

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
ASHWAUBENON PUBLIC SAFETY OFFICERS' ASSOCIATION
and
VILLAGE OF ASHWAUBENON

Case ID: 532.0002
Case Type: MA

(Jamie Zynda Grievance)

Award No. 7961

Appearances:

Aaron Halstead, Hawks Quindel S.C., Attorneys at Law, 409 E. Main Street, P.O. Box 2155, Madison, Wisconsin 53701, appearing on behalf of the Association.

Tony Wachewicz, Village Attorney, 2155 Holmgren Way, Ashwaubenon, Wisconsin 54304, appearing on behalf of the Employer.

ARBITRATION AWARD

The Ashwaubenon Public Safety Officers' Association, hereinafter referred to as the Association, and the Village of Ashwaubenon, hereinafter referred to as the Village or Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. The Association made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the above-captioned grievance. The undersigned was so designated. A hearing was held in Ashwaubenon, Wisconsin on January 27, 2020. The hearing was transcribed. On March 23, 2020, the parties filed briefs whereupon the record was closed. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUES

At the hearing, the parties stipulated to the following issues:

1. Whether the December 18, 2018 Letter of Direction issued to Officer Jamie Zynda was non-disciplinary, thus making the grievance non-arbitrable and therefore not subject to Wisconsin Statute § 111.70?

2. If the Letter of Direction is disciplinary, did the Village violate the collective bargaining agreement including any policy or practice related to conditions of employment and/or deviate from, misinterpret, or misapply a policy or practice relating to conditions of employment when it issued a December 18, 2018 letter to Officer Jamie Zynda and placed it in his personnel file?

PERTINENT CONTRACT PROVISION

The parties' 2014-19 collective bargaining agreement (hereinafter CBA) contained the following pertinent provision:

ARTICLE XXXV

GRIEVANCE PROCEDURE

Definition: A grievance is defined as any complaint by an employee involving interpretation, application or alleged violation of a specific provision of this Agreement, or where a policy or practice relating to wages, hours or conditions of employment is considered improper or unfair, or where there has been a deviation from or the misinterpretation of or misapplication of a policy or practice relating to wages, hours or conditions of employment.

Step 4. If the complaint is not satisfactorily resolved at Step 3, either party may request arbitration within fifteen (15) days after receipt of the decision at Step 3. . . .

BACKGROUND

Unlike virtually every municipality in the state of Wisconsin, the Village of Ashwaubenon operates a Public Safety Department. This department provides law enforcement, firefighting, and paramedic/EMT services to the community. The employees in the department are known as Public Safety Officers (PSOs). The Association represents the PSOs. Most of the PSOs work a "firefighter-type" work schedule, consisting of a 24-hour shift on and two 24-hour shifts off, rotating throughout the year. The PSOs who work 24-hour shifts are scheduled for road patrol for their first eight hours, where they perform traditional police functions. They spend their remaining 16 hours waiting for fire or paramedic/EMT calls for service.

For many years, the Fraternal Order of Police (FOP) lodge in the Green Bay area has sponsored a summer golf outing as a charitable fundraiser. FOP is an organization consisting of current or retired law enforcement officers. It is separate from the Ashwaubenon Public Safety Officers' Association. This golf outing is a big deal; hundreds of people participate and there are dozens of sponsors. Some of those who attend each year are PSOs and supervisors in the Ashwaubenon Public Safety Department (APSD). In addition to attending the event, the record shows that various APSD employees have been involved in planning and running that golf outing each year.

For at least the last ten years, APSD has committed Village resources to aid in the operation of this golf outing. Specifically, APSD has lent an on-duty Community Service Officer (CSO) to work at the event. Additionally, APSD has lent its all-terrain vehicle and accompanying trailer to be used at the event. This vehicle and accompanying trailer identify it as belonging to the APSD. FOP publicly thanked the APSD each year for their contributions and being an event participant.

FACTS

This case involves something that happened at the 2018 FOP golf outing at the Brown County Country Club. Specifically, it involves the conduct of Jamie Zynda at same. Zynda is a PSO in the APSD.

