of rule violation, Grievant was issued a written warning.

The City argues that the Chief is applying the rule or order fairly and without discrimination against Grievant. While other officers testified they have arrested persons in the past who were not prosecuted by the District Attorneys' office, it was not pointed out in

those cases that it was for failure to establish probable cause. There is a distinction between probable cause needed for an arrest and the evidence needed for a conviction. It is not unusual for a District Attorney to refuse to prosecute after an arrest, but it is unusual for a District Attorney to find that there was no probable cause for an initial arrest. Police must possess probable cause before they may search a person or a person's property, and they must possess probable cause to believe that the person has committed a crime before they may arrest a person. In most criminal cases the court must find probable cause exists to believe that the defendant committed the crime before the defendant may be prosecuted. Grievant had an obligation to find probable cause before the arrest, regardless of whether or not the State would follow through with charging her. This is not the first incident when a citizen was confined by Grievant in a manner that was constitutionally suspect and inconsistent with department policy.

The City argues that the written reprimand reasonably related to the seriousness of the alleged violation and to Grievant's record of service with the Department. It is clear there was no probable cause to arrest Bjork. At no time were the elements of the crime all met as required by Supreme Court authority. Grievant did not wait for the outcome of the situation in order to determine whether or not this rather emotionally overwrought woman would, in fact, leave her children unattended. Her statements, and the fact that she left the apartment to make some telephone calls in the parking lot area, all the while knowing that her children were safe in the apartment with Durham, fail to meet the requirement established in the ORNELAS case that a reasonable suspicion of each element of the crime must exist before probable cause to arrest is present. It is not sufficient to hear a person threaten to commit a crime. With certain exceptions not present here. Grievant has been disciplined before for similar prior actions. The Department provided him specific training on the issue, to prevent incidents like this from re-occurring. Depriving someone of their civil liberties is a serious matter that must be dealt with in an appropriate manner, or the City is subject to liability. According to the collective bargaining agreement, an officer must be disciplined consistent with protecting the citizenry from such abuses, bearing in mind the obligation to use the least effective discipline needed to convey the message. Grievant had been given an oral reprimand on the earlier occasion. A written reprimand is the next step in the disciplinary process. It is reasonable considering the seriousness of the conduct and the prior oral reprimand for the same type of behavior.

Association

In summary, the Association argues that the City did not have just cause and failed to provide evidence that would justify a written warning, or any discipline, to Grievant. The testimony of the Deputy District Attorney was an effort by the City to distort the issue. Deputy District Attorney Grube testified he would not be able to prosecute. He did not testify that Grievant did not have probable cause to arrest. The burden of proof necessary for an arrest and that to file charges is different. Probable cause amounts to more than a bare suspicion but less than evidence that would justify a conviction, citing *SPINELLIS V. UNITED STATES*, 393 U.S. 410 (1969), *DRAPER V. UNITED STATES*, 358 U.S. 307 (1959), *CARROLL V. UNITED STATES*, 267 U.S. 132 (1925), *UNITED STATES V. MANCILLAS*, 580 F.2D. 1302 (2ND CIR. 1978), AND *STATE V. PASZEK*, 50 Wis.2D 619 (1971). It is not uncommon for an officer

to make an arrest and for the prosecutor to refuse to issue charges. Officers can arrest under §968.07, Wis. Stats., but can later determine the person should be released under §968.08, Wis. Stats. The Legislature was aware of situations when an arrest may be made on limited information at the scene, and later allowed time to analyze the situation and the law and consult counsel, later determining to release the person. And, the Deputy District Attorney and all other officers who testified admitted the showing of actual abuse was not required for child abuse under §948.21(2), Wis. Stats. While the District Attorney may not have been comfortable prosecuting Bjork, the testimony did not show Grievant acted in bad faith or was without probable cause to arrest Bjork.

The Association argues that the Chief of Police failed to meet the standard of just cause as required by the collective bargaining agreement prior to issuing discipline in the form of a written reprimand. The Association refers to the seven tests of just cause found in §62.13(5)(em) for its analysis because this statutory definition is a well established due process model and had been adopted by the City and Association in the collective bargaining agreement to determine if discipline is appropriate. The Chief of Police is following progressive discipline in reference to the prior undocumented counseling, and not conforming to the collective bargaining agreement just cause standard. There is no reference to progressive discipline theory in the collective bargaining agreement. Future violations could possibly bring severe discipline under the progressive discipline doctrine. The Association asks that the just cause standard of §62.13(5) (em) as voluntarily adopted by the parties be used.

