

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

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INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the Fraternal Order of Police, Ohio Labor Council, Inc. and the City of Springboro, Ohio. The Union contends that the Employer terminated Police Officer, Brian C. Stewart, not for just cause. The Employer maintains that Mr. Stewart's termination was justified and was for just cause. Following the termination of employment, the Union filed a grievance challenging and appealing the action taken by the Employer (Jt. Exh. B).

The undersigned was selected by the parties pursuant to the Federal Mediation and Conciliation Service to conduct a hearing and render a binding arbitration award. The first day of hearing was conducted on November 18, 2009, and the hearing was concluded on the second day of hearing on December 15, 2009. The hearing was held at the Springboro City Hall. At the hearing the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of relevant exhibits.

The parties stipulated that the matter was properly before the arbitrator. Witnesses were sworn and sequestered. A record of the hearing was made by Therese Grycz from Grycz Reporting Service.

ISSUE

The parties agreed upon the following statement of the issue to be resolved by the Arbitrator.

"Was the Grievant discharged for just cause? If not, what shall the remedy be?"

WITNESSES

TESTIFYING FOR THE CITY:

Sgt. Daniel L. Bentley
Sgt. Aaron Zimmaro
Police Officer Nathan R. Anderkin
Lt. Tim F. Parker
Lt. Jon Wheeler
Chief Jeffrey Kruithoff
City Manager Christine Thompson

TESTIFYING FOR THE UNION:

Union Representative Mark Scranton
Police Officer Brian Hawk
Steven Nicholas Clark
Melody Meredith
Brian C. Stewart

RELEVANT PROVISIONS OF THE AGREEMENT

Article 1, General Provisions.

Section 1.1: Purpose

This Agreement entered into by the City of Springboro, Ohio, hereinafter referred to as the "City" and the Fraternal Order of Police, Ohio Labor Council, Inc. hereinafter referred to as the "OLC" or as the "FOP/OLC," or as the "FOP," or as the "Union," has as its purpose the following: To promote cooperation, and orderly, constructive and harmonious relations between the City, its Employees and the OLC;

To comply with the requirements of Chapter 4117 of the Ohio Revised Code except as otherwise provided herein; and to set forth the full and complete understanding and agreement between the parties governing wages, hours, terms and conditions of employment for those employees included in the bargaining unit as defined herein; and
To establish a procedure for the peaceful resolution of grievances.

Article 4, Management Rights.

The OLC recognizes and accepts the right and authority of the City to determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy, such as:

(K) To suspend, discipline, demote or discharge for just cause, layoff, transfer, assign, schedule, promote or retain employees;

Article 8, Grievance.

Section 8.4: Grievance Procedure

Step 4: Arbitration: If the grievant is dissatisfied with the decision of the City Manager, the matter may be taken to arbitration by the OLC by filing with the City Manager, within ten (10) days of his decision, a Notice of Intent to Arbitrate. Within ten (10) days thereafter, the City and the OLC shall by joint letter solicit nominations from the Federal Mediation and Conciliation Service for an arbitrator to hear the case. The arbitrator's decision and award shall be in writing and set forth all facts relied upon in making the decision. In developing the decision, the arbitrator shall have no power to add to, subtract from, contradict or otherwise modify the express terms of this Agreement.

When issued in accord with the procedures and limitations set forth above, the arbitrator's decision and award shall be final and binding on the parties. Both the City and the OLC shall share equally in the cost of the arbitrator. Any party requesting a transcript shall pay the cost thereof.

Article 10, Ordinances, Rules and Regulations.

Section 10.2: Rules and Regulations

The City has the right to promulgate reasonable work rules, policies and procedures consistent with its charter authority to regulate employees in the performance of the City's police services and programs. To the extent any work rules, policies and procedures have been or will become reduced to writing, every employee shall be provided copies.

Work rules, policies and procedures are to be interpreted and applied uniformly to all employees covered by this agreement under similar circumstances.

Article 11, Investigations and Discipline.

Section 11.2: Disciplinary Procedure

(A) No employee shall be disciplined except for just cause.

(B) The principles of progressive discipline will be generally followed with respect to minor offenses, but shall not be applicable to major offenses.

GRIEVANCE

The Union filed a Grievance Report Form in behalf of the grievant, Brian C. Stewart, on March 6, 2009 with the following information. Article and section number violation: Article 11, Section 11.2 (A) (B); Article 1, Section 1.1; Article 10, Section 10.2.

Statement of Grievance: On 03-06-09, my employment with the City of Springboro was terminated without just cause and contrary to progressive discipline.

Remedy Requested: 1. Reinstatement as a Springboro Police Officer. 2. Made whole for lost wages and all benefits. 3. All record of improper termination removed from my file.

