

CHARGES

Kenneth Gardner, a police officer employed by the City of Canandaigua, is hereby charged, pursuant to Civil Service Law §75, with misconduct and incompetency in the performance of his duties as set forth in the following charges and specifications; and on the basis that he violated certain Rules and Regulations of the Canandaigua Police Department.¹

CHARGE ONE - MISCONDUCT AND INCOMPETENCY - VIOLATION OF CANANDAIGUA POLICE DEPARTMENT RULES AND REGULATIONS: THREATENING AND COERCING A FELLOW POLICE OFFICER

A. On or about December, 1992, Officer Gardner was involved in arranging a Christmas party for the members of the Police Benevolent Association. On or about December 7, 1992, Officer Gardner indicated to Lieutenant Robert Ruggles that officers who would not volunteer to work for other officers during the Christmas party would not receive assistance from other police officers, that is, "back-up". Later in that same conversation Officer Gardner tried to deny that he had said this. Later, on or about December 9, 1992, Lieutenant Ruggles had a conversation with Officer Gardner in which he counseled Gardner that threatening other officers with no back-up would not be tolerated. During this conversation Officer Gardner denied that he said that he would not give back-up to these officers and instead said that it was the officers who would not volunteer that would not provide back-up to other officers.

B. On or about January 3, 1993, Officer Gardner, had a conversation with rookie Officer Dan Ball in the locker room at the Canandaigua Police Department. During this conversation Officer Gardner threatened that Officer Ball would not receive back-up in a situation where it was needed if Officer

¹The Rules and Regulations referred to in the charges are set forth in the full text in Attachment A.

Ball continued to associate with officers like Michael Colacino who was believed to be overly supportive of Police Department management. Officer Gardner has been, at all relevant times, the president of the union representing the police officers employed by the City of Canandaigua.

C. On or about January 4, 1993, Lieutenant Ruggles learned about the conversation between Officers Ball and Gardner when Officer Ball complained to him about Officer Gardner's conduct. Lieutenant Ruggles then talked to Officer Gardner. Officer Gardner stated in effect that based on his background, police officers that do not support other police officers in police and nonpolice matters did not get backed-up when they needed it.

D. The conduct described above constitutes misconduct and incompetency, as well as a violation of the following Rules and Regulations of the Canandaigua Police Department:

1. Article VII, Rule 1(18) failure to treat any person civilly and respectfully (Att. "A", p. 20);
2. Article VII, Rule 1(41) - engaging in any activity, conversation, deliberation or discussion which is derogatory of Department policy or individuals (Att. "A", p.21); and
3. Article VII, Rule 1(65) - participation in a concerted action which is adverse to the maintenance of the public safety or welfare (Att. "A", p.24).

CHARGE TWO - MISCONDUCT:
VERBAL ABUSE AND PHYSICAL ASSAULT ON A FELLOW OFFICER

A. On January 4, 1993, Officer Michael Colacino learned of the conversation that took place in the locker room between Officers Gardner and Ball.

Officer Colacino was told in effect that Officer Gardner and other officers who were supportive of the union would not back him up because of his perceived support for management.

B. On January 4, 1993, at or about 7:30 P.M., Officer Colacino asked Officer Gardner to come into his office and then proceeded to ask Gardner why he made the statement that he would not back him up on the street. Officer Gardner refused to discuss the matter and left the office. Officer Colacino followed him into the hallway and again asked Officer Gardner why he would not back him up. At this point Officer Gardner began yelling and swearing at Officer Colacino. The yelling escalated and Officer Gardner moved face-to-face with Officer Colacino and bumped him with his chest.

C. Sergeant Charles Walker then came out of the sergeant's room and moved between Officers Gardner and Colacino, facing Officer Gardner because he was the aggressor. Officer Gardner continued to swear and curse at Officer Colacino. Sergeant Walker told Officer Gardner to leave the building but Officer Gardner ignored him. Sergeant Walker again told Officer Gardner to leave the building and Officer Gardner again refused, and continued screaming obscenities at Officer Colacino. At one point Officer Gardner shoved Officer Colacino. At no time did Officer Colacino initiate any physical contact with Officer Gardner.

