

Equal Justice for All

Lewis County Prosecuting Attorney's Office

July 17, 2014

To whom it may concern:

It has been determined that your case involves Centralia Police Officer Phil "PJ" Reynolds. As part of his employment, Officer Reynolds was involved in activities that were reviewed by his employer. Findings were made during that review. Those findings became the subject of an arbitration proceeding.

The Arbitrator, in making his decision, made findings that could be interpreted as a comment on Officer Reynolds' credibility. The Arbitrator's decision is attached to this letter.

Given the decision in *In re Stenson*, 276 P.3d 286 (2012), it is clear the higher courts have taken a "better safe than sorry" approach to disclosure of potential impeachment evidence. Such a position must be followed by this office as well. In addition, *Amado v. Gonzalez*, No. 11-56420 (9th Cir. Jul 11, 2014) places additional obligations on the State.

This notice is being provided as a courtesy only and should not be considered as any type of official determination by the Lewis County Prosecutor's Office. Any attempt to use this information at trial will be the subject of pre-trial litigation.

If you have any questions or concerns, do not hesitate to contact me directly at (360) 740-2638.

Sincerely yours,

JONATHAN L. MEYER
Prosecuting Attorney

JLM:jlk

BEFORE THE ARBITRATOR

TEAMSTERS UNION, LOCAL 252)	
)	
)	PHILLIP REYNOLDS
v.)	DISCHARGE GRIEVANCE
)	
CITY OF CENTRALIA)	
)	FMCS No. 120525-55937-6
)	

Reed, Peterson, McCarthy and Ballew, by **David W. Ballew**, Attorney at Law, appeared on behalf of the Grievant.

Summit Law Group by **Rodney B. Younker**, Attorney at Law, appeared on behalf of the Employer.

Procedural Background

By agreement of the parties, the undersigned was selected to serve as arbitrator in a dispute arising from the interpretation and application of a collective bargaining agreement between the City of Centralia (Employer) and Teamsters Union, Local 252 (Union). The Union argued that the Employer did not have just cause to suspend and terminate Phillip Reynolds, a bargaining unit employee (Grievant). A hearing was conducted in Centralia, Washington, on January 8, 9 and 10, 2014. By agreement, the parties submitted closing briefs on March 20, 2014. The parties' briefs were received in a timely manner.

The Issue

The parties stipulated that the issues for determination in this matter can be stated in the following terms:

Whether the suspension of Phillip Reynolds was for just cause. If not, what is the appropriate remedy?

Whether the discharge of Phillip Reynolds was for just cause. If not, what is the appropriate remedy?

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Pertinent Contractual Provisions

ARTICLE 35 EMPLOYEE DISCIPLINE

35.1 All disciplinary action, including suspension and termination, taken against an employee shall only be for just cause; provided, however, this provision shall not apply to an employee's non-promotional probationary period during which time the employment status shall be strictly at will.

35.2 Types of Discipline: Progressive discipline is acknowledged and utilized by the Employer. The forms of discipline generally utilized in seeking corrective action may include; but shall not be limited to: oral warning, written warning, demotion, suspension, and/or employment termination. The nature and gravity of the offense will determine the degree to which progressive discipline is used.

ARTICLE 36 GRIEVANCE PROCEDURE

* * *

36.5 Arbitration

36.5.1 Any grievance involving a property loss as defined in Section 36.4.1 that is not resolved at Step Two may at the option of either party, be referred to arbitration for final resolution. The requesting party shall file the necessary petition with the Public Employment Relations commission requesting the assignment of an arbitrator to hear the grievance or in the alternative, request a list of seven (7) independent arbitrators from either the American Arbitration Association of the Public Employment Relations Commission. If a list is requested, the striking order shall be determined by the flip of a coin.

36.5.2 In accordance with any arbitration proceeding pursuant to this Agreement it shall be understood by the parties involved that:

36.5.3 The arbitrator shall have no power to render a decision that will add to, subtract from, alter, change, or modify the terms of this Agreement, and his power shall be limited to interpretation or application of the express terms of this Agreement.

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36.5.4 The arbitrator shall rule only on the basis of information presented in the hearing and shall refuse to receive any information after the hearing except in the presence of both parties and upon mutual agreement.

36.5.5 Each party to the proceedings may call such witnesses as may be necessary for the presentation of its case and shall be subject to cross examination. The arguments of the parties may be supported by oral comment and rebuttal. Either or both parties may submit post hearing briefs within a time mutually agreed upon. Such arguments of the parties, whether oral or written, shall be confined to and directed at the matters set forth in the written statement of the grievance.

36.5.6 The decision of the arbitrator shall be final, conclusive and binding upon the Employer, the Union, and the employee(s) involved, provided the decision does not involve action by the City which is beyond its jurisdiction. The arbitrator's decision shall be made in writing and shall be issued to the parties within thirty (30) calendar days after the post hearing briefs have been submitted.

36.5.7 The expenses, if any, of the arbitrator shall be borne equally by both parties hereto.

36.5.8 Each party shall bear the cost of presenting its own case.

Factual Background

The City of Centralia offers law enforcement services to its local residents through the Centralia Police Department. The City has a collective bargaining relationship with Teamsters Union, Local 252, concerning a bargaining unit of police department employees. The parties' January 1, 2010 through December 31, 2012 collective bargaining agreement describes the bargaining unit as:

. . . all commissioned officers of the Centralia Police Department excluding the Chief of Police, Deputy Chief of Police, Police Commanders, non-commissioned employees, and emergency appointments.

At all times pertinent to this grievance, Robert Berg served as Police Chief. Chief Berg retains final disciplinary authority, based on recommendations made to him by

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members of his command staff. Jim Rich served as Services Bureau Commander, and David Ross served as commander for patrol, investigations and anti-crime services.

The department's patrol activities are conducted by 20 officers, working in two "crews". Each crew is under the supervision of two sergeants. Each crew is scheduled to work four consecutive 24-hour periods with the next four days off. Each officer reports to work at a different time, with more patrol officers on duty at "peak" hours, when most calls for assistance and other patrol activity take place.

