

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF MENDOTA HEIGHTS
(Employer)

and

LAW ENFORCEMENT LABOR SERVICES, INC.
(Union)

DECISION
(Disciplinary Suspension)
BMS Case No. 12-PA-0286

ARBITRATOR: Mr. Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: The hearing took place on April 30, 2013 at the Mendota Heights City Hall located in Mendota Heights MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs as of May 30, 2013.

APPEARANCES

FOR THE EMPLOYER:

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JURISDICTION

The Parties stipulated that this Arbitrator has been properly selected and appointed in accordance with the provisions of Article VII of the applicable labor agreement and thereby possesses the authorities, responsibilities and duties as set forth therein to hear and resolve this grievance dispute.

THE ISSUE

The Parties stipulated that the Issue is; *Did just cause exist for the one-day suspension of Officer Mike Shephard imposed by the City on August 3, 2011? If not, what shall be the remedy?*

THE EMPLOYER

The Employer, herein, the City of Mendota Heights, is a southern suburb in the Minneapolis-St. Paul Metropolitan Area. The City covers approximately 11 square miles and current population is over 11,000. Among its municipal functions, the City operates a full-time Police Department consisting of some 18 sworn Officers and 3 civilian employees. Supervision includes the Chief of Police and three Sergeants. The Patrol Division consists of about ten Officers staffing three rotating shifts and there is an Investigations Division consisting of three Officers, including a School Resource Officer. The Department's non-supervisory Officers are represented, for purposes of collective bargaining, by Law Enforcement Labor Services, Inc. (the Union and/or LELS).

THE UNION

Law Enforcement Labor Services, Inc. is Minnesota's largest labor organization dedicated solely to the representation of law enforcement employees and related personnel throughout the State of Minnesota. The Union's offices are located in St. Paul MN and it has numerous collective bargaining relationships and agreements with various cities, counties and other political subdivisions within the State of Minnesota; including the City of Mendota Heights and its Police Department.

COLLECTIVE BARGAINING HISTORY

The City of Mendota Heights and Law Enforcement Labor Services, Inc. have had an ongoing collective bargaining relationship, reflected by various successive labor agreements with respect to the City's Police Officers for a number of years. The Parties agree that the applicable labor agreement in this matter was effective January 1, 2010 and scheduled to expire on December 31, 2011.

RELEVANT CONTRACT LANGUAGE

ARTICLE X - DISCIPLINE

- 10.1 *The EMPLOYER will discipline employees for just cause only. Discipline will be in one or more of the following forms:*
- a. *Oral Reprimand*
 - b. *Written Reprimand*

- c. *Suspension*
- d. *Demotion*
- e. *Discharge*

10.2 *Suspensions, demotions and discharges will be in written form.*

10.3 *Written reprimands, notices of suspension and notices of discharge which are to become part of an employee's personnel files shall be read and acknowledged by the employee. Employees and the UNION will receive a copy of such reprimand and/or notices.*

FACTUAL BACKGROUND

Officer Michael "Mike" Shephard, the Grievant in this matter, has been a Minnesota Licensed Peace Officer since 2001. Officer Shephard commenced employment with the City of Mendota Heights Police Department (the Department) in 2006. During his tenure of employment with the Department, he has worked as a Patrol Officer in the Patrol Division.

In May 2011¹, Officer Shepard was routinely working Patrol on the Department's "C" shift, which starts at 10:00 PM and ends at 7:30 AM (a/k/a the graveyard shift).

On May 27, Sergeant Eric Petersen, one of the three supervisory Sergeants in the Department, received an email from Mike Aschenbrener, the Police Chief. In the email, Chief Aschenbrener advised Petersen that, in his May meeting with the Mendota Heights Traffic Safety Committee, it had been decided that the Department should take a close look at three specific traffic areas in the community and determine if there is a general need for on-going enforcement actions in those areas. Aschenbrener directed Sergeant Petersen to put together some report forms for use by the Patrol Officers and be prepared compile a full report on the results after 60 days.

Petersen subsequently prepared some log forms for the Patrol Division Officers. On May 28, Petersen issued an email message to the Patrol Division Officers with the Subject: "*Directed Patrol Areas.*" The body of the message read as follows:

"At the Mendota Heights Traffic Safety Committee Meeting, 3 areas thought to be problem areas were brought to the Chief's attention. These areas will receive extra attention over the next 45 days. At the conclusion, a report will be sent to the MHTSC advising them of the next steps if they are, in fact, problem areas.

¹ Unless otherwise indicated, all subsequent dates shall refer to the year 2011.

The committee did not give specific times for any of the areas, so officers on all shifts will be asked to spend some extra time at all three areas.

Area #1: Douglas and Lilac. Complaints received state that "no one slows down for the yield sign."

Area #2: 1st Avenue @ Laura. Complaint is speeding on 1st Avenue.

