IN THE MATTER OF ARBITRATION
BETWEEN

Butte Police Protective Association

Union,

and

City and County of Butte-Silver Bow, Montana,

Employer.

OPINION AND AWARD

(Detective Rhonda Staton Discharge)

August 9, 2021

A. Ray McCoy
Arbitrator

Appearances

For the Employer

Cynthia L. Walker, Esq.
POORE, ROTH & ROBINSON, P.C.
1341 Harrison Avenue
Butte, Montana 59702

For the Union

Karl J. Englund
KARL J. ENGLUND, P.C.
401 North Washington Street
P.O. Box 8358
Missoula, Montana 59807

JURISDICTION

The Parties notified the arbitrator of his selection on January 29, 2021. The Parties ultimately selected April 27, 2021 for the hearing date. The hearing was held on that date via Zoom. The hearing was continued on May 3, 2021. The Employer and the Union had a full and fair opportunity to present their respective cases through witness examinations as well as exhibits. The Parties elected to submit post-hearing briefs in lieu of verbal closing arguments. The arbitrator received the post-hearing briefs, as agreed, on May 21, 2021. The record was closed on that date. The Parties agree that the issue is properly before the arbitrator for determination. Article 17, Section 8 of the Parties' collective bargaining agreement governing the processing of grievances states the decision of the arbitrator shall be binding on both parties and empowers the arbitrator to make compensatory awards. (City-County of Butte-Silver Bow, Montana and Butte Police Protective Association July 1, 2020-June 30, 2022, p. 10, Hereinafter cited as "Agreement at p. ___")

ISSUE

The parties agreed on the following statement of issue to be decided by the arbitrator: "Whether the Employer violated the parties' collective bargaining agreement in terminating grievant Rhonda Staton's employment. If so, what is the remedy?"

RELEVANT SECTIONS OF CONTRACTUAL LANGUAGE

ARTICLE 10 - DISCIPLINE AND DISCHARGE

Section 1: No non-probationary/confirmed employee may be disciplined or discharged without just cause.

ARTICLE 13- HEALTH AND SAFETY

Section 5: The Employer and the Union recognize that behavioral health problems, inherent to most, if not all law enforcement employees due to stress, burn-out, post-traumatic distress syndrome, depression, etc., can be and most often are correctable through intervention, treatment and/or counseling. Therefore, the Employer will assist said employees at the employee's request.

In cases where an officer/civilian employee is involved in a traumatic situation directly or indirectly, said officer/civilian should be encouraged to submit to counseling.

In such situations, the Employer shall recognize that:

a) Self-referral is most desirable.

b) Employees who seek assistance shall not have job security or promotional opportunity jeopardized by this request for assistance.

c) Confidentiality must be maintained and privileged information will not be released to anyone without the employee's express written release of said information.

d) Assistance and rehabilitation will be given the upmost priority and every effort shall be made by the Employer to assist the employee through such difficult times.

e) The Employer and the Union must be receptive to and encourage the employees to seek assistance. Such described conditions shall be treated as any other illness, and shall not be used to harass, embarrass, or otherwise cause the employee further stress.

ARTICLE 17 - GRIEVANCE PROCEDURE

Section 2: A grievance, for purposes of this Agreement, is an unresolved complaint on the part of an employee(s) regarding treatment received from supervisory personnel or other employer representatives, dissatisfaction with working conditions, or any action on the part of the Employer which he/she considers to be a breach of this Agreement.

Section 8: Grievances shall be processed in accordance with the following steps:

Step 4: In the event a grievance has not been settled under the procedures above, the Grievance Committee may proceed directly to arbitration which shall be final and binding. Notice of intention to arbitrate the grievance must be sent in writing to the Council of Commissioners by the Union within five (5) working days after receipt of the decision of the Chief Executive.

If the matter proceeds to arbitration, the Union shall request, within ten (10) working days of the Council of Commissioners' notification, a list of seven (7) arbiters from the Board of Personnel Appeals, State of Montana. The rules governing the arbitration shall be as follows:

a) Each party shall be entitled to strike three names from the list in alternate order. The name remaining shall be the agreed upon arbiter. A coin toss shall determine who will strike the first name.

b) The decision of the arbiter shall be binding on both parties for the duration of the contract.

c) The arbiter shall be empowered to make compensatory awards.

The expense of the arbitration shall be borne 25% by the prevailing party and 75% by the unsuccessful party to the grievance. In all steps of the grievance procedure, when it becomes necessary for individuals to be involved during working hours, they shall be excused with pay for that purpose.

Section 9: The time limits enumerated above may be waived or extended upon mutual agreement of both parties.

BSBLED POLICY AND PROCEDURE MANUAL

POLICY NUMBER 302

PHYSICAL AND PSYCHOLOGICAL REQUIREMENTS

I. Purpose

The LED encourages all members to maintain the proper level of physical and psychological fitness to accomplish their essential job functions. It is essential that members possess the proper level of physical conditioning to effectively conduct their duties.

II. Definitions

LIGHT DUTY: Temporary duty performed by an employee who is recovering from a short term injury or illness. The duty is performed at the discretion of the Sheriff.

III. Policy

It shall be the policy of the LED to ensure personnel meet the necessary physical and psychological requirements of their assigned position. Furthermore it is the policy of the LED to comply with the provisions of the Americans with Disabilities Act (ADA) and the Equal Employment Opportunity Commission (EEOC).

IV. Procedure

A. Physical and Psychological Requirements:

1. Because it is the mission of the LED to protect the public safety, all members of the LED are to be physically and psychologically able to perform their assigned duties. Therefore, employees may be required to undergo physical or

psychological examinations if the Sheriff has reason to believe that an employee's fitness for duty is questionable.

