

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between
GREEN BAY PROFESSIONAL POLICE ASSOCIATION
and
CITY OF GREEN BAY

Case ID: 284.0020
Case Type: MA

AWARD NO. 7955

Appearances:

Jonathan Cermele, Cermele and Matthews, S.C., appeared on behalf of the Union.

Kyle J. Gulya, von Briesen and Roper, S.C., appeared on behalf of the City of Green Bay.

ARBITRATION AWARD

The Green Bay Professional Police Association (Union) and the City of Green Bay (City) are parties to a collective bargaining agreement (CBA) which provides for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, James J. Daley of the Wisconsin Employment Relations Commission was selected as the arbitrator on this matter. A hearing on that grievance was held on February 27, 2019, in Green Bay, Wisconsin. The hearing was not transcribed. The parties filed briefs on April 12, 2019, and rebuttals on April 24, 2019, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

Whether there was just cause to support the charges and, if so, whether the remedy under Article 3.5 of the Labor Agreement (transfer from a specialty position) was appropriate?

The City framed the issue as follows:

Did the City violate Article 3, Section 3.5, of the 2016-19 CBA when the City removed Detective Weiss from his detective assignment?

I have adopted the following issue:

Was Article 3, Section 3.5, of the 2016-19 CBA violated by the transfer of Weiss from his assignment as detective?

PERTINENT CONTRACT PROVISION

The parties' 2016-19 CBA contains the following pertinent provision:

Article 3 – GRIEVANCE PROCEDURES AND DISCIPLINARY PROCEEDINGS

* * *

3.5. REMOVAL FROM SPECIALTY TEAM OR ASSIGNMENT – Removal from a specialty team position or assignment shall only be for cause. Examples of “cause” may include but are not limited to poor performance, reluctance to perform assigned duties, failure to successfully complete training, continued failure to be available for call-in, poor documentation and the like.

BACKGROUND

In 2017, two alleged sexual assaults occurred with the purported assailer being a student within the Green Bay School District. A reporter from the Green Bay Press Gazette, Doug Schneider, made some inquiry to the Green Bay Police Department (GBPD) requesting more information. As a reaction to this request, GBPD felt there may have been an internal leak to Schneider that prompted an inquiry. GBPD proceeded to do an internal investigation as to whether this occurred.

During GBPD's internal investigation, it came to light that Grievant, Detective Andrew Weiss, had suspicious activity relating to his usage of the Green Bay Electronic Records Program (GERP) approximately one hour prior to the call from Schneider. Weiss had no reason for using the GERP program as he was not associated with the matter being investigated. This was followed up with an investigation specific to Weiss' activity. During the investigation GBPD requested Weiss' personal cell phone records in order to determine if he had made calls to Schneider during the time in question. Weiss refused to provide this information, citing privacy rights and that the

cell phone in question was owned by his girlfriend. Ultimately, GBPD was not able to associate Weiss as being the source of Schneider's inquiry; however, it was shown Weiss had been in contact with Alderman Andy Nicholson regarding the alleged crime. Nicholson has a background in law enforcement and met Weiss when they were both formerly employed by the Sheriff's Department for Outagamie County. The two shared a friendly relationship. Nicholson provided the name of the alleged suspect, and Weiss stated he would "look it up." Weiss provided confirmation to Nicholson that the name associated with the alleged activity was correct but did not provide the names of the victims who were minors. Weiss also indicated some of this information was available on CCAP, and instructed Nicholson to view that site for more information.

After the conclusion of the investigation, Weiss was removed from his assignment as detective for violating the following GBPD policies:

1. § 320.6.6(a): Standards of Conduct-Unauthorized Access, Disclosure, or Use.
2. § 320.5.9(n): Standards of Conduct-Conduct.
3. § 701.2 & §701.5(e): Personal Communication Devices.
4. § 1008.2: Personnel Complaints.

A. POLICY VIOLATIONS EXAMINED.

1. § 320.5.6.a – UNAUTHORIZED DISCLOSURE. Unauthorized and inappropriate intentional release of confidential or protected information, materials, data, forms or reports obtained as a result of the member's position with this department.

The Union argues there is no just cause supporting the transfer of Weiss for his actions relating to sharing the information retrieved from GERP and given to Alderman Nicholson. In support of this, the Union offers that the information provided was neither confidential nor protected information and indicates that the name of the suspect had already been made public by the district attorney's office when the criminal complaint became public.

The City correctly notes the information provided goes beyond the information that was made publicly available. Nicholson indicated Weiss shared that the suspect allegedly groped a girl in the hallway and raped a lady. Weiss identified the gender of the victim and other details that were not part of the charging document. Whether these details were material is irrelevant for purposes of my review, it is sufficient that the information shared was obtained by accessing the GERP system.