Sergeants alternate between day and night shifts, rotating schedules every 90 days. Sergeants direct the officers in their crews and are responsible for scheduling work, providing training and mentoring and obtaining equipment that may be needed. Sergeants are also responsible for regular performance reviews. Sergeants do not have authority to conduct disciplinary investigations.

The Grievant, Phillip Reynolds, began employment with the Centralia Police Department in April 2006. The record reflects that he had several disciplinary issues during his work as a police officer. As early as 2009, Mr. Reynolds received a "correction notice" because he failed to appear at trial, forcing a prosecutor to dismiss charges against an accused perpetrator. Approximately one month after his failure to appear in court, Mr. Reynolds received a letter of reprimand for violating the department's arrest policy. In addition, Mr. Reynolds was suspended for two days because of a number of policy violations he made in connection with the way that he processed a burglary report, and he was later found to have engaged in inappropriate activity by failing to pursue a complaint because he had a low opinion of the complaining party.

In 2010, Mr. Reynolds received a letter of reprimand for violating the Centralia Police Department's policy concerning pursuits. As part of that reprimand, Mr. Reynolds

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underwent refresher training on the police department's pursuit policy and met with Commander Rich to review relevant department rules. In the latter part of 2010, Mr. Reynolds received a "correction notice" for violating the department's sick leave policy. The sick leave issue arose from an incident when Mr. Reynolds reported to work in an improper uniform. His shift sergeant, Sergeant Buster, noted that Mr. Reynolds had received prior warnings about uniform issues. Mr. Reynolds returned to his home, but rather than reporting back to work, he took sick leave for the day. Sergeant Buster believed that Mr. Reynolds was acting in a defiant manner because of the uniform issue, and not because of illness.

In January 2011, Sergeant Warren counseled Mr. Reynolds about his attitude. Mr. Reynolds had developed a reputation as an officer who would only do the minimum amount of work required and other officers did not believe that he would come to their assistance. Sergeant Warren observed Mr. Reynolds' patrol vehicle parked at an auxiliary city building (the "Mellon Street facility") when he should have been out on patrol. Sergeant Warren approached the facility and discussed the situation with Mr. Reynolds, who appeared to be generally unconcerned about the matter. Sergeant Reynolds asked Mr. Reynolds how the department could help him become part of the team again, but Mr. Reynolds did not believe that he had done anything wrong. Sergeant Warren observed the same behavior from Mr. Reynolds the next night. Sergeant Warren confronted Mr. Reynolds for a second time, and told him that there would be disciplinary consequences if he did not improve his behavior. The record reflects that Sergeant Warren observed an improvement in Mr. Reynolds' performance for the rest of the time that they worked on the same shift.

A quarterly performance review conducted in 2011 showed that Mr. Reynolds continued to have issues with his fellow officers and with performing his duties in an acceptable manner. Particular attention was given to Mr. Reynolds' failure to support other officers as backup on duty calls and the frequent instances when Mr. Reynolds appeared to absent himself from active patrolling. Mr. Reynolds' issues with authority

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continued until March 2011, when a series of events took place that led to his suspension from service.

On March 13, 2011, Mr. Reynolds was involved in the apprehension of an individual who fled the scene of a vehicular accident. The suspect was apprehended and he was handcuffed with his hands behind his back. The suspect was then placed in Mr. Reynolds' patrol car for transport to jail. The suspect was acting belligerently, and he struggled with the officers who placed him in Mr. Reynolds' car. The officers did not buckle the suspect into Mr. Reynolds car, even though buckling was a normal procedure that was typically performed when a perpetrator was placed in a police vehicle. Mr. Reynolds did not attempt to buckle the suspect in, believing that the other officers had already taken care of the situation.

As Mr. Reynolds drove away, the suspect began to hit his head into the partition between the front and back seats as well as the left rear passenger window. He also started throwing his weight into the left rear passenger door. Reynolds became concerned that the suspect could escape, so he stopped his car and radioed for assistance. He was close to the scene of the incident, so there were police officers within several blocks of his location. Sergeant Warren and another officer responded to Mr. Reynolds' request for assistance. The record indicates that Sergeant Warren and the officer arrived within one minute of Mr. Reynolds' call.

Upon their arrival, they saw Mr. Reynolds next to the patrol vehicle with his Taser in use. Each officer was issued a Taser as part of his/her regular equipment. Considered to be a self-defense item, a Taser uses a 50,000 volts of electrical current to momentarily incapacitate a suspect, either through barbs fired into the person's skin, or by direct application of the Taser. While temporarily causing great discomfort, a Taser, if used properly, will not cause permanent harm. The Centralia Police Department provided its officers with detailed instruction about the use of Tasers, including updates on legal issues surrounding the use of the device. Each officer had

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to take part in training exercises on Taser use, and the officers were expected to make detailed reports if the Taser was used in the line of duty.

On the day in question, it was clear that Mr. Reynolds had used his Taser on the suspect in the back seat of his patrol car. The suspect was still handcuffed, and after he was removed from the car and checked for injuries, he was transported to jail without further incident. Mr. Reynolds filled out a "use-of-force" card and incident report concerning the use of the Taser. Commander Ross reviewed the report, and was concerned about several matters, so he started an internal investigation.

Detective Sergeant Patrick Fitzgerald conducted the investigation.

During the course of his investigation, Sergeant Fitzgerald interviewed Mr. Reynolds, Sergeant Warren and the responding officer. Mr. Reynolds stated that he applied the Taser twice during the entire episode with the belligerent suspect. Sergeant Fitzgerald believed that Mr. Reynolds was referring to the normal use of a Taser, where each use, or "cycle" was a five-second discharge. Each Taser has a built-in computer chip that records use. The information from the Taser can be downloaded and analyzed to determine how long each Taser cycle was, and how many cycles were used in any given time period.

