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uploading them. It also contained training materials. On December 10, 2018, an email from COO [E] (Joint Exhibit #11, p. 2) was sent stating that the standard for submission of an AFA was 72 hours after admission. On March 8, 2019, Ms. [F] and COO [E]both sent emails (Joint Exhibit #15, p.3) which again clarified the timelines. Ms. [F] sent another email on March 8, 2019 (Joint Exhibit #13, p. 2) showing data that 0 AFAs had been uploaded for the actual month of admission for January and February of 2019.

Management did follow the steps of Progressive Discipline as outlined in the CBA, Article 24.02-Progressive Discipline. (Joint Exhibit #1). The steps are:

a. One (1) or more written reprimand(s);

b. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

c. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer.

d. Termination

The Grievant received a written reprimand dated April 3, 2018 (Joint Exhibit #6). The Grievant received a 3-day working suspension effective November 10, 2018 (Joint Exhibit #5). The Grievant received a 5-day working suspension, a major working suspension, effective February 16, 2019 (Joint Exhibit #4). HR-22, Progressive Discipline, allows the employer use of discretion in following these steps. Also, the Grievant was made aware of the consequences of his failure to accurately complete and file the forms.

The penalty of discharge is very serious and not to be taken lightly. As in all discipline/discharge cases, the Arbitrator evaluates Management's actions against the Seven Tests as written by Arbitrator Carroll Daugherty [Brand, N. & Biren, M. H. (Eds.) (2015). Chicago, IL: American Bar Association. Discipline and discharge in arbitration, third edition.] The questions an Arbitrator must consider:

1. Did the employer give notice?
2. Was the rule reasonably related to operations?
3. Was there an investigation prior to discipline?
4. Was the investigation fair?
5. Was there sufficiency of proof?
6. Were the rules applied in a nondiscriminatory way?
7. Was the penalty appropriate?

In each instance, this Arbitrator can answer yes. The Grievant did receive notice, a fair investigation was conducted, Management supplied sufficient proof to substantiate the allegations, and the rules were applied in a nondiscriminatory fashion. The rule was certainly related to the operations of the facility. Noncompliance could and has resulted in financial penalties. Thus, the penalty of discharge is appropriate.

AWARD:

The hearing record shows that the Employer has proven by a preponderance of evidence that the Grievant, [H], violated Work Rule 2.6 of the Code of Conduct and General Work Rules. For the reasons stated above, the grievance is denied.

This closes the arbitration.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy each of the Arbitration report was delivered via email on the 2nd day of March 2020, to Ms. [A], Advocate for the Employer and Mr. [G], Advocate for the Union

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20-1 ARB ¶ 7618 City of Kalamazoo and Kalamazoo Public Safety Officers' Association.

LEE HORNBERGER, Arbitrator. Selected by the parties. Case No. AAA 01-18-0003-0489. Hearing held in Kalamazoo, Michigan, October 22-24, 2019. Post-hearing briefs filed by March 4, 2020. Award issued on March 17, 2020.

Falsification—Termination—Dishonesty.—A public safety officer filed a grievance contesting his termination for placing false information in reports to justify his actions. The arbitrator denied the grievance. The employer established that the officer falsely added "I observed a grip of a handgun" to his report in order to create probable cause for his search of the car passenger's purse, where he found drug paraphernalia. Falsification of employer records, especially a record that has safety implications, is well known to be a dischargeable offense. The employer, therefore, had just cause to terminate.

Kurt P. McCammon, Attorney, for the Employer. Timothy J. Dlugos and Aubree A. Kugler, Attorneys, for the Union.

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[Text of Award]

DECISION AND AWARD

INTRODUCTION

HORNBERGER, Arbitrator: This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between the City of Kalamazoo (Employer) and the Kalamazoo Public Safety Officers' Association (KPSOA). KPSOA contends that the Employer violated the CBA when it terminated Grievant. The Employer maintains that it did not violate the CBA when it terminated Grievant.

I was selected by the parties to conduct a hearing and render a final and binding award. The hearing was held on October 22, 23, and 24, 2019, in Kalamazoo, Michigan. At the hearing, the parties were afforded the opportunity for examination and cross- examination of witnesses and for the introduction of relevant exhibits. The hearing was transcribed. The transcript was received on November 6, 2019. KPSOA's post-hearing brief was received on February 3, 2020. The Employer's post-hearing brief was received on February 4, 2020. KPSOA's Motion to Amend the Record to Include Evidence Arising After Conclusion of the Hearing was received on February 5, 2020. The Employer's Answer to KPSOA's Motion to Amend the Record was received on February 26, 2020. KPSOA's Response was received on March 4, 2020. The dispute was deemed submitted on March 4, 2020, the date the last post-hearing submission was received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

The advocates did an excellent job in representing their clients.

ISSUES

Was there just cause for the termination of Grievant, and, if not, what is the remedy? Tr. 6-7.

RELEVANT CONTRACTUAL LANGUAGE

CBA Art. IV.1

> In the event an employee in the bargaining unit shall receive a written warning, be suspended from work for disciplinary reasons, or is discharged from his or her employment after the date hereof, and he or she believes that the discipline was unjustified, such discipline shall constitute a case arising under the Grievance Procedure.
>
> . . . .
>
> Art. III, subsection (c) of the Third Step:
>
> [T]he arbitrator . . . shall have [no] authority to add to, subtract from, change or modify any provisions of this Agreement, Civil Service Ordinances, City Personnel Rules, Regulations and Personnel Rules, Regulations and Personnel Policies of the City of Kalamazoo, and the Kalamazoo Public Safety Department Rules and Regulations and/or Policies and Procedures, but shall be limited solely to the interpretation and application of the specific provision contained therein. However, nothing shall be construed to limit the authority of . . . the arbitrator . . . to sustain, reverse or modify an alleged unjust discipline or discharge that may reach this stage of the Grievance Procedure. The decision of . . . the arbitrator shall be final and binding upon the parties hereto.
>
> Art IV.2.
>
> In the event it should be decided under the Grievance Procedure that the employee was unjustly suspended or discharged, the Employer shall reinstate such employee and pay full compensation, partial or no compensation as may be decided under the Grievance Procedure, which compensation, if any, shall be at the employee's regular rate of pay at the time of such discharge or the start of such other than specified in Section 36-24 of the City of Kalamazoo Traffic Code and corresponding sections of the Michigan Vehicle Code.

FACTUAL OUTLINE

Précis

Grievant was a Public Safety Officer (PSO) with the Employer from May 26, 2015, until he was terminated on March 27, 2018, for allegedly putting false information in a February 6, 2018, report, stating " . . . I observed a grip of a handgun in the purse." After the termination, allegations surfaced concerning Grievant allegedly also putting false information in a September 18, 2016, report stating a vehicle "accelerated at me at a high rate of speed" and a June 25, 2017, report concerning a suspect allegedly fleeing arrest and going into a house. After additional investigation, the Employer issued charges and findings against Grievant for the "at me" and "house" reports. In this Decision, I will decide whether there was just cause for discharge.

Background

Grievant [A] was a PSO with the Employer from May 26, 2015, to March 27, 2018.

Chief [B] has been the Chief since 2017. She has been employed by the Employer for 25 years.

Assistant Chief [C] has been employed by the Employer for 23 years.

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PSO [D] has been employed by the Employer for eight years.

Prosecuting Attorney [J] has been the Prosecuting Attorney of Kalamazoo County since 2013.

PSOs are trained to respond to fire, EMS, and police matters. Prior to beginning his employment with the Employer, Grievant attended the Kalamazoo Law Enforcement Training Center. He is MCOLES certified. During his employment with the Employer, Grievant received commendations for his police work and his dedication to the community.

