

STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

TOWN OF DARIEN

-and-

BURR J. ALLEN

Case No. MPP-33,956

A P P E A R A N C E S:

Attorney Jarad M. Lucan
for the Town

Attorney Thomas W. Bucci
for the Complainant

CORRECTED COPY¹

DECISION NO. 5202

SEPTEMBER 30, 2021

DECISION AND DISMISSAL OF COMPLAINT

On February 4, 2020, former Darien police officer Burr J. Allen (the Complainant) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the Town of Darien (the Town) violated the Municipal Employee Relations Act (MERA or the Act) by repudiating a last chance agreement.

After the requisite preliminary steps had been taken, the matter came before the Labor Board for a hearing on November 12, December 16, and December 23, 2020. Both parties were represented, allowed to introduce evidence, examine and cross-examine witnesses, and make argument. Both parties filed post-hearing briefs on March 12, 2021 and reply briefs on March 22, 2021. Based on the entire record before us, we make the following findings of fact and conclusions of law and dismiss the complaint.

¹ Decision No. 5202 originally issued on September 22, 2021 but was not mailed to the Complainant's counsel's current address. The only changes in this corrected copy are the date of issue and the certification page.

FINDINGS OF FACT

1. The Town is a municipal employer within the meaning of the Act.
2. The Darien Police Association (the Union) is a labor organization within the meaning of the Act and at all relevant times has been the collective bargaining representative of a unit of all full-time patrol officers, police sergeants, and police lieutenants employed by the Town. (Ex.1).
3. The Union and the Town are parties to a collective bargaining agreement (Ex. 1) with effective dates of July 1, 2018 through June 30, 2022, which states, in relevant part:

**ARTICLE 14
GRIEVANCE PROCEDURE**

SECTION 14.01 Definitions

- (a) “Grievance” is hereby defined as a written claim by an Employee that a specific provision expressed in this Agreement has been violated, misinterpreted or misapplied by the Town...

...

SECTION 14.02 Procedure

All grievances shall be processed exclusively in accordance with the following procedures...

(a) STEP ONE: Chief

- (1) ... [T]he Grievant must submit the Grievance to the Chief, or designee, through the Union representative....

(b) STEP TWO: Town Administrator

- (1) If the Grievance is not resolved at Step One and the Grievant desires to proceed further, the Grievant must submit the Grievance to the Town Administrator, or designee...

...

(c) STEP THREE: Arbitration

If the Grievance is not resolved at Step Two and the Union desires to process the Grievance to Arbitration, the Union must file a Demand for Arbitration ...

...

**ARTICLE 18
DISCIPLINARY ACTIONS**

...

Section 18.02

No Employee shall be reprimanded, suspended, demoted, dismissed, or otherwise disciplined without due and sufficient cause.

...

(Ex. 1).

4. At all times relevant hereto, the Darien Police Department General Orders have stated, in relevant part:

G.O. 4.3 Subject: Internal Affairs and Discipline

...

D. Code of Conduct

...

3. Accountability, Responsibility, and Discipline

...

c. Officers shall be accurate, complete, and truthful in all matters.

6. Use of Alcohol and Drugs

...

d. No officer shall report to work or be on duty as a law enforcement officer when his/her judgment or physical condition has been impaired by an alcoholic beverage, medication, or other substance(s).

e. Officers must notify a supervisor of the use of any substance, prior to reporting for duty, which impairs their ability to perform as a law enforcement officer.

...

E. Discipline: Officers who violate any section of the General Orders, Regulations, or Special Orders as set forth in this manual; or engage in any other conduct or activity deemed... contrary to the Code of Conduct ... shall be subject to disciplinary action.

...

2. Discipline will generally be administered in a progressive manner.

...

(Ex. 3).

5. From July 5, 2017 to September 12, 2019, the Complainant was a patrol officer in the Darien Police Department and a member of the Union bargaining unit.

6. On January 24, 2019, at the end of his shift, the Complainant had a seizure and crashed his police cruiser into several vehicles parked in the lot of the Darien Police Department. Complainant was transported to Stamford Hospital for medical attention.

7. On or about January 30, 2019, the Complainant informed police chief Raymond Osborne and captain John Lawlor that he had been medically cleared to return to duty. The Complainant returned to duty on February 7, 2019.