Area #3: Marie between Dodd and Valley Park. Complaint is speeding.

In each of your mailboxes I put 3 directed patrol assignment sheets (one for each area). Over the next 45 days, please spend some time in the 3 areas and document the times, stops, citations, warnings, etc. (all noted on the directed patrol sheets).

If you need extra directed patrol sheets, please let me know. Otherwise, these details will run from May 29th until July 15th. Near the end of this period, please place the directed patrol sheets on my desk or in my mailbox.

If here are any questions, please contact the Chief or myself.

Sergeant Eric Petersen

Later in the evening of May 28, Sergeant Petersen was in the process of placing the log sheets for the Directed Patrol Areas (DPAs) in the officers' mailboxes in the Department. This occurred prior to Petersen actually issuing his email message to the officers. He and Officer Shephard apparently encountered one another in the squad room. Petersen gave Shephard his log sheets and the two individuals had some direct conversations about the logs and the assignment. For his part, Shephard alleges that he pointed out that for the officers on the C-Shift (graveyard shift), this assignment was probably a waste of time because in the wee hours of the night, there typically would be little or no traffic at any of the three designated Areas. Shepard further contends that during the ensuing discussions with Petersen, Petersen agreed with him and said something to the effect that the DPAs didn't apply to the officers working C-Shift. Petersen does not recall having conversations with Shephard on the evening of May 28 about the DPA assignment and but concedes that if he did, he may have agreed with Shephard's comments about there potentially being little or no traffic in the Areas during the C-Shift. However, Petersen denies ever telling Shephard that the assignment did not apply to him and the other officers on C-Shift. Petersen specifically notes that the directive from the Chief of Police clearly stated that the directive applied to "...officers on all shifts..." and that he, Petersen, did not have the authority to modify or change the Chief's directive.

The May 28 DPA program was concluded, as scheduled, on July 15 and on July 20 Petersen requested all the officers to turn in their completed logs so he could

compile the results into a report for the Chief to subsequently present to the Traffic Committee. He received completed logs from the three Sergeants and nine Patrol Officers, but three (3) of the Patrol officers failed to submit completed logs - Officers Fordham, Shephard and Urman.

On July 28, Petersen sent an email to Fordham, Shephard and Urman asking for their personal written explanation as to why they had no log activity for the DPA program?

Fordham apparently did submit a completed log and that left only Shephard and Urman with no submitted logs. They responded to Petersen's July 28 email as follows:

Officer Urman - email, August 7, "*My thought was it was directed at officers that work during high traffic times. That neighborhood is generally very quiet after 10. My apologies.*"

Officer Shephard - email, July 28, "*When you spoke with me about the assignment, you said something to the effect of 'this probably doesn't apply to C-shift, but the Chief didn't give any specified times.' I mistakenly took that literally and did not think that the assignment's focus was during c-shift hours.*"

On September 8, Sergeant Petersen called Officer Shephard into a meeting at which time he presented Shephard with a Memorandum dated August 3. The memo essentially recited the background and details of the May 28 DPA assignment and Shephard's admission that he had not completed the required assignment or the related logs and, therefore, did not perform the assignment as directed by a supervisor. The memo went on to state;

"This is in direct violation of the Mendota Heights Personnel code, Section 27; f, 1 and 2 which states, 'Evidence of any of the following acts shall be cause for disciplinary action...' Section 1 states: 'Incompetence, inefficiency, or negligence in the performance of duty.' Section 2 partially states: 'Insubordination, including, but not limited to, refusal to obey an order which a superior is entitled to give and have obeyed...'

It was specifically noted that Shephard had received a letter of Reprimand from Sergeant Convery for insubordination arising out of an incident in January, 2010 or about a year and one-half earlier. Because of that previous disciplinary action, he was being given a one-day suspension without pay.

Concurrently, Officer Denise Urman was issued a written Warning for insubordination for her failure to obey the Directed Patrol Area instruction of May 28 and to properly complete that assignment.

THE GRIEVANCE

On September 9, 2011, the day after Shephard received the one-day suspension, the Union filed a written Step 3 Grievance on his behalf, protesting the disciplinary action. The grievance specifically alleged that the City issued the suspension without "just cause"; in violation of the requirements of Article X, Section 10.1 of the labor agreement. To remedy the alleged violation, the Union requested that the City rescind the one-day suspension, remove all reference to it from Officer Shephard's personnel record and make him whole for hours lost.

Following a Step 3 meeting with the Union, Chief Aschenbrener sent the Union a letter on September 23 which stated as follows:

"As promised in our meeting on Tuesday afternoon, I met with Sergeant Petersen and discussed the comments around handling the assignments. Sergeant Petersen did not advise Officer Shephard not to do the work directed in the email or not to fill out the direct patrol sheets he was handed. Therefore, the disciplinary action will stand."