That year, like every year, multiple APSD PSOs and supervisors attended the golf outing. So did many FOP members from the Brown County area, their guests, and representatives of event sponsors. It was likely that those in attendance knew the identities and affiliations of the other attendees.

One of the foursomes that golfed that day consisted of APSD Lieutenants Neal Brown, Don Riha, Scott Schermilzler and PSO Zynda. Everyone in that foursome wore knee length jean shorts and a button up collared Hawaiian shirt. There was nothing on their clothing that identified any of them as being associated with APSD.

At some point while this group was golfing, Zynda modified his clothing. Specifically, he rolled up the bottom of his jean shorts so that they were no longer knee-length but were now substantially up his thigh. By doing that, the jean shorts were transformed from being knee-length into being very short jean shorts. He also rolled up his shirt into a halter top design which showed off his belly. Doing that showed off a lot of skin because, by his own admission, Zynda is a large man. While Zynda was not asked at the hearing why he modified his clothing, it can fairly be surmised that he did so for comedic affect. After Zynda had modified his clothing, an unidentified person took a picture of the foursome. In said picture, Zynda is clowning for the camera. That picture was later posted, for a while, on the FOP Facebook page. A caption identified the foursome as being a team from APSD.

On the final hole of the round, Zynda took off his jean shorts, revealing he was wearing a thong underneath. He then teed off in his thong. While Zynda was not asked at the hearing why he took off his shorts and teed off in his thong, it can again fairly be surmised that he did so for comedic affect. The members of his foursome were entertained by Zynda's attire (i.e. his thong) and laughed at same. According to Zynda, after he teed off, he put his shorts back on.

It is unknown if people other than the members of the foursome personally witnessed Zynda teeing off in his thong. Nonetheless, it was still memorialized via cell phone pictures and video taken by those present.

After the FOP golf outing ended, word of Zynda's attire on the last hole did not remain secret. Instead, not surprisingly, the word spread via the proverbial grapevine. As part of that process, the afore-mentioned pictures and video of Zynda wearing his thong made the rounds.

One of the people who received a picture of Zynda in his thong was APSD Lt. Luke Pasterski, who was on the golf outing planning committee. This picture was also shared with others in the APSD. One of the people in the department who received the picture of Zynda in his thong was Capt. Jody Crocker, whose job duties at the time included handling internal affairs and internal investigations. Crocker showed the picture to APSD Chief Dunning. When he did so, he quipped "your boys are making you proud again".

After Chief Dunning became aware of the existence of Zynda's thong picture, he did not conduct an inquiry into same, nor did he direct that any other supervisor in the department conduct one. As will be noted later, the reason he did neither of those things was because he did not think there was anything to investigate about Zynda's conduct at the golf outing.

Village Manager Allison Swanson also heard about Zynda's conduct at the golf outing. It disturbed her. Swanson has line authority over the APSD. She talked to Chief Dunning about her concerns over the matter and urged him to "look into it." While it is unclear what Dunning told Swanson when she gave him this directive, it is clear he did not act on it, meaning he did not conduct an inquiry himself or direct any other supervisor in the department to conduct one. The reason he did not act on Swanson's directive was because he did not think there was anything to investigate about Zynda's conduct at the golf outing, or that Zynda had violated any policy by his actions. Swanson disagreed.

While this disagreement between Dunning and Swanson over whether the Zynda golf outing matter warranted an investigation could have been looked at in a vacuum, that is not how Swanson saw it. From her perspective, this disagreement was part of something bigger, to wit: tension between her and Chief Dunning over how APSD was run. Swanson wanted the Employer's rules and policies enforced and followed consistently across the board, and she did not think Dunning was doing that. Additionally, it disturbed Swanson that the APSD supervisors had condoned Zynda's conduct at the FOP golf outing.

Swanson then retained Green Bay attorney Geoffrey Lacy and directed him to conduct an outside investigation into Zynda's conduct at the FOP golf outing. Swanson then recused herself from Lacy's investigation.

Lacy, who has no connection to the APSD, subsequently conducted an investigation into Zynda's conduct at the golf outing. In doing so, he interviewed Zynda, the four lieutenants who have already been referenced above, and Chief Dunning. Afterwards, he wrote a Report and submitted it to the Village. His Report contained, among other things, an "Executive Summary", "Conclusions" and "Recommendations". Those sections of his Report are reproduced below:

Executive Summary

During the investigation, I reviewed photos (although no one provided a photo of Officer Zynda in a thong or a video, just descriptions of them), and spoke with those in attendance, including Officer Zynda.