The Association contends that the evidence clearly shows that Grievant had reasonable grounds as required under §968.07(1)(d), Wis. Stats., to believe Bjork was committing the crime of child abuse and abandonment. Grievant testified Bjork made several statements about her unwillingness to care for her infant children, such as I can't watch these fucking children. Officer Croak observed her irrational behavior including loud, profane statements that she wouldn't or could not care for the children. Grievant made numerous attempts to mediate or make alternate arrangements, stopping her forward progress no less than three occasions. She proclaimed her unwillingness to care for her children. When she had made her way from the apartment to the hallway and then the parking lot, Grievant felt she truly was going to abandon her infant children and decided to arrest her. At the time the infant twins were alone, inside the apartment, unmonitored. Grievant had already been notified by Durham that he was unwilling to care for the children, who he believed were not his. And Grievant has asked Bjork if he could contact family or friends to watch the children, but she refused. Grievant was the only one at the call because Officer Croak had left. He did not have the luxury of giving Bjork time to gather herself, or smoke a cigarette, as suggested by the Chief of Police. It would have been inappropriate for Grievant to contact neighbors as Bjork is the legal guardian of the children and had to care for them herself or make alternate arrangements. Grievant did not have the authority to place the children with someone else. He contacted Human Services for custody placement and they refused to come out that night. Subsequently, the twins were placed with Durham.

The Association contends the rule or order for warrantless arrests is being applied by the City in an unreasonable manner, citing several authorities for the definition of probable cause. The Association argues that Grievant, who was the only officer at the scene at the time of the incident, had probable cause to arrest Bjork in conformity with the law and therefore did not violate the warrantless arrest policy of the Department.

The Association does not believe the City made a reasonable effort to investigate the rule violation. The City had nearly a month to investigate the incident. The investigation was not reasonable. It based its decision on the subjective belief of several Officers, none of whom were at the residence to observe the totality of the circumstances. Officer Croak was never interviewed. If someone had checked the dispatch log they would have determined Croak was there. Had the City interviewed Croak it would have found his version of events supported the decision of Grievant. Instead, the City relies upon the rants of Bjork, presumably angry, while getting a ride home. But she did not file a complaint, nor did the City present her as a witness, leaving the Association to wonder about her credibility.

The Association contends not only was there a lack of substantial evidence supporting its decision to issue the written warning, but a lack of any credible evidence that Grievant violated the arrest policy of the Department. Two five month old infants were about to be abandoned by their mother. Grievant took appropriate action to protect them. The Chief of Police would have preferred that Grievant walked away, leaving the infants alone and abandoned. Someone should review the actions/inactions of the Chief for failure to properly investigate this matter.

The Association argues that even though there was testimony of arrests being made by other officers that did not result in a prosecution, there was no evidence in the record by the City of other officers treated similarly to Grievant. Charges against defendants are often reduced, amended or dropped, resulting in instances where a person is arrested but ultimately not charged with a crime. This is one of those instances. The fact that charges were not brought against Bjork is a question for the District Attorney's office. Grievant did his job.

As to whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the department, the Association believes this step was not met by the City. Grievant did not violate Department policy because he had probable cause to arrest. The City reliance on the prior verbal warning is problematic because it was not documented, even though the Department discipline form has a box specifically for verbal warnings. An oral warning has to be documented to substantiate it occurred and a copy given to the officer. Here the oral warning appears to be a fabrication and there is no documented evidence to prove Grievant was ever provided an oral warning.

In reply to the City arguments, the Association argues that the City has made several misstatement of fact in its brief. The employer's brief says that Mr. Grube immediately stated there was no probable cause to arrest for child neglect. In fact, that is not what Grube testified to at the hearing. He testified he did not believe his office would be able to prosecute.

