

FEDERAL MEDIATION AND CONCILIATION SERVICE

BEFORE

ARBITRATOR BARRY E. SIMON

In the Matter of the Arbitration Between)	
)	
ILLINOIS FRATERNAL ORDER OF POLICE)	
LABOR COUNCIL,)	
)	
Union,)	FMCS Case No. 190610-07971
)	Grievant: James McClain
and)	
)	
VILLAGE OF WAUCONDA,)	
)	
Employer.)	

OPINION AND AWARD

The above identified matter was heard before the undersigned Arbitrator, selected by the parties through the Federal Mediation and Conciliation Service, on January 17, 2020 in the Wauconda Village Hall, Wauconda, Illinois. Representing the Illinois Fraternal Order of Police Labor Council, hereinafter referred to as “the Union,” was:

Jennifer Sexton, Esq.
Illinois FOP Labor Council

Representing the Village of Wauconda, hereinafter referred to as “the Village” or “the Employer,” was:

John B. Murphey, Esq.
Odelson, Sterk, Murphey, Frazier & McGrath, Ltd.

Sworn testimony was given before the Arbitrator, and recorded and transcribed by a Certified Shorthand Reporter. In lieu of closing arguments, the parties filed post-hearing briefs that were received by the Arbitrator on March 17, 2020, at which time the record was closed.

Background: The Village of Wauconda is located in Lake County, Illinois, northwest of Chicago. It has a population of approximately 15,000. Its Police Department has approximately 32 sworn full-time officers and approximately 8 part-time officers. At all times relevant to this dispute, James McClain, hereinafter referred to as “Grievant,” was employed by the Village as a Patrol Officer in the Police Department. As such, he was a member of the bargaining unit represented by the Union pursuant to a collective bargaining agreement effective May 1, 2019 through April 30, 2023, hereinafter referred to as “the Agreement.”

Certain material facts in this case are undisputed. On January 12, 2019, after learning of an incident involving his wife and Island Lake¹ Police Officer Richard Aguilar, Grievant phoned Sergeant James Gainer of the Island Lake Police Department about the incident. Grievant acknowledges that, during this conversation, he said of Ofc. Aguilar, “If I ever see him, I’ll punch him in the face.”

Sgt. Gainer reported this conversation in a January 17, 2019 email to Island Lake Interim Police Chief Dan Palmer.² The same day, Chief Palmer phoned Wauconda Police Chief David A. Wormes, saying to him, “I have a problem with one of your officers.” Chief Wormes then directed

¹The Village of Island Lake is the next community west of Wauconda. The two villages participate in a mutual aid relationship, along with other communities in the vicinity.

²Chief Palmer’s appointment became official in March 2019.

Sergeant John Combs, who is in charge of internal investigations, to investigate Chief Palmer's complaint. Sgt. Combs presented the findings of his investigation to Deputy Chief Michael Botterman in a Report of Inquiry, which was then presented to Chief Wermes.

Sometime prior to March 27, 2019, Chief Wermes issued the following Notice of Proposed Termination to Grievant:

Please be advised that I am considering the termination of your employment with the Wauconda Police Department for the following reasons and causes:

1. On January 12, 2019, you repeatedly threatened bodily harm to a police officer from another agency. There was no cause or provocation for these threats. Such activity constitutes gross misconduct and damages the relationship between the Wauconda Police Department and the other agency.

2. On February 4, 2019, you were interrogated concerning the misconduct described above in accordance with the Uniform Peace Officers' Disciplinary Act. At the commencement of the interrogation, you were admonished that if you were dishonest or deceptive or otherwise insubordinate during the course of the interrogation, such misconduct, in and of itself, would constitute cause for discipline up to and including termination.

3. I have determined that during the course of your interrogation, you made multiple statements which were false, deceptive or otherwise misleading.

4. A summary of my findings and conclusions is set forth in Report of Inquiry No. 2019-0001, a copy of which is attached this Notice.