During the course of my discussions, it became clear that all officers interviewed did not view Officer Zynda's conduct as anything significant or anything to be concerned about, and all of them initially asserted that the off-duty nature and private nature of the event indicated that this was not job related. I felt these characterizations to be genuine. Officer Zynda did not have any intent to harass, make uncomfortable, or otherwise infringe on the rights of others, but was rather simply having fun. This is not the first time he has engaged in similar activity at other events. There is no evidence that he has been regarded as anything other than entirely appropriate and professional while on duty.

Conclusions

a. Erroneous Distinction Between On-Duty and Off-Duty Conduct: The FOP golf outing, although attended while off-duty, organized by an independent entity (the FOP), and not expressly identifying the team as the Ashwaubenon Public Safety Team—is nonetheless reasonably treated as an extension of the workplace. The event is for law enforcement and financial supporters, public safety personnel are involved in coordinating it, and persons in attendance know who the identities and affiliations of other attendees. (sic)

In addition, the fact that photos were posted on Facebook, disseminated electronically to others not in the foursome, and

shown in the Public Safety offices, eliminates any suggestion that this involves strictly off duty, private conduct.

As such, the Department had both a duty and a right to investigate and correct behavior, if required. In fact, the Department has done so in the past with conduct engaged in during off duty events.

b. Officer Zynda: his behavior was unusual, but not per se unlawful or prohibited by policy. He was wearing a thong without shorts on the course for a short period, which he acknowledged. He was not aware of and did not take a video, but one does exist. Officer Zynda was with three supervisors, has engaged in similar behavior in the past and had every reason to believe that the Department took a strict off duty conduct view, provided no unlawful activity occurred.

Recommendation as to Officer Zynda

Provide a non-disciplinary Letter of Direction or Counseling Letter reminding him that he represents the Department not only when on duty, but also when engaging in events or in the community such that he is identified with the Department and as Law Enforcement generally. To be aware that things are not necessarily private and that instead things are inherently subject to public display and publicity. This is not a criticism or an expectation with respect to a particular manner of dress, but rather, a reminder that intentionally provocative, particularly sexually provocative behavior, such as golfing while wearing nothing but a thong (at least as to pants) reasonably appears to be intended to be sexually provocative whether done by a man or a woman.

The Department's ability to retain and command respect and authority when engaged in policing activities particularly is critical to both their success and safety. Conduct attributed to officers that may tend to impair that credibility harms that mission. In the future, the expectation is that he will consider whether a course of conduct, if publicly viewed, has the capacity to harm the reputation, image, or credibility of the Department and to act accordingly.

For the Supervisors present (Schermilzler, Riha, Brown and Pasterski) – a letter of direction/counseling reminding them of the same as Officer Zynda, and also explaining that a clear off duty/on

duty delineation does not exist. They have a responsibility to counsel a subordinate whose actions carry a significant potential to damage the reputation, image, or credibility of the Department or its officers, as well as to counsel a subordinate not to disseminate or to facilitate dissemination of material that may do the same. Likewise, they have an obligation not to participate in disseminating or encouraging such behavior.

For the Chief – when information is brought to the Chief’s attention in a way that suggests one of his officers may be engaged in conduct that is of management interest, the Chief has a duty to investigate it or to assure that it is investigated. This does not mean corrective action necessarily would have resulted from an investigation, but simply ignoring it and deciding to just “stay out of it” is inappropriate. The Chief’s failure to investigate or to direct an investigation, notwithstanding notice of some concern regarding Officer conduct, is inconsistent with prior efforts to manage off-duty conduct, and, does itself expose the Department to additional liability, had such conduct, been for example, a violation of sexual harassment policies, yet no investigation or corrective action had been taken. This should be addressed in the PIP reference in the K9 investigation.

