CITY OF LIVINGSTON MT

The City of Livingston Montana and the Montana Public Employees' Association are parties to a collective bargaining agreement applicable to the City's Police Department. Fourteen (14) employees are covered by that collective bargaining agreement. That agreement contains a grievance and arbitration provision. Police Officer Matt Tubuagh filed a grievance contesting disciplinary action in the form of a written reprimand. The grievance requests removal of the written reprimand.[1] Both parties stipulated the grievance was properly before the arbitrator for final resolution without procedural issues.

APPLICABLE CONTRACT PROVISIONS

ARTICLE X-POLICIES & PROCEDURES, RULES & REGULATIONS

The Employer agrees to furnish each employee here under with a copy of the City Policy & Procedures Manual, Department Policy and Procedure Manual, Rules and Regulations and other policies of employment, and agrees to furnish each employee with a copy of any changes. LPDEA employees hereby adopt the City of Livingston Personnel Policy and Procedures Manual, including the Alcohol and Controlled Substance Use and Testing, and subsequence revisions and agree to comply with all provisions which do not conflict with this agreement. The Association agrees to appoint a representative to the City Policy and Procedures Review Committee, which meets annually, normally in January, to review the manual and forward recommendations to the City Manager for approval.

[1] Certain requested relief was withdrawn and redacted from the grievance. Issue is limited to the incident of June 8, 2012.

Article XIII-DISCIPLINE -

Upon suspected violation of federal, state or local laws, City Policies or procedures, employee conduct/behavior/performance standards, or department policies, procedures or rules and regulations, the employee may be subject to disciplinary action.

Procedure

1. Allegations of wrong-doing shall be investigated by the Department head, or his/her designee, such as a supervisor, or as directed by the City Manager.
2. As determined during the investigative process, the employee will be advised of the allegation and may be given an opportunity to voluntarily respond orally or in writing.
3. If an investigation interview is requested, the employee will be notified in writing of the time and location. They will be given reasonable advance notice and informed in writing of the suspected violation and in general terms what the interview will be regarding. The City may compel employees to answer questions. Refusing to answer questions upon demand is considered insubordination and will subject an employee to disciplinary action up to and including termination. Investigative interviews will be audio recorded.
4. In situations where disciplinary action may be taken, employees have the right to request an attendee of their choosing (i.e. Union representative, co-worker, and attorney) to be present during any compelled interview. The attendee is permitted to clarify questions being asked to the employee and give advice to the employee but they cannot bargain with the City, answer questions for the employee,

prevent the employee from answering questions, advise the employee to give false or misleading answers, or otherwise interfere with or disrupt the investigation.

5. Employees are afforded protection under the "Garrity Rule," in which compelled statements made to the City under threat of disciplinary action, and pursuant to an Internal investigation, will be used for internal purposes only and will not be used against the employee as part of any criminal investigation.
6. Upon completion of the investigation, the department head and/or their designee will notify the employee in writing that the investigation has been completed and scheduling a time and place to meet for the purpose of discussing the investigative findings. During the meeting the employee will be provided written notice of the findings, to include specific disciplinary action, if any. The employee will sign the document as proof of receipt and a copy will be provided to them.

   At any time during the investigation, the employee may be placed on paid administrative leave. This shall not be considered a disciplinary action.

   If discipline is warranted, it will be rendered in one of the following forms:

1. Verbal Counseling

   The City Manager and/or their designee will meet with the employee and explain the problem and necessary corrective action. They will also outline the time period in which the employee must correct the problem and the consequences should the employee not comply. This will be documented in writing a record of verbal counseling. The employee and

City Manager and/or his designee will sign the record of verbal counseling, which attests that the meeting took place, that the employee understood the problem and the corrective action required. The record of verbal counseling will be placed in the employee's personnel file.

2. Written Reprimand

   The City Manager and/or designee will document the problem in the form of a written reprimand. They will meet with the employee, present the letter, and explain the problem. During the meeting they will clarify the necessary corrective action, the time period to comply and the consequences should the employee not satisfactorily complete the necessary action. The letter to the employee will clarify that employee is receiving a written reprimand as part of the formal disciplinary procedure. A copy of the written reprimand must be signed by the employee that attests the employee participated in the meeting, understood the problem and corrective action required and received the written reprimand. A copy of the written reprimand will be given to the employee and a copy placed in the employee's personnel file.

D. If the employee doesn't agree that the discipline was warranted or if They consider the disciplinary action inappropriate, the employee may Follow the collective bargaining grievance procedure or applicable law.

