No. 83-

IN THE

Supreme Court of the United States

October Term, 1983

GARY McDONALD,

Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELIAS, CITY ATTORNEY; UNITED STEEL WORKERS OF AMERICA, DISTRICT 29

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I.

SHOULD UNAPPEALED ARBITRATION AWARDS — AS DISTINGUISHED FROM STATE COURT DECISIONS — BE GIVEN PRECLUSIVE EFFECT IN CASES BROUGHT UNDER 42 U.S.C. § 1983?

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The Respondents, City of West Branch, Michigan; Paul Longstreet, Chief of Police; Bernard C. Olson, City Manager; Charles W. Jennings, City Attorney; Demetre J. Elias, City Attorney; and United Steel Workers of America, District 29, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the order of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

PETITIONER'S ARGUMENT IS WITHOUT MERIT BECAUSE PETITIONER'S PROPOSED INTERPRETATION OF 28 U.S.C. § 1738 and 42 U.S.C. § 1983 CONTRAVENE BOTH PUBLIC POLICY AND THE LEGISLATIVE INTENT OF CONGRESS TO PRECLUDE JUDICIAL REVIEW ABSENT ABUSE OF PROCESS.

This Court in *Allen* v. *McCurry*, 499 U.S. 90, 101 S. Ct. 411 (1980), held that the preclusion rule emanating from the full faith and credit clause of the United States Constitution, U. S. Const. art IV, § 1, applies to § 1983 litigation.

The implementing legislation, § 1738, applies to both federal and state courts. Preclusion effect will be withheld from state court decisions only in the event the state court has evidenced an unwillingness or inability to protect the claimant's federal rights. This allows redress in the event of inferior state remedies.

The *Allen* court acknowledged the competing considerations arising out of a strong congressional concern that the state courts were not sufficiently dedicated to the protection of federal rights and a congressional desire to allow wronged parties a *de novo* trial. However, it indicated that in order for § 1983 to override the doctrine of preclusion advanced in § 1738, there must be "some affirmative showing" of a "clear and manifest" intent to override § 1738.

This court specifically rejected the ". . . generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court . . ." *Supra* at 101 S. Ct. 419.

The thrust of petitioner's argument is that unappealed arbitration awards may not be given preclusive effect since they are not *state court decisions*. It ignores, however, the language within § 1738 which requires ". . . federal courts to give preclusion effect to state court judgments whenever the courts of the state from which the judgments emerge would do so". *Id.* at 101 S. Ct. 415.

Michigan courts give preclusive effect to labor arbitration awards; and they may not be impeached even if there are erroneous findings of fact, erroneous rulings, or errors of law for the reason that the contractual element is present in the award. An error of law will render the award void only if it requires the parties to do an illegal act or violate a positive mandate of the law. *Fraser* v. *Ford Motor Co.*, 364 Mich. 648; 112 N.W.2d 80 (1961).

The underlying rationale for this holding is that the parties agreed to resolve their disputes by arbitration and they specifically agreed to be bound by the decision. Absent fraud or mistake, a claimant cannot reject the scope of the agreement. *Stowe* v. *Mutual Home Builders Corp.*, 252 Mich. 492; 233 N.W. 391 (1930).

In Michigan, the petitioner could have proceeded to have the arbitration award vacated. He chose not to do so. In the absence of pursuing his appellate remedy, the arbitration award becomes final and not subject to collateral attack. The arbitrator has effected the contractual intent of the parties.

The order of the Sixth Circuit Court of Appeals filed April 19, 1983, evidenced proper review of this case applying the preclusion doctrine. The judges reviewed the case in its entirety and all concluded that the petitioner's § 1983 suit was an attempt to relitigate the reason for his dismissal and vacate the arbitration award.

The only remaining question is whether or not claimant suffered an abuse of process. The Sixth Circuit found there was none.

Having concluded that the First Amendment issue was a subterfuge to retry the arbitration, the appellate court had no authority, absent abuse of process, to withhold preclusion effect to the arbitration finding. It must give the same preclusion effect to the arbitration award that the courts of the state from which it emerged would. The facts litigated at trial were identical to the facts which were, or could have been, litigated at arbitration.

The public policy argument for the federal courts absenting themselves from cases where there are recognizable arbitration standards subject to judicially supervised constitutional limits is compelling. Allowing collateral attack on arbitration decisions in which the state has a compelling interest is not consistent with the legislative intent of Congress and interferes in the legitimate areas of state responsibility.

Petitioner, in attempting to support his argument that preclusion effect may not be given to arbitration awards, relies heavily on this Court's language in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461; 102 S. Ct. 1883; *reh. denied*, 103 S. Ct. 20 (1982).

Interestingly enough, however, *Kremer* holds that a federal district court is required under § 1738 to give preclusion effect to a state court decision upholding an

administrative agency's rejection of an employment discrimination claim. Additionally, petitioner is precluded from litigating the same grievance in a federal court when under the laws of the state of New York petitioner could not raise the same grievance in the courts of New York.

Thus, § 1738 prevails and the historic respect of the federal court for state court judgments remains intact.

Petitioner argues that this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36; 94 S. Ct. 1011; 37 L. Ed.2d 147 (1974) should control in this case alluding to the language that any private arbitrator's decision which purports to resolve a Title VII complaint will not bar subsequent suit in federal court. Respondents disagree.

The petition for writ of certiorari was granted in *Gardner-Denver*, a Title VII case, to discuss the weight, if any, to be given to overlapping decisions that one forum must give to a determination in another. Title VII cases are unique in that a claimant has at least four forums in which to process his claim. The claimant may look to the state for relief via a state administrative agency, a state court, EEOC, and, finally, a federal court.

The decision spoke to the merits of the doctrine of preclusion as applied to administrative and arbitration hearings while recognizing that the ultimate responsibility for the protection of a claimant's federal rights rests in the federal courts.

Indeed, this Court indicated that where a competent arbitrator presides over a hearing in a procedurally fair manner and develops an adequate record regarding discrimination, the arbitration findings are accorded great weight. *Id.* at 415 U.S. 60, n. 21.

If the arbitration award is subject to judicial review and the state courts may apply *res judicata* and collateral estoppel principles, it takes no great leap of logic to assume that an arbitration decision could deserve preclusive effect.

What the court said in *Alexander* v. *Gardner-Denver Co.*, *supra*, regarding arbitration is that the federal policy which favors arbitration may not be interpreted to mean that an arbitrator's resolution of a contractual claim disposes of a statutory claim under Title VII. *Id.* at 1019, n. 6. It concluded that federal policy in favor of arbitration and against discriminatory practices can best be accomplished by allowing the employee to pursue both the grievance procedure and his cause of action under Title VII.

The *Gardner-Denver* court also spoke to the election of remedies problem acknowledging that unless the Title VII federal enforcement proceedings mesh with the state proceedings there will be an incentive by the claimant to abandon state proceedings and concentrate on the federal remedy. This would appear to fly in the face of the concept that Title VII is designed to supplement, rather than supplant, existing laws and institutions of the state to protect against employment discrimination. *Supra* at 415 U.S. 48-49.

Respondents submit that no such issues entered into this case.

The arbitration dealt with whether or not the City of West Branch had "just cause" to fire petitioner. The arbitrator, after a "judicial type" hearing said it did on the basis of the "Dack incident". No constitutional issues were raised either before or at arbitration. Petitioner instituted his First Amendment suit after the arbitrator's decision was adverse to him.

In his federal suit, he complained that his discharge as a police officer was in retaliation for expressing his First Amendment rights to freedom of speech and assembly as well as a claim that the discharge procedure denied him due process under the 14th Amendment.

The arbitration proceeding was not used by petitioner for resolving his civil rights claim.

A review of the special interrogatory form reveals that the jury found that petitioner was discharged from his position as police chief in retaliation for, or to suppress, his union activity, whereas, the arbitrator found the petitioner was discharged for the "Dack incident".

The identical issue was raised in both forums. Under the doctrine of *res judicata* and collateral estoppel, the jury should have been foreclosed from passing on this issue. Since they found there were no due process violations, a judgment notwithstanding the verdict should have been entered by the trial court.

On review, the Sixth Circuit Court of Appeals applied the doctrine of preclusion and, having found no evidence of an unwillingness or inability on the part of the state to protect the claimant's federal rights, reversed the judgment of the lower court as to the defendant Longstreet.

This suit is not unlike *Smith* v. *Dawes*, 614 F.2d 1069 (5th Cir. 1980), wherein the plaintiff-employee appealed the district court grant of a summary judgment dismissing her suit for wrongful discharge.