Ergo, here we are in arbitration.²

SUMMARY OF THE PARTIES' MAJOR ARGUMENTS

THE EMPLOYER:

1. Article X - Discipline and Section 27 of the City's Personnel Code specify the means and methods available to the City to impose disciplinary action upon employees for violations of policies or rules. Section 27 of the Personnel Code provides that a first-line supervisor, including a Police Sergeant, has the authority to suspend an employee without pay for up to one day for conduct including: "1. *Incompetence, inefficiency, or negligence in the performance of duty, and 2. Insubordination, including, but not limited to, refusal to obey an order which a superior is entitled to give and have obeyed.*"

A. Officer Shephard violated a clear directive from his supervisor, Sergeant Eric Petersen. Shephard acknowledges receiving Petersen's email message of May 28 concerning the Designated Patrol Areas (DPAs). The email message clearly stated that, "*The committee did not give specific times for any of the areas, so **officers on all shifts** will be asked to spend extra time at all 3 areas.*" (emphasis added)

At the close of the DPA period for the three designated areas on about July 15, Officer Shephard was unable to hand in any

² No grievance was filed by either Officer Urman or the Union in connection with her disciplinary action arising out of the DPA assignment situation.

completed log sheets for the DPAs and admitted that he hadn't spent anytime checking on or patrolling the DPAs as set forth in Petersen's email of May 28. Sergeant Petersen never told Shephard that the email was incorrect or that the May 28 email was not mandatory and, therefore, he and the other officers on the C Shift could choose to ignore it. However, Shephard, on his own volition, subsequently decided that the DPA assignment didn't apply to him, while his colleagues proceeded to carry out the assignment. Shephard's behavior clearly falls within the generally accepted definition of "*insubordination*".

B. Officer Shephard clearly knew that the DPA assignment was mandatory for the officers on C Shift. In the hearing, Officer Shephard at first testified that Sergeant Petersen, during a conversation on May 28 (prior to his reading of Petersen's email regarding the DPA assignment), said that the DPA did not apply to C-Shift, but said that he was giving Shepard the DPA log sheets "*in case you want to go up there and do it.*" Shephard testified that he took that to mean that the DPA assignment was optional. However, later that day, Shephard did receive Petersen's email message, which clearly stated that officers on all shifts were responsible for spending their downtime at the three problem locations specified. Officer Shephard further testified that later in the evening of May 28 he had another conversation with Petersen and Petersen told him , in the presence of Officer Wilson, that the DPAs probably didn't apply to C-Shift. For whatever reason, the Union did not call Officer Wilson as a witness to corroborate Shephard's testimony.

Apart from Shephard's own testimony, there is no other evidence to support his contention that Petersen ever told him that the DPA assignment was optional for the C-Shift.

Later in the hearing, Officer Shephard testified that Sergeant Petersen told him that the DPA assignment "*probably*" did not apply to the C-Shift. There is an obvious difference between saying that an assignment "probably" does not apply and saying that the assignment does not apply. Shephard never went back to Petersen to clarify whether the assignment did, in fact, apply to the C-Shift.

Officer Shephard also conceded that he had subsequently kept the DPA log sheets that he received from Sergeant Petersen in his gear bag that routinely has with him in his squad car. It defies explanation as to why he would keep those log sheets with him for about forty-eight calendar days; if he truly believed that the DPA assignment did not apply to him.

Finally, the DPA assignment email must have been written clearly enough that all but two officers (Shephard and Officer Denise Urman) submitted log sheets showing that they had done the DPA assignment, as directed, during the period May 29 and July 15. Among those officers who submitted completed log sheets were two of Officer Shephard's colleagues on the C-Shift. Apparently, those two officers did not receive any message or word to the effect that the C-Shift could ignore the DPA assignment.

2. The Discipline imposed upon Officer Shephard is reasonable. Employers possess the inherent authority to issue discipline that is tailored to a specific employee and to that individual's prior disciplinary history and conduct. Arbitrator McCoy articulated this principal in *Stockholm Pipe Fittings Co.*:

"When an employees has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decided upon the proper penalty. If management acts in good faith upon a fair investigation and affixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it...The only circumstances under which a penalty imposed by management ca be rightfully set aside by an arbitrator are those where discrimination, unfairness or capricious and arbitrary actions are proved - in other words, where there has been an abuse of discretion." Stockholm Pipe Fittings Co., 1 LA 160, 162 (McCoy, 1945).

The discipline imposed upon Officer Shephard, in this instance, was not "*unreasonable, unjust, arbitrary or capricious*" under the totality of the circumstances and was fair and consistent with the City's policies and practices regarding progressive discipline.