ARTICLE XIV-GRIEVANCE PROCEDURE

STEP IV-If the decision of the City Manager is not satisfactory, the employee and/or his representative may have the grievance arbitrated by an impartial third party upon written request. Within five (5) traditional working days after submission of a written request to arbitrate, a request for

a list of Arbitrators will be made to the Montana Board of Personnel Appeals. Within five (5) traditional working days of the receipt, each party will alternately strike names from the list and the name remaining shall be the arbitrator.

C. The Arbitrator's fees shall be shared equally by the aggrieved party and the City. The Arbitrator shall have no authority to alter, amend or delete any Policy of the City, or provisions of this Agreement. The Arbitrator shall render a decision within thirty (30) calendar days of any hearing and such decision shall be final and binding on both the aggrieved and the City.

D. State law shall apply in all suspensions and/or dismissals that are not in conflict with the above paragraphs and the state law for suspensions and/or dismissals shall be followed.

RULES

9.09 Subject: Criticism. A member shall not destructively criticize or maliciously ridicule the department, its policies, programs, actions or officers.

9.10 Subject: Courtesy. A member shall constantly strive to maintain a courteous attitude towards the public and his fellow members of the Department. He shall be respectful, dignified and firm in pursuing

9.15 A member of the Department shall not show disrespect to a superior officer either by speech, suggestion or manner, and he shall refrain from criticizing, circulating rumors, carrying gossip or otherwise engaging in the conversation and activity which affects the morale of the Department or the status of any member thereof. Disciplinary measures will be taken by the Chief of Police for violations of this rule.

ISSUE- DID THE EMPLOYER HAVE JUST CAUSE FOR THE REPRIMAND ISSUED THE GRIEVANCE FOR THE JUNE 8, 2012 INCIDENT? IF NOT WHAT SHALL THE REMEDY BE?

FACTS/BACKGROUND

There is no disagreement on the basic facts regarding events giving rise to this grievance. On June 8, 2012 Officer Matt Tubaugh entered the Squad Room where Officer Jessica Kynett was seated at the computer and asked "Is this what we do on day shift-play on Face book?" Officer Kynett responded to the effect she was not on Face book and the grievant was not here supervisor. Officer Tubaugh made a comment that Officer Kynett should not be taking official time off to perform rehab for an unknown injury. Officer Kynett replied that she had permission. Officer Tubaugh then commented that the citizens of Livingston deserved better from their employees. Officer Kynett was within minutes of completing her shift and left the squad room. Later that evening Kynett contacted Chief of Police Darren Raney regarding the incident. An administrative investigation was initiated as a result of an Kynett's Complaint alleging "It was reported that on June 8, 2012 at around 1651 hours, while in the office and off duty, you (Officer Matt Tubaugh) confronted Officer Kynett about being on the internet, expressed concern about her having a physical therapy appointment while on duty earlier in the day and implied that she may be physically unable to perform her duties if she required physical therapy. The comments were reportedly made in a hostile, confrontational and aggressive manner that was perceived to humiliate Office Kynett in the presence of co-workers including two supervisors".[2]

[2] City Exhibit #1

POSITION OF THE EMPLOYER-The discipline was warranted to prevent a hostile work environment. The grievant's conduct was destructively critical of a fellow officer in the presence of Supervisory Officers, lacking in respect for Superior Officers and made malicious comments detrimental to the force.

POSITION OF THE ASSOCIATION-The MPEA contends employer has not met its burden of proof to justify a written reprimand and that the grievance should be sustained. It argues that the discipline imposed is far in excess of anything justified by the events and that no disciplinary action is appropriate under the circumstances. The grievant was well within his rights to question the use of internet while on duty and leaving duty for purposes of physical therapy. There was no intent to criticize or demean a fellow officer.

OPINION/DECISION-

The burden of proof in alleged misconduct for which the employee is disciplined is that of the employer's to prove. Where that misconduct involves violations of the employer's rules, policies and procedures it is incumbent upon the employer to show the existence of that rule, policy and procedure, employee awareness and was the rule properly applied. The task of any arbitrator examining the issue of just cause or good and sufficient cause is to examine the evidence, testimony of respective witnesses and to determine the most probable truths.[3] The Employer's own Policy on Discipline does not reference either just cause or good and sufficient cause. The parties' collective bargaining agreement does not contain usual just cause standard for discipline/discharge, however there is ample indication to infer the existence of a just cause standard by the very existence of a

[3] Dworkin, Harry, Elwell-Parker Electric 87 LA 327

collective bargaining agreement. While the employer used good cause and the Association used just cause in framing the issue as whether just cause existed for the Employer's disciplinary action, the terms are not significantly different. Both distinguish between harsh, unfair, biased, prejudicial or arbitrary & capricious discipline and that which is fair and reasonable. In reaching his decision, the arbitrator considers just cause standards to apply to whether the Employer's discipline was warranted.