Grievant was born in Egypt. His family moved to Norway, to the United States for a short period of time, and back to the Middle East, specifically, Egypt and Lebanon. During the time Grievant was living in the Middle East, he spoke Arabic and attended school where Arabic was spoken. Arabic was his primary language and was spoken in his home during that time. At around age 13, his family relocated to the United States.

According to Grievant, despite speaking and understanding English, Grievant, having spoken Arabic during his formative years, English still causes him difficulty with grammar, syntax, and spelling. Grievant possesses a master's degree in human performance from Western Michigan University and a bachelor's degree in exercise science from Western Michigan University. Grievant has achieved much, academically and in his law enforcement career, all in English.

According to Grievant, his language difficulties were evidenced by his report writing efforts up until the day the "grip of a handgun" incident occurred. The February 6, 2018, Daily Activity Report of SGT [E], stated,

Training

* * *

Upon reviewing PSO [A]'s report ref. 18-1864 [case prior to "grip of a handgun" incident], I noted that several significant changes and additions needed to be made. We spent approx. 20 minutes discussing report writing and making changes to his report. The changes included spelling and grammar, information that had been omitted, giving more detail on vague information, and correcting chronological errors to make the report easier to follow.

Concurrent with his employment with the Department, Grievant was also employed as an instructor at Kalamazoo Valley Law Enforcement Center, an instructor of suicide by cop mitigation, and as a use of force expert at the Western Michigan University School of Medicine. He also owns a small business where he teaches mixed martial arts to civilians.

Prior to his employment with the Employer, Grievant was a professional mixed martial arts fighter. He also ran a non-profit which mentored at-risk youth through the use of mixed martial arts. Currently, Grievant is employed by another municipality as a police officer, a position he obtained in approximately April 2019.

December 27, 2017, Honesty Standard/ Expectation

The December 27, 2017, Honesty Standard/Expectation was signed by Grievant on January 17, 2018. The Honesty Standard/Expectation states:

Law enforcement professionals, and their departments, are held to a higher standard than the citizens they have sworn to protect and serve. In times when law enforcement legitimacy is being criticized and officers find themselves under a societal microscope, it is important to ensure that law enforcement professionals adhere to a strict code of truthfulness. This applies to all employees of the Kalamazoo Department of Public Safety.

The integrity of KDPS depends upon the personal integrity of each employee. KDPS desires honest coworkers and we commit to recruit, hire, train, and retain only those who meet or exceed our high standards of conduct as stated in KDPS R-15. The public has the same expectation. Therefore, the act of being less than candid and failing to be truthful to any supervisor, on any official document, in any court proceeding, or during the course any official interaction, may result in termination.

By signing below, you acknowledge that you understand the Honesty Standards and my expectations.

February 6, 2018, "grip of a handgun" situation

According to Grievant, on February 6, 2018, he was working the 7:00 a.m. to 7:00 p.m. day shift. He was conducting a surveillance by himself at a known drug house. He was watching the house from his police car. There was suspicious activity with people entering the house for a very short period of time. A car with two people in it left the house. Grievant followed. He did not have his emergency lights on. It was important to catch up with the car. Grievant got behind the car. He decided to pull the car over and turned his emergency lights on. The subject car stopped. There were a male driver and a female passenger in the car. The driver did not have a driver's license. Grievant had the driver exit the car. Grievant asked the driver if there was anything illegal in the car. The driver looked at the passenger, who was still in the car. Grievant had contacted the

Dispatcher. In response to this, PSO [D] arrived on the scene before the driver got out of the car.

According to Grievant, Grievant asked the driver if Grievant could search the driver's person. After consent was given, Grievant searched the driver and found nothing. The driver then gave consent to search the car. As of that time, the female passenger was still in the car. Grievant walked to the front passenger side of the car. He asked the passenger to exit the car. Grievant got consent from the passenger to search her person. Grievant asked the passenger to leave her belongings in the car. The passenger left her purse in the car. Grievant then began a search of the car. He searched the purse. There was contraband in the purse. There was a toy BB gun with a blue grip. There were also plastic baggies. According to Grievant, he had consent to search the purse. According to Grievant, his search of the purse was not based on probable cause and did not have to be based on probable cause. He located two syringes in the purse. This was consistent with drug paraphenia. Grievant used a Field Test Kit to determine that at least one of the syringes contained methamphetamine. Grievant placed the passenger under arrest. She was taken to jail. The evidence was logged. Subsequently that day, Grievant prepared his Report. He typed the Report in Word and then pasted it in the Department's ILEADS report program. That is what he was trained to do.

Grievant reported the following in his Report:

> I made contact with the passenger, B_____ and asked her to exit the vehicle and talk to me. B_____ was holding her purse in her lap at this time, I observed a grip of a hand gun in the purse. I asked her to leave her belongings in the vehicle and exit and she complied.

The Report was then sent to SGT [E], Grievant's Supervisor. At the car stop and search, Grievant had been wearing a body cam which was turned on at the time. Grievant did not review the video before writing his Report. Grievant then went home.

PSO [D]

PSO [D] was at the February 6, 2018, traffic stop. He was in uniform. He was called to assist Grievant with the traffic stop. Grievant had been watching a drug house. There were cars coming and going. PSO [D] was the back-up PSO to Grievant. A car with two people in it left the house. There was a female passenger in the car. Initially PSO [D] was on the passenger side. He was looking for weapons. If a PSO sees a weapon, the PSO alerts the other PSO. In such a situation, PSO [D] might pull his own gun. PSO [D] did not see the grip of a handgun. He was by the passenger side of the car for a couple of minutes. He was looking for a weapon at that time. Grievant never said there was a gun or a BB gun. PSO [D] was standing back with the two occupants. PSO [D] did not recall whether he saw a purse. He thinks that he "probably" did.

February 7, 2018

According to Grievant, during the morning of February 7, 2019, SGT [E] approved Grievant's report. SGT [E] made specific reference to the traffic stop. He asked Grievant, "Can you do this?" SGT [E] asked Grievant a "hypothetical" question. The question was, "If you had seen the gun . . . would there have been probable cause for the search?" According to Grievant, this question was shouted from one room to another. Grievant viewed SGT [E] as a mentor. SGT [E] never went over the "gun" report line by line with Grievant. According to Grievant, Grievant did not intentionally falsify anything. Later there was a discussion concerning the video. Grievant was asked where in the video is it that he first saw the gun. On February 7, 2018, the case was presented to the Kalamazoo County Prosecutor's Office.

Assistant Chief [C]

Assistant Chief [C] investigated the "a grip of a handgun in the purse" case. He was reviewing whether it was a miscommunication or a "lie" in Grievant's Report. It was the Assistant Chief's function to take information presented to him and compare it to whether there was a violation of policy. He reviewed the video. He concluded that there was no way possible that Grievant could have seen the handgun. What was on the video was "not coinciding with what is within the Report." PSO [D] was the other PSO on the scene. Grievant never told PSO [D] that Grievant had seen a gun. The Assistant Chief concluded that Grievant lied when he wrote "a grip of a handgun in the purse" in his Report. Grievant allowed the Report to go forward without being corrected. According to the Assistant Chief, there is a "level of integrity required." The female passenger was arrested for possession of methamphetamine. She was put in jail. Eventually there would have been a preliminary hearing. Given the issue with the video, the Assistant Chief believed it was best to not go down that road. The Assistant Chief believed that Grievant had violated the Honesty Standard. According to the Assistant Chief, consent comes from the possessor and probable cause comes from the belief of the searcher. Grievant told the Assistant Chief that the Grievant had consent from the passenger to search. Minor distinctions in facts can make a difference as to whether there is consent. The bodycam sees what the chest is seeing. The Assistant Chief reported his findings to the Chief with all the documenta-

tion and the videos. The Assistant Chief made no recommendation to the Chief.