D. By reason of the foregoing, Officer Gardner engaged in misconduct in the performance of his duties as a police officer. Officer Gardner also violated the following Rules and Regulations of the Canandaigua Police Department as the result of his conduct toward Officer Colacino:

1. Article VII, Rule 1(15) disorderly conduct (Att. "A", p. 19);

2. Article VII, Rule 1(17) using course, profane or insolent language to any person while on duty (Att. "A", p. 19);
3. Article VII, Rule 1(18) failure to treat any person civilly and respectfully (Att. "A", p. 20);
4. Article VII, Rule 1(19) willful maltreatment of any person (Att. "A", p. 20); and
5. Article VII, Rule 1(41) engaging in any activity, conversation, deliberation or discussion which is derogatory of Department policy or individuals (Att. "A", p. 21).

CHARGE THREE - MISCONDUCT AND INCOMPETENCY:
FAILURE TO OBEY A COMMAND BY A SUPERIOR OFFICER

A. As outlined in Charge Two above Officer Gardner failed, on January 4, 1993, at or about 7:30 P.M., to obey the direct order of Sergeant Walker to cease and desist his verbal and physical assault on Officer Colacino and to leave the building. Officer Gardner engaged in this conduct while on duty and in uniform.

B. By reason of the foregoing, Officer Gardner engaged in misconduct and incompetency in the performance of his duties as a police officer.

C. In addition, Officer Gardner violated the following Rules and Regulations of Canandaigua Police Department as the result of the conduct noted above:

1. Article V, Rule 2(3) failure to obey lawful orders (Att. "A", p. 14);

2. Article V, Rule 2(6) failure to maintain and render courtesy to superior officers when in uniform (Att. "A", p. 14); and
3. Article VII, Rule 1(3) disobedience of an order (Att. "A", p. 19).

**CHARGE FOUR - MISCONDUCT AND INCOMPETENCY - INSUBORDINATION
THROUGH REPETITION OF MISCONDUCT AFTER BEING COUNSELED
REGARDING SIMILAR MISCONDUCT**

A. On or about October, 1991, Officer Gardner was counseled by Police Chief Patrick McCarthy regarding an incident where Officer Gardner refused to obey a direct order given by Lieutenant Jon Whittenberg to leave the building. A counseling memo was issued and Officer Gardner was advised that a similar refusal to take direction from a superior officer would lead to a disciplinary action.

B. By failing to obey the earlier counseling memo Officer Gardner has failed to obey the directions of a superior officer and failed to adequately perform his duties as a police officer.

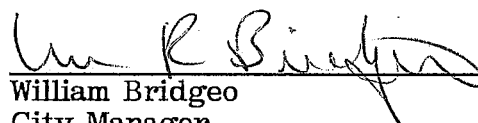
C. By reason of the foregoing, Officer engaged in misconduct and incompetency in the performance of his duties as a police officer.

D. Officer Gardner also violated the following Rules and Regulations of the Canandaigua Police Department as a result of his conduct in failing to obey the earlier counseling memo:

1. Article VII, Rule 1(3) disobedience of an order (Att. "A", p.19);
2. Article VII, Rule 1(4) insubordination toward a superior officer (Att. "A", p. 19);

3. Article VII, Rule 1(5) inattention to duty (Att. "A", p. 19); and
4. Article VIII, Rule 8 disorder and neglect to the prejudice of good order, efficiency or discipline by deliberately ignoring or not heeding the earlier counseling memo regarding obeying the orders of a superior officer (Att. "A", p. 26).

Dated: January 19, 1993


William Bridgeo
City Manager
Canandaigua, New York

EAT-095.py

TO: Chief Patrick McCarthy
FROM: Police Officer Michael J. Colacino
DATE: January 5, 1992
RE: ALTERCATION WITH OFFICER KEN GARDNER

Chief McCarthy,

This memo is directed to you in regards to an altercation which took place between Police Officer Kenneth Gardner and myself.

On January 4, 1992 at or about 7:20 P.M., I was in my office doing paperwork. Earlier in the day, Officers Stan Chizuk and Dan Ball approached me and advised me of a conversation that took place in the locker room between Ken Gardner and Dan Ball. I was informed that in the conversation, Ken Gardner made statements to Dan, implicating that if Dan continued to hang with Officers like Stan and myself, who suck Dick around the department, that he would find out what it's like to be getting your ass kicked some night, and feel the effects of not being backed up. This is the fourth or fifth time that I have been advised of similar conversations that Officer Gardner was involved in where he had made similar comments regarding backing up of fellow Police Officers. This is a very serious issue, and an extreme concern of mine.

