

**Labor Arbitration Awards: 1986 - Present, Newaygo County and Newaygo County Sheriff's Office and Command Officers Association of Michigan., 23-2 ARB ¶8224, (Mar. 27, 2023)**

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23-2 ARB ¶8224. LEE HORNBERGER, Arbitrator. Selected by the parties. Case No. MERC 22-1-1797-GA. Hearing held in White Cloud, Michigan, February 17, 2023. Post-hearing briefs filed by March 17, 2023. Award issued March 27, 2023.

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**Headnote**

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**Demotions: Rights, employee: Due process.—**

. A police sergeant filed a grievance contending that the employer violated the collective bargaining agreement when it demoted him to Deputy. The arbitrator sustained the grievance, vacated the demotion, and ordered reinstatement. The demotion occurred because of the sergeant's violation of work rules involving a botched arrest, which the employer said was the result of "inept leadership abilities" and "poor supervisory decisions." The arbitrator concluded, however, that insufficient evidence existed for those conclusions. The sergeant did not violate the arrest rules. His work record indicated that he was highly qualified. No evidence existed of any dishonesty on the sergeant's part. The sergeant's failure to arrest the suspect on the night in question was remedied by a subsequent arrest and conviction. Demotion for this incident was far too harsh.

Michael R. Blum, Attorney, for the Employer. Christopher Tomasi, Attorney, for the Union.

**[Text of Award]****DECISION AND AWARD****INTRODUCTION**

**HORNBERGER**, Arbitrator: This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Newaygo County and Newaygo County [A]'s Office (Employer) and the Command Officers Association of Michigan (Union). The Union contends that the Employer violated the CBA when it demoted Grievant from Sergeant to Deputy. The Employer maintains that it did not violate the CBA when it demoted Grievant.

Pursuant to the procedures of the Michigan Employment Relations Commission, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on February 17, 2023, in White Cloud, 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 dispute was deemed submitted on March 17, 2023, 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.

Both advocates did an excellent job in representing their clients. All involved in the arbitration were courteous and professional. The post-hearing submissions were very helpful.

**ISSUES**

In its Post-Hearing Brief, the Employer framed the issue as: Did the demotion of Grievant from Sergeant to Deputy violate the CBA?

At the arbitration hearing, the parties generally agreed that the issues are: Was there just cause for the demotion? If not, what is the remedy?

I determine that the issues before me are: Was there just cause for the demotion? If not, what is the remedy?

## **RELEVANT CONTRACTUAL LANGUAGE**

### **ARTICLE 2**

#### **EMPLOYER RIGHTS**

\* \* \*

*Section 2.* Rules of conduct not inconsistent with the specific terms of this contract in effect at the date of this Agreement may be continued by the Employer. The Employer shall have, within their discretion, the right to make, amend, supplement or delete rules and regulations. New rules shall be reasonable and shall relate to the proper performance of an employee's duties and shall not be applied in a discriminating manner. The Union President shall receive a copy of any new or modified rule two (2) working days prior to its effective date, unless conditions warrant immediate implementation. If there is concern regarding the reasonableness of the new rule or rule change, the Union President may request a special conference between the Union, [A] or their representative and the County Administrator to discuss the new rule.

\* \* \*

*Section 5. Retention of Rights.* The Employer reserves and retains, solely and exclusively, all rights to manage and direct its work forces, except as expressly abridged by the specific provisions of this Agreement, including by way of illustration, but not limitation, the determination of policies, operations, assignments, schedules, layoffs, etc. All rights, functions, powers and authority which the Employer has not specifically abridged, delegated, or modified by specific terms of this Agreement are recognized by the Union as being retained by the Employer.

### **ARTICLE 7**

#### **DISCHARGE AND DISCIPLINE**

*Section 1.* For all non-probationary employees discipline shall be for just cause.

*Section 2. Discipline Notice.* The Employer agrees, upon the discharge or discipline of an employee, to notify in writing the employee and their steward of the discharge or discipline. Said written notice shall contain the reasons for the discharge or discipline. Should the discharged or disciplined employee consider the discharge or discipline to be improper, it shall be submitted to the grievance procedure. Notwithstanding the above, probationary employees are not entitled to use the grievance procedure.

*Section 3. Prior Discipline.* In imposing any discipline or discharge on a current charge, the Employer will not take into account any prior infractions which occurred more than two and one-half (2-1/2) years previously.

*Section 4. Representation.* The employee against whom charges have been made may be represented at such hearing by the steward or Union representative or Union attorney.

*Section 5. Charges and Specifications.* The charges and specifications resulting in such discipline or discharge shall be reduced to writing by the commanding officer invoking the action and copies shall

be furnished to the chief steward or the alternate chief steward and the member against whom the charges are brought. The chief steward and employee involved shall sign and acknowledge receipt of the disciplinary action.

## **ARTICLE 8**

### **GRIEVANCE PROCEDURE**

\* \* \*

#### **Section 4. Arbitration**

\* \* \*

D. The arbitrator's powers shall be limited to the application and interpretation of this Agreement as written. The arbitrator shall at all times be governed wholly by the terms of this Agreement and shall have no power or authority to amend, alter, or modify this Agreement in any respect. By accepting a case from the parties, the arbitrator acknowledges their limitations of authority, and agrees not to decide an issue which is outside of their jurisdiction under this Agreement.

E. The arbitrator's decision shall be final and binding on the Employer, Union and employees; provided, however, that this shall not prohibit a challenge to the arbitration decision in a court of competent jurisdiction, if it is alleged that the arbitrator has exceeded its jurisdiction, or that such decision was obtained through fraud or other unlawful action.