2. Sworn members must be physically and psychologically able to perform their duties as a Police Officer. This may include patrol duty, making arrests, quelling disturbances and supervising or transporting inmates etc. They must be capable of using as much force as necessary, including the use of firearms and physical restraints, to fulfill their duties.

3. Non-sworn members must possess the physical and psychological ability to perform the duties of their position.

4. All employees may be subject to a physical or psychological evaluation if necessary.

B. Temporary Physical or Psychological Conditions:

1. Members with temporary physical or psychological conditions, which may prohibit them from performing the full duties of their position, will not be permitted to work. They may use accrued sick and vacation time to remain on the county payroll until they are able to return to full duty or become eligible for Light Duty.

2. If a member does not have enough accrued sick and vacation time to remain on the payroll, they may request a medical leave of absence without pay until they have the ability to return to full duty. See the Butte-Silver Bow Personnel Policy & Procedure Manual.

3. Sworn pregnant members will be permitted to wear civilian maternity clothing in lieu of a uniform. They will perform the full duties of their position to the degree that is reasonable for their condition. They will not be required to use physical force or perform other duties that would jeopardize their health and welfare or that of their unborn child.

C. Permanent Physical or Psychological Conditions:

1. Employees who suffer permanent physical or psychological conditions, which preclude their ability to perform the full duties of their position, will not be retained in their position.
2. Any employee who can no longer perform the duties of their position, due to a permanent physical or psychological condition, will be treated on an individual basis. The Sheriff will treat employees in this status in a fair and equitable manner.

D. Determination of Temporary or Permanent Physical or Psychological Condition:

1. The Sheriff will normally decide if an employee has a temporary or permanent physical or psychological condition that does not permit the employee's full performance of duty.

2. The Sheriff may order a physical or psychological (fitness for duty) evaluation of the employee if there is doubt concerning the employee's ability to perform the full duties of the position. The Sheriff must document and articulate the reason for the request. The LED will pay the cost of the evaluation with a professional of the Sheriff's choosing.

E. Evaluation of Physical or Psychological Condition:

1. An evaluation Board will consider all permanent physical or psychological conditions. The Board will consist of the following:
   a. Sheriff
   b. Undersheriff
   c. Captains
   d. Butte-Silver Bow Personnel Director

2. The Board will consider all available information concerning the employee's ability to perform the full duties of the position. The employee will be permitted to offer any information available to the Board. The Board will make the final determination concerning the employee's ability to perform the full duties of the position.

MONTANA STATUTES

§ 7-32-303 Peace officer employment, education, and certification standards -- suspension or revocation -- penalty.

(1) For purposes of this section, unless the context clearly indicates otherwise, "peace officer" means a deputy sheriff, undersheriff, police officer, highway patrol officer, fish and game warden, park ranger, campus security officer, or airport police officer.

(2) A sheriff of a county, the mayor of a city, a board, a commission, or any other person authorized by law to appoint peace officers in this state may not appoint a person as a peace officer who does not meet the qualifications provided in this subsection (2) plus any additional qualifying standards for employment promulgated by the Montana public safety officer standards and training council …

A peace officer must:

(a) be a citizen of the United States;

(b) be at least 18 years of age;

(c) be fingerprinted and a search made of the local, state, and national fingerprint files to disclose any criminal record;

(d) not have been convicted of a crime for which the person could have been imprisoned in a federal or state penitentiary;

(e) be of good moral character, as determined by a thorough background investigation;

(f) be a high school graduate or have been issued a high school equivalency diploma by the superintendent of public instruction or by an appropriate issuing agency of another state or of the federal government;

(g) be free of any mental condition that might adversely affect performance of the duties of a peace officer, as determined after:

(i) a mental health evaluation performed by a licensed physician or a mental health professional who is licensed by the state under Title 37, who is acting within the scope of the person's licensure when performing a mental health evaluation, who is not the applicant's personal physician or licensed mental health professional, and who is selected by the employing authority; or

(ii) satisfactory completion of a standardized mental health evaluation instrument determined by the employing authority to be sufficient to examine for any mental conditions within the meaning of this subsection (2)(g), if the instrument is scored by a licensed physician or a mental health professional acting within the scope of the person's licensure by a state;

(h) be free of any physical condition that might adversely affect performance of the duties of a peace officer, as determined after satisfactory completion of a physical examination performed by a health care provider who is licensed by the state under Title 37 and acting within the scope of the person's licensure when performing the physical examination, who is not the applicant's personal health care provider, and who is selected by the employing authority;

(i) have successfully completed an oral examination conducted by the appointing authority or its designated representative to demonstrate the possession of communication skills, temperament, motivation, and other characteristics necessary to the accomplishment of the duties and functions of a peace officer;

(j) possess or be eligible for a valid Montana driver's license; and

(k) be certified or be eligible for certification as a peace officer by the council or become eligible for certification upon completion of the requirements contained in subsections (6) through (10).

(3) At the time of appointment, a peace officer shall take the formal oath of office prescribed in Article III, section 3, of the Montana constitution. No other oath may be required.

(4) Within 10 days of the appointment, termination, resignation, or death of a peace officer, written notice of the event must be given to the Montana public safety officer standards and training council by the employing authority.

(5) It is the duty of an appointing authority in Montana to ensure that each peace officer appointed under its authority has the basic training, including any training required in subsections (6) through (8), in addition to meeting all other requirements of peace officer certification promulgated by the Montana public safety officer standards and training council. Any peace officer appointed after September 30, 1983, who fails to meet the minimum requirements as set forth in subsection (2) or who fails to complete the basic training required by subsections (6) through (8) forfeits the position, authority, and arrest powers accorded a peace officer in this state.