I felt yesterday's comment was the straw that broke the camels back and decided to approach Officer Gardner. In private, in an attempt to resolve this matter once and for all, at about 7:30, I asked Officer Gardner to come into my office. He sarcastically stated, "For what?" I replied, "I just want to talk to you about something." At this point he entered my office and I closed the door. I asked him flat out what the problem was between him and I, and why he made the statement that he wouldn't back me up on the street? He replied, "This is bullshit, I never fucken said that, and I'm sick of this shit. Everyone around here is saying shit to me that I supposedly said." After this, he said, "I'm done talking, the conversations over, and walked out into the hallway. I got up from my desk, walked out, and said, "Wait a minute Kenny, you haven't answered my question yet." He then yelled, "If you have something more to say, say it to my face out here, I'm not going to be in your office, that's bullshit." I replied, "I wanted this to be in private, between you and I. If you want it out here in the open in front of your cronies, that's fine." At this point he began screaming and yelling at me, that I was a cock-sucker, no good mother fucker, loser, and repeatedly called me a G-boy. I don't have a clue as to what G-boy represents. As he was

screaming at me, he was about a half an inch from my face and was pushing his chest into me forcing me backwards. Sgt. Walker came up to Ken and told him to get back on the road and to break it up. Kenny never left, and approached me again screaming obscenities to me. I told him I just wanted him to know that If I ever heard him say that he wouldn't back me up, that I would have his job. He stuck his chest out, pushing against me again, and said, "You're a fucken weasel and continued to attempt to start a fistfight." During this whole ordeal, I never took my hands from my pockets. All at once, as Ken was yelling, Officer Ralph Liberatore grabbed Kens arm and physically pulled him away from me. Sgt Walker made another attempt to get Ken out of the building. After this, Kenny continued to yell and approached me again, and stated, "Get your fucking hands off me." Then he proceeded to take both of his hands and shove me in the chest. This forced me back down the hall. Sgt Walker demanded that Ken leave, and that I walk away. I left and went into the office. After a few seconds I went back into the hallway. Ken was still hanging around. Ken finally went down the steps and outside. Sgt Walker followed Ken outside. I went into the locker room, and then back into my office. Officer Scott Lambert was also present at the briefing table during this altercation, and Custodian Tom Danehe was in the halls cleaning.

I hope that this matter is dealt with accordingly, and that this kind of humiliation will cease. It is very disappointing to have a new Officer come into our department wanting to be here in the worst way, and then be approached by someone in an attempt to sway opinions. I hope you understand how I feel, and why I approached Officer Gardner. Ken has been a thorn in my back since the day I walked through the door. Officer Gardner has never displayed any professionalism toward me.

Respectfully submitted,



Michael J. Colacino
Police Officer

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From

POLICE DEPARTMENT

City of Canandaigua
 21 Ontario Street
 Canandaigua, New York 14424
 (716) 394 - 3311 & 394 - 3312

PLEASE RETURN THIS MESSAGE REPLY TO



To

LT. Ruggles &
 LT WITENBERG

DATE	01/05/93
SUBJECT	Conflict between Colacino & Gardner

Message

1/4/93 -

Just prior to my roll call, I walked into a very heated argument between Officer Colacino and Officer Gardner on the 2nd floor - Lobby area.

Gardner and Colacino were standing toe to toe.

Gardner was very irate and edging for a fight.

Parties were separated.

Argument was apparently over a conversation regarding back-up for calls. Colacino wanted to talk to Gardner and Gardner didn't want to talk with Colacino.

Sgt. C. Waller
 Signed

Reply

The problem is getting out of hand and should be nipped in the bud before someone gets hurt.

DATE _____

Signed _____

ORIGINATOR FOLD MARKS

CITY OF CANANDAGUA

IN THE MATTER OF DISCIPLINARY CHARGES

- AGAINST -

KENNETH GARDNER

UNDER AND PURSUANT TO SECTION 75 OF THE
CIVIL SERVICE LAW OF THE STATE OF NEW YORK

REPORT AND RECOMMENDATIONS

To: William R. Bridgeo, City Manager
City of Canandagua
Two North Main Street
Canandagua, New York 14424

Pursuant to your designation , dated January 19, 1993 (H.O. # 1.), the above captioned matter was referred to me, to hear and report with recommendations pursuant to Section 75 (2) of the Civil Service Law.

The statement of charges (H.O. # 2.) were served upon the Respondent on January 19, 1993, who filed his ANSWER (H.O. # 4.) to the charges on January 29, 1993.

A hearing was held before me on February 24 and 25, 1993, in the Hurley Building, in the Town of Canandagua. The Respondent, Kenneth Gardner, was represented by Robert E. Brennan, Esq. The charging party was represented by Peter J. Spinelli, Esq. Both parties made oral closing statements, following which, the hearing was closed.