In *Smith*, the bargaining agreement had a clause for binding arbitration. A hearing was held, and the arbitrator ruled that under the applicable regulations, the plaintiff's discharge was for just cause. Plaintiff then

brought a suit on a breach of the bargaining contract, 39 U.S.C. § 1208 (b), contending that her discharge for the reasons given by the arbitrator was in breach of the collective bargaining agreement. She asked the court to determine whether the arbitrator's decision was so erroneous that it was arbitrary and capricious. The appellate court, in affirming the judgment of the lower court, said:

> "Having availed herself of the grievance procedures of the collective bargaining contract, the plaintiff-employee is likewise subject to the contract provision that the arbitrator's decision is final and binding." *Supra* at 1073.

In footnoting its opinion, the court stated that it did not interpret the lower court's reasoning in granting its summary judgment as holding it had no jurisdiction to entertain a litigation, but that its essential holding was that there was no genuine issue of law or fact because the arbitrator's decision was final and binding. *Id.* at 1070.

This case, being devoid of a constitutional rights issue in the first instance, is subject to the mandate of 28 U.S.C. § 1738.

II.

THERE IS NO CONFLICT OF DECISIONS ON THE ISSUE PRESENTED IN THE PETITION.

Petitioner seeks a grant of writ of certiorari on the grounds that the decision in this matter is in conflict with four courts of appeals which have decided that state administrative determinations — and a fortiorari arbitration award — should not be given preclusive effect.

The cases cited by petitioner for the proposition all deal with civil rights issues raised in the initial grievance in a § 1983 action or are cases brought under other reconstruction civil rights acts.

Kremer, supra, was an employment discrimination claim heard before an administrative agency.

Moore v. *Bonner,* 695 F.2d 799 (4th Cir. 1982) was a civil rights action brought by a teacher as a result of defendant's decision not to renew her contract.

James v. *Board of Education,* 461 F.2d 566 (2d Cir.) *cert. den.,* 409 U.S. 1042 (1972), was a complaint under § 1983 alleging violation of the plaintiff's civil right to wear a black armband in class.

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. *New Jersey State Board of Higher Education,* 654 F.2d 868 (3d Cir. 1981) involved a federal suit by non-parties to a state enforcement proceeding advancing independent constitutional rights.

In *Patsy* v. *Florida International University,* 634 F.2d 900 (5th Cir.) (en banc), *rev'd on other grounds;* 102 S. Ct. 2557 (1982), the suit was in the nature of a civil rights action brought by the employee, Patsy, against the University alleging sex and racial discrimination.

Interestingly enough, in *Patsy,* the appellate court held that the civil rights suit may be dismissed for failure to exhaust administrative remedies before the § 1983 action is brought in federal court, absent the traditional exceptions to general exhaustion of remedies rule. Citing *McKart* v. *United States,* 395 U.S. 185; 89 S. Ct. 1657; 23 L. Ed.2d 194 (1969).

None of these cases deal with an administrative decision or an arbitration award in a non-civil rights case.

A valid and final arbitration award has the same effect for purposes of claim preclusion as a court judgment. Restatement of the Law of Judgments, 2d, § 84 (1).

The Restatement of the Law of Judgments, 2d, § 27, states that:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

This preclusion applies not only to an opposing party but also applies to any other person unless there is evidence that the litigant lacked a full and fair opportunity to litigate the issue in the first action, or he presents circumstances which justify him an opportunity to relitigate the issue. Restatement of the Law of Judgments, 2d, § 29.

In summary, it is apparent that the alleged conflict presented by petitioner is, at best, illusory.

In order to create a conflict, the petitioner has relied exclusively on the federal courts' interpretation of the preclusion doctrine as it relates to Title VII cases.

All of the cases cited by the petitioner have at their very foundation a federal right which was proclaimed by the asserting party in the first instance. Thus, this case is factually distinguishable from the cases cited.

There is no public policy reason or documented congressional intent to override § 1738 by enactment of § 1983. Rather, *Allen* v. *McCurry*, *supra*, suggests that the courts and Congress wish to defer to state court authority whenever such deference does not undermine procedural fairness.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 1, 1983

No. 83-219

In the Supreme Court of the United States

October Term, 1983

GARY McDONALD,
Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,
Respondents.

ON WRIT OF CERTIORARI TO THE
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FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed August 11, 1983.
Certiorari Granted October 3, 1983.

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No. 83-219

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 21, 1979—Plaintiff McDonald's complaint filed in the United States District Court for the Eastern District of Michigan, Northern Division.

December 12, 1979—Answer of Defendant United Steelworkers of America filed.

December 18, 1979—Answer of remaining defendants filed.

December 4, 1980—Memorandum Opinion and Order Granting Defendant United Steelworkers' Motion To Dismiss filed.

February 27, 1981—Jury Impanelled.

March 9, 1981—Trial begins.

March 14, 1981—Trial ends. Special Interrogatory Forms as to Defendants Paul Longstreet, Charles Jennings, Demetre Ellias, City of West Branch, and Bernard Olson, filed.

March 23, 1981—Judgment entered that, as to Defendants City of West Branch, Bernard Olson, Charles Jennings and Demetre Ellias, the Plaintiff take nothing and the action be dismissed on the merits; and that, as to Defendant Paul Longstreet, the Plaintiff recover the sum of $4,000.00 in compensatory damages and $4,000.00 in punitive damages with interest thereon, each party to bear his own costs of the action.

March 31, 1981—Defendant Paul Longstreet's Motion For Judgment Notwithstanding The Verdict filed.

April 6, 1981—Plaintiff's Motion For Judgment Notwithstanding The Verdict filed.

May 28, 1981—Memorandum Opinion and Order Denying Both Motions For Judgment Notwithstanding The Verdict filed.

June 23, 1981—Order Extending Time For Filing Notice Of Appeal filed.

June 26, 1981—Plaintiff's Notice Of Appeal filed.

July 10, 1981—Defendant Longstreet's Notice Of Cross-Appeal filed.

April 16, 1983—Opinion and Order of The Court Of Appeals For The Sixth Circuit filed.

May 16, 1983—Order of The Court Of Appeals For The Sixth Circuit Denying Rehearing filed.

August 11, 1983—Plaintiff's Petition For Writ Of Certiorari filed.

October 3, 1983—Order Granting Plaintiff's Petition For Writ Of Certiorari filed.

PLAINTIFF'S COMPLAINT FILED NOVEMBER 21, 1979

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No: 79-10281

Gary McDonald,
Plaintiff,

vs.

City of West Branch, a municipal corporation; Paul Longstreet, as Chief of Police, West Branch; Bernard C. Olson, as City Manager, West Branch; Charles W. Jennings, as City Attorney, West Branch; Demetre J. Ellias, as City Attorney, West Branch; United Steelworkers of America, District 29, an unincorporated association;
Defendants.

COMPLAINT
DEMAND FOR JURY TRIAL

Now comes Gary McDonald and for his Complaint alleges as follows:

1. Plaintiff is a resident of the City of West Branch, Michigan.

2. Defendant City of West Branch is a municipal corporation duly organized and existing under and by virtue of the laws of the state of Michigan, and is situated in the County of Ogemaw.

3. Defendant Paul Longstreet was and is the duly appointed and acting Chief of Police of the City of West Branch, Michigan, at all times mentioned herein.

4. Defendant Bernard C. Olson was and is the duly appointed and acting City Manager of the City of West Branch, Michigan, at all times mentioned herein.

5. Defendants Charles W. Jennings and Demetre J. Ellias are and were the duly appointed and acting City Attorneys for the City of West Branch, Michigan, at all times mentioned herein.

6. Defendant United Steelworkers of America, District 29, is an unincorporated association of working men, during all times mentioned herein, and was the union representative of plaintiff and two other officers of Local 7935, City of West Branch, Police Officers Union.

7. This Court has jurisdiction under Title 42, United States Code, Sections 1983, 1988, and Title 28 United States Code, Section 1343, in that plaintiff is and has been deprived of his rights secured under the First, Fifth and Fourteenth Amendments to the United States Constitution. The amount in controversy is in excess of Ten Thousand Dollars, exclusive of interest and costs.

8. Plaintiff was, during all times alleged herein, a duly appointed and qualified police officer for the City of West Branch, Michigan, and had been since May, 1967. During that time plaintiff diligently and faithfully performed the duties assigned to him.

9. Plaintiff has a property interest and entitlement to his continued government "employment" which was protected by the Due Process clauses and statutes of the United States based upon the following:

9a. Plaintiff was by Michigan law entitled to retain his office subject only to dismissal and discharge for cause;

9b. Plaintiff was additionally entitled under the contract then existing between the City of West Branch and

the United Steelworkers to retain his position subject only to dismissal and discharge for cause;

9c. Plaintiff further understood his position was permanent by virtue of his understandings with officials of the City of West Branch and past practice.

10. Alternately and additionally, plaintiff has a liberty right, protected by the United States Constitution, not to be deprived of his government position for exercising his fundamental rights of freedom of speech, freedom of association and freedom to petition for redress of grievances without Due Process of law.

11. That on or about November 27, 1976, defendants Chief of Police Paul Longstreet and City Manager Bernard C. Olson, as agents of the City of West Branch and themselves, arbitrarily, maliciously and capriciously discharged plaintiff with the letter, shown in the attached Exhibit A, which is incorporated by reference herein.