February 19, 2018, Office of Professional Standards made aware

On February 19, 2018, the Office of Professional Standards was made aware of the February 6, 2018, traffic stop situation.

February 27, 2018, Grievant placed on Administrative Leave with pay

On February 27, 2018, Grievant was placed on Administrative Leave with pay by order of the Chief.

March 1, 2018

On March 1, 2018, there were Interview Warnings to Grievant. The Office of Professional Standards interviewed Grievant. The KPSOA attorney was present. The Office of Professional Standards interviewed PSO [D]. A KPSOA representative was present. Assistant Chief [C] interviewed PSO [D].

March 26, 2018, Pre-Determination Hearing

On March 26, 2018 Chief [B] conducted a Pre-Determination hearing to give Grievant the opportunity to respond to the OPS findings in the "I observed a grip of a handgun in the purse" investigation. Prior to the hearing, the Chief gave notice to Grievant and the KPSOA. Grievant was represented at the hearing by the KPSOA President and the KPSOA attorney. The Chief read a description of the facts which led to the OPS findings. At the conclusion of the Pre-Determination hearing, the Chief adjourned the hearing until the following morning so she could review her notes and make her determination.

March 27, 2018, Determination Hearing

On March 27, 2018, at approximately 9:00 a.m., the Chief reconvened the hearing by offering to give Grievant "the benefit of the doubt," provided he met several "performance requirements and other conditions set forth in a last-chance agreement . . . ." Those requirements included:

- A 14-day, 168 hour suspension, commencing Tuesday, March 27 through Sunday, April 22;

- Training on search and seizure and report writing, as determined by [F] and Executive [G], or their designee;

- Prior to each written report, you must review your body-cam footage and additionally, you will not cut and paste information into your reports for a period of at least one year subject to the extension and the sole discretion of KDPS;

-You will not be eligible to apply for a specialty unit for three (3) years, commencing when the last-change agreement referenced is signed by all parties, subject to a discretion, at the sole discretion of KDPS;

This last-chance agreement for five years commences when signed by all parties, including you and the union, which reflects these terms and condition, and prohibits you from engaging in similar acts or policy violations, including without limitation, submitting inaccurate reports, or violating search and seizure policy or law. The last-change agreement is non-precedent setting and is not subject to grievance or arbitration. However, you may grieve any subsequent termination by the City to determine solely if you violated the terms of the last-chance agreement.

The proposed five-year LCA was apparently reduced to three years after the parties discussed the terms.

According to Grievant, Grievant believed that the proposed LCA would have him waiving too many rights to due process. Grievant declined the LCA.

March 27, 2018, Final Determination Hearing

On March 27, 2018, there was a Final Determination Hearing. Grievant's employment was terminated at this hearing. On July 16, 2018, there was a Step III Appeals Board proceeding. On August 3, 2018, the KPSOA submitted its Demand for Arbitration.

Chief [B]

The Chief has overall supervision and leadership of the Department. There are 253 sworn officers and 35 civilian staff. Chief [B] was the sole decision maker for the March 27, 2018, termination of Grievant. She did not get involved in the investigation. She reviewed the investigation documents, including the videos. She did not ask staff whether discipline should be imposed. She gave Grievant the opportunity to see the investigation material and add to it. A Pre-Determination Hearing Notice was given to Grievant and KPSOA. She held a Pre-Determination Hearing concerning the "grip of a handgun" situation on March 26, 2018. There was subsequently a Determination Hearing, a Final Determination Hearing, and a Personnel Memorandum.

The Chief determined that discipline was warranted. She determined that Grievant had "lied." She considered the seriousness of the violation and someone's liberty had been taken away because of what was written in the police report. She took the prior four-day suspension into account and the fact that there might be future *Gigglio* issues. She never believed it was a mistake or error. According to the Chief, a discovery of a

weapon should be immediately communicated to fellow PSOs. Gun cases are significant cases. There was a short period of time between the event and the writing of the Report. There is "no doubt in the [Chief's] mind" that the termination was appropriate. Even though the Chief believed that Grievant had "lied" concerning the "grip of a handgun" entry, she believed he could have been rehabilitated. This would involve a systematic manner. The question was "is he going to continue to lie?" She crafted a LCA proposal. This proposal was submitted to Grievant and KPSOA. Grievant had violated the Honesty Standards. The Honesty Standards give the Chief discretion. She had hired Grievant. She testified, "But when you scratch the surface, it is not there." There was discussion with KPSOA concerning the Chief's LCA proposal, including the temporal length of the proposed agreement. Grievant declined the LCA proposal. On March 27, 2018, Grievant was terminated.

Later in 2018 prior 2016 and 2017 allegations arise

After the March 2018 termination, the prior September 18, 2016, "at me" and June 25, 2017, "Mr. [H]_____ house" allegations arose. Grievant did not agree to be interviewed concerning these pre-termination allegations that arose post-termination. By this time, he had ongoing civil litigation with the Employer concerning a Federal whistleblower case.

September 18, 2016, "driver then accelerated at me at a high rate of speed" situation

According to Grievant, on September 18, 2016, a PSO waived Grievant down in a situation that escalated. Grievant was eventually standing on the driver's side of the car. The driver opened the door. The driver was reaching underneath the seat. The driver turned off the car lights. The car got way. Grievant was hit by the car. Grievant received medical treatment from EMS. According to Grievant, Grievant did a sprawl. This is where Grievant removed traction from the ground so that he would not become hyperventilated. Grievant did what he could to remove his feet from the ground. According to Grievant, this was a simple case. His Report was done within two hours and twenty minutes after the event.

Grievant reported in his report the following information:

> Both did not comply. PSO Boglitsch ordered the driver to turn off the vehicle. The driver then accelerated at me at a high rate of speed. I was struck by the driver's side of the vehicle. The white mustang then crashed into a parked car in the parking lot and stalled momentarily.

September 20, 2016

On September 20, 2016, Detective [H] presented the "at me" case to the Prosecutor for review and handling. There was a Charging Request. There was an allegation of felonious assault with a motor vehicle.

June 25, 2017, [H]—house situation

According to Grievant, Grievant was on patrol in Zone Two on June 25, 2017. J_____ was a Zone priority. [H]_____ was a parole absconder. Grievant was in his patrol car. He observed [H]_____. Grievant attempted to catch [H]_____. Grievant spun around his marked police car. Grievant returned to [H]_____'s house. According to Grievant, [H]_____ was walking up the front steps of the house. Grievant told [H]_____ to stop. [H]_____ did not stop. [H]_____ entered the house and locked the door behind him. Grievant approached the house. He asked a female in the house to let him in. She refused to unlock the door. According to Grievant, it was pretty clear that [H]_____ had walked into the house. Grievant called for additional units. Other units arrived. By this time, the female was on the phone. Apparently she was talking with [H]_____. There were telephone conversations between Grievant and [H]_____.
[H]_____ stated, "I ain't there no more."

Grievant reported that:

> On 25 June 2017, at approximately 14:54 hours, while on patrol I observed [H]_____, a known wanted parole absconder, reaching into the trunk of a silver Dodge Charger with two black stripes in front of _____ Ave. I attempted to arrest [H]_____. [H]_____ quickly walked into _____Ave. and locked the door before I could apprehend him.
>
> I identified [H]_____ from his ILEADS photograph. [H]_____ was reaching into the trunk of a silver Dodge Charger with black racing stripes. As I pulled up on [H]_____ in my fully marked KDPS patrol vehicle and exited dressed in my KDPS class A uniform [H]_____ quickly walked into _____ Ave. I ordered [H]_____ to stop and I advised

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him he had warrants. [H]_____ locked the front door.