8. On March 7, 2019, Osborn initiated an Internal Affairs investigation into the Complainant's January 24 accident. Upon obtaining the Complainant's medical records from Stamford Hospital, the Town discovered that the Complainant's blood alcohol content (BAC) at the time of the accident was .01 and that the Complainant had not been fully cleared to return to duty. Based, in part, on this information, the Town charged the Complainant with violating General Order 4.3, Code of Conduct sections (3)(c), 6(d), and 6(e).

9. On or about April 4, 2019, the Complainant, the Union, and the Town entered into a last chance agreement (LCA), which stated, in relevant part:

1. **Just Cause for Discipline.**

The following disciplinary charges ... are deemed founded and based on due and sufficient cause:

General Order 4.3, Code of Conduct, mandating that "*Officers shall be accurate, complete, and truthful...*" in that [the Complainant] ...was not complete and truthful in a meeting with Chief Osborn and Captain Lawlor on January 30, 2019, concerning his ability to return to work...

...

General Order 4.3, Code of Conduct mandating that "*No officer shall report to work or be on duty as a law enforcement officer when his/her judgment or physical condition has been impaired by an alcoholic beverage, medication or other substance(s)*" in that [the Complainant] ... was impaired by alcohol and prescription medication while on duty on January 24, 2019, which contributed to the seizure he experienced resulting in property damage...

...

General Order 4.3, Code of Conduct, mandating that "*Officers must notify a supervisor of the use of any substance, prior to reporting for duty, which impairs their ability to perform as a law enforcement officer...*"

...

2. **Penalty in Lieu of Discharge.**

The [Complainant] shall serve an unpaid, disciplinary suspension of thirty (30) calendar days...

...

- a. The [Complainant] shall be subject to random alcohol/drug testing while on duty for a period of two (2) years from the date of his return to work. The [Complainant] shall be ordered by the Chief, or his designee, at random intervals to go to AFC Urgent Care in Norwalk (or other testing facility as designated by the Town) for testing. A positive alcohol/drug test will be considered a violation of this agreement.

...

3. **Conditions of Return to Duty.**

- a. Prior to his return to duty, the Employee shall ... participate in the ... Intensive Outpatient Program at the [ARC]...

...

4. **Violations of this Agreement or Any Police Department Policy, Rule or Order.**

...During the term of this Agreement, the following may result in additional disciplinary charges brought against the [Complainant] up to and including his immediate termination from employment at the sole discretion of the Town:

- Any violation of any of the material terms of this Agreement; or
- Any repeat violation of the General Orders listed in section 1 of this Agreement...

...

5. **Notice of Reasons for Future Termination from Employment.**

...If the [Complainant] or the Union disputes the factual basis for the [disciplinary] charges, a grievance may be filed pursuant to the contractual grievance procedure. It is understood and agreed by the Union and the [Complainant] that the Step Two decision shall be final and shall not be subject to the arbitration procedure set forth in the collective bargaining agreement, and that by signing this Agreement the Union and [the Complainant] are expressly waiving their right(s) to challenge the suspension or termination of [the Complainant] except as provided herein.

...

10. **Acceptance of Agreement.**

[The Complainant] and the Union agree to accept the consequences and conditions set forth in this Agreement. Neither the Union nor [the Complainant] shall file any grievance, prohibited practice complaint, ... or other action against the Town concerning the consequences and conditions set forth in this Agreement...

...

(Ex. 2).

10. On July 20, 2019, the Complainant failed to show-up for roll call at the start of his scheduled 3:00 p.m. to 11:00 p.m. shift. The sergeant on duty, Alison Hudyma, directed officer Lou Gannon to remain on duty to cover the Complainant's absence. After several unsuccessful attempts to telephone the Complainant, Hudyma consulted with lieutenant Thomas Whyte. Whyte directed Hudyma to drive to the Complainant's home. Hudyma repeatedly rang the Complainant's doorbell but received no response. Hudyma walked over to a sliding glass door and began knocking, but again received no response. After a few minutes, Hudyma left the premises.

11. While Hudyma was driving back to the Police Department, the Complainant first telephoned Gannon, and then telephoned Hudyma. The Complainant told Hudyma that he had overslept and was on his way. Hudyma said that she would see him when he arrived. (Ex. 7).

12. When the Complainant arrived, Hudyma intercepted him outside the Sergeant's Office. Hudyma moved to within 3-feet of the Complainant and observed that his eyes were extremely red and bloodshot. Hudyma conducted a "sniff test" but did not detect the odor of alcohol. Hudyma told the Complainant that, based on his history of drinking, she was questioning him to ensure that he was fit for duty. The Complainant promised that he had not had a drink in 5 months and went to the locker room to change into his uniform. (Ex. 8).