After Lacy’s report was submitted to the Village, it adopted his recommendations and letters of direction were issued to Zynda and the four lieutenants in mid-December 2018. The wording of all the letters was essentially identical. The letters to the lieutenants were signed by Swanson and the letter to Zynda was signed by Dunning. After the letters were issued to those five employees, everyone in the APSD (both line officers and supervisors) underwent harassment training.

Zynda’s letter provided in pertinent part:

Re: Investigation into the FOP Outing

Summary of Investigation

The Village has initiated an investigation into conduct occurring at the Fraternal Order of Police (FOP) golf outing held on August 3, 2018. The investigation was conducted by outside counsel for the Village because the potential policy violations involved multiple members of department management and may elicit concern over the department’s overall enforcement of the anti-harassment policy of the Village. The Village determined a neutral, objective third

party would best ensure an independent review of the facts and circumstances surrounding this event.

The investigation has discerned the following information. You golfed in a foursome with Lieutenants Schermitzler, Riha and Brown at the FOP golf outing. This foursome, although not expressly an Ashwaubenon Public Safety team, was recognized and labeled in photos as representing Ashwaubenon Public Safety. The event is for police officers as well as law enforcement vendors and sponsors. It is an invitational event and while not directly sponsored by Ashwaubenon Public Safety, APS is recognized for its support of the event on the event's internet page for contributions to the event. In addition, Lt. Luke Pasterski is on the FOP golf outing board and assisted in organizing the event.

At the FOP golf outing, you dressed in very tight, short shorts and a Hawaiian style shirt that was rolled into a halter top design. While golfing, you removed your shorts and golfed for at least some period of time wearing only a thong and halter top design of your shirt. This was photographed and videoed by attendees. Several photos of the foursome were posted on social media accounts and shown to various members of the Department during the workday by others (not you).

You did not feel your dress or actions were inappropriate. Each officer concluded this was harmless off duty fun.

Policy Directives

You shall fully review the Village's Anti-Harassment Policy and dress code for the Village and the Department of Public Safety. You are further reminded that you represent the department on and off duty, particularly in community events where you are specifically identified as an Ashwaubenon Public Safety Officer. While an event may seem somewhat private, activities in public spaces are subject to public display and publicity. Dress that is intentionally provocative, particularly sexually provocative in nature, such as golfing with nothing but a thong, reasonably appears to be intended to be sexually provocative whether done by a man or woman. This is materially different than wearing a dress, for example to a holiday party, which may be intended to provoke a response, but not necessarily sexually provocative.

The Department has the right to retain and command respect and authority when engaged in policing activities. The conduct of

officers whether on or off-duty that may impair that credibility is harmful to the success of the department and to individual officers.

In the future, you should consider whether your actions or dress, if viewed publicly, has the capacity to harm the reputation, image or credibility of Ashwaubenon Public Safety, yourself, or others as an officer of the department. Any actions harmful to this mission may be subject to discipline.

About a month later, there was a promotional opportunity in the department for the rank of lieutenant. Zynda applied for the promotion and was allowed to participate in the lieutenant promotional process. The record indicates that being formally disciplined within the prior year disqualifies an employee from promotional consideration. Dunning testified that if the letter of direction issued to Zynda was disciplinary in nature, then Zynda would have been excluded from participating in the promotional process.

The Association subsequently grieved Zynda's letter of direction, contending it was unwarranted discipline. The grievance was appealed to arbitration per the parties' CBA.

DISCUSSION

Issue No. 1

The first stipulated issue raises two separate matters and combines them into one issue. I'm going to address them separately. The first matter is whether Zynda's letter of direction constitutes discipline. The second matter is whether the grievance is arbitrable. I'll address those matters in inverse order.

As just noted, I'm first going to address whether the grievance is arbitrable. Based on the following rationale, I find it is. Some arbitration provisions specify that only certain types of disciplinary actions can be appealed to arbitration, such as suspensions and discharges. When these types of arbitration provisions exist, it means that discipline less than a suspension (i.e. say, a written warning) cannot be appealed to arbitration and thus is non-arbitrable. That is not the situation here. In Article XXXV of the CBA, a grievance is defined thus:

Definition: a grievance is defined as any complaint by an employee involving interpretation, application or alleged violation of a specific provision of this Agreement, or where a policy or practice relating to wages, hours or conditions of employment is considered improper or unfair, or where there has been a deviation from or the misinterpretation of or misapplication of a policy or practice to wages, hours or conditions of employment.