A pre-termination Loudermill hearing will be held in my office on **March 27, 2019, at 2:30 p.m.** You are entitled to have Union representation at this meeting. You will be given an opportunity to explain your conduct and otherwise tell your side of the story. There will be no witness presentation. The meeting will be transcribed by a court reporter.

On April 4, 2019, Chief Wermes issued Grievant a Termination Notice, reading as follows:

This memorandum confirms the pre-termination meeting held in my office today. I have considered the matters you and your union representative raised at the meeting. Upon full consideration, I have concluded that just cause exists to terminate your employment.

Accordingly, your employment with the Village of Wauconda is terminated, effective immediately. You are ordered to promptly return all Department equipment in your possession.

You will be receiving separate communications regarding final compensation and post-employment benefits.

On April 5, 2019, the Union filed a grievance on behalf of Grievant, asserting that he was terminated without just cause. As a remedy, the Union asked that the termination be rescinded and that Grievant be placed back to work with full back pay and reinstatement of applicable accrual of benefits lost, including pension contributions from the Employer. The grievance was denied by the Employer, and was progressed through the grievance procedure in accordance with the provisions of the Agreement. The parties being unable to reach resolution, the matter was submitted to arbitration before the undersigned Arbitrator. The parties have stipulated that the grievance is properly before the Arbitrator and that he has jurisdiction to render a final and binding Award.

Statement of Issue: *Did the Village have just cause to terminate Grievant, James McClain?*

If not, what is the appropriate remedy?

Relevant Contract Provisions:

ARTICLE 3 MANAGEMENT RIGHTS

Except as specifically limited by the express provisions of this Agreement, the Village retains all traditional rights through its Village President and Board Trustees and its officers, agents and designees to manage and direct the affairs of the Village of Wauconda in all of its various aspects and to manage and direct employees. This provision shall include, but not be limited to the following:

* * *

L. to discipline, demote, suspend and discharge employees for just cause (probationary employees without just cause);

ARTICLE 5 GRIEVANCE PROCEDURE

* * *

Section 5.3 Arbitration

If the grievance is not settled in Step 3 and the Council wishes to appeal the grievance from Step 3 of the grievance procedure, the Council may refer the grievance to arbitration, as described below, within fifteen (15) business days of receipt of the Village's written response as provided to the Lodge/Council at Step 3:

* * *

D. The arbitrator shall submit their decision in writing within thirty (30) calendar days following the close of the hearing or the submission of briefs by the parties, whichever is later.

* * *

F. The fees and expenses of the arbitrator shall be divided equally between the Village and the Council; provided, however, that each party shall be responsible for compensating its own representatives and witnesses.

Section 5.4 Limitations on Authority of Arbitrator

The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. The arbitrator shall consider and decide only the question of fact as to whether there has been a violation, misinterpretation or misapplication of the specific provisions of this Agreement. The arbitrator shall be empowered to determine the issue raised by the grievance as submitted in writing at the Second Step. The arbitrator shall have no authority to make a decision on any issue not so submitted or raised. The arbitrator shall be without power to make any decision or award which is contrary to or inconsistent with, in any way, applicable laws, or of rules and regulations of administrative bodies that have the force and effect of law. The arbitrator shall not in any way limit or interfere with the powers, duties and responsibilities of the Village under law and applicable court decisions. Any decision or award of the arbitrator rendered within the limitations of this Section 4 shall be final and binding upon the Village, the Lodge/Council and the employee(s) covered by this Agreement.

ARTICLE 7 SENIORITY, LAYOFF AND RECALL

* * *

Section 7.6 Termination of Seniority

Subject to confirmation by the Chief of Police or designee and not overturned by an Arbitrator, seniority and the employment relationship shall be terminated for all purposes if the employee:

- A. quits;
- B. is discharged (for just cause for an employee who has successfully completed the probationary period);

Relevant Employer Policies:

Police Department Policy 321, Standards of Conduct:

321.5 CAUSES FOR DISCIPLINE

The following are illustrative of causes for disciplinary action. This list is not intended to cover every possible type of misconduct and does not preclude the recommendation of disciplinary action for violation of other rules, standards, ethics and specific action or inaction that is detrimental to efficient department service.