When considering the level of discipline to impose upon Officer Shephard, the City considered not only the fact that he had completely disregarded Sergeant Petersen's email directive of May 28 regarding the DPA assignment, but also his previous history of insubordinate conduct. It was concluded that Officer Shephard does not like being told what he is to do.

On January 17, 2010 Shephard was issued a written Warning for insubordination for refusing to remove a plastic cup holder from his squad car, after Sergeant Convery had warned him that beverages placed in the cup holder could spill and cause damage to the equipment in the squad car. Two months later, after issuing that instruction to Shephard, Convery again noticed that the cup holder was still in his vehicle. When Convery again instructed him to remove the cup holder from the vehicle, Shephard became obstinate and argumentative. He told Convery that he didn't

understand what the problem was with the cup holder and demanded that Sergeant Convery tell him specifically what policy he violated.

Additionally, Shephard was issued a second written Warning in connection with a June 17th, 2010 incident in which a citizen called the Department to complain that Officer Shephard was observed driving a Mendota Heights squad car at dangerous speeds approaching 100 miles per hours. When questioned about the citizen's complaint, Shephard admitted that he was driving the observed squad car, that he wasn't chasing any suspect and was probably doing at least 80 mph. He said he had been trying to keep up with another officer. Obviously, driving a squad car at very high speed for no justifiable reason put the public at needless risk. In the written Warning issued to Shephard, he was specifically cautioned that if he was involved in a similar incident, it would be dealt with "*in a more severe manner.*" That language should have put Officer Shephard on notice that further disciplinary incidents would not be dismissed with a written warning. The instant disciplinary incident took place approximately a year after this second written Warning.

The purpose of progressive discipline is to put employees on notice of improper behavior or poor job performance, in order to give the employee an opportunity to correct these deficiencies. Obviously, if the initial disciplinary steps are unsuccessful in correcting the errant behavior, then the subsequent penalties become more stringent and severe. Here the City had previously put Officer Shephard on notice of his insubordinate behavior in his prior disciplinary actions, i.e. written Warnings. A one-day suspension was the appropriate next level of progressive discipline and fully in accordance with the provisions of *Article X, Discipline* of the applicable labor agreement. The one-day suspension imposed upon Officer Shepard is not arbitrary, capricious, discriminatory nor unreasonable in light of the totality of the circumstances.

The Union and Officer Shephard claim that his discipline in the DPA situation was inappropriate. They point to the fact that another officer in the Department also failed to spend any time on the Directed Patrol Assignments (DPAs) and, like Shephard, didn't turn in any completed log forms, but didn't receive a one-day disciplinary suspension. Their contention is correct, that Officer Denise Urman, also working C-Shift, did not spend any time on the DPA and turned in no completed log forms. She was issued a written Warning for insubordination for failing and refusing to properly carry out the DPA assignment. She was given the lesser disciplinary penalty, because, unlike Shephard, she had no previous similar disciplinary offenses on her record.

The City clearly has the authority and obligation to determine the appropriate level of penalty, based up the severity of the offense, as well

as to issue progressively severe discipline where an employee has a past history of similar misconduct or behavior. Accordingly, both Officer Urman and Officer Shephard were each treated fairly and reasonably with respect to the discipline imposed, in recognition of each of their personal disciplinary histories.

Conclusion: Given Officer Shephard's intentional disregard of his superior officer's clear directive and his previous history of insubordinate misconduct, the one-day suspension without pay is appropriate and reasonable discipline and is clearly in accordance with the Just Cause requirements of the applicable labor agreement. The City respectfully requests that this arbitrator deny the Grievance in its entirety.

THE UNION:

The City claims that Officer Shephard was insubordinate when he failed to perform the DPA assignment of May 28, despite knowing what he was expected to do.

In evaluating or analyzing a claim of insubordination, arbitral case law typically recognizes that three (3) criteria must be met to establish such a claim. First, the directive or order must be clear and understood by the employee. Second, the directive or order must be understood by the employee as an "order" and Thirdly, the employee must understand the penalty that may be imposed by the employer for being insubordinate.

Based upon the facts in this matter, the Union argues that, contrary to the City's assertion, Officer Shephard never received a clear-cut order from his superiors that he was to carry out the DPA assignment of May 28. At the very time that the DPA assignment was being conveyed to Officer Shephard, it was simultaneously explained to be not applicable to his C-Shift. In the hearing, the City emphasized inconsistencies in Shephard's accounts of his conversations with Sergeant Petersen on the evening of May 28. According to Shephard, Petersen said that the assignment "probably" did not apply or "really" did not apply to his C-Shift. These are minor distinctions and not really significant as to the clarity of the directive. The fact that Petersen made any of those comments confused the original order by raising questions as to its applicability to Shephard and his C-Shift is what made the order "unclear." Had Sergeant Petersen not qualified the DPA by adding a comment to the effect that it was not applicable to Shephard's shift, the order to perform it would likely have been clear. However, as soon as Petersen confused the issue by raising an issue concerning its applicability to C-Shift, it could no longer be concluded that a clear order was, in fact, issued.