11a. The charges, to the extent understood, are false and untrue.

11b. The charges were used as a device to carry out the threats of defendant Chief of Police Paul Longstreet to discharge plaintiff for his union activity in organizing the other police officers, processing grievances, and in the exercise of his rights of free speech, assembly and to petition to redress for grievances, and for the broader purpose of eliminating the union.

11c. The charges are unspecific and unconstitutionally vague and are not sufficient to support any discharge or other disciplinary action.

11d. The letter failed to provide plaintiff with notice of what misconduct he was in fact being charged with in that it did not state exactly what conduct was proscribed,

the date of the alleged misconduct, nor any other circumstances by which plaintiff could be informed and be given any opportunity to prepare a defense, all in a clear effort to deny plaintiff his rights to Due Process.

11e. The defendant City of West Branch had failed to provide any rules or regulations concerning police conduct or misconduct to notify plaintiff and others of any conduct which would be proscribed.

11f. The letter was not a sworn complaint issued by the mayor of the City of West Branch as required by the Michigan statutes.

12. That neither the Chief of Police Paul Longstreet nor the City Manager Bernard C. Olson, nor they together, had authority to discharge plaintiff, when in fact only the Mayor of the City had authority to temporarily suspend a police officer and he did not do so. Thereafter the defendant City of West Branch through its Mayor and City Council failed to rectify the obvious wrongs of its Chief of Police and City Manager in permitting them to assume authority they in fact did not have.

13. The letter was delivered to plaintiff on Thanksgiving day and plaintiff was given no opportunity to have a hearing prior to the discharge, which was effective two days after service.

13a. That plaintiff demanded a hearing prior to discharge, in the form of a grievance on November 26, 1976, but no hearing was given.

13b. Plaintiff is informed and believes that a hearing, after notice by a sworn complaint, was required to be held before the City Council prior to any discharge, under Michigan law. The City Council was required to be presented evidence to support the charges, plaintiff

be given an opportunity to defend and a fair decision be made by the City Council, all of which were denied to him.

13c. The lack of hearing prior to termination and discharge deprived plaintiff of his constitutionally guaranteed rights to liberty, property, and Due Process of law.

14. That defendants Chief of Police Paul Longstreet and City of West Branch were aware that plaintiff had certain medical problems, in part caused by on-the-job injuries or aggravated thereby, and that this, with the discharge, would prohibit any future employment opportunities elsewhere as a police officer; and deprive plaintiff of a liberty interest protected by the Fifth and Fourteenth Amendments to the United States Constitution and statutes thereunder.

15. Defendants Paul Longstreet and City of West Branch were aware that after passage of sufficient time plaintiff could not be automatically reinstated and would be required to be recertified by the Michigan Training Council and should have provided him with a prompt hearing.

16. One month after the discharge a hearing was scheduled before the City Council, or a committee thereof, pursuant to the Union contract; no hearing was in fact held. Defendants Chief of Police Paul Longstreet, City Manager Bernard C. Olson, and City Attorney Charles W. Jennings and/or Demetre J. Ellias refused to present testimony of witnesses. They gave conclusionary statements to the Council, or committee thereof, which accepted same without further inquiry or findings. They exerted pressure upon plaintiff to defend himself by testifying without advising him of the charges.

17. The statutorily required hearing before the City Council was not demanded by defendant United Steel-

workers of America, as plaintiff's representative, and apparently it waived plaintiff's right to same without his consent in denial of plaintiff's right to Due Process of law and in violation of defendant Union's duty of fair representation.

18. The City Council and Mayor of Defendant City of West Branch failed to take action to provide proper procedures to guide defendants Chief of Police and City Manager, to provide the hearing and in failing to order plaintiff restored to duties after failure of showing of cause within the time statutorily required; and for failure to declare the "discharge" action invalid; all in denial of plaintiff's right to Due Process of Law.

19. Plaintiff was advised during the meetings related to this and other matters by the City Attorney Charles W. Jennings that he (plaintiff) should not press his demand for a hearing because it would lead to disruption of plaintiff's family and possibly a divorce.

20. Thereafter, defendant United Steelworkers of America waived a grievance resolution step of mediation by the State Labor Mediation Service, without the plaintiff's consent, breaching its duty of fairly representing your plaintiff, who was a member of the Union and its "Steward".

21. After repeated requests and demands by plaintiff and defendant Union for notice specifying the charges, a letter was sent by defendant City Attorney Charles W. Jennings to the Union one month after the discharge alleging eight "incidents" of misconduct; seven of these "incidents" were beyond the scope of the original letter, Exhibit A, the eighth "Following the County Sheriff" could be reasonably implied within the original letter. They were not in the form of a sworn complaint as required by state law, and failed to disclose the names, dates and other

circumstances which would have allowed plaintiff his constitutionally assured right to prepare a defense.

21a. One "incident" contained in the letter alleges criminal misconduct on the part of the plaintiff, which is false. This "incident" was not within the scope of the original "causes" for discharge, Exhibit A, and was calculated to injure plaintiff's reputation.

21b. This "incident" was previously investigated and rejected by defendant Chief of Police in an internal investigation of the matter prior to plaintiff's discharge and could not properly have been the basis of his decision to discharge plaintiff.

21c. That to this date no criminal charges have been brought against plaintiff regarding this alleged "incident".

22. On or about July 26, 1977, or eight months after plaintiff's discharge an Arbitrator's hearing was held on the eight new "incidents" and not on the original causes for discharge contained in Exhibit A. The Arbitrator rejected all except one, the criminal misconduct.

22a. The plaintiff waived his potential rights as a criminal defendant and testified as to the alleged misconduct. The Arbitrator chose to accept the testimony of the witness rather than plaintiff in regard to the criminal charge.

22b. Defendant Union negligently failed to or refused to present the testimony of companion officer one Louis Osten in rebuttal. Defendant Union through its attorneys failed to demand specification of the charges prior to the Arbitration, failed to properly prepare, sent a new attorney for the hearing rather than the one who had discussed the case with plaintiff prior to the hearing, and because of unfamiliarity with the circumstances failed to fully cross examine the witness to determine her credibility, and was

otherwise negligent in its duty of fair representation of plaintiff.

22c. The Arbitrator upheld the discharge, after determining that the original charges were without merit, based on this one "incident" of the new charges; his decision can not properly support the discharge.

22d. The Arbitrator's decision was announced in November, 1977.

23. Prior to the Arbitration, defendant City of West Branch continued the deprivation of plaintiff's rights by refusing to disclose to a hearing officer for the Unemployment Compensation commission the substance of the charges against plaintiff and effectively prevented plaintiff from obtaining Unemployment Compensation.

24. Defendant City of West Branch by defendant City Manager Bernard C. Olson thereafter denied plaintiff's pension reimbursement claim for the amount which had been deducted from his pay.

25. Thereafter, defendant City of West Branch through its Workers Compensation Insurance Carrier, in negotiating a settlement of plaintiff's injury claim, endeavored to extract a "quit slip" or written statement of voluntary quit from plaintiff as part of its negotiation for settlement of the claim; this is a continuation of defendant City of West Branch effort to deny plaintiff of his rights to Due Process of Law.

26. As a result of the defendants deprivation of plaintiff's constitutional and statutory rights, wrongful and illegal discharge and failure of duty of fair representation, plaintiff has been deprived of wages of more than $36,000.00 to date, other benefits, including pension and medical insurance, and has been greatly injured in his reputation, and prohibited from his chosen profession as a police officer.

WHEREFORE, plaintiff demands:

A) That he be reinstated with full back pay and all benefits accruing since the date of discharge, reasonable attorney fees, and costs of this action:

B) That plaintiff be awarded actual damages and exemplary damages in the sum of $500,000.00: and

C) That plaintiff have such other and further relief as is equitable and just.

[Signatures and Jurat Omitted in Printing]

* * *

DEMAND FOR JURY TRIAL

PLEASE TAKE NOTICE that Plaintiff herein, by and through his attorney, Richard A. Alatalo, demands trial by jury of all the issues so triable.

[Signature Omitted in Printing]

EXHIBIT A

CITY OF WEST BRANCH
119 North Fourth Street
West Branch, Michigan 48661—Phone 1-517-345-0500

To: Gary McDonald, Patrolman
From: Paul Longstreet, Chief of Police
Subject: Discharge and Cause

Effective this date, you are relieved from duty. Effective 12:01 A.M., Saturday, November 27, 1976 you are discharged for proper causes as follows:

1. Conduct unbecoming an officer.
2. Illegal tactics and procedure.
3. Harrassing and thereby alienating other law enforcement agencies with whom we should be able to work cooperatively and in mutual support.

4. Insubordination.

5. Neglect of duty.

Equipment assigned to you is to be turned in prior to the effective date of your discharge (i.e. before 12:01 A.M., Saturday, November 27, 1976). Your permit to carry a concealed weapon by virtue of being a police officer will terminate on or before that time.