Eventually [H]_____ was found and arrested. Detective [I] presented this case to the Kalamazoo County Prosecutor's Office. Detective [I] requested the charge of resisting and obstructing a police officer.

On September 26, 2017, there was a Preliminary Examination before District Judge Richard A. Santoni, District Judge. Following arguments by the Assistant Prosecuting Attorney and defense attorney Garrity, the Court dismissed the charge of resisting and obstructing an officer. The Court stated:

> THE COURT: Okay, I kind of expected to see Mr. [H]_____ in the video, because based on the officers testimony, he would have been in the video when he see — passed by. And he isn't in the video and I . . . can't explain that.
>
> An obviously, from what I have been told here, Mr. [H]_____ was not located in the home. There's a lot of speculation as to climbing out a possible window. But I don't know anything about the setup of the house from the evidence. I've heard some argument, but from the evidence, I don't know anything.
>
> I can't put Mr. [H]_____ in the home. And I also have a lot of difficulty believing testimony when part of it is obviously wrong. Which is, that he was out by the vehicle on the street. If that's wrong, why should I believe the rest? So, I don't have enough evidence. I am finding a crime was not committed. Case is dismissed. Tr. 17-18.

On October 17, 2018, the June 25, 2017, house situation was brought to the attention of the Employer by defense attorney Garrity.

Assistant Chief [C]

According to the Assistant Chief, subsequently the September 18, 2016, "at me" and 2017 "house" allegations surfaced after the termination of Grievant. The Assistant Chief had no prior knowledge of these allegations. The decision was made to investigate these two allegations as if Grievant were still employed by the Employer.

According to the Assistant Chief, in the September 18, 2016, "at me" situation, there was a traffic stop. The car accelerated and took off. The matter went to the Prosecuting Attorney for alleged felonious assault by motor vehicle. Grievant was the primary PSO. Grievant's Report said, "at me." The Assistant Chief viewed the video. In his opinion, the "at me" statement in Grievant's Report was "a lie." The video was not consistent with the Report. The Assistant Prosecuting Attorney had authorized a charge of felonious assault with a motor vehicle. The charge was later dropped by a different Assistant Prosecutor after a review of the video. According to the Assistant Chief, the video did not show intent to hurt Grievant.

Grievant did not accept the offer for a Pre-Determination Hearing. The KPSOA appeared but Grievant did not. The Assistant Chief made no recommendation to the Chief.

According to the Assistant Chief, the June 25, 2017, [H]_____ "house situation" came to the Assistant Chief's attention in 2018. The statements in Grievant's Report were not consistent with the body cam video. The Report was written to substantiate a predetermined belief that there was resisting and obstructing a police officer.

[H]_____ had been a Zone priority for a couple weeks. There was in car MVT video and body cam video. The video does not have a good view of the car trunk. There was no video of a "lawful order" to stop on video. But the video has gaps.

Resisting and obstructing a police officer is a two-year felony. Attempted resisting and obstructing a police officer is a misdemeanor.

[H]_____'s denials on the audio tape are not in Grievant's Report. These would have been exculpatory statements. According to the Assistant Chief, this is very significant.

Kalamazoo County Prosecuting Attorney [J]

Kalamazoo County Prosecuting Attorney [J] testified concerning the impact of the three alleged situations in his viewpoint. According to the Prosecuting Attorney, *Brady v Maryland*, 373 US 83 (1963), requires the turnover of exculpatory information to the defense. *Giglio v United States*, 405 US 150 (1972), requires the turnover of information that impacts on the credibility of witnesses to the defense. The Prosecuting Attorney Office takes these requirements seriously. In addition, the attorneys in his office have ethical requirements.

Brady/Gigglio notices are rare. Only four have been issued under the Prosecuting Attorney. It is the Prosecutor's responsibility to do the *Brady/Gigglio* letter. The Prosecutor's Office does not have a *Brady* list. The Prosecutor's decision to issue a *Brady/Gigglio* letter is independent of the Police Department decision. The Prosecutor relies on the Police Department to give him the *Brady/Gigglio* information.

Having an honest police officer is very important. The Assistant Prosecutors cannot review all the video evidence.

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The "grip of a handgun in the purse" case was brought to his office's attention first. According to the Prosecuting Attorney, if the firearm were not visible, there was no reason to search inside the purse. Then his office looked at all three situations together. It was apparent that there was a problem.

In the September 18, 2016, vehicle "at me" case, a felony charge was authorized because of the "at me" language. The case was bound over and scheduled for trial. There was increased scrutiny of how the case was approached. The Prosecuting Attorney viewed the "at me" video. Grievant ran at the car and tried to jump on it.

Grievant's credibility was tarnished by the *Brady/Gigglio* letter. It would be impossible to sustain a conviction.

Chief [B]

According to the Chief, after the termination, two additional prior alleged falsehoods surfaced. These were the September 18, 2016, "accelerated at me" and June 25, 2017, [H]_____ house situations. The Chief asked for an Internal Affairs investigation of these two situations. She did not participate in these investigations. Grievant was no longer an employee at that time. Notice was given to Grievant. The Employer provided the same due process and KPSOA rights to Grievant as to incumbent employees. Grievant and the KPSOA were told this. The investigation continued. When it was completed, the Chief received the investigation files. There was a Pre-Determination Hearing on August 13, 2019. Grievant did not attend. The KPSOA President attended. The Chief determined that these two situations were dischargeable events. A consolidated Determination was issued on August 15, 2019, in these two cases. The Chief testified "I cannot have an Officer who lies." "An Officer who lies is no good to me."

CONTENTIONS OF THE PARTIES

a. For the Employer

Grievant was a PSO, duly sworn to protect the public, to enforce the law and to be honest and truthful. Grievant violated his oath and Employer policies, destroyed his credibility and integrity, and undermined public trust when he lied in official police reports, in official investigations, and in his testimony.

In the B_____ situation, Grievant falsely reported seeing the grip of a handgun in a purse held by B_____. The video evidence, however, established conclusively and irrefutably there was no grip or handgun visible. B_____ was arrested, deprived of her freedom, only to have the charges against her dropped because Grievant lied.

After a thorough examination by the Office of Professional Standards and determinations by the investigators as well as the Chief that Grievant had lied, he was terminated from employment when he refused to accept an offer by the Chief to allow him to remain employed if he met certain well-reasoned and relevant performance and conduct-related requirements.

After Grievant's termination, a local defense attorney reported to the Employer that she had evidence that established Grievant lied in two other cases (H_____ and [H]) which the defense attorney personally defended. The Office of Professional Standards completed another thorough and professional investigation into the two new cases and determined Grievant had lied in both.

In H_____, Grievant falsely reported the defendant drove his vehicle "at" the Grievant and then used that false report to request a serious charge for felonious assault with a motor vehicle. Video evidence revealed the lie. Grievant ran toward and jumped onto the side of the vehicle. The driver did not drive "at" Grievant. This lie resulted in the dismissal of the felony charge and plea bargaining the other charge against the driver.

In [H]_____, Grievant falsely reported he saw [H]_____ leaning in the trunk of a vehicle, gave an order to [H]_____ to "stop," which [H]_____ ignored. Then Grievant used that false claim to support a resisting and obstructing charge against [H]_____. Grievant also lied in his police report to say [H]_____ admitted to being in the house (he was never located at the home) at the time of the incident when a recording on Grievant's own body camera established that [H]_____ had actually repeatedly denied that he was in the house. At the Preliminary Examination, the District Court Judge dismissed the resisting and obstructing charge against [H]_____, calling into question Grievant's credibility and truthfulness.