As cited in its brief, the Union would have this arbitrator note the following arbitral principles and positions with respect to the "clarity" of orders and directives issued to employees:

- A directive will not be enforceable unless the employee has either actual or constructive notice of that directive.
- Rules must be communicated effectively to employees in some manner.
- Rules are unreasonable where they provide no clear guidance as to what is expected of employees.
- A reasonable rule must be one which the employee can understand and comply with.
- The employer bears the burden of proving that the employee knew of the policy before they can rightfully enforce it.

These principles all recognize that for an employer to demand compliance with a rule, order or directive, the same must be made clear and effectively communicated. In the instant case, Sergeant Petersen's direction for the DPA, as communicated to Officer Shephard, cannot be viewed as clear and effectively communicated. In fact, even Petersen admitted that at the time of discussing the DPA with Officer Shephard on the evening of May 28, he, himself, questioned whether it applied to Officer Shephard's C-Shift.

The Union also notes that it is significant that following Peterson's conversations with Shephard on May 28, there was no further clarification concerning the expectation of Officer Shephard performing the DPA. At a minimum, the fact that Petersen had personally raised a question as to whether the DPA applied to Shephard certainly injected confusion into the situation. The subsequent failure of Petersen, or any one else in authority, to clarify management's expectations allowed tht confusion to continue. The Union can think of no good reason for the City to have not, at some point in the 45 day assignment period, sent out a reminder as to its expectations. This would have assisted a view that the DPA assignment was clearly issued. Finally, while the City suggests that Shephard was likely aware that the other officers on C-Shift were, in fact, performing the DPA (a point that Shephard again disputes) one could just as logically conclude that the City was aware that Officers Shephard and Urman were not performing the DPA and that other officers were not going to all three (3) of the directed Areas. The City had the opportunity to monitor compliance and, in turn, address or correct any confusion or uncertainty, but failed to do so.

Even if this arbitrator were to conclude that the order to perform the DPA was itself clear, it must still be determined whether Officer Shephard understood that he, personally, was expected to perform the DPA. As to that question, it should be noted that there is no evidence to indicate that Shephard decided to ignore the assignment out of spite, laziness or to be difficult. He did not initiate a conversation with Petersen suggesting that the DPA should not be required for his shift. It was Sergeant Petersen who came to him and questioned the applicability of the assignment to the C-Shift. Shephard had routinely performed assigned DPAs in the past and had participated in the original creation of the log form used for this particular DPA situation.

Given the nature of the DPA assignment and Officer Shephard's shift, this would have been a very easy task for him. He could have gone to one of the three Areas in the middle of the night, logged time on the assignment during periods of minimal, if any, traffic and likely made no stops, warnings or citations. In fact, several of the other officers spent notable periods of time on the DPA assignment, but didn't record a single stop, warning or citation. There is no evidence that Officer Shephard failed to conduct any other appropriate patrol activities during his shifts. The fact that he believed his time was better spent conducting his regular patrol activities, rather than monitoring areas during periods of low traffic does not show that he was derelict in his duties.

Conclusion: For the reasons outlined above, the Union respectfully requests that Officer Shephard's Grievance be sustained and this arbitrator should direct the City to remove the "One-Day Suspension without pay for insubordination" from his personnel file, award him one day's pay and direct other appropriate relief to make him whole.

ANALYSIS, DISCUSSION AND FINDINGS

As noted previously in *Article X, Discipline, Section 10.1*, this labor agreement conditions Discipline upon "Just Cause" and like most labor agreements, this one contains no other statements, standards or definitions as to the precise meaning of that term.

Despite of the absence of a definition of "just cause" within the labor agreement itself, one would expect that - given the myriad of disciplinary cases that labor arbitrators have had to deal with over the course of many decades - the labor arbitrators themselves would have certainly reached a clear consensus as to the meaning of those terms. Wrong! The situation was aptly explained by one seasoned, veteran labor arbitrator who observed that neither he nor his esteemed colleagues have ever been able to reach agreement on an universally accepted definition of the term "just cause", but he noted that he and every other labor arbitrator could readily recognize the presence or absence of "just cause" in any particular case.

Over the decades there have been numerous attempts and proposals, by various individuals and entities to formulate a universally acceptable definition of "Just Cause", but none have, in fact, achieved universal acceptance among arbitrators or the courts.

Over the years, I have found it a couple of the proposed definitions to be helpful when confronting "Just Cause" situations. One of them is Arbitrator Carroll

Daugherty's "*The Seven Tests of Just Cause.*"³ Daugherty's "Tests" are relatively simple, straightforward and logically appealing for many.