Employer's Position

1. The Union's grievance is automatically nullified due to the Union's departure from the established grievance procedure. Pursuant to Step 4 of the established grievance procedure set forth in Section 8 of Article 17, notice of intention to arbitrate the grievance must be sent in writing to the BSB Council of Commissioners within five (5) working days after receipt of the Chief Executive's decision. The Union received the Chief Executive's decision on September 28, 2020. Five (5) working days from receipt of the Chief Executive's September 28, 2020, decision would have been October 5, 2020. However, the Union did not submit written notice of its intention to proceed to arbitration to the Council of Commissioners until October 7, 2020. Pursuant to Section 6 of Article 17, the Union's departure from the established grievance procedure shall automatically nullify the grievance. Accordingly, BPPA's grievance must be denied on that basis.

2. The Union's grievance should be denied because just cause existed for Staton's termination. Article 10 of the parties' CBA provides that no non-probationary/confirmed employee may be discharged without just cause. Just cause is not defined in the CBA. However, just cause is common vernacular in labor arbitration matters, which simply means an employer must have a justifiable reason for a discharge. The following seven-part standard was developed to analyze whether just cause exists for discipline or discharge; (a) the employee knew of the employer's policy; (b) the employer's policy is reasonable; (c) there was a sufficient investigation; (d) the investigation was fair and objective; (e) substantial evidence exists that the

employee violated the policy; (f) the employer's policy has been consistently applied; (g) the discharge was reasonable and proportionate.

3. The Union did not argue that Staton was not aware of Montana law or BSBLED's policy requiring her to be physically and psychologically fit for duty. Nor did the Union argue that such laws or BSBLED's policy are not reasonable. In addition, the Union did not argue that BSBLED's investigation of Staton's performance issues or the FFDE performed by Dr. Watson were insufficient or were not fair and objective. The Union also did not argue that BSBLED has not applied Policy 302 consistently. The only argument raised by the Union is that BSBLED should have allowed Staton to attempt to mitigate her lack of fitness for duty prior to terminating her employment. Regardless of the fact that the Union did not raise any argument concerning the above-referenced parts of the just cause standard, analysis of each of the parts of the standard demonstrate that just cause existed for Staton's termination. As a police officer having been issued a certificate by the Montana public safety officer standards and training council (POST), Staton knew the minimum qualifications required for officers in Montana.

4. Staton also knew that BSBLED Policy 302 requires all sworn members to be physically and psychologically able to perform their duties as a police officer. Staton also knew that BSBLED Policy 302 provides that the Sheriff may order a psychological (fitness for duty) evaluation of an employee if there is doubt concerning the employee's ability to perform the full duties of the position.

5. Due to the level of trust and power afforded to law enforcement officers, law enforcement agencies are obligated to ensure that officers are fit to perform their duties. Accordingly, BSBLED Policy 302 is reasonable based on Montana's statutes and regulations setting forth the minimum qualifications required for police officers. BSBLED's investigation of Staton's performance issues and the FFDE performed by Dr. Watson were sufficient as well as fair and objective. In fact, the Union's psychologist agreed that BSBLED had sufficient grounds to send Staton for a FFDE based on her ongoing performance issues, the FFDE performed by Dr. Watson was appropriate, and Staton's test results demonstrated she was unfit for duty. Moreover, Staton and the Union's psychologist agreed that she was not fit for duty. As a result, BSBLED was obligated by law to terminate her employment. In addition, based on Staton's

failure to meet the minimum requirements for a police officer, she forfeits the position, authority, and arrest powers accorded a peace officer in the State of Montana.

6. BSBLED has applied Policy 302 consistently. As Sheriff Lester testified, BSBLED has sent officers involved in shootings as well as officers with performance or behavior issues for FFDEs by Dr. Watson. None of the other officers sent for FFDEs were deemed unfit for duty. BSBLED did, however, require the officer sent for a FFDE to address a behavior issue to complete additional counseling pursuant to Dr. Watson's recommendation.

7. The Union's argument that BSBLED should have allowed Staton additional time to mitigate her lack of fitness for duty is contrary to Montana law. It also ignores the fact that significant remedial efforts were made to improve Staton's performance issues for a prolonged period of time without success prior to placing her on paid administrative leave and sending her for a FFDE. It further ignores the fact that Staton did not make any effort to mitigate her lack of fitness for duty while she was on paid administrative leave for six months, even after she was informed by Dr. Watson of his conclusion that she was not fit for duty. In fact, Staton testified that once she was placed on leave, she stopped seeing her counselor and did not seek any other mental health treatment while on leave. At no time did Staton or the Union provide BSBLED with any documentation from a licensed mental health professional demonstrating that she was fit for duty.

8. Pursuant to Montana law, Staton must be free of any mental condition that might adversely affect her performance of the duties of a peace officer as determined after a mental health evaluation performed by a licensed mental health professional selected by BSBLED. In addition, pursuant to BSBLED Policy 302, Staton must be psychologically able to perform the duties of a police officer.

9. Once Dr. Watson determined that Staton did not meet the minimum requirements for a police officer, she forfeited the position, authority, and arrest powers accorded a peace officer in the State of Montana and BSBLED was obligated by law to terminate her employment. Knowing that Staton's father passed on April 18, 2020, Sheriff Lester allowed Staton to remain on paid leave to allow her time to grieve without having to deal with the added stress of losing her job. This additional leave time also gave Staton the opportunity to work on becoming fit for

duty. However, she chose not to make any effort to do so. As a result, BSBLED had no choice but to terminate her employment. Accordingly, just cause existed for her termination and the Union's grievance should be denied.