I have reviewed my notes taken at the hearing, the demeanor of the witnesses, the exhibits introduced and the transcript of the hearing which was received by me on March 15, 1993 .

At the outset of the hearing, the Respondent made four (4) motions on which I reserved decision. The first motion made was:

To dismiss all of the instant charges, based upon the Respondent's allegation that the Rules and Regulations of the department which accompanied the charges (HO #1) were defective inasmuch as the last four (4) pages of the Rules and Regulations (pages 26-29).

The Respondent, in defense of his motion, submits that he did not receive the missing four (4) pages until the morning of the hearing, thereby rendering him unable to adequately prepare for the hearing.

I note that the charges with the accompanying Rules and Regulations of the department were served upon the Respondent on January 19, 1993 and the instant hearing was held on February 24, 1993. If the Respondent was concerned about the missing four (4) pages, he had over one (1) month to bring this matter to the attention of the Charging Party, but did not do so. If the matter of the missing pages were overlooked by the Respondent until the day of the instant hearing, the Respondent could have requested a postponement of the hearing, pending review of the missing four (4) pages, but made no such request. I am therefore denying motion #1.

The second motion made by the Respondent was that the Rules and Regulations accompanying the instant charges were invalid because they had been updated and the Respondent had not been supplied with a copy of the operative Rules and Regulations. During the hearing, the parties stipulated that the Rules and Regulations accompanying the charges were correct and that motion was withdrawn by the Respondent.

The third motion made by the Respondent was:

The Rules and Regulations accompanying the charges were so overly broad and vague, that they violated his due process rights and violated his first amendment rights to free speech.

The Respondent made no effort to specify which rule or regulation was overly broad and vague, thereby depriving him of due process rights. In respect to rights of free speech under the first amendment, not all speech is protected by the first amendment and in the employee - employer relationship, certain rights are left at the door, e.g., an employee may not utter sexually humiliating remarks to another employee, without violating State and Federal statutes. The third motion made by the Respondent is hereby denied.

The fourth motion of the Respondent was:

The letter issued to the Respondent on October 1, 1991, (City #6) should not be admitted and used to support charge #4, and charge #4 should be dismissed inasmuch as the subject letter was grieved and was resolved on the basis that it was to be removed from the Respondent's personnel file on September 30, 1992.

Charge # 4 relies in great part on City #6, which for all intent and purposes, no longer exists, based upon the resolution of the grievance. In respect to the Respondent's motion to dismiss charge #4, I will address that issue later in this report.

THE POSITION OF THE CHARGING PARTY

Officer Kenneth Gardner is the President of the Union and is therefore in a position of Power and authority among his peers. He has used that power and authority to suggest and imply that officers who disagree with his views and perceptions of the "establishment", and who rely on management rather than the Union for their working well being, would not receive backup from other officers when needed in situations which require police backup.

The City contends that Gardner conveyed this suggestion to Lieutenant Ruggles on two (2) occasions, i.e., December 7, 1992 and January 4, 1993, and to Daniel Ball on January 3, 1993.

The City further contends that on January 4, 1993, Gardner engaged in a physical and verbal assault on officer Michael Colosino, when Colosino confronted Gardner regarding alleged statements concerning backup, which Gardner had made on the previous day, and refused a direct order from a superior officer to leave the police department building.

The City asserts that the mere threat that an officer who is in disfavor with the Union might not receive police backup when required, is of such a serious nature as to require termination from the Canandagua police force.

THE POSITION OF THE RESPONDENT

The Respondent contends that officer Gardner never said that which he is accused of saying and did not disagree with the City's position that the threat of withholding backup when required constitutes a threat to the safety of the police officers and is an extremely serious matter.

The Respondent asserts that what Gardner said was in an attempt to persuade the officers to engage in a more cooperative working relationship and to call a halt to the dissension which is rampant among the officers within the department.

In respect to the altercation which occurred between officer Gardner and Colosino on January 4, the Respondent submits that Colosino initiated the confrontation which took place and was the aggressor. Officer Gardner did not disobey an order given to him by a superior officer; that in fact, it was Colosino who disobeyed a direct order to return to his office and attempted to continue the altercation between him and Gardner.

The Respondent suggests that the instant proceeding is an overreaction to by management and an attempt to improperly interfere with internal Union affairs and engage in Union busting.