He did not testify the arrest was without probable cause. The burden of prove is different for prosecution as opposed to arrest. The employer's brief also says it is a slippery slope to oppression if officers were allowed to simply anticipate criminal activity and make arrests based upon it. In fact, Grievant did not simply anticipate criminal activity. He made attempts to mediate and make alternative arrangement for the children. He stopped Bjork's forward progress at least three times. She steadfastly proclaimed her unwillingness to care for the children. He had been notified by Durham that Durham was unwilling to take care of the children. Grievant felt Bjork truly was going to abandon them. The twin infants were alone inside the apartment complex unmonitored. For a majority of the incident Grievant was the only officer on scene. It is easy for people to Monday morning quarterback and make assumptions on what should and should not have been done, as all factors that were present during the event cannot be taken into account. The employer's brief says that Officer Windler has been disciplined by the Department for similar prior actions while on duty. In fact, there is no written record of the oral discipline, so it can't be used to justify a written warning here. Oral warnings have to be documented. This appears to be a fabrication. The employer's brief states that further, there can be little doubt that if the City fails to discipline officer who overstep their bound by making arrests of citizens without probable cause, the City is subject to liability. In fact, there is no liability as long as the officer had probable cause, which Grievant did. No citizen made a complaint, not even Bjork.

DISCUSSION

Facts

As is apparent from the arguments of the parties, there are some important factual disputes in this case which are material to the ultimate issues. The facts have been determined as set out in the Background and Facts part of this Award. The most significant of the disputed factual determinations is that Bjork was walking away from Grievant when he made the decision to arrest and arrested her. The City argues she was walking back towards Grievant. That is from a comment Bjork made to Sgt. Peterson while he was taking her to the apartment to get her things. She also told Sgt. Peterson that she had no intention of leaving the children. Bjork did not testify at the hearing. She was obviously not cross examined and her credibly, in terms of her demeanor, cannot be judged. However, what she told Sgt. Peterson about her intentions and what she told Grievant are two different, inconsistent and contrary things. She did not tell Grievant she had no intention of leaving her children. Before the arrest she said the opposite, and referred to them as "fucking kids". Her conflicting statements undermine her credibly as to not only her intentions, but as to her other statement to Sgt. Peterson about returning when she was arrested. It is also clear that shortly before and at the time of the arrest she was in a highly excited and anxious condition. This is the direct observation of Grievant. The testimony of Officer Croak confirms that to the point in time of his departure. Even while with Sgt. Peterson she still felt the need to cool down. Her condition undermines how accurate her observations and immediate recollection may have been, and makes her statement to Sgt. Peterson about returning less reliable. This is contrasted with the direct testimony of Grievant that Bjork continued to walk away after he had told her to stop. This is also what Grievant put in his report. This is also consistent with her

statements to Grievant at the scene about her not going to take care of the kids. It is consistent with her having gone from the apartment to the hallway, then from the hallway to the parking lot, then at least 100 feet from the apartment, and then even further away. And Grievant, who testified credibly, was the only person to testify who was in a position to observe Bjork's movements immediately before and during the arrest. His credibility was not successfully impeached at the hearing. Croak had left by the time of the arrest. Durham was not called to testify. The undersigned is persuaded that Grievant's version is accurate. Bjork had stopped, but then continued to walk away and was not returning when Grievant arrested her.

Another important fact dispute is the location of Durham immediately before and during the arrest. The City argues that Durham was still there and able to take care of the children, and that he never left the apartment. Again, Durham and Bjork did not testify. By the time of the arrest, Officer Croak had left. Grievant testified, credibly, that Durham had loaded his belongings in his truck, had the two older children in the truck in car seats, and was in his truck himself at the time Grievant was putting the handcuffs on Bjork. Durham had emphasized that he was not going to take the twins. It is clear, and the undersigned is persuaded, that immediately before and at the time of the arrest Grievant had observed, accurately, that Durham was at his truck ready to go as he said he was going to, and that the five month old twins were in the apartment alone. No one was with them. Durham was not with them and was not caring for them. Durham had expressed no other intention other than he was leaving that night with only the two older children. To the extent that the City is arguing that Durham was taking care of the twins, the undersigned is not persuaded that he was at the time of the arrest. It was only after the arrest that he volunteered to stay with them.

This finding of Durham's location also has implications in assessing Deputy District Attorney Grube's opinions. It goes to the factual assumptions he was making during his telephone conversation with Grievant. Grube testified that he understood the male, Durham, was the next day or maybe the day after suppose to be moving out of state or leaving so that would eventually leave the female as the sole care provider for the kids. But at the time the incident was unfolding that night it looked like the kids were still being supervised or still with the male. To the extent that Grube understood Durham was caring for the children and was not leaving until at least the next day, such understanding is not consistent with the facts as of the time of the arrest. Durham was not caring for the children at the time of the arrest. He had left the children in the apartment, was out in his truck, and was in the process of leaving that night.