That is very broad language. I find it is broad enough to apply to a letter that does not use the term "written warning", and thus is less than a written warning, but yet, the employee alleges

still constitutes discipline. That of course is the situation here. Having found that the matter complained of here constitutes a “grievance” within the meaning of the contractual grievance procedure, the next question is whether such a grievance, once filed and processed through the grievance procedure, can be appealed to grievance arbitration. For the purpose of context, it is noted that there are some arbitration provisions that have a broad definition of a grievance, but then substantially narrow what can be appealed to arbitration. For example, there are arbitration provisions that allow all sorts of disciplinary actions to be grieved, but then specify that only suspensions and discharges can be appealed to arbitration. The reason this example is cited, of course, is because the arbitration provision in this CBA is not that narrow. To the contrary, it is very broad, and says that “if the complaint is not satisfactorily resolved at Step 3”, the matter can be appealed to arbitration. Application of this broad arbitration provision to the instant grievance results in a finding that the matter involved here is arbitrable.

The focus now turns to the other matter referenced in the first issue: whether the letter given to Zynda constituted discipline. Usually, when an employee gets disciplined, there is no question that they got disciplined. Some obvious examples are when an employee gets a written warning, a suspension, or gets fired. All are part of the standard progressive disciplinary sequence used by many employers. Here, though, there is a question whether the letter given to Zynda constitutes formal discipline. The Association contends it was, while the Employer disputes that assertion.

Before I answer that question though, the following context is pertinent. The letter given to Zynda does not specify what the discipline was. While the letter takes Zynda to the proverbial woodshed for wearing the thong at the FOP golf outing, it does not say that he is getting a particular discipline as a result. For example, it was noted above that one type of discipline that is less than a suspension is a written warning. Zynda’s letter does not use that term anywhere in its contents. That means that Zynda’s letter is not even a written warning. Therefore, it is something that is less than that. The caption on the letter is not dispositive either, because all it says is “Investigation into the FOP Outing”. When the parties stipulated to the issues to be decided here, they called the letter in question a “letter of direction.” That was the phrase that Lacy used in his Report as his recommendation for Zynda and the lieutenants. However, the phrase “letter of direction” is not found anywhere in the letter itself. Be that as it may, since that is what the parties called the letter in the stipulated issues, I will use that same terminology.

Having given that context, the focus now turns to a review of the letter itself. As already noted, the letter criticized what Zynda did at the golf outing, and then gives him some job instructions to follow going forward. I’ll address those parts separately. With regard to the first part (i.e. the criticism), it is noted that being criticized by anyone – let alone one’s employer – is an uncomfortable and unpleasant experience. That said, it happens every day and, as such, is part of daily living. With regard to the second part (i.e. the job instructions), they also are a common workplace occurrence. While job instructions are often given verbally, they don’t have to be. Sometimes they are given in writing (as happened here).

Having reviewed the letter itself, the final question is whether Zynda’s letter of direction constituted discipline. I find it did not because of these unique facts. Shortly after the letter was

issued to Zynda, a promotional opportunity arose in the department. I'm referring, of course, to the lieutenant promotional opportunity. Zynda was allowed to participate in that promotional process. That is noteworthy because the record shows that employees who have received formal discipline in the last year are not allowed to participate in the promotional process. Since the Employer allowed Zynda to participate in that promotional process, that establishes that the Employer did not consider Zynda's letter of direction to be formal discipline. If the Employer had considered that letter to be formal discipline, Zynda would not have been allowed to participate in that process. Since he was allowed to participate though, that undercuts the Association's claim that the letter of direction constituted formal discipline. I therefore find that the letter in question did not constitute formal discipline.

Issue No. 2

Although I just found that the letter in question did not constitute formal discipline, in this section it is assumed for the purpose of discussion that the letter was formal discipline. Building on that premise, the question to be answered is whether the Employer's issuance of that letter to Zynda violated the CBA, or any policy or practice. Based on the following rationale, I answer that question in the negative, meaning I find its issuance did not violate the CBA, or deviate from, misinterpret or misapply any policy or practice.