The derogatory and in some cases slanderous remarks made by you in public against any and all authority of properly designated City Officials, including the City Council, City Manager and myself can only be construed, as a deliberate attempt to undermine our operation. This, in conjunction with your demoralizing influence on other members of our department has brought us to a point at which our operation is not only ineffectual but intolerable. In light of these facts, the immediacy of the specified actions set forth above are deemed necessary in the interest of public safety and the protection of signators of certain attestment affidavits.

Specific and appropriate actions thereon will be forthcoming at the proper time and place. Authority for this action is cited as, but not limited to, Section 4.7e and 4.11a of the city charter and Article III of our union contract.

Signed:

/s/ Paul Longstreet
Paul Longstreet
Chief of Police

Confirmed:

/s/ B. C. Olson
B. C. Olson
City Manager

"A Wonderful Place to Live"

DEFENDANTS' ANSWER FILED DECEMBER 18, 1979

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Caption Omitted in Printing]

ANSWER, AFFIRMATIVE DEFENSES AND RELIANCE ON JURY DEMAND OF DEFENDANTS CITY OF WEST BRANCH, PAUL LONGSTREET, AS CHIEF OF POLICE, WEST BRANCH; BERNARD C. OLSON, AS CITY MANAGER, WEST BRANCH; CHARLES W. JENNINGS, CITY ATTORNEY, WEST BRANCH; AND DEMETRE J. ELLIAS, CITY ATTORNEY, WEST BRANCH

NOW COME the defendants CITY OF WEST BRANCH, a municipal corporation; PAUL LONGSTREET, as Chief of Police, West Branch; BERNARD C. OLSON, as City Manager, West Branch; CHARLES W. JENNINGS, City Attorney, West Branch; and DEMETRE J. ELLIAS, City Attorney, West Branch, by their attorneys, Smith & Brooker, P.C., and make answer to plaintiff's complaint as follows:

1.

Admitted.

2.

Admitted.

3.

Admitted.

4.

Admitted.

5.

Admitted.

6.

Admitted on information and belief.

7.

For answer to paragraph seven (7) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that the Court has jurisdiction under the sections therein alleged, contained in Titles 28 and 42 of the United States Code.

8.

For answer to paragraph eight (8) of plaintiff's complaint, your defendants deny the same as being untrue, although they admit that the plaintiff was a police officer of the City of West Branch for a number of years up to and including November of 1976.

9.

For answer to paragraph nine (9) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

9a.

For answer to paragraph 9a of plaintiff's complaint, your defendants deny the allegations therein set forth and contained as being untrue, except they admit that, under the agreement between the UNITED STEELWORKERS OF AMERICA and the CITY OF WEST BRANCH, any employee could be discharged for "proper cause" only. By way of further answer, your defendants affirmatively allege that plaintiff was discharged for proper cause and that said discharge was upheld after an ap-

propriate hearing before an arbitrator appointed by the American Arbitration Association, a copy of said opinion being attached hereto and marked Exhibit 1.

9b.

For answer to paragraph 9b of plaintiff's complaint, your defendants admit the same and affirmatively allege that plaintiff was discharged for cause and that said discharge was upheld by the appropriate authorities.

9c.

For answer to paragraph 9c of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

10.

For answer to paragraph ten (10) of plaintiff's complaint, your defendants admit that plaintiff, as well as any other citizen, has certain rights provided under the Constitution and law of the land, but your defendants deny as untrue the allegation that plaintiff has been deprived of his position for exercising his fundamental rights of freedom of speech, association and petition. By way of further answer to said paragraph, your defendants affirmatively allege that the plaintiff, during the time that he was a police officer for the CITY OF WEST BRANCH, engaged in actions unbecoming to an officer of the law, including but not limited to acts of excessive and improper use of authority to such an extent that plaintiff lost his effectiveness as a police officer in the community of West Branch.

11.

For answer to paragraph eleven (11) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that the

plaintiff was discharged on or about November 27, 1976, for cause, growing out of serious acts of misconduct. By way of further answer to said paragraph, your defendants allege that the misconduct of plaintiff was of such a nature and so seriously destructive of plaintiff's role as a police officer that no remedial action other than discharge was appropriate.

11a.

For answer to paragraph 11a of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

11b.

For answer to paragraph 11b of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

11c.

For answer to paragraph 11c of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

11d.

For answer to paragraph 11d of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, and affirmatively allege that plaintiff, prior to discharge, was well aware of the acts of misconduct in which he had engaged and which formed the basis of his discharge for cause.

11e.

For answer to paragraph 11e of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

11f.

For answer to paragraph 11f of plaintiff's complaint, your defendants deny the allegations therein set forth and contained as being untrue, except they admit that the letter marked Exhibit A and attached to plaintiff's complaint was not a "sworn complaint."

12.

For answer to paragraph twelve (12) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

13.

For answer to paragraph thirteen (13) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that a letter was delivered to the plaintiff on Thanksgiving day and further admit that the discharge was effective approximately two days thereafter. By way of further answer to said paragraph, your defendants affirmatively allege that the discharge of plaintiff was in the public interest and was precipitated by several acts of misconduct involving citizens of Ogemaw County.

13a.

For answer to paragraph 13a of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that no hearing was given to the plaintiff prior to discharge.

13b.

For answer to paragraph 13b of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

13c.

For answer to paragraph 13c of plaintiff's complaint, your defendants deny the same inasmuch as said allegation is untrue.

14.

For answer to paragraph fourteen (14) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that Defendant PAUL LONGSTREET was cognizant of the fact that plaintiff had "certain medical problems" allegedly caused by injuries sustained in a work-related incident.

15.

For answer to paragraph fifteen (15) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that Defendant LONGSTREET was aware that, after an extensive period of time, plaintiff could not automatically be reinstated unless recertified by the Michigan Training Council.

16.

For answer to paragraph sixteen (16) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

17.

Your defendants make no answer to paragraph seventeen (17) of plaintiff's complaint inasmuch as the allegations contained therein do not pertain to them.

18.

For answer to paragraph eighteen (18) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

19.

For answer to paragraph nineteen (19) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

20.

Your defendants make no answer to paragraph twenty (20) of plaintiff's complaint inasmuch as the allegations contained therein do not pertain to them.

21.

For answer to paragraph twenty-one (21) of plaintiff's complaint, your defendants deny the allegations contained therein inasmuch as said allegations are untrue, except they admit that a letter was sent by Attorney Jennings to the Union.

21a.

For answer to paragraph 21a of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

21b.

For answer to paragraph 21b of plaintiff's complaint, your defendants neither admit nor deny the same, they not having sufficient information, knowledge or belief upon which to predicate either an admission or denial and, therefore, leave the plaintiff to his proofs. Your defendants affirmatively allege that plaintiff has failed to appropriately describe and identify the "incident" to which he is alluding.

21c.

For answer to paragraph 21c of plaintiff's complaint, your defendants neither admit nor deny the same, they not having sufficient information, knowledge or belief

upon which to predicate either an admission or denial and, therefore, leave the plaintiff to his proofs, except your defendants admit, on information and belief, that no criminal charges have been brought against the plaintiff.

22.

For answer to paragraph twenty-two (22) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except they admit that on July 26, 1977, a hearing was held in West Branch, Michigan, before the Honorable George E. Bowles, Arbitrator.

22a.

For answer to paragraph 22a of plaintiff's complaint, your defendants deny the allegations contained therein inasmuch as said allegations are untrue, except your defendants admit that the plaintiff testified at the hearing and that the Arbitrator accepted the testimony of a female witness that plaintiff had committed an offense against her person and rejected the testimony of the plaintiff as "not to be believable."

22b.

Your defendants make no answer to paragraph 22b of plaintiff's complaint inasmuch as the allegations contained therein do not pertain to them.

22c.

For answer to paragraph 22c of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue, except your defendants admit that the Arbitrator upheld the discharge of the plaintiff. By way of further answer to said paragraph, your defendants allege that, from the plain language of the Arbitrator's Opinion, plaintiff was found to be guilty of "questionable judgment" on various occasions in addition to the offense

committed against the person and privacy of a female citizen.

22d.

Admitted on information and belief.

23.

For answer to paragraph twenty-three (23) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

24.

For answer to paragraph twenty-four (24) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

25.

For answer to paragraph twenty-five (25) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

26.

For answer to paragraph twenty-six (26) of plaintiff's complaint, your defendants deny the same inasmuch as said allegations are untrue.

AFFIRMATIVE MATTER

A.

PROVOCATION

Your defendants affirmatively allege that the plaintiff's employment as a police officer was terminated for good cause inasmuch as the plaintiff, prior to discharge, commenced a course of conduct to provoke Defendant LONGSTREET and other public employees, contrary to the best interest of the Police Department for the City of West Branch.

B.