\* \* \*

*NEWAYGO COUNTY [A]'S OFFICE RULES*

## **RULES FOR LAW ENFORCEMENT OPERATIONS**

*3:3 Supervisors Responsibility:* Supervisors are responsible for the performance of their subordinates.

*4:4 Conduct Unbecoming Department Personnel:* Personnel shall conduct themselves, at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming Department personnel shall include: that which brings, or may bring, the Department into disrepute or reflects discredit upon the employee or the department: that which impairs the efficient operation of the Department.

*4:7 Neglect or Inattention to Duty:*

- (A) Personnel shall not perform their duties negligently, carelessly or in an inattentive manner.
- (B) They shall not engage in any activities or personal business on duty, which would cause them to neglect or be inattentive to duty.

*4:12 Unsatisfactory Performance:*

- (A) Personnel shall maintain sufficient competency to properly perform their duties in a manner that will maintain the highest standards of efficiency in carrying out their duties and the objectives of the Department. Unsatisfactory performance may be demonstrated by a lack of knowledge of law, departmental guidelines; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the employees rank, grade, or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention.

- (B) In addition, the following is considered unsatisfactory performance: repeated poor evaluations or a written record of repeated infractions of departmental guidelines. Rx. 2.

## USE OF FORCE

### I. PURPOSE

To guide deputies in the use of force to overcome the resistance offered; to effect a lawful arrest, and/or accomplish the lawful performance of duty while protecting the public; to provide for deputy safety; and to provide for the treatment of any injury or complaint of injury arising from the use of force.

### II. DEFINITIONS

\* \* \*

G. "*Reasonableness*" means within reason, moderate action suitable to the situation, consistent with department approved training and policies. The final decision as to the reasonableness of a police action will be determined on a case by case basis by those members of the department called upon to review the appropriateness of those tactics or actions, based on what a "reasonable" deputy would have done under like circumstances.

\* \* \* Rx. 3.

## ARREST MANAGEMENT

REQUIREMENTS FOR ARREST: in the following circumstances a deputy may make an arrest within the municipal jurisdiction for.

- (A) An arrest warrant commands a deputy to immediately arrest the named person and make them available for court proceedings.
- (B) An arrest warrant must be obtained prior to arresting in the following circumstances.
1. On probable cause for a misdemeanor when a suspect flees into a dwelling. (No Forcible Entry)
  2. In order to make forcible entry for the purpose of making a felony arrest, without exigent circumstances, into a defendant's dwelling. Deputies must have reason to believe the defendant is inside the dwelling.
  3. In order to make forcible entry for the purpose of making any arrest, without exigent circumstances, into a third party's home. (In this case, a Search Warrant is also required). Rx. 4.

## FACTUAL OUTLINE

### List of participants

**Deputy RB** is a police officer with the Employer. She made the earlier meth related arrest of KH and accompanied Grievant to the house in question.

**Deputy \_\_\_ C** is a police officer with the Employer. He went to the house in question and covered the back of the house.

**TG** was inside the house in question. There was an FOC warrant out for TG. TG is a friend of CS.

**Deputy PG** has worked for the Employer for 25 years.

**SH** was present inside the house in question.

**KH** was the driver of the initial civilian vehicle in question.

**[B]** is self-employed. She worked for the Employer as a Road Deputy from August 2018 to September 2022.

**[A] BM** has been the County [A] since 2017. He has 32 years of law enforcement experience.

**Grievant** has been employed by the Employer since 2000. He was originally part-time. He went to the Road Patrol in 2001. He became a Sergeant in 2008. He became a Road Patrol Sergeant in 2018. He was demoted to Deputy in August 2022.

**MSP Trooper TP** has been employed by the MSP for over ten years. His coverage area includes Newaygo County.

**Under[A] CP** is the County Under[A]. Under[A] CP began working for the Employer in 1995. He was appointed Under[A] by the [A] in 2017.

**CS** owned or rented the home in question.

## Introduction

### FACTUAL OUTLINE

#### TESTMONY OF THE UNDER[A]

The **Under[A]** was involved with the demotion of Grievant. The operative event concerning the demotion occurred on the early morning of June 14, 2022. The Under[A] received a phone call from the MSP. The MSP had received a complaint from CS. Because of the complaint from CS, the MSP was doing an assault and battery criminal investigation. The Bodycam video of the incident was sent to the MSP. The Under[A] contacted Grievant. He asked Grievant, "What transpired last night?" Grievant responded, "There was a tip. I went to the house. ... There was a FOC [Friend of the Court] warrant." CS was harboring a fugitive. Grievant told the Under[A], "I panicked." Grievant was not sure if he could arrest under an FOC warrant. The Under[A] does not believe Grievant had advised others of what had happened. There was a "FOC warrant" for TG. The \_\_\_ Drive house was rented by CS. Grievant could not enter the house with an FOC warrant if the FOC target did not live in the house.

With the Under[A] on the stand at the arbitration hearing, the video was reviewed. On the video, the "second female at the residence" asks if they have a "search warrant." Grievant replied, "We don't need a warrant. We have an arrest warrant." Grievant says, "I saw him in the window. We are not here for you. You are harboring a fugitive." CS says there is "no one here to watch my children." Grievant said "We are here for him. Not for you. ... I know for 100% ([TG]) is in here."

Grievant was placed on paid suspension. Deputy RB was also placed on paid suspension. At some point, Grievant was "reinstated." After the Michigan Attorney General Office had been considering the situation for a long time, the Employer decided to return Deputy RB and Grievant to work. The Attorney General investigation was "taking too long." No criminal charges were brought against Deputy RB or Grievant.