BACKGROUND

The Grievant, Brian Stewart, has served as a Police Officer for the City of Springboro, Ohio for eleven years. On November 19, 2008 the Grievant was arriving on his shift, and he agreed to take a call regarding a citizen car lock out. This was confirmed by his supervisor, Sgt. Daniel Bentley. The City of Springboro performs lock out service for its citizens. This is a standing policy of the City as confirmed by City witnesses including its Chief of Police and City Manager. The citizen requesting assistance was Ms. Jessica Leach. Officers are instructed to use a "slim jim" to open locked cars. In the past some police officers used a different tool called a "pink lady," but now police officers were expected to uniformly utilize the "slim jim." While the City would prefer each police car to have a "slim jim," it is a fact that many do not. From time to time the City orders additional "slim jim" tools when it is discerned that a number are missing. It is a fact that there are always some vehicles that are equipped with the tool. The Grievant has a difficult time using the "slim Jim" and had better success using the "pink lady." While

there is no official training procedure regarding the use of the "slim jim," police officers are exposed to the use of the tool during on the job training. Opening locked out cars is a regular occurrence at the City of Springboro, and it is performed by most if not all police officers.

When Officer Stewart accepted the call, he knew there was no "slim jim" in the vehicle to which he was assigned. He also did not attempt to locate a "slim jim" in another police car prior to proceeding to the lock out at the local McDonalds Restaurant where Ms. Leach was waiting. Upon arriving at the scene, he observed Ms. Leach standing by her locked out automobile. Without exiting the police car, Officer Stewart stated the following to Ms. Leach. "We can't unlock your car. I don't have a lock out tool, and we are starting not to do lock outs. We can't even get into most modern cars now anyways. Someone I can call for you? I have to go. I got a priority call." (City Exh. 19A).

Ms. Leach placed a follow up telephone call to the City complaining that Officer Stewart did not unlock her automobile and that she knew the City of Springboro did lock outs for citizens.

Numerous witnesses for the City, including the City Manager, testified at hearing that the City of Springboro continues to perform lock outs as a service to its citizens. The City has not contemplated an end to this service, and the "slim jim" tool is often effective in opening newer models of automobiles.

On December 8, 2008, Sgt. Bentley issued a "Memorandum of Coaching and Counseling" to Officer Stewart regarding the incident with Ms. Leach. The Memorandum summarized the discussion Sgt. Bentley had with the Grievant in regards to his untruthful statements to the citizen and the manner in which the lock out was handled. The Memorandum stated, "We have discussed what is expected from you when responding to a call for assistance and I anticipate no further problems with regards to this. An ESL entry will be made documenting this Coaching and Counseling." (City Exh. 11A)

During the meeting which resulted in the Memorandum, Officer Stewart stated to Sgt. Bentley that Lt. Wheeler had stated to him that it was acceptable to tell a citizen that "you don't have a lock out tool" if you know you will not be able to open a locked automobile. Mr. Stewart made this statement a number of times. Sgt. Bentley approached Lt. Wheeler about this statement, however Lt. Wheeler insisted that he never made a statement of this nature.

On December 23, 2008 Sgt Bentley informed Lt. Wheeler of the statement made by the Grievant. Officer Stewart was confronted by both managers and made a number of statements which essentially ended in his assertion that Lt. Wheeler had instructed him to lie if necessary to citizens regarding lock outs. (City Exh. 2A) Lt. Wheeler insisted that he never made any such statement. He informed Chief Kruithoff regarding the matter, and the Chief directed him to investigate the matter further.

On December 15, 2008 Grievant responded to a call from the local CVS Pharmacy regarding a suspicious individual in a car who appeared to be injecting himself with an undetermined substance. Mr. Stewart drove to the CVS parking lot and observed the individual injecting himself with a syringe. As it appeared the suspect was lunging toward the officer with the syringe, Officer Stewart pulled out his service weapon and ordered the suspect to leave his vehicle and lay on the ground. Police Officer Anderkin also arrived on the scene and assisted the Grievant in handling the suspect. Officer Stewart stated that he believed illegal drug usage was involved. Sgt. Bentley arrived on the scene, and Lt. Parker also arrived on the scene briefly to determine if any additional assistance was needed.

The suspect, Mr. Lotter, was then transported to Sycamore Hospital for testing of illegal drug use. Officer Stewart followed the ambulance to the hospital while Sgt. Bentley and Officer Anderkin took an inventory of the suspect's vehicle. The car was then towed to an impound lot, and a "holder" was placed on it in order that it could be held until it was determined if the suspect was using illegal drugs and what charges the City may bring against him. Although Grievant did not place the holder on the suspect's automobile, he was responsible for the administration of the impoundment since he was the arresting officer. Grievant was the contact for Mr. Lotter regarding retrieval of his automobile. As there was a pending investigation regarding Mr. Lotter, his automobile was not to be released until the results were known. Therefore the "holder" was placed on the vehicle. It would be necessary for the

suspect to retrieve his vehicle in person in order that he could personally receive appropriate charges if any.

On December 18, 2008 Mr. Lotter called the Grievant regarding the release of his automobile and advised that his father would retrieve the vehicle. The Grievant indicated that a "holder" had been placed on the vehicle and that his father was not authorized to make the retrieval. It is not clear if the Grievant stated to Mr. Lotter that the automobile may be "forfeited." At a later time Mr. Lotter called Sgt. Bentley to complain that he was being given the run around regarding retrieval of his vehicle. who responded that only he, rather than his father, could retrieve the vehicle after a determination was made regarding charges and that he should contact Officer Stewart. During this time the keys to Mr. Lotter's automobile appeared in Officer Stewart's mail box. It is unclear who placed the keys in his box.

During this time the Grievant approached Sgt. Zimmaro regarding the release of the Lotter vehicle. Zimmaro was not familiar with the details of the case. Sgt. Zimmaro testified that the Grievant told him that Lt. Parker had placed the "holder" on the vehicle because the City was pursuing "forfeiture" of the Lotter automobile. Forfeiture is a legal process in which the court turns the ownership of a vehicle over to the public jurisdiction. It is a lengthy process and is rarely used by the City of Springboro. It requires action by the Prosecutor and a court order. Officer Nathan Anderkin testified that he was a witness to this conversation, that Mr. Stewart

stated to Sgt. Zimmaro that Lt. Parker wished to pursue forfeiture of the vehicle because the case involved drugs.

Sgt. Zimmaro informed Sgt. Bentley and Lt. Parker of this conversation. Lt. Parker denied making this statement to Officer Stewart. Sgt. Bentley approached the Grievant regarding the statement. Grievant stated to Sgt. Bentley that Lt. Parker placed a "holder" on the vehicle for the purpose of forfeiture.

Officer Stewart informed Mr. Lotter regarding the process of retrieving his vehicle, and eventually the automobile was returned to him.

The City initiated a formal investigation into the actions and statements of the Grievant. Witness statements were gathered, and the Grievant was interviewed on two occasions in the presence of the union representative. Then on February 13, 2009, Chief Kruithoff issued a notice of pre-disciplinary hearing as required by the collective bargaining agreement. The Union and Grievant waived the pre-disciplinary hearing. Police Chief Kruithoff issued a recommendation of termination of employment on March 4, 2009. (City Exh. 8B) City Manager, Christine Thompson, confirmed the termination by letter on March 6, 2009. (City Exh. 9B)

On March 6, 2009 the Union filed a grievance and Notice of Intent to Arbitrate appealing the termination of Brian Stewart. The matter was heard by this Arbitrator on November 18, 2009 and December 15, 2009.

POSITION OF THE CITY

The City of Springboro argues that it has presented sufficient evidence to discharge the Grievant based on repeated dishonesty. The City states that it has provided clear and convincing evidence to meet its burden of proof. The City argues that it has met its "seven part Daugherty test for just cause" in that the Grievant had forewarning of the probable disciplinary consequences of his actions; the City's rule regarding dishonesty was reasonable especially based upon the nature of police work and its relationship to the community; a thorough investigation regarding violation of the City's policies was conducted; the investigations were fair and objective; there was substantial evidence that the policy violation occurred; rules were applied in an even handed manner; and the degree of discipline was reasonably related to the offense.

The City argues that the Grievant must be held to a higher standard of conduct as law enforcement officers have a greater responsibility to the general public than the average citizen. The City points to *Jones v. Franklin County Sheriff (1990)*, 52 Ohio St. 3d 40, 43 as the

foundation for this position. The City states that its witnesses at hearing testified to the critical nature of honesty in the work life of a police officer. Even Officer Anderkin, a member of the bargaining unit, testified that honesty is critical: "It's the oath you take when you are hired." The City argues that the Grievant is completely aware of the standards regarding honesty.

The City goes on to argue that arbitrators have generally held that honesty is an essential requirement for law enforcement officers. City witnesses testified that any form of dishonesty on the part of a law enforcement officer, both external and internal, may inhibit the ability to give testimony in court. The City cites a number of arbitration cases supporting this contention. The City states that the evidence shows clearly that the Grievant was dishonest to citizens and to members of the Police Department.

The City further argues that the Grievant knowingly and purposely lied to Ms. Leach. He had no intention of assisting Ms. Leach in opening her automobile as he did not even possess the lock out tool. His statements that the City was starting to not do lock outs and that it was not possible to unlock newer vehicles were untrue. When Ms. Leach followed up with a complaint regarding the Grievant, he attempted to cover up his actions by stating that Lt. Wheeler told him that it was acceptable to make false statements regarding the inability to unlock automobiles. This became the second false statement of the Grievant in this incident.

The City contends that the Grievant was dishonest again regarding the impounding of the Lotter automobile. Grievant was familiar with the "holder" process, and he was also aware of "forfeiture." After having a conversation with Mr. Lotter regarding the retrieval of the vehicle, Grievant approached Sgt. Zimmario to cover himself in the event Mr. Lotter filed a complaint against him. Grievant stated to Sgt. Zimmario that Lt. Parker had said to him that a "holder" had been placed on the vehicle in order that it would be forfeited to the City of Springboro. This statement was witnessed by Officer Anderkin. Lt. Parker never made this statement. He had minimal if any involvement in the Lotter arrest and case. The testimony of Parker, Bentley, Zimmario and Anderkin contradict statements made by the Grievant. Although the Grievant stated during the City's investigation that his statements had been taken out of context, there is no other evidence to substantiate this claim.

The false statements regarding the Lotter incident violate the Department's specific rules regarding dishonesty.

The City argues further that the Grievant failed to follow departmental policy when he failed to perform the lockout for Ms. Leach as well as not returning Mr. Lotter's vehicle in a proper manner. The Grievant's dishonesty was caused by his initial failure to assist these citizens in the appropriate manner based upon City procedures.

The City submits that it conducted a fair and complete investigation. Additionally the Grievant was given ample opportunity to take responsibility for dishonest statements, but he failed to do so. The overwhelming statements, witnesses and recordings which contradicted the Grievant were presented at arbitration. Recordings made by the City were legal and appropriate.

The Union's challenge to the role Lt. Wheeler played in conducting the investigation for the City, based on his involvement in the case, lacks merit. The City has allowed fact witnesses to conduct internal investigations, and the City followed the collective bargaining agreement in the conduct of the investigation and disciplinary process. The Grievant waived his right to a pre-disciplinary hearing, therefore providing no evidence to refute the charges of the employer.

Arbitrators have sustained termination of employment for violations of rules of honesty in cases of police officers. "Police officers must be able to present unchallenged testimony as to the events they witness. Grievant's intentional lies are fatal to his ability to operate as a police officer." The City states that it "is not bound by the tenets of progressive discipline for serious or 'major offenses' like dishonesty." It cites Article 11, Section 11.2 (B) of the collective bargaining agreement as its authority to terminate the Grievant.

The Union's case failed to refute the City's evidence against the Grievant. Union witnesses failed to testify to the Grievant's credibility or honesty. Although the Union implied that the

City attempted to subvert its case at arbitration by not delivering subpoena's in an appropriate manner, none of the witnesses testified that this was true including Ms. Meredith, the Dispatcher.

In response to the Union's argument that the Grievant was already disciplined regarding the Leach incident when the City issued a Memorandum of Coaching and Counseling, the City maintains that a memorandum of this nature is not discipline based on the collective bargaining agreement. Discipline starts at the reprimand level. The Union cannot argue "double jeopardy."

Finally the Grievant was not treated in a disparate or discriminatory manner. While the Union argued anti union animus, it failed to produce any evidence. The Union never filed an unfair labor practice charge to the Ohio State Employment Relations Board. Grievant was terminated based on his lies to the public and members of the police Department.

The City's decision to discharge Grievant is based on violation of internal rules, dishonesty and the higher standard of conduct placed on law enforcement officers. Therefore the City had just cause to terminate the employment of the Grievant. The City asks the arbitrator to uphold the discharge of the Grievant.

POSITION OF THE UNION

Officer Brian Stewart has been a full time police officer for the City of Springboro for eleven years. His overall disciplinary record is "uneventful." He has never been suspended and has had a few counselings. There is no active discipline in his file at this time.

Officer Stewart volunteered to take the Leach lock out on November 19, 2008. The Grievant explained that he did not have a lock out tool and offered to call a tow truck. The Union admits that he did mislead her when he stated that the City is beginning to no longer do lock outs. Grievant left the McDonald's parking lot when an emergency call came over the radio.

Following this incident, the Grievant's supervisor, Sgt. Bentley, issued a Memorandum of Coaching and Counseling for his conduct in dealing with Ms. Leach, and he considered the Memorandum the end of the matter.

On December 15, 2008, the Grievant was dispatched to CVS regarding Mr. Lotter injecting a liquid into his arm while he sat in his vehicle. Following the arrest of Mr. Lotter by the Grievant, the suspect was transported to the hospital, and the Grievant followed. Sgt. Bentley and Officer Anderkin had the vehicle towed. Sgt. Bentley authorized the placing of the "holder" on

the Lotter vehicle. A number of days later, the Grievant received a voice mail from Mr. Lotter inquiring about the retrieval of his vehicle. Mr. Stewart instructed Mr. Lotter regarding the retrieval of the vehicle, the same information that was provided by Sgt. Bentley.

The Union argues that arbitrators "closely scrutinize discharge cases because of the stigma attached to discharge." It is a catastrophic penalty. The quantum of proof in discharge cases is higher than in non discharge cases. The Union cites a number of arbitration cases to support its argument.

Article 11.2 of the collective bargaining agreement states that an employee is not to be disciplined except for just cause. The City as employer agreed to this just cause standard. An important component of just cause is progressive discipline.

On December 23, 2008, Sgt. Bentley issued a Memorandum of Coaching and Counseling to the Grievant regarding the Leach lock out incident. Sgt. Bentley considered the matter closed. The City then included the Leach incident as one of the charges against the Grievant which ended in discharge. The Union argues that, to include the Leach incident in the charges, subjects the Grievant to double jeopardy. The Union quotes *Elkouri and Elkouri*, "Once discipline for a given offense is imposed and accepted, it cannot thereafter be increased, nor may another punishment be imposed, lest the employee be unfairly subjected to "double Jeopardy."

The City found the Grievant guilty of violating the "chain of command" regarding a scheduling issue and replacement items for his uniform. The Union states that this issue was never part of the investigation of the Grievant and should not now be considered as a part of this case. These were minor issues that do not rise to the level of discipline.

The Grievant was found guilty of failing to fill out a portion of the Lotter report. But based on uncontroverted evidence at hearing, it is clear that the report was completed by Officer Anderkin at the direction of Sgt. Bentley since the Grievant followed the suspect to the hospital.

The Grievant is not guilty of lying to Mr. Lotter. Mr. Stewart instructed Mr. Lotter in the proper process of retrieving the vehicle, that he would be required to appear at the Police Department. Mr. Lotter contacted Sgt. Bentley because he felt he was getting the run around because his father could not retrieve the vehicle for him. In essence, Sgt. Bentley confirmed with Mr. Lotter what the Grievant had stated to him.

The City should not have terminated the Grievant regarding the Leach incident. He never disputed that he handled the call unprofessionally. He was already disciplined for this incident.

The Grievant disputes stating that Lt. Wheeler instructed him to lie to the public. In any event this was a conversation that took place years ago. No one has a perfect memory regarding such conversations. "If Officer Stewart was lying about his memory of the conversation, it would make no sense for him to repeatedly remind the Sgt. to follow up on it." This was a misinterpretation. Officer Hawk testified that he remembered a conversation about the "pink lady" that occurred about four or five years ago, and this discussion involved Stewart and Wheeler.

The allegation regarding Lt. Parker comes from Sgt. Zimmaro's interpretation of the Grievant's statement on December 18, 2008. His interpretation makes no sense because the Grievant did not tow the Lotter vehicle, and he did not place the "holder" on the vehicle. The Grievant was only looking for some guidance from Sgt. Zimmaro regarding the release of the vehicle. Officer Anderkin provided two alternative phrases based on what he may have heard when the Grievant took the matter to Sgt. Zimmaro. Officer Anderkin knew that Lt. Parker did not put the hold on the vehicle because he himself initiated the "holder" at the direction of Sgt. Bentley. No one is able to answer what exactly the Grievant stated to Sgt. Zimmaro. The Grievant did not lie to Sgt. Zimmaro. The Grievant does remember a conversation he had with Lt. Parker regarding the procedure used to "seize" a vehicle. This was a conversation that had taken place in the past. The City's position that the Grievant was intentionally dishonest makes no sense.

Other police officers at the City of Springboro have intentionally lied to managers and received less discipline. Officer Anderkin lied to a sergeant and received a one day suspension. Officer Coleman lied to Lt. Wheeler about an automatic weapon and received less than a 30 day suspension. The Grievant has been subjected to disparate treatment, and, it must be noted, served as a Union associate during the previous collective bargaining negotiations with the City.

The Union argues that termination is not the appropriate level of discipline based on the collective bargaining agreement between the parties. The Ohio Supreme Court has determined that an arbitrator has the authority to review the appropriateness of imposed discipline. The Union cites a number of cases regarding this arbitral authority. "This Agreement between the Employer and the FOP does not restrict this Arbitrator from reviewing the appropriateness of the level of discipline imposed. That being the case, even if this Arbitrator were to find just cause exists for some level of discipline, this Arbitrator must review the penalty imposed and determine whether it is too severe under all the circumstances of the situation."

The Union also argues that the Grievant's employment history and lack of prior discipline play a mitigating factor in the decision to be rendered. Just cause requires the Arbitrator to see the total employment history. It is clear that the Grievant had no prior discipline during his eleven years of employment with the City except for minor counseling. Discipline within the just cause context is designed to correct behavior and not to punish to set an example. The Union states

that the termination in this case is unduly harsh, arbitrary and capricious and should at the very least be mitigated.

All of the witnesses at arbitration made mistakes in their testimony based on their memory of events. The Grievant should not be held to a higher standard. If the Grievant believes what he heard was accurate, then he cannot be charged with dishonesty by the City.

The Union had made a reasonable request for a continuance to allow for a witness to testify who was out of town. The City refused. Officer Hawk had difficulties in accessing the Union's subpoena at city hall. The discharge of the Grievant is based upon hostility of the Union on the part of the City.

The Union requests the arbitrator to sustain its grievance in behalf of Brian Stewart and to reduce the discipline to an appropriate level, if any, and order the City to reinstate the Grievant with full back pay, benefits, seniority based on just cause and corrective discipline.

DISCUSSION

The seven part *Daugherty* test for just cause is a recognized foundation for a disciplinary case and is used as a guide by many arbitrators. It is a guide that this Arbitrator has utilized in analyzing this case.

The evidence clearly indicates that the Grievant was dishonest with Ms. Leach regarding the lock out. He never had any intention of attempting to unlock her automobile as he was aware that he left the Police Department without a lock out tool. Ms. Leach knew that the City performed lock outs and called to complain regarding the behavior of Officer Stewart. The Grievant had not anticipated that this young lady would follow up and catch him in his dishonesty and failure to assist. The Grievant was interviewed by his supervisor, and a Memorandum of Coaching and Counseling was issued.

The Union argues that to make the Leach incident a part of the discharge case is double jeopardy because a counseling memo is a low form of discipline. The City argues, and its witnesses testified, that a counseling memo is not discipline. Instead discipline begins at the reprimand level.

The answer to this dispute is resolved by the collective bargaining agreement between the parties in two sections. Article 11, Section 11.1 (G) states the "Violations sustained at this pre-disciplinary conference may result in disciplinary action ranging from an oral warning or counseling up to and including termination of employment." This statement makes it clear that the parties include counseling as an appropriate form of discipline. Article 12, Section 12.1 states in part that "Discipline resulting in no more than a verbal or written warning or counseling shall cease to have force and effect after one (1) year of continuous full time employment without discipline." Again, the parties have bargained that counseling is a low level discipline. Therefore the argument proffered by the Union that this is double jeopardy is sustained. The Grievant was disciplined for his dishonesty toward Ms. Leach when he was presented with the Memorandum of Coaching and Counseling.

Rather than view the Leach incident as part and parcel of the instant case before the Arbitrator, the Memorandum of Coaching and Counseling is viewed as a stand alone disciplinary action and may instead be considered in the light of progressive discipline.

The Grievant insisted that Lt. Jon Wheeler instructed him that it was acceptable to give misinformation to citizens regarding lock outs. These statements by the Grievant occurred during and following the issuing of the Memorandum of Coaching and Counseling. Lt. Wheeler states that he never made such statement and acted surprised when learning what had been

said by the Grievant. Knowing that the Grievant made an untruthful statement in the previous discipline regarding Ms. Leach, this Arbitrator must consider the credibility of the actors. Lt. Wheeler is a sixteen year veteran of the Springboro Police Department. He has served as a police officer, officer in charge, field training officer, sergeant and currently a lieutenant. As a manager he must enforce policies and procedures of the City. Lt. Wheeler claims that he never made the statement to the Grievant. It is his responsibility to ensure that lock outs are performed for Springboro's citizens. During the investigation of this case, he pressed the Grievant about the statement and never received a clear explanation. It is clear that the Grievant was dishonest when he stated to Sgt. Bentley that Lt. Wheeler indicated that it was acceptable to make false statements regarding lock outs.

Following the arrest of Mr. Lotter and the subsequent towing of his vehicle, the Grievant approached Sgt Zimmaro, an eleven year veteran of the Police Department, at shift change and engaged him in a conversation regarding the incident. The Grievant indicated that Mr. Lotter had been calling him in order to make arrangements to retrieve his vehicle. Sgt. Zimmaro was not familiar with the case, and he asked for more details from the Grievant. Sgt. Zimmaro then asked why a "holder" had been placed on the vehicle. Sgt. Zimmaro testified at hearing that the Grievant stated "that Lt. Parker had asked him to place a holder on the vehicle due to the possibilities of going after the vehicle for forfeiture due to felony drug offense." This statement by the Grievant was witnessed by Officer Anderkin, a member of the bargaining unit.

It is clear from the record of this case that Lt. Parker did not have this conversation with the Grievant. It is also clear from the record that the Grievant made this statement to Sgt. Zimmaro. During the investigation into this matter, the Grievant indicated that perhaps he remembered a more general statement made by Lt. Parker in the past about the process of forfeitures, an excuse similar to that used in the Wheeler incident. The Union argues that memories are inaccurate, and that the Grievant did not make an intentional false statement. Nevertheless it is clear that the Grievant did in fact make this statement very specifically regarding the Lotter vehicle. It is clear that this was a dishonest statement. What is unclear to this Arbitrator is the intent. Was he worried that Mr. Lotter felt the Grievant was being less than forthcoming and would report him to management? The City makes this argument, but there is no way to substantiate that claim or charge. What is a violation of policy and good police work is that the Grievant knowingly made a dishonest statement to a supervisory employee. Grievant's explanation during the investigative interviews was vague and fuzzy as it was at arbitration.

The City argues that the Grievant is in violation of the "Chain of Command" based on inquiries regarding a training schedule and uniform items. The City attempts to paint a picture of an employee who shops for answers and is manipulative. While the Grievant's actions may be an irritant to the Department, they do not rise to the level of disciplinary action in the instant case.

The City also argues that the Grievant was not diligent in completing the paperwork in the Lotter vehicle towing. Other employees were responsible for completing the documents due to the fact that the Grievant followed Mr. Lotter to the hospital. There is no clear evidence that the Grievant was guilty of a policy violation in this respect.

The City also charged the Grievant with intentionally delaying the return of Mr. Lotter's vehicle in violation of policy. There is no clear evidence that the Grievant intentionally delayed the return of the vehicle. It appears that the Grievant may have been concerned that Mr. Lotter would bring a complaint against him, thus the dishonest statements regarding Lt. Parker, but Sgt. Bentley gave the suspect the same or similar information as was provided by Officer Stewart.

City Exhibit 8 B is the Notice of Investigative Findings issued by Chief Jeffrey Kruithoff following the investigation of the Grievant and offer by the City for a pre-disciplinary hearing. This document is the basis of the discharge of the Grievant and was adopted by the City Manager. It contains multiple policy violations on the part of the Grievant. Many of the charges are repetitive of one another. This case comes down to the following: Grievant lied to Sgt. Bentley when he stated that Lt. Wheeler instructed him that it was acceptable to make dishonest statements to the public regarding lock out calls. Second, the Grievant lied to Sgt. Zimmaro when he stated that Lt. Parker authorized the placing of the "holder" on the Lotter vehicle for

the purpose of forfeiture. These two incidents come on the heels of the Grievant being counseled (disciplined) for making an untruthful statement to a member of the public, Ms. Leach.

The Union argues that the Grievant is targeted by the City on the basis of anti union animus. It states "Hostility towards the Union in Springboro is nothing new." Nevertheless the Union offered no testimony or evidence that the City discriminated against the Grievant or any other union member on the basis of union activity or membership. The Union's regional staff representative testified at hearing and presented no testimony to support the proposition that the Grievant was targeted due to his Union activity or that there is hostility toward the FOP at the City. It appears that the Union has not filed an unfair labor practice charge against the City of Springboro nor grievance alleging anti union bias. There is no foundation for this challenge to the discharge.

The Union argues further that, as proof that there is a thread of anti union bias, subpoenas issued for the hearing in the instant case were not properly delivered to Union witnesses. There did seem to be some confusion in the delivering of the subpoenas, and this Arbitrator urges the parties to develop a mutually agreed process for the future. Witnesses did appear at the hearing, and Ms. Meredith, a Dispatcher, testified that she was not aware of subterfuge in the manner in which the City handled the subpoenas.

The Union suggests further that the City refused a continuance of the second day of hearing to allow for a witness to testify who was out of town. It is true that the City indicated its desire to move the case forward, but the Arbitrator indicated that he would make the call. He advised the parties that it was imperative that each side have full opportunity to put on its complete case. At this point the Union indicated that it was prepared to move forward without the witness and declined the suggestion by the Arbitrator that a short continuance could be considered.

The Union argues that discharge is too severe a penalty in a case of this nature. Numerous cases are cited regarding reduced penalties of discharge to lesser discipline by Arbitrators. In the case of *Ohio Department of Youth Services, 96 LA 916 (Dworkin, 1991)*, Arbitrator Dworkin reduces a disciplinary penalty and states "why use a cannon when a pea shooter will do the job?" This is a sound analogy and one to which this Arbitrator subscribes. The question in this case though considers whether a dishonest police officer is able to function in his role as a law enforcement officer. The answer to this question may well require the "cannon." The Union also reminds the Arbitrator that the Ohio Supreme Court has also held that an Arbitrator has the authority to review and revise the level of imposed discipline.