LIMITATION OF ACTIONS

Your defendants affirmatively allege that plaintiff's claim is barred by the Statute Limiting Claims.

C.

LACHES

Your defendants affirmatively allege that plaintiff's claim is barred by laches on his behalf.

D.

WAIVER

Your defendants affirmatively allege that plaintiff has waived any right to proceed in this action by electing the remedy of ARBITRATION.

E.

RES ADJUDICATA

Your defendants affirmatively allege that plaintiff's claim has been adjudicated in the arbitration proceeding and he is barred from litigating the same claim in this Honorable Court.

F.

LACK OF JURISDICTION OVER A MUNICIPALITY

Your defendants affirmatively allege that this Court lacks jurisdiction over the Defendant CITY OF WEST BRANCH which is a municipal corporation and not a PERSON within the meaning of 28 USC 1343 for the purpose of maintaining a civil rights action.

G.

IMMUNITY FROM SUIT

Your defendants affirmatively allege that they are immune from suit inasmuch as the acts complained of were done properly in the performance of defendants' official duties.

H.

FURTHER AFFIRMATIVE DEFENSES

Your defendants reserve the right to raise such other and further affirmative defenses as may be appropriate upon the completion of discovery proceedings in this cause.

I.

RELIANCE ON JURY DEMAND

Your defendants rely upon the jury demand filed by the plaintiff in this cause.

WHEREFORE, your defendants claim judgment of no cause for action, costs and actual attorney fees.

DATED this 17th day of December, A. D. 1979.

[Signature Omitted in Printing]

(Note - Exhibit 1, Arbitration Opinion, appears as Exhibit 35, in following)

PLAINTIFF'S EXHIBIT NO. 8—LETTER DISCHARGING PLAINTIFF McDONALD, NO DATE

CITY OF WEST BRANCH
119 North Fourth Street

West Branch, Michigan 48661—Phone 1-517-345-0500

To: Gary McDonald, Patrolman
From: Paul Longstreet, Chief of Police
Subject: Discharge and Cause

Effective this date, you are relieved from duty. Effective 12:01 A.M., Saturday, November 27, 1976 you are discharged for proper causes as follows:

1. Conduct unbecoming an officer.
2. Illegal tactics and procedure.
3. Harrassing and thereby alienating other law enforcement agencies with whom we should be able to work cooperatively and in mutual support.
4. Insubordination.
5. Neglect of duty.

Equipment assigned to you is to be turned in prior to the effective date of your discharge (i.e. before 12:01 A.M., Saturday, November 27, 1976). Your permit to carry a concealed weapon by virtue of being a police officer will terminate on or before that time.

The derogatory and in some cases slanderous remarks made by you in public against any and all authority of properly designated City Officials, including the City Council, City Manager and myself can only be construed, as a deliberate attempt to undermine our operation. This, in conjunction with your demoralizing influence on other

members of our department has brought us to a point at which our operation is not only ineffectual but intolerable. In light of these facts, the immediacy of the specified actions set forth above are deemed necessary in the interest of public safety and the protection of signators of certain attestment affidavits.

Specific and appropriate actions thereon will be forthcoming at the proper time and place. Authority for this action is cited as, but not limited to, Section 4.7e and 4.11a of the city charter and Article III of our union contract.

Signed:

/s/ Paul Longstreet
Paul Longstreet
Chief of Police

Confirmed:

/s/ B. C. Olson
B. C. Olson
City Manager

PLAINTIFF'S EXHIBIT NO. 8A—GRIEVANCE REGARDING DISCHARGE OF PLAINTIFF McDONALD

GRIEVANCE REPORT

USWA Local Union No. 7935 Grievance NO. 4-GMCD-76

Location West Branch Michigan Date NOV 27-1976

EMPLOYEE'S NAME	IDENTIFICATION NO.	DEPARTMENT	JOB TITLE
Gary Mc Donald		West Branch City Police	Patrolman

Use space below to write in other important Grievance information

On 11-25-76 I received a written discharge at my home. It was delivered by the Chief and the City Manager. Cited was Article 111 of our contract, and 4.7E and 4.11 of the City charter. I called the chief at 10.25AM on the 26th, per step 1 of the Grievance. No satifaction from the Chief.

Nature of Grievance

We state that the Discharge has no proper cause, and further it shows no proper cause. We further feel that there is no legitimate reason for this type of action, or any other type of action against officer Gary Mc Donald.

Settlement requested in Grievance We request that the aggrieved be made whole, and that full seniorty rights be restored for years of service. Further that all wages and benefits be made whole, without any loss of wages, benefits, or time in seniorty.

Agreement Violation Article 111 of the union contract.

Signature of Aggrieved: Gary Mc Donald

Signature of Union Representative: Gary Mc Donald

Form USWA 3[illegible] PRINTED IN U.S.A.

COPY FOR LOCAL UNION

PLAINTIFF'S EXHIBIT NO. 9—LETTER FROM C. JENNINGS TO D. TAFT, DECEMBER 23, 1976 (SPECIFYING CHARGES)

JENNINGS AND ELLIAS
ATTORNEYS AT LAW
107 NORTH THIRD STREET
WEST BRANCH, MICHIGAN 48661
(517) 345-0490

Rose City Office
215 West Main
Rose City, Mich. 48654
(517) 685-8812

Hale Office
3263 M 65
Hale, Mich. 48739
(517) 728-5771

CHARLES W. JENNINGS
DENNIS J. ELLIAS

December 23, 1976

USA
DEC 27 1976
Rec'd - Bay City

Mr. Don E. Taft
Staff Representative
United Steelworkers of America
1104-1106 South Madison Avenue
Bay City, Michigan 48706

Re: 4-GRCD-76

Dear Mr. Taft:

This letter is to confirm our meeting with the Grievance Committee of the West Branch City Council on Wednesday, December 29, 1976, at 7 p.m.

Listed below are specific incidents of misconduct on the part of Officer Gary McDonald for which the City of West Branch caused the letter of November 29, 1976, to be delivered to Officer McDonald:

1. Making a sexual assault upon a minor female.

2. Improper and unauthorized personal use of a police department cruiser, by parking in Bunting's gravel pit with a female companion.

3. Use of threats, harrassment and intimidation in an attempt to procure a date with a minor female.

4. Following two minor females while on duty and attempting to conceal their whereabouts from their parents.

5. Harrassing County Sheriff by following him in his motor vehicle on several occasions.

6. Disrespectful, derogatory and apparent slanderous remarks made publicly, while on duty, against city officials.

7. Falsely accusing Chief of Police of indecent conduct and attempting to undermine his authority; also a slowdown in enforcement action.

8. Improperly detaining a young female in the police department office without the benefit of a matron.

Yours very truly,

JENNINGS AND ELLIAS
WEST BRANCH CITY ATTORNEYS

BY: Charles W. Jennings

PLAINTIFF'S EXHIBIT NO. 10—INVESTIGATION REPORT, OCTOBER 30, 1976

West Branch City Police

County Ogemaw
Township
Village
City West Branch

Complaint No. 3644-376-76
File Class No.
Message No.

COMPLAINT REPORT

Post, District, Bureau or Division West Branch City Police (Name) (Number)

Date October 30, 1976

If this is an original report, complete this box.

Complainant Randy Dack Telephone No.

Address West Branch, Michigan Time Rec'd. A

Received by Investigated by P

If this is a supplementary report, complete this box.

Date of original investigation

Investigating Officers

If this report concludes complaint, complete this box.

☐ Complaint Unfounded ☐ Complaint Closed by Arrest ☐ Service Rendered ☒ Other Disposition

☐ Complaint Closed by Arrest(s) involving person(s) under 18

Date of Final Disposition 10-30-76 Post of Final Disposition (Number)

NATURE OF COMPLAINT Report of a Sexual Assault.

REPORT

INVESTIGATION:

Complainant came to my office and reported that he believed was on Wed. nite Oct.27, 1976, officers McDonald & Osten had stopped his wife Barbara, and that McDonald some how got the door open" as she had them locked" and got into the car. He then was to have played with titties, legs etc. All the time complainant was telling me this he was crying.

Stated that he wifes father George Trout knew of what took place and wanted to see the Prosecutor about signing a complaint against officer McDonald.

I checked with Mr Trout and he did'nt seem to know anything about what had taken place, and stated he did not believe that it happened. He call Barbara out of the house and she stated Quote Mr Longstreet I don't know whats going on but Iam not having an affair with any of your men.

Complainant was recontacted and advised, and he state he could not understand why his wife would tell him something like that if it was not true. Stated he would go out to her fathers place to find out and would get back with me.

STATUS:

Complaint closed at this time. Complainant had told the same story to the City Manager, and Councilman Oswald before coming to me.