As a result of Grievant's lies and as required by law, the Kalamazoo County Prosecuting Attorney conducted an independent review of the facts and determined the Prosecuting Attorney must issue a "Brady/Giglio" notice to all criminal defense counsel in cases which Grievant had been involved and in future cases in which he may become involved. The purpose of a "Brady/Giglio" notice is to warn defense counsel that Grievant had lied during official police investigations or in testimony, which

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defense counsel could then present to juries in cases in which Grievant testified or was involved.

Chief [B]determined Grievant's lies warranted discharge.

The Employer asks that I deny the Grievance.

b. For KPSOA

Officer [A] was a PSO. As a PSO, he was a member of the KPSOA, the labor union which represents the bargaining unit of PSOs within the Department. He was terminated without the appropriate cause on March 27, 2018, in violation of the CBA.

KPSOA filed a grievance on behalf of Grievant challenging the termination. It was denied by the Employer at each step of the grievance procedure. KPSOA has subsequently submitted the grievance to arbitration. Mere weeks before arbitration, however, the Employer began investigation into two additional separate incidents, which had occurred in 2016 and 2017. These subsequently investigated incidents are stale. They do not involve information which was previously unavailable or undiscoverable. At the very least, the Employer would have been tacitly aware of the incidents at the time of their occurrences. No action was pursued against Grievant at those times. Therefore, these charges cannot relate back to the original termination. Regardless of whether the Arbitrator agrees the incidents fail to relate back, there was no wrongdoing by Grievant in either situation. No just cause exists for termination regarding the subsequent charges.

Essentially, the matter before the Arbitrator consists of two separate cases: the original charges stemming from the B_____ incident in February 2018, and the subsequent charges stemming from the H_____ (2016) and [H]_____ (2017) incidents.

The Arbitrator must determine whether the termination of Grievant in either instance was unjustified.

Grievant made some mistakes in his reports and in the course of performing his duties. He has admitted those mistakes where they exist and has taken responsibility for them. Grievant acknowledged his shortcomings and expressed his desire to undergo whatever training may be necessary to improve his skills and knowledge in order to become the officer that he knows he can be.

The Employer contends that these were more than mistakes. Following Grievant's initial termination, the Employer sought information from a source outside the Department (i.e., criminal defense attorney Garrity) who directed the Employer to matters involving Grievant which had long since passed. The two cases which the Employer dug up regarding H_____ and [H]_____ are stale. The cases themselves were not new to the Department; both were originated within the Department and handled by the Prosecutor's Office to disposition. Neither resulted in any claims of impropriety by Grievant upon their prior adjudication. Instead, the Employer went looking for this information in an attempt to bolster its case against Grievant.

Despite the Employer's best efforts, the evidence illustrates Grievant did not intentionally falsify any of his reports. When the reports in each of the incidents are viewed in the context of all the facts and circumstances presented in this case, it is clear that neither Grievant's mistakes nor the principles of just cause required termination.

KPSOA requests that I grant the Grievance.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered evenhandedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that Grievant was terminated for just cause.

March 2018 Termination

CBA Art. IV.1 states "In the event an employee . . . shall receive a written warning, be suspended from work for disciplinary reasons, or is discharged from his or her employment . . . , and he or she believes that the discipline was unjustified, such discipline shall constitute a case arising under the Grievance Procedure. . . . "

The Rules of Conduct include the following:

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• R-15-CODE OF CONDUCT, Chapter VI – Protection of Prisoners, Their Rights, and Their Property, Section 6.1, states:

No officer shall arrest any person or search any premises or person except with a warrant of arrest, a search warrant, or when such arrest or search is authorized without a warrant under the laws of the State of Michigan, the United States or the ordinances of the City of Kalamazoo.

• R-15-CODE OF CONDUCT, Chapter VI – Section 6.3:

No officer shall falsely arrest, imprison, or direct any malicious prosecution against any person.

• General Order, Index Number G-48, SEARCH WARRANT PLANNING, SEARCH WARRANT SERVICE, AND WARRANTLESS SEARCHES, Section H:

KDPS personal shall ensure that warrantless searches are only conducted when valid exceptions to the search warrant rule are present and can be articulated in the report.

• R-15-CODE OF CONDUCT, Chapter VIII – Section 8.2:

Officers shall be truthful at all times, whether under oath or not, when conducting any official police business.

• R-15-CODE OF CONDUCT, Chapter, VIII - Section 8.5:

No officer shall knowingly falsify any report, document, or record or cause to be entered any inaccurate, false, or improper information on records, documents, or reports of the Department or of any court or alter any record, document, or report except by a supplemental record, document, or report. No officer shall remove or destroy or cause the removal of destruction of any report, document or record without proper authorization.

• General Order, Index Number G-59, OPERATION OF DEPARTMENT VEHICLES AND USE OF EMERGENCY EQUIPMENT, Section III, A, 1., which states:

On duty KDPS members shall strictly comply with the requirements of the traffic laws of the City of Kalamazoo and the State of Michigan and shall not be exempt, other than specified in Section 36-24 of the City of Kalamazoo Traffic Code and corresponding sections of the Michigan Vehicle Code. Emphasis added.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

KPSOA argues that I should apply the clear and convincing standard. The Employer has the burden of moving forward and, at a minimum, establishing a *prima facie* case. The quantum of proof may vary according to the charges involved. In general, arbitrators apply the preponderance of evidence standard in determining whether the employer has established the necessary just cause. Many arbitrators require a higher degree of proof where the alleged conduct is of a type recognized by criminal law or carries a similar stigma that affects the reputation of the accused and results in the discharge of the grievant. Elkouri & Elkouri, p. 15-26, n 124, citing *Professional Med Team*, 111 LA 457 (Daniel, 1998) (clear and convincing evidence for discharge cases in general), and *JR Simplot Co*, 103 LA 865 (Tilbury, 1994) (standard of proof for discharge for acts of industrial sabotage should be clear and convincing evidence, which is something more than preponderance and means that the trier of fact must find more than a slight tilt on the scale of justice). The clear and convincing standard has been applied in cases where the offense of which the employee is accused is "seriously criminal, especially opprobrious, or shameful so as to stigmatize the employee and likely to prevent the employee from obtaining other employment." Elkouri & Elkouri, *How Arbitration Works*, 2010 Supplement (2010), at 348, n 26, citing *United Parcel Service*, 121 LA 207 (Wolff, 2005) (employer must prove by clear and convincing evidence that it had just cause to discharge employee for dishonesty, because dishonest conduct, if proven, would mark employee's discharge for conduct that was opprobrious or shameful and make it difficult for employee to find other employment). KPSOA requests that I require the Employer to carry the burden of demonstrating by clear and convincing evidence the reasons that would justify its termination decision, as opposed to some lesser form of discipline for Grievant's performance issues.

I will apply the preponderance of evidence standard in determining whether the Employer has established just cause. As indicated by Professor Abrams, "**the employer must convince the arbitrator what occurred**." Abrams, p. 208. Emphasis added.

Grievant knew of the Honesty Standard

The rules need not be in writing. In the absence of posted rules, the Employer has the burden of proving that Grievant knew or should have known of the rule before it can be enforced. Elkouri & Elkouri, pp. 13-164 to 13-165.