As already noted, this case involves Zynda's conduct at a FOP golf outing. The Employer contends that what he did there was inappropriate.

Before I delve into that, I'm first going to address the fact that Zynda was off duty at the time he was at the golf outing. That's important, of course, because there is a difference between police officers (or, in this case PSOs) engaging in off-duty misconduct as opposed to on-duty misconduct. Here's why. When an employee commits misconduct while on duty, its nexus to the workplace is usually considered obvious. In contrast, when the employee commits misconduct while off-duty, the nexus to the workplace is less obvious. Because of that, the Employer has to show that a nexus exists between the employee's off-duty conduct and the Employer's legitimate business interests. Knowing that, the Association makes a variety of arguments aimed at trying to separate Zynda's conduct at the golf outing from his job with the Village as a PSO. Specifically, the Association notes that Zynda was not working at the time, was away from his workplace, and was at the golf outing for an event "in his capacity as a volunteer member of a charitable organization (FOP) that is unaffiliated" with the APSD and the Village. Building on the foregoing, the Association maintains that Zynda "was not serving, representing or in any way acting in his capacity as a Village PSO." In his Report, Investigator Lacy found otherwise and concluded that the golf outing in question "likely qualifies as an extension of the workplace." The undersigned concurs with Lacy's finding, except that I drop the hedge word "likely" from the beginning of that quote. My rationale follows. First, this golf outing was a law enforcement outing; most of those present were members of area law enforcement or their invited guests. Because of that, it is likely that those in attendance knew the identities and affiliations of the other attendees. Second, an APSD Community Services Officer (CSO) was assigned to work at the golf outing. Third, the APSD provided an all-terrain vehicle for the event that was operated by the CSO. That vehicle was identified as an APSD vehicle. Fourth, the record shows that these

financial contributions by the APSD and the Village to the annual FOP golf outing had been ongoing for the last ten years. When these factors are considered collectively, they outweigh the Association's claim that the golf outing at issue here involved strictly off-duty, private conduct.

Aside from the foregoing, there is another reason why this particular social gathering was considered an extension of the workplace. That reason, which is determinative, is this. The Employer has an anti-harassment policy in its Personnel and Policy manual. While that policy obviously proscribes harassing conduct from occurring in the workplace, it also applies to certain social gatherings that employees attend while they are off-duty and away from the work site that the Employer has deemed to be an "extension of the workplace." In this case, I don't need to make my own determination whether a golf outing qualifies as one of the social gatherings covered by the phrase "extension of the workplace" within the meaning of that policy. That is because the policy specifies which off duty and off site "social gatherings" are covered. One of the social gatherings specifically named is "golf outings". That being so, APSD employees were on notice that the annual FOP golfing outing was an off-site social gathering that was deemed by the Employer to be an "extension of the workplace". That, in turn, means that APSD employees are to comply with the Employer's anti-harassment policy while at the FOP golf outing.

The focus now turns to what Zynda did at the golf outing. On the last hole, Zynda took off his jean shorts. He was wearing a thong underneath. He then teed off. After doing that, he put his jean shorts back on. Although Zynda admitted to the foregoing conduct, he had no choice but to make that admission since pictures and a video of it exist. Not surprisingly, news of Zynda's attire at the golf outing made the proverbial rounds. The pictures and video were first seen, disseminated and discussed by the attendees at the golf outing. After that, the pictures and video made their way back to both the APSD and Village Hall where they were also seen, disseminated and discussed.

Ultimately, there were different reactions by different people to Zynda's thong at the golf outing. The following shows this. The three members of the foursome that saw Zynda wearing the thong first-hand (i.e. the three lieutenants) thought it was hilarious light-hearted fun. They were not offended by what Zynda had done and did not consider it inappropriate. When Chief Dunning heard what Zynda had done, he concurred with the lieutenants that Zynda had not done anything wrong. Building on that premise, Dunning decided not to conduct an inquiry into the matter himself, nor did he direct any other department supervisor to conduct one. After Village Manager Swanson concluded there was not going to be an internal department investigation into the matter, she ordered an external investigation. The outside investigator disagreed with the APSD supervisors' viewpoint and recommended that Zynda and the lieutenants get a letter of direction or counseling. The Village Manager ultimately adopted his recommendation and such a letter was issued to Zynda and the lieutenants. Only the letter to Zynda is before me.