Respectfully Submitted,

Paul L. Longstreet

Paul L. Longstreet Chief
West Branch City Police

PLAINTIFF'S EXHIBIT NO. 31—SUBMISSION TO ARBITRATION, DATED FEBRUARY 9, 1977

American Arbitration Association

SUBMISSION TO ARBITRATION

Date: February 9, 1977

The named Parties hereby submit the following dispute to arbitration under the VOLUNTARY LABOR ARBITRATION RULES of the American Arbitration Association:

On November 27, 1976, Officer Cary McDonald, Patrolman with the City Police Department of the City of West Branch, was discharged for proper cause under the agreement dated October 15, 1975 between the United Steel Workers and the City of West Branch.

The letter of discharge citing proper cause defined proper cause as (1) conduct unbecoming an officer, (2) illegal tactics and procedure, (3) harassing and thereby alienating other law enforcement agencies with whom we should be able to work cooperatively and in mutual support, (4) insubordination, and (5) neglect of duty.

The Union disputes the reasons for discharge.

We agree that we will abide by and perform any Award rendered hereunder and that a judgment may be entered upon the Award.

Employer The City of West Branch

Signed by [signature] Title City Attorney

Address Charles W. Jennings
107 North Third Street, West Branch, Michigan, 48661

Union United Steelworkers of America Local 7935

Signed by [signature] Title Staff Representative

Address 1106 S. Madison Ave. - Bay City, MI 48706

PLEASE FILE TWO COPIES

PLAINTIFF'S EXHIBIT NO. 35—ARBITRATION OPINION AND AWARD, DATED OCTOBER 31, 1977

IN THE MATTER OF THE VOLUNTARY ARBITRATION BETWEEN:

Case No. 54 39 0189 77

CITY OF WEST BRANCH

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL 7935.

OPINION

This matter was heard pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association at the County Building, Ogemaw County, City of West Branch, on June 9, 1977. Both parties were represented by counsel, and both filed post-hearing briefs. The hearing was declared officially closed by Deborah K. Reynolds, Tribunal Administrator for the Association, on October 4, 1977.

APPEARANCES

For the City	*For the Union*
Charles W. Jennings, Attorney	John C. Claya, Atty.
Paul L. Longstreet, City Police Chief	Gary McDonald, Police Officer
B. C. Olson, City Manager	Don E. Taft, Staff Rep.
	Sylvia Rassette, Staff Representative

The case involves the discharge of Officer Gary McDonald on December 23, 1976. The City attorney wrote to Don E. Taft, Staff Representative for the Union, making

a specification of the charges on which the discharge was based. They were:

"Listed below are specific incidents of misconduct on the part of Officer Gary McDonald for which the City of West Branch caused the letter of November 25, 1976, to be delivered to Officer McDonald:

1. Making a sexual assault upon a minor female.

2. Improper and unauthorized personal use of a police department cruiser, by parking in Bunting's gravel pit with a female companion.

3. Use of threats, harrassment and intimidation in an attempt to procure a date with a minor female.

4. Following two minor females while on duty and attempting to conceal their whereabouts from their parents.

5. Harrassing County Sheriff by following him in his motor vehicle on several occasions.

6. Disrespectful, derogatory and apparent slanderous remarks made publicly, while on duty, against city officials.

7. Falsely accusing Chief of Police of indecent conduct and attempting to undermine his authority; also a slowdown in enforcement action.

8. Improperly detaining a young female in the police department office without the benefit of a matron."

CONTRACT PROVISIONS CITED

Article XXI - GRIEVANCE PROCEDURE

Section 21.2, Step 5. Binding Arbitration:

In the event an adjustment is not made, or the dispute regarding the disciplinary action has not been satis-

factorily settled in Step 4, the matter may then be referred within fifteen (15) work days to an impartial arbitrator to be appointed by mutual agreement of the parties. In case the Union and the City cannot mutually agree upon an arbitrator within ten (10) calendar days, one shall be appointed under the rules of the American Arbitration Association. The arbitrator selected shall have authority only to interpret and apply the provisions of this Agreement to the extent necessary to decide the submitted grievance and shall not have authority to alter, add to, delete from, disregard or amend any of the provisions of this Agreement. The decision of the arbitrator shall be final and binding on the parties. The fee and expenses of the arbitrator shall be jointly paid by the City and the Union.

ISSUE:

Was the discharge of Officer Gary McDonald for just cause?

1. Making a sexual assault upon a minor female.

The pivotal testimony is found beginning at page 25 of the transcript and is quoted verbatim:

"A. Then they both got out of the car and they come over to the car and they were talking. Then Gary reached in the window and he grabbed at my legs and then at my breast.

Q. Did he say anything to you? Barbara, I know you're upset, but I want you to tell me what he said, if anything.

A. Before he got out of the car he says, that he had a hard on so big that he couldn't get up.

Q. And did he make any mention about your relationship with your husband?

A. Yes. He said he would be better in bed than Randy was.

Q. You say he touched your legs and did he touch your breast, too?

A. Yes.

Q. All right. Did he ask you to remove any clothing, anything like that?

A. Yes. He told me after he touched my breast, he told me to lift my shirt up and take my bra off.

Q. What, if anything, did you do?

A. Nothing. I just sat there. Once I shut the door and then he opened the door up and Louie told him something, to get back in the car or something and he wouldn't.

Q. I see. Did you leave then?

A. Yes.

Q. Okay. Now, when you left, where did you go?

A. I went right back to my sister's."

On cross-examination, the witness, Barbara Jo Dack, testified:

"Q. What do you remember that he said?

A. Well, when he first got out of the car he said that he had a hard on so big that he couldn't get out of the car.

Q. You say when he first got out of the car. How far was he from the car when he said that?

A. He was walking up towards the car.

Q. And you heard that?

A. Yes.

Q. You did not hear what he and Officer Osten were discussing two feet away from the car, though?

A. No.

Q. What else did he say?

A. He said that—I already said when he said that, come up and see him and his wife because she likes pretty girls, too. And he said to lift up my top. After he grabbed me, he said lift up your top and take your bra off, too, because he wanted to see what was all under that.

Q. What did Officer Osten say, did he stand there?

A. Yes. I don't think he said anything.

Q. And then after this supposedly fondling that took place what happened then?

A. After that he tried—well, I started to roll up the window and he asked where I was going, and I told him home, and he tried opening up the door and he had it open, then I don't know, Louie said something to him, I guess, and he shut the door, he just shut the door himself and I left after that.

Q. You did tell him that you were going home?

A. Yes.

Q. And you rolled up your window?

A. About half-way I had it rolled up.

Q. Then what did Officer McDonald say or do?

A. I don't think he said anything.

Q. Do you remember what he did, he turned away?

A. They both went back and got in the car.

Q. What did you do?

A. I left and went back out to my sister's house."

On cross-examination, the witness testified that she thought that her husband's brother had been on the West Branch Police Force. She said she did not know if he had resigned from that Department. She did testify that she had heard that the brother said that he had brought charges against Officer McDonald, but she never heard the whole story about what went on. She also testified that she had no personal hatred against Officer McDonald and had known him a number of years, but had never been in the same social groups together.

On vigorous cross-examination by Union counsel, variance was shown as to the placing of the car in front of her before she turned off the road preliminary to the incident. Furthermore, it was shown that the witness testified that Officer McDonald walked up beside her car, next to Louis Osten and began talking and that before he got out of the car, that he made a statement about his physical condition.

On cross-examination, she testified:

"Q. What do you remember that he said?

A. Well, when he first got out of the car he said that he had a hard on so big that he couldn't get out of the car.

Q. You say when he first got out of the car. How far was he from the car when he said that?

A. He was walking up towards the car."

It is pointed out that she actually had placed Mr. McDonald in three different places. The first version was that Mr. McDonald was seated when he made the statement. Further, she was unable to recall what state-

ments were made by Officer McDonald and Osten as they approached the vehicle. As to the incident, Officer McDonald testified at page 133:

"Q. Do you remember this specific occasion that Miss Dack testified about?

A. Yes, I do.

Q. All right. Could you relate to the Arbitrator what occurred?

A. Officer Osten and I were on patrol that evening and it was late, I don't know what time it was, it was late at night. And we had been on routine patrol. We stopped on Meade Street in front of the Masonic Temple, it's right below the Michigan State Police Post, it's about half, three-quarters of a block off the main street, but you can watch all the traffic coming in and out of town on the main drag. We were sitting there and we had our lights off and maybe only been there a few minutes when a car came down there, come in from the east and turned and pulled up alongside our vehicle. Now, it pulled up across the road, actually it was parked on the wrong side of the road. We were parked on the east side of the road facing north, the other car pulled across and in the car was Barbara Dack.

Q. Did you have a conversation with Miss Dack?

A. Yes, we did.

Q. What was the substance of that conversation?

A. The substance of the conversation was basically with Officer Osten in reference to—she had been having family problems with her husband, and she advised us she was separated and attempting to get a divorce. Officer Osten had had contact with her husband right about that time and in reference to an attempted suicide.

THE ARBITRATOR: On whose part?