Grievant was aware of the Employer's Honesty Standard. Tr. 494. *First Transit*, 128 LA 586 (Goldberg, 2010) (denying grievance when grievant received adequate notice of the rule prohibiting cell phone use); *Thatcher & Sons, Inc.*, 76 LA

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1278 (Nutt, 1981) (grievant was repeatedly warned and failed to improve); and *Potash Co. of America*, 40 LA 582 (Abernethy, 1963) (sustaining discharge when employee's misconduct continued in spite of reprimands and warnings).

Warnings of improper conduct, even if there were no penalty, prior to the discipline at issue, are relevant to deciding whether the present discipline was for just cause. Where an employee continues a rule violation after being previously warned, this stands against the employee. Elkouri & Elkouri, pp. 15-79 to 15-81.

The Honesty Standard/Expectation was signed by Grievant on January 17, 2018. The Honesty Standard/Expectation states:

> Law enforcement professionals . . . are held to a higher standard than the citizens they have sworn to protect and serve. In times when law enforcement legitimacy is being criticized and officers find themselves under societal microscope, **it is important to ensure that law enforcement professionals adhere to a strict code of truthfulness.** This applies to all employees of the Kalamazoo Department of Public Safety.
>
> The integrity of KDPS depends upon the personal integrity of each employee. KDPS desires honest coworkers and we commit to recruit, hire, train, and retain only those who meet or exceed our high standards of conduct as stated in KDPS R-15. The public has the same expectation. **Therefore, the act of being less than candid and failing to be truthful to any supervisor, on any official document, in any court proceeding, or during the course any official interaction, may result in termination.**
>
> By signing below, you acknowledge that you understand the Honesty Standards and my expectations. Emphasis added.

Grievant knew or could reasonably be expected to know that providing false information on required documentation could result in discharge. Nolan, *Labor and Employment Arbitration* (1998), p. 319. Grievant was on notice of the need to follow Employer rules or face disciplinary action.

The policy was a reasonable work rule

Management has the right to establish reasonable workplace rules not inconsistent with the CBA. Elkouri & Elkouri, pp. 13-144 to 13-145. The Employer's Honesty Standard is reasonable and work related.

There was a fair and objective investigation

"Industrial due process . . . requires management to conduct a reasonable inquiry or investigation before assessing punishment." *Id*. at 15-49.

It is a fundamental principle of employment law that the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id*. at 15-47 to 15-50. *Federated Dep't Stores v. Food & Commercial Workers Local 1442*, 901 F.2d 1494 (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co*., 613 F.2d 716, 718 (8th Cir.), cert. denied, 446 U.S. 988 (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness); *Skelly v. State Personnel Bd*, 15 Cal.3d 194, 539 P.2d 774 (1975) (remedy for violation of employee's due process rights was back pay from date of discipline until date of decision after a fair hearing); *State of Florida*, 134 LA 1181 (Abrams, 2015) (under the just cause standard the employer must conduct a thorough investigation before it disciplines or discharges an employee for alleged misconduct).

Abrams, p. 211, states:

> . . . [T]he concept of "due process" is inherent in the just cause provision.
>
> . . . [a]arbitrators prefer seeing evidence that management . . . offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

Arbitrators "often overturn otherwise valid discharges where the employer has denied the employee those [due process] protections." Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.

Arbitrator Goldstein stated at *State of Illinois*, 136 LA 122, 129-130 (2015), that:

> [A]n employer's obligation to a predisciplinary investigation is determined by context. . . . [T]he level of discipline involved is an important consideration . . . in determining whether the underlying investigation by the employer was fair and reasonable.

In the case before me, Grievant was given a meaningful opportunity to tell his side of the story before discipline was imposed. There was an adequate check against the possibility of an incorrect decision.

There is a preponderance of proof that there was a February 2018 violation

One of my duties is to decide how credible each witness was. It is up to me to decide if a witness's

testimony was believable, and how much weight I think it deserves.

I started my credibility analysis with the viewpoint that all witnesses are equal and deserving of equal deference concerning their recollections. At the onset, neither Employer nor KPSOA witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility . . . . [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible . . . ." Elkouri & Elkouri, p. 8-97.

Here are some things I consider in evaluating witness testimony. (A) Was the witness able to clearly see or hear the events in question? Sometimes even an honest witness may not have been able to see or hear what was happening and may have an incorrect recollection. (B) How good the witness's memory seemed to be? Did the witness seem able to accurately remember what happened? (C) Was there anything else that may have interfered with the witness's ability to perceive or remember the events? (D) How did the witness act while testifying? Did the witness appear honest? Or did the witness appear to be mistaken? (E) Did the witness have any relationship with any party, or anything to gain or lose from the case that might influence the witness's testimony? Did the witness have any bias, prejudice, or reason for testifying that might cause the witness to testify incorrectly or to slant the testimony in favor of one side or the other? (F) Did the witness testify inconsistently while on the witness stand, or did the witness say or do something or fail to say or do something at any other time that is inconsistent with what the witness said while testifying? If I believe the witness was inconsistent, I ask myself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. I consider whether the inconsistency was about something important, or about some unimportant detail. I ask myself if it seemed like an innocent mistake or if it seemed deliberate. (G) How believable was the witness's testimony in light of the other evidence? Was the witness's testimony supported or contradicted by other evidence that I found believable? If I believe a witness's testimony was contradicted by other evidence, I realize people sometimes forget things, and even two honest people who witness the same event may not describe it exactly the same way.

These are some of the things I consider in deciding how believable each witness was. I consider other things that I think shed light on the witness's believability. I use my common sense and my everyday experience in dealing with other people. Then I decide what testimony I believe and how much weight I think it deserves. See generally WD Mi Civ JI 2.07. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98.

I have considered all the circumstances of all the witnesses when assessing which testimony is the most credible. I have considered the totality of the circumstances.

"[T]he employee has the burden of proving the validity of the defense or excuse that the employee asserts in justification for his . . . conduct." *Id.* at 15-25 fn 118.

SGT [E] not being called as a witness

According to the KPSOA, SGT [E] was not called to testify by the Employer, though still employed by the Employer. No excuse was proffered by the Employer to suggest that SGT [E] was not available for the arbitration hearing. SGT [E] was one of the witnesses relied on by the Employer concerning the B_____ incident. He initiated review of that matter, submitted memoranda, and participated in interviews during the investigation of the B_____ incident. According to the KPSOA, where SGT [E]'s statements conflict with Grievant's testimony, I should draw an adverse inference against the Employer regarding SGT [E]'s hearsay statements in his memoranda and interviews.

The failure to call as a witness a person who is available and should be able to provide important testimony may permit an arbitrator to form an inference that the testimony would have been adverse to the party that did not call such person as a witness. *Id.* at 8-51 to 8-52.

It has been indicated that:

> If the missing witness appears to the arbitrator to have played a critical role in the events raised in the grievance, the neutral will draw a negative inference that the missing witness would not have testified in support of the claim. Abrams, p. 147.

I agree with the KPSOA that where Grievant's testimony is contradictory to the hearsay information from SGT [E] I should give deference to Grievant's testimony and that SGT [E]'s hearsay statements should be afforded less weight than Grievant's where they conflict with one another. This includes the hypothetical nature of some questioning from SGT [E] of Grievant. This is not a criticism of SGT [E]. It is the result of his not being called as a witness at the arbitration hearing. SGT [E]'s hearsay statements should be afforded less weight than Grievant's where they conflict with one another.

