

FEDERAL MEDIATION AND CONCILIATION SERVICE

CAPITOL CITY LABOR PROGRAM, INC.,

Union,

Arbitrator Thomas J. Barnes, Esquire

and

Case No. 210622-07806

CITY OF DEWITT,

Chad Vorce (Termination)

Employer.

OPINION AND AWARD

CHRONOLOGY

Date of Grievance: May 5, 2021

Date of Hearing: September 29 & 30, 2021

Location: DeWitt City Hall

Briefs Filed: November 5, 2021

COUNSEL FOR THE EMPLOYER

Michael R. Blum, Esq.
Foster Swift
28411 Northwestern Highway, Suite 500
Southfield, MI 48034

COUNSEL FOR THE UNION

Jeffrey S. Donahue, Esq.
White Schneider, P.C.
1223 Turner Street, Suite 200
Lansing, MI 48906

WITNESSES FOR THE EMPLOYER

Bruce Ferguson, Police Chief
Clyde Smith, DeWitt Police Officer
Luke Shafer, Michigan State Police Trooper
Dan Coss, City Administrator
Alexander T. Hamilton, Lansing State Journal
Delivery Driver

WITNESSES FOR THE UNION

Chad Vorce, DeWitt Police Officer and
Grievant

BACKGROUND AND FACTS

The facts in this case are largely undisputed and since the Employer's Post Hearing Brief accurately recites those facts the following is largely taken from the Employer's Post Hearing Brief.

On January 14, 2021, at approximately 7 a.m. Grievant left his home outside of the City of DeWitt with his [REDACTED] in his pickup truck and while existing the neighborhood spotted what he thought was a suspicious van. Upon approaching the van and then rolling down his window he asked what the person in the van was doing and he said he was "doing me." The driver of the van was a young black male approximately 17 years old. Grievant then called the Clinton County 911 asking for a police response telling the operator "it's a black male hanging out in the area and he said he is just doing me and he needs to be checked." Grievant then reported to the dispatcher that the driver of the van tried to back up and ram him to which the Grievant told the dispatcher that if that happened again he was going to go "shots fired". At one point Grievant left his truck and brandished his gun pointing it at the van driver. The delivery van circled the neighborhood with Grievant and [REDACTED] tailing him. Eventually the van left and proceeded to a well lit Sonoco gas station not far away. Grievant followed him and continued to pursue him around the gas pumps at the gas station until eventually they met face to face with the van facing the Grievant's pickup. At the Sonoco station the Grievant again took his gun out and pointed it at the van driver. Soon thereafter, DeWitt police officer Clyde Smith arrived and he was followed by Michigan State Police (MSP) trooper Luke Shafer. Upon arriving the scene officer Smith found the van driver and the Grievant shouting at one another and using profanity. Smith placed the van driver Hamilton in his police car in order to diffuse the situation. MSP trooper Shafer also tried to de-escalate the situation by separating the Grievant and Hamilton but Grievant

was not cooperative. Shafer wrote in his report "I attempted multiple times to stop Chad [Vorce] from yelling at Alexander [Hamilton] which had negative results. Shafer first further explained in his report as follows:

"Chad began telling Alexander why he thought his behavior was suspicious and stated we had vehicles stolen in our neighborhood. There was a UDAA two weeks ago, someone stole a car. (2) people are breaking into cars. (3) I think a black male is going to be breaking into a house at the same subdivision.

Shafer further characterized the escalating situation between Hamilton and the Grievant as follows:

"Chad and Alexander began yelling at each other again at which point the Grievant exclaimed "now you are going to jail for felonies [sic] assault. At that point I stood between Chad and Alexander, advising Chad he needed to go sit in his vehicle. Officer Smith placed Alexander in the rear seat of his patrol vehicle."

Shortly thereafter at approximately 8 a.m. Police Chief Ferguson received a phone call from a DeWitt resident who was at the Sonoco station explaining what he had witnessed. He told Chief Ferguson he thought there was going to be a shooting. As a result, that citizen was interviewed as part of the investigation. Another citizen who was also at the Sonoco station was also interviewed during the investigation. That citizen had called 911 to report it. Chief Ferguson after receiving the citizen call called the Chief of Police for DeWitt Township informing that Chief that he had been contacted by a citizen about the incident at Sonoco. The Township Chief said that since none of his officers were involved he directed that citizen to contact Chief Ferguson directly. Ferguson then called the citizen back and told him that he would be contacted soon for more information. Shortly thereafter, Chief Ferguson reviewed the CAD report to try to determine what was going on and who was involved. At 8:45 a.m. Officer Smith returned to the DeWitt police department and prepared his case report. In addition, he testified and reported that he had

told Grievant that he should go to the police department to provide his statement of what occurred as soon as possible; Grievant did not do so.

