

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

**ARBITRATION AWARD**

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In the Matter of:	:	Case No. 2023-A-0122
Town of Windsor	:	Date of Award: <u>October 19, 2023</u>
And	:	Hearing Date: July 28, 2023
Windsor Police Department Employees Association	:	38 Wolcott Hill Road Wethersfield, CT 06109

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**APPEARANCES:** Patrick J. McHale, Attorney at Law (For the Town)  
David S. Taylor and Stephen F. McEleney, Attorneys at Law  
(For the Union)

**I. ISSUE:**

Was Sergeant John Simon disciplined with a written reprimand for Just Cause?

If not, what shall the remedy be?

**II. PROCEDURAL BACKGROUND:**

The Windsor Police Department Employees Association (hereinafter the "Union") filed a grievance asserting that the Town of Windsor did not have just cause when it issued a written reprimand to Sergeant John Simon (hereinafter either the "Grievant" or "Sgt. Simon").

The grievance was not resolved and was appealed to arbitration. On July 28, 2023 an arbitration hearing was held at the SBMA offices in Wethersfield, Connecticut. Both parties were provided an opportunity to offer testimony and cross-examine witnesses.

The Town and the Union both filed post hearing briefs by the due date of September 8. Reply Briefs were filed by the Town and the Union on September 22. The Panel held an Executive Session on September 26.

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:**

There are few, if any, factual disputes in this case. The events were recorded on the BWCs of the officers involved and the recordings were provided to the Panel. (Union Ex. 1)

Sgt. Simon has been employed by the Windsor Police Department for over twenty (20) years. Prior to the incident that is the subject of this arbitration, Sgt. Simon had no prior discipline. By all accounts, he is an excellent police officer who has "always been a dependable and conscientious officer, supervisor and leader" in the Windsor Police Department. (Town Ex. 2) These were words of Chief Donald Melanson (hereinafter "Chief Melanson") contained in the Grievant's written reprimand.

On July 7, 2022, the Police Department was notified that then Sgt. Thomas Messina (hereinafter "Mr. Messina") had been involved in a domestic dispute at his home in Sturbridge, Massachusetts and was intoxicated. It was reported that he was driving to Windsor to retrieve his motorcycle which was parked at a local restaurant in Windsor.

Captain Andrew Power (hereinafter "Captain Power") was in charge of the Windsor Police Department as Chief Melanson was away on vacation. Captain Power went to the restaurant with another officer to await Mr. Messina's arrival. Captain Power did not have on his body worn camera (hereinafter "BWC") when he approached Mr. Messina upon his arrival. Shortly thereafter Captain Power retrieved and activated his BWC. Mr. Messina was generally in terrible condition and apparently intoxicated. Two other officers were at the scene, Sgt. Saylor and Officer Majewicz when Sgt. Simon arrived. At that time, Sgt. Simon was the on-duty Patrol Supervisor. Sgt. Simon and Mr. Messina were friends.

Captain Power asked the Grievant to speak to Mr. Messina "man to man" and instructed the Grievant to "put your body camera on" prior to those discussions. Sgt. Simon activated his BWC as instructed. In a short interchange between Sgt. Simon and Mr. Messina, the Grievant asked Mr. Messina: "What's going on Tom?" and Mr. Messina replied, "I'm not saying shit." Approximately one minute after activating his BWC, the Grievant turned it off. Thereafter, an interaction occurred between Sgt. Simon and Mr. Messina that was not recorded on the Grievant's BWC.

Sgt. Simon testified that he did not believe that Mr. Messina would talk with him if he did not turn off his BWC. The Grievant further testified that he believed his role was to be Mr. Messina's friend and that he was not interacting with Mr. Messina as a police officer.

An Officer Tustin and an Officer Johnson (who were both apparently Union officials) arrived at the restaurant having "self-dispatched". Neither individual activated his BWC. Sgt. Saylor activated his BWC and deactivated it in accordance with the policy

and as directed by Captain Power to do so. This was while they had a conversation between the two of them. Thereafter, Sgt. Saylor did not reactivate his BWC. For a brief time while interacting with Mr. Messina in Hartford, Lt. Neary left her BWC in her vehicle.

It was determined as part of an Internal Affairs investigation that all the above individuals violated the BWC policy to varying degrees, including Captain Power. The named individuals and Captain Power each received either a verbal reprimand or a documented non-disciplinary counseling.

The Internal Affairs investigation concluded that the Grievant also violated the BWC policy. Additionally, it was determined that the Grievant was insubordinate when he turned off his BWC after receiving a direct order to turn it on from Captain Power.

