

UNITED STATES GOVERNMENT  
FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF

ARBITRATION BETWEEN:

_____	)	
NEW ENGLAND POLICE BENEVOLENT	)	FMCS 180919-08539
ASSOCIATION, NEPBA LOCAL 412	)	
	)	William T. S. Butler
	)	Arbitrator
And	)	
	)	
	)	
TOWN OF BRATTLEBORO, VERMONT	)	
_____	)	

April 29, 2019

APPEARANCES:

Hanley Law Offices, LLC, Thomas E. Horgan, Esquire, for the Union  
Fishery and Fisher, LLC, Robert Fisher, Esquire, for the Town of Burlington  
Officer Chad Emery, Grievant  
Chief Michael Fitzgerald, Witness for the Town of Burlington  
Captain Mark Carignan, Witness for the Town of Burlington

OPINION AND AWARD

By the terms of an Agreement between the Town of Burlington, Vermont and the New England Police Benevolent Association, NEPBA Local 412, disputes between the parties are to be settled in accordance with the grievance and arbitration procedures recited in the Agreement. In accordance with the terms of that Agreement, and the procedures of the Federal Mediation and Conciliation Service, the undersigned was selected as the arbitrator to hear and decide the grievance concerning Officer Chad Emery.

A hearing was held on April 9, 2019 at the Town Hall in Burlington at which time the parties presented their case, offered exhibits and witnesses in support of their positions, and examined and cross examined such witnesses. The proceedings were recorded on an electronic digital recorder provided by the Town Manager's Office, with the assent of the Union. At the request of the arbitrator, a complete authentic digital copy of the entire record was immediately given to him, as well as the Union through its attorney. The parties were offered an opportunity to file a post hearing brief and a subsequent reply memo, 30 and 35 days [post the hearing date,] which they eventually jointly declined the opportunity. As such the record was closed on the hearing date.

#### ISSUE

The parties, at the opening of the hearing jointly submitted to the arbitrator a proposed issue to be decided in this proceeding, It was:

1. Did the Town of Brattleboro have just cause under the parties' Collective Bargaining Agreement to demote Sergeant Chad Emery from Sergeant to Patrol Officer on June 5, 2018?
2. If not, what shall be the remedy?

The arbitrator accepted the issue as framed by the parties and proceeded accordingly.

Together with the jointly submitted issue the parties jointly offered 18 Exhibits reaffirmed as a Joint Exhibit at the opening of the hearing, which were accepted and acknowledged by the arbitrator, and so constitute a formal and complete Addendum to the Record of this proceeding.

#### CONTRACT TERMS

Notwithstanding that the parties agreed the arbitrator could take notice of any provision of the CBA, several sections of that Agreement, as well as related official Department and Town manuals, were of pertinence to this proceeding, and so are noted.

Town Employee Manual

Police Department Policies and Procedures

Collective Bargaining Agreement, effective January 1, 2016 through June 30, 2019;

#4 MANAGEMENT RIGHTS . . . Transfer, promote, demote, lay off; or discipline employees for just cause shown

Maintain and enforce rulers of discipline

#7 DISCIPLINARY/DISCHARGE ACTIONS

The Town of Brattleboro provides a system of progressive discipline which may be invoked for failure of employees to follow workplace policies, guidelines and practices or for

failure to perform duties of their position in an acceptable manner. Any discipline shall be for just cause.

Nothing in this Section shall prohibit the Town from bypassing the above mentioned corrective discipline or for applying disciplinary action of differing degrees or progressively for different kinds of offenses.

Severe disciplinary action may be taken only after consultation with the Town Manager. The seriousness or frequency of violation, as well as job performance history will be factors in determining the level of discipline.

#### Demotion

In certain instances, a demotion to a position of lower responsibility and pay may be in the best interests of the employee and the Town. A department head may recommend demotion to the Town Manager when they believe an employee has been unable to satisfactorily perform the position duties. No employee may be demoted to a position with less responsibility than the position in which they were hired.

#### #8 GRIEVANCE PROCEEDINGS

The Agreement provides for 3 steps in the grievance process, following which open matters may be referred to arbitration: I Issuing supervisor; verbal answer in 7 days; II written complaint, chief; 7 days response; III referred to Town Manager; meeting with town manager, chief, union president and grievant; 7 days answer.

#### #14 INTERNAL INVESTIGATIONS

The Town and the Association agree that internal investigations shall be handled in accordance with Policy and Procedure #2001 (as amended March 17, 2016)

#### #30 PERFORMANCE EVALUATION

Formal, written evaluations shall become a permanent part of an employee's personnel file.

### BACKGROUND AND FACTS

This arbitration concerns discipline imposed on the grievant for his actions as they relate to the Internal Investigation initiated by the department following a citizen complaint filed with the Department by a sworn officer in a neighboring town. That complaint concerned her initiating a call to the department dispatcher about a domestic disturbance observed by that officer. The grievant was the responding officer. The response by him prompted an Internal Investigation. It was, however, the grievant's conduct during that investigation that prompted this proceeding.

Patrol Officer Chad Emory, the grievant in this matter, was hired by the Brattleboro Police Department on January 24, 2005 and graduated from the Vermont Police Academy's 79<sup>th</sup> class in 2005. Completing the field training officer program he was promoted to sergeant August 19, 2011. Successfully finishing a wide variety of police enforcement training modules including intensive training in effective handling of domestic disputes, he also has supervised all three shifts at one time or another.

His personnel record reflects that the grievant served successfully for 13 years without the imposition of any formal discipline. His monthly and annual evaluations conducted under

established department procedures, while strong and positive in most respects, still showed some ongoing performance problems he and the department never quite resolved. His supervising lieutenant formally noted the one negative mark on his performance record shows in his annual evaluation "his voicing of personal opinions in front of subordinate officers in an inappropriate manner including complaining about procedure, command staff, other supervisors and other." One lieutenant says he had discussed it often enough that it was necessary to note it in his annual evaluation.

In February 2018 the grievant was counseled about allowing officers to go home without completing reports for arrests – documented in a monthly evaluation.

One month later, on March 22 at about 6:00 p.m. there had been a domestic dispute at 125 Canal Street in Brattleboro, called in by an off duty Hinsdale New Hampshire police officer, Melissa Evans, who happened to be traveling home that way.

She eventually filed a civilian complaint against the Brattleboro Police Department, in particular the dispatcher and the responding officer. Her complaint was founded on the dispatcher prematurely hanging up on her while the incident was live, and the responding officer taking 20 minutes to respond. Of note she expressed "concern about filing a complaint" against the department; her husband is a lieutenant in the Brattleboro department.

The civilian complaint was formally investigated by Captain Mark Carignan. His investigation and report resulted in formal discipline against the grievant, but that is not the focus of the action grieved by the union here.

In the course of Carignan's investigation of the civilian complaint, he had need to interview the grievant as well as several other officers in two departments. He verbally and in writing ordered the grievant "not to discuss this investigation, or the facts and circumstances related to it with anyone." Carignan, after interviewing several other officers, determined that the grievant, in his view, had violated those orders and discussed the internal investigation with others on April 5 and 6<sup>th</sup>. He informed grievant of the violations and reinforced his orders to the grievant again, followed by a formal, and second, complaint of misconduct against him for such violations. The first misconduct charge against the grievant stemmed directly from the citizen complaint based on the March 22 call incident.

It did not stop there. Grievant initiated a call to the supervising lieutenant of the complaining officer in the Hinsdale department, with whom he had a friendly and personal relationship, discussing the internal investigation and to inquire about that subordinate complaining officer "what's up with her?"

That lieutenant was interviewed as part of the internal investigation by Captain Carignan about the conversation with the grievant.

That conversation, cited again in direct contravention with the captain's verbal and written orders to grievant, was the source of the third formal complaint against the grievant for misconduct by his disobeying a direct order from a superior officer.

Of note there appear to be no other formal complaints in the grievant's personnel file, prior to these three, in his 13 years of service.

Captain Carignan had requested of the chief, and received, a 10 day extension on the time allotted to conduct interviews for an internal investigation. The grievant had unsuccessfully complained of this extension in a grievance.

It was the second and third formal complaints of insubordination charged against the grievant in the course of the "Canal Street domestic disturbance complaint" that prompted this arbitration. Both of these were brought about by charges that [now] Patrolman Chad Emery-reduced in rank as a direct result of the first complaint and resultant internal investigation. He was charged twice with violation of direct written and verbal orders not to discuss the internal investigation with anyone.

Of note Carignan was reversed by the chief on his charge of insubordination as a consequence of discussion the grievant had about the internal investigation with his direct superior.

Emery had made some offhanded remarks relative to the internal investigation to two officers subordinate to him. In one case he had discussed some details of the investigation with an officer in another department.

This was denied by the grievant saying "he could not recall such discussion."

In the course of the internal investigation the grievant had been closely questioned about his whereabouts and activities by Carignan on April 6, 12 and May 2, 2018, at the time of the domestic disturbance March 22 call. The grievant remained non-responsive despite Carignan's repeated efforts to approach the issue from varying angles, and at different times. Grievant repeatedly said "I don't recall."

The May 2 interview focused substantially on the pre and post interview conversations, ordered not to have taken place per Captain Carignan's verbal and written orders. The captain said were the grievant to clearly have intended to influence the internal investigation, such would have been justification for immediate dismissal. Proof was insufficient, the captain said.

With all of the officers involved in such conversations with grievant, none challenged the statement that there was no effort to involve them in the investigation, nor persuade them as to what they should or should not say.

Accepting this view Carignan said it appeared the grievant's efforts were aimed at an effort to gain information for himself – no worse.

Captain Carignan concluded in his investigation document that the grievant had repeatedly violated his direct order in writing and verbally not to discuss the investigation, or events surrounding it, with anyone. He said "grievant appeared to be completely oblivious to the effect his conduct could have on the complainant as well as the witness officers."

Most pointedly the grievant having called the complainant officer's supervisor to discuss the internal investigation, was very close to influencing the posture of the complainant – querying her supervisor as to "what's up with her?". This act concerned the captain in his investigation the most – according to his testimony in the Investigation report.

Captain Carignan stated there were mitigating and aggravating factors to consider in evaluating action against the grievant in this internal investigation. A strong positive attribute was his 13 years of service in the department unmarked by formal discipline. But there were

several aggravating factors to this conduct (discussing internal investigation information with other officers despite being warned not to do so). Reaching back to written comments in the grievant's personnel file annual evaluation, the captain noted his standing practice of outspoken criticism of the department in front of subordinate officers; this practice continuing despite being counseled and warned against such conduct.

The grievant was characterized as lacking the ability to recognize the significant effect of his actions on others in the department in connection with the internal investigation. He was charged with "having no functional working knowledge of his professional obligations as a sergeant to protect the integrity of the investigation and to protect the professional integrity of his subordinates, two of the most important part of his job.

The captain concluded bypassing progressive discipline here was appropriate and called for due to "gross deviation from professional standards consistently displayed by the grievant." "This deviation has been reflected in years of evaluation by his supervisors." "That same kind of conduct continued over the month long investigation despite being repeated orders and warnings against it."

He further determined "it indicates a demonstrated unwillingness or inability to do the job of sergeant regardless of existence or lack of previous discipline."

Taking exception to the captain's characterizations of his conduct and communications with other officers, the grievant contested the significance, depth and characterization in his comments, remarks and conversation he may have had about internal investigation, no matter how brief or truncated they may have been. Consistent with this view the captain's interviews with the four officers all stated unequivocally that they were not asked to say or do anything concerning the internal investigation, nor had they been influenced in their positions. As to the grievant having spoken of the internal investigation with his direct superior, Lt. Warner, the chief said the captain's characterizing such as insubordinate was entirely incorrect – indeed, such communication was to be encouraged.

A series of other questions posed by Captain Carignan elicited improbable responses from the grievant, leaving him to doubt the whole travel of the grievant's testimony, so he surmised. The captain's query as to where grievant was at the time the "125 Canal Street domestic disturbance" call came in, remained "I don't recall; I don't remember. "Yet he had recalled with precision the auto stop made some 15 minutes before." The grievant also spoke about having made a call at the hospital emergency room, but there was no department record of that occurring.

With two additional charges of disobeying a direct verbal and written order, Captain Carignan recommends and the Chief of Police agrees that the Town Manager accept that "Sergeant Emery should be demoted to Patrol Officer."



#### POSITION OF THE EMPLOYER

The department charges the grievant having deliberately and willfully violated, on at least 6 occasion, direct verbal and written orders not to discuss the internal investigation of the "125 Canal Street domestic disturbance" incident, and department personnel handling that call. Notwithstanding the grievance having acknowledged and stating his understanding of those orders, he nonetheless had conversations with 3 police officers about these proceedings. Most egregious was his initiating a call and conversation with the lieutenant supervisor of the complaining officer, probing him to find out what had prompted her to take such actions. He queried "What's up with her?"

These actions were viewed as violative of direct written and oral orders, sharing facts or information relative to the internal investigation, not known by others, with other officers who may be interviewed and as such potentially colored or shaped their responses. This was inconsistent with acceptable procedures provided for in the department's internal investigations rules. They also were direct refusal to obey the direct orders of a superior officer, not once, but repeatedly some six times.

Most significantly they had the real potential to undermine or interfere with testimony or information obtained in the course of conducting an important investigation into department response to an incident.

While not directly related, this kind of free-lance conduct is of the kind for which the grievant had been counselled on to avoid in past occasions – and written up as impermissible conduct contrary to department practices in one of his annual evaluations. And it strongly argued that the grievant was indifferent to or ignorant of such conduct as inadequate and inappropriate for one performing the job and responsibilities of a sergeant

#### POSITION OF THE UNION

The grievant denies having violated the order of the captain not to discuss the facts and circumstances surrounding the internal investigation. By way of support he points to the fact that all four officer witnesses interviewed by Captain Carignan concurred that the grievant never asked them to become involved in any way with the internal investigation nor did he suggest at any time what they may or should say or not say.

Most of the "discussions" in fact were one sided extemporaneous highly abbreviated or truncated comments or remarks made by the grievant; getting things off his chest. He neither sought nor expected anything of them.

As with his conversation about the internal investigation with his supervisor, Lt. Warner, such was deemed entirely appropriate and to be encouraged, according to action taken by the chief.

As with his instructions from Captain Carignan not to discuss the internal investigation, which he acknowledged, he did not view such orders as covering incidental, remarks or comments such as was the case here. To him a "discussion" was a two way conversation involving both parties.

He also argued that his service of more than 12 years, 5 being successfully promoted to sergeant, was not marked by formal discipline in the department. Such discipline of a demotion from sergeant to patrol officer for supposedly having violated direct orders 6 times was excessive and unwarranted. He noted that this incident arose as a result of an off duty police officer from another state filing a complaint against the department; she being married to an officer in that receiving department – and apprising the investigating officer that “she had concerns about filing such a complaint” against the department.

#### DISCUSSION

The question put to the arbitrator does not define whether the demotion of Sergeant Emery from sergeant to patrol officer on June 5, 2018 is indefinite or for a definite period. It matters considerably, presuming that just cause under the CBA is found to have existed for such discipline. Before examining the qualification, if any, of the demotion the question of whether or not just cause under the CBA existed, needs to be answered.

Aside from the general managerial prerogatives to manage the agency, short of restrictions or qualifications in the CBA, it specifically addresses and authorizes the demotion of a covered member.

#4 MANAGEMENT RIGHTS authorizes the town to “. . . demote, lay off or discipline employees for just cause shown.”

Given that a demotion may be viewed as a severe discipline, and not one imposed after progressive steps of varying discipline, but rather as a single disciplinary action imposed after a single incident or pattern of behavior, the CBA accommodates such action taken by the Town in #7 DISCIPLINARY/DISCHARGE ACTIONS.

It says in part “[n]othing in this Section shall prohibit the Town from by passing the above mentioned corrective discipline or for applying disciplinary action of differing degrees or progressively for different kinds of offenses.”

“Severe disciplinary action may be taken only after consultation with the Town Manager. The seriousness or frequency of violation as well as job performance history will be factors in determining the level of discipline.

Specifically, demotion may be achieved with a covered employee by a department head, with the approval of the Town Manager,” when they believe an employee has been unable to satisfactorily perform the position duties.” Such would appear to support Town action driven both by disciplinary and performance reasons.

The issue of authority under the CBA to demote the grievant is without question – supported by sufficient facts to clearly show the Town had just cause to do so.

The facts are the travel of the month long events in March-April 2018 when Captain Carignan conducted an internal investigation into departmental actions in its response to the “125 Canal Street domestic dispute incident” in March, 2018.

The captain has sufficiently documented his oral and written orders to the grievant not to discuss any facts or circumstances concerning the internal investigation with anyone. The sergeant had been interviewed by the captain in this investigation.



Pursuing a drastic penalty of discipline imposed on Sergeant Emery was viewed by Captain Carignan as appropriate “due to the gross deviation from professional standards consistently displayed by Sergeant Emery. This deviation has been repeated in years of evaluation by his superiors. The same kind of conduct continued over this month-long investigation despite repeated written and oral orders warning against it.

The captain then draws a singular conclusion this composite of behavior and performance points to – “a demonstrated unwillingness or inability to do the job of sergeant regardless of the existence or lack of previous discipline.”

Solely focusing on the current matter, the grievant being a reluctant witness in the “125 Canal Street domestic disturbance” internal investigation, the judgment is unquestionably correct. But to paint a 12 year veteran who appears to have performed the job of sergeant for five years *on balance* in a satisfactory and sufficient manner – by his monthly and annual evaluations as reflected in his personnel files (exhibited in these proceedings), and not substantially contested by the Town in these proceedings – further footnoted by his supervising lieutenant as showing his documented improvement in performance over the three months preceding this incident.

Saying a current deviation, no matter how serious in the context of these professional violations, sufficiently defines five years of acceptable performance, now viewed as incompetent, has to be viewed as an inconsistent finding.

To allow it is to repudiate the combined judgment of his supervising lieutenants, along with his captain, chief, and town manager over a most recent five years that Sergeant Emery was performing appropriately and satisfactorily the sergeant’s job. Such is to not allow the best informed composite judgment about his knowledge and ability to perform that job.

In sharp juxtaposition and contrast, in the sergeant’s March and April 2018 performance, at least as to his posture as a witness, he clearly had not done the sergeant’s job in even a minimally acceptable fashion.

Sergeant Emery was demoted from his job to that of patrol officer on June 5, 2018, not solely for his professionally impermissible meddling in the internal investigation, which was sufficient in and of itself to cause the punitive and performance driven demotion, but also because it was noted in several evaluations he had displayed “personal opinions in front of subordinate officers in an inappropriate manner . . . several times . . . and counselled him on strategies to avoid doing it.” It even became necessary to write it in his annual evaluation.

But the police department decided in its wisdom not to further discipline him with other verbal, written, suspension, or demotion action.

Now comes the Canal Street incident.

In recent months just prior to March 2018 the grievant had been counseled on the department’s requirement for completing incident or arrest reports in a timely fashion, before the end of a shift; something he had failed to do. And the record reflected that he had allowed his subordinate officers on his tour of duty to do the same.

