

In the Matter of the Arbitration

Between

Fraternal Order of Police
Ohio Labor Council, Inc.,
Employee Representative

and

City of Sidney,
Employer

AAA Case # 01-19-0001-9953

ARBITRATOR'S DECISION AND AWARD

Douglas J. Behringer
General Counsel
Fraternal Order of Police
Ohio Labor Council, Inc.

Daniel G. Rosenthal,
Jackson Lewis P.C.
Attorney for the Employer

David J. Millstone,
Arbitrator

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Fraternal Order of Police)	David J. Millstone,
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City of Sidney,)	AAA Case # 01-19-0001-9953
Employer)	

An oral hearing was held on September 26, 2019 in the City Council Chambers of the City of Sidney, Ohio before Arbitrator, David J. Millstone. The arbitrator was selected by the parties pursuant to the Collective Bargaining Agreement through the administrative services of the American Arbitration Association.

Douglas J. Behringer, General Counsel for the Fraternal Order of Police, Ohio Labor Council, Inc., presented the case on behalf of the Employee Representative (hereinafter referred to as the "Union"). Also, present for the Employee Representative were Joshua Divans, Grievant and Witness; and Barry Gray, Staff Representative for the Union.

Daniel G. Rosenthal, Lawyer for the Employer, presented the case on behalf of the Employer. Also, present for the Employer were William Balling, Chief of Police of the City of Sidney (hereinafter referred to as the "City") and Witness; and Vickie Allen, HR Manager of the City. During the hearing, the Employer called Detective Jon Hofmann of the Police Department of the City; Mark Cundiff, City Manager of the City; and Joel Glass, IT Manager for the City, as witnesses.

A Court Reporter was present, and a stenographic record of the hearing was taken. The parties acknowledge this matter is properly before the Arbitrator. Both parties filed post-hearing briefs.

THE GRIEVANCE

Sergeant Joshua Divens had his employment with the City terminated effective May 17, 2019 as the result of alleged multiple violations of City policy and directives from supervisors. (CX 22) The City's stated reasons for the discharge included a history of poor performance and examples of non-feasance and acts of misconduct, including falsification of his daily log. (Id.)

A grievance was filed on May 21, 2019. (Joint Exhibit 1¹) The grievance alleged violations of Article 25, Sections 1 and 3 of the Collective Bargaining Agreement (Joint Exhibit #2) ("CBA") claiming the City terminated the Grievant's employment on May 17, 2019 without "just cause" and by "failing to follow progressive discipline."

Steps 1 through 4 of the Grievance Procedure were waived by the City at the Union's request and a Step 5 meeting was held with the City Manager on June 6, 2019. No new evidence was presented beyond what was presented during the pre-disciplinary process. The grievance was denied by the City Manager who found the City had not violated the Collective Bargaining Agreement in its termination of the Grievant.

ISSUE

The issue before the Arbitrator is whether the Employer had just cause to terminate the Grievant, and, if not, what will be the remedy.

BACKGROUND

Performance and Disciplinary Issues

Prior to 2018, Grievant had a clean record and had been performing on a satisfactory level with some clerical issues over the years. (T. 34) Starting in January of 2018, there appeared to

¹ Joint Exhibits will be referred to as "JX"; City Exhibits are referred to as "CX" and Employee Representative or Union Exhibits will be referred to as "UX"; references to the Transcript are referred to as "T" with page numbers designated.

be more errors and particularly more errors involving critical functions. As a result, on March 27, 2018 Chief Shoemaker met with the Grievant over concerns regarding his performance, including his handling of the spring firearm training and the firearm training scheduling; the firearm simulator usage; an inaccurate entry concerning another employee's vacation; and the failure to keep the log book up to date. A "Written Counseling" was issued describing the concerns and documenting the performance deficiencies. (CX 1; T. 34-36)

Problems with performance persisted after the counseling session. A one-day suspension without pay was issued following a July 31, 2018 Pre-Disciplinary Hearing, including the following performance deficiencies:

- Failure to complete and process paperwork for Court involving an incarcerated prisoner;
- Failure to call in needed personnel on two occasions; and
- Failure to complete shift timesheets for over a week. (CX 3; T. 39-54)