The City argues that Grube had specifically stated to Grievant on the night of the incident that "no probable cause existed for any criminal charge that he was aware of". But this is not exactly what the evidence shows. This is not what Grievant said to Sgt. Peterson or put in his report. It is not what is in Sgt. Peterson's report. The City's argument is also not exactly what Grube testified to at the hearing. Based on his testimony, he did not feel from his discussion with Grievant that there was enough for his office to prosecute a case for neglect. They also talked about disorderly conduct, and whether or not the initial call to the apartment rose to that level with an arrest for disorderly conduct being appropriate. At the end of the discussion, to Grube it did not seem likely that there was enough to prosecute for disorderly

conduct. Grube did not see a reason to hold her for neglect and disorderly conduct did not seem to apply. There is no persuasive evidence that he specifically told Grievant that night that there was no probable cause to arrest Bjork. At best his testimony is ambiguous on that point. He may have said that to Capt. Slattery, but that is a different conversation than the one argued by the City.

There is also the fact issue raised by the Association as to whether Grievant had previously received an oral warning concerning the prior jailing of a juvenile. The collective bargaining agreement requires that any and all disciplinary actions be placed in the employee's personnel file and refers to written and oral reprimands placed in personnel files be removed after a certain period of time. The form normally used for memorializing an oral warning was not produced by the City at the hearing and there is no record of one having been made. However, the credible testimony of Lt. Anzalon establishes that the incident did occur and that he did make the warning. The undersigned is persuaded that the oral warning was given to Grievant, and that for some unexplained reason the City did not make or produce a written record of it. The absence of that written record does not mean that the oral warning did not occur. Any ramification from this will be discussed below as needed.

Just Cause Standard

The collective bargaining agreement requires just cause to discipline an employee, but does not define just cause. The Association argues the application of the seven factor test for just cause under §62.13(5)(em), Wis. Stats., because it is a well established model and has been used by the City and Association in the collective bargaining agreement to determine if discipline is appropriate. But, as was just observed, the collective bargaining agreement does not define just cause. Neither does it refer to §62.13(5)(em), Wis. Stats., in reference to discipline. This arbitration is not a proceeding of a City Police and Fire Board of Commissioners, which is governed specifically by §62.13(5)(em). And, there is nothing in the record to indicate that that statutory standard has been applied by the parties as a past practice. However, the City does not argue for the use of a different standard of just cause. Both the City and the Association have argued their respective cases at the hearing and in their written briefs in terms of the seven statutory factors. These seven factors are practically identical in form and substance to the seven factors of just cause as set out in *GRIEF BROTHERS COOPERAGE CORP.*, 42 LA 55 (Daugherty, 1964), which are occasionally used by grievance arbitrators in determining questions of just cause in discipline cases, particularly where the parties both request that standard to apply. While the undersigned normally applies a different, more broadly utilized standard of just cause,⁴ because the parties here have both argued the

⁴ See, e.g., *MILWAUKEE COUNTY*, No. 67050, MA-13729 (GORDON, 3/25/2008) at p.8. (The Parties did not point to a definition of just cause in the collective bargaining agreement and they did not stipulate to a definition of just cause. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it reasonably reflects its disciplinary interest. . . .)

seven part statutory standard that will be the one applied. The seven factors under §62.13(5)(em), Wis. Stats., are:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3. was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

Merits

The subject matter of the discipline involved alleged violations of two Department policies concerning when an arrest can be made without a warrant and evidentiary considerations in connection to the warrantless arrest. They speak in terms of reasonable grounds to believe the person has committed or is committing a crime, Sec. 3-2-14, and that the quality of evidence establishing probable cause should be considered, Sec. 3-2-15. They are drafted in conformity with §968.07, Wis. Stats., and Wisconsin case law as to arrests by a law enforcement officer. The policies state:

Sec. 3-2-14 WARRANTLESS ARRESTS

GENERAL POLICY –

1. An arrest warrant should be obtained whenever possible.
2. An arrest may be made without a warrant when there are reasonable grounds to believe the person has committed or is committing a crime. A warrant is necessary to arrest an individual in his dwelling unless there are emergency circumstances.

COMMENTARY – This is based on Sec. 968.07, Wis. Stats. (1977).