1. *Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?*
2. *Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?*
3. *Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?*
4. *Was the company's investigation conducted fairly and objectively?*
5. *At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?*
6. *Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?*
7. *Was the degree of discipline administered by the company in a particular case reasonable related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?*

Personally, I find Daugherty's "Test" to be a useful tool in organizing and analyzing the facts and evidence that come to the fore in discipline cases. However, like many arbitrators, I find that it is rigid and overly mechanical in its application as a true test of "just cause"; in that it fails to recognize and allow for the weighing of the myriad of factors and nuances that are involved in a typical discipline situation.

An alternative view of the "just cause" situation was set forth by Roger I. Abrams and Dennis R. Nolan in "*Toward a Theory of 'Just Cause' in Employee Discipline Cases*", 85 *Duke Law Journal* 594 (1985). Like Daugherty's "Tests", I find Abrams and Nolan's theoretical construct to be another useful tool to organize and analyze the myriad of facts presented in a typical disciplinary case where the term "Just Cause" is not defined in the contract.

Procedurally, in this matter, the Employer bears the initial burden of proof to establish, by the evidence, that at the time the discipline was imposed it had established a *prima facie* case⁴ that Just Cause existed for the action. If the Employer meets that initial burden; then the burden of proof shifts to the challenging party to present credible evidence to refute or rebut the *prima facie* facts. The standard of "proof" in virtually all arbitral forums involving discipline is

³ See *Enterprise Wire Co.*, 46 LA 359, (Daugherty, 1966) and *Grief Bros. Cooperage Corp.*, 42 LA 555, (Daugherty, 1964)

⁴ *Prima Facie* denotes evidence that - unless rebutted - would be sufficient to prove a particular proposition or fact.

the Preponderance of Evidence standard; *Is it more likely than not that the facts presented by one party, when weighed against the facts presented by the opposing party, are true?*

Turning now to this matter and after reviewing and considering the record testimony and evidence, several preliminary considerations and findings are appropriate;

The Employer's prima facie case, based upon its record evidence, is essentially as follows:

1. At the time of his alleged misconduct Officer Shephard was aware or reasonably should have been aware of the provisions of the City's Personnel Code regarding insubordination. Additionally, he was also aware that, in light of his previous Warnings, further violations or misconduct would almost certainly result in more severe penalties.
2. The order issued by Chief Aschenbrener to have the Officers, including Shephard, conduct the DPA assignment on or about May 28 was directly related the Department's missions to serve and protect the City's citizens by addressing their concerns regarding traffic problems and by dealing with traffic violations within the community.
3. The subsequent email issued by Sergeant Petersen to all Patrol Officers, including Officer Shephard, on May 28 clearly stated the purpose, parameters and operational requirements for the assignment, specifically the fact that it applied to **"...officers on all shifts."**
4. When subsequently requested by Sergeant Peterson, on July 20, to turn in his completed DPA assignment log sheets, Officer Shephard failed to do so.
5. When asked by Sergeant Petersen on July 28 for a written response as to why he did not turn in any DPA log sheets, Officer Shephard stated, *"When you spoke to me about the assignment, you said something to the effect of 'this probably doesn't apply to C-shift, but the Chief didn't give any specified times.' I mistakenly took that literally and did not think that the assignment's focus was during c-shift hours."*
6. In addition to Officer Shephard, the Employer determined that one other Officer, Denise Urman, also failed to turn in any completed log sheets for the DPA assignment. Urman said that, *"My thought was it [the assignment] was directed to officers that work during high traffic times. That neighborhood is generally very quiet after 10. My apologies."*
7. Officer Shephard was given a One-Day disciplinary Suspension without pay for failing to carry out the DPA assignment. Officer Urman was given a written Warning for the same offense. The Employer imposed the more severe discipline upon Officer Shephard because he had received two (2) previous disciplinary Warnings in the course of the preceding year and a half or so.

Based upon the foregoing, I find that the Employer has established a *prima facie* case in support of its contention that it had "Just Cause" to discipline Officer Shephard on or about September 8, 2011.

Having found that the Employer has met its initial evidentiary burden, the Union now bears the burden of presenting sufficient arguments, evidence and facts sufficient to successfully rebut or challenge the Employer's position.

I am in agreement with the Union as to the general criteria to be used in evaluating a potential insubordination situation; 1) the order or directive must be clear and understood by the employee, 2) the order or directive must be understood by the employee as an order, not merely a request and 3) the employee must understand the penalty that may be subsequently imposed for knowingly and willfully disobeying the order or directive.