The Grievant stated he felt the treatment for these matters was excessive and inconsistent with how others had been treated. (CX 3) The Chief testified that while these were clerical errors the work was "very critical to our operations and the magnitude was more than anyone else by far." (T. 45) The Grievant testified he did not grieve the suspension and took responsibility for his actions. (T. 178)

Within weeks of the Pre-Disciplinary Hearing, the Grievant persisted in making errors that were serious enough for the Chief to recommend an additional suspension of three days, but with the recommendation that two of the three days be waived. The Grievant acknowledged he had made serious errors, "not my first." He requested he receive one unpaid day off. (CX 4) A 3 day suspension was issued and both suspensions were served after the first of the year following a ten week FMLA. (T. 64, 66) The Grievant testified he did not grieve the suspension and took responsibility for his actions. (T. 178)

Because of the ongoing concerns with Grievant's performance, the City placed him on a Performance Improvement Plan ("PIP"). (CX 5 and 8; T. 66) As part of the PIP, Grievant was required to maintain a daily log including a daily tasks section, a phone log section and a section for other tasks. The log was to be filled out completely and accurately. (CX 5; T. 67-68) The

Captain was not satisfied with the initial daily logs and provided Grievant with further instruction on what he expected to be included in the daily log. (CX 6 and 8; T. 72-73)

Incidents Leading to Recommendation for Termination of Employment

On April 18, 2019, Captain Shoemaker sent Chief Balling a memorandum recommending termination of the employment of Grievant and citing his rationale for the recommendation. (CX 9; T. 85) The recommendation was made following an investigation the Chief had asked him to initiate into telephone usage of Grievant. (T. 84)

The Chief had specifically asked Captain Shoemaker to check personal calls made and received by Grievant as a result of an incident where Grievant received multiple calls from his girl friend/wife while meeting with the Chief. (T. 81-84) The Captain checked the phone records from February 23 through April 15, a total of 33 shifts, and found 89 personal calls to or from the girl friend/wife of Grievant totaling 712 minutes or 11 hours and 42 minutes.² (CX 9).

The Captain also checked the AVL data log and compared it with the activity log of the Grievant over a 17 day period. He found Grievant's vehicle had been at his residence for at least 14 days during the 17 days. Additionally, he discovered Grievant had falsified his log entries regarding his activities while his car was at home. (*Id.*)

There were three incidents on April 9 on which Captain Shoemaker also reported. The first involved a missing juvenile. The Grievant was the Officer in Charge. It was reported he was the only officer who did not show up to assist in looking for the child. His log reported he was on patrol, but AVL had him situated at his residence. (*Id.*) The second incident involved a fight to which Grievant was dispatched and failed to either answer his radio or respond to the call. His log showed he was "on station." (*Id.*) The third incident involved a stabbing to which he did respond until after being called several times. A new officer was on scene and Grievant is reported to have left the incident before all work was complete in order to take a meal break. Grievant subsequently complained about how the detective handled the situation. (*Id.*)

² The actual calculation is 11 and 52 minutes.

The Captain also felt Grievant was not sufficiently “proactively” engaged in police activity while on patrol. In addition, he cited some other minor issues related to the PIP. (*Id.*) The Captain met with Grievant to review his findings. Grievant is reported to have responded that he had not given his best effort, but stated he felt he is “a pretty good police officer and . . . [does] a pretty good job for the city.” (*Id.*)

The Chief independently verified the information contained in the Captain’s recommendation. He confirmed there were 89 personal calls to or from the wife/girl friend of Grievant during the 33 shifts. He did not check other possible personal calls. The Chief noted some, but not all of the calls were logged. (T. 91-93) With respect to the time spent at his residence, the Chief found there were nine hours outside of the meal break time during 14 of the 17 day period spent at the residence of Grievant. He found the activity log to be falsified “in different ways – some patrolling, some taking calls, some doing paper work, a variety of other matters that could not have been done from home.” (T. 94)

April 24 Pre-Disciplinary Investigative Meeting

On April 19, 2019, Chief Balling placed Grievant on suspension with pay pending a pre-disciplinary meeting. (CX 10; T. 112) The pre-disciplinary meeting was held on April 24, 2019 and the meeting was recorded. A transcript of the recording was prepared. (CX 11 and 11A; T. 113)