* * *

321.5.8 PERFORMANCE

* * *

- (c) Failure to participate in, or giving false or misleading statements, or misrepresenting or omitting material information to a supervisor or other person in a position of authority, in connection with any investigation or in the reporting of any department-related business.
- (d) Being untruthful or knowingly making false, misleading or malicious statements that are reasonably calculated to harm the reputation, authority or official standing of this department or its members.

* * *

- (i) Any act on- or off-duty that brings discredit to this department.

321.5.9 CONDUCT

- (a) Failure of any member to promptly and fully report activities on his/her part or the part of any other member where such activities resulted in contact with any other law enforcement agency or that may result in criminal prosecution or discipline under this policy.

* * *

- (d) Unauthorized or unlawful fighting, threatening or attempting to inflict unlawful bodily harm on another.

* * *

- (f) Discourteous, disrespectful or discriminatory treatment of any member of the public or any member of this department or the Village.

* * *

- (m) Any other on- or off-duty conduct which any member knows or reasonably should know is unbecoming a member of this department, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this department or its members.

Position of the Employer: The Employer submits that just cause for discipline may be determined by three questions, namely: (1) Did the Employer observe due process? (2) Does the evidence support the Employer's conclusion that discipline is warranted? (3) Is the disciplinary sanction proportionate to the offense which has been proven?

With respect to due process, the Employer asserts the parties have agreed there are no procedural issues. It says it conducted a thorough investigation, affording Grievant multiple opportunities to present his case, including at the pre-termination meeting where he declined to speak.

The Employer next argues it proved its case against Grievant and his termination was appropriate. It explains there are two elements to its case. The first involves Grievant's threats of physical violence against Island Lake Police Officer Aguilar. It says the first element was proven by Grievant's admission that he uttered the threats, and that they constituted serious misconduct having a negative impact on his professionalism and the Department's relationship with the neighboring department. The Employer notes Grievant acknowledged that he deserved significant discipline for his conduct.

The Employer asserts the second element of Grievant's termination relates to his not being truthful during its investigation of this matter, despite being admonished that dishonesty or deception would be cause for discipline up to and including termination. In this regard, the Employer asks the Arbitrator to employ accepted guidelines in assessing the credibility of Grievant and the Village's witnesses who were interviewed and testified at the arbitration hearing.

The Employer suggests that Grievant had developed a strategy of admitting what he needed to, but then presenting excuses for his inexcusable misconduct, and his loss of control. In doing so, the Employer asserts Grievant attempted to convince his superiors that he was simply defending his wife's honor. To this end, the Employer posits that Grievant linked Ofc. Aguilar to an incident involving Wauconda Sergeant Timothy Burke and his wife, Jenna Burke, although that incident involved a different Island Lake police officer. When confronted with the differences between his statements and those of the other persons interviewed, the Employer says Grievant accused them all of lying. The Employer asks the Arbitrator to find its witnesses, who had no motivation to lie, to be credible, thereby supporting the conclusion that Grievant was dishonest on multiple occasions during the course of his disciplinary interrogation.

The Employer next argues that termination was appropriate in this case. It cites arbitral decisions upholding the discharge of police officers for dishonesty. In particular, it contends that Grievant's conduct could impugn the integrity of the department and affect its ability to provide service to the community. Because of the extraordinary power they have to deprive individuals of their freedom, the Employer says society cannot afford dishonest police officers. It avers that Grievant's dishonesty would raise a *Brady* issue, with him being unable to testify under oath, write

citations, make arrests, or process evidence. According to the Employer, any future testimony or reports generated by Grievant would be tainted because of the constitutional requirement that the state turn over potentially exculpatory evidence to defense counsel under *Brady v. Maryland*. It explains that acts not involving untruthfulness, but nevertheless bringing an officer's honesty into question, may be within the disclosure rule. If it is known that an officer has lied under oath or submitted false official reports to his supervisors, the Employer asserts this information must be turned over as *Brady* material because it negates the officer's credibility. The Employer notes that Grievant acknowledged his familiarity with these requirements.

