

IN THE MATTER OF THE ARBITRATION BETWEEN:

City of Sauk Rapids, Minnesota
and
Law Enforcement Labor Services, Inc.

BMS Case No. 17PA0475
Eric Norsten, Grievant

Opinion and Award of Arbitrator

Arbitrator:

Carol J. Tidwell

Appearances:

For the Employer:

Pamela Steckman
Attorney at Law
Rinke Noonan
Suite 300 US Bank Plaza
St. Cloud, Minnesota 56302
320.656.3551
psteckman@rinkenoonan.com

And

For the Union:

Isaac Kaufman
General Counsel
Law Enforcement Labor Services, Inc.
327 York Avenue
St. Paul, Minnesota 55130
651.793.2313
ikaufman@lels.org

Date of the Award: June 2, 2017

Jurisdiction

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between the City of Sauk Rapids, Minnesota (“City” or “Employer”) and Local 949 of Law Enforcement Labor Services, Inc. (“LELS” or “Union”). The grievant Eric Norsten (“Grievant” or “Norsten”), was employed by the City and is a member of the Union.

The undersigned neutral arbitrator was selected by the parties pursuant to the rules of the Minnesota Bureau of Mediation Services to conduct a hearing and render a binding arbitration award. The hearing was held in Sauk Rapids, Minnesota on two days, April 24 and 25, 2017. The parties stipulated that the matter was timely and properly before the arbitrator. Both parties were afforded a full and fair opportunity for the examination and cross-examination of witnesses who testified under oath as well as the introduction of exhibits. The attorneys representing the parties filed written briefs which were received by the arbitrator in a timely manner on May 26, 2017, at which time the record was closed.

Issue

The parties each offered a statement of the issue at the hearing on April 24, 2017. The Union’s written statement of the issue was: “Did the City of Sauk Rapids violate the Collective Bargaining Agreement by terminating Eric Norsten without just cause? If so, what is the appropriate remedy?” The arbitrator finds that the issue in this case is as presented in writing by the Union.²

¹ The applicable CBA was contained in both City Exhibit 3 and Union Exhibit 1.

² See Section 22.6 of the CBA, cited below. The issue stated verbally at the hearing by the City was essentially the same as that presented in writing by the Union.

Factual Background

The City of Sauk Rapids, Minnesota (“City”) provides law enforcement services to its residents through its police department (“Department”). The Department is headed by a chief of police; currently this is Perry Beise (“Chief”), who has served in that capacity since mid-2008. Sauk Rapids is located directly across the Mississippi River from the larger city of St. Cloud.

The Grievant has been a patrol officer since 1991; he worked for the cities of Breckenridge, Minnesota and Clarkfield, Minnesota before being hired by the City in November of 2000. At the time of his termination by the Employer on December 12, 2016 the Grievant had been a police officer for a total of approximately 25 years and an employee of the City in that capacity for approximately 16 years.

The City cited as the bases³ for terminating the Grievant three events or groups of events, namely (1) a citizen complaint of unnecessary Tasing⁴ by the Grievant at Coborn’s grocery store in May of 2016; (2) six different dates on which the Grievant admittedly left the City limits for home in his squad car without Department permission and contrary to Department policy while he was on duty, and which he failed to properly record on his timesheets, and during which he exceeded the posted speed limit when going to and fro without the use of sirens or flashing lights; and (3) a charge of improper use of force in that the Grievant Tased a female (“Woman”) whom he had taken into custody after responding to a mental health call⁵ to the Department by the Woman’s husband, and whom the Grievant had then transported to the hospital in St.

³ These three bases were initially testified to by Sergeant Daniel Falk, an officer with the Department who was heavily involved with the City’s investigation of the Grievant that led to his discharge.

⁴ A Taser (the verb is “Tasing” or “Tased”) is an electrical weapon issued to and used by officers in the Department. Its possible uses and actual uses in this matter will be discussed in detail in this Opinion.

⁵ This generally means that the police are called to respond to a person or persons who may or may not be suffering from a mental illness but whose behavior is generally chaotic and uncontrolled and who present possible imminent harm to themselves and/or other persons. Oftentimes the ingestion of a controlled substance by the person has also occurred.

Cloud, while the Woman was in four-point soft restraints in the emergency room at the hospital.⁶

Relevant Contract, Policy, and Procedure Provisions

The relevant provisions of the CBA of the parties which expired on December 31, 2016 are as follows:

Article 22. Grievance Procedure

...