. . .

SEC. 3-2-15 EVIDENTIARY CONSIDERATIONS

GENERAL POLICY – The officer must consider whether there are reasonable grounds to believe the person to be arrested has committed or is committing a crime.

PROCEDURES - In determining whether reasonable grounds exist, the officer must consider all the facts available at the time of decision, which are drawn from:

1. Personal observations, including inquiry after the officer's suspicions are aroused.
2. Informer's tips, whenever possible corroborated by independent inquiry.
3. Information from within the department and other police agencies, including that received over communication networks.
4. Past criminal activity by the suspect, which, however, may be used only in conjunction with other evidence.
5. Physical evidence at the scene.
6. Reports of victims or eyewitnesses.

COMMENTARY - The arresting officer, of course, does not need to establish guilt beyond a reasonable doubt. Although the officer needs evidence enough for probable cause only and not for conviction, the quality of the evidence establishing probable cause should be considered.

On the just cause issue, the first four of the seven factors, or questions, can be answered rather easily in the affirmative. As to the first, Grievant is a trained, experienced police officer who has had specific training on the subject of arrests. He had received the policies before the incident. He had been orally warned by the Department about arrests in the prior juvenile matter as the credible testimony of Officer Avalon establishes. Grievant could reasonably be expected to have knowledge that the probable consequences of violating Department policies could lead to discipline. He could reasonably be expected to have knowledge that the probable consequences of violating policies concerning arrests could have implications in terms of prosecution of the arrestee, infringements on civil liberties or potential exposure of the City to liability as well a negative effect on the Department's reputation in the community. It is the alleged conduct, that of violating department policies for an arrest without probable cause, that is the subject of the inquiry in this factor. The Association's arguments on this factor go to whether the actions underlying the alleged conduct itself occurred - whether Grievant had probable cause to arrest - not to the question of whether he could reasonably have knowledge of the probable consequences of the alleged conduct. Whether he did or did not have probable cause is a different question. He is alleged to have arrested someone without probable cause. The undersigned is persuaded that Grievant could reasonably be expected to have knowledge of the probable consequences of arresting somebody without probable cause.

The second question is whether the rule or order that the subordinate allegedly violated is reasonable. The policies requires that there be probable cause for an arrest based on reasonable grounds to believe a crime has been or is being committed. Probable cause is needed for a warrantless arrest. The two policies are drafted in conformity with the opinions

of the United States Supreme Court, e.g., *DRAPER V. UNITED STATES*, 358 U.S. 307, (1959), and with Wisconsin law as found in §968.07(1)(d), Wis. Stats., and Wisconsin case law, e.g. *STATE V. DIMAGGIO*, 49 WIS.2d 565 (1971). The Association does not argue that they are not reasonable, but that the City is applying them in an unreasonable manner. The Association argues that Grievant, the only officer at the scene the night of the incident, had probable cause to arrest Bjork. Again, the Association is arguing the underlying question of whether or not there was probable cause, not whether the probable cause requirement in the policies is reasonable. The Association's argument is an argument suited for different questions. The policies themselves are reasonable.

As to the third question, the Association contends that the City did not make a reasonable effort to investigate the rule violation to discover whether the Grievant did in fact violate a rule or order. Other than pointing out that the City had nearly a month to investigate the matter, the Association merely refers to the next factor in contending the investigation was not reasonable. It does not point out any reason why the investigation was not reasonable. The City points to Capt. Slattery's internal investigation and his contact with Grube, Sgt. Peterson, Grievant and his Union Representative, and Lt. Anzolon. Officer Croak's presence at the scene for a time was not known to the Department because there was no Department record of it and Grievant did not mention it. The dispatch on duty that evening was in all probability the County and not the City. Capt. Slattery investigated the aspects of this case that he would normally investigate. The City cannot be faulted for not knowing of Officer Croak's presence under these circumstances. While it did not later interview Bjork or Durham, it did have at least some of their information contained in Grievant's and Sgt. Peterson's reports. The effort was reasonable.