DISCUSSION

Basically, the gravamen of the charges coalesce around the primary allegations of the City concerning statements and comments made by Gardner concerning the issue of officers backing up each other when required. I will deal first with Charge one, which is:

Misconduct and incompetency - violation of Canandagua police department rules and regulations: Threatening and coercing a fellow police officer.

This charge alleges that Gardner in December, 1992, in the course of trying to arrange coverage for a Christmas party, stated to Lieutenant Ruggles that officers who refused to cover for other officers who wished to attend the Christmas party would not receive backup when required. On/about December 9, 1992, Gardner denied making the foregoing statement to Ruggles and instead said that his previous statement was "officers who would not volunteer to cover for the Christmas party were the officers who would not provide backup for other officers when required".

On/about January 3, 1993, Gardner had a conversation with Daniel Ball, who was new on the police force, in which he threatened Ball with the prospect of not receiving backup when needed, if Ball continued to associate with officers like Mike Colocino, who were overly supportive of police department management.

On/about January 4, 1993, officer Gardner stated to Lieutenant Ruggles that "based on his background, police officers that do not support other police officers in police and non-police matters did not get backed up when they needed it".

The City, in it's charge, cited a number of violations by Gardner, of the rules and regulations of the department, which would support the charge of incompetency and misconduct.

THE TESTIMONY CONCERNING CHARGE ONE

Daniel Ball is a Patrolman in the Canandagua police department, who was hired on December 21, 1992, hence a new employee, having been hired approximately two (2) weeks prior to the conversation between him and Gardner on January 3, and testified as follows:

At approximately 11:30 a.m. on January 3, he was coming on

duty for the 12:00 p.m. to 8:00 p.m. shift. He stated that two (2) officers were having a loud argument downstairs as he went upstairs to the locker room. He acknowledged that there are three (3) rooms, including the upstairs lobby adjoining the locker room and there could have been someone in one of the other rooms. Ball initiated a conversation with Gardner who, Ball states, was the only other person in the locker room, and said "Stan and Libertore are having an argument downstairs and are really going at it". Gardner responded "that is what happens when they don't use FTO's (Field Training Officers) that they are supposed to". Ball testified that he asked Gardner if the Union had a problem with the Chief of Police, because if that was the situation, then he did not want to be part of the Union President's Advisory Committee. Gardner confirmed that he did have a problem with the Chief because of a difference of opinion concerning fixed shifts. Gardner stated that "You can get somewhere here through merit or you can be one of those that is in the Chief's office all the time telling on other officers. those people will find out what it means not to have backup". Ball responded and said " You cant really tell me that the problems here are so bad that you wouldn't back somebody up? Gardner said "Well what would you do if somebody was in the Chief's office and told on you? I'm sure that if you were called to back them up you really would? (like I'm sure you won't). Gardner then said "Stanley and Colocino are going to get themselves in a situation where they are getting their asses kicked and then they will find out what it means not to have backup". Following his conversation with Gardner, officer Casson walked into the room and the three (3) of them had some idle conversation.

Ball stated that after the foregoing conversation with Gardner, he was scared and thought about finding employment elsewhere. He had concluded from the conversation with Gardner that if he (Ball) was found to be talking to the Chief, then he would not receive backup if needed .

He then told Stanley Chizuk, his FTO, what had transpired in the locker room, and on the following day, January 4, conveyed to Lieutenant Ruggles, who is the officer in charge of the patrol section, of his conversation with Gardner. On the same day, Chizuk and Ball met with Colocino in the parking lot of Thompson hospital, at which time, they conveyed to Colocino the conversation which had taken place between Ball and Gardner on the previous day.

Ball identified his daily log, which was entered into evidence and marked as CX#1, which constituted three (3) pages. The notes, which Ball stated he made approximately three to four hours following his locker room conversation with Gardner on January 3, accurately reflected and supported his sworn testimony. Ball stated that he entered the notes in his daily log after having talked with Chizuk, who suggested that he do so.

Ball stated that he had given a copy of the notes to Ruggles following his conversation with him which took place on January 4, 1993.

Daniel Ball was a new employee in the department, and in my opinion, had not been in the department long enough to form any strong biases either for or against specific individuals or for or against the Union.

Robert Ruggles is a lieutenant in the department who has been in law enforcement over twenty-one (21) years, and as a lieutenant in the department for approximately eight (8) years.