Section 22.6 Arbitrator's Authority. The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this contract. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the City and the employee. The arbitrator shall have no authority to make a decision on any other issue not submitted.

Article 23. Discipline.

23.1. The City will discipline employees for just cause only.

...

23.5. Discharge will be proceeded (sic) by a five (5) day suspension without pay.⁷

The relevant provisions of the applicable City policies and procedures are as follows:

Policy P-06⁸

Rules Relating to the Use of Specific Weapons

...

D. Use of Electronic Incapacitation Device (Taser)

...

3. Restricted Uses:

a. The Taser shall not be used on restrained individuals unless the actions of the subject pose a potential threat of bodily harm to themselves or to any other person.

⁶ The facts of the circumstances regarding the Woman were not in dispute.

⁷ The arbitrator notes that this provision, in conjunction with the limitation on arbitral authority in CBA Section 22.6, cited above, arguably would require that the grievance be automatically upheld in favor of the Grievant without substantive reasoning or rationale, as there was no testimony that the termination of the Grievant was preceded by a five day suspension without pay. This provision as written contradicts the requirements of just cause in the CBA, however, making the contract ambiguous in this regard and in need of interpretation, which is not proscribed by the wording of Section 22.6. In any event, given the harsh and unjust result to the City of applying this provision literally, as written, the arbitrator declines to do this. See Elkouri and Elkouri, 8th Edition, Chap. 9.3.A.xv.

⁸ City Exhibit Policy/Statements B.

Updated Standard Operating Procedure, M-02⁹

On duty officers of the Sauk Rapids Police Department are required to eat their meals within the City limits. Officers may leave the city limits to a distance of one (1) mile to obtain food and then return to the city.

DUTIES

...

Subd. 2. Officers shall report their location of meals or breaks to the dispatcher.

Burden of Proof

The Employer bears the burden of proving to the satisfaction of the arbitrator by a preponderance of the evidence that there was just cause to terminate the Grievant's employment.

Position of Employer

The City asserts that the three bases cited above and testified to at the hearing provide support for the termination of the Grievant. It maintains that it did a proper and complete investigation in addition to that investigation conducted by the police in St. Cloud,¹⁰ the results and a report of which were provided to the City by St. Cloud police prior to termination of the Grievant. The Employer cites the need for three essential qualities of police officers, namely, honesty, integrity, and reliability, and states that these qualities were shown to be absent in at least the first two bases of its termination of the Grievant. The Employer claims that the third basis for termination, namely, the Tasing of the Woman while she was in four-point soft restraints violates the Department policy on the use of force. The City also asserts that the

⁹ City Exhibit XII; although this policy does not so provide, the Chief testified that permission may be requested by an officer to act contrary to this policy and that on occasion, as a supervisor deems possible and appropriate, the Department grants this permission.

¹⁰ The St. Cloud police had criminal jurisdiction over the Tasing incident due to the location of the event at the hospital there; additionally it was the Chief's preference that St. Cloud police investigate for any criminal conduct by the Grievant due to a potential conflict of interest for the Department. The St. Cloud police investigated for potential criminal action by the Grievant and concluded that none occurred.

penalty of termination that was imposed is commensurate with the three bases asserted and in light of his prior disciplinary record. The Employer asks that the grievance be denied.

Position of Union

The Union agrees that the Grievant violated Department policy by driving his squad car to his residence outside of city limits while on duty, but alleges that this policy has not been consistently enforced by the Department. LELS further maintains that the Grievant remained on duty even while outside of city limits and was available for calls from the Department. Lastly, the Union asserts that even if all of the City's charges against the Grievant are found by the arbitrator to have occurred, the penalty of termination is unduly harsh. The Union asks that the Grievance be sustained with the Grievant reinstated and made whole or, alternatively, that the termination be reduced to an appropriate level of discipline consistent with the requirements of just cause.

Discussion and Opinion

Whether there is just cause to terminate the Grievant in this case initially requires the arbitrator to address a fundamental inquiry, namely, was the Grievant guilty of some misconduct or the violation of a reasonable rule, policy, or procedure of which the employee had notice. If the arbitrator finds that this has occurred, the arbitrator must then determine whether the penalty imposed by the employer is commensurate with the misconduct or violation and, further, whether any mitigating factors are present. The analysis of whether there is just cause and what the remedy shall be essentially requires that the arbitrator place the behavior of the Grievant in appropriate context.