13. Hudyma asked Whyte to assess the Complainant's fitness for duty. When the Complainant exited the locker room, Whyte directed him to the Sergeant's Office. In a subsequent sworn statement (Ex. 8), Whyte stated, in relevant part:

[The Complainant] appeared disheveled. I got physically close to him and ... his eyes were red and bloodshot. I also observed a heavy cologne scent emanating from his person. I asked [the Complainant] if he had been drinking, to which he stated "no" ...

Whyte asked the Complainant why his eyes were red. The Complainant responded that he was tired. The Complainant said that he helped his mother with her flower delivery business that morning, took a nap before his shift, and overslept. According to Whyte, the Complainant "was speaking slowly, almost methodically." Whyte directed the Complainant to wait with officer Gannon in the patrol officer's lounge. (Exs.7, 8, 9).

14. Hudyma contacted captain Jeremiah Marron. At Marron's direction, Hudyma asked the Complainant to take a breath test and the Complainant agreed. On their way to the booking room, where the Police Department keeps an intoxilyzor, Hudyma and the Complainant met Whyte. Whyte remarked, "I guess he [the Complainant] agreed" to the test, which prompted the Complainant to ask, "do I have a choice?". Hudyma said, "yes" and the Complainant asked to speak to the Union president, officer Christopher Jimenez.

15. Jimenez arrived and spoke privately with the Complainant. Afterward, Jimenez asked Hudyma and Whyte whether the Complainant needed a 0.0 BAC to be fit for duty. They responded that under Police Department policy, the Complainant could not have alcohol in his system. After further private discussion, Jimenez said they were contacting a Union attorney. Jimenez or the Complainant said that the Complainant was concerned that "something may show up in his system." After further consultation, the Complainant stated that he had been advised that under the terms of the LCA, he was only required to test at AFC in Norwalk. The Complainant agreed to be tested there. However, AFC was closed for the night. Hudyma told the Complainant that he must decide whether he would take a breath test at the Police Department. The Complainant conferred with Jimenez again and then declined to take the test. Whyte and Hudyma relieved the Complainant from duty. (Exs. 2, 7, 8, 9).

16. On July 20, 2019, Hudyma submitted a statement documenting her interaction with the Complainant. Three days later, on July 23, Whyte also submitted a statement documenting his interaction with the Complainant.² (Exs. 7, 8).

17. By memorandum dated July 29, 2019, Marron notified the Complainant that he was under investigation for violating General Order 4.3 and the LCA. (Ex. 5). Over the next 3 days, Marron interviewed officers who worked with the Complainant the night before he was late for his shift. They all reported that the Complainant exhibited no unusual behavior.

18. On or about July 30, 2019, Marron interviewed Gannon. Gannon recounted the events of July 20, including the substance of his telephone conversation with the Complainant. Gannon stated that, among other things, the Complainant said that he saw Hudyma outside his home that morning. Gannon added that the Complainant did not appear to be intoxicated when he arrived and did not smell like alcohol.

19. On or about August 2, 2019, at Marron's direction, Gannon submitted a written statement,³ which provided, in relevant part:

[The Complainant] told me that he overslept ... I told him to call Sgt. Hudyma because she was on her way to his house. He stated that the doorbell must have been what woke him up ... [and that] ... he saw [Hudyma] walking back to her car. At that point, [the Complainant] stated he was going to take a quick shower and he would be right down to work.

...

(Ex. 4).

20. On August 8, 2019, Marron and Anderson interviewed the Complainant in the presence of Jimenez and Union attorney Kevin Greco. During the course of the interview, the Complainant was asked more than once what had awakened him on July 20 and he answered, "the doorbell". In addition, the Complainant was asked more than once whether he saw Hudyma at his home on the morning of July 20 and denied seeing Hudyma. The Complainant stated that the blinds on his sliding glass door were closed.⁴ Neither Marron nor Anderson informed the Complainant that his testimony conflicted with Gannon's statement. (Exs. 4, 9).

21. On or about August 20, 2019, after learning that Complainant might be charged with untruthfulness, Jimenez asked Gannon whether he would be willing to amend his statement. Gannon stated that he would be open only to clarifying his "paraphrasing" of the conversation with the Complainant, since the event was unimportant to him at the time. However, Gannon was not going to change his statement. Jimenez warned Gannon that, if he clarified his statement, he might be investigated for untruthfulness. Jimenez told Marron that Gannon may wish to clarify his statement and Marron responded that he did not believe it would be appropriate. Sometime

² Whyte signed and notarized his statement on August 16, 2019. Hudyma did the same on September 6, 2019. (Exs. 7, 8).