The Union arguments;

1. The Union's major contention is that for Officer Shephard, there was no "clear" order or directive to him to complete the DPA assignment. In support of that assertion, the Union points specifically to the conversations that allegedly took place in the squad room between Shephard and Petersen on the evening of May 28, as Petersen was apparently distributing the log sheets for the DPA assignment. According to Shephard's testimony, in those conversations,
 - Petersen told him that the DPA assignment didn't apply to the C-Shift, but said he was giving Shephard the log sheets "*...in case you want to go up there and do it.*"
 - Shephard also testified that in a later conversation with Petersen in the squad room on that same evening, Petersen stated the DPA assignment "*probably*" did not apply to the C-Shift. Shephard further testified that Officer Wilson was present when Petersen made that statement, but Wilson did not testify at the hearing. Officer Shephard acknowledges that he had no further or subsequent conversations with Petersen or any other supervisors/managers with respect to the DPA assignment, until he received the email query from Petersen on July 28, as to why he hadn't submitted any completed log sheets for the assignment.

Discussion and Findings: Obviously, as indicated in the hearing, Sergeant Petersen failed to support or corroborate Officer Shephard's recollections as to the specifics of the conversations that allegedly took place between him and Petersen in the squad room on the evening of May 28. Petersen has no specific recollection of such conversations, but points out that he would not have told Shephard that the DPA assignment didn't apply to officers on the C-Shift because the Chief's original order made it perfectly "clear" that because the complaints received from the Traffic Committee

did not specify any particular time periods, the Chief wanted the officers to monitor the problem areas on all shifts.

With respect to Chief Aschenbrener's requirement that the officers on all shifts were to carry out the May 28 DPA assignment, I don't think that was merely an oversight on his part. No one specifically questioned him in the hearing about that point so I am left to surmise his specific intent. Both Shephard and Urman, in defense of their failure to carry out the DPA assignment, allude to their perception and experience which told them that during C-Shift, there probably isn't a lot of traffic activity in any of the three DPA Areas. I have no doubt that Chief Aschenbrener, when he composed the DPA assignment and order, was also personally aware that the officers on C-Shift probably wouldn't see much activity in those areas. However, I believe that he included C-Shift in his order so that when the assignment period ended, he would have firm, hard field data with respect to the traffic situation in the three areas during all time periods, including the "graveyard hours", and that would eliminate any issues or questions from the Traffic Committee as to what the officers actually observed - where and when.

With respect to what was actually said by Petersen to Officer Shephard on the evening of May 28, regarding the applicability of the DPA assignment to the C-Shift, I find that the Union has not provided sufficient evidence to overcome or rebut the Employer's position that Sergeant Petersen did not, in any way, modify Chief Aschenbrener's order to exempt Officer Shephard or other officers on the C-Shift from carrying out the DPA assignment. I base that finding on the following:

- Assuming that Petersen did, in fact, tell Shephard in the alleged conversations on the evening of May 28 that C-Shift didn't have to carry out the DPA assignment; then later in the evening Petersen would have found himself in something of a quandary as he got ready to issue his formal email regarding the DPA assignment to the officers. If he issued the email with the original provision, required by the Chief, that all shifts carry out the assignment, he would also have noted that Shephard would almost certainly informally advise his colleagues on C-Shift that Petersen had said they didn't have to do that assignment. Therefore, Petersen would have been faced with either modifying his email or immediately contacting Shephard and clarifying his alleged statements from earlier in the evening. The fact that Petersen went ahead and issued the email unchanged, indicates to me he didn't make any conflicting statements regarding the scope of the assignment to Shephard or anyone else.
- Furthermore, if Shephard's recollections of the conversation(s) with Petersen earlier in the evening of the 28th are essentially true and correct, one would reasonably expect to see some logical follow-up

events. When Shephard subsequently received Petersen's email regarding specifics of the DPA assignment later in the evening, he would have noted the conflict between Petersen's alleged statements and the wording in the email that clearly said the assignment applied to "...all shifts." and logically, he would have contacted Petersen to resolve the conflict.

- If Petersen, indeed, indicated to Shephard on the 28th that the DPA Assignment did not really apply to the C-Shift, why didn't Shephard ever mention or discuss that with his colleagues on C-Shift? If he had done so, it would have almost certainly immediately exposed the "conflict" between Petersen's email and the alleged "exemption" for C-Shift and would have ended back in Petersen's lap for "clarification." That, of course, would have quickly resolved the issue.
- If Shephard truly believed that Petersen said that the DPA assignment didn't apply to or involve the C-Shift, why didn't Shephard immediately discard the log sheets that he had just received from Petersen. Obviously, he wouldn't need the log sheets. Instead, Shephard conceded that he kept the log sheets and put them in his duty bag, which routinely rides with him in the squad car. Why did he keep them?
- Finally, I note that in his email response to Sergeant Peterson on July 28, as to why he didn't turn in any DPA log sheets, Shephard **didn't** say, "Sergeant Petersen, you told me on May 28, that this DPA assignment didn't apply to the C-Shift." Instead, he said, "*When you spoke to me about the assignment [on May 28th], you said something to the effect of 'this probably doesn't apply to C-shift, but the Chief didn't give any specified times.' I mistakenly took that literally and did not think that the assignment's focus was during c-shift hours.*" (emphasis added)

2. The Union also argues that Sergeant Petersen's alleged statements of May 28 to Officer Shephard created "confusion" for Shephard and that, as a result, it was not "clear" to him that he was to carry out the DA assignment.