As background, an explanation of a Taser and what it means to "Tase" someone follows. Information provided to the arbitrator by witnesses including the Department's Taser

instructor¹¹ shows that a Taser is an electronic incapacitation device which is provided to officers (including the Grievant) by the City for their use in accordance with state law concerning the use of force as well as Department policies and procedures. Tasers, which are shaped similarly to hand guns and which appear to be made of plastic,¹² may be used in one of two ways as instruments of force. The first way is by the use of a removable cartridge on the “business” end of the Taser. Use in this way shoots electrodes into the subject by means of two approximately 21-foot long wires to which the electrodes are attached, which send an electrical current into the subject inducing temporary neuro-muscular incapacitation. This means that the subject’s muscles are locked and the subject becomes temporarily immobilized. In the second use, called “drive stun,” the business end of the Taser with the cartridge removed is placed directly on the skin of the subject at which time the Taser is activated by the officer. Activation may occur for variable periods of time as the officer determines is necessary in the circumstances. The drive stun method is used to produce pain compliance, meaning that the subject feels pain and thereby hopefully is motivated to comply with the officer’s instructions. Lastly, the Taser also functions as a flashlight.

Of the three bases cited at the hearing by the Employer for the termination of the Grievant, the third event, namely, the purported excessive use of force by Tasing the Woman, is the most significant. The two other bases for termination will be discussed below.

Tasing Incident

As to the first inquiry in just cause analysis about the reasonableness of the policy at issue, there is no question that Department policy P-06¹³ regarding the use of a Taser on a restrained individual is a reasonable one, and the arbitrator so finds. The Grievant did not

¹¹ Officer Dave Rosenkrans, a 17-year employee of the Department.

¹² Additionally, the Taser shown during the hearing was bright yellow in color.

¹³ The relevant language in the policy is: “The Taser shall not be used on restrained individuals unless the actions of the subject pose a potential threat of bodily harm to themselves or to any other person.”

assert that he was ignorant of this policy and the arbitrator therefore also finds that he had knowledge of the policy. As to the next question, that is, whether the Grievant violated this policy, an evaluation of the circumstances is required, given the “unless” clause in the policy that Tasing of a restrained person is acceptable if the person poses a potential threat of bodily harm to themselves or others. This evaluation takes place, as it must, in hindsight by the Employer and, due to the grievance, by the arbitrator.

What are the facts and circumstances to be reviewed as part of the evaluation of whether the “unless” clause was satisfied? The City asserts that the events at the hospital but not what transpired at the scene of initial interaction between the Grievant with the Woman are all that is relevant. The arbitrator disagrees and finds that the circumstances of the call to the Department and the uninterrupted interaction between the Woman and the Grievant are one lengthy incident and all relevant to Grievant’s later use of the Taser on her at the hospital.

As the incident report¹⁴ shows, on May 30, 2016 at about ten p.m. the Grievant and Sgt. Bukowski, the Grievant’s supervisor who was also on patrol in a separate squad car, both reported to a call from dispatch about an intoxicated, disturbed female. When the two officers arrived on the scene¹⁵ of the caller’s home they found the caller (a man who was the Woman’s husband) and an older woman (who was either the Woman’s mother or mother-in-law) trying to verbally control the Woman, who was physically lashing out, running around in the grass, and making guttural noises along with using profanity. In addition, the Woman’s teenage son was standing in the driveway, apparently distraught at his mother’s behavior.

The Woman may well have had “excited delirium,”¹⁶ a state of extreme mental and psychological agitation, hypothermia, hostility, exceptional strength and endurance without

¹⁴ City Exhibit IV.A. The report states a short description: “CALLER STATED HIS WIFE IS INTOXICATED AND HE WANTS HER REMOVED” (capital letters are used in the exhibit).

¹⁵ The squad car camera recording of the event from the Grievant’s vehicle with video and audio was shown in its entirety at the hearing.

¹⁶ The Woman’s medical records were unavailable at the hearing but the parties stipulated that excited delirium was an issue when she was taken into custody. It was determined later that she had an extremely high blood alcohol content (.25), and had ingested cannabinoids (marijuana).

apparent fatigue. As the officers attempted to get her into the squad car she struck out at them. The squad car recording demonstrates that she was clearly out of control both physically and verbally and actively fighting the officers as well ignoring the verbal pleas of her family members. Nevertheless, the two officers were able to corral her and then handcuff her hands in front of her; as a security measure before putting her into the squad car the handcuffs were moved from the front to behind her back. She was strapped into the seat belt in the back of the squad car, despite her almost non-stop kicking and screaming.