A. On the part of her husband, Mr. Dack. She appeared to her manner of talking to have been drinking and I base this on ten years of experience as a police officer, and I do know the girl, and I even knew her even before she drove a car; and she discussed the problem about her husband and that was the general course of conversation. Nobody got out of the cars. She was pulled right up next to the patrol car and the windows were down and at that she pulled up and left, and that's the last we've seen her and the last I ever talked to her.

Q. Did you ever say to her that, I've got a hard on for you?

A. No, I never did.

Q. Did you attempt in any way to leave the vehicle and fondle her breast?

A. No. I didn't—nobody got out of the car. I didn't get out of the car. Her car was parked right beside ours and the conversation that was carried on was carried on right through the car windows.

Q. Did you make any effort to reach in the car and touch her leg?

A. No. I was on the passenger's side and the drivers were parked—she was parked like this, the drivers were to each other, I was on the far side of the car."

DISCUSSION

The Arbitrator has carefully reviewed the whole of the testimony with respect to this incident, and recalls vividly the demeanor of both witnesses and the manner in which both witnesses testified. Through very thorough and capable cross-examination, the only element of bias

or animus that was suggested on the part of the witness against Officer McDonald was her sketchy knowledge of the fact that her brother-in-law had once been on the West Branch Police Department and might have filed some sort of charge against Officer McDonald. This standing alone, would not impeach the testimony of the witness or challenge her credibility.

If she had no personal animus against the grievant, why would she put herself through the very considerable ordeal of testimony under oath on the record, and in the presence not only of the grievant but others whom she knew and did not know? It is specifically recalled that it was necessary to interrupt the testimony to quiet the witness a number of times; a recess was taken on one occasion. The Arbitrator finds that she was reluctant to testify and her testifying caused her noticeable distress and tension, even to the point of tears.

Assessing, then, the credibility of both witnesses, and noting the obvious interest of the grievant in the outcome of this proceeding, the Arbitrator finds the testimony of Ms. Dack is the more believable under all of the circumstances and finds, as a fact, that the incident occurred substantially as she described it so far as the fondling of Ms. Dack, and the request that she take off her bra.

It is true that counsel, on cross-examination, was able to show certain discrepancies as to the beginning of the conversation and the placement of the car or cars in relation to Ms. Dack and the grievant. These discrepancies do not go to the truth of the central pivotal testimony and only tend to show, in the judgment of the Arbitrator, that her version was not carefully and meticulously fabricated or contrived, so that each and every detail was exact and precise, and, therefore, not open to any challenge.

2. Improper and unauthorized personal use of a police department cruiser by parking in Bunting's gravel pit with a female companion.

There was no support in the testimony for this charge.

3. Use of threats, harrassment and intimidation in an attempt to procure a date with a minor female.

There was extended testimony with respect to the attempt of a minor female to arrange a date for another female with Officer McDonald. It would serve no useful purpose to review and recite the whole of the testimony of the principals, but suffice it to say, that it was not established that Officer McDonald himself participated in the attempted procuring of the date. It appears that a young lady, other than the one whom Officer McDonald was to date, was the prime mover, much to the embarassment of the other young lady, her parents and her employers. But the proofs were fatally defective so far as an actual link to Officer McDonald himself.

4. Following two minor females while on duty and attempting to conceal their whereabouts from their parents.

The testimony was offered that Officer McDonald did follow two minor females while on duty in a police vehicle to a gravel pit and turned his lights off while at the gravel pit when it appeared that a car was approaching the police vehicle and the car in which the two minor females were sitting, after having been followed there by Officer McDonald. The situation is an ambiguous one, but it was not established that Officer McDonald was attempting to conceal the whereabouts of the two minor females from their parents. At most, this was an incident showing questionable judgment; it did place him in a position where his conduct would appear improper to suspicious parents.

5. Harrassing County Sheriff by following him in his motor vehicle on several occasions.

The proofs did establish that on several occasions Officer McDonald, in a police vehicle, followed the County Sheriff through town. It was also known that the Sheriff was not supported in his election campaign by Officer McDonald. Here again, it must be found as a fact that the incident or incidents did occur and that they showed questionable judgment on the part of Officer McDonald and also a possible motive of attempted embarassment of the County Sheriff.

6. Disrespectful, derogatory and apparent slanderous remarks made publicly, while on duty, against city officials.

The proofs did show that Officer McDonald was most outspoken, and tactless, and did play a critical role in expressions against city officials. Such expressions, no doubt, caused embarassment to his Chief, but certainly absent any clear and definitive rule against such expressions, they would not, without warning, be subject to severe penalty. They would be subject to warning ,and perhaps time-off penalty in attempted corrective action.

7. Falsely accusing Chief of Police of indecent conduct and attempting to undermine his authority; also a slowdown in enforcement action.

The proofs showed that Officer McDonald passed along a statement or rumor alleging indecent conduct; that the matter was investigated, and there was a finding made that the Chief of Police had not engaged in any indecent conduct.

Obviously, this incident which had no foundation in fact caused great embarassment and distress to the Chief of Police, but it was not established that the information was turned over by Officer McDonald in a reckless man-

ner, or that he had a base motive in passing the information through investigative channels. Conceivably, a more tactful approach could have been made, but the incident, at most, was that of a person passing along information for investigation by third persons. Furthermore, so far as the charge of undermining the authority of the Chief of Police, Officer McDonald was critical both orally and in writing, of the Chief of Police. It cannot be determined whether the motive was one of undermining the Chief's authority or one of contesting action that rightly or wrongly Officer McDonald believed to be improper. In a dispute over uniforms, Officer McDonald, it was found, did over-react. So far as a slowdown in ticket-writing, this charge failed of proof. It was not established what number of tickets written could constitute the norm, or whether or not officers, including Officer McDonald, had been admonished or instructed what number of tickets should be written or should not be written. Even a bare numerical analysis did not establish that Officer McDonald or other officers were engaged in any deliberate, intentional campaign to slow down ticket-writing and thus embarrass the Chief. So far as Officer McDonald's official relations with young people, the proofs showed that he was one to spend quite a bit of time talking with them and working out problems rather than to pursue a policy or practice of writing tickets on attempting to prosecute; the Arbitrator certainly could not fault this approach. Such an approach sensitively used is the more effective one.

8. Improperly detaining a young female in the police department office without the benefit of a matron.

There was a general practice, and a good one, in the department to have a female suspect placed in the custody of another woman, a matron. This is routine practice in all well-organized departments that have a sufficient com-

plement. But there were occasions in this Department when a matron was not available and therefore, at least for an interval, a male officer would have in custody a female suspect. It was not established that under the particular facts of the incident cited that a department policy was violated, since a matron was not immediately available.

GENERAL DISCUSSION AND RULING

The picture that emerges as to Officer McDonald is that of an Officer who was better than average by admission of his Chief up until May of 1976, and then became a disruptive force in the Department by the view of the Chief. But the discharge action cannot stand on the basis of acts of tactlessness; the grievant himself admits that he is given to candid expression. There is nothing in the record to show that he had been warned, or otherwise disciplined, for expressing his opinion on matters of internal affairs in the Department or indeed in respect to his apparent political activities in support of a rival candidate for sheriff. There must be more than a showing that the grievant was controversial and was critical of Department policy. It has been found as a fact that the Department did not establish a slowdown in ticket writing.

The only serious charge found is that growing out of the Dack incident, and this incident must be examined carefully with reference to the lawful discharge of the duties of a police officer in a small community.

We have found the testimony of Ms. Dack to be credible, and we have found necessarily the testimony of the grievant not to be believable.

Is the offense committed against the person and the privacy of Ms. Dack such a serious offense as to warrant discharge? The police officer, particularly in a small town, has an acutely sensitive role with particular rela-

tion to young people and most certainly, to the opposite sex. He is, at best, a community symbol of fairness and security - a protection for all those who find themselves in a helpless situation. Conversely, he must not use his authority in a way that violates rather than protects those under his control. Such excessive or improper use of authority would be universally condemned as the very opposite of good police practice. Improper or excessive use of authority is destructive of the symbolism of helpfulness and strength that a good police department should have and constantly must seek to keep.

The incident, in the Arbitrator's view, was not one which can be said to have been explained because of any provocation on the part of Ms. Dack. There is no plausible explanation for Officer McDonald's conduct.

Having found this serious violation, may the Arbitrator also find that some penalty, short of discharge, would accomplish the ends of corrective or progressive discipline? It cannot be found that there might not be a repetition of the same or similar acts. So it cannot be found that disciplinary layoff, for example, would accomplish correction. More importantly, it is the deliberate - and reluctant - conclusion of the Arbitrator that Officer McDonald, because of the Dack incident, has lost his effectiveness as a police officer in the community. The misconduct is of such a nature and so seriously destructive of the sensitive police role that it is found that no remedial action of the Arbitrator can be expected to restore Officer McDonald to a position of confidence and acceptance in the community in a police role.

The discharge, therefore, is sustained.