Chief Ferguson thereafter received an email from MSP Lt. Speights concerning the incident and contacted him by phone. Lt. Speights reported that he had concerns about what had taken place because it could be racial and could involve criminal activity and that he was assigning the matter to a detective for investigation. Chief Ferguson responded that his department would fully cooperate in the MSP investigation. Later that day around 6 p.m. Chief Ferguson returned to the police department and saw an email that Grievant had sent to the Lansing State Journal at noon that day and on which Chief Ferguson was copied. In the email Grievant identified himself as a DeWitt police officer and requested that the Lansing State Journal put Hamilton on a separate paper route.¹

On the very next day Chief Ferguson met with City Administrator Coss to review the events of the previous day and decided to place Grievant on administrative leave pending its investigation. That investigation was placed on hold until the MSP could complete its investigation. Upon that investigation being completed, the City received additional documentation and evidence from the MSP investigation including the MSP incident report prepared by Shafer and an MSP incident report prepared by Det. Sgt. Scott Singleton who Lt. Speights had assigned to the matter. The MSP report by Singleton indicated that the matter would be forwarded to the Clinton County Prosecutor's Office for review of any charges but since neither the Grievant nor Hamilton wishes to pursue such charges the prosecutor declined to pursue the matter.

¹ Since the claimed email violation was not critical to the Police Chief's discharge decision I need not consider it here.

Finally, the City completed its internal investigation which was assigned to Sgt. Stoltzfus. His investigation was completed on April 25, 2021, in which Chief Ferguson determined Grievant had violated the City's social media policy and had violated the police department's rules and regulations, 4.2 General Conduct, in the following respects:

- Grievant's investigation in pursuit of Hamilton was outside his jurisdiction and police authority.
- His use of force was unjustified and excessive.
- His tone and demeanor was excessive and his inability to de-escalate the situation brought discredit to himself and the department.
- He put [REDACTED] the community and responding officers at risk when he told the Clinton County dispatch to have the officers respond priority because he was going to go shots fired as he pursued Hamilton to the Sonoco gas station.
- His conduct and behavior on the morning of January 14, 2021, brought disrespect to himself and the DeWitt City Police Department.

The Chief then provided the internal investigative report to City Administrator Coss who subsequently served a notice of a pre-discipline (Loudermill) hearing. The hearing was held on May 5² and at the conclusion of which Administrator Coss concluded that Grievant had violated the City and Police Department policy and that termination was warranted and he was subsequently notified in writing that he was terminated as follows:

The City's comprehensive internal investigation regarding policy violations has been completed and it has been determined that your off-duty conduct violated the following City and Police Department policies: City of DeWitt Personnel Policy Manual Section 19 – Social Media Policy and City of DeWitt Police Department Rules and Regulations 4.2 – General Conduct.

Based on the information collected through the comprehensive internal investigation, and after consideration of the information you presented during the

² I express no opinion on the four months which elapsed from the date of misconduct (1-11-21) to the date of discharge (5-5-21) since the issue was not raised.

Loudermill Hearing on May 5, 2021, it was determined that just cause exists for termination of your employment as a police officer with the City of DeWitt.

Your employment with the City of DeWitt Police Department is terminated effective May 5, 2021.

APPLICABLE CONTRACT PROVISIONS

.....

**ARTICLE 2.
RIGHTS OF THE CITY**

Section 4.0.

.....

- (b) The City shall also have the right to promote, assign, transfer, suspend, discipline, and discharge for just cause, layoff and recall personnel, to establish reasonable work rules and policies and penalties for violation thereof, to make judgements of ability and skill; to determine work loads; to establish and change work schedule, to provide and assign relief personnel, provided, however that these rights shall not be exercised in violation of any specific provision of this Agreement.

.....

**ARTICLE 4.
GRIEVANCE PROCEDURE**

.....

Section 6.7. Discipline. Discipline should be positive, developmental and progressive in nature, and shall be for just cause. Any discipline taken against an officer shall be in writing and shall specify the charges resulting in such discipline.

.....