Mr. Reynolds did not inform Sergeant Fitzgerald that he deployed the Taser through the police car's open window, but he did admit that he failed to follow established procedure because he did not issue a warning before the Taser was fired. Sergeant Fitzgerald issued a report finding that Mr. Reynolds had violated department policies by failing to seatbelt the suspect in the patrol vehicle. Sergeant Fitzgerald acknowledged that the other officers did not secure the suspect when they placed him in the vehicle but reasoned that Mr. Reynolds had primary responsibility for security because he was the transporting officer. Sergeant Fitzgerald did not find that Mr. Reynolds had violated any Taser policies. At the time he made his conclusion, Sergeant Fitzgerald was not aware that Mr. Reynolds actually used the Taser three

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times, or that he applied the Taser for 19 seconds in one of the three cycles. This information only came to light at a later time when the department made a detailed examination of Mr. Reynolds' Taser.

Sergeant Fitzgerald forwarded his report to Commander Ross who reviewed it without the benefit of knowing about the extended Taser use. Commander Ross agreed with Sergeant Fitzgerald's findings, and forwarded the matter to Chief Berg for final action. Chief Berg had authority to request further review of the matter before he decided on the appropriate level of discipline, so he asked for more information. As part of the new information, Chief Berg obtained the downloaded data from Mr. Reynolds' Taser, which showed three applications and extended time of use. The Taser record disclosed that Mr. Reynolds applied the Taser for 19 seconds, followed by applications of six seconds and five seconds.

Chief Berg determined that Mr. Reynolds acted inappropriately in the situation, since he used the Taser so many times in a short interval while assistance was on its way to the scene. Chief Berg was concerned that his conclusion ran contrary to the recommendations made by his staff but he believed that the circumstances required his action. Chief Berg sustained violations of department policies and practices arising from Mr. Reynolds' use of the Taser in "use of force", "less lethal weapons use", "restraint during transport", exercising common sense and promoting the department's values", "committing unsafe acts or endangering self or others", "dishonesty or untruthfulness", and "displaying competent performance and achieving competent performance results".

On March 15, 2011, while the Taser incident was still being investigated, Mr. Reynolds was involved in another situation that led to disciplinary action. On March 15, Mr. Reynolds was on duty when he heard a police radio report from a neighboring jurisdiction, the City of Chehalis. A Chehalis Police officer was engaged in a vehicle pursuit. The Chehalis officer reported that the suspect was northbound on

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Interstate 5, a major highway that ran through Chehalis and Centralia. Mr. Reynolds monitored the Chehalis police radio reports, and decided to join in the pursuit. Mr. Reynolds believed that the Chehalis officer needed to have support in the pursuit, and so he decided that he should join in. Mr. Reynolds proceeded onto Interstate 5 and pursued the suspect until she drove into Centralia, eventually colliding with a parked vehicle. Mr. Reynolds used his police car to pin the suspect's car at the collision scene until the Chehalis officer could catch up.

The suspect did not comply with orders to leave her vehicle, and Mr. Reynolds and the Chehalis officer ended up in a physical confrontation with her. Mr. Reynolds got on the hood of the suspect's car and drew his service weapon while the Chehalis officer attempted to extricate the suspect. The suspect did not comply, and Mr. Reynolds holstered his weapon and tried to give the Chehalis officer assistance in his efforts.

At some point during the altercation, Mr. Reynolds used his Taser. His first attempt to use the device did not have any effect, since the probes did not make good contact. Mr. Reynolds used the Taser for a second time, applying the device directly to the suspect's leg. Eventually, the suspect was secured and transported to jail. Analysis of Mr. Reynolds' Taser showed two activations: one for eight seconds and one for 44 seconds. Mr. Reynolds prepared a police report on the incident. He failed to mention unholstering his weapon, nor did he explain the second, and more protracted, Taser use.

All police vehicle pursuits are subjected to internal review, so Mr. Reynolds' March 15, 2011 pursuit was reviewed following established policies. Sergeant Denham conducted the initial review and decided that Mr. Reynolds' pursuit was within departmental policies. Sergeant Denham forwarded his review to Commander Ross, who concurred in Sergeant Denham's reasoning. The matter was forwarded to Chief Berg who, in turn, asked Commander Rich to review the matter. Commander

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Rich had extensive experience in vehicle issues, and Chief Berg wanted his opinion on the matter. Commander Rich reviewed the incident, and he disagreed with Sergeant Denham and Commander Ross, noting three violations of department pursuit policy. Commander Rich believed that there was insufficient basis for Mr. Reynolds to believe that a felony-level crime had been committed. Commander Rich further concluded that it was likely that the suspect would have been apprehended because the Chehalis officer already identified her at the beginning of the incident, so Mr. Reynolds' immediate participation in the pursuit was unnecessary. Finally, Commander Rich noted that Mr. Reynolds was not requested to give assistance by Chehalis officers or authorized to give assistance by Centralia police supervisors.

Chief Berg determined that the matter should be submitted to a thorough internal review. Sergeant Fitzgerald was ordered to conduct the review, and he analyzed available documents concerning the pursuit at issue. Sergeant Fitzgerald did not find a violation of the department's use of force policy, even though Mr. Reynolds' Taser was discharged twice. There was no evidence that the Taser was being applied to the suspect for the entire period of the discharge, so Sergeant Fitzgerald concluded that the use of force policy was not violated.

Sergeant Fitzgerald did, however, find that Mr. Reynolds violated policies concerning the pursuit (no request from Chehalis police to join the pursuit and no prior authorization from Centralia command) and reporting the pursuit incident. The Centralia Police Department requires its officers to complete a "use-of-force" card whenever force is required during an interaction with a suspect. Officers must also complete a report detailing each Taser deployment. Sergeant Fitzgerald found that Mr. Reynolds did not complete the use-of-force card appropriately, nor did he prepare an accurate incident report.

Chief Berg agreed with Sergeant Fitzgerald's conclusions, sustaining violations of policies concerning motor vehicle pursuits, dishonesty or untruthfulness and

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displaying competent performance. Chief Berg was prepared to move forward on discipline, and was going to conduct a *Loudermill* hearing to allow Mr. Reynolds and Local 252 to present facts and mitigating evidence before discipline was imposed. However, he was not satisfied that he had a complete picture of Mr. Reynolds' employment, particularly surrounding his use of the Taser. Accordingly, he reexamined a series of events dating back to 2009. The record reflects that Chief Berg made inquiry into four incidents involving Mr. Reynolds' use of a Taser.