**IV. PERTENENT LANGUAGE FROM THE COLLECTIVE BARGAINING AGREEMENT, RULES AND REGULATIONS, GENERAL ORDERS and STATUTES:**

**COLLECTIVE BARGAINING AGREEMENT**

**JULY 1, 2021 – JUNE 30, 2022 (TOWN EX. 1)**

**ARTICLE IV – GRIEVANCE PROCEDURE**

**SECTION 4.1. Purpose.** The purpose of the grievance procedure shall be to settle employee grievances on as low an administrative level as possible and practicable so as to insure efficiency and employee morale.

**SECTION 4.2. Definition.** A grievance for the purpose of this procedure, shall be considered to be a Union complaint concerned with:

- a. Fair application and interpretation of departmental rules and regulations;
- b. Matters relating to the interpretation and application of the Articles and Sections of this Agreement.

**SECTION 4.3. Procedure.** The Union shall have available the following grievance procedure on behalf of any employee who feels aggrieved concerning wages, hours, or conditions of employment or on any matter under the contract excepting the wage scale itself set forth herein. Time limits specified below may be extended by mutual agreement if by the nature of the grievance such is required.

**Step 1.** Any grievance shall be submitted in writing to the Chief of Police within ten (10) working days of the occurrence which gives rise to the grievance. In the text of the grievance, the grieving party will document that he did discuss the issue at hand with his supervisor, or the supervisor giving rise to the grievance, prior to the written submission. The Chief of Police or his designee shall render a decision within ten (10) working days of the receipt of the grievance.

**Step 2.** If the grievant is not satisfied with the disposition of the grievance at Step 1, it shall be presented in writing to the Town Manager or his/her designee within ten (10) working days of receipt of the decision at Step 1. The Town Manager or his/her designee shall render a decision on the grievance within ten (10) working days of receipt of the grievance. Either party shall be granted a ten (10) working day extension provided written notification of such extension is received within the time frame of this Step.

Step 3. In the event the grievance is not resolved by Step 2, the Union may, within ten (10) working days of the Town Manager's decision, submit the grievance to mediation and arbitration by the State Board of Mediation and Arbitration in accordance with its usual rules and procedures, at the same time notifying the Town's Personnel Office of the submission. The Union's notice to the Town's Personnel Office shall include a copy of each document submitted to the SBMA and shall be served upon the Town at the same time and using the same means of submission as the Union uses to make its submission to the SBMA. In determining the timeliness of a submission of a grievance to arbitration, the date upon which the SBMA received the Union's submission shall be controlling.

**SECTION 4.4. Arbitration Limits.**

- a. Only the Union shall be authorized to submit a grievance to arbitration.
- b. Any arbitrator shall be limited to ruling on interpretations as to the application or meaning of the terms of this Agreement, and shall have no power to add to, or subtract from, or modify any of the terms of this Agreement.
- c. When both parties agree, a single public member arbitrator will be used to arbitrate grievances under this article. **SECTION 4.5. Expedited Arbitration.** The parties agree to the utilization of an expedited arbitration system for cases involving suspensions, demotions and all other disciplinary actions except terminations and for such other cases as may be agreed upon by the parties. Cases to be heard in expedited arbitration shall be conducted in accordance with the expedited arbitration procedures of the State Board of Mediation and Arbitration (SBMA Regulations Section 31-91-51), except that the parties shall have the right to file briefs supporting their positions within fourteen (14) days after the last testimony is taken upon the matter and the Arbitrator's award shall be issued within fourteen (14) days after his or her receipt of said brief(s).

**SECTION 4.6. Just Cause.** No employee shall be discharged, terminated, demoted, suspended or disciplined in any other manner except for just cause.

## ARTICLE V. DISCIPLINARY PROCEDURE

**SECTION 5.5. Arbitration Limitations.** Any arbitrators shall be limited to ruling on interpretations as to the application or meaning of the terms of this Agreement, and shall have no power to add to, or subtract from, or modify any of the terms of this Agreement.

**SECTION 5.6. Records.** All records of verbal reprimands shall be removed from the personnel file after six (6) months. Records of written reprimands shall be removed from the personnel file after two (2) years. Records of suspension of ten (10) days or less shall be removed from personnel file after three (3) years. Should an officer be subject to subsequent disciplinary action, any records removed may be used to show progressive discipline. If no discipline other than oral reprimands for a period of 5 years, prior discipline cannot be used to show progressive discipline. This shall not apply to discipline resulting in a served suspension of 5 days or more.