CITY OF DEWITT POLICE DEPARTMENT

Rules and Regulations

. . . .

4.2 GENERAL CONDUCT

Police Officers are the most visible representatives of the city, and to the majority of city residents, he/she is a symbol upon whom they can rely. An officer's conduct is closely scrutinized by the public and when his/her actions are found to be excessive, unwarranted, or unjustified, they are criticized more severely than the comparable conduct of persons in other walks of life. Since the conduct of an officer, both on duty and off, may reflect directly upon the Department, an officer must at all times conduct himself/herself in a manner which does not bring discredit to himself/herself, other Police Officers or the Police Department. That which brings discredit upon the officer as a member of the Department, or that which impairs the operation and efficiency of the Department is considered unacceptable conduct for Department personnel.

All members of the Department shall thoroughly acquaint themselves with the duties of the office position or employment which they hold. They shall perform the duties thereof properly and with care and attention. In carrying out the functions of the department, all members thereof shall direct and coordinate their efforts in such a manner as will tend to establish and maintain the highest standard of dignity and efficiency.

ANALYSIS AND OPINION

At the hearing the Grievant testified regarding his actions. At the time of the hearing he was an 18 year veteran of the department and prior thereto he had spent 8 years as a military police officer in the Army. In his years at the City he was never disciplined and there were no formal complaints against him by any citizens. Grievant testified that when he viewed the videos of what had occurred on the evening in question he became upset to his stomach and wished that he had handled the situation better. He testified that if the situation had occurred while he was on duty he would never have acted in such a fashion. He further explained he believed his reaction was out

of concern for the presence of [REDACTED] in the vehicle but he also acknowledged that by putting [REDACTED] in harms way be made the situation worse.

The Grievant testified that he initiated his actions because he suspected the delivery driver could have been a suspect in local crimes and said he wanted to help apprehend the suspect and "be a hero to the department and his community." Grievant took full responsibility for his conduct and recognized how the situation went tragically wrong. He also admitted violating the City's policy on email usage. Grievant acknowledged he had multiple opportunities to simply drive away and let the on duty officers take care of the delivery driver. He further related that he honestly thought the delivery driver was trying to ram him and he had to act to protect [REDACTED]. Thus, he testified that's why he called for a priority response on his 911 call when he said he was going to go shots fired if he got rammed again and why he pulled his off duty weapon and identified himself as a police officer when doing so.

Last, Grievant testified he was not a racist and was upset by any inference that he was. Finally, Grievant testified that if he had been on duty none of the events of January 14 would have happened the way they did and he was convinced that he could return to be a productive member of the City's Police Department as he had been for the past 18 years.

Since the facts were largely undisputed and since it was clear to the Arbitrator at the hearing that there had been serious violations of the Department's policies as set forth by the Employer in its discharge letter the significant issue remaining to be decided is whether discharge was the appropriate discipline. In that connection it is helpful to review a number of authorities that the Employer and Union counsel have diligently referred to in their post hearing briefs. I begin by reviewing the Employer's citations' authority followed by the Union's arbitral opinions. Before doing so, three principles overlay the case involving the police officer in this situation. The first

is whether or not off duty conduct is a sufficient basis for discipline and if it is, in what circumstances does such conduct warrant discipline. The second is that police officers are held to a higher standard of care than other employees. Finally, it is acknowledged that the discharge of a certified police officer is most often the end of his career as a police officer.

Regarding the higher standard of care required of a police officer, the Employer cites *City of Oakland Park and Metro Broward Professional Firefighters Local 3080*, 133 LA 929 (Wood, 2014) for the proposition that while an employee's conduct away from the place of business is normally viewed as none of the employer's business there is an exception where if it can be shown that an employee's misconduct off the premises has a detrimental effect on the employer's reputation or where the off duty conduct leads to a refusal, reluctance or inability of other employees to work with the employee involved. The arbitrator there also noted the high standard attached to a police officer's conduct:

"In the public sector, certain positions are held to such a high standard that the employee's conduct off duty can have a detrimental effect on the employer's ability to operate effectively. For example, public safety employees and teachers are typically held to a higher standard of conduct because they hold positions of public trust and are quite influential." 133 LA at 937.

Finally, that case set forth the three prong test for determining whether off duty conduct is sufficient to meet the just cause standard for disciplinary action:

"First, the arbitrator must find the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined."