The Association contends that for the fourth question of whether the efforts under the third test were fair and objective, the City investigation was lacking. It contends that the Department's conclusion that there was no probable cause is based on the subjective beliefs of persons who were not at the scene to observe the totality of the circumstances. The Association points out that dispatch was not checked for other police presence and there was no interview of Officer Croak, which would have supported Grievant's decision. It argues that the City relies on Bjork's rants, noting she did not file a complaint or testify. Finally, the Association contends the City did not present a shred of evidence to support the written warning given to Grievant. The City counters that it interviewed everyone it knew who was present that evening and that it could not be expected to know Officer Croak was there. He had no opinion on probable cause anyway. The Department reviewed the reports of the incident and spoke with Grube. The undersigned is not persuaded that there was anything unfair or not objective in the investigation. The Association has not explained how the Chief was subjective and not objective, other than obviously he was not at the scene at the time of the arrest. But the Chief's determination was based on what he understood to be objective facts - accurate or not- and two written policies. The investigation also included the opinions of Grube, who has some measure of expertise in the area due to his position as a Deputy District Attorney and his familiarity with the case. Contrary to the City argument about interviewing everyone it knew to be involved, it did not interview Durham to any real extent. It did have the benefit of Bjork's verbal statements to Sgt. Peterson. Sgt. Peterson did have a brief

discussion with Durham that night while Bjork picked up some belongings, as reflected in his report. Had the City more thoroughly or formally interviewed Durham and Bjork, and interviewed Officer Croak, it may have had a better understanding of the facts and circumstances. But there is nothing to show that it intentionally did not interview them or did not want to know or hear what they could provide. Even though the City might have done more, particularly in terms of interviewing Durham perhaps by telephone, there is nothing here that indicates any attempt to unfairly investigate the matter. The record demonstrates that the City made a good faith effort to investigate the matter, did so fairly, and came to its conclusions based on what it found from the investigation in an objective manner.

The fifth question as applied here is more complicated, and is whether the Chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against Grievant. As is clear from the above, some important fact determinations have been made that differ from what the City believes the facts were at the time of arrest. The parties have argued that the Grievant either did or did not have probable cause to make the arrest. That is a mixed question of law and fact which, as the case law cited by both parties shows, cannot be precisely articulated. Here, there has been no determination in a Court of Law as to whether there was or was not probable cause to arrest. The parties have put that question to the undersigned. The fifth just cause question asks, in essence here, if there was substantial evidence that Grievant violated the two policies. If there was probable cause to arrest then there is no substantial evidence that Grievant violated the policies. If there was no probable cause to arrest then there is substantial evidence that he did violate the policies. If he violated the policies that would be just cause for discipline, depending on the answers to the other two remaining just cause questions. If he did not violate the policies then there would be no just cause to discipline him.

The parties have cited to various statements or definitions of probable cause. For example, from the United States Supreme Court there is the case of *MARYLAND V. PRINGLE*, 540 U.S. 366 (2003), which stated at p. 371.

The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt”, and that belief of guilt must be particularized with respect to the person to be searched or seized....
(citations omitted)

The United States Supreme Court also stated in *ORNELAS V. UNITED STATES*, 517 U.S. 690 (1996) at pp. 695-696

Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, non-technical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *ILLINOIS V. GATES*, 462 U.S. 213, 231 (1983) (quoting *BRINEGAR V.*

UNITED STATES, 338 U.S. 160, 176 (1949)); see UNITED STATES V. SOKOLOW, 490 U.S. 1, 7-8 (1989). As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." GATES, SUPRA, at 232. We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, UNITED STATES V. CORTEZ, 449 U.S. 411, 417-418 (1981), and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found, see BRINEGAR, SUPRA, at 175-176; GATES, supra, at 238. We have cautioned that these two legal principles are not "finely tuned standards," comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. GATES, SUPRA, at 235. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed. GATES, SUPRA, at 232; BRINEGAR, SUPRA, at 175 ("The standard of proof [for probable cause] is . . . correlative to what must be proved"); KER V. CALIFORNIA, 374 U.S. 23, 33 (1963) ("This Cour[t] [has a] long established recognition that standards of reasonableness under the [Fourth Amendment](#) are not susceptible of Procrustean application"; "[e]ach case is to be decided on its own facts and circumstances" (internal quotation marks omitted)); TERRY V. OHIO, SUPRA, at 29 (the limitations imposed by the Fourth Amendment "will have to be developed in the concrete factual circumstances of individual cases").

And in DRAPER V. UNITED STATES, 580 U.S. 307, 313 (1959) there is:

Probable cause exists where the facts and reasonably trustworthy information known to the arresting officers, are "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.
(citations omitted)

In Wisconsin there is §968.07(1), Wis. Stats., upon which Department policy 3-2-14 at issue here is actually based, which provides:

968.07 Arrest by a law enforcement officer. (1) A law enforcement officer may arrest a person when:

. . .