As previously noted, I'm persuaded that Zynda stripped down to his thong for comedic affect. He thought it was funny. While his opinion was shared by the others in his foursome, that was not the viewpoint of the Village Manager. She thought that what Zynda had done was problematic because it had the potential to harm the Department's reputation, image and credibility. For the reasons expounded on below, I concur with her, and find that Zynda's thong

stunt was, in a word, inappropriate. Simply put, it should not have occurred at this particular outing because it was an extension of the workplace.

As Village Manager, it's Swanson's job to see the proverbial big picture. As such, she was certainly aware that harassment does not have to be reported by a victim or complained about by somebody who saw it. She knew that a third party can be offended by the behavior of willing participants. Here, she was the complainant, because she was offended by Zynda's actions at the golf outing. As Village Manager, she's also aware that the Village is responsible for its own acts and for those of its agents, regardless of whether those acts were authorized or even forbidden. She's further aware that the Village has to maintain a harassment free workplace that encourages the reporting and investigating of such behavior. She's further aware that the Village is responsible for harassment between co-workers and needs to take action to stop it when it becomes aware of same. She's further aware that failure to take action exposes the Village to liability in the event of future related harassing behavior. In contrast, the APSD supervisors must not have known the foregoing, because they condoned Zynda's conduct. That was ill-advised for the reasons just noted.

Aside from the foregoing, there is this additional reason why Zynda's conduct was problematic. The physical act of taking off one's pants to display their underwear, especially when it is a thong, is sexual in nature. That's because a thong is a sexually suggestive article of clothing. Zynda knew that, of course, and that is why he put his pants back on after he teed off. Rhetorically speaking, why didn't he golf the entire round in his thong? By putting his pants back on after he teed off, that demonstrated that Zynda knew it was inappropriate to tee off in a thong at a FOP golf outing. The fact that Zynda was sans pants for just a short time period does not mitigate his conduct. Nor does the fact the Zynda still had his collared shirt on after he took off his pants. It was not okay for Zynda to wear a thong because he accompanied it with a collared shirt.

The focus now turns to the part of the letter which referenced the Employer's anti-harassment policy and the dress code policy. Earlier in my discussion I addressed the anti-harassment policy and its application to golf outings. As for the dress code policy, there is nothing therein that explicitly prohibits the wearing of thongs at events that are an extension of the workplace. Be that as it may, it is not much of a stretch to say that thongs are implicitly prohibited at such events because the policy prohibits other attire that is similar to a thong. While the letter did not say he violated those two policies, it insinuated it. According to the Association, the Employer could not do that, but instead had to make a specific finding that Zynda violated those policies before it could issue a letter of direction. I find otherwise. When an employee does something that the Employer does not want repeated, it can say that to the employee. In doing that, the Employer does not have to say that the employee violated a specific rule or policy or make a finding to that effect. Instead, it can insinuate it. That gets the point across to the employee of "don't do it again." Here, the Employer's letter counseled Zynda about certain behavior it did not want repeated (i.e. teeing off in a thong at a FOP golf outing). The Employer could do that. Prior to the issuance of the letter, Zynda thought it was acceptable for him to tee off in a thong at a FOP golf outing. He now knows otherwise.

Accordingly, I find the Employer had a reasonable and justifiable basis to issue the letter of direction. The letter therefore passes muster with the undersigned.

In light of the above, it is my

AWARD

Regarding Issue No. 1:

The grievance is arbitrable; and

The letter of direction issued to Officer Jamie Zynda did not constitute formal discipline.

Regarding Issue No. 2:

Even if the letter of direction issued to Zynda constituted formal discipline, the Village did not violate the CBA, or deviate from, misinterpret or misapply any policy or practice relating to conditions of employment when it issued that letter to Zynda and placed it in his personnel file. Therefore, the grievance is denied.

Issued at Madison, Wisconsin, this 7th day of May, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in blue ink, appearing to read "Raleigh Jones", is positioned above a horizontal line.

Raleigh Jones, Arbitrator