

_____	)	
IN THE MATTER OF CONTROVERSY	)	
BETWEEN	)	
TEAMSTERS UNION,	)	DECISION
	)	
LOCAL UNION #760	)	
	)	
UNION	)	OF
	)	
AND	)	
	)	
City of East Wenatchee Police Department	)	JOHN R. SWANSON
	)	
EMPLOYER	)	ARBITRATOR
	)	
Re: Termination/Discharge	)	February 20, 2020
_____	)	

**Appearances**

**Reid, McCarthy, Ballew & Leahy, LLP** by David Ballew , Esquire, for and on behalf of Teamsters Local Union #760, Union.

**City of East Wenatchee City Attorney** by Devin Poulson, Esquire, for and on behalf of City of East Wenatchee Police Department, Employer.

This arbitration is between Teamsters Local Union #760, hereinafter referred to as the “Union” and the City of East Wenatchee Police Department, hereinafter referred to as the “Employer”. The parties have selected John Swanson to serve as Arbitrator and agreed the Arbitrator's Award will be final and binding upon the parties. The hearing was held on December 11th and 12<sup>th</sup> in East Wenatchee, WA. Both parties were given the opportunity for full examination and cross-examination of witnesses as well as the introduction of relevant exhibits for argument. The parties agreed to file post hearing briefs simultaneously on Friday, January 24, 2020.

**Issue**

Was the termination of grievant for just cause and in compliance with the Collective Bargaining Agreement between the parties?

If not, what is the appropriate remedy?

**Record Before The Arbitrator**

1. Exhibits: (a) Forty-one (41) Employer exhibits including a thumb drive containing audio and video backup of officer testimony supplementing the exhibits accepted into evidence;  
(b) Five (5) Union exhibits accepted into evidence.
2. Witness testimony taken under oath at the hearing;
3. Post hearing briefs filed simultaneously on January 24, 2020.

**Facts**

This dispute arose from a DUI stop on January 24, 2019 in East Wenatchee. Officer Ruiz observed a vehicle driving erratically and intercepted the vehicle in a parking lot. Officer Ruiz became aware that he knew the driver of the vehicle and asked his Sergeant if he could be relieved as the officer on the scene to avoid any perceived conflict. Sergeant Fauconier assigned Officer Cabellero to the scene. Officer Cabellero was in training and as a result had his FTO overseeing some of his activities to assist if needed. During the course of observing the field testing for BAC, officers on the scene made their individual assessment of the driver's impairment. It is not uncommon for officers to make informal, casual bets among themselves regarding impairment levels for drivers they confront. The problem in this case developed shortly after Officer Cabellero completed the BAC test. The grievant, who at that time was Officer Cabellero's FTO, took a picture of the BAC test result and texted it to a string of fellow officers. The grievant inadvertently included officers other than those present during the January 24, 2019 incident in his text. Sending a picture of the arrested driver's BAC test on the grievant's personal cell phone rather than his work phone is an alleged violation of not only the defendant's right to privacy but a violation of police procedures. The Employer's case relies exclusively on the Professional Standards Investigation and Investigator Coble's interviews of the officers on the scene of the January 24, 2019 DUI stop and arrest.

**Relevant Contract Provisions**

**ARTICLE 1  
DEFINITIONS**

- 1.1 "Employer" or "City" means the City of East Wenatchee, Washington.
- 1.2 "Union" means Teamsters Union Local 760.
- 1.6 "Probation Period" means a one (1) year period, commencing upon the initial date of hire as a full-time regular employee, during which period an employee may be disciplined or discharged by the City at will and without appeal or recourse to the grievance procedure. An employee is ineligible for certain benefits provided by this Agreement during the probationary period.
- 1.15 "Date of Employment". The first day in paid status; used for the purpose of computing advancements between the various grades of the rank of Police Officer, and for computing other compensation eligibility.

**ARTICLE 5  
MANAGEMENT CLAUSE**

- 5.1 Retention of Rights. The City shall retain all customary, usual and exclusive rights, functions, prerogatives, and authority connected with or incident to its responsibility to manage the affairs of the Police Department without the need or obligation to bargain further with respect to any such subjects or the effects thereof or the exercise of its discretion and decision making authority.

- 5.2 Management Rights. The exclusive prerogatives, functions and rights of the City include but shall not be limited to, the following:
- c. hiring, promoting, training, retraining, laying off (subject only to the City's civil service system and the rules and regulations of the City's civil service commission), suspending, disciplining, demoting and discharging employees **for just cause** and discharging probationary employees at will.