Finally, the Employer argues that reinstating Grievant would be contrary to clearly established public policy. Citing *Decatur Police Benevolent and Protective Association Labor Committee v. City of Decatur*, 2012 IL App. (4th) 110764, 360 Ill. Dec. 256, 265 (2012), the Employer says, "it is a violation of public policy to require the continued employment of an officer who has been found to be abusive and untruthful."

The Employer concludes it has proven by a preponderance of the evidence that it had just cause to terminate Grievant's employment. It asks, therefore, that the grievance be denied.

Position of the Union: The Union denies that there was just cause for Grievant's termination. With respect to the Employer's charges concerning Policy 321.5.9, Conduct, the Union first says Grievant had no reason to report this incident to a supervisor because he had merely made two phone calls, while off duty, to vent to his friends about an incident that had upset his wife. It says he took no actions to confront Officer Aguilar, much less threaten or harm him. The Union

notes that Grievant has not denied he said he would kick Ofc. Aguilar's ass, but insists he did not use any profanity beyond that. It questions Sgt. Gainer's credibility, pointing out that he testified that he was concerned about the phone call, but did not tell his Chief about it until days later, and never contacted Ofc. Aguilar to warn him of this supposed threat.

With regard to a conversation Grievant had with Sgt. Burke and his wife while they were on speaker phone in their car, the Union contends Grievant assumed Mrs. Burke was referring to Ofc. Aguilar when she began to complain about an Island Lake police officer. It argues that Mrs. Burke's testimony regarding the conversation was not credible, citing discrepancies in her testimony and with that of her husband.

The Union disputes the Employer's allegation that Grievant falsely testified that he and Sgt. Gainer are friends outside of work. It cites Sgt. Gainer's testimony that they have texted on other issues beyond work. Further, it refers to Grievant's knowledge of Sgt. Gainer's relationship with Heather Caroselli, despite Sgt. Gainer's insistence that he had not discussed this with Grievant. It concludes that Sgt. Gainer was not forthcoming about his relationship with Grievant.

The Union asks the Arbitrator not to give significant consideration to the interview with Grievant's wife. It notes that she was not called to testify by the Village, and her interview statements were not subject to cross-examination. Further, it asserts the Employer relied upon Ofc. Aguilar's statement in an effort to discredit Mrs. McClain's claims about the incident involving him. The Union contends the Employer may not rely upon her statement and discredit her at the same time.

The Union concludes that Grievant has been consistent and truthful in his account of the incident between his wife and Ofc. Aguilar. It avers that Sgt. Burke's testimony was consistent with Grievant's, but that Jenna Burke and Sgt. Gainer were impeached multiple times. The Employer, argues the Union, does not have the evidence necessary to support its claim that Grievant was not truthful during the investigation.

Finally, the Union argues the Employer failed to utilize progressive discipline. It notes that Grievant has been a Wauconda Police Officer for twelve and one-half years, and has almost no disciplinary history. To terminate him for a private phone call he made to two friends flies in the face of progressive discipline, asserts the Union.

Arguing that the Employer has not met its burden of proof that there was just cause to terminate Grievant, the Union asks that the grievance be sustained, that the Arbitrator order that Grievant be given back pay, that any record of his termination be expunged, and any other appropriate remedies.

Discussion: This case has as its origin a January 12, 2019 incident involving part-time Island Lake Police Officer Richard Aguilar and Grievant's wife. While he was directing traffic, Ofc. Aguilar became involved in an argument with Mrs. McClain. She then called Grievant and told him about the conversation, saying that Ofc. Aguilar used profanity toward her. This prompted Grievant to phone Sgt. Gainer, Ofc. Aguilar's superior. During this conversation, Grievant made a threat against Ofc. Aguilar. In an email he sent to Island Lake Interim Chief of Police Dan Palmer on January 17, 2019, Sgt. Gainer wrote:

On 01-12-2019 at 1211 hours I received a call from Officer McClean [*sic*] from Wauconda PD on my cell. He was inquiring who was directing traffic at Route 176 and Williams Park Rd due to an accident. I confirmed with him that it was Officer Aguilar. He then became very angry advising me Officer Aguilar is an asshole who just yelled at his wife, who was driving through. He stated Ofc. Aguilar screamed at his wife and now she is parked on the side of the road crying. I advised McClean I would speak with Ofc. Aguilar. During our conversation McClean repeatedly threatened bodily harm to Ofc. Aguilar, stating "If I ever see him I will knock him the fuck out" and "I'll knock that mother fucker out if I see him". [Er. Ex. 3]

In relating what Grievant said to him, Sgt. Gainer testified, "Well, I remember him saying he would fucking knock him out and punch him." [Tr. 39] Ofc. Aguilar testified he found Grievant's statements disconcerting and that he would have some concern about Grievant's intentions if he were to respond to an assignment to assist him. [Tr. 81, 82]

Grievant offered the following testimony regarding his conversation with Sgt. Gainer:

I asked him if it was Aguilar. He said yes, it was, and at that point I said - - I told him - - I said, well, you can tell him if I - - you know, punch him in his face for threatening my wife before - - In that turmoil I was, if he ever threatens my wife again, I will punch him in his face.

I don't know the exact words, but that is pretty the gist of it. [Tr. 199]

When asked on cross-examination if he agreed with the proposition that for a police officer to threaten another police officer is unacceptable conduct, Grievant replied, "Yes." [Tr. 217] He then testified as follows:

MR. MURPHEY: You chose to call a police officer and utter those horrible threats; isn't that right?

OFC. MCCLAIN: Yes.

Q. And you admit that you should be punished for that, right?

A. Yeah. [Tr. 218-219]

Even though Grievant denied using the profanities quoted by Sgt. Gainer, his admission that he threatened bodily harm against Ofc. Aguilar, and his further admission that he should be punished for it, ends the Arbitrator's inquiry as to whether the Employer has proven this charge against him. The facts surrounding the incident between Grievant's wife and Ofc. Aguilar are not relevant to the Arbitrator's consideration. Even if they were as Grievant describes, he has admitted that his reaction was inappropriate. If this were the only basis for Grievant's termination, the Arbitrator would then turn his attention to the quantum of discipline imposed.

The second aspect of the charges against Grievant relates to the Employer's contention that he lied under oath during his February 4, 2019 interrogation by Attorney John Murphey. [Er. Ex. 13] This interrogation, which was pursuant to the Uniform Peace Officers' Disciplinary Act, began with Sgt. Combs ordering Grievant to "direct truthfully any questions and answer them truthfully as well." This was followed by Mr. Murphey giving Grievant a *Garrity* warning, which concluded with Grievant acknowledging that if he lied or was otherwise insubordinate in that proceeding, the lie or insubordination could, in and of itself, be used as a basis for discipline against him, up to and including firing. [Er. Ex. 13, p.7]

The Arbitrator is satisfied that Grievant understood his obligation to be truthful during this interrogation, as well as the potential consequences if he was not. This is reflected in the following testimony before the Arbitrator:

MR. MURPHEY: You heard - - you heard the chief testify about the importance of police officer honesty, right?

OFC. MCCLAIN: Yes, I did.

Q. You agree with that, don't you?

A. Yes, I do.

Q. Well, again, we are talking generally speaking.

A. Yes.

Q. All right. And that -- and that there are -- there are circumstances where a -- if a police officer lies under oath, that that can't be tolerated, right?

A. Correct, yes.

Q. All right. And as a trained officer you are familiar with the so-called *Brady* requirements, right?

A. Yes, I am.

Q. Okay. And that if a -- if a police employer concludes that a -- a police officer lies under circumstances similar to that, that chief is under an obligation to turn that over to the state's attorney, right?

A. I can't speak for the chief, but yes, I would assume.

Q. And I am talking general terms.

A. In general terms. Like I said, I am only familiar with the wording. I don't know what the procedures of *Brady* is.

So --

Q. All right. So you know then that somebody who is a -- who is a -- who has credibility issues similar to what we have here, allegedly, that becomes something that the state's attorney has to disclose to defense counsel?