There was a July 25, 2022, meeting. The Union was there. The [A] made the final decision concerning the demotion. There was an August 2, 2022, meeting scheduled to have the *Cleveland Board of Education v.*

*Loudermill*, 470 U.S. 532 (1985), hearing. The meeting date was changed to August 4, 2022. Grievant had a prior November 19, 2021, reprimand.

According to the Under[A], at the June 14, 2022, event, Grievant was under control. Grievant contacted the County Prosecutor's Office concerning "the harboring" allegation against CS. Charges were brought against CS and she was convicted. According to the Under[A], Grievant and Deputy RB had plenty of information to get a search warrant for the house. The June 14, 2022, situation was investigated by the MSP. The MSP did not issue charges against Grievant or Deputy RB. The Under[A] did not ask Grievant why there was no attempt to get a search warrant. The Employer has an Internal Investigation Department. There was no citizen complaint to the Employer concerning this incident. The Under[A] did not interview Deputy RB.

### TESTIMONY OF THE [A]

On the day of the event, the [A] was out of the country. Later he reviewed the situation with the Under[A]. On July 25, 2022, the [A] discussed the situation with Grievant. The [A] asked Grievant if he had anything to say. Grievant said, "Aren't I allowed to make any mistakes?" Grievant told the [A] there would be mass resignations if he were demoted. Grievant said the [A]'s poor leadership would result in a mass exodus from the [A] Department. The Union Steward and the [A] then concluded the meeting.

The [A] made the demotion decision. The decision was based on the videos, police reports, and the opinion of the Under[A]. The reasons for the demotion included the responsibility to perform appropriately, arresting and then unarresting in CS's own home was neglect, and there was a failure to report the incident to the Under[A]. There was just cause for the demotion. This included the severity of the violation. The [A] was "appalled" by what was in the video. The [A] lost all faith and trust in Grievant. The employees had received a copy of the policies, including the use of force policy. The [A] is not aware of any cold cases Grievant solved. CS was subsequently charged with harboring and was convicted of that. The Under[A] did not do *Garrity v. New Jersey*, 385 US 493 (1967).

The [A] wrote in the August 1, 2022, Notice of Demotion document for Grievant,

As you have been made aware, a complaint has been made to the [MSP] reference an incident you were involved with on June 13, 2022.

Considering the information received from the [MSP] about the incident at \_\_\_ Drive on June 13, 2022, you were placed on immediate suspension with pay on June 16<sup>th</sup>, 2022. During this time an[] internal investigation/review of the incident was conducted.

On June 13<sup>th</sup>, you assisted Deputy [RB], and Deputy \_\_\_ C on \_\_\_ Drive. You attempted to make an arrest on an FOC warrant on [TG], who was on parole and just sold meth to an individual that was stopped down the road. You advised that you saw [TG] in the house, but knew it was not his house and was a third-party residence. The homeowner [CS] came to the door and advised that [TG] was not in the house. [CS] stayed on the enclosed porch of the house and shortly after putting her arm out of the door, at which time you grabbed, and she fell to the floor. Deputy [RB] and yourself then enter the residence, use force to detain and cuff her. During this time [CS] was advised on several occasions that she was under arrest for harboring a fugitive. After a short while you made the decision to uncuff her and back away from the house since the warrant was o[B]y FOC.

The next day I was contacted by the [MSP] who advised that they received a call reference assault and battery and excessive use of force against agency. Later that day you were contacted for the details of the event. After the detail, you mentioned that you "panicked" and were not sure if you had authority as it was a civil FOC warrant.

The particular incident provided two separate opportunities for search warrants within the scope of the law. Rx. 17.

### TESTIMONY OF GRIEVANT

According to **Grievant**, it is "important to try to be proactive ... [and] look for crime." He sets annual goals for himself and then reviews those goals.

On June 13, 2022, Deputy RB asked Grievant to come out to see what should be done next. Suspect KH had said meth had been provided at the \_\_\_ Drive house. Deputy RB and Grievant were familiar with the house. Suspect KH said that TG, the "boyfriend" of the owner of the house, was at the house and the provider of the meth. There was a discussion about what to do. There had been a three gram bag of meth in KH's vehicle.

They asked for a third cruiser. This cruiser would be parked down the road. There was one Officer deployed to the rear of the house. The earlier two Officers, Grievant and Deputy RB, went to the front of the house. Grievant saw a man through the kitchen window. It was TG.

According to Grievant, it was eventually "hands on" with CS. Grievant knew CS was harboring a fugitive. CS reached outside of the house. Grievant got ahold of CS's left wrist. She fell backwards into the house. Grievant fell with her. He got her handcuffed. She was crying and screaming. No weapons or macing were used. On the question of lodging CS, Grievant was considering a lot of things at that point. CS's children were in the house. Grievant did not have confidence in the FOC warrant. He decided to err on the side of caution. It was a misdemeanor. So he made the decision to back away.

Grievant talked with the Prosecutor. CS was arrested the following weekend. CS filed a complaint against Deputy RB and Grievant.

At 5:42 p.m., June 14, 2022, Grievant sent an email to the [A] and Under[A] that said,

[RB], [Deputy C] and I attempted an FOC warrant last night at \_\_\_ Drive on [TG], who is also on parole and just sold meth to a guy that [RB] stopped down the road. We saw [TG] inside the house, but its not his house, so we didn't enter without a warrant. The homeowner and [TG]' girlfriend, [CS], lied to [RB] several times about [TG] being there, so we detained her for harboring a fugitive. She resisted a little bit, but we got her in cuffs. We tried to convince [CS] to just go get [TG] and bring him out, but she wouldn't. I made the decision to uncuff her and back away from the house since the warrant was o[B]y for FOC. [RB] submitted the report today and Worth sounds like he will likely issue for harboring on [CS].