### **TOWN OF WINDSOR PERSONNEL RULES 2018 EDITION (Town Ex. 7)**

**11-10 Disciplinary Actions.** Whenever an employee's performance, behavior, work habits or personal conduct falls below a desirable level, the supervisor shall inform the employee promptly and specifically of such lapses and give counsel and assistance. If appropriate and justified, a reasonable period of time for improvement may be allowed before initiating disciplinary action. In some instances a specific incident may justify severe disciplinary action in and of itself; however, the action to be taken depends on the seriousness of the incident and the whole pattern of the employee's past performance and conduct.

- A. **Reprimand.** In situations where an oral warning has not resulted in expected improvements, or where more severe initial action is warranted, a written reprimand shall be sent to the employee and a copy shall be placed in the employee's personnel file.
- B. **Suspension.** A regular full-time employee may be suspended by his/her Division Manager/Department Director or Town Manager with or without pay for reasons of misconduct, negligence, inefficiency, insubordination, disloyalty, unauthorized absence, or other justifiable reason when alternate personnel actions are not appropriate. The Town Manager and the employee shall be furnished with a written statement of such action specifically setting forth the reasons for the suspension and the appeals procedure. A regular full-time employee so suspended shall have the right to appeal as provided in Section 12.2 of these rules.

- C. Dismissal or Demotion. The Town Manager or a Department Director may dismiss or demote an employee for the good of the Town service. Reasons for such action may include, but shall not be limited to:
5. Insubordination.

### **GENERAL ORDER 12.0 (Town Ex. 8)**

#### **III. Standards of Conduct**

##### **D. Prohibited Conduct**

The following acts by a member of the Department are prohibited or restricted:

4. Insubordination – failing or deliberately refusing to obey a lawful order issued by any superior officer.

#### **IV. Department Order System**

An order is a command or instruction, written or verbal, given by the Chief of Police or any superior officer. All lawful orders, written or verbal, will be carried out fully.

A. Unjust, Improper or Conflicting Orders – Orders that appear to be unjust, improper or conflicting with any previous departmental order will be carried out. The member obeying such an order will not be held responsible for disobedience of a previous order or for the inappropriateness of an unjust or improper order. After carrying out the order, the officer to whom the order was given may file a written report to the Chief of Police via the chain of command, departing from the chain to address the next higher member in the chain of command above the individual responsible for the disputed order, if necessary, indicating the circumstances and the reasons for questioning the order along with his/her request for clarification of departmental policy. If any unlawful order is given to any member of the department, such member will promptly report such fact to the Chief of Police. Orders issued by persons outside of the Department will not be complied with unless authorized by the Chief of Police or due process of law.

#### **VI. Administrative Procedures**

##### **F. Disciplinary Charges, Hearings and Procedures**

The Police Chief will investigate all violations of the orders, rules and regulations of the Department, or any misconduct on the part of any member thereof, and he/she will initiate such disciplinary action as he/she



deems proper, and will report such action to Town Manager with his/her recommendations.

2. Offenses and Violations – Departmental offenses and violations include but are not limited to the following:

- d. Neglect of duty or disobedience of orders
- m. Insubordination or disrespect toward an officer of rank

3. Disciplinary Action, Complaints, Grievance Procedures, etc. – All procedures taken by the Department pursuant to a report of violation or offense will be in accordance with the applicable provisions of the Personnel Rules and/or Union Contract then in full force and effect.

**GENERAL ORDER 2.01  
CHAIN OF COMMAND AND ORGANIZATIONAL CHART  
(Town Ex. 9)**

It is the policy of the Windsor Police Department to post and annually review the accuracy of the department's organizational chart and to ensure that the following are adhered to:

7. All sworn and non-sworn employees obey all lawful orders of a superior including any order relayed from a supervisor to an employee of a lesser rank. In instances of conflicting orders the employee must advise the supervisor, who provided the conflicting order, of the conflict and follow the last lawful order received.

**GENERAL ORDER 10.08  
MOBILE VIDEO RECORDING SYSTEM (Town Ex. 10)**

**B. Policy**

3. Each police officer shall use body worn camera equipment while interacting with the public in such sworn member's law enforcement capacity in accordance with this policy (based upon the guidelines established by the POST Council and DESPP).

**D. Procedures**

2. Use and activation of an issued or approved body-worn and dashboard cameras.

b. Police officers issued or assigned a body-worn and dashboard cameras shall activate the camera while interacting with the public in a law enforcement capacity.

(1) For the purposes of this policy, "interacting with the public in a law enforcement capacity," means that a police officer is in personal contact with one or more members of the public, the purpose of which is to conduct a self-initiated investigation into, or to respond to a third-party complaint involving, the possible commission of any offense, violation or infraction.

