

STATE OF CONNECTICUT
DEPARTMENT OF LABOR
STATE BOARD OF MEDIATION AND ARBITRATION

ARBITRATION AWARD

In the Matter of:	:	Case No. 2022-A-0101
City of Danbury	:	Date of Award: January 23, 2023
And	:	Hearing Dates: October 12, 2022
Danbury Police Union Local Lodge 028	:	October 31, 2022
Kenneth Utter, Grievant	:	Zoom Hearings

APPEARANCES: Michael C. Harrington, Attorney at Law (For the City)
Eugene J. Zingaro, Attorney at Law (For the Union)

I. ISSUE: (Agreed to by the Parties)

Whether there was just cause to suspend Officer Utter for eight (8) days?

If not, what shall the remedy be?

II. PROCEDURAL BACKGROUND:

The Hat City Local C.A.C.P. a/k/a Danbury Police Union Local Lodge 028 (hereinafter referred to as the "Union") filed a grievance asserting that the City of Danbury (hereinafter referred to as the "City") did not have just cause when it suspended Police Officer Kenneth Utter for eight (8) days (hereinafter referred to as "Officer Utter" or the "Grievant").

The grievance was not resolved during the Grievance Procedure and was appealed to Arbitration. Arbitration hearings were held via Zoom on October 12 and 31. Exhibits were provided to the Panel in advance of the hearing which were admitted into evidence over the course of the hearings. Both parties were provided an opportunity to offer testimony and cross-examine witnesses. The City and the Union both filed post hearing briefs by the due date of November 23, 2022. The parties reserved the right to file Reply Briefs and were to inform the Board if they would exercise that right by November 28. The Panel did not receive notice or a Reply Brief from either party. The Panel held an Executive Session on December 13, 2022.

The parties have complied with the grievance and arbitration provisions of the collective bargaining agreement. This grievance is properly before the Connecticut State Board of Mediation and Arbitration.

III. STATEMENT OF FACTS:

On June 9, 2021, the Danbury Police Department (hereinafter referred to as the "DPD") received a call that an individual would not leave the Danbury Public Library. The individual later identified as Sean Paul Reyes (hereinafter referred to as "Mr. Reyes") was video recording in the Library and had been requested to leave by the security guard.

Mr. Reyes identified himself as "The Long Island Auditor" and is what is known as a "constitutional auditor". Constitutional auditors test the right to photograph and video record in public places. These individuals are activists who believe that their activities promote transparency and open government.

Two (2) officers were dispatched to the call, Officers Dennis and Tibbitts. Two (2) other officers self-dispatched to the call, Officers Cameron and Utter. Sgt. Dickinson arrived at the Library shortly thereafter. Sgt. Dickinson asked Mr. Reyes to leave. Mr. Reyes began to comply after being told he would be arrested if he did not. Officer Utter asked for Mr. Reyes' identification. Mr. Reyes ultimately provided identification which was verified by DPD dispatch. Officers Tibbitts and Utter interrupted Sgt. Dickinson when he was trying to speak with Mr. Reyes.

Mr. Reyes left the library and was told he may record from the outside of the building. During most of the incident, Mr. Reyes continued to bait Officers Dennis, Tibbitts and Utter and they engaged back with him. At all times Mr. Reyes filmed the interaction. It appeared that Mr. Reyes attempted to get a reaction from the officers so that he could get a better "production" to publish on YouTube. Mr. Reyes' words were both personally and professionally insulting and demeaning at a minimum. At one point, Officer Utter grabbed Mr. Reyes' right wrist and stated into the camera "You're wrong", repeating what he had been saying previously.

After engaging with Mr. Reyes outside for approximately eight (8) minutes, Officers Tibbitts and Utter walk away. Officer Tibbitts always had his body camera on; Officer Utter never activated his body camera. After walking away, Officer Utter said to Officer Tibbitts (which statement was recorded on Tibbitts' body camera),

I hate fucking people like that. I am telling you now, fucking five years ago with this shit, he would have been on the fucking ground. Ten, fifteen, twenty years ago, that motherfucker would have been dead. His teeth would have been missing.

Mr. Reyes filed a complaint against the Danbury Police Department and published an edited version of his video recording on YouTube. The body camera footage containing Officer Utter's statement noted above was released under the Freedom of Information Act. Officer Utter, other Danbury Police Officers and the DPD received negative publicity and, in some cases, threats as a result of these remarks and their publication. Some of the threats have been made to members of Officer Utter's family and the families of other officers.