Chief Berg's Investigation

October 24, 2009 incident

Chief Berg first examined an incident occurring on October 24, 2009. Mr. Reynolds received information that a man was exposing himself in a public area. Mr. Reynolds contacted the suspect, who then attempted to leave the scene on a bicycle. Mr. Reynolds caught up to him after a short foot pursuit, and after a verbal altercation, used the Taser to subdue him. Information taken from Mr. Reynolds' Taser showed that he used the device five times within a short period. The data showed deployments of five seconds, 23 seconds, ten seconds, seven seconds and six seconds. Mr. Reynolds' report indicated that he had deployed the Taser "more than two times", and did not give any kind of detail about the Taser's use.

Sergeant Fitzgerald reviewed the matter and concluded that Mr. Reynolds had reason to use the Taser, although the length of use and number of uses went beyond departmental guidelines. Sergeant Fitzgerald did not sustain a finding that Mr. Reynolds used excessive force in the situation, but he did sustain policy violations concerning improper Taser use and failure to prepare complete and accurate reports. The matter was forwarded to Commander Ross who concurred with Sergeant Fitzgerald's conclusions.

Chief Berg initially sustained violations of a less lethal weapons policy, dishonesty and untruthfulness policy and displaying competent performance. These findings

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were modified following a *Loudermill* meeting conducted with Mr. Reynolds and his union representative. The modification will be detailed after explanation of the other events and the *Loudermill* procedure.

December 3, 2009 incident

The next incident occurred on December 3, 2009. On that date, Mr. Reynolds was involved in an incident where he deployed his Taser three times within a few minutes. Mr. Reynolds was dispatched to a public park where a suspect was sleeping in a restroom stall. Mr. Reynolds attempted to get the individual to discard beer that he had with him and to leave the restroom. Mr. Reynolds reported that the individual refused to comply with directives, and, at one point, moved his hands in a manner that took them out of Mr. Reynolds line of sight. After using the Taser, Mr. Reynolds was able to secure the suspect and to complete the arrest.

The matter was routinely forwarded to Sergeant Fitzgerald for review. Information obtained from Mr. Reynolds' Taser showed deployments of five seconds, 21 seconds and eleven seconds. Mr. Reynolds' report about the incident showed two uses of the Taser and did not refer to any lengthy deployment. Sergeant Fitzgerald found that Mr. Reynolds did not provide an accurate report, and there were a number of issues concerning his stated use of the Taser and how the incident took place. For example, the report did not indicate that the suspect was in a stall with Mr. Reynolds firing his Taser downward from the adjacent stall. In addition, Mr. Reynolds did not mention the third Taser deployment, nor did he explain why the other deployments were of extended duration.

Sergeant Fitzgerald found that Mr. Reynolds violated departmental policies concerning the use of excessive force, the inappropriate use of a Taser, and the submission of an incomplete and misleading report. Commander Ross agreed with Sergeant Fitzgerald's findings, and the matter was forwarded to Chief Berg. Chief

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Berg determined that Mr. Reynolds violated departmental policies and standards of conduct concerning the use of common sense and the use of force.

January 25, 2011 incident

On January 25, 2011, Mr. Reynolds made a traffic stop where the driver became uncooperative and combative. Another officer arrived to provide assistance. Mr. Reynolds informed the driver that he was under arrest and directed him to exit his vehicle. Mr. Reynolds deployed the Taser twice, and the driver was finally subdued, with the assisting officer taking him into custody.

Mr. Reynolds reported that he used his own Taser for both deployments, but in fact, he took the assisting officer's Taser for the second application. The first Taser deployment lasted for 11 seconds, but did not have significant effect. It appeared that the Taser darts did not make sufficient contact to deliver the full voltage, so the driver did not comply with orders to surrender. Mr. Reynolds did not mention that the second Taser application lasted for 29 seconds.

As in the other incidents, Sergeant Fitzgerald reviewed Mr. Reynolds' report. He concluded that Mr. Reynolds had reason to use the Taser, although he did find that the 29-second application violated departmental policy. Sergeant Fitzgerald also found that Mr. Reynolds violated departmental policies concerning appropriate reporting. Commander Ross agreed with Sergeant Fitzgerald's conclusions. Chief Berg sustained violations of improper Taser use and incomplete report preparation.

February 9, 2011 incident

On February 9, 2011, another Centralia officer was dispatched to the local Salvation Army facility where a suspect was threatening employees. The officer saw the suspect walking away from the Salvation Army premises and proceeded to catch up with him to inform him that he would not be welcome on Salvation Army property and that any further attempts to enter that property would be considered to be trespass. A physical

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altercation began between the suspect and the officer. Mr. Reynolds then arrived on the scene. He used his Taser to subdue the suspect.

Mr. Reynolds' report on the matter indicated that he used the Taser twice, but information gained from the device disclosed that there was a single use of 30 seconds in duration.

Sergeant Fitzgerald did not sustain any policy violations arising from the February 9, 2011 incident. Commander Ross found a "technical" violation of policy in connection with the use of the Taser, and he also determined that Mr. Reynolds violated departmental policies concerning proper report writing. Chief Berg accepted Commander Ross' conclusions about the situation.

The Loudermill proceeding

On June 23, 2011, Chief Berg sent Mr. Reynolds a letter setting a *Loudermill* hearing for July 1, 2011 at the Centralia Police Department. Chief Berg informed Mr. Reynolds that the *Loudermill* proceeding would include examination of the four situations described above, as well as the pursuit incident and the transportation of a suspect incident. In all, six matters would be discussed.

During the course of the proceeding, the Union objected to any inclusion of the four 2009 and 2011 incidents that were subject to Chief Berg's analysis. The Union argued that those matters were untimely under terms of the parties' collective bargaining agreement, which required that disciplinary decisions must be made within 45 days of the issue being brought to the Employer's attention. The Employer maintained that it did not have prior notice of Mr. Reynolds' conduct because it did not review the Taser information until March 2012 when department officials looked at the computer record of Mr. Reynolds' Taser use. The Employer maintained that it had no reason to make inquiry earlier, believing that Mr. Reynolds' reports were accurate.