## **ARTICLE 6 CIVIL SERVICE AND SENIORITY**

- 6.2 Seniority. Seniority, as used in this Agreement, is defined as the length of an employee's continuous full-time service with the East Wenatchee Police Department since his/her last date of hire, including any authorized leave of absence, up to a maximum of one (1) year.

## **ARTICLE 18 POLICE OFFICER'S BILL OF RIGHTS**

- 18.1 Before interrogation, the employee shall be informed of the nature of the matter in sufficient detail to reasonably apprise him of the matter. Nothing herein shall operate as a waiver of the Union's right to request bargaining information.
- 18.3 Administrative Investigations must be completed within 180 days of the matter coming to the attention of the Chief of Police. In the event the Chief of Police believes an extension beyond the 180 days is necessary, and the City establishes an appropriate burden that it has acted with due diligence and the investigation could not reasonably be completed due to factors beyond the control of the City (for example, extended illness or other unavailability of a critical witness, such as the complainant or the officer being investigated, or necessary delays in the processing of forensic evidence by other agencies), the City must contact the Union prior to the expiration of the 180 days seeking to extend the time period. Any request for extension based on the unavailability of witnesses shall include a showing that the witness is expected to become available in a reasonable period of time. A request for extension based upon the above criteria will not be unreasonably denied.
- 18.4.2 Compliance with this provision is required if findings are to be entered or discipline is to be imposed. Issuance of a Loudermill notice of intent to discipline will constitute conclusion of the administrative investigation for purposes of this section.
- 18.4.3 Nothing in this Article prohibits the City from disciplining (provided just cause exists) an officer convicted of a crime.

### **Employer's Position**

The grievant was terminated because his conduct suggested that he was not truthful and lied during a Professional Standard Investigation regarding the misuse of his personal cell phone. Another reason for his termination was the Department of Licensing had determined he was not a credible witness during the Professional Standard Investigation. Assistant Police Chief Coble interviewed the officers present during the January 24, 2019 DUI stop including grievant. After the interview, Assistant Chief Coble concluded:

**“I have grave concerns about Officer Sheats' inability to be forthcoming and honest during interviews in a Professional Standards Investigation. He has shown these same traits during a previous Professional Standards Investigation where he answered one way and then changed his answer when he was confronted with conflicting information.”**

The grievant was also dishonest during a Professional Standards Investigation regarding mishandling of EBT cards. The Employer enumerated numerous situations citing grievant's alleged dishonest and questionable conduct. The Employers also provided the arbitrator with the Seven Tests for **just cause** from Arbitrator Carroll Daugherty's decision in Enterprise Wire Co. (46 LA359, 1966) which are applicable to any discipline case. The Employer believes the Arbitrator should be guided by these Seven Tests as well as the Employer's record before the Arbitrator at the hearing and police policies and procedures when confirming the **just cause** termination of the grievant.

It is clearly apparent the grievant broke the bond of trust that must exist between employer and employee. Because this bond of trust cannot be repaired, the Employer asks the Arbitrator to rule that the Employer terminated the grievant for **just cause**.

### Union Position

The Employer's case against the grievant alleges the grievant is dishonest and relies, in part, on grievant's own revelation made by him prior to his employment. He was completely revealing in his East Wenatchee Police background check, personal history statement and in the redacted 2011 pre-employment polygraph examination. After receipt of this information, the grievant was hired by the Employer.

After his employment, he was assigned the position of Field Training Officer. This job is responsible for training new officers and overseeing them in the police department. Citing prior conduct, in some cases 20 years prior to grievant's employment with East Wenatchee Police Department, is clearly a violation of the Labor Agreement's Police Officers Bill of Rights. The Employer did not provide any evidence during the interviews following the January 24, 2019 DUI incident that the grievant behaved improperly. The other officers involved were all interested in the arrested individual's BAC and to some extent offered their own guess as to the BAC. No one can dispute the fact that BAC was a common discussion between officers involved in DUI arrests. Blood alcohol tests and their affects are part of the training at the Law Enforcement Academy where officers study the impact of impairment and its degree of effect on individuals. The grievant never testified that the only reason for the text of the BAC results was to confirm a bet. On the contrary, because the officers on the scene had made their individual assessments of the driver's level of impairment and the actual BAC came out below their assessments, as Field Training Officer grievant felt he should inform them of the results. For these and all the foregoing facts, the Union requests the Arbitrator find the grievant was not terminated for **just cause**.

**Discussion**

Arbitrators, management and union representatives have searched for a precise definition of **just cause** and honest remedies for discipline. Arbitrators have defined it as a “fair and equitable basis for discipline” or “a system of justice” or some have said “the introduction of civil rights into the labor agreement.” When we are involved in a case such as this where the matter can have a profound impact on a person's future, we need a more precise definition.