The CBA instructs when severe disciplinary action is considered "the seriousness or frequency of violation as well as the job performance history will be factors in determining the level of discipline."

Those prior negative evaluation comments written in the monthly and annual personnel reports on the grievant necessarily will contribute to the judgment on this current discipline at bar.

Notwithstanding the considerable case to be made for the grievant's competence and knowledge to perform the job of sergeant, drawn largely from his past performance evaluation notes, an objective reading of the evidence submitted in this proceeding more than satisfactorily shows a severe departure from Town police department rules that support the severe imposition of discipline in the form of demotion from sergeant to police officer.

Whatever tolerance or countervailing motivation that Town may have had in not imposing formal discipline for Officer Chad Emery's past deviations from acceptable practice and rules, such was clearly exhausted here.

Coupled with that, interfering with an internal investigation, failing to treat official department business as confidential by discussing a complaint and investigation with an officer in another police department, being the supervising officer for the complaining officer in this case, and two of his subordinate officers, and finally disobeying written and oral orders not to discuss the investigation with anyone, fully supports the charge and finding in this arbitration.

While it is settled that just cause existed for the Town to demote the grievant, the issue of term for that personnel action remains unresolved in the query posed to the arbitrator.

At first blush it would seem to be the discipline of this 12 year department veteran and five year experienced sergeant to that of patrol officer, as being an indeterminate sentence of demotion.

As have other arbitrators, this case is interested in discipline that, while holding an employee accountable, promotes their future functioning in the workplace. Here the grievant has already experienced the personal embarrassment of working among his fellows for a significant period of time while openly downgraded to a lower rank, as well as a loss of pay.

It is a reasonable view, one held by a significant number of arbitrators, that demotion for an indeterminate term is not discipline, but merely punishment, and have reversed such actions. Discipline, a concept to which just cause is closely allied, seeks the betterment and development of an employee which the employer hired, and promoted upon his satisfaction of rigorous standards and in which it has made significant investment.

Cases for mere punishment do exist, but only in those cases where such a damaged relationship exists between employer and employee that its imposition is worth the damage to both the employer and employee.

This is clearly not that case.

While fully supporting the reasoning and actions of the Town in demoting the grievant, at some point (clearly not now) sufficient and appropriate punishment will have been exacted.

Then comes the need of the employer to seek the betterment and development of an employee which the employer hired and promoted upon his satisfaction of rigorous standards, and in whom it has made significant investment.

The just cause demotion of the grievant from sergeant to patrol officer, which commenced June 5, 2018, shall end with the grievant's reinstatement to the rank of sergeant on June 5, 2020, subject to a clear showing his professional comportment, support and compliance with department rules and practices – more particularly those which he has violated or abused as noted in his recent personnel evaluation records – have been accomplished by him.

Any determination of a sufficient positive showing may be made by this arbitrator, or otherwise, subject to a joint agreement of the Town and the Union.

With joint agreement the arbitrator shall retain jurisdiction for 90 days from the date of this award.

#### AWARD

The issue posed to the arbitrator by the Parties is: Did the Town of Burlington have just cause under the parties' Collective Bargaining Agreement to demote Sergeant Chad Emery from Sergeant to Patrol Officer on June 5, 2018? If not, what shall the remedy be?

The grievance is denied in part; remedy is ordered to modify the demotion by the Town.

The Town of Burlington had just cause under the parties' Collective Bargaining Agreement to demote Sergeant Chad Emery from Sergeant to Patrol Officer on June 5, 2018 for a definite period of two years from the demotion date of June 5, 2018 to June 5, 2020 upon which date the grievant shall be reinstated to the rank of sergeant. Such reinstatement is predicated on a general finding on the reinstatement date the grievant has reasonably comported with department rules and established practices for his rank and responsibility as a patrol officer shown in his monthly performance evaluations.

William T.S. Butler

/s/ William T. S. Butler

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April 29, 2019