

CONNECTICUT DEPARTMENT OF LABOR
BOARD OF MEDIATION AND ARBITRATION

CITY of BRIDGEPORT

CASE No., 2022-A-0104

And

Date of Award: June 21, 2022

AFSCME, COUNCIL 4
LOCAL 1159

Hearing Via Zoom
April 13, 2022

ADVOCATES

Robert J. Murray, Esq., for the City

Kelly A. Rommel, ESQ., for the Union

ISSUE

Did the City of Bridgeport have just cause to suspend Sgt. Bruno Rodrigues for 30 days when it imposed that discipline on October 29, 2021? And, if not, what shall the remedy be?

FACTS OF THE CASE

On May 13, 2021, Sgt. Bruno Rodrigues (Grievant) was randomly selected for a drug test.

On May 27, 2021, the Bridgeport Police Department was notified by Dr. Ronald Suski, the Medical Review Officer, that the Grievant had "...drug test negative, anabolic steroids/testosterone positive."

A second test confirmed the findings of the first and was certified on June 30, 2021.

On July 1, 2021, the Lt. in charge of the testing regime wrote to the Grievant advising him of the test results and placed him on administrative leave.

On July 6, 2021, the same Lt. notified the Chief of Police of the Grievant's test failure.

On September 2, 2021, the Chief notified the Grievant that a Loudermill hearing would be held on September 17, 2021.

The Loudermill was rescheduled and held on October 19, 2021. No new evidence about the initial failed test was produced at the Loudermill.

The Chief informed the Grievant on October 29, 2021, that he had violated G.O. 4.06 and was issued a 30-day suspension.

The suspension was grieved by the Union on October 30, 2021.

THE CITY'S POSITION

The foundation of the City's position was the application of the seven tests of just cause.

- (1) Was the employee warned of the consequences of his misconduct?

General Order (G.O.) 4.06 of the Bridgeport Police Department states clearly that "Police officers should be aware of over-the-counter performance enhancing supplements found in local stores. Most of these supplements are not FDA controlled and may contain products that will test positive for anabolic steroids.

Subsection 4 of G.O. 4.06 reads, "It is the responsibility of the individual officer to know what products they use, ingest, or take for maintaining health and fitness. It is recommended that all officers consult with a physician or medical provider before taking over the counter supplement's/products as they may contain substances that can test positive on a drug screening."

The City believes they satisfied criteria #1.

- (2) *Was the G.O. reasonably related to the safe and effective operation of the Bridgeport Police Department?*

"The City recognizes that the misuse of alcohol or the use of controlled substances by employees creates an undue risk to its employees, impairs an employee's job performance, and of paramount importance it creates an undue risk to the health and safety of the public we serve." (City Brief, pg. 7)

The City believes they satisfied criteria #2.

- (3) *Did the City do an investigation before deciding to discipline the Grievant?*

A sample from the Grievant, taken the same day, was retested at a different lab and confirmed the original test results.

The City believes they satisfied criteria #3.

- (4) *Was the investigation fair and objective?*

The City postulated that since the drug test was random, tested twice and determined it was not obtained with a prescription, this was both a fair and objective investigation.

The City believes they satisfied criteria #4.

(5) *Did the investigation prove there was a violation of G.O. 4.06?*

“The investigation produced substantial evidence that Sgt. Rodrigues violated G.O. 4.06.” (City Brief, Pg. 9) With the original test confirmed by a second test by a different lab the City concluded that they had provided substantial evidence.

The City believes they satisfied criteria #5.

(6) *Has there been a history of equal treatment of all employees, without discrimination?*

“The City applied its General Order evenly and without discrimination.” And “There was no evidence presented that the City had treated (the Grievant) in any disparate manner.” (City Brief, Pg. 10)

The City believes they satisfied criteria #6.

(7) *Was the discipline appropriate, reasonably related to the offence and the Grievant’s work record?*

“Although (the Grievant) had not been previously disciplined it is commonly accepted by many arbitrators that progressive discipline should not apply in all cases.” (City Brief, pg. 10)

The City believes they satisfied criteria #7.

THE UNION'S POSITION

The Union also presented their case based upon an analysis of the Seven Points of Just Cause.

1. Was the employee warned of the consequences of his conduct?

The evidence reveals that the Grievant ingested a legal, over the counter supplement containing Testosterone which was not disputed by the testimony of the City's witness, Dr. Suski. Evidence presented by the City revealed that the Grievant tested negative for anabolic steroids and all illegal substances.

"Dr. Suski testified that the distinction of the submission of (a) prescription resulting in a negative report and the absence of a prescription reporting a positive result, is a policy of the testing company. This rule of the testing company is clearly not spelled out in the Drug and Alcohol Testing General Order 4.06, and it has not been incorporated in any Bridgeport police department policy." (Union Brief, pg. 9)

The policy directive on drugs and alcohol states clearly that anabolic steroid detection will result in discipline. The Grievant's test was negative for all drug use. It also suggests consultation with his Dr. before taking any supplements because of the possibility of generating a positive on a drug test. The Grievant did exactly that and the Dr. suggested he take the supplement.

Did the City meet the criteria of question #1? No.

2. Was the employer's rule or order reasonably related to safe and efficient operations?

Did the City meet the criteria of question #2? Yes.