(d) There are reasonable grounds to believe that the person is committing or has committed a crime.

The Wisconsin Supreme Court has articulated its view of probable cause. In STATE V. DIMAGGIO, 49 Wis.2d 565, 572-573 (1971), the Court stated:

Probable cause for an arrest without a warrant requires that an officer have more than a mere "suspicion", but obviously he does not need the same quantum of evidence necessary for a conviction. The standard is objective, and more than a good faith belief on the part of the officer is necessary.

But it is only necessary that the information leads a reasonable officer to believe that guilt is more than a possibility. The probability is one which would cause a reasonably prudent man – “not a legal technician” – to act. Moreover, the information which the officer is acting upon may be based in part on hearsay.
(citations omitted).

Similarly, in *STATE V. PASZEK*, 50 Wis.2d 619, 624-25, (1971), the Court stated:

Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable office to believe that guilt is more than a mere possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.
(citations omitted)

Of course, all of these definitions of probable cause or reasonable grounds have to be applied to an alleged crime or criminal activity.

In this case the alleged criminal violation Grievant was concerned with is neglect of a child. Wisconsin Statutes provide:

948.21 Neglecting a child. (1) Any person who is responsible for a child’s welfare who, through his or her actions or failure to take action, intentionally contributes to the neglect of the child is guilty of one of the following:

- (a) A Class A misdemeanor.
- (b) A Class H felony if bodily harm is a consequence.
- (c) A Class F felony if great bodily harm is a consequence.
- (d) A Class D felony if death is a consequence.

(2) Under sub. (1), a person responsible for the child’s welfare contributes to the neglect of the child although the child does not actually become neglected if the natural and probable consequence of the person’s actions or failure to take action would be to cause the child to become neglected.

Under this statute the five month old twins need not actually have been neglected. The question ultimately becomes whether there were reasonable grounds, or probable cause, for Grievant to believe that the natural and probable consequences of Bjork’s actions or failure to take action would cause the five month old twins to become neglected. If so, that would be to contribute to the neglect of a child and there would be reasonable grounds, or probable cause, to make the arrest.

At the time of the arrest the two five month old twins were in the apartment, alone. They were not being cared for by Durham or anyone else. Durham was in his truck with the older children ready to leave as he had said he was going to do. Bjork had intentionally left the apartment, then the hallway and was at least 100 feet from the apartment into the parking lot. She was not in her dwelling. She had said numerous times she would not and could not take care of the kids. She had referred to her own children in the most derogatory of terms, calling them "fucking kids". She had revealed a callous attitude toward them by telling Grievant that when she was angry at Durham she took it out on the kids. She was obviously upset generally and particularly with Durham at the time. She told Grievant that she has post partum depression. This is a not so veiled threat against the safety of the children. She was very anxious and agitated. She had not cooperated with Grievant in his attempts to identify family and friends who might care for the children. She was even refusing to help him contact her mother, other relatives or friends. She knew, as did Grievant after his call, that Human Services was not going to get involved that night to care for the children. She was told by Grievant that Durham was ready to leave. Durham had left the infants in the apartment and was in his truck with the two older children ready to leave for out of state. Even after Bjork was told by Grievant to stop, she again continued to leave. Grievant made all these observations and this is more than mere suspicion, and more than a mere possibility of a crime being committed. He observed her in the process of not merely leaving, but actually leaving her infant twins uncared for. The undersigned is persuaded that the natural and probable consequences of Bjork's actions in leaving, as was not only her stated intention, but her actual movement away from the apartment where the children were, would contribute to them being left alone, not cared for, and for at least some period of time become neglected in violation of the statute. Grievant had a reasonable, factual basis for his belief that Bjork would continue to leave the children alone or even do them harm even if she did at some unknown time later return. In the opinion of the undersigned this is probable cause that she was violating §948.21, Wis. Stats.