Consent and probable cause in "grip of a handgun in the purse" situation

There is the issue of whether the consent of the driver to search the car gave Grievant consent to

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search the passenger's purse on February 6, 2018, even if there was no probable cause to do so. The Employer argues that one of the motivating reasons for Grievant's "I observed a grip of a handgun" entry was to create probable cause to search the purse. The Employer argues that the driver could not give consent to search the passenger's purse and hence probable cause would have been needed. The KPSOA argues that consent from the driver was good enough and there was no need for probable cause.

The Michigan Supreme Court ruled in a peremptory order in *People v. LaBelle*, 478 Mich. 891 (2007), that consent from the driver was enough. The Michigan Court of Appeals followed *LaBelle* in *People v. Mead*, unpublished per curiam opinion of the Court of Appeals, issued September 13, 2016 (Docket No. 327881) (*Mead I*). The Michigan Supreme Court vacated and remanded *Mead I* in *People v. Mead*, 500 Mich. 967 (April 14, 2017) (*Mead II*). On remand, the Court of Appeals continued to follow *LaBelle*. *People v. Mead (On Remand)*, 320 Mich. App. 613 (August 8, 2017) (*Mead III*). In response to this, the Supreme Court unanimously overruled *LaBelle*, and reversed *Mead III*. *People v. Mead*, 503 Mich 206 (MSC 156376) (April 22, 2019) (*Mead IV*). This background means from at least 2017 to April 22, 2019, it was not clear in Michigan whether driver consent for a car search included effective consent to search a passenger's purse. As of April 22, 2019, it was clear that driver consent was not enough. In light of the murkiness of the law, a reasonable police officer in February 2018 would have preferred to have had a legitimate reason to search the passenger's purse other than or in addition to the driver's consent. This legitimate reason would have been either probable cause or passenger consent.

The Prosecuting Attorney testified that:

> Q Based upon your years of experience, your knowledge of prosecuting cases and your investigation that you completed within your office, did the assistant prosecuting attorney who issued that case rely upon that ["I observed a grip of a handgun in the purse"] statement that was in the report to determine whether or not charges should be issued in that case?
>
> A Absolutely. **If . . . a firearm wasn't visible as was reported or as was described in the . . . police report, then . . . you don't have a reason to be going into the purse.** It was . . . relied on in terms of what evidence we had and the reasons for the admissibility of evidence in that case.
>
> Q [L]et me assume for a minute a hypothetical. Even if valid consent had been given, but a statement that, I saw the grip of a handgun in a purse was included in a police report, if that was a lie, would that impact your ability to move forward with charges, even assuming consent had been given?
>
> A Absolutely. It . . . would impact us moving forward in that case, and it would impact us moving forward in all other cases where . . . that officer was going to be a witness. The credibility of the testimony of officers in these cases is instrumental in our ability to move forward and our ability to prove a case beyond a reasonable doubt, and our ability to obtain justice for the victims of crimes. Emphasis added. Tr. 162-163.

The proposed LCA

At the March 27, 2019, Determination Hearing, the Chief offered a no precedent LCA to Grievant.

> Last-chance settlements occur when a company believes it has adequate reason to discharge an individual and the union is willing to sacrifice contractual entitlements in order to preserve the job. *Butler Mfg Co.*, 93 LA 441, 445 (Dworkin, 1989). Accord *Cleveland Electric Illuminating Co.*, 130 LA 101, 107-108 (Cohen, 2011).
>
> Arbitrator Roberts stated in *Porcelain Metals Corp.*, 73 LA 1133, 1138 (Roberts, 1979):
>
> [LCA]s are supported by consideration and may, therefore, be taken as a modification of the [CBA], in their application to special employees. The Company gives valuable consideration for such agreements by giving up a contended right to discharge an employee at the time reinstatement is made pursuant to such an agreement. Being supported by valid consideration, such agreements are a valid contractual novation to the [CBA].
>
> [LCA]s are supported as a matter of public policy. They serve a useful social function of salvaging the employment of employees whose jobs would otherwise be lost. Many times, the impact of a "Last Chance" Agreement will have
>
> sufficient shock value to rehabilitate an errant employee. If arbitrators did not enforce [LCA]s, employers would cease to enter them, and the beneficial, social purpose which they serve would be lost to society generally - and to members of the bargaining unit specifically.
>
> It has been indicated that:
>
> It is not uncommon for management to agree with a union request that it not discharge an employee for certain misconduct, but to give him or her one last chance. . . . A [LCA] generally provides that if the employee commits another offense within a certain period of time, he or she shall be subject to discharge. . . . Arbitrators should and do enforce [LCA]s as long as the facts support the claim that the

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employee engaged in further misconduct covered by the agreement. These agreements offer to management and the employee an opportunity to salvage an employee and demonstrate a positive benefit the union brings to the work force. . . . . Abrams, p 220. Elkouri & Elkouri, pp. 15-52 to 57.

Under the totality of the circumstances, the offering of a potentially mutually agreeable LCA was an appropriate option for the Chief. The Chief had the right to propose the LCA. Grievant had the right to decline the LCA. The offering of a no precedent LCA by the Employer is not evidence of lack of just cause. *Id.* at 8-43 and 9-32 to 9-33.

Affect of falsification of records

It has been stated that:

The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." Abrams, p. 202.

"As part of the basic employment bargain every worker makes, an employee must provide his employer with a reasonable amount and quality of work in exchange for the compensation and benefits he receives." *Carmeuse Lime & Stone*, 135 LA 1668, 1670 (Abrams, 2016).

Furthermore,

An employer is entitled to honesty from its employees. If it can't believe its own workers, the employer can't trust then with the job responsibilities and equipment necessary to do their work. An employer's inability to trust its workers puts its overall mission at risk. *Oregon Liquor Control Commission*, 137 LA 1809, 1815 (Pedersen, 2017).

Arbitrators have held that falsification of employer records, including dishonest entries on activity records, can be just cause for discharge. *Atlanta Linen Service*, 85 LA 827, 829 (Slatham, 1985) (falsification of employer records being just cause for discharge is "certainly understandable as the [employer] must insist and rely upon the integrity of records . . . [F]alsification implies that some action was reportedly taken which, in fact, was not in reality taken"); *Robert Bosch Corp.*, 117 LA 1406 (Lalka, 2002) (employer had just cause to discharge an employee who falsified a production log).

"A deliberate falsification of [employer] records that have safety implications is universally recognized as a dischargeable offense: '[F]alsifications that may adversely affect [the health and safety of the workforce and the public at large] will not be readily excused.'" *Georgia Power Corp.*, 125 LA 97, 99 (Abrams, 2008) (finding that employer had just cause for discharging a 25-year employee with no previous discipline who falsified a work record). See *Zimmer Surgical, Inc.*, 137 LA 1734, 1744 (Ross, 2017).

Penalty

It has been said that, when an employee "has violated a rule or engaged in conduct meriting disciplinary action, it is the function of management to decide the proper penalty." *Park Geriatric Village*, 81 LA 306, 311 (Lewis, 1983). The fact that the employer may have imposed a somewhat different or more severe penalty than the arbitrator might have fixed "had he had the decision to make originally is not justification for [the] arbitrator to change the penalty." *SA [D] and Co.*, 26 LA 395, 396 (Stouffer, 1956). An arbitrator "should not substitute his personal judgment for that of management because he does not agree with management in its disciplinary decision." *Parkview-Gem Inc.*, 59 LA 429, 431-432 (Dugan, 1972). *Emerson Electrical Co.*, 89 LA 512, 515 (Traynor, 1987) (once "the evidence demonstrates just cause exists for discipline, an arbitrator is not warranted in overruling its decision to discharge unless the evidence shows management acted in an arbitrary, capricious, discriminatory or inequitable manner"). Elkouri & Elkouri, pp. 15-32 to 15-35. Abrams, p. 212. *Rabanco Ltd*, 137 LA 328, 337-338 (Latsch, 2017).