10. The Union's argument that BSBLED violated Article 13, Section 5 of the CBA raised for the first time at arbitration is automatically nullified due to the Union's departure from the established grievance procedure.

11. For the first time in the grievance process, the Union argued at the arbitration hearing that BSB violated Section 5 of Article 13 in terminating Staton's employment. The grievance procedure set forth in Article 17 defines a grievance as an unresolved complaint on the part of an employee regarding treatment received from supervisory personnel or other employer representatives, dissatisfaction with working conditions, or any action on the part of the Employer which he/she considers to be a breach of this Agreement. If Staton believed BSB violated Section 5 of Article 13, she was required to report that in writing to a steward within 15 calendar days of the violation or the grievance shall be forever waived. As confirmed by BPPA President Lt. John O'Brien, no grievance concerning anything other than Staton's termination was submitted to/by the Union. Accordingly, the Union's grievance alleging a violation of Section 5 of Article 13 was forever waived. In addition, Section 6 of Article 17 states that departure from the established grievance procedure by the Union shall automatically nullify the grievance.

12. Even if the merits of the Union's grievance alleging a violation of Article 13, Section 5 were to be considered as valid (which it is not), no such violation occurred. Staton did not request assistance with a behavioral health problem due to stress, burn-out, post traumatic distress syndrome, depression, etc. Since Staton was not involved, directly or indirectly, in a traumatic situation, the provisions of Section 5 of Article 13 applicable to such situations do not apply to Staton. Nevertheless, various members of BSBLED offered assistance to Staton related to personal issues, which she declined. BSBLED was aware that Staton was seeing a counselor and had been prescribed medication.

13. Sgt. Vaughn provided training, guidance, and assistance to Staton with her caseload and Staton was not assigned any new cases for a prolonged period of time prior to being placed on

paid administrative leave and sent for a FFDE. Accordingly, no violation of Section 5 of Article 13 occurred and the Union's grievance must be denied. Regardless, as set forth above, once Staton was determined to be unfit for duty by a mental health professional, she did not meet the minimum qualifications for a law enforcement officer in Montana and forfeited the position, authority, and arrest powers accorded a peace officer in the State of Montana. And, BSBLED was obligated by law to terminate her employment. Despite having over 90 days after learning Dr. Watson had determined her to be unfit for duty, Staton made no effort to attempt to become fit for duty. As a result, BSBLED had no other alternative but to terminate her employment as required by law. Accordingly, just cause existed for her termination and the Union's grievance should be denied.

Union's Position

1. We begin by making clear what this case is not about. At hearing, Butte-Silver Bow spent a significant amount of time on matters not mentioned in the termination letter or in the July pre-termination or due-process letter incorporated by reference into the termination letter. Thus, for example, we heard about a couple of verbal reprimands for minor incidents; we heard about a kid drinking at a football game; and, we heard too much about whether detectives were required to call in when they were off sick and left their homes. Since none of those incidents were mentioned in the termination letter, none of them are relevant. That is true because it is firmly established that a discharge "must stand or fall upon the reasons given at the time of the discharge. Arguments in support of a discharge based on matters not asserted at the time of the discharge "suggest that the employer itself has doubts that the original grounds for discipline have been proven or are sufficient to justify the discipline."

2. Additionally, this case does not involve a debate about whether Detective Staton was fit for duty in March and April of 2020 when she took the fitness for duty examination. There is no dispute that from December 2001 to July 2008, Ms. Staton was a good patrol officer and for the next decade, a good detective. Captain Holland testified that situation began to change in late-summer 2018 when Detective Staton was confronted with the facts of the particularly horrific case of child abuse and called the Sheriff in tears.

3. From that point forward, as outlined in the termination letter, there were a series of incidents in which her work performance was deemed by her employer as unsatisfactory. Detective Staton does not dispute that the incidents specially mentioned in the termination letter did occur. She acknowledges she put files in the basement when she cleaned her office (but denies she tried to hide those files since the basement storage area was accessible to others). She acknowledged the need to work on those files and get them into shape (and she did so, even though Sergeant Vaughn thought she was incapable of doing so). She acknowledged that she was upset by Sergeant Vaughn's edits of one of her reports. And so too, she does not dispute that her Taser was missing and that her gun was damaged. Those incidents occurred, but the questions under the contract and specifically the questions under Article 13 Section 5 is whether Butte-Silver Bow knew or should have known that those behaviors were related to "stress, burn-out, post-traumatic stress syndrome, depression, etc." and if so, what the contract requires when an officer has "behavioral health problems . . . due to stress, burn-out, post-traumatic stress syndrome, depression, etc."

4. The answer to the question of whether Butt-Silver Bow knew or should have known that Detective Staton was suffering from mental and emotional turmoil is obvious from the facts. The specific incidents of conduct mentioned in the termination letter did not occur – and nothing like those incidents occurred -- prior to the traumatic events of September 2018. The facts of that 2018 child-abuse case significantly affected Detective Staton and the Sheriff and Captain Holland knew that at the time. Detective Staton informed the Sheriff in January 2019 that she was overwhelmed by work. In early 2019 Sergeant Vaughn was of the opinion that she was, in his words, "manic," "scattered," "overwhelmed" and "fall[ing] apart." The Sheriff was of the opinion in December 2019 that her crying about the redlined edited report was "far from what I would expect from a seasoned detective." The Sheriff believed in February 2020 that she was not "the same person" as she was earlier in her career. And, throughout this entire time, Detective Staton was not hiding the fact that she was seeing a mental health professional about work-related stress and depression. In other words, after September 2018, it was clear -- and as time passed it became increasingly more obvious -- that Detective Staton had what the contract

refers to as "behavioral health problems . . . due to stress, burn-out, post-traumatic stress syndrome, depression, etc."