**CONNECTICUT GENERAL STATUTES § 29-6d.  
USE OF BODY-WORN RECORDING EQUIPMENT**

(c)(1) On or after July 1, 2019, each sworn member of (A) the Division of State Policy within the Department of Emergency Services and Public Protection, (B) the special police forces established pursuant to section 10a-156b, (C) any municipal police department for a municipality that is a recipient of grant-in-aid as reimbursement for body-worn recording equipment pursuant to subparagraph (A), (B) or (D) of subdivision (1) of subsection (b) of Section 7-277b or subdivision (2) of said subsection (b), and (D) any municipal police department for any other municipality that is a recipient of a grand-in-aid as reimbursement for body-worn recording equipment pursuant to subparagraph (C) of subdivision (1) of said subsection (b) if such sworn member is supplied with such body-worn recording equipment, shall use body-worn recording equipment while interacting with the public in such sworn member's law enforcement capacity, except as provided in subsection (g) of this section, or in the case of a municipal police department, in accordance with the department's policy, if adopted by the department and based on guidelines maintained pursuant to subsection (j) of this section, concerning the use of body-worn recording equipment.

(g)(1) Except as otherwise provided by any agreement between a law enforcement agency and the federal government, no police officer shall use body-worn recording equipment to intentionally record (A) a communication with other law enforcement agency personnel, except that which may be recorded as the officer performs his or her duties, (B) an encounter with an undercover officer or informant, (C) when an officer is on break or is otherwise engaged in personal activity, (D) a person undergoing a medical or psychological evaluation, procedure or treatment, (E) any person other than a suspect to a crime if an officer is wearing such equipment in a hospital or other medical facility setting, or (F) in a mental health facility, unless responding to a call involving a suspect to a crime who is thought to be present in the facility.

## V. DISCUSSION

Not unlike many other collective bargaining agreements, this CBA does not define “just cause”. As quoted from an award in an earlier case, just cause is typically defined as: A reason that is legally acceptable or sufficient and whether the employer was guided by reasonableness and fairness. In its simplest form, there must be satisfactory proof that the employee engaged in the act upon which the discipline is based. Just cause is one which is not for any arbitrary, capricious, or illegal reasons and which is one based on facts. For example, if the proof is insufficient that the employee committed a violation, discipline cannot stand. If the evidence is sufficient to demonstrate that the employee is ‘guilty’ of the conduct alleged, then the next question, generally speaking, relates to whether the penalty is for just cause. The Connecticut Supreme Court held that for the just cause standard to have been met, the employer must have a reasonable ground for discipline which is also fair.

There is no dispute that the Grievant violated General Order 10.08 which requires that police officers activate BWCs “while interacting with the public in a law enforcement capacity.” He was not alone. Other officers who failed to activate their BWCs at various times on July 7, 2022 received either a verbal reprimand or non-disciplinary counseling. The level of penalty or action by the Town was presumably based upon an assessment of such things as whether the violation was intentional, the length of time it occurred, acknowledgement that the officer violated the General Order, etc.

Like many other officers involved in the incidents on July 7, the Grievant admitted that he violated General Order 10.08. By doing so, he admitted that on July 7, he was

interacting with a member of the public, Mr. Messina. The question becomes whether the Grievant was insubordinate when he turned off his BWC and if that represented "just cause" to issue Sgt. Simon a written reprimand.

Section III, D-4 of General Order 12.00 defines insubordination as: "failing or deliberately refusing to obey a lawful order issued by any superior officer. (Town Ex. 8) Section IV of General Order 12.00 goes on to define an order as "a command or instruction, written or verbal, given by the Chief of Police or any superior officer. All lawful orders, written or verbal, will be carried out fully." Subsection A of Section IV provides that even unjust, improper or orders conflicting with previous departmental orders are to be "carried out."

Paragraph 7 of General Order 2.01 provides that in the event there are conflicting orders, "the employee must advise the supervisor, who provided the conflicting order . . . and follow the last lawful order received." (Town Ex. 9)

This was a very difficult situation for all the officers, especially the Grievant. Mr. Messina was a fellow police officer who was experiencing significant personal issues. Sgt. Simon was a good friend of Mr. Messina. Sgt. Simon was concerned and felt Mr. Messina was drunk, out of control, in a significant amount of distress and might possibly harm himself or others.

Captain Power tried to interact with Mr. Messina and have him comply but was unsuccessful. Captain Power asked Sgt. Simon to speak with Mr. Messina "man to man". Captain Power then instructed/reminded Sgt. Simon to turn on his BWC when interacting

with Mr. Messina. Sgt. Simon approached Mr. Messina and turned on his BWC. Sgt. Simon turned his BWC off approximately a minute after turning it on.