The second prong examines whether the misconduct was of the nature that had an adverse impact on the public employer's ability to operate efficiently and effectively. In other words, whether there was a legitimate governmental interest or nexus between the conduct and the effect if any on the employment relationship. Arbitrators consider, as a major factor, how the misconduct at issue effects the employee's job responsibility. As arbitrator Tia Denenberg stated: No discipline is warranted, however, for off duty conduct which does not impune the intrinsic competence or character of the employee.

Third, assuming that the employer has proven the misconduct and that there is a nexus between that conduct and the employee's job responsibility the arbitrator must determine whether the employee's conduct warranted the particular discipline imposed." 133 LA at 938.

In this case, the firefighter was found to have tested positive on a drug test for marijuana and since he was in a safety sensitive position the employer terminated his services. Arbitrator Jeanne Wood in reinstating the employee with certain conditions commented on what can occur in the course of human events:

"There can be no doubt that the loss of his job in the midst of both family and personal health issues has been a wake-up call regarding the need to make the right choices when faced with the most monumental challenges. By the same token it is important to recognize that even good people can make bad choices at times. This is the human condition and the human condition dictates that sometimes otherwise while-meaning individuals find themselves in situations where the best decisions are not made. An isolated mistake should not end the career of an individual who has but for this incident, demonstrated competence and commitment to his professional especially where there is no evidence that the mistake actually affected the performance of his duties, caused damage to the employer, or anyone else. Grievant made a bad choice in his personal life. There has been no evidence that he has ever done such a thing in his professional life.

The City, as his employer, has made quite an investment in Grievant and Grievant has demonstrated his commitment to the City through competent performance of his duties and an unblemished employment record. The essence of just cause is that both the employer and the employee "benefit when an employee can be rehabilitated and retained as a productive member of the work force. The trained employee is seen as a valuable resource, making it economically prudent to attempt rehabilitation of a current employee."

Based on Grievant's convincing testimony that he has learned his lesson; his genuine demonstration of remorse; the fact that he has taken corrective measures; along with the devastating effect this disciplinary action has undoubtedly had on his life, there is sufficient evidence that the Grievant has rehabilitated so that the city can operate with reasonable assurance that the conduct will not be repeated."

133 LA at 939.

Closer to home the Employer has cited Arbitrator Kathryn VanDagens' decision in *Berrien County*, 126 LA 938 (VanDagens, 2009) wherein the arbitrator upheld the discharge of a

corrections deputy (not a certified police officer) who while on a last chance agreement continued to cavort with a known felon. In addition, she lied about her relationship and further provided money to the felon while he was in jail. The case is distinguishable for several reasons:

1. She was a corrections officer, not a certified police officer;
2. She had 8 years of service, not 18;
3. She was on a last chance agreement; and
4. Her misconduct in my estimation was not in any way a mistake in judgment and was more egregious than the facts in this case.

Third, the Employer refers to another case involving Arbitrator VanDagens, *Vista Nuevas Head Start and Michigan AFSCME Council 25*, 129 LA 1519 (VanDagens, 2011) wherein a teacher in a Head Start program posted on Facebook a number of disparaging and abusive and profane remarks about co-workers, students and parents at the school where she was a pre-school teacher. The posts were available to a number of Facebook readers. I find it unnecessary to repeat the language in this case other than to say it was vulgar and repulsive at a minimum. Arbitrator VanDagens' thinking is well summed up in a closing paragraph in her Award:

"Grievant was a pre-school classroom teacher. The employer points out that the Grievant was expected to take a leadership role and serve as a role model to those in the program. Also, the program standards required that staff complied with the Head Start standards of conduct which consisted of respecting and promoting "the unique identity of each child and family and refrain from stereotyping on the basis of gender, race, ethnicity, culture, religion or disability" and following "program confidentiality policies concerning information about children, families and other staff members." Grievant's posts revealing that one of her students had head lice and complaining about the parents' "dumb ass questions" hardly meet these standards.

129 LA at 1529.

Based upon the reported facts in that case I would have reached no different conclusion than Arbitrator VanDagens.

The fourth case cited by the Employer is the matter concerning *International Association of Firefighters and Employer (name redacted)*, 2016 LA Supp. 205, 288 (Ruben, 2016). In that case, Grievant, who was on a last chance agreement, while off duty at a concert became drunk and insulted a patron at the concert and was evicted from the concert by a police officer for engaging in rebellious behavior toward police officers including calling one of them the "n" word. I see this case as well as being considerably more egregious than the present case. The arbitrator noted that not only was Grievant's conduct reprehensible while drunk at the concert he had active discipline of a three day suspension and last chance agreement for misconduct in addition to calling a police officer the "n" word, all of which Arbitrator Ruben found justified discharge.