5. Under Article 13, Section 5 Butte-Silver Bow had the obligation had to make "assistance and rehabilitation" the "upmost priority" and it had to make "every effort" to assist Detective Staton "through such difficult times." The Association acknowledges that Detective Staton was given some assistance in doing some of the specific tasks that were part of her job – for example, help from Sergeant Vaughn in learning how to organize a case file and short periods of time in which she was not assigned new cases while she worked the backlog. However, the contract requires more than just help – more than "assistance."

6. The contract also requires rehabilitation. The requirement that rehabilitation be the "upmost priority" cannot be ignored. The contract must be read as whole and effect must be given to all of its provisions. Article 13, Section 5 says a person who is suffering from "behavioral health problems . . . should be encouraged to submit to counseling." There is nothing in the record showing that anyone in management encouraged Detective Staton to submit to counseling. Section 5(d) requires the Employer to "encourage the employee to seek assistance" and likewise, that was not done. The failure to have rehabilitation the "upmost priority" and the failure to make "every effort" to assist Detective Staton through the difficult times caused by her psychological condition are seen most glaringly first, in Dr. Watson's report and second, in the decision to terminate based on that report.

7. It hardly serves any purpose related to rehabilitation when in September and October 2018, both Sergeant Vaughn and Captain Holland expressed strong reservations about Detective Staton's ability to remain a detective yet they did not perform a formal performance evaluation or express those reservations to her or counsel her. Instead, they continued to assign her case, after case, after case – the most cases assigned to anyone other than Sergeant Vaughn. It is hardly rehabilitation when Detective Staton repeatedly expressed to management that she was overworked and overwhelmed and was told repeatedly that all detectives felt that way. It is hardly rehabilitation when she was clearly upset and had been crying over the fact that her supervisor used red ink to edit a report and in response, the Sheriff advised her to take a drive.

8. As to Dr. Watson's report, it states that Detective Staton told him repeatedly that she did not believe she was fit for duty and the results of the psychological tests confirmed that. Dr. Watson then wrote a report saying Detective Staton was unfit for duty, but did not explain why, did not explain the underlying condition that renders her unfit for duty and provided no diagnosis. It's as if Detective Staton went to physician, said she was not feeling well, and after the physician examined her and he informed her she is not feeling well (and nothing more). While that may have been the limited scope of Dr. Watson's engagement by Butte-Silver Bow, that kind of a non-diagnosis does nothing to facilitate the priority of rehabilitation. How can Detective Station– how can any patient -- intelligently make any effort to get better? How can a person engage in therapy to address a condition for which the person has no diagnosis?

9. Additionally, Dr. Watson's asserted that the prognosis for recovery is not good because, in his estimation, she took no personal responsibility for her situation, when in fact; he never asked her if she believed she had any responsibility for her situation. Simply put, Dr. Watson asserts her prognosis for recovery is not good without a diagnosis as to what's wrong and without having inquired directly about the critical underlying reason for his pessimistic prognosis.

10. Importantly, once Butte-Silver Bow received Dr. Watson's report, it waited four months and then adopted Dr. Watson's opinion and terminated Detective Staton without giving her the opportunity to seek rehabilitation. As Dr. Nicoletti, an expert in the specialized area of police psychology explained, this was a critical error. What Butte-Silver Bow should have done was inform Detective Staton of Dr. Watson's opinion (give her the report that Dr. Watson refused to give her), inform her that management was in agreement with or adopting that opinion and then allowed her reasonable time to seek medical care so that she, at the very least, had an opportunity to rehabilitate and seek to get herself fit for duty. Dr. Nicoletti's testimony that this approach is standard practice in fitness for duty examinations was un-contradicted. More importantly, that standard practice is entirely consistent with and mandated by the contract's requirement that rehabilitation must be the priority and Butte-Silver Bow was required to make "every effort" to assist Detective Staton.

11. Courts that have addressed the phrase "every effort" in the context of contractual language have found it enforceable. A clause requiring “every effort” imposes an enforceable obligation on the employer to make “any and all earnest attempts that are reasonably possible.” It was well within reason that after a long career and before simply firing an employee with an obvious and confirmed medical issue, Butte-Silver Bow would have followed the standard procedure and allowed Detective Staton to take medical leave to seek the appropriate medical care.

FINDINGS OF FACT

Butte-Silver Bow Law Enforcement Department (BSBLED) hired the Grievant, Rhonda Staton as a police officer on December 10, 2001. BSBLED promoted Staton to the position of detective on or about July 7, 2008. BSBLED does not do annual performance appraisals. BSBLED, therefore, has no record of Staton’s performance that would suggest anything other than she adequately performed her duties between her hire date (2001) and approximately 2017. In 2017, the Sheriff issued Staton a verbal warning for tardiness. In sergeant’s notes regarding that verbal warning, he said:

> “You are a senior Officer and a Detective in the department and thus we expect you to be a positive example, which you have been in the past.” (Employer Exhibit 2, Hereinafter cited as “Er. Ex. ___”)

It is therefore accurate to conclude that Staton adequately performed her duties between 2001 and 2017. There is no suggestion that her performance in 2017 was less than adequate. Sheriff Lester issued another verbal warning to Staton in 2018 for refusing to investigate whether a juvenile boy was engaged in underage drinking at a high school football game. That verbal warning was also not a permanent part of Staton’s personnel file. The letter from Sheriff Lester informing Detective Staton of the verbal reprimand is dated September 5, 2018 and includes the following:

> “After reviewing the matter, I have decided to issue you a verbal reprimand to be documented and remain active in your personnel file for a period of six (6) months from the date this disciplinary matter is resolved.” (Er. Ex. 14)