[CS] called in today trying to mask an assault complaint against us with Kalinowski, but he said she'd have to call MSP. So, I wanted to give you a heads up in case she follows through with MSP. Rx. 6.

On June 14, 2022, Deputy RB filed a report concerning June 14, 2022, that, in part, said,

Offense HARBORING A FUGITIVE – MISDEMEANOR

Statute 750.199(2)

NIBRS Code 49000-Escape/Flight ...

Location Residence/Home

Entry Forced No

Offense POLICE OFFICER-ASSAULTING/RESISTING/OBSTRUCTING

Statute 750.81D1

NIBRS Code 4800-Obstructing Police ...

Location Residence/Home

Entry Forced No

*Offender*

[CS] 750.81D1 – POLICE OFFICER

ASSAULTING/RESISTING/OBSTRUCTING

750.199(2) – HARBORING A FUGITIVE – MISDEMEANOR ...

*Other*

[TG] Other: 750.8101 – POLICE OFFICER –

ASSAULTING/RESISTING/OBSTRUCTING

Other: 750.199(2) – HARBORING A FUGITIVE –

MISDEMEANOR ...

CONTACT WITH SUSPECT, [CS]:

[CS] spoke with me over the phone last week was notified her boyfriend, [TG], has a FOC warrant out of Montcalm Co. [CS] was instructed to contact the Newaygo County [A]'s Office immediately upon him being at the residence. [CS] was even provided with a business card with central dispatch's number on it. [CS] had advised she understood this and was aware of the consequences of hiding her boyfriend [TG].

On Tuesday, 06/14/2022 at 0038 hours, I knocked on the door at the porch and [Grievant] who was standing off to the left of me, in between the door and the garage, advised he saw [TG] in the kitchen. [Grievant] has had prior contacts with [TG] and confirmed it was in fact him. I explained to [CS] we were aware [TG] was inside as we saw him and he had a warrant for his arrest.

[CS] insisted [TG] was not inside and continued to cover up or conceal him from us by saying we saw another female in the residence. As this female approached (identified as [SH]) [Grievant] confirmed it was not that female that was observed. We continued to explain to [CS] [TG] had a warrant and needed to surrender. [CS] was standing in the doorway of the porch, she appeared to be partially breaking the plane of the doorway when [Grievant] grabbed [CS]'s wrist in order to affect an arrest on [CS] for harboring a fugitive as it was apparent the crime would continue if she was not lodged (misdemeanor lodging exception #3). [CS] pulled away. [CS] fell backwards into the porch area and resisted [Grievant] and myself. She was advised she was under arrest, and to stop resisting several times. [CS] was finally secured in handcuffs behind the back.

Once [CS] calmed down, she agreed to get [TG] for us peacefully. [CS] had mentioned her young daughter being inside the residence as well. [CS] was un-handcuffed and walked inside claiming she was retrieving [TG], but did not return.

It was agreed that due to time of night, and an infant child inside, the best course of action was to request charges with the prosecutor's office at this time.

**WARRANT INFORMATION:**

[TG] shows one FOC warrant out of Montcalm Co date of warrant 04/11/2022. ....

**PROSECUTION REQUESTED:**

Resist and obstruct police X2

Harboring a fugitive .... Rx. 17.

### Testimony of MSP Officer TP

**MSP Officer TP** is familiar with the \_\_\_ Drive location. Neighbors reported someone breaking into that residence during the summer of 2022.

There was a warrant for CS's arrest. TP knew Grievant had been suspended. He later learned CS was convicted.

He has been familiar with Grievant for 15 years. TP testified that "we're friends. ... We don't hang out much." Concerning CS approximately a week after the day in question, TP went up to the house. He said, "We have a warrant for your arrest." CS fled into her \_\_\_ Drive house. They were making contact through a window. They "negotiated" for approximately 30 minutes. Eventually she came out. She surrendered and was arrested. This was on a "harboring a fugitive warrant."

### Testimony of Deputy PG

**Deputy PG** knows Grievant. He has worked with Grievant most of Deputy PG's career. Grievant was PG's Supervisor. Deputy PG testified that Grievant is "one of the best Sergeants I worked for." Grievant will stand up for you. Grievant came over to PG's house when PG had an incident. Grievant has a good reputation. Grievant was on the forefront of fighting crime. Grievant would ask his Deputies, "What is your goal for this year?" Grievant would follow-up on that at the end of the year.

### Testimony of [B]

**Ms. [B]** knew Grievant. Grievant was [B]'s Supervisor for one year. This was on the night shift. [B] testified that Grievant was "very encouraging. ... [She] appreciated Grievant's leadership." Grievant would ask, "How would you handle a situation like this." Grievant was competent. He was a good motivator. [B] and Grievant did not hang out together outside of work. [B] was encouraged to be pro-active by Grievant. Grievant would ask, "How many traffic stops in a night?" But it was not a quota system.

### CONTENTIONS OF THE PARTIES

According to the Employer, the issue in just cause cases is whether the disciplinary action was reasonable under the circumstances. *In re Town House Apartments*, 83 LA 538 (1984, Roumell) (citing *Riley Stoker Corp.* 7 LA 764 (Platt, 1947)). In demotion cases, the issue should be not viewed purely as disciplinary action because a demotion carries with it an additional element of employee suitability for the position. Employees in a position of command not o[B]y have supervisor responsibilities over other officers employed by the Employer, but also are responsible to their superior command officers. Grievant, as a Sergeant, was vested with an additional level of accountability to his chain of command as well as to his subordinates.