During the investigative pre-disciplinary meeting, Grievant acknowledged Captain Shoemaker previously reviewed the PIP with him. Among the terms of the PIP, Grievant was required to document all activities and log all phone calls. (CX 11 and 11A)

Grievant understood he was to limit personal phone calls to emergencies and “important” calls. He stated he believed he logged all personal calls with the possible exception of those interrupted and subsequently continued shortly thereafter (he stated he may have logged those as a single call). He labeled those calls as “home” on the log. He also stated he had approximately a handful (around five) emergency calls over the last 33 shifts and between 24 and 30 of what he considered important calls. He acknowledged having 89 personal calls during 33 shifts is unacceptable. (*Id.*)

Grievant understood he had two 15 minute paid breaks each day which could be combined for a 30 minute paid meal break. During such breaks he knew he was required to monitor his radio and respond. Grievant acknowledged he stopped at his residence for meal breaks and bathroom breaks. He could not recall how much time he spent at his residence for those breaks. He did state might have been for a few minutes or up to an hour at a time. Grievant acknowledged being at his residence was not part of his assigned duties. He did not record all of the time when he stopped at his residence. Grievant stated his log was accurate when he did log his meal time. He did not call out during breaks at his residence. If he did not log the meal time, he logged it as patrol time. With respect to meals at home, he may have arrived a few minutes early or stayed a few minutes over. He acknowledged that stopping at home 14 of 17 shifts for over 9 hours was not acceptable. (*Id.*)

Three incidents on April 9, 2019 were discussed with him. The first involved a missing juvenile. He was the Officer in Charge for the shift and stated that as the supervisor he is supposed to respond. His recollection was the juvenile "was found before I got there." He was also questioned about a fight he was dispatched to involving 10 people. He did not recall the situation and asked to see the logs. The logs were not available. The third incident he was asked about involved a stabbing incident where he and a newer officer were dispatched. Grievant stated he did respond and went to at least three different locations involved with the incident. He stated the junior officer was not just "turned loose." (*Id.*)

Finally, at the investigative, pre-disciplinary meeting, the Grievant acknowledged it would not be acceptable to falsify logs; it would not be acceptable to violate either the mission statement or the vision statement of the department; it would not be acceptable to violate basic employee responsibilities; and it would not be acceptable to fail to respond to calls. Grievant denies that he falsified any logs. He also acknowledged "honesty" is one of the core values of the department. (*Id.*)

The Response from the Grievant to the Specific Allegations

At the hearing, Grievant took responsibility for his actions that led to the two suspensions. He understood his rights to grieve the suspensions but did not do so. He testified that in meetings with supervision, he repeatedly took responsibility for his actions and recognized he had not performed as well as he should have. (T. 178)

While Grievant also took responsibility for the 89 calls to and from his wife's number, he pointed out it amounted to less than three calls per shift, averaging eight minutes or less per call. (T. 179) He stated he tried to keep the calls to a minimum. However, he offered mitigating testimony that during the time in question, his wife had two extensive surgeries and one minor procedure, all of which required assistance. He claims to have already "caught flack" for using sick leave and taking FMLA so he was reluctant to take any additional sick leave to assist his wife. (T. 179) He argued others made personal calls all the time. (T. 180)

With respect to the question of whether he was "actively patrolling", Grievant pointed out that during 33 shifts he logged 61 hours of patrol time. He has never been a ticket writer, believing he can affect change in people's driving habits by giving a warning and talking with them. It was his understanding there were no strict numbers of citations that applied to supervisors while acknowledging officers had a goal of at least two tickets per week. He believed there were no policies he directly violated. (T. 180-182)

Grievant acknowledged he stopped by his home "probably . . . more often than other people" claiming his wife was immobilized with legitimate health issues. (T. 184) He did not call out because he did not want to be taken out of service and wanted to be available to answer calls from his officers and to be dispatched. (T. 182-185) He also questioned the accuracy of the AVL/GPS data stating dispatchers had indicated they saw irregularities. (UX 3; T. 185-187)