Based on the evidence/exhibits, testimony, and collective bargaining provisions, it is clear the Employer has established a reasonable rule, policy & procedure regarding criticism of a fellow officer. The record does not indicate that the grievant was unaware of the rule, policy and procedure regarding criticism of a fellow officer. Simply because an employee does not agree that disciplinary action was warranted or the discipline is inappropriate does not provide grounds for setting aside that discipline. The question is whether than rule was properly applied which subjected the grievant to disciplinary action.

While the grievant was off duty, that does not mean the Employer's rules of conduct do not apply, especially where a nexus with his employment exists. The grievant was on the Employer's premise in the squad room and in the presence of fellow Officers. The comments made can reasonably be considered to pertain to the operation of the Department. There is uniform agreement that the grievant entered the squad room and while standing in proximity to Officer Kynett asked "Is this what we do on day shift?" Employer witnesses characterized the comment at this point as made in a joking manner. When the grievant commented that Officer Kynett could not have been too busy having taken time out for a physical therapy treatment

matters became confrontational. Employer witnesses including both officer's Supervisors indicated the conversation quickly turned hostile and confrontational the tone of voice of both Officer Kynett and the grievant changed. Officer Leonard testified "what started out as a joke, now nobody is joking and things got out of hand. Officer Leonard characterized the exchange as hostile, resulted in yelling and was not a good thing". Officer Johnson testified that both got heated and hostile in tone and inflection in an elevated voice requiring him to step out of his office and tell the grievant to "knock it off. Officer Johnson testified that when the grievant continued and failed to "knock it off", he repeated the "knock it off" instruction. Officer Leonard testified hearing Johnson state "knock it off" twice. The grievant indicated he did not hear Johnson tell him to "knock it off" but that it was possible Johnson did so. Officer Hand testified the conversation was argumentative and that Johnson told the grievant two or three times to stop. Hand stated he told the grievant he'd get in trouble. Hand indicated to the grievant that it would be better to address his concerns with the Administration. Officer Hand indicated the conversation was a volatile and accusatory discussion. Officer Hand indicated the grievant was the aggressor in the conversation. The record establishes that the argument broke up only when Officer Kynett left the room and not on any action on the grievant's part.

The grievant did not deny the statements attributed to him & indicated Officer Leonard's testimony was accurate. The grievant acknowledged that he "just made a comment and did not consider it fighting words. I just made a comment and did not view it as airing dirty laundry". She seemed angry but I was not. The grievant testified that he had heard Officer Kynett check out to have a physical therapy session and that it bothered him. It is equally

clear that the grievant believed that he did nothing wrong when the written apology was given stating " I am writing this letter of apology as demanded by the Chief of Police". The grievant's apology lacks sincerity. That belief was carried into the hearing.

The Association correctly points out that it is a legitimate concern of any officer that backup officers be physically able to protect him if necessary. On this point the arbitrator is in agreement. The grievant was aware Officer Kynett had not participated in a voluntary physical fitness test due to being in physical therapy.[4] It would be reasonable for an officer hearing a call that their backup would be going off duty for physical therapy to be concerned. There is an appropriate place and procedure for raising those questions which the grievant chose not to follow. The grievant's comments were especially disrespectful when done in the presence of Officers with Supervisory responsibilities. The replies by Officer Kynett were neither abusive nor profane or accompanied by gestures. Officer Leonard stated Kynett replied "Don't worry about what I am doing. You are not my supervisor". It was a simple outburst regarding questioning of how she was spending her time at the moment and fitness for duty by taking time for physical therapy during working hours. Based on the testimony, the arbitrator is of the opinion that the grievant, not Officer Kynett, initiated and pursued the discussion.

There is no question that the grievant's supervisor or the other supervisors were not concerned over the fact Officer Kynett was on the computer albeit for personal use shortly before the end of her shift. Nor were the Supervisors questioning Kynett taking time off for a physical therapy appointment. As

[4] City Exhibit #4- Grievance

Supervisors it is logical that the Supervisors were aware that permission had been granted. When Officer Johnson commented that only nine minutes remained of the shift and that Kynett had been busy, the grievant continued to insist that Kynett could not have been too busy since time off for physical therapy. The grievant did not bother to inquire of supervisors who were present whether permission had been given to do so and continued by the statement "citizens deserve better."

All witnesses place the length of confrontation at approximately twenty-thirty seconds. In an industrial setting the arbitrator would dismiss the grievant's comments as an unfortunate outburst. In that setting such comments are, at best, harsh and but not inappropriate but it is not abusive. In the setting of a Police Department close cooperation between Officers are imperative. The grievant could reasonably conclude that his comments questioning Kynett's fitness for duty and citizens deserve better were derogatory comments that would result in a response from Kynett.