IV. PERTINENT LANGUAGE FROM THE COLLECTIVE BARGAINING AGREEMENT (Joint Exhibit 1) 1075 (City Exhibit 5), and

ARTICLE 25

(N.B. The Article quoted in the City's brief is incorrect)

DISCIPLINARY ACTIONS AND DISCHARGE

Section 25.1 No employee shall be suspended, discharged, reduced in rank, or grade, or be subject to any other disciplinary action, except for just cause.

Section 25.2 A meeting may be held by the Chief of Police if, in his determination, the offense involved would warrant a suspension of ten (10) or fewer working days. In the event such a meeting is held by the Chief of Police, no further hearing will be scheduled in accordance with Section 25.3. If the employee is not satisfied with the decision of the Chief of Police, said employee may process a grievance under the provisions of Article 9, Grievance Procedure. The parties shall have the option of a representative of their choice in a meeting conducted by the Chief of Police and such meeting shall be closed to the public and press unless it is mutually agreed otherwise.

Section 25.6 Any employee who may be found guilty of any charges and subjected to punitive measures and/or discharge, shall have the right, as provided in Article 9, to appeal such decision to the Connecticut State Board of Mediation and Arbitration.

GENERAL ORDER 1075 (City Exhibit 5) – Appendix A

Category B: Violations and/or disregard of policy that involve a misuse of authority, or ethical offense, and/or that create or pose the potential for

clear serious adverse impact on public safety or the professional image of the Department. Some examples include but are not limited to:

- Failure to activate/use body worn camera or vehicle camera system video and/or audio microphone consistent with Department policy
- Insubordination

Category A: Generally minor violations or disregard of policy that are not considered to be unethical and do not involve a misuse of authority, have minimal nor no adverse impact on public safety or the professional image of the Department. Some examples include but are not limited to:

- Rude of (sic) unprofessional conduct toward the public or in the public view

These are the specific infractions the Grievant was charged with - City Exhibit 4

Discipline levels for Category A and B Offenses: (Appendix B)

Discipline Level	Mitigating Penalty	Presumptive Penalty	Aggravated Penalty
A	Training & Counseling (Written)	Verbal & Written Reprimand	1-5 day Suspension
B	Written Reprimand to 5 Day Suspension	1 to 10 day Suspension	5 day Suspension to anything less than termination

V. DISCUSSION

This is not the typical just cause case. The Panel was supplied with a video recording of the events June 9, 2021 which the members carefully reviewed. There are occasions when parties argue that video recordings do not accurately reflect the events as they occur. The angle may be off, the perspective may be different, the audio may not be clear, the entire scene may not be accurately depicted, all of which can certainly be true. The Panel is not faced with any of those or any other questions regarding the video in this situation. It is noteworthy that the Union made no claim that the video recording did not accurately reflect the events of June 9.

The following is a discussion of each of the charged offenses:

A. Failure to activate/use body-worn camera or vehicle camera system video and/or audio microphone consistent with department policy.

The Grievant was charged with failure to activate his body worn camera. The Grievant admitted to having failed to activate his body camera and appears to have apologized for failing to do so during his predisciplinary meeting. The body camera was newly issued equipment to the Grievant. The Union argues that because the equipment was newly issued, the Grievant should be either excused for not activating it or receive only minor discipline.

The Grievant testified at the hearing that he did not realize that he did not activate his body camera. In reviewing the video, it would seem that the lack of incessant beeping when the body camera was activated would make one aware that ones' body camera was not activated. Sgt. John Dickenson (hereinafter referred to as "Sgt. Dickenson") received a written warning for failure to activate his body camera that day even though he

eventually turned it on. It would be appropriate for the Grievant to be disciplined for failure to activate his body camera as it was likewise new equipment for Sgt. Dickenson.

B. Insubordination.

The Grievant was charged with Insubordination. The Panel heard on the recordings and the YouTube video how all the officers conducted themselves when they encountered Mr. Reyes in the Library. It can hardly be described as DPD's finest hour. Two (2) officers had been dispatched to the Library on what would have been a minor disturbance. Two (2) additional officers self-dispatched with the Grievant taking charge as the senior officer on scene. The officers escalated the situation by name calling with Mr. Reyes in response to his taunts.