The Union has also submitted a number of arbitral authorities that merit review and scrutiny. In *AAA case (names redacted)*, 2020 WL 8616381 (Waxman, 2020) a police department terminated a 9-year police officer with no prior discipline, for running the license plate of his estranged wife and girlfriend multiple times and violating a restraining order and for conduct unbecoming. According to Arbitrator Waxman, "where there is a potential for an employee to correct unacceptable behavior, it behooves an employer to adhere to principles of progressive discipline. The discharge was reduced to a two week suspension. In a second case, *AAA case (names redacted)*, 2015 WL 4714850 (DeTreuX, 2015) the arbitrator reduced a discharge to a 25 day suspension as well as being subject to a fitness test. In that case, a 10-year police officer, while off duty, was involved in an altercation at a bar after some heavy drinking and thereafter lost control of his vehicle flipping it on its side, striking two parked vehicles, one of which struck another parked car. The officer tested at twice the legal limit for alcohol and was charged with driving under the influence and careless driving. The officer participated in a rehabilitation program but he failed to appear for a city council termination hearing about the incident and he

was terminated for multiple violations of the City Code of Ethics and police department directives related to the DUI. In addition, the officer had multiple prior disciplinary actions and off duty alcohol related incidents. The arbitrator noted that the officer's DUIIL attracted negative publicity to both him and his department but pointed to mitigating factors that the Grievant had been a "great employee" and was well liked among his peers. In my opinion this case is clearly more egregious than the present one.

In the third case, *AAA case (named redacted)*, 2010 WL 4829995 (Pearce, 2010) a corrections officer was terminated following an altercation with a man who he believed was having an affair with his wife. Upon agreeing to meet the man in a parking lot he went home and retrieved his firearm, for which he did not have a valid license to carry at the time, and during the subsequent confrontation in the parking lot he pulled his gun and allegedly threatened to kill the man. He was arrested, charged with assault with a dangerous weapon, and threatened to commit murder. Subsequently his wife received a restraining order against him. The court found him a danger to society and held him without bail. The arbitrator determined that the termination was inappropriate and reduced the discharge to a suspension of 30 days relying on the Grievant's 10-year record of being a good and reliable employee and his clean disciplinary record and that there were other corrections officers at the department who committed more egregious violations and received lesser penalties. Except for the disparate treatment part of this opinion I would have thought discharge would have been appropriate.

Next, in *City of Cleveland*, 108 LA 912 (Skulina, 1997) the Grievant, while separated from his wife and living with another woman with her two children, struck the son of the woman and was verbally abusive. Grievant was convicted of assault but the arbitrator reinstated the grievant believing this was a one time event and that he had expressed remorse for his actions.

In yet another case with a short service police officer, *Ohio State Highway Patrol and FOP, Ohio Labor Council*, 107 LA 779 (Feldman, 1996) an officer's suspension for five days was reduced to one day where the grievant had been suspended for getting into an off duty confrontation with a park patrolman who had informed the grievant that he could not block the street, that their illegally parked cars needed to be moved, and that food could not be dispensed and the music was too loud. In response, the grievant escalated the situation to the point that the 9-year veteran policeman called for backup with witnesses testifying to grievant's obnoxious behavior. In addition, the arbitrator noted the three year patrolman had prior disciplines. Nevertheless, the five day suspension was reduced to one day. It appears to me that based on the facts reported that was an extremely light discipline to begin with that was reduced to almost a negligible discipline.

Next, the Union cites *City of Manfield and FOP, Ohio Labor Council*, 105 LA 935 (Shanker, 1995) where an officer with 6 ½ years of service was suspended for 20 days for a fight that occurred off duty at his home. The arbitrator reduced the 20 days to 7 citing the following mitigating circumstances; no prior discipline, the offense took place off duty, no evidence indicating which spouse provoked the incident, and no evidence that the grievant deliberately planned the physical violence.

Next, in *City of Toronto and FOP, Fort Steuben Lodge 1*, 102 LA (Duff, 1994) the city discharged a police officer for disobeying a direct order to stay away from a civilian who had accused him of sexual harassment. After the female citizen claimed she was being harassed the off duty officer, his police chief instructed him to stay away from her but he was later seen leaving her residence only partially clothed. The arbitrator found there was no just cause to support discharge concluding the conduct was off duty and involved no serious crime.