A. Oh, yes, absolutely.

Q. Okay. And that then makes the police officer's testimony subject to cross examination and impeachment, right?

A. Correct, yes.

Q. And then you have heard both myself in opening statement and actually the chief in his testimony use the phrase damaged goods, right?

A. I heard him, yes.

Q. All right. And you would - - you would agree that a police officer who has lied under such circumstances is damaged goods?

A. I believe that if a police officer under those circumstances would be damaged goods, yes.
[Tr. 238-241]

The Employer bases its charge that Grievant made false statements on a comparison between the record of Grievant's interrogation by Sgt. Combs and the interviews Sgt. Combs subsequently conducted with several people mentioned by Grievant. In addition, the Employer also refers to documents prepared by these persons.

The first instance cited by the Employer was Sgt. Gainer's email quoting Grievant as using profane language during their telephone conversation. Noting a discrepancy between the email and a subsequent handwritten statement by Sgt. Gainer, Sgt. Combs asked him to clarify what Grievant said to him. Sgt. Gainer offered two quotes: "If I see that mother fucker I will knock him out," and "I'll knock that mother fucker out." When questioned at the arbitration hearing if he had any doubt in his mind that Grievant used the "F" word repeatedly, Sgt. Gainer answered, "No doubt. No." [Tr. 41] Although he admitted making a threat against Ofc. Aguilar, Grievant was emphatic that he did not use profanity in his conversation with Sgt. Gainer.

In his interrogation, Grievant was asked about his relationship with Sgt. Gainer. He stated that they were friends outside of work, but not so much social. Grievant said they don't go out or hang out, but he had spoken to Sgt. Gainer, particularly in regard to Heather Caroselli. Sgt. Gainer told Sgt. Combs that they were work associates, but never had a relationship outside of work. When asked, on cross-examination, if he knew Grievant outside of work, Sgt. Gainer replied that he did, and that he had Grievant's phone number saved on his phone. When asked if he and Grievant had

texted on personal issues, he answered, “Yeah, very rare, but I am sure there has been text exchanged.” [Tr. 52] When asked if he had ever talked to Grievant about his relationship with Ms. Caroselli, Sgt. Gainer answered that he had not, and had only talked to his Chief of Police, his uncle and his lawyer. Grievant, however, testified that he had personal knowledge of the relationship with Ms. Caroselli that he had obtained from Sgt. Gainer.

The Employer next cites Grievant’s conversation with Sgt. Tim Burke and his wife, Jenna. This was the first conversation Grievant had after talking to his wife, and was over a speaker phone in the Burkes’ car. In his interrogation, Grievant stated that his purpose in calling Sgt. Burke was to have him go over and make sure Ms. McClain was okay. [Er. Ex. 13, p. 14] Grievant had stated during his interrogation that he called Sgt. Burke because “he’s one of my friends.” When asked about his relationship with Grievant, Sgt. Burke told Sgt. Combs that Grievant was a co-worker, and they had an “occasional phone call but most, if not all contact is work related.” [Er. Ex. 15] According to Sgt. Burke, he told Grievant that he only knew Ofc. Aguilar by name. He testified that he then mentioned an incident with another Island Lake Police Officer, mentioning him by name. In his interrogation, Grievant stated that Sgt. Burke related a similar experience with Ofc. Aguilar, where Mrs. Burke “got into a verbal argument, and she at the time felt intimidated and threatened by him.” [Er. Ex. 13, p. 17] When interviewed by Sgt. Combs, Sgt. Burke explained, “We discussed a previous incident [with] another former IL PD officer that occurred years ago. Completely unrelated.” [Er. Ex. 15] Sgt. Burke did not recall Grievant asking him to check on his wife.

Mrs. Burke corroborated all of her husband’s statements, both when interviewed by Sgt. Combs and in her testimony before the Arbitrator. In particular, she denied that Grievant asked them

to check on his wife. With respect to Grievant's contention they talked about another incident involving her and Ofc. Aguilar, Mrs. Burke responded, "Ofc. Aguilar was never discussed while speaking to Ofc. McClain, other than Tim saying he did not think he knew the officer but was sure he probably had met him at some point over the years." [Er. Ex. 17] At the hearing, she added that Grievant was swearing during the phone call, although she acknowledged that she had not mentioned profanity in her written statement. She testified, however, that she was confident as to what she heard.