The Employer suggests the Arbitrator consider the seven tests formulated by Arbitrator Carroll Daugherty in Enterprise Wire Co., 46 LA 359 (1966) which are considered applicable to every discharge or discipline case and the Arbitrator has complied.

(1) **Reasonable Rule or Order:**

**“Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?”**

Based on the record it appears that none of the officers had knowledge of the restrictions on cell phones. The examiner spent much of his interview explaining how that policy and procedure worked. In one interview with Officer Gregory, Interviewer Coble responded to a question:

**KG: I mean you know, I guess if he would have just sent a number, I mean would that be a violation.....probably not.**

**RC: Probably not**

Personal cell phones are used by duty officers on many occasions. While the use of personal cell phones may be explained in Policies and Procedures, the policy regarding cell phones apparently is not well communicated to the officers.

(2) **Notice:**

**“Did the Employer give the employee forewarning or foreknowledge of the possible consequences of the employee's disciplinary conduct?”**

The notice test requires that the Employer communicate clearly and unambiguously to the officers first what kind of conduct leads to discipline and second, what the penalty would be for any particular act of misconduct. Not one of the officers that were interviewed by Examiner Coble had any notice that anything about the January 24, 2019 DUI incident was improper. As stated in Test 1, Examiner Coble spent much of his interviews discussing Policies and Procedures.

(3) **Investigation:**

**“Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?”**

It appears the grievant violated a rule or policy of which he and others were not aware. Obviously as a FTO he should be more cognizant of the policy on cell phones. However, it appears that, for whatever reason, no cell phone incident has ever been reviewed with this much scrutiny.

(4) **Fair Investigation:**

**“Was the Employer's investigation considered fairly and objectively?”**

Generally speaking, a fair investigation is one that is complete, timely and conducted in accordance with the employee's due process rights i.e. the right to defend himself, the right to union representation.

**Arbitrator Daugherty means something more specific.** In order for there to be a fair investigation, an upper management police officer or respected Employer official who is not personally involved and has no direct interest in the outcome assumes a quasi-judicial role and elevates the case for discipline fairly and objectively as would some outside official. This test is important because Assistant Chief Coble, who is the grievant's principal accuser, has a natural tendency to believe that his view of what took place is correct. Yet, Assistant Chief Coble, like anyone else, might misjudge a situation, even with the best of intentions. The independent judgment of some other management official is necessary if all the evidence on both sides is to receive an objective evaluation.

Assistant Chief Coble outsourced the EBT investigation to the criminal division of the Washington State Patrol and based on the record, disregarded their conclusion that **“there is no apparent evidence to support anything other than that Officer Sheats seized the EBT cards after Gregory Cook was arrested, placed them in the temporary lockers at the East Wenatchee Police Department and subsequently destroyed the cards.”** Assistant Chief Coble then assigned Detective Darnell from the department to make another investigation of the WSP investigation. This investigation concluded that Officer Sheats declined to disclose the names of officers who had not followed the chain of evidence and had destroyed material they had intended to return when the owner could not be contacted. Detective Darnell's investigation concluded with the following: **“It should be noted that I could interview every officer on this department and prolong the conclusion of my investigation; however, I don't see how that would change what actually occurred in this case. I believe it's undisputed some officers are not handling evidence/property the way evidence/property should be handled and or processed. I make this statement based on what Fauconnier, Sheats and Leyde reported to me. There have been driver's licenses left on the front counter of the police department presumably for return to the rightful owner. Although, I have personally never seen an officer place a driver's license on the front counter, I certainly have seen them on the front counter. It would appear that further training regarding evidence handling be implemented department wide to avoid such poor police practices in the future. In addition, further training should be implemented on the importance of properly documenting officer actions or inactions in their respective narrative reports. I believe Fauconnier accurately pointed out that if Sheats had properly supplemented his investigative report (as he told Sheats to do but never did) this all may have been avoided.”**

While the EBT matter is not factually relevant, it has been a cornerstone in the Employer's case regarding just cause. A review of the exhibits in the record raises the obvious question about the propriety of the EBT investigation and its conclusions. **In this matter following Daugherty's philosophy and the Arbitrator's evaluation of the record, the grievant did not receive a fair investigation.**

**5. Proof:**

**“At the investigation, did the 'judge' obtain substantial evidence that the employee was guilty as charged?”**

It goes without saying in every situation involving discharge and discipline, proof is basic and other things being equal, of all the just cause tests it is the most often in contention. Moreover, it is self-evident that if no misconduct is proved, no penalty can be just.

From the very beginning there are problems for the Employer. The Notice of Termination, on its face, is flawed. The second bullet cited on the June 27, 2019 notice cites dishonest and fraudulent statements made by the grievant in his **2/14/2019** interview. There was no interview on 2/14/2019. The third and fourth bullet points cite injury to the public service by his dishonest actions. None of grievant's actions could be known by the public and certainly did no injury to the public service.