He testified that in December, 1992, an issue had developed concerning coverage for officers who wished to attend the Christmas party. Officer Gardner came to see him on December 7 to make him aware that there was a coverage problem and asked if the department go below minimum coverage on the evening of the Christmas party. Ruggles denied that request. Ruggles stated that as they continued to talk, Gardner said those officers who are refusing to provide coverage may find themselves without backup, because they weren't being very brotherly about it. Ruggles told Gardner that backup is a cop's lifeblood and he didn't want to hear anymore about that. Upon further discussion, Gardner denied having said what he did just a couple of minutes previously.

On December 9, 1992, Ruggles had another conversation with Gardner about the backup issue. Ruggles stated that this came about because rumors were rampant in the department about comments concerning denial of backup. Ruggles wanted to dispose of the issue because it was a matter of great concern in the department. Ruggles stated that when he talked with Gardner about the matter, Gardner denied having said what Ruggles heard him say on December 7 and said that what he did say on the 7th was that officers who come into Ruggles's office on a regular basis would be the officers who wouldn't back the other officers.

Sometime over the New Years holiday, Sergeant Bardeen called Ruggles at home and told him that there was a lot of talk within the department about backup. When Ruggles returned to work on January 4, he was told by Lieutenant Wittenberg that Ball and Chizuk were coming in to see him to discuss their concerns about the backup issue. The meeting was held between Ruggles, Ball and Chizuk in Ruggles's office. Ball told Ruggles that officer Gardner confronted him in the locker room and told him that either he (Ball) would go along with the program and join the right group of people; stay away from the administration; do the right things for the Union, or he would find himself without backup while he was out on patrol. Ball told Ruggles that he perhaps made a mistake by coming to work in this department.

At approximately 12:00 noon on that day, Ruggles talked with

Gardner at which time Gardner stated that he could not understand what was going on; that he is a product of his New York training and said in New York, if a cop screws another cop, he should not expect backup. Ruggles said that he was aware of Gardner's previous employment as an officer in New York City for the transit police.

Ruggles stated that there was dissension within the department. Officers were choosing up sides as to who would or would not be actively involved with the Union.

Lieutenant Ruggles identified three (3) pages of his notes, which were entered into evidence as CX. 2a, 2b and 2c. The notes were for the dates of December 7, and 9, 1992, and January 4, 1993. On December 7, Ruggles notes in his third paragraph stated:

Gardner threatening no backup for officers who won't work for others wanting to go to X-MS party.

In paragraph 4 of Ruggles's notes of December 9, Ruggles wrote:

Told Red about what will happen if I hear officers not backing each other. Denies saying no backup & then states only persons capable of not backing up others are officers who come into my office on a regular basis.

In paragraph 1 of Ruggles notes of January 4, Ruggles wrote:

Comp. from Chizak Ball-re-Gardner threatening no backup. Spoke with all involved. Red still has N.Y. problem.

Ruggles said that he did not initiate any disciplinary action or ask the Chief to initiate disciplinary action following his conversation with Gardner on December 7, because he believed it to be idle talk.

Ruggles testified that he had many difficulties with Gardner in the past and had other conversations with Gardner in which Gardner would deny having said that which he just got through saying. He was familiar with the fact that Gardner had become the Union President about one and one-half years ago, and felt that Gardner has been aggressive in areas which concern him personally, more than anything else.

Michael Colocino has been employed by the department for approximately two (2) years as a Patrolman and testified as follows:

On January 4, 1993, he met with Ball and Chizuk in the

Thompson Memorial Hospital parking lot and discussed the conversation which took place between Ball and Gardner on the previous day in the second floor locker room. Colocino decided that he would confront Gardner as "man to man" and discuss the alleged conversation that he had with Ball on January 3 and that confrontation did take place on that day. Colocino testified that on one (1) previous occasion, Gardner commented to him about failure to cooperate with the Union could lead to a denial of backup. Colocino stated that this took place about a week following an accident in which Colocino was involved and the department asked him to submit a statement concerning the accident. Gardner had told him that he would be crazy to make a statement because management would fuck him. Gardner had said that they all have to work together and if they don't, it might make the difference between if a guy goes lights and sirens to come back somebody up or if he doesn't.

Charles B. Walker is a Patrol Sergeant; has been employed by the Canandagua Police Department for approximately twelve (12) years and testified as follows:

In December, 1992, he did the performance evaluation on Gardner and in the course of that evaluation, had conversation with Gardner concerning the rumors within the department about possible denial of backup. Gardner stated to him

" I never said anything about not backing up officers. I said how can guys expect--that run to the Chief all the time, expect someone at two o'clock in the morning have another officer get down to assist this officer real fast with the volume of traffic or the traffic lights that were out in the morning".