In summary, the Employer's case with respect to Grievant making false statements primarily rests on these two phone calls. The Arbitrator's review of the record shows conflicts between Grievant's statements and those of Sgt. Gainer, Sgt. Burke and Jenna Burke concerning (1) the relationship between Grievant and the two sergeants; (2) whether Grievant used profanity during his call to Sgt. Gainer;³ (3) whether Grievant asked Sgt. Burke to check on his wife; and (4) whether the Burkes talked about another incident Mrs. Burke had with Ofc. Aguilar.

As for the first conflict, the Arbitrator does not consider that to be significant because people can have different perceptions of their relationships with others. The other three conflicts, however, are significant as they relate to the substance of the phone calls, and present factual issues rather than perceptions. As there are no recordings of either of the phone calls, it rests with the Arbitrator to assess the credibility of the Grievant and the other three witnesses.

³The Employer has made it clear that Grievant's use of profanity was not a basis for its discipline decision. It is relevant only to the extent that it is an element in the charge concerning his making false statements.

The Arbitrator finds that Sgt. Gainer was a credible witness. If all Grievant did was make a threat against Ofc. Aguilar, without using any profanity, that would have been sufficient for Sgt. Gainer to report it to his Chief. It would then have been sufficient for Chief Palmer to report it to Chief Wermes. There would be no need for Sgt. Gainer to embellish his report by accusing Grievant of using profanity if it had not actually happened. There is no evidence of any enmity between Sgt. Gainer and Grievant. In fact, Grievant has portrayed them as friends outside of work. There is no logical explanation, therefore, as to why Sgt. Gainer would not be truthful about the nature of the phone call.

Both Sgt. Burke and his wife gave consistent testimony regarding their phone conversation with Grievant. Of greatest significance is their assertion that they never spoke of another incident they had with Ofc. Aguilar. They were insistent that they were talking about another Island Lake officer, and it would not make sense for them to attribute that incident to Ofc. Aguilar. Grievant, however, was adamant they were talking about Ofc. Aguilar. Again, Grievant said he called Sgt. Burke because he was a friend. There is no evidence of enmity between Grievant and the Burkes, and the Arbitrator cannot find any reason why they might be untruthful. The Arbitrator finds the Burkes to be credible witnesses.

Although it was not relevant to Grievant's termination, a credibility issue arose at the arbitration hearing when Grievant testified that he had discussed the incident involving his wife and Ofc. Aguilar after he arrived at work. According to Grievant, he briefly mentioned it to officers who were having a briefing in the sergeant's office. When asked if he used profanities during this discussion, Grievant replied he did not. Joshua Marshall, a part-time officer with the Wauconda

Police Department, testified about an April 5, 2019 email he sent to Chief Wermes and Sgt. Combs, describing Grievant's conduct in the office. In pertinent part, the email stated:

On or about Saturday January 12th, 2019 while sitting on the desk Officer McClain came into the police department office area. He began to rant and rave using profanities about Officer Rich Aguilar of the Island Lake Police Department. Specifically he began asking me if I could believe how his wife was treated by Officer Aguilar. Officer McClain was visibly upset that Officer Aguilar had told his wife to turn her vehicle around due to a blocked roadway. Officer McClain was stating phrases as, "who the fuck does he think he is." "That guy is a fucking jagoff, I don't give a fuck if he just found out he had cancer no right to treat my wife that way." I did not interact or offer much in return as I felt Officer McClain so enraged there would be no way to calm him down and did not want him to start taking this out on me as I used to be employed with Island Lake. Officer McClain then continued his verbal onslaught with other officers in the sergeant's office. [Er. Ex. 22]

Grievant denied Ofc. Marshall's account, testifying that he said "hi" to him, and nothing else. [Tr. 210] Despite the length of time between the incident and Ofc. Marshall's email, the Arbitrator finds him to be a credible witness.