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Rather than arguing about timeliness, Chief Berg decided to drop all references to Taser use or excessive use of force from the disciplinary matter, but he did include all references to incident reporting violations. Chief Berg noted that Mr. Reynolds' inaccurate and misleading reports could affect the course of criminal investigations, and were a serious violation of departmental policies.

During the course of the *Loudermill* hearing, Mr. Reynolds admitted that he could have done a better job on the reports in question and that he would work harder to correct his behavior. On July 12, 2011, Chief Berg issued his disciplinary determination. Chief Berg noted Mr. Reynolds' acknowledgement of difficulties but ultimately concluded that the violations at issue were serious and had to be addressed through the imposition of a two-week suspension without pay, effective on July 12. Chief Berg also included a performance improvement plan for Mr. Reynolds. Chief Berg established a twelve-month work plan including quarterly performance evaluations and training in the general areas of pursuit, use of a Taser, appropriate report writing and a "line employee's academy" which covered a number of fundamental police procedures.

Chief Berg further removed Mr. Reynolds from availability as an acting supervisor, and he directed that "adverse interactions" with sergeants must be in written form. While expressing his hope that Mr. Reynolds could improve his performance as a police officer, Chief Berg warned him that this was his last opportunity to improve his performance and that further problems could lead to his dismissal.

The Union grieved the suspension. The suspension grievance is part of the instant proceedings.

Mr. Reynolds completed the prescribed training programs by the end of 2011. His employment difficulties continued with an incident occurring on January 1, 2012. Mr. Reynolds reported for his scheduled work shift at approximately 9:00 AM on

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January 1. He notified the police dispatcher that he was "in service" in his patrol vehicle. Around 11:00 AM, a citizen came to the Centralia Police Department to report suspicious activity in a city park. The citizen was concerned that the activity could be drug-related. Sergeant Buster was on shift, and he decided to respond to the incident report himself. As he approached the park, he saw the suspect vehicle leaving. Sergeant Buster tried to follow but soon lost track of the vehicle. He contacted dispatch about the situation, with the hopes that another Centralia police officer could assist him. Sergeant Buster did not specifically ask for Mr. Reynolds in his radio transmission, but he testified that he believed that Mr. Reynolds should have been available to assist, and that he should have responded to his request for help.

Mr. Reynolds did not assist Sergeant Buster, who proceeded to pass by an auxiliary city facility some distance from the police department. As he passed by the auxiliary facility, he noticed Mr. Reynolds' patrol car parked there. Sergeant Buster was upset because it appeared that Mr. Reynolds was in a position to provide effective support but did not make any attempt to do so.

Several hours later, Mr. Reynolds had only reported in about a single traffic stop and did not otherwise make contact about his work. By that time, Sergeant Buster became involved in situation where he had to serve a warrant on a potentially dangerous individual. Another officer responded to provide back-up at the scene. While he was on the way to deliver the warrant, Sergeant Buster noticed a female suspect who also had an outstanding warrant. By the time he reached the scene where the male suspect had been seen, two officers were present. One officer detained the male suspect while the second officer began searching for the female suspect. Once he served the warrant, Sergeant Buster joined the search for the female suspect. Sergeant Buster eventually found her and took her into custody with the two officers who responded earlier acting as backup for him. During this entire period, Mr. Reynolds never made contact with Sergeant Buster or to the department's dispatch.

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As he returned to the Centralia Police Department with the female suspect, Sergeant Buster passed by the city's auxiliary facility and saw Mr. Reynolds' patrol car parked there. While he was processing the female suspect, the officer who dealt with the male suspect expressed his frustration that Mr. Reynolds did not take any affirmative action to assist either arrest. Sergeant Buster told the officer that he would talk to Mr. Reynolds about the situation.

Sergeant Buster returned to the auxiliary facility and found Mr. Reynolds' squad car still parked there. Sergeant Buster stopped his car and approached the building. As he was approaching, Mr. Reynolds came out of the building and went toward his patrol car. Sergeant Buster told Mr. Reynolds that he wanted to ask him some questions. Sergeant Buster testified that Mr. Reynolds placed his lunch box on the ground, took a few steps back and folded his arms, saying "okay, go ahead". Mr. Reynolds remembers speaking with Sergeant Buster but denied making such gestures. Sergeant Buster asked Mr. Reynolds if he had been involved in another call when Sergeant Buster asked for assistance on the earlier pursuit. Mr. Reynolds replied by asking if his answer could lead to discipline.

Sergeant Buster testified that he was surprised by Mr. Reynolds' response and finally said "possibly". Mr. Reynolds then stated that he was uncomfortable speaking without a union official present. Sergeant Buster then asked Mr. Reynolds' about another patrol matter, with Mr. Reynolds again asking if his answer could lead to discipline. Sergeant Buster again replied "possibly", and Mr. Reynolds reiterated his position that he would not answer without union representation present. Sergeant Buster then asked Mr. Reynolds if he was refusing to answer any questions about patrol activities without union representation. Mr. Reynolds again asked if his answer could lead to discipline. Sergeant Buster said that it could, and the conversation ended. Mr. Reynolds got into his patrol vehicle and left the scene.

Sergeant Buster reported the January 1, 2012 incident to Commander Ross who, in turn, spoke to Chief Berg. Commander Ross directed Sergeant Buster to place Mr. Reynolds on administrative leave until Chief Berg contacted him.

On January 5, 2012, Sergeant Buster filed a complaint against Mr. Reynolds, noting his refusal to assist other officers and his resistance to supervision. The complaint was processed through department procedures, and Chief Berg assigned Commander Rich to lead the investigation. Commander Rich interviewed Sergeant Buster and other officers who were on shift on January 1, 2012. He also interviewed Mr. Reynolds, who appeared with a union representative.