At no time during this sequence did the recording show the Grievant or Sgt. Bukowski Tase the Woman or discuss doing so. The Grievant testified at the hearing that he took the Taser out at the scene only to remove the cartridge¹⁷ when he wanted to use it as a flashlight; it was quite dark¹⁸ in back of the house where the Woman was and the presence of a train¹⁹ on nearby railroad tracks increased the danger to the Woman and all present. The Grievant stated that he removed the cartridge because he did not want to inadvertently shoot the electrodes into her while using the Taser as a flashlight, testifying that the safety has to be switched off in order to use the Taser as a flashlight.²⁰

The Grievant alone then began transporting the Woman in his squad car to the hospital located in St. Cloud; the squad car camera remained on during the transport. The Woman almost immediately disengaged the seat belt and began moving around in the back seat, kicking the squad car windows as well as the cage behind the Grievant; she did this so forcefully that the

¹⁷ There may be some confusion about when and how many times the Grievant removed the cartridge from the Taser. In his modified supplemental report as part of the incident report the Grievant wrote that he removed the cartridge (“end probes”) from the Taser at the hospital shortly before he Tased the Woman via a drive stun. His testimony at the hearing asserted that he removed the cartridge at the Woman’s home in order to use the Taser as a flashlight. Perhaps he replaced the cartridge after removing it at the Woman’s house and then removed it again at the hospital. In any event, there is no question that the cartridge was removed before he Tased her at the hospital and that his action was a drive stun.

¹⁸ The scene was illuminated primarily by the squad car lights.

¹⁹ The train could be heard on the squad car recording.

²⁰ The City contended that it was unnecessary for the Grievant to use the Taser as a flashlight as the video clearly showed he had a separate flashlight on his belt; the Grievant credibly testified that he simply forgot about his flashlight in the chaos of the situation.

cage and the back of the front seat could be seen moving in the recording. She alternated this behavior with being quiet and relatively still for moments at a time. The Grievant testified that he activated his lights and sirens during this trip due to the nature of the Woman's behavior; he stated that ordinarily he did not do this for a hospital transport.

The Grievant called ahead to the hospital about the nature of the Woman's behavior and asked that hospital security personnel help with removing her from the squad car, which two did. One of these hospital security officers, G.S., who helped remove the Woman from the squad car and get her to the emergency room, described the circumstances of the Woman's arrival at the hospital and what happened once inside in the incident report²¹ which he wrote and filed with the hospital, as follows, in part, with names and specific room²² information redacted:

. . . The patient²³ was very agitated and was kicking on the driver's side door of the squad car. Several times the patient tried to kick out the side window of the vehicle. I told (an RN) that we needed more staff to remove the patient from the back of the squad car. I told (an RN) that we should get a bed so we could immediately take her out of the car and put 4-point restraints on the patient. The patient was removed from the back seat of the squad car and placed on the cart. During that time the patient was screaming and yelling and struggling with ETC²⁴ staff members. The patient's legs were immediately put into restraints. The patient was then wheeled to ETC Room (X). Once inside Room (X), I removed the handcuffs from the patient and the patient's arms were both placed into restraints. During that time the patient was very agitated and was screaming and yelling at ETC personnel and the Sauk Rapids police officer.²⁵ The patient then lifted up her head and spit in the face of (name), ETC staff. Spit hit (name) in the chest and face area. At that time a spit hood was placed on the patient. The patient began to struggle with ETC personnel. The patient was then tased by Officer Norstine (sic) in the left leg to get the patient to comply. Dr. (name) ordered medication to calm down the patient. After the patient was given medication, she fell asleep. . . . Physical description of (the Woman) is a (race²⁶) female, 5'8", 175 pounds . . . Total time of incident was 29 minutes.

²¹ City Exhibit IV.C.

²² The room in the trauma area of the hospital into which the Woman was brought is one of several such areas which are separated generally only by curtains.

²³ The Woman is referred to as the "patient" in hospital documentation cited in this Opinion.

²⁴ ETC means the emergency trauma center, also referred to herein as the ER or emergency room.

²⁵ The Grievant

²⁶ The arbitrator, having viewed the squad car video at the hearing and having met the Grievant at the hearing, concludes that both the Woman and the Grievant were of the same race.