/s/ George E. Bowles
George E. Bowles
Arbitrator

DATED: October 31, 1977
Plymouth, Michigan 48170

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

CITY OF WEST BRANCH

-and-

UNITED STEELWORKERS OF AMERICA,
LOCAL 7935.

CASE NUMBER: 54 39 0189 77

AWARD OF ARBITRATOR

THE Undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated October 15, 1975 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

ISSUE:

Was the discharge of Officer Gary McDonald for just cause?

ANSWER:

Yes.

/s/ George E. Bowles
Arbitrator's signature (dated)

[Jurat Omitted in Printing]

PLAINTIFF'S EXHIBIT NO. 42 (EXCERPTS)—ARTICLES I, III & XXI OF COLLECTIVE BARGAINING AGREEMENT BETWEEN UNITED STEELWORKERS OF AMERICA AND THE CITY OF WEST BRANCH, MICHIGAN

[Cover Omitted in Printing]

AGREEMENT

THIS AGREEMENT entered into this 15th day of October, 1975 by and between the City of West Branch, Michigan, hereinafter referred to as the "City" and the United Steelworkers of America, AFL-CIO-CLC, hereinafter referred to as the "Union".

ARTICLE I

PURPOSE AND INTENT
PREAMBLE

WHEREAS the Employer is a public employer and is engaged in furnishing essential public services vital to the Government of the City of West Branch; and

WHEREAS, both the Employer and its employees have a high degree of responsibility to the public to assure the orderly and uninterrupted operations and functions of government; and

WHEREAS both parties recognize this mutual responsibility:

Section 1.0 Purpose and Intent

It is the intent and purpose of the parties that this Agreement shall promote and improve all relationships between the City and the Union and set forth herein the basic agreement covering rates of pay, hours of work, and

conditions of employment to be observed and to provide a procedure for the prompt and equitable adjustment of grievances.

Section 1.1 No Discrimination

It is the continuing policy of the City and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin, age, or sex. The representatives of the Union and the City in all steps of the grievance procedure and in all dealings between the parties shall comply with this provision.

Section 1.2 No Discrimination Because of Union Activities

The City agrees that it will not discriminate against, interfere with, coerce or restrain employees in any way because of their membership in, or their activity in behalf of, the Union unless such activity is specifically prohibited by this Agreement.

* * *

ARTICLE III

RIGHTS OF THE CITY

Section 3.0 City Rights

It is hereby recognized by all parties hereto that the City, on its own behalf and on behalf of the electors of the City, hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Michigan, and the United States. It is further recognized that the exercise of powers, rights, authority, duties and responsibilities by the City, the adoption of

policies, rules, regulations, and practices in furtherance thereof, and the use of judgement and discretion in connection therewith shall be limited only by the terms of this agreement and then only to the extent such terms hereof are in conformance with the Constitution and laws of the State of Michigan and the Constitution and laws of the United States.

Among the powers, rights, authority, duties and responsibilities which shall continue to be vested in the City of West Branch, but not intended as a wholly inclusive list of them, shall be: The right to direct the work of its employees; hire, promote, assign, transfer or retain employees; demote, suspend or discharge employees for proper cause; maintain the efficiency of the departmental operation; relieve employees from duties because of lack of work or other legitimate reasons; determine the methods, means and personnel by which operations are to be carried on.

* * *

ARTICLE XXI

GRIEVANCE PROCEDURE

Section 21.0 Definition

"Grievance" as used in this agreement is limited to a complaint which involves the interpretation or application of, or compliance with, the provisions of this agreement.

Section 21.1 Efforts to Adjust Grievances

All grievances, disputes or complaints arising under and during the term of this agreement shall be settled in accordance with the procedure herein provided. Every effort shall be made to adjust controversies and disagree-

ments in an amicable manner between the Employer and the Union.

Section 21.2 Earnest Effort to Settle Promptly

Should any grievance, dispute or complaint arise over the interpretation or application of the contents of this agreement, there shall be an earnest effort on the part of the parties to settle such promptly through the following steps.

Step 1. An employee with a grievance shall first discuss it with his immediate supervisor, with the Union representative present.

Step 2. If the employee's grievance is not resolved in Step 1, the employee shall reduce his grievance to writing, stating all the facts, and present it to the Union Grievance Committee. If the Union Grievance Committee deems the grievance a just one they will present the grievance at a joint conference with the committee from the City Council or directly with the department head.

Step 3. If the grievance is not resolved in Step 2, the employee may appeal to the West Branch City Council.

Step 4. If the grievance is not resolved in Step 3, the matter may then be referred within thirty (30) days to the State Labor Mediation's Server. The parties will then, in accordance with law, request non-binding mediation, provided, however, that the Union and the City Council may agree to binding mediation by the State Labor Mediation Server. It is expressly understood and agreed that there is no suggestion in this provision to in any way obligate either party to enter an agreement to have the mediation binding.

Note: The Step 5 portion of the Grievance Procedure shall *only* become operative in cases dealing with disciplin-

ary action or discharge and then only after all steps of the Grievance Procedure as set forth in this Article XXI have been exhausted unless the City and the Union have agreed in writing otherwise.

Step 5. Binding Arbitration: In the event an adjustment is not made, or the dispute regarding the disciplinary action has not been satisfactorily settled in Step 4, the matter may then be referred within fifteen (15) work days to an impartial arbitrator to be appointed by mutual agreement of the parties. In case the Union and the City cannot mutually agree upon an arbitrator within ten (10) calendar days, one shall be appointed under the rules of the American Arbitration Association. The arbitrator selected shall have authority only to interpret and apply the provisions of this Agreement to the extent necessary to decide the submitted grievance and shall not have authority to alter, add to, delete from, disregard or amend any of the provisions of this Agreement. The decision of the arbitrator shall be final and binding on the parties. The fee and expenses of the arbitrator shall be jointly paid by the City and the Union.

* * *

PLAINTIFF'S EXHIBIT NO. 49A—MINUTES OF THE SPECIAL MEETING OF THE CITY COUNCIL HELD JANUARY 27, 1977

SPECIAL MEETING OF THE WEST BRANCH CITY COUNCIL HELD IN THE COUNCIL ROOM OF THE CITY HALL, THURSDAY, JANUARY 27, 1977

Meeting was called to order by Mayor George Madison at 6:45 P.M.

Present: Mayor George Madison, Councilmen Arnold Dunbar, Reuben Kaarre, Jack Oswald, Richard Weryh [sic] and Thomas Zettel

Absent: Councilman Ross Reed

Others present: City Manager-Clark Bernard Olson, Police Chief Paul Longstreet, City Attorneys Jennings and Ellias, Steelworkers Union Representative Don Taft and Gary McDonald

Mayor Madison stated the purpose of the meeting was for the Council to hear the grievance of Mr. Gary McDonald, discharged patrolman. He asked Mr. Taft if he had any objections to the meeting being taped. Mr. Taft indicated that he had none as long as he knew that this was the case and commented on his objection to the Grievance Committee taping without such advance notice. Mayor Madison then turned the meeting over to City Attorney Charles Jennings.

Mr. Jennings stated that he would review the grievance procedure for the benefit of the Council and read charges as provided to Union Representative Taft by letter. He read the charges and asked Mr. Taft how he wished to respond.

Mr. Taft stated that he wished to respond item by item to each charge and proceeded accordingly. Each

charge was discussed. Mr. Taft's basic contention was that he would not recognize affidavits unless the signator is available for cross-examination as a witness. His request as to names, times and places were provided with the exception of charge number one and the witness in charge number two which Attorney Jennings stated he would not provide until the proper time. Union Representative Taft upon query of Attorney Jennings as to procedure indicated that he would prefer going to compulsory arbitration as opposed to nonbinding mediation as the next step in the grievance procedure if necessary.

Councilman Kaarre was excused at 7:55 P.M. to attend another meeting as previously requested.

Mr. Jennings called for a recess and Mr. Taft and Mr. McDonald were excused at 7:55 P.M.

Meeting was reconvened at 8:15 P.M.

Motion by Oswald, supported by Zettel, that for lack of sufficient evidence to the contrary, the discharge of Mr. McDonald be upheld.

Yes: Thomas Zettel, Richard Werth, Jack Oswald, Arnold Dunbar and Mayor Madison

No: None

Absent: Reuben Kaarre and Ross Reed

Motion carried

Upon recommendation of Attorney Jennings Council agreed to waive mediation. Attorney Jennings then asked Union Representative Taft to agree to such waiver for the record. Mr. Taft agreed.

Motion by Oswald, supported by Zettel, that the meeting be adjourned at 8:20 P.M.

[Signatures Omitted in Printing]

OPINIONS, DECISIONS, JUDGMENTS, ORDERS AND OTHER PARTS OF THE RECORD

The following opinions, decisions, judgments, orders and other parts of the record have been omitted in printing this Appendix because they appear on the following pages in the Appendix to the printed Petition for Writ of Certiorari: