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IN THE MATTER OF THE ARBITRATION

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CITY OF CHAMPAIGN

and

FMCS 15-00442  
Grievance 14-1014  
Discharge

ILLINOIS FRATERNAL ORDER OF POLICE,  
LABOR COUNCIL  

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Appearances: For the Union: Tamara Cummings, Esq.  
Legal Counsel  
For the City: Jennifer Bannon, Esq.,  
Legal Counsel

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the Federal Mediation and Conciliation Service. Hearings were held in the above matter on February 6 and March 13, 2015 in Champaign, Illinois. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to do closing arguments. The arbitrator has considered the testimony, exhibits and arguments of the parties.

ISSUE

The parties stipulated to the issue:

Did the Department have just cause to discharge the Grievant? If not, what is the appropriate remedy?

BACKGROUND

The FOP, Labor Council, hereinafter referred to as the Union, represents the police officers employed by the Police Department of the City of Champaign, hereinafter referred to as the Department. It has a Collective Bargaining Agreement with the Department that began on July 1, 2012.

Grievant was hired on February 8, 2010 as a Patrol Officer. He was working on the night shift at the time he was discharged. During his time with the Department he had a reputation as a very proactive officer. Along with Grievant's many arrests, there were many occasions where force was required. He was among the leaders in both arrests and incidents involving use of force. In all of the instances but one, it was found the force used was justified. He was counseled on December 15, 2012 regarding his use of force in a particular incident. The Department also was concerned that he often did not seek to deescalate a situation and thought additional training might be helpful.

Many of Grievant's colleagues testified about Grievant's ability as a patrol officer. Each indicated he or she felt confident in situations where Grievant was the officer's backup. They all noted how he often responded for requests for assistance quicker than most. His training officer testified he thought Grievant was one of the best trainees he had.

Grievant notwithstanding the praise had incurred prior discipline. [REDACTED]  
[REDACTED] He was reprimanded on January 30, 2012 regarding an accident in which he was involved. He was reprimanded again on September 27, 2012 over his operation of a vehicle. He was also counseled in February of 2012 for being discourteous and on April 29, 2013 for missing an assignment. Counseling is not considered discipline.

#### DISCUSSION

There were three separate incidents that led to Grievant's discharge. The Arbitrator will first describe the facts of each incident. He will then discuss the problematic issues surrounding the incident and give his findings regarding that incident. He will then discuss the appropriateness of the decision to discharge Grievant based on his findings regarding these incidents.

The first incident occurred on March 13, 2014. Grievant had made a traffic stop. He issued a citation. A ticket is supposed to be turned in immediately so it can be processed. The Officer also must record the information on the computer. Grievant was charged with not turning in the ticket and for failing to file the report. It was later learned there was a problem with the software and reports were sometimes deleted by the computer.<sup>1</sup> This allegation was then dropped. Grievant acknowledged he forgot to turn the ticket into the Department. He put it in a folder and forgot about it. He was interviewed regarding this incident on May 14 and again on June 18. He acknowledged on both occasions he was wrong. He also admitted that during the hearing. It was recommended Grievant receive a one-day suspension for this failure. Grievant does not challenge the conclusion and agrees this level of discipline was appropriate for this offense.

The Arbitrator does not disagree. He did forget to turn in the citation. There are consequences to that failure for the parties concerned. It can effect insurance claims and have other ramifications. Grievant acknowledged this is so. Thus, the Arbitrator can find no fault with the Department's conclusions regarding this incident. Grievant did what he was charged with doing and was appropriately disciplined.

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<sup>1</sup> Exhibit 16, page 3.

The second incident occurred on April 11, 2014. There was a significant disturbance caused by several people including two sisters. Several officers were dispatched. Grievant was one of them. He was not the lead officer but there to assist. He took control of one of the sisters. That individual had thrown a chair at another participant in the altercation. Officers have cameras in their patrol cars. Since there were many officers present, there were several cameras recording the event. The cameras also have audio so that much of the discussion between the officers and the individuals at the scene can be heard.

Grievant when he took control of the sister got into a discussion with her. He at times used profanity. He was also belligerent towards her. He eventually escorted her towards a squad car. She was resistant as she wanted to go to her sister. Grievant at one point grabbed her shoulder to move her along. She then spit in his face. Needless to say this escalated the matter. He got her to the squad car, but she was not getting into it voluntarily. Her legs were still outside the car. He kicked her legs to get them into the car. He appears to have done that twice.

Grievant subsequently filed his report regarding the incident. In the report, he did not note he had to grab her arm to move her along and also failed to note his kicks to her legs. The Department investigated the incident and found fault with Grievant. His use of profanity and how he handled the situation were questioned. His failure to record these physical events in his report was also found to be improper. It was determined the first of the two kicks was in accord with Department Policy in that she was not getting into the car and the kick was a method that can be used to gain compliance. It did question the second kick. Officer Spensley was present during the time Grievant placed the woman in the car and stated he did not see anything done improperly.

Grievant was asked about this incident during his May 15 interview. He was asked if he thought the kicks were reasonable. He said yes and no. He then explained: "yes, because she was resisting my efforts to place her in the car and no. I would say no just because there were so many officers there I could have just removed myself from the scene and had somebody else do it." Grievant was interviewed a second time on June 18, 2014. Lieutenant Swenson asked again if he thought the kicks were reasonable. He said he felt they were. The Lieutenant then stated he thought this response might be: "in conflict with what you said during your fact finding, but I will have to look back."<sup>2</sup> They were actually not in conflict. Grievant said in both cases the kicks themselves were reasonable. His caveat was that he should have exculpated himself from the situation given what had occurred, especially after she had spit in his face.

The Department concluded this incident warranted a three-day suspension. Again, Grievant does not challenge this conclusion. He admitted he used profanity and did not act professionally during the encounter. He also acknowledged he did not include in his report the kicks or that he had grabbed her arm when escorting her to the car.

Once more, the Arbitrator agrees with the Department's findings as to this incident, except he does not agree the second kick was shown to be inappropriate. Looking at the video of the incident it is hard to determine where the woman's legs were when the second kick occurred. Testimony was that she still was not completely in the car. The video is not clear enough to contradict that testimony. The Arbitrator does agree

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Grievant was not acting professionally during the encounter. He should not have used profanity and he was to an extent baiting her. It was recommended Grievant receive additional training following this and the first incident to show him how he might better handle these confrontational situations. Observing his demeanor during the incident, the

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<sup>2</sup> Exhibit 34, pages 6-7

Arbitrator would concur this course of action was warranted. Skills in deescalating a situation are critical to prevent force from having to be used. In this case, perhaps if Grievant had tried to do that, the woman would not have spit at him and been more compliant when taken to the squad car. That is not a certainty, but it might have helped alleviate the situation. Based on all these findings and Grievant's acknowledgement that the level of discipline was appropriate, the Arbitrator affirms this suspension.

This brings the Arbitrator to the final incident. It is this last incident that led the Department to conclude discharge was warranted when taking into account the other two incidents. It occurred on May 26, 2014. Grievant was called to a residence where there was a possible house fire. He testified he had been at the same residence earlier in the day, but did not at that moment realize it was the same place. There was smoke in the house when he arrived. A woman was seen leaving the house just as they were arriving. Grievant was there with Sergeant Crane. The Sergeant told Grievant to go in one direction to look for her and he would go another. They did not find her. Grievant then cleared the call and went back to the station. He later heard another call about a woman causing damage in a store. He indicated he was in the immediate area when he heard the call. He went to the store, but the woman had left before he arrived. He then left the store.

Shortly after he left, he saw a woman fitting the description of the woman in the store walking down the sidewalk. This was the same lady they had looked for earlier. He turned on the camera on his dash and left the squad car. He called for her to come to him. She started to run, but Grievant knew he could catch her easily. She stopped running after a few steps and turned towards Grievant. She then grabbed his face and scratched it. He was bleeding from the scratch. He got hold of her and tripped her to get her on the ground. She fell with her back on the ground. Grievant kneeled next to her.

He stated she was not wearing any underwear and her nightgown was up to her chest. He did not want to straddle her given this condition. At one point, he pepper sprayed her to calm her down, but she remained uncooperative. She was not yet in handcuffs. The video then shows an upward movement of Grievant's arm. After another few seconds he was able to turn her over and get her in handcuffs. Grievant called for backup during the encounter and several other officers and Sergeant Crane soon arrived. The Sergeant immediately told Grievant to leave and get cleaned up from his scratches. Grievant left and another officer took the woman to the station.

Sergeant Crane does a use of force review for the Department as part of his duties. He reviewed the video tape taken from Grievant's dash cam. He concluded Grievant's use of force was appropriate. His report was then sent to his Supervisor, Lieutenant Pollack, for review. Lieutenant Pollack zoomed in the picture to see it closer. It showed Grievant approach the woman and his taking her down. It then showed Grievant's upward arm movement and it coming down towards the woman. The Lieutenant believed Grievant had thrown a punch at the woman. He then had the tape reviewed by Lieutenant Swenson. He also concluded a punch had been thrown.

An investigation was begun. The woman was interviewed and asked about a punch. Her reply was that she was not concerned about that. There was a car parked at the spot where all the events occurred. The driver of the car was interviewed. He saw the woman taken down, but said he did not see anything else. His car was leaving right as the alleged punch was taking place. Grievant was then asked about the incident during his interview on June 18, 2014. He demonstrated what he said occurred. He said he had grabbed her arms and pinned them to the ground as her arms were coming up towards him at the time he grabbed them.

At the end of the investigation, it was determined what is seen on the video was a punch, which it felt was improper. It was also concluded the woman had suffered injuries and they were not listed in his report. He was also accused of lying about what occurred. That and the alleged punch are the most serious of the charges. Finally, Grievant was faulted for not decontaminating the woman after she had been pepper sprayed. It is Department Policy to do that to alleviate the affects of the spray.

The Arbitrator wants to address this last allegation first. Sergeant Crane testified that as soon as he arrived he told Grievant to leave, which he did. Other Officers took over the scene. Sergeant Crane did not direct any of them to decontaminate the woman. That was not done until she arrived at the Station. He was disciplined for his failure to decontaminate her or for not telling others to perform the task. Clearly, Grievant had to leave when he was directed to do so by his superior. He was engaged with the woman until others arrived. He had no opportunity to do it himself before they arrived and he was ordered to leave when they did arrive. He did immediately leave. He cannot be faulted for not decontaminating her given this sequence of events. This allegation is not supported by the facts.

Grievant maintains he had no knowledge the woman was injured and that was why nothing was written in the report about an injury. It should be remembered that until others came, Grievant and the woman were entangled with each other. There is no indication she had obvious bruises or cuts. If it were her legs that were bruised, he would not have observed that as her legs were behind him. There is simply no evidence Grievant knew of any injury to her. If he did not know, which he said was the case his failure to put it in his report cannot be faulted. The Arbitrator finds no merit to this charge.

One other aspect of the encounter mentioned in the investigative report was the manner in which Grievant first made contact with the woman. She had by all accounts a mental disorder. Grievant's first contact with her was to order her to "come here." The Department notes this is another instance where Grievant did not try to take immediate steps to prevent a situation from escalating. It is a symptom of a continuing problem the Department believes. The Arbitrator must concur. His approach did heighten the tension. Had he been less directive and tried to quietly get her to meet with him the whole confrontation might not have taken place. Once again, one cannot know for sure if that would have helped, but Grievant should be faulted for not trying that approach first.

The Arbitrator now turns to the alleged punch. There was no audio of any of the events. It is strictly what can be seen from the dash cam. The patrol car where the camera was located was some distance from where Grievant and the woman were standing and later wound up on the ground. That is the only visual that there is of the event.

The Arbitrator finds the statement from the driver of the car adds nothing one way or the other to the record. He was leaving as the main event occurred. The tail lights of the car are seen to be on just as the arm movement is happening. He said he did not see anything and that is understandable. It does not mean nothing occurred, because something did occur, it only means he was not observing the two of them at that instant. Similarly, the woman's response that she was not concerned about that when asked about the alleged punch is not an acknowledgement that a punch was thrown. It is a non-answer from a woman who was having mental difficulties. The Arbitrator gives her statement no weight at all towards proving or disproving the arguments of the Department that a punch was thrown. This means the video and Grievant's statements

during the investigation and his testimony at the hearing are the only real evidence of what took place.

Grievant said during his interview the woman "got her left hand up reached up towards my face so I reach back, grab her hand and slam it to the ground."<sup>3</sup> He testified when asked by the Arbitrator if this interview statement was accurate. He said it was. The Arbitrator has reviewed the tape countless times and even stopped it as the arm was coming up and going down. The picture is anything but clear. However, there are two troubling aspects as to what is seen. Grievant said he was simply trying to pin her arm down. His arm comes up to his shoulder before it comes down. That seems to be more than simply trying to pin her arm down. It need not go that high to accomplish that purpose. Grievant said her left arm was at his face while he had the right pinned. The video does show the woman's arm moving. It seems to be moving twice. The alleged punch occurs between 1 minute and one minute and one second into the tape. It does look like, but one cannot be certain from the tape that her arm was moving at the 56 second mark. It does come right down again. The second movement is after his arm movement. There is no arm movement from her observed at the instant of his arm movement. If her arm could be seen moving right after the alleged punch and possibly shortly before it, it should have been seen moving right when it was occurring?

On the other hand, the fact that her arm moved only seconds before the punch and then again right after would indicate that her arm was not contained at that juncture and that would add some credibility to Grievant's contention he did what he did because he was concerned what she might do next. The woman had scratched Grievant and his face was bleeding. She was not under control even after the pepper spray and after she was taken to the ground. She was even still moving her arms after the alleged strike,

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<sup>3</sup> Exhibit 34, page 4

and not lying quietly. Her actions up to that point, especially since she was not yet in handcuffs and was unstable would legitimately be cause for concern for any officer in that situation, especially one there by himself.

Grievant tried to get control of the situation. He cannot be faulted for that. His intent might honestly have been to control her and her arms, but it nevertheless does appear that towards that end he wound up throwing a punch. His arm, as noted, came up too high for it to have simply been an attempt to pin her arm. This Arbitrator and the supervisors who viewed the tape have the advantage of seeing it over and over and breaking it down segment by segment. In reality, it all happened fast. It must be judged in that context. If she was fighting him as she appears to be doing, then taking action to subdue her cannot be faulted, especially given his prior injury. He said his goal was, and there is no reason to discount that given her arm movements, to gain control and toward that end he engaged in a physical act. There is no evidence anything was done, even if it was a punch, out of malice or a loss of temper, but was instead done to subdue an uncooperative person. It must be viewed in that context. That is a significant factor.

This brings the Arbitrator to the other serious charge, dishonesty. The Department argues Grievant's testimony should not be credited. It argues he only admitted to his wrongdoings regarding the first two incidents because he knew he was being investigated for this last serious incident. The problem with that argument is that it does not conform to the evidence. This last incident took place on May 26, 2014. Grievant was interviewed regarding the first two incidents on May 15. He admitted during that interview he failed to turn in the citation and that was wrong. During this same interview, he also admitted he was wrong in several respects during the second incident. All of

these admissions occurred 11 days before this last incident. These admissions could not then have been made to save him from discharge for this last incident.

The Department then argues Grievant denied throwing a punch because of these two on-going investigations knowing he was in trouble. While there is merit to that argument, it does seem out of character for him to now change course from his truthfulness in the past. The Union has pointed out that Grievant has always admitted when he has made errors in the past, and there is no reason to believe he is lying now given that fact. His admissions regarding the first two incidents it argues prove that point. The Arbitrator after observing Grievant and listening to the testimony of others finds Grievant to be a credible person. Even his Supervisors have said they have found him to be an honest person. Would he then lie about this last incident fearing his job was on the line as the Department argues? The Arbitrator finds that argument just does not ring true. It would be too large a deviation from his character. Furthermore, he might not have known this incident could mean discharge. He would not automatically know this incident could be the last straw, if he told the truth. A major reason discharge is on the table is because of the allegation he lied. He, as is true with all those in the police profession knows how serious lying is and he knew there was a camera capturing the event. Why would he then compound his dilemma by lying?

How then does his story comport to what the video shows? The Arbitrator finds the most plausible explanation is that in Grievant's mind the video does comport to his recollection and his recounting of events. Others observing it, including this Arbitrator see it one way and he may very honestly be seeing it another. Lying requires intent. Grievant is apparently wrong in his perception of what he did, but the Arbitrator finds it is based on his errant perception of events and not an intent to deceive. That is not an uncommon occurrence. No doubt the action he took was taken for the purpose he has

stated, he just did not do it the way he thinks he did. There is a difference between being simply mistaken and knowing what one says is wrong and saying it anyway. One requires intent and the other does not. Finding such intent to deceive for this Grievant is a bridge too far for this Arbitrator given all that preceded the event.

Grievant is certainly not blameless. He did do an act that was more than required when he had her on the ground. He did fail to deescalate the situation from the outset, as was so regarding the April 11 encounter. He deserves discipline for those failures. He was given a one-day suspension for the first event and a three-day suspension for the second. Those were upheld. The Arbitrator, however, cannot uphold the discharge. One of the reasons the Arbitrator cannot sustain the discharge is the praise he was given by his fellow officers and notations by his supervisors regarding his abilities. Lieutenant Shaffer noted that in his report in July of 2013.<sup>4</sup> Other supervisors have similarly found Grievant to be a proactive positive officer. Thus, in addition to his deficiencies there are many positive aspects to Grievant's performance as a police officer. The Arbitrator also finds it difficult to sustain a discharge when the only evidence is a blurry video taken from some distance away that shows an act that took all of one second. While the Arbitrator has agreed with the Department that it is a punch, to end a career of a good officer on such limited and blurry evidence seems harsh.

Most importantly, the Arbitrator has disagreed with the Department that Grievant exhibited dishonesty during this event. The Arbitrator fully agrees with the Department that the honesty of an officer is paramount. How can one testify in a criminal case if that officer has no credibility? A finding of dishonesty is fatal to the employment of one holding a position like that of Grievant. The absence of such a finding here, however, is fatal to the case of the Department. This fact and the other facts noted have been

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<sup>4</sup> Ex 7 under Findings.

weighed by the Arbitrator in deciding to overturn the discharge, but Grievant does deserve to receive another suspension for this last event.

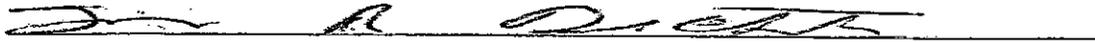
This would be Grievant's third suspension in a short time period. He did not have a perfect record prior to these three incidents. All of that merits a more severe discipline for this event. The Arbitrator substitutes the discharge with a thirty-day suspension. It shall also be part of this Award that Grievant be required to undergo additional training. Lieutenant Shaffer had put together a training plan for Grievant that was interrupted by this last incident and the subsequent discharge. The plan shall be reinstated. While his use of force in the past has for the most part been justified, that does not mean there were not others ways to control the situation. Grievant needs to work on his ability to find those alternative ways and to deescalate an encounter so that force might not be necessary. Grievant works in a high crime area late at night. The chance for an escalating situation is even greater there. It was suggested he go on day shift, which is a different environment. The Arbitrator will leave that to the Department and the Grievant to determine. He should, however, be mindful of these areas of deficiency in deciding how to move forward from here.

#### AWARD

1. The Grievance is granted in part and denied in part.
2. The discharge is set aside.
3. Grievant shall receive a one-day suspension for the March 13, 2014 incident and a three-day suspension for the May 15, 2013 incident.
4. Grievant shall receive a thirty-day suspension for the May 26, 2014 incident.
5. Grievant shall be made whole from the date of the discharge until offered reinstatement less the time off for the three suspensions.
6. Grievant shall be required to attend additional training as noted in this Award and as determined by the Department.

7. The Arbitrator shall retain jurisdiction for no less than 60 days to resolve any issues regarding the implementation of this Award.

Dated: April 3, 2015

A handwritten signature in cursive script, appearing to read "Fredric R. Dichter", is written above a solid horizontal line.

Fredric R. Dichter, Arbitrator