Consequently, the letter was no longer a part of Detective Staton's disciplinary record as of March 5, 2019. In November 2018, Captain Holland discovered four boxes of investigative files assigned to Detective Staton in the basement of the law enforcement center. In January 2019, Sheriff Lester and Captain Holland met with Staton to discuss the investigative files she had placed in the basement. During that meeting, Sheriff Lester asked Staton whether she felt she could continue to be in the detective division. Staton explained that she was feeling overwhelmed and thinking of going back to the patrol position she held when she was first hired by BSBLED. Sheriff Lester wrote that he responded to her admission of feeling overwhelmed and the fact that she was considering going back to her patrol position as follows:

> "I advised you that you had been able to be a successful detective in the past and that I felt you were capable of doing the job. I advised you that most detectives feel overwhelmed at times and that sometimes things look different after you have a few days to think." (Joint Exhibit 8, Hereinafter cited as "JT. Ex. ___.")

Sheriff Lester did not issue any discipline to Detective Staton but instead offered to set up a process whereby she could get assistance to bring her files up to date and to properly record them in the system. On January 16, 2020, Sheriff Lester wrote about that meeting with Captain Holland and Detective Staton and included the following:

> "I pointed out to her that the only discipline that had been given Rhonda during my tenure as sheriff was for failure to take proper action at a Butte High School Football game after a juvenile student was reported as being intoxicated (Rhonda took no action at all). Rhonda nodded but did not speak when I advised her of these facts. (Er. Ex. 17)

As of January 2020, therefore, there is no evidence Detective Staton had any disciplinary record in her file. She had been verbally reprimanded, given one written report of a verbal reprimand that expired six months after it was given. There is no record she was ever suspended for poor performance. Nor is there any annual performance review to suggest anything or than Detective Staton was meeting expectations. In early 2020, Sheriff Lester was informed that Detective Staton lost her department issued taser. On February 19, 2020, Sheriff Lester wrote:

> "2-19-20, after a long period of debating what to do, Undersheriff Skuletich and I met with Rhonda in my office…I asked Rhonda about the lost taser… I told Rhonda that she did not seem to be the same person she was when I was lieutenant in the detective division and her supervisor and that I was very

> concerned that she had indicated to HR that she was barely functioning. I explained to her that she would have to see Dr. Watson for a fit for duty evaluation. Rhonda seemed somewhat relieved that she was not being disciplined. I advised her that my first concern was her well-being but that discipline on the things we talked about was likely." (Er. Ex. 19)

The arbitrator, therefore, concludes that between 2001 and 2020 when Sheriff Lester ordered Detective Staton to report for a fitness for duty examination, her performance record was free of discipline. There were certainly numerous issues raised regarding Detective Staton's inability to keep up with her case files, standard issue equipment, tardiness etc. None, however, resulted in discipline. There is a well-documented set of notes, written by Sheriff Lester, Detective Sergeant Ray Vaughn, Detective Sergeant Williams, and Detective Captain George Holland. None of those written notes are discipline and none were included in Detective Staton's personnel file.

Throughout many of those written notes is evidence that Sheriff Lester and almost every other person in a position of leadership within the BSBLED knew and understood that Detective Staton was suffering from some kind of severe emotional issues that were in fact interfering with her job performance. For example, Sheriff Lester as noted above said he told Detective Staton that he was concerned for her well-being. He acknowledged that in January 2019, Detective Staton told him she was feeling overwhelmed enough to give up her detective position and return to patrol. (Jt. Ex. 8) At the end of the year, Sheriff Lester acknowledged that Detective Staton contacted him "clearly distraught and sounded as though you were crying." (Id. at p. 2) In addition the final investigative report regarding Detective Staton's hostile work environment complaint concludes she was "hypersensitive" and misunderstanding her supervisor and co-workers. In other words, her emotional and mental well-being was interfering with her placing the proper emphasis on the actions of others toward her in the workplace.

> "Concerns raised by the complainant seem to be rooted in less than optimal communications between involved parties and the injection of emotional feelings. The complainant, at times, seems hypersensitive, resulting in actions by others being magnified out of proportion to the message intended." (The Tri-County Investigative Summary, December 2019, p. 2)

Sheriff Lester made clear the impetus for his decision to require Detective Staton to submit to a fit for duty evaluation. He wrote:

> "On January 24, 2020, you wrote a letter to the Butte-Silver Bow Personnel Director Leslie Clark, indicating that you were disappointed in the results of a Human Resources investigation. In that email, you indicated that, "My health has been affected to the point that I am barely functioning". The fact that you indicated you were "barely functioning" caused me a great deal of concern and was a factor in my decision to have you see Dr. Watson for a Fit for duty evaluation." (Id.)

While Sheriff Lester lumps all of the concerns regarding Detective Staton's performance (failure to keep her files up to date, tardiness, loss of her taser, damage to her weapon) in with his concern for her well-being as the reason for his decision to order her to see Dr. Watson, it is clear that without the concern for her psychological well-being, the performance issues raised between 2017 and 2020 standing alone would have been insufficient to order the fit for duty evaluation. In fact, it was Detective Staton's admission that she was barely functioning, meaning her psychological well-being was at a minimum fragile, that moved Sheriff Lester to order the fit for duty evaluation. In short, Detective Staton was called out for a number of performance issues none of which resulted in discipline but most, if not all, of her supervisors including the sheriff was convinced she was suffering from some sort of emotional or mental problem that was interfering with her ability to do her job.

The fitness for duty evaluation conducted by licensed psychologist, George W. Watson, Ph.D., was designed, as he summarized, to determine whether Detective Staton would meet the requirements applicable to a new hire.