Finally, in *County of Nye and Nye County Law Enforcement Association*, 102 LA 1133 (McCurdy, 1993) a sergeant was demoted to a police officer based on off duty conduct. While off duty the officer had accosted a juvenile for underage gambling and used vulgar, abusive and profane language in doing so. The grievant was reinstated to his sergeant position, no back pay and a six month probationary period.

I conclude that a fair reading of all of these cases is that the instant case is more significantly supported by the Union's citations and that the Employer's cases are decidedly stronger in favor of discharge than the present case.

It is clear what the Grievant did in this case violated the police department's policies. However, there are mitigating factors that auger in favor of recognizing this as an instance of poor judgment that hasn't occurred in 18 years and it's not likely to occur again given Grievant's recognition of what he did wrong.

Given the above arbitral authorities and the undisputed facts in this case I find it most useful to evaluate this matter based upon the three conditions to justify discharge that Arbitrator VanDagens set forth in the *Vista Nuevas* case cited above.

Harms the Employer's Reputation

There is considerable evidence that the Employer's integrity and reputation was impacted and impaired by Grievant's conduct. There were five witnesses that offered support for that conclusion, i.e., Officer Smith, citizens Seeger and Joseph, MSP Trooper Schafer, MSP Det. Sgt. Singleton, MSP Lt. Speights, and of course, Chief Ferguson and City Administrator Coss. There are counter veiling factors which several of these witnesses were not and are not aware of such as Grievant's 18 years of service, his unblemished disciplinary record, his admission that he made a serious mistake, and his remorse at the arbitration hearing. Nevertheless, the Police Department's

reputation was adversely affected. Notwithstanding all of this, in almost any case where a police officer is engaged in misconduct there is an adverse impact upon the Employer's reputation, integrity and standing. While I didn't examine in great detail each of the cases cited in the Union's post hearing brief, it appears that in nearly all of those cases a member of the public was either involved or the misconduct was such that it was highly unlikely that the matter would not have come to the attention of other individuals other than those directly involved in the case and in particular since they all went to arbitration. In short, any police officer misconduct case is going to have some ripple effect upon the department's reputation, some larger, some smaller. As pointed out at the time of the hearing there was no widespread publicity involving this matter.³

In an ironic twist of fate in my opinion Lansing State delivery driver Hamilton testified in a manner in which he did not exhibit any disdain for the Police Department nor any anger or dislike for the Grievant. It appears incredibly unusual to have a young black individual minding his own business while delivering newspapers being pursued by the Grievant who twice pulled his gun on Hamilton and not have any seething dislike or hatred for what happened. He may have, and not in a small way, saved Grievant's skin with his unemotional testimony.

Thus, while I conclude that Grievant's misconduct did have an impact upon the Police Department, it was not at a degree so injurious that it otherwise undermined or significantly impaired the otherwise good reputation of the Department.

³ The Employer has filed a Post Hearing Motion to reopen the record based on events that occurred subsequent to the hearing whereby this matter did receive media attention, some of it being rebroadcast world-wide. I have considered the Motion and the response thereto and have decided herein to deny that Motion on the basis that it was not indicated how the matter became a subject for the media. Nor is it clear to the undersigned how or who raised the issue. It would not appear that it would have been advantageous to either the City or the Grievant to shine a light on these events. Nevertheless, while there is some authority for reopening an arbitral hearing with new evidence relating to the underlying charges, it would be speculation on my part to try to determine who may have caused unnecessary disclosure other than perhaps the media uncovering such information through its various resources.

Employee is Rendered Unable to Perform His Duties or Appear At Work

This qualification applies in cases where an employee is engaged in misconduct such that seriously injures himself or others or is jailed or otherwise unable to report for duty. That is not this case and thus, that part of the VanDagens' test is not at issue here.

Leads to a Refusal, Reluctance or Inability of Other Employees to Work with Grievant

Here there was some testimony from Officer Smith that after he thought about Grievant's conduct some months later he was troubled by (as I was) Grievant's racial comments and actions. While perhaps out of kindness, Officer Smith did not testify that he would refuse to work with Grievant. I am not particularly enamored with this test since it could lead to a situation where an employee is being reinstated by an arbitrator to a department that is hostile to his racial or other protected characteristics. Obviously, that test has no validity in that environment and context. Moreover, if Grievant's fellow employees are reluctant or express an unwillingness to work with him, that is his burden to overcome. Every police officer has made mistakes. It is the nature of the occupation where sometimes split second life taking or life saving decisions are made. On a daily basis most police officers see a lot of people make a lot of mistakes, sometimes major and sometimes only a minor traffic ticket.