Commander Rich informed Mr. Reynolds that he was under orders to answer questions during his interview, and that refusal to answer could lead to a finding of insubordination that would lead to discipline. Mr. Reynolds did answer Commander Rich's questions, but he did not remember details and it appeared that the interview would not produce any real information. Commander Rich prepared a report about the interview, noting that Mr. Reynolds appeared to have real issues with authority and that his answers were either sarcastic or "deceptive". Commander Rich concluded that Mr. Reynolds violated a number of departmental policies concerning insubordination, failure to show courteous behavior to a superior officer, being available for work, obeying orders and directives, and not giving a "full day's work for a full day's pay".

The matter was reviewed by Commander Ross, who shared Commander Rich's concerns about Mr. Reynolds' attitude and performance. Of most importance to him, Commander Ross was concerned about allegations concerning Mr. Reynolds' insubordination and failure to support fellow officers.

The matter was referred to Chief Berg who offered Mr. Reynolds an opportunity to explain his version of affairs. He met with Mr. Reynolds and his union representative

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and decided that Mr. Reynolds had violated a number of departmental policies and standards of conduct. Chief Berg did not agree with the conclusion that Mr. Reynolds' refusal to answer questions without union representation showed insubordination, reasoning that Mr. Reynolds could well have been exercising rights protected by the state's labor relations law.

Chief Berg concluded that Mr. Reynolds was insubordinate by refusing to provide back up for other officers, and violated department rules and standards by failing to do a full day's work as a patrol officer. Chief Berg also found that Mr. Reynolds demonstrated a lack of candor in his reports and failed to meet his obligation to improve working relationships. Based on these matters, Chief Berg terminated Mr. Reynolds from employment with the Centralia Police Department, effective March 22, 2012. The Union filed a grievance concerning his dismissal in a timely manner. The grievance concerning Mr. Reynolds' suspension was consolidated with the grievance concerning dismissal for hearing.

Positions of the Parties

The Employer

The Employer argues that Chief Berg had just cause to suspend and to ultimately terminate Phillip Reynolds from employment as a police officer with the Centralia Police Department. The Employer argues that Mr. Reynolds' continually showed hostility toward supervisors, refused to perform his duties as expected and submitted vague and misleading reports about his police work. The Employer contends that Chief Berg acted appropriately by suspending Mr. Reynolds because he committed a number of policy and procedure violations. Originally, Chief Berg analyzed the situation in light of allegations of inappropriate use of force, improper participation in a vehicle pursuit and failure to submit clear and appropriate reports. Ultimately, Chief Berg decided to rely on allegations concerning Mr. Reynolds' use of force in the transport of a suspect in his police vehicle, his unauthorized participation in the police pursuit conducted by Chehalis Police, and his refusal to follow directions to

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submit clear and unambiguous reports when he decided that suspension was necessary.

Moving on to the matter of dismissal, the Employer maintains that Chief Berg had just cause to remove Mr. Reynolds from employment with the police department. The Employer also asserts that, given his prior disciplinary record, Police Chief Berg was well within his authority to conclude that termination was appropriate. The Employer contends that Mr. Reynolds refused to accept supervision and actively attempted to avoid work assignments where he was expected to support his fellow officers. The Employer also stated that, in addition, Mr. Reynolds submitted vague and inaccurate police reports, making it almost impossible for the Employer to trust his judgment or work in the field. The Employer notes that arbitrators respect just cause determinations made in the law enforcement setting, giving deference to the difficult decision made to remove an employee from work, and the Employer asks the Arbitrator in this case to make a similar determination, dismissing the grievance.

The Union

The Union argues that the Employer did not have just cause to suspend Mr. Reynolds or to discharge him from employment with the Centralia Police Department. The Union maintains that although the Employer referred to six incidents in its decision to suspend Mr. Reynolds, Chief Berg ultimately decided to set five of the six incidents aside and not rely on them as the basis for discipline once the Union reminded him that those matters were untimely and should not be considered under terms of the collective bargaining agreement. The Union argues that while Chief Berg decided it would be inappropriate to impose discipline on use of force grounds, he sustained discipline because of Mr. Reynolds' use of a Taser in transporting a suspect, his unauthorized participation in a police pursuit involving Chehalis Police, and his misleading and dishonest report writing.

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The Union notes that the investigating sergeant did not find that Mr. Reynolds had used unnecessary force in the suspect transport matter. In addition, the Union contends that initial investigations showed that Mr. Reynolds did not commit any violations in the pursuit matter. The Union asserts that only after secondary review did either matter lead to disciplinary scrutiny.

As to report writing, the Union contends that the Employer did not have just cause to subject Mr. Reynolds to a suspension because of the reports at issue. The Union notes that many of the alleged incidents were not supported by other officer reports, nor did the Employer document any complaints at the time that the incidents were alleged to have occurred. The Union maintains that Mr. Reynolds' reports were reviewed at the end of each shift by the shift sergeant, and, for the most part, these reports did not give rise to any concern about their accuracy.

As to contentions that Mr. Reynolds was dishonest in his report writing, the Union argues that he never showed an intention to deceive or mislead the Employer, so those allegations must be set aside from further consideration.

Turning to Mr. Reynolds' termination, the Union argues that the Employer did not have just cause to discharge him from employment. The Union argues that Mr. Reynolds' activities on New Years' Day 2012 were substantially similar to those of other police officers, and that the real issue leading to discipline arose when Mr. Reynolds asked to have union representation present before he answered any questions from Sergeant Buster. The Union notes that Mr. Reynolds was sent home on administrative leave before he could meet with his union representative and that the final *Loudermill* hearing did not take place for a month after the incident took place. ~~In addition, the Union argues that the Employer's assertions about statements made by other police officers should not be given any weight because the officers supposedly making the statements were not present at hearing.~~

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As a remedy, the Union asks to have Mr. Reynolds returned to work as a Centralia Police Officer, with all back pay and benefits reinstated through the time of his suspension and for the period of his dismissal from service.