The City cites a number of cases which involve dishonesty of police officers. Arbitrators have determined that discharge is an acceptable penalty in light of the higher standard expected of officers of the law. An Ohio court reinforced this theory in *Jones v. Franklin County Sheriff*, 52 Ohio St. 3d 40, 43 (1990)

The Grievant took an oath of office as a Springboro police officer. Inherent in this oath is the standard to be truthful and honest. As an eleven year employee of the department, he is aware of the possible consequences that dishonesty may bring. The Grievant had just been counseled for dishonesty over the Leach incident. The various rules of the City regarding honesty are essential for a functioning organization that is responsible to the public. The City completed a thorough investigation of the incidents, and the Grievant had ample opportunity to admit to the violations. Had he done so, the City may have considered a different level of discipline. The investigation was fair. Union representation was afforded the Grievant. Although other employees may have received a lesser penalty when it was determined they engaged in dishonesty, the circumstances in the cases referenced were different. In one case, the employee recanted his false statement and admitted his error in a timely manner. He nevertheless received a substantial suspension. Finally, the question of appropriate penalty in this case must be determined

Article 11, Section 11.2 (A) states that "No employee shall be disciplined except for just cause."

The Union relies heavily on this provision of the Agreement.

Article 11, Section 11.2 (B) states "the principles of progressive discipline will be generally followed with respect to minor offenses, but shall not be applicable to major offenses."

Is dishonesty a major offense? City Exhibit 4 A is the "Manual of Rules and Regulations, Code of Ethics and Disciplinary Process for the Springboro Police Department." Section 2.35 of this manual is entitled "Dismissal." It states that "Any member may be dismissed from the Division when proven guilty of any of the following." Dishonesty is listed as the third bullet in a list of offenses which may lead to discharge. Based on this policy, the City has incorporated dishonesty as a major offense.

In *Jones v. Franklin County Sheriff*, 52 Ohio St. 3d 40, 43 (1990), the court held that police officers are held to a higher standard. "Law enforcement officers carry upon their shoulders the cloak of authority of the state." The court in this case enforced the discharge of a deputy sheriff for dishonesty.

Arbitrator Harry Graham, in the case of *Clark County Sheriff and FOP/OLC, FMCS Case No. 97-14112, 1998*, upheld the discharge of a deputy sheriff. He stated the following. "It is unnecessary to belabor the fact that untruthfulness on the part of a law enforcement officer must be regarded as a very serious offense. It breaches the bond of trust that must exist between law enforcement agencies and the community. Providing false testimony to the Department calls into question the reliability of testimony that an officer might provide in a Court of Law. The Department cannot be placed in the position of having testimony impeached due to untruth in an internal investigation. It is unnecessary to delve into the question of whether or not the Employer followed the principles of progressive discipline in this instance. The offense committed by the Grievant was serious. It struck at the heart of the responsibility of a law enforcement officer. By his actions Deputy Ake has provided the Employer with the requisite just cause for discharge." Arbitrator Graham, a long tenured and respected practitioner, sets out a clearly annunciated guide in cases of internal dishonesty by law enforcement officers.

In the case of *Montclair, 127 LA 32* the Arbitrator upheld the discharge of a police officer who made a false statement regarding an off duty incident. The Grievant had many years of service with the City and an excellent work record. But now the Grievant's credibility in respect to his ability to testify in court, which is an essential element of a police officer's duties, is seriously

called into question. "This rule is unfortunate as it holds sworn officers to a higher standard in this one particular fact of their lives...."

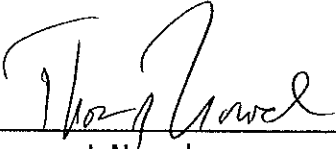
Likewise in the case of *Fort Worth*, 127 LA 41, the Arbitrator upheld the discharge of a police officer for dishonesty because he lost the ability to effectively testify in court in behalf of the City.

In the instant case, Brian Stewart lied on two separate occasions after having received a disciplinary counseling for dishonesty to the public. Based on City policy, this is a major violation of the disciplinary code. The discharge of the Grievant is therefore supported by Article 11, Section 11.2 (B), and the Arbitrator is bound to honor this provision of the collective bargaining agreement. Dishonesty on the part of the Grievant seriously impedes his ability to perform his duty as a law enforcement officer for the City of Springboro especially in the role of providing testimony, that would not be impeached, in a court of law in behalf of the Department. This is a critical facet of his job description and a requirement for all law enforcement officers.

AWARD

The Grievant was discharged for just cause. The grievance of Brian C. Stewart is denied.

Signed and dated this 25th day of February, 2010 at Maineville, Ohio.



Thomas J. Nowel
Arbitrator