³ Gannon signed and notarized his statement on August 8, 2019. (Ex. 4).

⁴ During the hearing on November 12, 2020, Hudyma testified that she could not see into the Complainant's apartment because the blinds on his sliding door were closed. (Ex. 7).

thereafter, Marron asked Gannon whether he wished to change his statement and Gannon declined. Gannon never amended his statement.

22. In a report dated September 5, 2019, Marron concluded that the Complainant violated General Order 4.3 and the LCA by being untruthful about whether he saw Hudyma at his residence on July 20. The Complainant was not charged with any other offenses. (Ex. 9).

23. In a letter to the Complainant dated September 12, 2019 (Ex. 10), police chief Anderson stated, in relevant part:

During the course of [your interview], you stated that you were awakened by the doorbell... Hudyma reported that she first rang the doorbell multiple times and received no response. She then started knocking on a sliding door, which would have been after you were already awake, again with no response. Throughout your responses under oath, you maintained that you did not see ... Hudyma at your residence. Officer Gannon, both orally to Capt. Marron and then in a sworn written statement, related that you did tell him [Gannon] ... on July 20, 2019 that you observed ... Hudyma at your residence. In other words, ... you were not accurate, complete and truthful in all matters.

... General Order 4.3 requires that “officers shall be accurate, complete and truthful in all matters.” In the span of approximately 2 years ... you have been the subject of three separate Internal Investigations into misconduct and you have not been accurate, complete and truthful in all matters as required, including the one at issue. I therefore now hold the position that your termination from active service ... is required as of [today] as you have violated the [LCA] and General Orders of the Department...

...

24. The Union filed a grievance, alleging that the Town violated the collective bargaining agreement by terminating the Grievant’s employment without due and sufficient cause. (Ex. 11).

25. In letters dated September 24 and October 7, 2019, the Town denied the grievance at the first 2 steps of the grievance procedure, stating:

The Grievance ... does not dispute the factual basis upon which [the Complainant’s] termination was based. Under the specific and controlling terms of the [LCA], a dispute of the factual basis is the only basis upon which a grievance may be filed...

...

(Exs. 12, 14).

CONCLUSIONS OF LAW

1. An employer violates its duty under the Act to bargain in good faith when it repudiates a last chance agreement.

2. The Town did not repudiate the last chance agreement when it terminated the Complainant’s employment.

DISCUSSION

The Complainant contends that the Town repudiated the LCA in violation of Section 7-470(a)(4)⁵ of the Act by fabricating a charge of untruthfulness to discharge him under the LCA and deprive him of his rights to contest his discharge at grievance arbitration. The Town responds that the Complainant failed to meet the standard for proving repudiation.⁶ Based on the entire record before us, we agree with the Town and dismiss the complaint.

The repudiation of contract doctrine arises from the principle that the duty to bargain in good faith is not limited to the negotiations of a formal contract, but also includes the obligation to carry out the terms of the formal contract in good faith . . . Repudiation of a collective bargaining agreement is something beyond mere breach . . . The Labor Board has found that repudiation of a collective bargaining agreement may occur in three circumstances: 1) where the respondent has taken an action based upon an interpretation of the contract and that interpretation is asserted in subjective bad faith by the respondent; 2) where the respondent has taken an action based upon an interpretation of the contract and that interpretation is wholly frivolous or implausible; and 3) does not involve an interpretation of the contract by the respondent nor does the respondent challenge the complainant’s interpretation of the contract, but rather it seeks to defend its action on some collateral ground which does not rely on an interpretation of the contract, e.g., financial hardship or administrative difficulties.

City of New Haven, Decision No. 4936 p.6 (2016); see also *State of Connecticut, Department of Correction*, Decision No. 5128 (2020); *City of Bridgeport*, Decision No. 4478 (2010); *Ansonia Board of Education*, Decision No. 3613 (1998); *Hartford Board of Education*, Decision No. 2141(1982).

The Complainant argues that the Town based its investigation on Whyte’s discredited observations about his appearance on July 20, and, when it failed to discover any evidence that he was impaired by alcohol, it resorted to the contrived charge that he had not been “accurate,

⁵ Section 7-470 of the Act states, in relevant part:

(a) Municipal employers or their representatives or agents are prohibited from: ... (4) refusing to bargain collectively in good faith with an employee organization which has been designated ... as the exclusive representative of employees in an appropriate unit....