As indicated before, Nicholson has a background in law enforcement. If the information was publicly available through CCAP or the district attorney's office, Nicholson had the education and expertise to locate that information without the assistance of Weiss. What Weiss could offer that other "public" sources could not was access to the GERP system.

The GERP system login screen has terms of agreement for its usage as follows:

By accessing this database, I certify that I am an authorized user and actively involved in a law enforcement related activity for which I am accessing this database. I understand that unauthorized access or access for improper use may subject me to discipline up to and including termination and/or civil and/or criminal action as well as revocation of my access to this program. All data contained in this program is the sole property of the City of Green Bay and the Green Bay Police Department. This data may not be copied, republished, redistributed, transmitted, altered, edited or exploited except as required by law or as allowed by City of Green Bay Police Department policies. Further, I certify that upon the printing of all electronic citations, I understand and approve said citation to have my electronic signature attached. By accessing this database, I accept these terms and conditions.

By accessing the GERP system, Weiss was in direct violation of the terms of service indicated above. The terms clearly state the user must be actively involved in a related activity to access the database, which Weiss was not. It states the data may not be redistributed except as allowed by law or as allowed by GBPD, which was violated when Weiss shared the information contained within to Nicholson.

The Union relies on the notion mentioned prior that the information was no longer confidential or protected due to alternative sources for similar information. The information remains confidential and protected regardless of alternative sources for the same information or other public disclosure. Whether from a “leak” or a credible source of official capacity, the confirmation of such information from a separate reporting agency (in this case GBPD) has separate and identifiable weight and significance. As such, the procedures for releasing information must be adhered to. If GBPD wanted an exception that allowed personnel to share information that was reported elsewhere without adhering to GBPD’s procedure, their policy manual or terms of acceptance in GERP should reflect that. They do not.

2. § 320.5.9.n – CONDUCT UNBECOMING. Any other on- or off-duty conduct which any member knows or reasonably should know is unbecoming a member of this department is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this department or its members.

The Union argues that Lieutenant Gering acknowledged Nicholson is an alderman and that, as such, had Nicholson gone through the proper channels he probably would have received the same information that was provided by Weiss. Putting aside the limited authoritative value of a statement made during an interrogatory by an investigator in an effort to extract information from the subject being interviewed, even if it were true it would not support unauthorized release of information or access to GERP based on a speculative assessment of what the GBPD would do when acting on that assumption.

The Union further argues the conduct does not fit within the definition of the policy as a violation, noting that typical examples of such conduct include failing to obey an order, failing to respond to a call for service, and speaking derogatorily about GBPD. While the actions of Weiss could arguably be considered to reflect poorly on GBPD, and perhaps have a tangential effect on the good order, efficiency, morale, etc., I find the behavior of Weiss does not fall within the traditional understanding of this provision. Every action of an officer that leads to discipline could be argued to be in violation of this section, and that is not how I read its intended purpose. Instead, as noted by the Union, this provision is intended to cover more traditional forms of behavior that may be less specified in other areas of employee expectations. The inclusion of this policy violation is redundant of other policy violations alleged. As such, Weiss was not in violation of this section.

3. § 1008.2 – FAILING TO COOPERATE IN AN INVESTIGATION. The Green Bay Police Department takes seriously all complaints regarding the service provided by the Department and the conduct of its members. All members shall cooperate in personnel complaint investigations.

and

§ 701.3 – PERSONAL COMMUNICATION DEVICES. Members forfeit any expectation of privacy with regard to any communication accessed, transmitted, received or reviewed on any PCD issued or funded by the Department.

Part of the rationale supporting the transfer of Weiss was his objection to and non-compliance with the request by GBPD to provide copies of his cell phone logs during its investigation of who the GBPD source was to the press. The Union argues that: (1) Weiss was not the owner of the phone in question and therefore was not authorized to provide the information requested; and (2) since GBPD does not pay for its use, and it is not its property, it has no right to access the information requested.

While there is some question as to whether I am empowered to interpret what amounts to a constitutional claim of privacy or narrowly confined to interpreting the CBA in this specific matter, I will attempt to be responsive as much as possible to the issues the Union presents.

GBPD's request was narrowly tailored to just the list of calls made and received during the period in question, not the content of those calls. The request was made so Weiss could be removed from suspicion as being the source to Schneider of the informational request. By failing to provide that information, there is no question he was not being cooperative in the investigation.