The incident report²⁷ filed by the hospital security officer states that the time of the incident was 10:27 p.m.²⁸ and that it “cleared” or completed at 10:56 p.m.²⁹ The date of his report is 5/30/2016, the same day as the incident, indicating that it was completed almost immediately and before midnight that same evening. The third page of the incident report exhibit lists the hospital staff present in the Woman’s ETC room at 22:41 (10:41 p.m.), as follows (the number and identity of staff changed to some extent during the time the Woman was present):

- G.S., Security Officer
- J.R., Security Officer
- K.N., PCE (personal care extender)
- G.F., PCE
- N.S., PCA (personal care assistant)
- J.M., RN (registered nurse)
- M.L., nursing supervisor
- S.V., PCA
- M.T., LPN (licensed practical nurse)

Evidence presented at the hearing by the City provided complete details of the events in the room where the patient was taken upon entering the hospital. The Woman was laying prone on her back on a table covered by a sheet which she kept trying to kick off. The Woman’s arms and legs were in four-point soft restraints which allowed her limbs significant movement while keeping her from getting off the table. The Grievant was holding down her left leg and the second hospital security officer, J.R., held down her right leg since the restraints did not immobilize her. One of the PCAs in the room, N.S., told the St. Cloud police officer that he did not see the Tasing because he was holding her right arm.³⁰ Another staff member, G.F., a PCE, told the St. Cloud investigator that the Woman came close to head butting him but was unsuccessful; G.F. was standing on the Woman’s left side as was the Grievant.³¹ The Woman’s

²⁷ City Exhibit IV.C.

²⁸ The officer used the military time of 22:27 in his report.

²⁹ Again, in military time this was stated as 22:56.

³⁰ City Exhibit IV.B.

³¹ City Exhibit IV.B.

movements caused her body to move lower on the table at least twice (after each time staff moved her back up nearer to the top of the table) before the Grievant drive stun Tased her briefly on her left thigh.³² Hospital personnel³³ were clustered around the table, primarily near her upper body. All four of the Woman's limbs were not only in four-point soft restraints but additionally each of her four limbs was being held down by a hospital staff member or the Grievant.

The investigator from the St. Cloud police, A.M., obtained and reviewed the hospital video as part of his investigation and noted in his investigative report³⁴ that the Woman was "moving from side-to-side as if to get the sheet off." The Woman was clearly agitated and unsubdued and had a fair amount of limb mobility although she remained on the table. A.M. took statements beginning on June 1, 2016 from the hospital staff who were in the room with the Woman at various times on the night of May 30, 2016. These statements were largely consistent with the Grievant's version of events in the hospital room as well as the incident report of G.S., the hospital security officer. A.M. related in his investigative report that one of the hospital staff who was interviewed expressed an opinion that the Tasing was unnecessary.³⁵ A number of the hospital staff interviewed by A.M. stated that the Woman and the Grievant yelled at each other, both using profanity. Of those who said they observed the Woman's thigh after the Tasing none

³² The Department's Taser training officer testified that, when he looked at the record for the Taser the Grievant used that night it showed a time of three seconds for the drive stun on the Woman.

³³ A third page of the hospital incident report, City Exhibit IV.C., listed by name and job title nine "hospital staff present in the room at 5-30-16 at 22:41" (10:41 p.m.) including the two hospital security officers. This list did not include the Grievant nor the physician who ordered medication and to whom the security officer referred in his report, cited above. This brings the total in the room to at least 11 at one time during the event, not including the Woman. The statements of two of these persons as provided to the investigating officer from the St. Cloud police show that they, a nursing supervisor ("M.L.") and an LPN ("M.T."), were assigned to the room next to where the Woman was, and that they came into her room primarily because the loud profanity was troubling to the patient for whom they were caring.

³⁴ City Exhibit IV.B.

³⁵ This was S.V., a personal care assistant who is a student at St. Cloud Tech College in the paramedicine program. S.V. told A.M. when interviewed on June 4, 2016 that she did not think it was necessary to tase somebody who was in restraints and she thought about it after the fact and did not think it was the right thing to do. See City Exhibit IV.B. page 6.

indicated that she was marked or bruised by the Tasing. The Woman herself was also interviewed by A.M. and said she had no recollection of the Tasing.