⁶ The Town also argues that, as an individual, the Complainant lacks standing to bring a repudiation claim under the Act, and that he waived his rights to file this complaint when he signed the LCA. The Town raised the same defenses in an earlier motion to dismiss the complaint for lack of subject matter jurisdiction, which we denied on October 22, 2020. Accordingly, we proceed to the merits of the dispute.

complete and truthful”. In *Hartford Board of Education (Thomas Latina)*, MPP-28,975 (2012), we stated that intentionally fabricating an incident to use as an excuse to fire the complainant under a last chance agreement, if proven, would constitute subjective bad faith under our test for repudiation. See also *State of Connecticut Judicial Branch*, Decision No 4349 (2008) (Pursuing an action for a non-legitimate purpose or as a “sham” constitutes evidence of subjective bad faith). Thus, the Complainant is alleging the first type of repudiation. Conclusions regarding actual or subjective bad faith must be based on an examination of all the evidence. *West Hartford Education Association v. DeCourcy*, 162 Conn. 566, 591 (1972); *City of Bridgeport*, Decision No. 5036 (2018); *City of Meriden*, Decision No. 4553 (2011). Ordinarily, a single factor is insufficient to support a conclusion of bad faith. *State of Connecticut (P-3B Unit)*, Decision No. 3521 (1997). Moreover, while we recognize that subjective bad faith, like improper animus, is often a matter of inference, the inference must be supported by the record and be reasonable. *Hartford Board of Education (Elaine Papas)*, Decision No. 5179 (2021).

In our view, the record does not support a reasonable inference that the Town repudiated the LCA. The investigation may have originally focused on whether the Complainant was impaired by alcohol on July 20. An investigation goes where the evidence leads, however, and subsidiary issues are not immaterial merely because they are not directly connected to the primary topic under investigation. This is particularly significant where the subsidiary issue is truthfulness, and the subject of the investigation is a police officer. Moreover, while Whyte’s observations may have been less than credible, the Town ultimately rejected that evidence as a basis for discipline. We think this cut against a finding that the Town acted in subjective bad faith.

The Complainant further argues that Marron essentially conducted a sham investigation. We disagree. Marron testified that he gave more weight to Gannon’s statement than to the Complainant’s testimony because Gannon had “no reason to lie”. Assessing credibility and weighing evidence was well within Marron’s purview. Moreover, examining the self-interests of witnesses is an accepted method of resolving credibility disputes. *City of New Haven*, Decision No. 4739 (2014); *Griswold Board of Education*, Decision No. 3786 (2000). The Complainant also alluded that the Town prevented Gannon from changing his statement. During the hearing, however, Gannon explicitly denied that allegation. It was Jimenez, and not the Town, who told Gannon that amending his statement might result in an investigation. Moreover, we credit Gannon’s hearing testimony that his statement is accurate. The Complainant also relies on the fact that Marron never inquired into whether the blinds on his sliding glass door were closed on July 20. We think such reliance is misplaced because that evidence is at best inconclusive. Since the Complainant said that he was awake by the time Hudyma knocked on the glass, it is reasonable to infer that he moved the blinds to see who was there. Under these circumstances, we credit Marron’s testimony that he believed that the issue of the blinds was not significant. The Complainant disagrees with Marron’s assessment. However, we do not view it as evidence of subjective bad faith.

Finally, the Complainant contends that he was fired over a trivial discrepancy. The Complainant may dispute that, whether or not he actually observed Hudyma at his residence is a material fact. There is evidence, nonetheless, of inconsistency, and the LCA gave the Town sole discretion to terminate the Complainant for failing to be accurate, complete, and truthful at all times. “We consider charges of repudiation to be serious, and we require substantial proof of them.” *New London Housing Authority*, Decision No. 3717 p.4 (1999). Based on the existing

record, the Complainant has failed to prove that the Town repudiated the LCA in subjective bad faith by exercising that discretion. Accordingly, the complaint is dismissed.

ORDER

By virtue of and pursuant to the power vested in the Connecticut Board of Labor Relations by the Municipal Employee Relations Act, it is hereby

ORDERED that the complaint filed herein be, and the same hereby is **DISMISSED**.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Wendella A. Battey
Wendella A. Battey
Acting Chairman

Barbara J. Collins
Barbara J. Collins
Board Member

Thomas P. Clifford, III
Thomas P. Clifford, III
Alternate Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 30th day of September, 2021 to the following:

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