With respect to reimbursement for personal phone calls, he felt the City policy was out of date as the current plan had unlimited calls. He was unaware of anyone reimbursing the City for personal calls. (T. 193-194)

Grievant addressed each of the incidents on April 9. Regarding the missing juvenile, the primary officer arrived on the scene and found the child within 2 ½ minutes. As a supervisor he

would perform a secondary function in the search. Grievant testified he would normally close out whatever he was working on before responding to a missing juvenile call. He did acknowledge he would have been on notice of the missing child about 7 minutes before she was found. (T. 196-200). With respect to the fight, Grievant testified he does not believe he was ever called or actually dispatched. The log record does not show any follow-up calls to him and therefore he thinks his number was simply generated by the computer. He did not recall the specific incident but would normally show up at a fight. He said it was possible he did not hear the call on the radio. (T. 200-207). On the stabbing incident, he states "he would show up to a stabbing call as quickly as possible." (T. 208) He recalls arriving at the scene around the same time as the ambulance and he stepped back to let the junior officer do his job. Grievant testified he called in the detective and went to at least three different sites related to the incident. (T. 207-212)

Grievant stated he began having problems in the department at the time of his divorce. He believes the Chief held a bias because his girl friend (and subsequently new wife) worked at the hospital with the Chief's wife. He believed the bias was because the Chief's wife was disciplined and given a suspension without pay based upon a complaint from Grievant's girl friend/wife. (See UX 3; T. 163 – 166) Prior to the incident between his girl friend/wife and the Chief's wife he had not been disciplined for anything. After that, it changed dramatically. (T. 166) He also accused the Captain of being biased and getting involved in his divorce on behalf of his ex-wife. Grievant believed that was at least part of the reason he ended up with the discipline he received. (UX 2; T. 167 – 178) In support of his argument, Grievant submitted a recording of a meeting between Captain Shoemaker and himself on November 13, 2018 when he was given the PIP. (UX 4) The first third or so of the recording deals with issues concerning the divorce proceedings and warnings to Grievant that he needed to take care not to engage in any conduct that would bring disrepute to the department. (*Id.*)

RELEVANT COLLECTIVE BARGAINING PROVISIONS

Article 3 of the CBA contains a Management Rights clause which provides, in relevant part, as follows:

“The City reserves and retains the right to direct, manage, and control the affairs of the City and its employees, except to the extent that this Agreement specifically provides to the contrary.

This includes, but is not limited to: . . . the termination for just cause . . .; the making, amending, and enforcement of reasonable work rules and regulations . . .” (JX 2)

Article 25 of the CBA addresses Corrective Action and provides, in relevant parts, as follows:

“Section 1. Discipline. Bargaining unit employees shall not be reprimanded, reduced in pay or position, suspended, discharged or removed except for just cause”

Section 3. The City agrees that the principles of progressive corrective action will normally be followed with respect to minor offenses; that is an oral warning for the first offense, a written reprimand for the second offense. More severe disciplinary action may be taken for subsequent offenses. Mitigating or aggravation [sic] circumstances may be considered for each offense. If the offense is of a more serious nature, a different sequence is permitted which is appropriate in light of the nature of the objectionable conduct.” (*Id.*)

The Arbitrator is constrained by the directive in Article 6, Grievance and Arbitration by having “no power to add to, subtract from, or modify this Agreement in any way, but shall instead be limited to the application of the terms of this Agreement in determining the dispute.” (*Id.*)

ANALYSIS AND FINDINGS

The City argues it has just cause for the termination of Grievant based upon his course of conduct over a fifteen-month period during which he was repeatedly dishonest, derelict in his duties and insubordinate. While they point out the prior discipline for performance and argue the course of conduct as justification for the termination, the City argues the repeated

dishonesty, standing alone, justifies the discharge of the Grievant. (City Post-Hearing Brief) The Union argues the City has singled out Grievant for discharge for improper reasons – support of ex-wife by the Captain; and bias against him because of the relationship of his current wife and and the Chief’s wife at their workplace. Should the Arbitrator find there is no bias, the Union argues the City has failed to meet its burden of proof and has not proven the Grievant is guilty of the allegations against him. They argue further the reasons for the discharge bear no relationship to the two prior suspensions and, therefore, the suspensions cannot serve to establish progressive discipline as required by the collective bargaining agreement. Finally, the Union argues in the alternative, if there is sufficient just cause for discipline there are sufficient mitigating factors to prevent sustaining the discharge. (Union Post-Hearing Brief)