Sgt. Simon and the Union contend that Sgt. Simon was acting as Mr. Messina's friend and counselor. Presumably Sgt. Simon did not believe he was acting as a police officer at that time. Clearly Sgt. Simon was trying to act in the best interest of his friend, Mr. Messina. However, Sgt. Simon is a police officer and was the Patrol Supervisor at the time.

The Union argues that Sgt. Simon did not violate General Order 12.00 (III)(D)(4). While Sgt. Simon did not deliberately refuse to obey a lawful order, he did, in fact, fail to obey a lawful order.

In determining whether just cause exists, many arbitrators utilize the Seven Elements of Just Cause first outlined by Arbitrator Carol Daugherty in *Enterprise Wire Co.*, 46 LA 359 (1966). Under a traditional view, if any of the questions proffered under the *Daugherty* test is answered in the negative, then just cause does not exist. Today, this formulaic analysis of the *Daugherty* test has been rejected by many arbitrators. The Panel is not constrained by the *Daugherty* test and rejects its formulaic application. However, that does not negate the *Daugherty* test as it can be helpful in determining whether just cause exists.

Both the Town and the Union analyzed the Grievant's conduct in relation to the elements of the *Daugherty* test in their respective Briefs and Reply Briefs. As the Grievant admitted to having violated the BWC policy, only the insubordination charge will be addressed.

## Daugherty Elements of Just Cause

1. Was the Worker Given Advance Warning of the Probable Consequences of his Conduct?
2. Was the Controlling Rule, Order or Standard Reasonably Related to Efficient and Safe Operations?
3. Was the Alleged violation of the Rule or Order fully investigated Before Discipline?
4. Was the investigation fair and objective?
5. Did the investigation uncover substantial proof of guilt?
6. Was the employer's treatment even-handed and non-discriminatory?
7. Was the disciplinary action reasonable related to the worker's record and the gravity of the offense?

The elements will not be separately discussed, however, since the parties argued its elements, the Panel would note the following:

The Grievant acknowledged that he knew the consequences of being insubordinate and that the rule met the standard articulated in Item 2 of the *Daugherty* test. The investigation was fair and objective and it showed that Sgt. Simon was told to turn on his BWC by Captain Power and that after a brief time of compliance, he did not follow the directive.

The Union claims that Lt. Neary and Sgt. Saylor were insubordinate and received no punishment. Captain Power gave both a direct order to arrest Mr. Messina after he fled from Hartford Hospital where they had taken him. Mr. Messina told them "Don't touch me, get a warrant." They called and spoke with the Chief Melanson and explained the situation. Chief Melanson then modified Captain Power's order and told Sgt. Saylor

that they should use their best judgment. This type of interchange did not occur between Sgt. Simon and Captain Power at the restaurant parking lot. Chief Melanson considered Sgt. Simon's unblemished and exemplary service record when he imposed a written reprimand.

As stated earlier, July 7, 2022 was a very difficult day for the Windsor Police Department, especially Sgt. Simon. Sgt. Simon was trying to help Mr. Messina, his friend, who was having a significant personal crisis. Sgt. Simon received a direct order to turn on his BWC when interacting with Mr. Messina. While he initially complied, Sgt. Simon made the decision to "fall to comply" thereafter.

Sgt. Simon is rightfully concerned that the written reprimand he received will adversely impact his ability to be employed in a public safety capacity following his retirement from the Windsor Police Department. The written reprimand is dated October 24, 2022. Section 5.6 of Article V of the CBA provides that "Records of written reprimands shall be removed from the personnel file after two (2) years." Therefore, it will be removed approximately a year from today. The CBA provides any removed record may only be used to show progressive discipline if the "officer is subject to subsequent disciplinary action."

The language of the written reprimand is unusual in that it clearly states that Sgt. Simon has "always been a dependable and conscientious officer, supervisor and leader" in the Windsor Police Department. The Panel sincerely believes that this one incident involving an attempt to aid a fellow officer in crisis should not adversely impact Sgt.

Simon's ability to gain a public safety position post-retirement which will allow him to demonstrate his well-honed excellent police skills and leadership.

**VI. AWARD**

For the reasons set forth herein, a majority of the Panel finds the Town had just cause to issue the Grievant a written reprimand.

BY THE ARBITRATION PANEL:

/s/ Linda J. Yelmini

Linda J. Yelmini (Public Arbitrator & Chairperson)

/s/ Philip White

Philip White (Management Arbitrator)

/s/ Santo Franzo (dissenting)

Santo Franzo (Labor Arbitrator)