The just cause standard requires more than a finding that an employee committed misconduct which subjects the employee to disciplinary action. It requires the employer to consider whether mitigating circumstances exist and whether the penalty is appropriate. In a close analogy, not all participants in a fight are always disciplined equally. The aggressor often receives more severe disciplinary action. Occasionally even an aggressor receives no discipline. If the other employee is not considered to have provoked the incident or does no more than defend themselves a lesser or no penalty is warranted. Each incident must be examined for its settling and circumstances.

The Association contends the argument was a mutual exchange. The arbitrator agrees. Officer Hand's testimony makes it clear that Kynett took offense, her voice was elevated and that Kynett angry. In his words, it was an argument. Clearly Kynett reacted to what she considered criticism of her performance. Based on the record Officers Johnson, Leonard and Hand considered the exchange merely a brief heated argument and did not initiate any disciplinary action on either. There is nothing in the record that Officers Johnson, Leonard or Hand reported the incident to Chief Raney. If Kynett had not reported the exchange to Chief Raney it is probable no disciplinary action would have occurred.

In summary there is little doubt that the grievant both initiated and at the very least, was disrespectful and lacking in tact when addressing Kynett. For that the grievant was subject to disciplinary action. Whether the grievant intended to address Kynett with his comments, they were said in her presence. Whether the grievant intended to belittle or create a hostile environment is not material. It is clear Kynett took them as such when Kynett's physical fitness was being questioned, particularly in the comment that "citizens deserve better". Finally there are the actions taken by Kynett in reporting the incident to Chief Raney. Raney's decision to issue a written reprimand was not taken for punitive purposes but due to his concern over the ability of the grievant and Kynett to work together in a small sized Police Force where the ability to work together is critical. The Employer has met the requirements of due process and the Arbitrator is convinced the Employer did not act in an arbitrary, capricious or unreasonable manner. A measure of discipline is warranted.

The just cause standard goes beyond whether misconduct exists and whether the Employer imposed disciplinary action that was not arbitrary, capricious or in an unreasonable manner. The arbitrator is required to ascertain whether there are mitigating circumstances and whether the penalty was reasonably calculated to correct that misconduct. The event was clearly an argument by any definition of the word. Officer Johnson's statement to "knock it off" could well apply to both participants. The grievant was disciplined for destructive criticism or maliciously ridiculing Kynett. A malicious act or statement is that done intentionally for the purpose of injury. The grievant's comments after the initial joking comment were a heat of the moment outburst and in response to an angry defensive Kynett. There were no threats or gestures made by the grievant. The comments while inappropriate do not rise to the level of destructive criticism or malicious ridicule. Nor does a single isolated outburst rise to the level of creating harassment or a hostile environment. Any affect on the morale and operating efficiency appears minimal. In the analogy of a fight situation, while the grievant initiated what became a hostile event, Kynett was an equal participant. Kynett could have allowed the Supervisory Officers to handle the event, or walk out as Kynett did later. In the arbitrator's opinion Kynett's continued response is a mitigating factor which the arbitrator is required to consider in determining whether the penalty was appropriate especially where no prior disciplinary action regarding the grievant is part of the record.

CONCLUSION /AWARD

The grievance is sustained in part and denied in part. After considering the evidence, exhibits, testimony and arbitrator's notes, collective bargaining agreement and Montana Law, the arbitrator concludes the record supports a finding that the employer had just cause under the collective bargaining

agreement to discipline the grievant. The written reprimand is to be reduced to a verbal warning provided the grievant makes a sincere apology to Officer Kynett satisfactory to Chief Raney. Failure to do so will result in reinstatement of the written reprimand. It is hoped that both have learned a valuable lesson.

Respectfully:

Jerry Hetrick, Arbitrator
Dated December 20, 2012 and made effective at the City of Livingston MT Police Department.

IN THE MATTER OF ARBITRATION

BETWEEN

CITY OF LIVINGSTON MONTANA

MONTANA PUBLIC EMPLOYEES' ASSOCIATION

FOR THE EMPLOYER	FOR THE ASSOCIATION
Bruce Becker, ATTORNEY	Carter Picotte, Attorney
John Leonard, Sgt.	Darcey Dahl, Field Rep.
Dale Johnson, Sgt.	Matt Tubaugh, Grievant
Wayne Hand, Officer	
Darren Raney, Chief	
Ed Meese, City Manager	

Date of Hearing: November 20, 2012

Date of Award: December 20, 2012