- *Discipline for Performance Reasons and Discipline for Misconduct Are Different*

The Union properly points out, the employer has the burden to prove wrongdoing in a discharge case. Assuming that burden is met, the Arbitrator must determine whether the punishment assessed by management should be upheld or modified. See, *How Arbitration Works*, Elkouri and Elkouri (Kenneth May, Editor in Chief), BNA 2012 (Chicago, IL), 15-23. The Union argues the burden of proof should be “beyond a reasonable doubt” or at least “clear and convincing.” In a discharge case for misconduct, the burden of proof on the employer is more than simply a preponderance of the evidence. However, the employer is not required to prove its case beyond a reasonable doubt. The standard to be applied is proof that is clear and convincing. Where the Union argues bias by the employer, the Union has the burden to establish such misconduct by the City’s agents, the Captain or the Chief by clear and convincing evidence.

The Employer posits it has just cause for discharge because of the course of conduct engaged in by Grievant over fifteen months. The City argues alternatively, the dishonesty repeatedly exhibited by Grievant is sufficient in and of itself to establish just cause. This case involves mixed issues. The Grievant has been disciplined for both performance reasons and for misconduct.

The employee counseling and the first two suspensions were for unsatisfactory performance reasons. Because the unsatisfactory performance persisted, the City placed Grievant on a PIP. When misconduct became involved, the City decided to discharge Grievant.

It is inappropriate to mix performance and conduct. Each must stand independently to justify a discharge. If performance is the basis for the discharge, it is incumbent on the City to establish the Grievant had performance issues sufficient to justify discharge independent of any acts of misconduct. If the City wants to rely on misconduct for the discharge, it must establish the misconduct was sufficient to establish just cause and that the appropriate level of progression was followed for the misconduct. Nothing prevents the City's from relying upon directives in performance discipline or the PIP in considering whether there was misconduct.

If either performance or conduct is sufficient to justify discharge, there is no need to evaluate whether the other is sufficient. If the City establishes the alleged misconduct was sufficient to justify discharge, there is no need to analyze the performance issues separately. The same is true if the City establishes the performance issues were sufficient to justify discharge.

- *Did the City Establish the Alleged Misconduct?*

The allegations justifying termination are outlined in the termination letter of May 16, 2019 and include the following:

- The Grievant made or received 89 personal phone calls totaling 712 minutes from his wife's telephone number during 33 shifts;
- The Grievant issued only one citation during 61 hours of logged patrol time during the same 33 shifts;
- The Grievant was at his residence during 14 of 17 work shifts without calling out or noting it on his performance logs;
- The Grievant falsified his performance logs;
- The Grievant failed to reimburse the City for personal phone calls;
- The Grievant failed to show up for missing juvenile call;
- The Grievant failed to respond when dispatched for a fight involving ten persons; and
- The Grievant failed to assist a newer officer regarding a stabbing incident, leaving to go home before the incident was finally resolved. (CX 22)

Two of the allegations listed above are for performance and not misconduct and will not be considered in this section. The charge Grievant was not actively patrolling is a performance issue based upon whether he was adequately performing under his PIP. Similarly, the charge of the failure of Grievant to adequately supervise or assist the newer officer in the stabbing incident also goes to performance and not misconduct.

The remaining charges all go to conduct. However, two of those allegations also will not be considered. The charge of failure to pay for personal phone calls in violation of City Policy will not be considered because it is the finding that the policy is not reasonable. Article 3 of the CBA (JX 2) requires work rules be reasonable. The requirement for employees to pay for personal phone calls where there is no charge to the City under its telephone plan is not reasonable. While the City has the right to limit or restrict personal calls during working time, charging for such calls when the City cannot establish a cost per minute or per call is unreasonable.