It has been said that arbitrators should not alter the employer's choice of penalty unless the employer's actions have been arbitrary or in violation of a statute or the CBA. This principle is summarized in *Davison Chemical Co.*, 31 LA 920, 924 (McGuiress, 1959), as follows:

Where proper cause for a disciplinary action exists, a penalty imposed in good faith by management should not be disturbed by the arbitrator. It is not for the arbitrator to substitute his judgment for that of one having proper authority to discharge, where there has been no abuse of discretion or no conduct forbidden by statute or the labor agreement.

Arbitrator Whitley P. McCoy summarized management's discretion to determine the appropriate level of discipline.

Where an employee has violated a rule or engaged in 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 one man's eyes may be only light 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. *Vertex Aerospace, LLC*, 120 LA 767, 768 (Kilroy, 2004) (quoting *Stockham Pipe Fitting Co.*, 1 LA 160 (McCoy, 1945)).

Grievant's falsification destroyed his credibility and made it impossible for the Employer to trust him in the future.

The "accelerated at me" and house/[H]— allegations

I have found that there was just cause for termination because of the "grip of a handgun" situation. I am not making a determination of whether there was just cause resulting from the "accelerated at me" and house/[H]_____ allegations.

The National Academy of Arbitrators, American Arbitration Association, and Federal Mediation & Conciliation Service, Code of Professional Responsibility for Arbitrators of Labor Management Disputes, C(1)(a), states:

C. Awards and Opinions

1. The award should be definite, certain, and **as concise as possible**.

> a. When an opinion is required, factors to be considered by an arbitrator include: **desirability of brevity**, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and **avoidance of gratuitous advice or discourse not essential to disposition of the issues**. Emphasis added. Abrams, pp. 297-298.

Impact of PSO HS situation

On February 5, 2020, KPSOA filed its Motion to Amend the Record to Include Evidence Arising After Conclusion of the Hearing by adding a January 14, 2020, document concerning a discipline of PSO HS. This was after the last post-hearing brief was filed on February 4, 2020. The Employer's Answer to KPSOA's Motion was received on February 26, 2020. KPSOA's Response was received on March 4, 2020. KPSOA's Motion proffers the January 14, 2020, 48-hour PSO HS suspension and asks that I consider it in making my decision. The Employer argues that I should deny the Motion and not consider the PSO HS situation.

I grant KPSOA's motion to admit the January 14, 2020, document into the Record. Other than admitting the January 14, 2020, document into evidence, I am not reopening the hearing. I have the discretion to amend the Record to admit appropriate evidence which was discovered by a party after the conclusion of the hearing. American Arbitration Association Labor Arbitration Rules, Rule 31. This additional evidence gives me a more complete viewpoint of the situation. It is in keeping with the arbitration process to grant KPSOA's Motion and admit the proposed exhibit.

Having carefully considered the PSO HS situation and the totality of the circumstances, I find that Grievant and PSO HS were not similarly situated.

KPSOA has the burden of proof concerning the similarly situated issue. "Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that the employer improperly discriminated against an employee." Elkouri & Elkouri, p. 15-84.

Grievant was a PSO with the Employer from May 26, 2015, to March 27, 2018. It has been represented without contradiction that PSO HS was an eight-year employee. Length of service with the employer is a factor in reviewing discharge cases. *Id.* at 15-74. The length of time that Grievant and PSO HS were employed is relevant to the comparable employee issue.

Grievant had a January 26-29, 2018, 14-day suspension. Exh. 3, p. 1. Tr. 441/6-11. There is no evidence that PSO HS had any prior disciplines. "[T]he employee's past record often is a major factor in the determination of the proper penalty for the offense." Elkouri & Elkouri, p. 15-69.

The conduct of Grievant had Giglio/Brady ramifications. There is no evidence that the PSO HS situation had any Giglio/Brady ramifications. *Id.* at 21-37 to 38.

The conduct of Grievant had an impact outside of the Department. There is no evidence that the PSO HS situation had any impact outside of the Department.

As indicated by the Chief, Grievant's February 6, 2018, "I observed a grip of a handgun" entry "resulted in a citizen being falsely arrested, the case being dismissed, and will likely result in [Grievant] being deemed an incredible witness for years to come under Brady/Giglio obligation." Exh. 3, p. 1.

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The PSO HS suspension document is in evidence. I do not find PSO HS to be similarly situated to Grievant. PSO HS did not commit the same or substantially similar offense as Grievant. Elkouri & Elkouri, p. 15-83 to 84.

KPSOA cites *Osram Sylvania v. Teamsters Local 528*, 87 F.3d 1261 (11th Cir. 1996). *Osram Sylvania* reversed the District Court's vacatur of a labor arbitration award. The award had found lack of just cause for a termination in light of evidence of the employer's treatment of another employee that occurred after the grievant's discharge. The Court of Appeals stated, "[the employer] argues that the 'violation' committed by the employee to whom [the grievant] was compared involves facts completely dissimilar to those in [the grievant]'s case. The arbitrator obviously thought otherwise; because that determination is not irrational, it will not be disturbed." *Osram Sylvania* is consistent with my decision because in the case at bar the PSO HS situation is not similar to Grievant's situation. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998), "require[s] that the plaintiff demonstrate that he or she is similarly-situated to the non-protected employee in all relevant respects."

The rule was applied evenly and without discrimination

There is no evidence of other PSOs providing false information on documentation that would be used to base charges that would be processed through the court system.

Conclusion

The crucial points in this case include the following:

1. The Honesty Standard is a reasonable work rule;

2. Grievant had signed for the Honesty Standard;

3. Grievant made no contemporaneous announcement of the existence of a handgun;

4. The lack of clarity as to what Michigan law was on February 6, 2018, as to whether the owner of a car can give valid consent for the search of the purse of a passenger in the car;

5. Grievant admits that he did not observe a grip of a handgun in the purse while B_____ was holding the purse in her lap, Tr. 445, 480-482, 497-498, and 500;

6. The situation was adequately investigated;

7. The policy was enforced fairly, objectively, and consistently within the bargaining unit concerning similarly situated employees;

8. Brady-Giglio implications, Elkouri & Elkouri, pp. 21-37 to 38;

8. The prior suspension;

9. The CBA; and

10. The totality of the circumstances.

This decision neither addresses nor decides issues not raised by the parties.

There was just cause for the termination of Grievant.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the grievance.

20-1 ARB ¶ 7619 Barnard College and Transport Workers Union, Local 264.

CARMELO R. GIANINO, Arbitrator. Selected by the parties. Award issued on January 2, 2019.

Harassment, sexual—Termination—Hostile work environment.—An employee who was the union president filed a grievance contesting his termination for creating a hostile work environment by refusing to question a witness at a disciplinary hearing because of her low-cut blouse. The arbitrator sustained the grievance in part. The employee was a security guard who, as union president, was called upon to question a witness. After he refused because of her attire, the employer terminated him. The arbitrator concluded that the actions constituted misconduct but not those sufficient to justify termination. He was ordered reinstated, but with the loss of back pay and seniority rights.

[Text of Award]

STATEMENT of CLAIM:

GIANINO, Arbitrator: The Union, on behalf of Claimant [A], seeks the following remedy(s) for its contention that Barnard College (hereinafter known as "College") improperly dismissed claimant from service:

—restoration to service,

—all back pay associated with his dismissal,

—all seniority and benefits intact.

The Union also wants addressed: Did the College violate Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act by discharging Claimant on or about March 1, 2018?

The College, on the other hand, wants the Claimant dismissed from service.