Analysis

In *General Refractories Co.*, 99 LA 311 (Richards, 1992), Arbitrator Richards explained that the imposition of discipline depended on the nature of the underlying act being investigated:

Arbitrators have long recognized that there are a number of offenses, or forms of employee misconduct, which constitute just cause for disciplinary action, up to and including termination, even when such offenses are not specifically mentioned in published "Shop Rules" or "Rules of Conduct" established by the employer. These offenses are deemed to constitute conduct which is so clearly wrong that specific notice that it is unacceptable and will result in disciplinary action is not deemed to be required by "due process" or "just cause". ... In the mind of this Arbitrator, embezzlement, fraud, larceny by trick, and conversion of the employer's property, money, etc. are all included in this category of offense, and constitute just cause for summary termination of the offending employee.

As the Employer properly notes in its closing brief, arbitrators must not substitute his or her judgment for management's, where management has "acted reasonably and in good faith" in the imposition of discipline for just cause. *Meridian Medical Technologies*, 115 LA 1564 (King, 2001). Arbitrator McCoy expressed this general view in *Stockham Pipe Fittings Co.*, 1 LA 160 (McCoy, 1945):

Where an employee has violated a rule or engaged in the conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is no justification for changing it. The minds of equally reasonable men differ. A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance which highly aggravates an offense in

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one man's eyes may be only slight aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management. The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary actions are proved – in other words, where there has been abuse of discretion.

To determine whether an employer has abused its managerial discretion, the concept of "just cause" has developed. It has long been accepted that an employer must have just cause for taking a significant employment action such as terminating an employee. As Arbitrator Donnelly stated in *Atwater Manufacturing Company*, 13 LA 747 (Donnelly, 1949):

If the Company can discharge without cause, it can lay off without cause. It can recall, transfer or promote in violation of the seniority provisions simply by invoking its claimed right to discharge. Thus, to interpret the agreement in accord with the company would reduce to a nullity the fundamental provision of a labor-management agreement – the security of a worker in his job.

Arbitration decisions often refer to the "seven tests" of just cause developed by Arbitrator Carrol R. Daugherty. See *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966); *Moore's Seafood Products, Inc.*, 50 LA 83 (Daugherty, 1968). The seven tests of just cause can be stated in the following terms:

1. Was the employee adequately warned about the consequences of his/her conduct?
2. Was the employer's rule or order reasonably related to efficient and safe operations?
3. Did the employer investigate before imposing discipline?
4. Was the investigation fair and objective?
5. Did the investigation produce substantial evidence or proof of guilt?
6. Were the rules, orders and penalties applied evenhandedly and without discrimination?

7. Was the penalty reasonably related to the seriousness of the offense and the past record?

While Arbitrator Daugherty is given credit for the creation of the "seven test" analysis, the elements of the "seven tests" have been used for many years. In a 1947 arbitration decision, Arbitrator Harry Platt made the following observation about cause as applied by labor arbitrators in termination cases:

It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a questions and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just.

Riley Stoker Corp., 7 LA 764 (Platt, 1947).

Arbitrators have rejected "mechanical" application of all seven tests in every case involving just cause, arguing that it is more important to focus on the elements of the test that may be of issue in the particular case. As Arbitrator Harris stated in *RCA Communications, Inc.*, 29 LA 567, 571 (Harris, 1957), analysis must determine "whether a reasonable [person] taking into account all relevant circumstances, would find sufficient justification in the conduct of the employee to warrant [discipline]". In essence, arbitrators rely on just cause as an analytical tool that allows examination of a disciplinary matter while inhibiting the need to interject personal opinions or beliefs.

I have been presented two separate disciplinary matters for determination: a suspension and a dismissal. Given the nature of these grievances, I will address each separately. Based on the

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~~record made in this matter, I dismiss the grievance concerning the suspension, but I grant the grievance concerning Mr. Reynolds' termination.~~

The Suspension

Mr. Reynolds' suspension came about because the Employer believed that he violated a number of departmental policies and standards concerning improper use of force and an inappropriate vehicular pursuit. As a police officer, it is reasonable that all members of the Centralia Police Department had knowledge of the rules and regulations pertaining to their employment. Arbitrator Howlett described situations where knowledge of work rules is at issue in the following manner:

[A] conscious remembering of a rule at the time an act is taken is not necessary in order that a discharge may be for proper cause. If such were the rule every discharge could be reversed by the testimony of the grievant (necessarily a subjective test) that he did not remember the rule which he was violating at the time he did so. The test with respect to a rule clearly communicated to employees must, of necessity, be determined by objective evidence. Unless strong reason is shown, every employee should be charged with knowledge of rules clearly communicated, whether he actually remembers them or not.

Valley Steel Casting Co., 22 LA 520, 527 (Howlett, 1954).

~~In this case, there is clear evidence that Mr. Reynolds knew that his employment with the Centralia Police Department was in a precarious position.~~ He had already been subject to a number of disciplinary measures, and he showed a pattern of behavior that created difficulties for the Employer. In fact, when he discussed the suspect transportation issue with Chief Berg, he admitted that he had not performed at acceptable levels. Such a statement would be impossible if the individual making it did not know what the standards of conduct were. I am satisfied that Mr. Reynolds was aware of his responsibilities as a police officer.

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I am further convinced that the departmental rules and regulations involved in the suspect transportation and the pursuit incidents were enacted for safety and efficiency. The rules were created for the safety of the police officers and the public and to ensure efficient use of the resources available to the department. In addition, the rules were well distributed, and the record reflects that they had been in place for a considerable length of time. ~~There is no doubt that the rules were intended for safe and efficient operation of the Centralia Police Department.~~

My analysis now turns to the Employer's investigation of events concerning the suspension. During the course of the investigation into the suspect transportation and the pursuit incidents, the Employer learned that Mr. Reynolds had not provided accurate information concerning the use of his Taser. ~~In fact, it appears that reports submitted in both incidents contained significant inaccuracies that could have affected further investigations.~~ I acknowledge that Chief Berg looked into a number of older incidents involving Mr. Reynolds' use of a Taser, but the Chief testified that he ultimately did not use any of those older incidents in determining the appropriate course of action. I accept the Chief's testimony on those matters, and this analysis is confined to whether the suspension was appropriate in light of the suspect transport and vehicle pursuit issues only.