Thomas Natoli, a witness for the Respondent is a Police Officer in the department and has been so employed for over one and one-half years. He testified as follows:

Prior to coming to Canandagua, he was an officer in the New York City Transit Police Department and worked with Gardner at that location. In April or May of 1992, he became the Secretary of this Union and continues in that capacity at this time. In a conversation with Colocino in December, 1992, in the conference room of the police station, Colocino stated that he was not happy with the way Gardner was running things and would do anything to get rid of Gardner.

Natoli stated that he was present on January 3, during a conversation between Gardner and Ball. Natoli was scheduled to work the C shift and had come in to ask Gardner to cover for him because he would be late. He stated that he did not see officer Chizuk or officer Casson and did not hear any discussion concerning FTO assignment. He stated that officer Libertore was

present at the same time. Ball had asked Gardner if he ever stated that he would never backup another police officer. Gardner said "no, I can't understand how one guy can stab someone in the back one day and then not come and help him later". The names of Colocino or Chizuk were not mentioned at that time and there was no further conversation concerning backup. He stated that there was a division among the officers concerning those who are supportive of the Union and those who are not and that Colocino was one who was not actively involved in Union affairs.

On cross examination, Natoli agreed that Gardner made a general statement, in sum and substance that if people were going to tell on people one day how could they expect those same officers to back them up on the street the next day.

Ralph Libertore has been employed as a Police Officer in this department since May, 1983 and has been the Treasurer of the Union for the last eight years and testified as follows:

On January 3, he was working the noon to 8:00 p.m. shift. On that day he was the shift supervisor and was in the police station at 11:30. He said that he had a discussion with Chizuk concerning FTO assignment, which was probably loud, because he, Libertore tends to be rather loud on occasion. He was sure that Ball had heard some of that discussion, because he was passing by at the time.

Following that discussion, he went up to the locker room. Ball and Gardner were there and a short time later, Natoli arrived. He related that Ball asked Gardner if he ever made a statement that he would ever (sic) back up another officer in the department. Gardner was annoyed with that query and responded what he said was that he couldn't understand how a guy could stab another officer in the back one day and two days later expect that same officer to forget that incident and come to their aid if they needed help. Libertore testified that the names of Colocino and Chuzic were not mentioned.

Kenneth Gardner, the Respondent, testified that he has been employed by the department since August 13, 1990 as a Patrol Officer and was elected as President of the Union on February 25, 1991.

On December 8, 1992, he had conversation with Lieutenant Ruggles concerning coverage for the Christmas party. Ruggles said to Gardner "there seems to be rumors going around that you are saying you won't back people up". Gardner responded "where I come from in New York, before roll call at the start of the tour, you have to turn around and know how many people are working that evening and knowing their post..I can't see how guys here constantly run around screwing each other and two days later forget everything and save them". Within a day or so following

that discussion with Ruggles, he denied saying to Ruggles that he wouldn't back up another officer and said to Ruggles "Lieutenant, I did not say that". What I said was " I can't see how people here run around stabbing each other in the back and two days later just forget it and expect that guy to come save their hide".

He stated that between December 9 and January 3, the rumors about backup were continuous and about four or five people had asked him about the veracity of the rumor.

Michael Casson has been a Patrol Officer in the department for the past twenty years. He testified that on January 3, he was on the A shift which is 4:00 a.m. until 12:00 noon. At 11:30 that morning officer Coon was working that day and Casson did not see Officer Natoli in the station; thus contradicting the testimony of Natoli, Libertore and Gardner. He observed only Ball and Gardner in the locker room; this being between 11:30 and 11:45 a.m. as best he could recall. He was in the locker room for only about a minute and the only conversation which he overheard was concerning how people in the department get ahead.

The undersigned finds that the City, by a preponderance of credible evidence, sustained it's burden of proof in respect to the allegations set forth in Charge One.

It is my opinion that the Respondent had in December, 1992 and January, 1993, engaged in acts of misconduct of the most serious nature. He was the President of the Union and therefore in a position of power, influence and authority. Although he did not at any time, state that he would not, based upon certain criteria, back up another officer when required, he let it be known that any officer who did not conform to his sense of proper cooperation, stood in danger of not receiving backup from other officers when a dangerous situation presented itself. In a police department, I am at a loss to envision a more serious and flagrant act of misconduct.