In demotion cases, the issue is whether the employee possesses the requisite level of skills and experience for their respective position. If they cannot, the employer must be provided the right to reassign the employee to a more suitable position in line with the skills and competencies exhibited in connection with their work performance. For example, in *Ford Motor Co*, Opinions of the Umpire, Opinion A-30 (1943), the Umpire stated that, in the interest of achieving optimum performance, management may make periodic appraisals of its employees and demote those whose performance falls below an acceptable standard. The Umpire stated:

We may assume further that the obligation to perform satisfactorily is a continuous condition of the maintenance of the better job and that an employee's performance, though once adequate, may fall below standard and merit demotion. ... Such a demotion would be an instance of the Company's continuing interest in the satisfactory performance of each of its jobs.

The right to determine who is to hold a command position is recognized by arbitrators. In *Richmond Heights (OH)*, 35 LAIS 54, 2006 WL 6827854 (Lanko, 2006), a sergeant was demoted to patrol officer because of deficiencies in filing of reports and his disciplinary record. The union argued the employer improperly scrutinized grievant's record and treated him differently than other officers. The arbitrator determined the failure to perform up to the level expected of a supervisory employee justified the employer's decision to demote the grievant. The arbitrator found that grievant's performance was not up to the expected level of a sergeant, and therefore demotion of the grievant was justified. A similar conclusion is required in this case.

There is no significant dispute as to what happened on the night of June 13, 2022, at the \_\_\_ Drive house, nor could there be because of the existence of the bodycam videos. The Union primarily argues that just cause cannot be met because Grievant o[B]y had one disciplinary action on his record; he had commendations or letters of appreciation for prior work he participated in; and newspaper reports concerning cases Grievant participated in. The Union's argument fails to address the issue discussed in *Ford Motor Co.*, which is whether Grievant's conduct on the night of June 13, 2022, exhibited performance at a level sufficient to meet his dual responsibilities as a person in a command position to his superiors as well as his subordinates. It did not.

The [A] testified that in reviewing the matter he had several serious concerns with Grievant's conduct. With respect to the June 13, 2022, incident, the [A] determined that it provided two separate opportunities for search warrants within the scope of the law: (1) based on the existence of methamphetamine, and (2) when Grievant personally identified TG in the \_\_\_ Drive house. Grievant made the decision not to do so, but instead proceed with physically detaining and arresting CS based solely on an outstanding Friend of the Court (FOC) warrant issued for TG. In doing so, Grievant violated numerous Employer rules.

As determined by the Under[A] and [A], Grievant's conduct was not reasonable, as required by the Use of Force Policy. Grievant failed to maintain sufficient competency to properly perform his duties in a manner that maintained the highest standards of efficiency in carrying out his duties, in violation of Rule 4.12. Grievant failed to conduct himself in a manner that reflected most favorably on the [A] Department, in violation of Rule 4.4. Grievant failed to properly supervise the performance of his subordinates, as required under Rule 3.3.

Grievant's decision to proceed with physically detaining and arresting CS based on the outstanding FOC warrant for TG violated the Employer's Arrest Management Policy. That policy requires that an arrest warrant be obtained prior to arresting in three specific circumstances, including:

3. In order to make forcible entry for the purpose of making any arrest, without exigent circumstances, into a third party's home. (In this case, a Search Warrant is also required.) Rx. 4.

That was the exact situation facing Grievant, yet he chose to forgo getting a warrant and instead entered the house and physically restrained and arrested CS in violation of Employer policy.

Grievant made the decision as to how he would proceed without informing or making any attempt to contact the [A] or the Under[A]. During the meeting on July 25, 2022, with the [A] and the Under[A] to discuss the matter, Grievant failed to accept any responsibility for the way he conducted himself, simply asking, "Aren't I allowed to make a mistake" and criticizing their leadership abilities.

Just cause existed for Grievant's demotion. After a thorough review of the matter, the [A] determined that he could no longer entrust Grievant with responsibility necessary to be in command. According to the Employer, I should not second-guess the [A]. As Arbitrator Roumell noted in *Town House* (citing *Stockham Pipefitting Co.*), arbitrators should not substitute their judgment for that of management. *Caro Center*, 104 LA 1092 (1995, Kanner) (management's decision should not lightly be upset if within broad parameters of reasonableness).

The Employer requests that the Grievance be denied.

## **b. For the Union**

According to the Union, it is the Employer's burden to show just cause for the discipline. The CBA grants the Employer's right to discipline but o[B]y for just cause. Jx. 1, p. 6.

As the County Prosecutor determined, Grievant did nothing improper, and Grievant's actions led to a charge and conviction of CS for harboring a fugitive. The Employer did not conduct any type of investigation, let alone the required "fair and thorough investigation." Grievant admitted that at one point he became uncertain about the legality of the arrest, and instead of making a mistake, he de-escalated a situation, used sound discretion, and released CS from custody. What Grievant did was err on the side of caution, contrary to the Employer who, without fairness or objectivity, prejudged his culpability, merely because CS made a complaint, and the MSP conducted a criminal investigation. The Employer without conducting any type of investigation made the leap that Grievant violated policies and demoted him without just cause. This determination was made prior to the conclusion of the criminal investigation, which resulted in no charges against Grievant. The Employer's impulsive hastiness is further illustrated by the fact that it originally demoted Grievant without any due process, including a *Loudermill* hearing. The Employer acknowledged that it had never sought the explanation of Grievant in an Internal Investigation setting according to its own Department policy, thus never affording him the opportunity to explain his actions on June 14, 2022, in a manner that would not compromise an on-going criminal investigation.