> "The FFDE focus here is to assess whether factors relating to her work history and her psychological-emotional makeup would warrant an equivalency to a positive new-hire recommendation. It is my professional opinion that if one's work history and psychological-emotional makeup warrant an equivalency to a positive new-hire recommendation, then that person would warrant a fitness for duty recommendation." (Jt. Ex. 10, p.2)

The factors relating to Detective Staton's work history were obviously provided to Dr. Watson by the Employer. Therefore, Dr. Watson had to determine Detective Staton's "psychological-emotional makeup" before drawing any conclusions regarding her fitness for duty. Again, the focus of concern, therefore, was with Detective Staton's psychological well-being. In other words,

as Sheriff Lester acknowledged, he was and others were concerned about her well-being. Indeed, Dr. Watson concluded that Detective Staton was not mentally and emotional stable.

> "The instruments used were the Personality Assessment Inventory (PAI) and the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). These two inventories have been used by this Evaluator, and others, in pre-hire evaluations in hundreds of instances. The psych testing results were very telling and troubling; by what they suggested and what they did not. The responses of RS to the Inventory's items, in the Evaluator's opinion, were not indicative of someone that warranted a positive recommendation for new-hire. Neither the data collection from the two Inventory's of RS responses presented a picture of someone that indicated a well-grounded, psychologically-emotionally stabilized individual. One needs that to warrant a positive new-hire recommendation." (Id at p.6)

As can be easily gleaned from Dr. Watson's conclusion, regardless of Detective Staton's work history or the performance issues identified by the Employer, her answers on the PAI and MMPI indicated she was emotionally unstable. What Dr. Watson's report fails to shed any light on is whether his evaluation identified any particular diagnosis as to what Detective Staton was struggling with and whether her condition was temporary or permanent. In fact, Dr. Watson's report sheds no light on Detective Staton's condition at all.

OPINION AND AWARD

Arbitrability

At the outset it is necessary to address the Employer's argument that the Union's grievance should be denied because it did not request arbitration in a timely manner. It is unusual to be presented with an argument regarding arbitrability for the very first time in the Employer's post-hearing brief. The arbitrator held a pre-hearing conference on April 21, 2021. In addition, to discussing hearing logistics, the arbitrator gave both sides an opportunity to inform the arbitrator of any issues related to the hearing. The Employer failed to raise the arbitrability argument at that time. The Employer did not reject the Union's notice of intent to arbitrate as being tardy but accepted the notice and moved forward with preparations for arbitration. Prior to the official start of the hearing on April 27, 2020 the arbitrator again gave both sides an opportunity to raise any issues having a bearing on the hearing and the hearing process. The Employer failed to raise the issue of arbitrability at that time. More importantly, it was the Employer who, on the day of the

hearing, laid out for the arbitrator the mutually agreed upon statement of the issue to be decided. Arbitrability was not included as an issue the arbitrator was asked to decide.

During the hearing, the Employer failed to put forth any evidence to show that the Union's notice of intent to arbitrate was received too late. The Employer's arbitrability argument suffers from having never been raised prior to or during the hearing. While there are two joint exhibits, one representing the Chief Executive's decision to deny the grievance dated September 28, 2020 and the other, the Union's notice of intent to arbitrate dated October 7, 2020, the Employer failed to demonstrate exactly when the Union received the Chief Executive's September 28, 2020 denial. The date on the letter is simply proof of the day the letter was composed but does not demonstrate when the letter was received by the Union. The Union would have to receive the Employer's denial of the grievance in order for the five (5) day clock to begin. That joint exhibit by itself is insufficient proof. It was incumbent upon the Employer to demonstrate exactly when the Union received the Chief Executive's denial in order for the arbitrator to determine whether the date on the Union's notice of intent to arbitrate tells us anything of significance regarding the timelines as outlined in the grievance procedure. Without that evidence the arbitrator must conclude the notice of intent was timely and in accord with Article 17, Section 8 of the Agreement.

The arbitrator was also asked to consider the Union's argument that the Employer violated Article 13, Section 5 of the Agreement as time barred because it did not include that argument in the original grievance filed on September 1, 2020. The grievance does, however, say the discharge was not supported by just cause. The Employer has the burden of demonstrating that it did indeed have just cause to terminate. Of course, in making a determination as to whether the Employer met its burden of just cause, the arbitrator is not limited to the specific articles identified in the original grievance form. Article 13, Section 5 is absolutely relevant to a determination of just cause here where the Employer admits it was concerned enough about Detective Staton's mental health to demand she submit to a fitness for duty evaluation. Article 13, Section 5 specifically imposes on both sides the requirement to recognize that behavioral health problems are inherent to most, if not all law enforcement employees. Article 13, Section 5 further imposes an obligation upon the Employer to provide assistance and rehabilitation and to

make doing so the utmost priority, when an employee is identified as suffering from some type of behavioral health problem. The Employer's argument that any consideration of Article 13, Section 5 is time barred must be rejected. Whether the Union raised the issue in the original grievance or not, once the Parties engage the arbitrator to determine whether just cause exists to support a termination and introduces the Agreement into evidence, the arbitrator is free to consider the entire Agreement and will not ignore any provision even if both sides fail to raise it. The entire Agreement is a part of the evidentiary record and no portion of it, thereof, is off limits to the arbitrator.

Burden of Proof

The Employer has the burden of proof. That burden requires the Employer to demonstrate by clear and convincing evidence that it has just cause to end the eighteen (18) year career of Detective Staton. Discharge, in an immediate and fundamental way, throws the employee's life into disarray. The clear and convincing standard is critical to making sure employers resort to discharge only in cases where the evidence is clear the employee engaged in conduct so severe that the ultimate form of discipline is warranted.