The Union argues because the phone was in the name of Weiss' girlfriend and not the property of GBPD, it had no right to request the information. However, the record established Weiss regularly substituted this particular cell phone for work purposes. The fact the cell phone was in the name of his girlfriend is a distinction without a difference as Weiss demonstrated constructive ownership of the device. Once the cell phone was regularly used for work purposes, it transmogrifies into a de facto instrument of Weiss in his official duties, and it follows that GBPD has a legitimate interest and right to information relating to work purposes from this device. To

find otherwise would be the equivalent of authorizing all law enforcement to evade reasonable inquiries based on the technical ownership of a device and would lead to an erosion of management to properly effectuate their necessary role in oversight, a role more pronounced in the area of public trust associated with the duties of law enforcement generally.

The Union further argues that, based on *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d. 562 (1967), an officer has a constitutionally protected right to privacy that cannot be waived during an investigation and, as such, the request of GBPD was prohibited based on the precedent established. The Union incorrectly places too much faith in *Garrity* in this regard. *Garrity* held that inducing cooperation in an investigation by threat of discipline was a violation of constitutional rights specific to making admissions inadmissible for purposes of *state criminal proceedings*. If this was a criminal court and Weiss was accused of criminal conduct, the argument would be sound. However this is an arbitration with no criminal ramifications.

The appropriate analysis of this request is better found in the context of *O'Connor v. Ortega*, 480 U.S. 709 (1987). Although specific to warrantless searches of government supervisors to an employee's workspace, the rationale applies in this instance equally. The primary consideration is whether the employee has a reasonable expectation of privacy in the area to be searched. As discussed prior, once Weiss substituted the cell phone in question for work-related duties, he surrendered the expectation of privacy he now attempts to invoke. His refusal to provide the requested information was in violation of the policy in question and had no constitutional protection.

The Union also relies on policy § 701.3 (that the forfeiture of privacy is specifically limited to any personal communication device (PCD) issued or funded by GBPD). The limitation expressed in this section clearly is intended to create a privacy expectation of one's personal information while excluding a privacy expectation for a work device. Weiss' usage of the device defines it in a way that is more controlling than who pays the bill. Furthermore, Weiss was disciplined under § 701.2, which states specifically in regard to and including personal PCDs, that "Any PCD used while on-duty, or used off-duty in any manner reasonably related to the business of the Department, will be subject to monitoring and inspection consistent with the standards set forth in this policy." To argue the implementation of *unius est exclusion alterius* specific to § 701.3 is to exclude and ignore the existence of § 701.2.

B. WAS THERE CAUSE TO TRANSFER?

Weiss contends there were procedural defects in the application of his rights under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Specifically, Weiss states while he was provided the opportunity to be heard regarding the initial elements of his discipline pursuant to *Loudermill*, GBPD subsequently rescinded some of the initial violations and added others, depriving Weiss of his *Loudermill* rights specific to the additionally specified violations of §§ 701.2, 701.5(e), and 1008.2.

The reliance Weiss puts on *Loudermill* is misplaced. In *Loudermill*, the court balanced competing interests specific to the discharge of a public employee. The weight accorded to

Loudermill varies depending on the severity of the disciplinary action taken. Subsequent cases have confirmed that a neutral pre-termination adjudicator is not required where there is also a post-termination administrative procedure. *Locurto v. Safir*, 264 F.3d 154 (2nd Cir. 2001); *Schacht v. Wisconsin Dept. of Corr.*, 175 F.3d 497 (7th Cir. 1999). In the present case, the arbitrator serves as the post-disciplinary administrative procedure and satisfies due process requirements under *Loudermill*, particularly given that the disciplinary action taken was short of discharge.

The actions of Weiss had the potential to cause serious harm to GBPD's goals of safeguarding the integrity of the investigation as well as maintaining the political balance of a challenging relationship with the school district and, ultimately, the community as a whole, including two alleged teenaged victims of a sex crime specifically. Given the sensitivity of the content being discussed, GBPD had a substantial interest in maintaining controlled dissemination of information. Weiss ignored this. Given the opportunity to cooperate in the investigation, Weiss did not and was in violation of GBPD policies in doing so.

While the Union downplays the severity of Weiss' actions by focusing on the extent of the information that was provided, it ignores the greater issue of respecting the political and legal aspects that are integrated in the release of sensitive information, elements that are reinforced by the language in the GERP login screen. By doing so, Weiss demonstrated a lack of discretion and placed doubt in GBPD's mind as to his ability to be trusted with confidential information. GBPD's failure to sustain the charge of conduct unbecoming is insufficient to lessen the severity of the actions Weiss did engage in. As such, cause existed under Section 3.5 of the CBA for the removal of Weiss from the position of detective and subsequent transfer.

Dated at Madison, Wisconsin, this 2nd day of July, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Arbitrator