The Grievant testified at the hearing that he believed the Woman to be a danger to herself or others. He stated that nothing had worked with her up to the point he Tased her. He said he feared that the Woman might head butt a nurse. Further, he said, she could have pulled one of her own muscles with her movements. The Grievant testified credibly that he used the Taser as a drive stun for a minimal time, as verified by the Department's Taser instruction officer who reviewed the recorded use of the Taser used that night and testified that the activation for drive stun mode was three seconds.

The arbitrator notes the statements of a number of hospital staff who were present in the room as related to A.M., the St. Cloud investigating officer and that the Grievant and the Woman were yelling at each other, both using profanity; she concludes that the Grievant's Tasing may have been motivated by a predictable albeit problematic frustration given the totality of his interaction with the Woman on May 30, 2016. The arbitrator notes that there was no testimony that any of the hospital staff raised a concern at the time of the Tasing about the Grievant doing this, and that only one³⁶ of the hospital staff did so days later when questioned in the course of the St. Cloud police investigation. As stated above, no criminal action was brought against the Grievant for Tasing the Woman. The arbitrator further acknowledges the Grievant's statement that he feared for the Woman's ability to inflict bodily harm to herself or another person,³⁷ but she concludes in hindsight that this fear was not entirely reasonable given the number of hospital staff in the room and the fact that they were clustered near her upper body, in addition to her restricted ability to move due to the restraints as well as her limbs being held down. Objectively, although necessarily in hindsight, the arbitrator concludes that the potential for the Woman to head butt a hospital staff member was scant. The arbitrator finds that the Grievant

³⁶ S.V., as noted above

³⁷ The Grievant testified to a concern that the Woman could still head butt someone as only her arms and legs were restrained.

violated the policy proscription on Tasing a person in restraints but also specifically finds that this is a close call.

Complaint at Coborn's

An individual filed a complaint with the City that the Grievant improperly Tased him at Coborn's grocery store on May 2, 2016. The Department concluded that the complaint was unsubstantiated due to it being unobserved and denied by the Grievant. The arbitrator notes that this incident was investigated by the Department only after the May 30, 2016 Tasing incident at the hospital, which undercuts its use as a basis for terminating the Grievant. Further, the City cannot generally pronounce a complaint unsubstantiated in a situation as occurred here but base discipline on it at the same time, thereby having its proverbial cake and eating it too. The arbitrator finds that this complaint does not constitute even part of the basis for just cause to terminate the Grievant.

Leaving City Limits for Meals, etc.

The third and final basis cited by the City for terminating the Grievant involved six different dates from March 30, 2016 to May 30, 2016 on which the Grievant admittedly left the City limits in his squad car for home without Department permission and contrary to Department policy while he was on duty, and which he failed to properly record on his timesheets, and during which he exceeded the posted speed limit when going to and fro without the required use of sirens or flashing lights.

The arbitrator notes that, again, the Department did not investigate these events until after the Tasing incident at the hospital, thereby undercutting their use as a basis for terminating the Grievant. There was testimony that the Department policy which was violated by these actions was reissued in 2015 to specifically address the behavior of the Grievant who was known to take meal breaks at home outside of City limits, but apparently this did not result

in his activities being monitored and properly disciplined. The arbitrator notes that this behavior was generally admitted by the Grievant and that he attempted to explain it away by a number of means,³⁸ all of which the arbitrator finds unpersuasive. The arbitrator finds that while the behaviors complained of by the Department would properly be the subject of appropriate discipline, this concern also does not constitute even part of the basis for just cause to terminate the Grievant, but it is nevertheless relevant to the remedy as discussed below.

Having found that the Grievant violated the Department's reasonable policy against the use of force on a person in restraints, of which policy the Grievant had notice, the question remains as to whether the penalty imposed by the employer is commensurate with the violation and, further, whether any mitigating factors are present. The context of the policy violation and the Grievant's work history and past performance are significant and important factors in these inquiries.