CHARGE TWO - MISCONDUCT
VERBAL ABUSE AND PHYSICAL ASSAULT ON A FELLOW OFFICER

The allegations contained in Charge Two relate to a confrontation which took place on January 4, 1993, between officer Colocino and Gardner. The testimony in respect to who engaged in the chest bumping and whether Colocino also physically touched Gardner's face was inconclusive. The testimony was undisputed by Gardner that he physically pushed Colocino, but there was countervailing testimony that this occurred only following Colocino poking Gardner's cheek with his finger. The City did not sustain it's required burden of proof in support of the allegations contained in Charge Two.

CHARGE THREE - MISCONDUCT AND INCOMPETENCY:
FAILURE TO OBEY A COMMAND BY A SUPERIOR OFFICER

Although Gardner may have been told more than once to leave the building, he may have been sufficiently overwrought so as to have not heard those directives from Sergeant Walker, who stated that he so directed Gardner more than once to leave the building. Officer Colocino, when directed by Walker to go back to his office, started to do so, but then, upon hearing more comments from Gardner, turned around and started to return to Gardner for more confrontation.

Even if, assuming arguendo, Gardner did disobey an order from a superior officer to leave the scene of the confrontation, then so did Colocino, by starting to leave and then starting to return. It would therefore be disparate treatment to find Gardner guilty of that portion of Charge Two, when Colocino also disobeyed the same order and was not in receipt of a disciplinary charge.

CHARGE FOUR - MISCONDUCT AND INCOMPETENCY - INSUBORDINATION
THROUGH REPETITION OF MISCONDUCT AFTER BEING COUNSELED
REGARDING SIMILAR CONDUCT

I have previously addressed with the Respondent's motion concerning the memorandum (CX#6) which was issued to Gardner on October 1, 1991 and its effect upon the allegations contained in Charge four.

The memorandum (CX#4) was grieved by the Respondent and the grievance was resolved by agreement that the memorandum was to be removed from his personnel file on September 30, 1992. The removal of the memorandum apparently took place at that time and the City may no longer rely upon it to support the allegations contained in Charge four.

Charge Four relies in great part on (CX#6), which for all intent and purposes, no longer exists, based upon the resolution of the grievance. In respect to the Respondent's motion to dismiss charge #4, I hereby grant the motion. Charge Four is hereby dismissed.

FINDINGS OF THE HEARING OFFICER

Charge One - Guilty
Charge Two - Not Guilty
Charge Three - Not Guilty
Charge Four - Not Guilty

RECOMMENDATION OF THE HEARING OFFICER

Based upon my finding of Guilty in respect to Charge One, I hereby recommend that Kenneth Gardner be terminated from the City of Canandagua Police Force.

Respectfully Submitted,

Bernard Winterman
Hearing Officer

April 1, 1993

Copy to: Robert J. Brennan, Esq.
Peter J. Spinelli, Esq.

City of Canandaigua
New York


232 1009

WILLIAM R. BRIDGEO
CITY MANAGER

716-396-5

April 5, 1993

HAND DELIVERED APRIL 5, 1993

Kenneth J. Gardner


Dear Mr. Gardner,

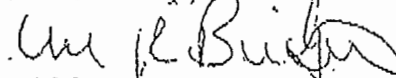
On January 19, 1993, you were charged with misconduct and incompetency as a City of Canandaigua Police Officer, pursuant to Section 75 of the Civil Service Law of the State of New York. In accordance with the provisions of that law, a hearing was held on February 24 and 25, 1993, by Bernard Winterman, duly appointed to make a recommendation as to what disciplinary action, if any, should be taken.

I am in receipt of Mr. Winterman's report and Recommendations - a copy of which is enclosed for you - and all materials related to that hearing, including exhibits and transcript. I have thoroughly reviewed all of these materials.

Based on the recommendation of the Hearing Officer, and my own independent review of the exhibits and transcript, I find that you are guilty of misconduct and incompetency, that Charge #1 - Violation of Canandaigua Police Department Rules and Regulations: Threatening and Coercing a Fellow Police Officer - of which you have been found guilty by Mr. Winterman is most serious in nature and that dismissal from employment with the City of Canandaigua is fully warranted.

Accordingly, effective this date, you are hereby terminated as an employee of the City of Canandaigua.

Sincerely,



William R. Bridgeo
City Manager

WRB:p

cc: Robert Brennan, Esq.
Robert J. Flavin, President Local 1170
Patrick W. McCarthy, Chief of Police
Joseph Delforte, City Clerk/Treasurer
Peter Spinelli, Attorney
Bernard Winterman
Georgia Delaney