The penalty of demotion is unreasonable and without just cause. To demote a 20 year plus employee, who has been a Sergeant for over 14 years, and who o[B]y has one documented verbal reprimand in his disciplinary file, is a travesty that flies in the face of progressive discipline. No mitigating factors were taken into consideration, such as his many years of quality service, almost no discipline history, and that he was/is well respected by his peers. The [A] admitted that he did not consider this, and that he did not talk to subordinate employees about Grievant's effectiveness as a command officer. The Union presented evidence of mitigating factors, showing the highly productive law enforcement career of Grievant as a command officer. The testimony of Deputy PG and former Deputy [B] describes Grievant as being a professional leader, a competent Sergeant, and a motivator who is proactive in his leadership approach. Grievant's shift consistently led the department in arrest statistics. Arbitral principle disfavors the use of disciplinary demotion. Persuasive arbitration decisions deem disciplinary demotions as excessively punitive and without just cause. Arbitrator Platt set aside a demotion in *Republic Steel Corp.*, 25 LA 733 (1955), writing:

I agree with Supervision that the aggrieved's carelessness on the days in question was inexcusable and that they deserved to be disciplined. And I would not hesitate to sustain any reasonable disciplinary penalty, as a corrective measure. But I do not believe that permanent demotion is a proper form of discipline where an employee's capabilities are conceded, and his performance is generally satisfactory but where his attitudes of the moment are improper. ...

That disciplinary demotions are frowned upon by arbitrators is recognized in law enforcement cases. In *Ohio Department of Highway Safety*, 103 LA 501 (1994), Arbitrator Feldman granted a grievance, in part, reinstating the grievant to the rank of sergeant, where the sergeant had engaged in false reports. His opinion states:

... the grievant is a longtime employee at the facility. Further, discipline must be progressive in nature. The purpose of discipline is not to punish but to promote conduct acceptable to the employer of a standard higher than that which the grievant exhibited at the time he received the discipline. The demotion is an extremely heavy burden when used as discipline because it is everlasting. Not o[B]y is the grievant disciplined immediately for the activity he was involved in, but the discipline is ongoing in that it affects his wage for a continuing and lasting period of time. ....

In *Cleveland Metro Parks*, 1995 LA Supp 115663 (1995), Arbitrator Cohen set aside a demotion of a park ranger sergeant over events that indicated some incompetency and violations of work rules and policies, maintaining

that other forms of progressive, and corrective discipline should have been adhered to, in citing Arbitrator Platt's decision in *Republic Steel Corp.*

Grievant was not careless or incompetent. He did not make false reports. His discipline history as a Sergeant has o[B]y one verbal reprimand. Considering all of this with his many accomplishments, and the fact that his subordinates perceive him as highly professional, competent, and proactive, the demotion is without just cause.

The Union asks that I grant the grievance, set aside the demotion, reinstate Grievant to Sergeant, make him whole, including the restoration of seniority, backpay and benefits, and remove the disciplinary action from his record.

## 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 even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that the Employer violated the CBA when it demoted Grievant.

### Discipline

Grievant was disciplined for allegedly violating work rules.

In relevant part the August 1, 2022, Notice of Demotion stated:

"The conclusion is that your actions are in clear violation of the following policies:"

*3.3 Supervisors Responsibility:* Supervisors are responsible for the performance of their subordinates.

*4.4 Conduct Unbecoming Department Personnel:* Personnel shall conduct themselves, at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming Department personnel shall include: that which brings, or may bring, the Department into disrepute or reflects discredit upon the employee or the department: that which impairs the efficient operation of the Department.

*4.7 Neglect or Inattention to Duty:*

A. Personnel shall not perform their duties negligently, carelessly or in an inattentive manner.

*4:12 Unsatisfactory Performance:*

A. Personnel shall maintain sufficient competency to properly perform their duties in a manner that will maintain the highest standards of efficiency in carrying out their duties and the objectives of the Department. Unsatisfactory performance may be demonstrated by a lack of knowledge of law, departmental guidelines; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the employees rank, grade, or position; the failure to take appropriate action on the occasion, of a crime, disorder, or other condition deserving police attention.

Use of force; definition, Section II; article G "Reasonableness"

"Reasonableness" means within reason, moderate action suitable to the situation, consistent with department approved training and policies. The final decision as to the reasonableness of a police action will be determined on a case by case basis by those members of the department called upon to review the appropriateness of those tactics or actions, based on what a "reasonable" deputy would have done under like circumstances

Arrest Management; Section IV; Article B (1), (2)

Requirements for Arrest: In the following circumstances a deputy may make an arrest within the municipal jurisdiction for.

A. An arrest warrant commands a deputy to immediately arrest the named person and make them available for court proceedings.

1. An arrest warrant must be obtained prior to arresting in the following circumstances.
2. On probable cause for a misdemeanor when a suspect flees into a dwelling. (No Forcible Entry)
3. In order to make forcible entry for the purpose of making a felony arrest, without exigent circumstances, into a defendant's dwelling. Deputies must have reason to believe the defendant is inside the dwelling.
4. In order to make forcible entry for the purpose of making any arrest, without exigent circumstances, into a third party's home. (In this case, a Search Warrant is also required).

The demotion letter also contained the following sentence: "Given the degree of inept leadership abilities, and poor supervisory judgment/decisions, you will be demoted to rank of Deputy effective immediately." Rx. 17 and Ux. 102.