3. Did the employer investigate before administering the discipline?

The Union contends there was no investigation following the report of the elevated testosterone since the City handled the Grievant in the same manner as an officer who tested positive for an illegal substance. They believe that is a misapplication of the General Order.

Did the City meet the criteria of question #3? No.

4. Was the investigation conducted fairly and objectively?

Since there was no investigation, the answer to criteria # 4 is No.

5. Did the investigation produce substantial evidence or proof that the employee was guilty as charged?

The test did not show any illicit drug use on the part of the Grievant, but the Police Department treated him as if he was a user of an illegal substance. There was testimony from Dr. Suski, the City's witness, that the elevated levels of testosterone were possibly present because the Grievant had used over the counter, totally legal, supplements.

Did the City meet the criteria of question #5? No.

6. Were the rules, orders and penalties applied evenhandedly and without discrimination?

The Grievant was treated as if he had used illegal drugs instead of ingesting a legal over the counter supplement. Even if he erred in not asking his Dr. if anything would show up in a drug test, the City had wide discretion in what level of discipline would be administered. "The City's discipline policy specifically states that "...the Chief of Police may deviate from the Disciplinary Matrix and retains the right to impose any level of discipline deemed appropriate to achieve the goals of the Department." (Union Brief, pg. 13) Instead, they chose to discount his work record and service of 20 years.

Did the City meet the criteria of question #6? No.

7. Was the degree of discipline administered in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee and his service with the City?

The Grievant has been a member of the police department for more than 20 years with a single written warning in the last ten years. "He did not engage in conduct prohibited by the policy and his actions did not warrant the harsh penalties that he faced for electing to ingest legal, over the counter substances in lieu of prescribed injections." (Union Brief, pg. 14)

Did the City meet the criteria of question #7? No.

DISCUSSION

The discussion section of the decision also follows the questions posed by the Seven Tests of Just Cause.

1. *Was the employee warned of the consequences of his misconduct?*
The panel found this an interesting question because General Order 4.06 prohibited the use of illegal drugs, or the abuse of alcohol and the City's testing determined the Grievant had not violated either. While the General Order did caution officers to check with their Dr. before taking any supplements because of the possibility of a problem with the drug test, this was a cautionary note the Grievant chose not to follow. The high testosterone reading was not in and of itself a problem.
Yes, the City met the first requirement.

2. *Was the G.O. reasonably related to the safe and effective operation of the Bridgeport Police Department?*
The rule is in place for the safety of all and the efficient operation of the department.
Yes, the City met the second requirement.

3. *Did the City do an investigation before deciding to discipline the Grievant?*
The only investigation was the report generated by the testing company about his elevated testosterone level that was not accompanied by a prescription. Considering the Grievant's 20-year career, with only a single written warning in the last decade, it would seem reasonable that there would be a whole host of questions from the City about what happened and why? Just as the Grievant was held responsible for not exploring more fully with his Dr. the effects of an over-the-counter supplement, the City has a responsibility to determine why a long-time, well-regarded employee had now experienced the sobering discipline of a lengthy administrative leave followed by an extended suspension.
No, the City did not meet the third requirement.

4. *Was the investigation fair and objective?*

At best the City did a cursory inquiry which was neither fair nor objective. They relied simply on a test result, one that was not requested, which identified a high level of testosterone but no illegal drugs in the Grievant's sample as their cornerstone instead of looking further for what had happened to determine an appropriate discipline. This was especially unsettling remembering the Grievant's work record and 20 years of service.

No, the City did not meet the fourth requirement.

5. *Did the investigation prove there was a violation of G.O. 4.06?*

The panel agrees that the Grievant had an elevated level of testosterone in his system, something the City did not test for specifically, which we now know was brought about by his use of an over-the-counter legal supplement. The unanswered question here is, why was this viewed so narrowly by the Chief following the Grievant's explanation of the source of the elevated testosterone and then treated in the same manner as the presence of an illegal, debilitating drug?

No, the City not did meet the fifth requirement.

6. *Has there been a history of equal treatment of all employees, without discrimination?*

No history was entered into evidence about how G.O. 4.06 has been enforced in the past when not dealing with an illegal drug.

No, the City did not meet the sixth requirement.

7. *Was the discipline appropriate, reasonably related to the offence and the Grievant's work record?*

The Grievant's work record is impressive as is the 20 years of service. His inattentiveness to the contents of the supplement and how they could raise a red flag in a drug test called for corrective action, which the panel believes the administrative leave accomplished. The Chief had the option to restructure the discipline, based on his work record and 20 years of service but chose instead to not exercise that option of leadership.

No, the City did not meet the seventh requirement.

DECISION

A majority of the panel believes the suspension to be excessive considering the constituent elements of the charged violation, the lack of an in-depth investigation, followed by a substantial administrative leave with apparent disregard of the Grievant's noteworthy work record.

The grievance is sustained and the Grievant shall be made whole for the time of the suspension.

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Mark E. Sullivan

6/13/22

Mark E. Sullivan, Public Member

Date

Michael C. Culhane Sr. - Dissenting

6-28-22

Michael C. Culhane, Management Member

Date

Kevin M. Murphy

6-20-22

Kevin Murphy, Labor Member

Date