We have the Employer's record replete with conjecture and inconclusive statements. In his March 13, 2019 report submitted to Chief Harrison and Mayor Lacy, Assistant Chief Coble states:

**“Officer Sheats tried to down play the wager by saying it was just a joke.”**

Every officer interviewed intimated the same thing – the energy drink part of the text was just guys joking around. It was no different than other roadside conversations between officers on the scene. The joking about buying an energy drink for the officer closest to the actual BAC does not negate the fact that on the scene attempts to assess the BAC of an impaired driver is done for training purposes. Assistant Chief Coble, in his report, goes on to say:

**“Later interviews with Deputy Williams, who adamantly stated that there was a wager made between officers at the traffic stop.”**

Using the word “adamant” is an embellishment of Officer Williams actual testimony in the audio interview. There is disputed testimony about who received the information regarding the BAC and about who was included in the alleged bet. One thing is clear and that is Assistant Chief Coble's intent to distort the details of this incident.

At the top of page 7 of the Employer's post hearing brief, the following is stated: **Neither Officer Gregory nor Officer Ruiz nor Officer Williams testified at the arbitration hearing that the purpose of the text was for training purposes.** My Sony recorder that I used to tape the arbitration hearing must be in need of repair because nowhere on it can I find testimony from officers Gregory, Ruiz or Williams.

All the officers at the scene were evaluating the impaired driver and interested in his BAC. How can the Employer deny the educational value in sharing the results of the BAC with officers who had jointly attempted to calculate the driver's level of impairment?. There can be no denying that Officer Sheats used his cell phone to communicate the BAC via a text. Based on the record it also cannot be denied that other officers use personal cell phones to communicate. The only officer that has suggested a violation occurred is Sergeant Rick Mott in his email to Assistant Chief Coble. The Employer has placed great weight on this email as a key piece of evidence. If this email was so key, why was Sergeant Mott not called as a witness? He himself submitted this evidence to the Employer. As a general matter, when a witness is not called to testify who might logically be expected to back up testimony relied upon by his own side, arbitrators have often drawn an 'adverse inference' from his failure to appear at the hearing; that is to say, they have concluded that his testimony probably would have been damaging to the Employer's case.

The Employer has failed to provide proof necessary to support their position in this case. Personal cell phone policies are not communicated adequately to all officers. No officer who was present at the January 24, 2019 incident was aware that any policy violation had occurred; the BAC result circulated is available to anyone; the department was not damaged, weakened or compromised in any way; the impaired driver's constitutional rights were not compromised and according to the BAC test, his level of impairment was exactly what was communicated.

“The party who has the burden of producing evidence—The burden as to a particular fact is on the party against whom the finding on that fact would be required in the absence of further evidence. The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to the fact.” **1.**

6. **Equal Treatment:**

**“Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?”**

This is another test that goes to the overall matters in this case and is another test where the Employer has a problem. The Employer has introduced so much prejudicial evidence – most of it recovered from the grievant prior to his employment – evidence from a pre-employment polygraph (which is not admissible in either criminal or civil proceedings) unproven statements of dishonesty and it appears that Assistant Chief Coble, by his different pursuits, was “out to get” the grievant. In addition an officer was recently reinstated after a plea bargain. The officer plead guilty on September 19, 2019 to disorderly conduct, a misdemeanor and was sentenced. Assistant Chief Coble said the department conducted its own

1. Pittsburgh Area Report, **Problems of Proof in Arbitration**, Cited n.17, pp.211-212

nvestigation and the officer would not lose his job. Here is an officer who plead guilty and was sentenced but returned to duty. Equal treatment? I think not.

### **Penalty**

In a case where honesty and truth are called into question and the result is termination, proof beyond a reasonable doubt is required. In this case obvious bias and prejudice has been shown; conflict of witness testimony critical to the hearing has occurred and disparate treatment has been shown. The grievant's use of his personal cell phone to text results of a BAC test would normally be subject to an admonishment and training – not termination. The Employer's actions in this case do not meet the test for just cause.

### **Summary**

For all the reasons set forth in the foregoing, the grievant was not discharged for just cause. The grievant is to be reinstated.

### **Decision and Order**

1. The grievant, Officer Tye Sheats, was not discharged for just cause.
2. The grievant is to be reinstated and made whole under the provisions of Article 16 – 16.3.3 from the date the grievance was filed.
3. The Arbitrator will retain jurisdiction until this Decision and Award is implemented.

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John Swanson, Arbitrator

DATED: February 20, 2020