Based upon the above authorities and Grievant's misconduct in this case, the discharge does not meet the just cause standard. There is, of course, the Grievant's 18 years of service and unblemished disciplinary record. But there is a little more. Grievant had information that there was crime in his neighborhood. In the dark and in the middle of winter, while leaving his house with his [REDACTED] he spots what he believes is a suspicious looking van. He approaches the van and when asked the driver of the van what he was doing, the van driver responds with a very

ambiguous response "I'm doing me."⁴ That obviously made the Grievant even more suspicious so he continues following the van and after the van attempts to back up and ram him he calls the dispatcher. Thus, he did not try to take this matter on solely by himself (although he claimed foolishly in my opinion that he wanted to be a hero). He radios again for backup and by the time he tails the delivery driver to the Sonoco station shortly thereafter two officers arrive one from his department and one from the MSP. There unfortunately he jumps out of his truck and pulls his gun again and identifies himself as a police officer knowing however other police assistance is on the way. It is at that venue that he clearly escalates the situation rather than de-escalating it as the other two attending officers did.

Given these events which occurred in less than a one hour period, while I conclude that Grievant's misconduct was serious it does not warrant discharge given all of the other considerations. Set in the context of the above other arbitration cases set forth above this is not an egregious case justifying discharge on a first offense. Even if I were to consider this a close case most arbitrators would err on the side of progressive discipline and in effect accord a Grievant a second chance. It is noted that the CBA's just cause provision here is unusually broad spelling out it is to be "positive and developmental." In that connection, I am reinstating Grievant with no back pay. He is to be reinstated within 10 days of this opinion with his seniority restored but no other accrued benefits for the calendar year 2021. Grievant is to be subject to whatever training program the Employer deems appropriate and the Employer and Union are to mutually agree upon a

⁴ If Mr. Hamilton had only replied "it's none of your business but I'm delivering newspapers", we wouldn't be here today. A discharge emanating from that precipitating exchange is at the least extremely unfortunate.

program which will provide sensitivity training with regard to racial and other related protected characteristics.

AWARD

Grievant is reinstated with no back pay. Grievant is to be reinstated within 10 days of this award with his seniority restored but no other accrued benefits for the calendar year 2021. Grievant is to be subject to whatever training program the Employer deems appropriate and the Employer and Union are to mutually agree upon a program which will provide sensitivity training with regard to racial and other related protected characteristics.

Retain jurisdiction for 90 days.

Respectfully submitted,



Dated: December 9, 2021

Thomas J. Barnes
P.O. Box 3699
Grand Rapids, MI 49501-3699
616/336-6621

Thomas J. Barnes, Arbitrator
P.O. Box 3699
Grand Rapids, MI 49501

tel: (616) 336-6621
fax: (616) 336-9878

tbarnesarb@att.net

STATEMENT FOR SERVICES

December 9, 2021

Via Email – mblum@fosterswift.com

Michael R. Blum
Foster Swift
28411 Northwestern Highway, Suite 500
Southfield, MI 48034

Via Email – jdonahue@whiteschneider.com

Jeffrey S. Donahue
White Schneider, P.C.
1223 Turner Street, Suite 200
Lansing, MI 48906

Re: FMCS Case No. 210622-07806
Capitol City Labor Program, Inc. and City of DeWitt
Chad Vorce (Termination)

Hearings held September 29 & 30, 2021 at DeWitt Administrative Offices (2 days at \$1,500 per day)	\$3,000
Study Notes, Exhibits, CBA, and Post Hearing Briefs; Review cited authorities, review Motion for Reopening & Response. Draft Opinion and Award (2 1/2 days at \$1,500 per day)	3,750
Travel: Mileage to and from DeWitt (September 29 & 30, 2021) (260 miles at \$.56 per mile)	145
Hotel	N/C
Parking	N/C
Meals	N/C
TOTAL	<u>\$6,895</u>
Payable by Employer:	\$3,447
Payable by Union:	\$3,447

PAYABLE WITHIN 10 DAYS OF RECEIPT