Grievant insists all of his statements were truthful. He never suggested that he might have been mistaken during his interrogation. Instead, all of the other witnesses, according to Grievant, were lying. The Arbitrator does not find it remotely realistic that all of the witnesses, other than Grievant, were lying during their interviews with Sgt. Combs and at the arbitration hearing. The Arbitrator doubts that three witnesses – Sgt. Gainer, Sgt. Burke and Ofc. Marshall – who are all police officers and presumably familiar with the *Brady* requirements, would lie under oath before the Arbitrator, particularly when there is no obvious motivation for them to do so. If they were all telling the truth, then Grievant, on multiple occasions, did not. Based upon the record before him, the Arbitrator finds that the Employer has proven, by a preponderance of the evidence, that Grievant, during the course of his interrogation, made multiple statements which were false, deceptive or otherwise misleading.

The Village's argument that termination was appropriate is persuasive. When a police officer threatens bodily harm against anybody in an unauthorized or unlawful manner, it is a serious matter. The Department's Standards of Conduct, in Section 321.5.9 (d), makes such misconduct subject to disciplinary action. The fact that Grievant made this threat to and against another police officer adds another layer of improper conduct. Such conduct was in further violation of Sections 321.5.9 (f) and (m). Ofc. Aguilar's testimony that he would question Grievant's intent if he were ever called out to assist him reflects how police officers must trust their fellow officers.⁴ When that trust is broken, it adversely affects the entire force. Severe discipline, up to and including termination would be warranted.

As noted above, Grievant's testimony shows he was aware of the consequences of being untruthful under oath. In addition, the Village's attorney asked him, "So, if it turns out that the Arbitrator concludes that these other people are telling the truth instead of you, you would agree that you should be fired, right?" Grievant answered, "If that is the determination, yes." [Tr. 220-221]

In *Village of Island Lake and Illinois FOP Labor Council* (Feb. 3, 2020), Arbitrator Marvin Hill explained the *Brady* decision as follows:

A major problem for the Grievant in this case is engendered by the famous *Brady* decision. In a nutshell, in *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court, Mr. Justice Douglass [*sic*], writing for the majority, held that prosecutorial withholding of exculpatory evidence (in this case withholding of a co-defendant's admission of the actual homicide) violates a defendant's due process rights "where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. As a result of that ruling prosecutors are required to notify defendants in criminal cases or their attorneys of evidence in their possession bearing on a police

⁴While a part-time officer with the Island Lake Police Department, Ofc. Aguilar is an experienced police officer. Prior to working for Island Lake, he had 32 years of service with the Chicago Police Department, 27 of which were as a Field Training Officer.

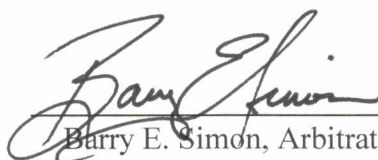
officer's credibility if he or she is called to testify. This would include previous lying or false statements by the law enforcement officer.

* * *

I have no doubt that if Officer Dickerson were returned to work the Administration would incur a major *Brady* problem if Mr. Dickerson were ever called to testify in a court or administrative proceeding. . . . While the Administration's position is well-taken, it is not necessary to link all 24 instances with the ten (10) reasons for termination in Exhibit #5 to sustain the dishonesty allegation outline in #10. Sufficient to hold that the Administration would have a major *Brady* problem if Officer Dickerson were returned to service.

With Grievant's integrity called into question, every report completed by Grievant would be subject to attack. An essential function of a police officer's job is to testify in court. Grievant's offense in this case would hang like an albatross around his neck each time he took the witness stand. With his credibility being subject to question, Grievant's value as a police officer is severely diminished. As argued by the Village, and agreed to by Grievant, he is "damaged goods." His termination was warranted.

Award: The Village had just cause to terminate Grievant's employment. The grievance is denied.


Barry E. Simon, Arbitrator

Dated: April 9, 2020
Arlington Heights, Illinois