~~I am not convinced that Mr. Reynolds knowingly presented untruthful reports, but the results of his inattention are still the same.~~ He submitted reports that were not accurate and could not be verified without further inquiry by the Employer. The Employer conducted thorough investigations into each incident and conducted those investigations in a fair and objective manner. I am satisfied that the Employer conducted the investigations to find out the truth of the matter, and did not begin the process with the idea of trying to find justifications for disciplinary action. Discipline followed based upon the evidence obtained through the investigations. Each investigation disclosed wrongdoing, and the Employer had to take measures to correct the situation.

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I further conclude that the Employer applied its rules and regulations in an evenhanded and nondiscriminatory manner in the circumstances of Mr. Reynolds' situation. The record demonstrates that the Employer took care to provide appropriate procedural safeguards and that Mr. Reynolds was given a full opportunity to present his version of events before discipline was imposed. There is no evidence that the Employer violated any provision of the collective bargaining agreement by imposing discipline in the form of a suspension.

The final question that must be addressed concerning the suspension is whether it was appropriate for the infractions that were committed. I am satisfied that that Employer exercised its supervisory discretion in an appropriate manner by suspending Mr. Reynolds. The Employer followed the necessary investigatory steps and determined that suspension was appropriate for the kinds of violation that were present. Mr. Reynolds had a series of employment difficulties that led to the suspension, and the level of discipline was appropriate for the activities being investigated. ~~I am satisfied that the Employer carefully weighed its options concerning the suspension and had just cause for suspending Mr. Reynolds from service with the Centralia Police Department.~~

The Termination

Mr. Reynolds' termination from service must now be discussed. As noted above, the standards concerning just cause must be examined to determine whether the Employer had cause to impose termination as a disciplinary measure.

Termination is an extreme form of discipline. It is disruptive for the employee who has lost his or her employment, for the employee's fellow workers who are either observers who watch the events leading to discipline unfold or who may be called upon to provide information about the alleged infractions, and ultimately for the employer who must find a replacement employee and deal with morale and production issues occurring when the termination takes effect. ~~The decision to terminate an employee must come after careful investigation and consideration of the precipitating event.~~

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Events leading to Mr. Reynolds' termination can be traced to New Year's Day 2012. The Employer maintained that New Year's Day was a very busy day, but the record does not support that contention. Several Employer witnesses, including Sergeant Buster stated that New Year's Day was a very slow shift and did not present a particularly difficult work environment. Mr. Reynolds came on shift in a timely manner at approximately 9:00 AM and was involved in several traffic stops and/or vehicle registration checks during the course of his work. As to the incident where Sergeant Buster investigated the suspicious activities at the local park, the Union properly notes that no other police officer responded for backup, and later, Sergeant Buster delivered a warrant at the scene of a traffic stop because he did not have anything else to do at the moment.

Later in the work shift, Sergeant Buster encountered Mr. Reynolds, and they had the confrontation that ultimately led to Mr. Reynolds being sent home. Mr. Reynolds did not have the opportunity to have a union representative present at the time of the conversation, and he was not called back for an interview for more than one month. As the Union appropriately noted, the investigation conducted at that time was primarily focused on allegations that Mr. Reynolds was insubordinate by refusing to answer Sergeant Buster's questions.

Once union officials reminded Chief Berg that Mr. Reynolds had the statutory right to wait for union representation before answering questions that could lead to discipline, the focus of the investigation turned to allegations that Mr. Reynolds failed to provide appropriate support for other officers during the course of his work shift and that he provided incomplete and misleading answers during the investigatory process. The interview process was conducted by Commander Rich. It appears that Mr. Reynolds gave short and direct answers to questions raised, but did not attempt to offer detailed explanations about any of the matters being investigated. I cannot conclude that Mr. Reynolds' answers were untruthful or misleading. I must make my ruling in light of the situation that existed at the time of the interview, conducted more than one month after events leading to the interview. This gap in

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time certainly did not help refresh recollections about incidents that took place on New Year's Day.

~~As to the allegations that Mr. Reynolds did not provide appropriate backup for fellow officers, the record simply does not support that conclusion. Sergeant Butcher was involved in one incident that he explained concerning the apprehension of a female suspect, and he did receive backup from several officers at the scene. The description of events leads one to conclude that Mr. Reynolds' presence was not necessary, nor did his absence from the scene create an unsafe situation for Sergeant Buster or any of the other responding officers.~~

~~I must agree with the Union that it appears that the Employer's main focus on the New Year's Day incidents revolved around Mr. Reynolds' refusal to answer Sergeant Buster's questions without union representation present. Once that matter had to be set aside because Mr. Reynolds was asserting a statutory collective bargaining right, the Employer attempted to use other minor events as a sufficient basis to terminate Mr. Reynolds from employment. The events described do not warrant such an extreme form of discipline, and the termination cannot stand. As the Union summarized in its closing brief, Mr. Reynolds has shown improvement in performance after counseling, and he should be expected to make further improvements in his employment with the Centralia Police Department.~~

As a remedy for this matter, I will order the City of Centralia to reinstate Mr. Reynolds to employment as a police officer, with all appropriate back pay and benefits owed to him during the time of his inappropriate dismissal. I will retain jurisdiction in this matter for a period of 60 days in the event there are any difficulties arising in the reinstatement and back pay processes.

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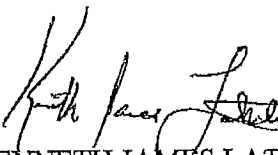
AWARD

Based on the foregoing and the record made in this matter, the City of Centralia had just cause to suspend Phillip Reynolds on July 12, 2011. The grievance concerning Mr. Reynolds' suspension is hereby **Denied**.

The City of Centralia did not have just cause to terminate Phillip Reynolds from employment as a police officer on March 22, 2012. The grievance concerning Mr. Reynolds' termination is hereby **Granted**. The City of Centralia is directed to reinstate Mr. Reynolds to the rank he held on March 22, 2012, with all back pay and benefit payments due from March 22, 2012 to the date of this award.

I retain jurisdiction in this matter for a period of 60 days from the date of this Award.

DATED at Lacey, Washington this 6th day of May, 2014.


KENNETH JAMES LATSCH,
Arbitrator

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