The CBA provides that:

Art. 2. Sec. 2. Rules of conduct not inconsistent with the specific terms of this contract in effect at the date of this Agreement may be continued by the Employer. The Employer shall have, within their discretion, the right to make, amend, supplement or delete rules and regulations. New rules shall be reasonable and shall relate to the proper performance of an employee's duties and shall not be applied in a discriminating manner. ... If there is concern regarding the reasonableness of the new rule or rule change, the Union President may request a special conference between the Union, [A] or their representative and the County Administrator to discuss the new rule.

\*\*\*

Art. 7. Sec. 1. For all non-probationary employees discipline shall be for just cause. The Employer's applicable rules are quoted in the Notice of Demotion.

### **Burden of proof**

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

### **Grievant's knowledge of work rules**

There is no evidence or argument that Grievant did not know of the work rules in question.

### **The work rules were reasonable**

Management has the right to establish reasonable work place rules consistent with the CBA. Elkouri & Elkouri, pp. 13-144 to 13-145. Assuming there is a proven violation and the other requirements of just cause, the Employer's work rules are reasonable. Abrams, p. 261. The Union does not argue to the contrary.

### **There was a fair and objective investigation**

Under all of the circumstances, there was an appropriate investigation.

"Industrial due process ... requires management to conduct a reasonable inquiry or investigation before assessing punishment." Elkouri & Elkouri, p. 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).

Abrams, p. 211, states:

... [T]he concept of "due process" is inherent in the just cause provision.  
... [a]rbitrators 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 indicated 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.

On July 25, 2022, the [A] discussed the situation with Grievant. The [A] asked Grievant if he had anything to say. The Grievant was given a meaningful opportunity to tell his side of the story.

### **The rule was applied eve[B]y and without discrimination**

There is no evidence or allegation that the rules have not been applied eve[B]y and without discrimination.

### **There is not a preponderance of proof that there was a violation**

Neither Employer nor Union 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.

I have considered all the circumstances of all the witnesses when assessing testimony. I have considered the totality of the circumstances. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98. See generally WD Mi Civ JI 2.07.

Furthermore:

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.

The background issues in this case are did CS leave her residence before she was arrested by Grievant and was CS eventually convicted for her June 14, 2022, harboring activity.

According to the Notice of Demotion, "[CS] stayed on the enclosed porch of the house and **shortly after putting her arm out of the door, at which time you grabbed, and she fell to the floor.**" According to Deputy RB's June 14, 2022, report, "[CS] was standing in the doorway to the porch , **she appeared to be partially breaking the plane of the doorway when [Grievant] grabbed [CS]'s wrist in order to affect an arrest on [CS] for harboring a fugitive as it was apparent the crime would continue if she was not lodged** (misdemeanor lodging exception #3)." Emphasis added.

The arrest was made after CS reached outside the door and broke the plane of the doorway. The arrest occurred when CS was not completely in the house. The arrest did not violate the Employer rules concerning making an arrest.

According to the Under[A], Grievant contacted the County Prosecuting Attorney Office concerning "the harboring" allegation against CS. Charges were brought against CS and she was convicted. According to the [A], CS was charged with harboring and was convicted of that. According to MSP Trooper TP, CS was convicted on a "harboring a fugitive warrant." According to Grievant's June 14, 2022, email, "RB submitted the report today and [the County Prosecuting Attorney] sounds like he will likely issue for harboring on [CS]."

I find that CS in the fullness of time was rearrested for, charged with, and convicted on the harboring allegation. This helps support that the not-in-the-house arrest of CS by Grievant for CS harboring did not violate the Employer rules concerning making an arrest.

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

The Employer argues that in a prehearing video conference with me, the Employer sought an earlier date for the arbitration hearing but the first available dates offered by the Union were in February 2023. The Employer objects to being held monetarily liable for the delay in getting to a hearing in this matter. This argument does not control. During the course of the prehearing procedures, the Union wanted an in-person hearing and would not agree to a virtual hearing. The Employer was willing to do either an in-person hearing or a virtual hearing. The result of these viewpoints was that the in-person hearing was held on February 7, 2023. The events giving rise to the demotion occurred on June 14, 2022. The Employer originally demoted Grievant by notice dated July 25, 2022. On July 27, 2022, the [A] sent an email to Grievant, rescinding the demotion, due to the fact that no *Loudermill* hearing occurred prior to the demotion. After the *Loudermill* hearing was waived, the Employer again demoted Grievant on August 1, 2022. The Grievance was filed on July 25, 2023, and refiled on August 8, 2023. The Petition for Grievance Arbitration to MERC was dated September 9, 2022. The notification letter from MERC to me was dated September 26, 2022. My first communication to the parties was on September 26, 2022. The parties were offered November 2022 dates. The Union was not available for the November dates and on September 28, 2022, requested February and/or March, 2023, dates. This resulted in a Zoom meeting on October 6, 2022, to discuss the scheduling situation. That Zoom meeting ultimately led to the February 17, 2023, in-person hearing date being scheduled. The Employer did not make a motion that I order that there be a virtual hearing. See generally National Academy of Arbitrators Advisory Opinion No. 26, April 1, 2020.

It has been indicated that:

Delay in moving a grievance to arbitration extends the period of lost wages and potential employer liability. One arbitrator reduced an employer's liability for back pay because the employee or the

union had caused or contributed to delay in the arbitration process, but no such reduction was allowed where responsibility for the unreasonable delay in the arbitration process could not be placed on either the employee or the union. Some arbitrators generally will not sustain a remedy for delayed arbitration absent time limitations in the [CBA]. Elkouri & Elkouri, pp. 18-41 to 42. See generally Abrams, pp. 56-59.