Discussion and findings. The Union's contention that Officer Shephard was "confused" by Sergeant Petersen's alleged statements on May 28 about whether the DPA assignment applied to him, I find to be without merit. To accept that contention, I also have to absolve Shephard of any responsibility to resolve that "confusion." Viewing the situation from his perspective on May 28th, he knew or reasonably should have known, after reading Petersen's email and the fact that it clearly said the DPA assignment applied to "...all shifts.", that he had a problem and/or was "confused". Petersen's email concluded by noting that if there were any questions, contact him or the Chief. Rather than immediately dealing with

his "confusion" by contacting Petersen or the Chief to resolve it, Shephard purposely choose to fully embrace his "confusion" and hold on to it for the duration of the DPA assignment. I find that was a conscious choice on his part and, obviously, a bad choice.

3. Finally, the Union contends that there was obvious disparate treatment in penalties for the same offense, between the Warning issued to Officer Urman and the more severe One-Day Suspension without pay for Shephard.

Discussion and findings. Based on the record evidence, I find no merit in this Union assertion. To the contrary, it is undisputed that Urman had no prior record of disciplinary action, prior to this offense. On the other hand, it is acknowledged that Shephard had received two previous written Warnings in the preceding 18 months or so, one in January of 2010 and a second in about June, 2010. Given the time proximity and nature of the two previous disciplinary incidents, the Employer was reasonably entitled to consider them in weighing Shephard's precise discipline.

In fact, under the general principles of industrial due process, it is virtually required and expected that an employer, in considering disciplinary action against an employee, will take into consideration the employee's past service and performance, including the past disciplinary record in determining suitable penalties. Such considerations may well result in more lenient or more severe penalties for the same offense, depending upon the nature of the employee's record.

I am fully satisfied that in this instance, the evident disparity in penalties is based solely upon the respective employment records of the two individuals. I note that there is no evidence to indicate that the disparity is based on any arbitrary, capricious, discriminatory or bad faith motives on the part of the Employer.

I do credit Officer Shephard's testimony in that I believe that he and Sergeant Petersen did have some sort of conversation on the evening of May 28 about the DPA assignment and I further believe that the conversation at some point involved the efficacy of having the C-Shift officers carrying out the assignment. However, when Shephard contends that Petersen, during the conversation, somehow "waived" the assignment for the C-Shift; a detailed analysis of each of their subsequent behaviors just does not support his contention. As the renowned TV arbitrator, "Judge Judy" frequently observes, "*If it doesn't make sense, it probably isn't true.*"

With respect to the three criteria, cited above, for evaluating possible insubordination; I find that on May 28 the Employer issued a "clear" order to all of the Department's Patrol Officer, including Officer Shephard, to perform DPA at

three specified locations or Areas over a period of 45 days. The email "order," as issued in email form by Sergeant Petersen on the 28th, at the direction of the Department's Chief of Police, clearly indicated that the assignment was mandatory for all officers on all shifts. As a seven-year veteran in the Department, Officer Shephard knew or reasonably should have known that disobedience of or failure to carry out the order would result in potential disciplinary action. He was also obviously aware that he had two previous disciplinary actions within the preceding 18 months or so and that a third incident would certainly result in a more severe penalty.

In summary I find that, for the reasons set forth above, the Union's specific arguments and contentions in rebuttal to the Employer's argument of Just Cause for the disciplinary action imposed upon Officer Shepard are without merit and insufficient to rebut or challenge the Employer's case. Accordingly, I find that, based upon the record evidence and testimony as a whole, the Employer has established, by a preponderance of the evidence, that Officer Shephard was properly disciplined for Just Cause.

CONCLUSION

In view of my analysis, discussion and findings above, I, therefore, conclude that the Employer has met its burden of proof and established by a preponderance of evidence that it had "just cause" to suspend Officer Michael Shephard, on about September 8, 2011, for one-day without pay for insubordination and that disciplinary action was in full conformance with the provisions of the applicable labor agreement.

DECISION

Having concluded that the Employer did not violate the applicable labor agreement, as alleged by the Union in its Grievance of September 9, 2011, the grievance is hereby denied and dismissed. Concurrently, the Employer's disciplinary decision with respect to Officer Michael Shephard is hereby sustained.

Dated at Minneapolis, Minnesota, this 1st day of July, 2013.

/s/ Frank E. Kapsch, Jr.
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of fourteen (14) calendar days from the issuance of this Decision to address any questions or problems related thereto.