The City argues in its Initial Brief that Bjork was walking toward Grievant when she was arrested, and argues in its Reply Brief that Durham remained in the apartment the entire time. Both these factual assertions are incorrect. And while there is an insufficient basis in this record to know if factually Bjork really suffered from post partum depression, were there any truth to that assertion it would add a level of concern for the stability and judgment of Bjork at that time. Even the Chief, in his testimony, acknowledged that under the circumstances it would be expected that she would say things she would not normally say, and act irrationally to a certain extent. Here Grievant did indeed observe Bjork behaving in what could be described as an irrational manner in both word and action. In saying irrational things and irrationally leaving the apartment with the five month old twins alone already, then refusing to help arrange care for them, the natural and probable consequences of such action would be to cause the children to be neglected. Despite Durham's comment about her saying this all the time, there is no reasonable basis in this record for Grievant to know that Bjork was the type who made wild comments she did not carry out. The City argues that Grievant should have waited for the outcome of the situation in order to determine whether nor not this rather emotionally overwrought woman would, in fact, leave her children unattended. The Chief

suggested waiting for time for her to smoke a cigarette. But this argument does not mean that there was not probable cause at the time of the arrest. The City summarizes its argument that Bjork's statements alone fail to meet the requirements of the case law that a reasonable suspicion of each element of the crime must exist before probable cause to arrest is present. But, Grievant observed more than Bjork's statements. She had already left the children. She had refused to cooperate with Grievant in making arrangements for the care of her children. She kept moving farther and farther away from the apartment. Grievant is being expected to assess the actions of someone who is saying and doing irrational things. The natural and probable consequences of such irrational behavior would be to leave the children unattended and neglected. Before the arrest there is no indication that Durham, however ignoble or noble his actions were up to that point, was staying. The City argues that Bjork was still on the apartment property when arrested and had not left the property. But she had left her apartment, the hallway, the building and was leaving the parking lot heading toward the street. It makes no difference that Bjork may have still technically been on the apartment property. Where the property line is has little, if any bearing on what the natural probable consequences would be of her leaving the actual apartment unit itself and refusing to take care of the children. Whether she remained within the legal description of the property is of a nominal consequence. Even the City does not argue that there would have been probable cause if she had crossed the property line, wherever that exactly was.

Two Department policies are at issue. The above demonstrates that there were reasonable grounds for Grievant to believe the person had committed or is committing a crime. He did not violate policy Sec. 3-2-14. As to the second policy, of the five different evidentiary considerations under policy Sec. 3-2-15, sufficient of those exist as is reflected in Grievant's report and testimony to show facts were available to determine their existed reasonable grounds to arrest. Specifically are his personal observations under consideration 1 of the policy. The Association is correct that he was the only officer on the scene the entire time and he was in a position to observe, remember and relate the incident. The essential details are contained in his report. Those details may be different than some of the ones argued by the City as to Bjork's direction of movement and the location on Durham, but Grievant's reported personal observations, what he saw and what he heard, are the factually correct ones. There are no informer tips, information from within the department or other agencies, or past criminal activity under evidentiary considerations 2, 3, and 4. No physical evidence was collected under point 5. There are no victim reports. Whether considered a report or a statement, what Bjork and Durham said to or in front of Grievant is contained in Grievant's report under evidentiary point 6, even though not in their own writing or their own documentation. At the time of the arrest the only substantial source of facts available to Grievant were those from his own observations under the first consideration in Sec. 23-2-15. This satisfies that policy as it is a recognized source of evidence that establishes probable cause and reasonable ground to arrest here. He did not violate that policy.

Based on the above conclusion that Grievant had probable cause and reasonable grounds to arrest Bjork, there is no substantial evidence that Grievant violated the rule or order as described in the charges filed against him, which is the subject of inquiry for the 5th question

in the just cause standard. Because of this, it is not necessary to determine the answer to the remaining two questions. Grievant did not violate with policies that he was alleged to have violated in the written discipline. It follows that just cause to discipline him has not been established as required by the collective bargaining agreement.

Two of the three remedies requested by the Association, that the City be ordered to cease and desist from violating the collective bargaining agreement and that the City be ordered to issue a statement that Grievant has been cleared of all charges, are more appropriate for violations of statutory labor laws than remedies in grievance arbitrations. Those remedies will not be used in this case.

Accordingly, based upon the evidence and arguments of the parties, I issue the following

AWARD

1. The Grievance is sustained.
2. As and for a remedy, the City will remove the written warning and all referenced of the discipline from Grievant's personnel file.

Dated at Madison, Wisconsin this 22nd day of April, 2009.

Paul Gordon /s/

Paul Gordon, Arbitrator