The Employer argues that Grievant told CS to come out of the house and grabbed her arm, resulting in CS falling back into the house and Grievant and Deputy RB physically restrained and handcuffed her. RB's bodycam, Rx. 9; RB 00393188, 05:30 – 19:00, and Grievant's bodycam. Rx. 9; Grievant, 04:55 – 18:50. This argument does not control. The arrest was made after CS reached outside the door and broke the plane of the doorway. The arrest did not violate the Employer rules concerning making an arrest.

The Employer argues that Grievant had been issued a Documented Verbal Reprimand on November 19, 2021, because of his involvement in a motor vehicle accident involving his patrol vehicle. This argument does not control. There was no just cause for the demotion. The prior discipline would be relevant for assessing penalty if there had been just cause for the demotion.

The Employer argues that in demotion cases, the issue is whether the employee possesses the requisite level of skills and experience for the position and whether Grievant's conduct on the night of June 13, 2022, exhibited performance at a level insufficient to meet his dual responsibilities as a person in a command position to his superiors as well as his subordinates. This argument does not control. Grievant possessed the requisite level of skills and experience for the Sergeant position. Grievant received a Letter of Recognition on August 12, 2009, stating "our department is quite proud to have you as a member;" a "Great Job" letter on October 18, 2010; a "Job well done" letter on June 26, 2015, stating, "I have always known you to be a hard working cop. ... I know we can always count on your focused dedication and tenacity when you are handling a case;" a Commendation Letter "for his exemplary leadership and dedication" from the Michigan Attorney General on August 18, 2015; included in a Proclamation "Honoring the Investigators for the Hannon Siders Cold Case" from the City of Newaygo on November 9, 2015; and a Meritorious Service Award "for his courageous efforts in preventing further injury to an armed, deranged man along with preventing injury to police officers and civilians" on March 10, 2016. Under the CBA, the standard for me to use is "just cause." In part, because CS's arm broke the plane of the doorway, there were no rule violations by Grievant. CS was eventually convicted of her June 14, 2022, offense of harboring a fugitive. Neither the County Prosecutor nor the State authorities determined that Grievant had done anything inappropriate.

The Employer argues that during the meeting on July 25, 2022, with the [A] and the Under[A] to discuss the matter, Grievant failed to accept any responsibility for the way he conducted himself, asking, "Aren't I allowed to make a mistake" and criticizing their leadership abilities. This argument does not control. This statement was not one of the reasons given in the Notice of Demotion. CBA, p. 6.

The Employer argues that the case of *Richmond Heights (OH)*, 35 LAIS 54, 2006 WL 6827854 (Lanko, 2006), should be followed. This argument does not control. Arbitrator Lanko ruled in *Richmond Heights* that "grievant's unacceptable performance justified his demotion and suspension. ... Failure to perform up to the level expected of a supervisory employee justifies employer's decision to demote the grievant." According to *Richmond Heights*,

... The grievant's unacceptable performance justified his demotion and suspension. The instant hearing was convened to consider two grievances involving a police officer. The first grievance was filed to protest the grievant's demotion from sergeant to patrol officer. The Employer stated that the grievant was deficient in the filing of reports and had a poor disciplinary record. The Union claimed that the Employer improperly scrutinized the grievant's record and treated him differently than other officers. The Arbitrator determined that the grievant's performance was not up to the expected level

for a sergeant and, therefore, given the evidence provided by the Employer, the demotion was justified. ....

In the case before me, Grievant was not deficient in the filing of reports. Except for a Documented Verbal Reprimand on November 21, 2021, he did not have a "poor disciplinary record." There is no preponderance of the evidence that Grievant violated any of the cited work rules on June 13-14, 2022. His record as a Sergeant included letters of recognition and commendation as well as a Meritorious Service Award. I have seriously considered the *Richmond Heights* case. The case before me is different than the *Richmond Heights* case.

### Relief

The Union's Post-Hearing Brief states,

the Union ... asks [me] to grant the grievance, setting aside the demotion, reinstating [Grievant] back to his rank of Sergeant, and to make him whole, including the restoration of seniority, backpay and benefits. And, to remove the disciplinary action from his record. Moreover, that [I] award whatever else [I] deem[] to be just and equitable in this case. *Id.* at 21.

I have the authority to grant an appropriate remedy. Elkouri & Elkouri, pp. 18-1 to 18-14. Abrams, pp. 169 to 184.

The appropriate remedy is that the Employer action of demoting Grievant from Sergeant be vacated *nunc pro tunc* and that Grievant be reinstated to Sergeant and made whole.

### Conclusion

The crucial points in this case include:

1. The Employer has the burden of proof;
2. There is no evidence of dishonesty or mendacity by Grievant;
3. CS engaged in harboring a fugitive for which she was eventually charged and convicted;
4. Neither the County Prosecutor nor State authorities brought charges against or made adverse findings against Grievant;
5. CS's arm broke the plane of the door, resulting in CS not being completely in her house;
6. There is not a preponderance of the evidence that there was just cause;
7. The totality of the circumstances; and
8. The CBA.

### AWARD

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

The Employer action of demoting Grievant from Sergeant is vacated *nunc pro tunc*. Grievant shall be reinstated to Sergeant and made whole.

I retain remedial jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any questions that may arise over application or interpretation of a remedy. *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, Part 6, Section E. Elkouri & Elkouri, pp. 7-49 to 7-54.