The Department's policy proscribes the use of excessive force on restrained persons, as it properly should, but it is incumbent on the Department to review the nature and extent of such violation when determining the penalty to impose. There would appropriately be a vast difference between discipline imposed for violation of this policy whereby an officer shoots and kills a suspect while that suspect is on the ground and restrained and the violation that occurred

³⁸ These explanations included that he reported to work early on several occasions (while commendable, police officers do not set their own hours of work and the Grievant needs to report and be on duty for all hours for which he is being paid as well as complying with all reasonable policies set by the Department of which he has been made aware); that his supervisor knew of his extended absence from the City even though the Grievant did not request much less receive permission to deviate from this policy as was potentially possible (permission means actual permission); that other officers conducted personal business while on the clock (while testimony showed that this was true, the extent of this was exceeded and abused by the Grievant on the six occasions presented by the City); and that even though he was outside of City limits he was still available for and took calls (while testimony of several witnesses showed that the Grievant did indeed take all calls while at home outside of City limits conducting personal business or eating a meal, taking calls is not the only duty to be performed by Department officers; patrolling the City is also an expectation of the job).

at the hospital in this case. Further, the Grievant has no history of nor any discipline for using excessive force over his lengthy career nor was there any testimony nor even any hint at the hearing that he is an angry person or is trigger happy. To the contrary, uncontradicted testimony by a number of witnesses showed that he has an ability to relate to suspects and other people just by talking with them, and was commended more than once by the Chief for this temperament and behavior.³⁹

The arbitrator notes that the Grievant did not Tase the Woman while he and Sgt. Bukowski were trying to subdue her, when this may well have been appropriate in order to gain her compliance. The Grievant credibly testified that the reason he and Sgt. Bukowski did not Tase the Woman at her home was because “we try (sic) to talk her down first – her son was there.” The Grievant’s professionalism and sensitivity to the situation including the presence of her family members speaks for itself. The short duration (three seconds) of the drive stun when the Grievant Tased the Woman at the hospital indicates appropriate self-restraint despite his back-and-forth yelling and profanity with the Woman at the hospital on top of the circumstances of apprehending her in the first place. The occurrences of prior discipline imposed on the Grievant do not exceed a written reprimand; in other words he has never been suspended. Most importantly, no prior discipline was for excessive force. No witness testified that returning the Grievant to the Department would be a detriment to the City, its residents, or the Department.

Based on the above discussion, documentation, and analysis of the sworn testimony and evidence provided at the hearing the arbitrator finds that the Employer did not have just cause

³⁹ Union Exhibit 4. This exhibit included a number of commendations of the Grievant and his work. While it is certainly possible for a decorated officer to nevertheless be properly terminated for just cause, the notations in the Grievant’s file and included in this exhibit are positive and relate directly to the issue here; they show the Grievant’s numerous occasions of humane, caring, and professional behavior on the job. A handwritten note by the Chief on a letter dated August 20, 2009 is an example of these qualities, which states “Eric, Well done. I am always impressed by your ability to gain people’s trust and cooperation. Thanks for the hard work. Chief Beise.”

to terminate the Grievant as a result of any or all of the behaviors on which his discharge was based and that the City has therefore violated the CBA.

Remedy

The arbitrator notes the behavior of the Grievant cited in this case by the Department with regard to the numerous times he was away from the City at home and related behaviors. These infractions would be a source of proper discipline of the Grievant and indicate to the arbitrator that the Grievant may well abuse his position for his own benefit. Whether these infractions stem from a poor attitude⁴⁰ or a perceived slight towards the Grievant by the Chief or others in management at the Department, or none or all of the above, is not relevant. In the arbitrator's experience people often do not like at least some persons with whom or for whom they work, but they are still properly required to behave in accordance with the reasonable expectations of their jobs. At the same time, the arbitrator is troubled by the City's after-the-fact investigation of these incidents and using them to support the Grievant's termination. The arbitrator imposes the discipline stated below and awards back pay, also as below.

⁴⁰ A one-time supervisor of the Grievant testified that the Grievant would avoid the Chief and was disruptive at training. It seemed to this witness, he stated, that the Grievant would try to get under people's skin, including the Chief and Department instructors.

AWARD

The grievance is **SUSTAINED, in part.**

The City is directed to reinstate the Grievant forthwith and to remit back pay from the date of his termination, December 16, 2016, to the date of reinstatement, which shall be reduced by two days without pay. The City is further directed to convert the termination of the Grievant into a written reprimand for violation of Policy P-06 and for leaving the City limits while on duty without permission contrary to policy, and to record same in his personnel file with an effective date of December 16, 2016.

The arbitrator retains jurisdiction for a period of sixty (60) days from the date of this Award to address any issues as may be necessary.



Dated: June 2, 2017

Carol J. Tidwell, J.D., Arbitrator
3517 Hemmingway Drive
Janesville, Wisconsin 53545
608.449.5265
caroljtidwell@gmail.com