The other incident that will not be considered is the allegation the Grievant failed to respond to a dispatch involving a fight. Failing to respond is an act of non-feasance and can be considered both a performance issue and a conduct issue. The City was unable to provide Grievant a copy of the incident log at the time of the pre-disciplinary hearing. At the arbitration, Grievant was able to review the event log and provided an explanation based upon the content of the log that is not unreasonable. The City offered no rebutting evidence and has not proven that charge by clear and convincing evidence.

As to the other allegations,

- Personal phone calls - Grievant does not challenge the number and acknowledges they are excessive.
- Time spent at residence - Grievant acknowledges that if accurate, the time would be excessive. He also acknowledges he spent more time at his home than others. He does, however, challenge the accuracy of the AVL/GPS information relying upon information from one dispatcher that what they see on the screen is not necessarily what is occurring in real time. The City did provide rebuttal evidence through its IT Manager who knows and understands the technical nature of the system. He vouched for the accuracy of the AVL explaining why the dispatchers screen may show a delay in the screen information. It is the finding that Grievant did indeed spend at least 9 hours outside of meal times on 14 work days, during a 17 work day period, at his residence.

- The juvenile call – it is undisputed Grievant failed to show up during a missing juvenile call. It was his responsibility to do so as the Officer in Charge. Grievant was at his residence when the notice came in. He had not called out so that, according to him he would not be out of service and would be able to respond to calls and be able to be dispatched. At least seven minutes elapsed between the time of the dispatch and when the child was found. A missing child is a high priority of the Department. One of the officers on the scene, Jon Hoffman testified confirming this. He testified a missing child is a priority call and that Grievant was shift supervisor and should have been there. (T. 149) He also indicated the neighborhood was one where there was sometimes a dope house within one or two blocks of where the incident occurred. (T. 150) He reacted to Grievant's failure to show by stating: "I was upset. I was rather mad just for the simple fact . . . two of the main priorities are children and the elderly, and when a child goes missing, you drop whatever the heck you have going on and assist in trying to locate the kid." (*Id.*) Grievant neither responded to the call nor started driving to the scene in response.
- Falsification of performance logs - Grievant denies falsifying his performance logs. The evidence is contrary to his denial. The phone logs were falsified by virtue of the absence of recording a number of his personal calls. He was required to enter all personal calls. The absence of information on a phone log is as much a falsification as is making an affirmative false statement. More significantly, listing time while at his personal residence as being on patrol is falsification of his daily activity log. To claim time out of his vehicle and off of the streets in his residence as patrol time is disingenuous. The Grievant knew he was spending excessive time at his residence and by listing patrol time or other activities, it was nothing more nor nothing less than covering up for something he knew was wrong.

The City has established wrongdoing. Dishonesty is a clear basis for discharge. The Grievant acknowledged honesty is the number one quality required in an officer and dishonesty is the number one negative quality. The cases cited by the City establish dishonesty is a prime reason for discharge of a police officer on first offense. A police officer cannot perform his or her job function if there is evidence of dishonesty or lying. The officer could never give testimony without have his or her credibility challenged. The officer cannot be relied upon by the City or the officer's supervisor.

- *Was the City so Biased Against the Grievant that the Investigation and Discharge Was Tainted or Unfair?*

Grievant has failed to meet his burden to establish there was bias against him that affected the decision to terminate his employment. First and foremost, he engaged in the misconduct alleged. Dishonesty by a police officer cannot be tolerated. He also failed to show bias by the Chief. The Chief testified he was unaware of any discipline against his wife. He confirmed with his wife there had been no discipline against her. He was not aware of any tension between his wife and Grievant's wife at work. The evidence indicates both the Chief and the Captain were trying to work with Grievant to assist him in his performance and ensure he was able to have a future with the City. The record does not display the kind of attitude that establishes bias.

CONCLUSION

The evidence demonstrates Grievant engaged in serious misconduct, including intentional falsification of his activity log and telephone log. Dishonesty is sufficient to justify discharge without following other steps in the progressive discipline process. There is no sufficient evidence of bias and no sufficient mitigating factors to offset the decision to discharge Grievant. The grievance is denied.


David J. Millstone, Arbitrator

Dated and made effective this 21st day of December 2019.