Sgt. Dickenson was the Field Sergeant on June 9, 2021. Once Sgt. Dickenson arrived, the officers did not cede control to him as the superior officer and were generally disrespectful to him. Sgt. Dickenson stated that he was trying to deescalate the situation as officers were trained to do instead of what the officers were doing on scene. Sgt. Dickenson confirmed at the hearing that he was disrespected, and that the situation was handled unprofessionally.

While the Grievant may not have been Insubordinate, he was certainly disrespectful to Sgt. Dickenson. The Grievant spoke over Sgt. Dickenson in the Library, he did not give control of the situation to Sgt. Dickenson as the superior officer when he arrived. The Grievant referred to Sgt. Dickenson as a "pussy" which was recorded and released to the public. This type of disrespectful behavior would, in the opinion of the Panel, fall within Category B.

C. Rude or unprofessional conduct toward the public or in public view.

It is unquestioned that Officer Utter called Mr. Reyes pathetic while they were in the Library. There is no clear reason why Officer Utter followed Mr. Reyes outside the Library and engaged with him for an additional approximate thirty (30) minutes after the officers had successfully removed him from the building. This is especially unclear since Mr. Reyes continued to taunt, berate, demean and otherwise attempt to antagonize the officers. This thirty (30) minute encounter culminated in Officer Utter grabbing Mr. Reyes wrist, directing the camera toward his own face and loudly repeated several times into the camera "You're wrong". Officer Utter's ultimate conduct could be described as either rude and/or unprofessional toward Mr. Reyes.

After the interaction outside the Library with Mr. Reyes, Officer Utter made the statements to Officer Tibbitts calling Sgt. Dickinson a "pussy" for having left the scene. Referring to Mr. Reyes, Officer Utter stated:

I hate fucking people like that. I am telling you now, fucking 5 years ago with this shit, he would have been on the fucking ground. Then, fifteen, twenty years ago, that motherfucker would have been dead. His teeth would have been missing.

At the hearing, Officer Utter testified that the statements were unprofessional publicly but privately they were not unprofessional. He further testified that it was just a way to vent and blow off steam and couldn't you say anything anymore. Officer Utter expressed no regret over having made the statements. Officer Utter appeared to be still angry with the DPD for releasing the video recording.

The only claim the Union made regarding the video recording of Officer Tibbitt's body camera of the statements of Officer Utter was that it should never have been

released. The Union claimed that as it was a private conversation between Officer Tibbitts and Officer Utter, Officer Tibbitts should have turned off his body camera. Under City Exhibit 1, perhaps an argument could have been made that Officer Tibbitts could have turned off his body camera thereby preventing recording the "conversation" or, more accurately, the statements of Officer Utter after the encounter outside with Mr. Reyes. However, the fact remains that Officer Tibbitts did not turn off his body camera and the statements were recorded.

The Union argues that since the conversation/statements should never have been recorded, the recording should never have been released. The logic of that argument does not exactly work under the Freedom of Information Act. As the Corporation Counsel for the City correctly advised the Chief of Police, under the FOIA, the City had no choice but to disclose the recording once the City received a request for it.

The Union argues that it was a "regrettable mistake" for the City to "choose" to put the statement into "public view". It would have been a violation of the law for the City to have failed to satisfy the clear requirements of the FOIA. It was more a "regrettable mistake" for Officer Utter to have chosen to put the statements into the "public view" than it was for the City to have fulfilled its duty under the law. Certainly, the consequences of Officer Utter's remarks to himself, his family, other officers and the DPD are also regrettable. However, Officer Utter has no one to blame but himself. It was concerning that Officer Utter seemed to have no regret for having made the statements. The DPD has investigated all threats that have been made against Officer Utter and his family and taken appropriate action against individuals where provable cases could be prosecuted.

VI. AWARD

For the reasons set forth herein, the Panel unanimously finds that the City had just cause to suspend Officer Utter for eight (8) days. The Grievant's conduct on June 9, 2021 was serious and he deserved a serious suspension. The Chief of Police took into consideration Officer Utter's over twenty-six (26) years of service with no other disciplinary action when he lowered the suspension from ten (10) day maximum to an eight (8) day suspension. Based upon a review of the video tape of this incident, the Panel would recommend the Department consider remedial training of officers in dealing with difficult individuals.

BY THE ARBITRATION PANEL:

Linda J. Yelmini 12/27/2022
Linda J. Yelmini (Public Arbitrator & Chairperson)

Betty M. Kuehnel 12/30/22
Betty Kuehnel (Labor Arbitrator)

Steven R. Werbner 1/17/23
Steven R. Werbner (Management Arbitrator)