The Seven Tests of Just Cause

The Employer suggests its' discharge decision be critiqued using the well-known "Seven Tests of Just Cause." The "seven tests of just cause" is a useful tool for arbitrators but not a required one. It is a filter providing the arbitrator a framework through which to examine the Employer's deliberative process leading to the discharge decision. It requires the arbitrator to determine whether the Grievant had notice of a workplace rule or requirement, knew of her responsibility to adhere to it and nevertheless failed to do so. Next, the arbitrator must determine whether the rule, policy or requirement was reasonable. In addition, the arbitrator must inquire into the fairness and objectivity of any investigation relied upon by the Employer in concluding discharge was necessary. In addition the seven tests provides whether the Employer's application of the discipline to the Grievant was non-discriminatory and whether the discipline was appropriate especially in light of any mitigating factors.

The Employer argues Grievant violated state law, specifically Montana Statute § 7-32-303 by not maintaining her psychological well-being.

" Any peace officer appointed after September 30, 1983, who fails to meet the minimum requirements as set forth in subsection (2) or who fails to complete the basic training required by subsections (6) through (8) forfeits the position, authority, and arrest powers accorded a peace officer in this state."

The arbitrator finds that identifying this state statute as the rule Detective Staton violated doesn't fit the facts. Detective Staton's conduct must have violated the Agreement or some other workplace rule. Detective Staton met all of the requirements of Montana Statute § 7-32-303 when she was hired as a patrol officer in 2001. Thereafter, it is more likely that Detective Staton looked to the Agreement and any other specific work rules imposed on the bargaining unit by the Employer as the source of the terms and conditions of employment with which she needed to comply. Montana Statute § 7-32-303 imposes a burden on the Employer to ensure all peace officers are fit for duty. It is incumbent upon the Employer to distinguish between a requirement imposed on it by Montana state law to not allow a peace officer who is not fit for duty to remain in the field and a rule to which the Grievant must adhere. Montana Statute § 7-32-303 simply makes clear that a detective who does not maintain psychological well-being will face removal. How the Employer discharges or removes an employee who does not pass a fitness for duty evaluation is governed by the Agreement.

The specific work rule, as opposed to state statute, relied upon by the Employer here is Policy 302. The Employer argues that Detective Staton knew that BSBLED Policy 302 requires all sworn members to be psychologically able to perform their duties and that she could be subject to a fitness for duty exam. Obviously, Policy 302 is a reasonable and relevant one. However, there is much more to Policy 302 that the Employer failed to comply with regarding the treatment of an officer determined to be suffering from a mental health issue that interfered with her ability to perform her duties.

First Policy 302 distinguishes between temporary and permanent mental health conditions. The policy acknowledges that some mental health challenges faced by employees might be temporary in nature but still require the employee be removed from duty for a temporary period of time or until able to meet the required psychological standard. The policy further recognizes that some mental health problems faced by police officers may be more permanent. Policy 302 states:

3. An evaluation Board will consider all permanent physical or psychological conditions. The Board will consist of the following:
   e. Sheriff
   f. Undersheriff
   g. Captains
   h. Butte-Silver Bow Personnel Director

4. The Board will consider all available information concerning the employee's ability to perform the full duties of the position. The employee will be permitted to offer any information available to the Board. The Board will make the final determination concerning the employee's ability to perform the full duties of the position. (Er. Ex. 22; Emphasis added)

The Sheriff failed to follow Policy 302. He did not make a determination as to whether Detective Staton's condition was of a temporary or permanent nature. The Sheriff did not convene the Board called for in Policy 302 which states the evaluation Board will consider "all" permanent psychological conditions. Nothing in Policy 302 gives the Sheriff discretion with regard to deciding that a permanent psychological condition need not go before the evaluation board called for in the policy. Had the Sheriff determined Detective Staton's condition to be permanent in nature, the evaluation board should have been convened to review her permanent condition before her employment was terminated. Had the Sheriff found her condition to be temporary in nature, then termination would not have been immediately imposed. No one responsible for doing so made a determination as to whether Detective Staton was dealing with a temporary or permanent psychological condition.

The Agreement sheds further light on the importance of making such a determination. Article 13 imposes a burden on the Employer to assist employees suffering from a mental health problem at the employee's request. More specifically, it suggest that officers involved in a traumatic situation directly or indirectly should be encouraged to submit to counseling. Here, it is clear that Officer Staton demonstrated on numerous occasions that she was suffering from stress resulting from her employment. Sheriff Lester and others made note of the same as spelled out in the findings of fact above. Sheriff Lester specifically said he was more concerned for her well-being. Detective Staton had appealed to him in tears on more than one occasion, suggested she might step down from her detective position and go back to being a patrol officer.

Confronted with her obvious distress, Sheriff Lester chose to downplay her concerns. One of those moments is quite clearly captured in his own notes…"I advised you that most detectives feel overwhelmed at times and that sometimes things look different after you have a few days to think." (Joint Exhibit 8) He also wrote: "I advised her that my first concern was her well-being but that discipline on the things we talked about was likely." (Er. Ex. 19) Given Detective Staton's obvious and numerous displays of emotional duress, the fact that she did not specifically ask for help with a psychological problem does not relieve the Employer of the burden imposed upon it by Article 13. If an officer is crying, distraught and expressing concerns over her treatment in the workplace, then by definition she is asking for help. The fact that Sheriff Lester did not understand that to be her request does not mean he gets to ignore the requirements of Article 13.

Article 13 required the Sheriff to do much more than simply say most detectives feel overwhelmed and to take some time to think. Detective Staton came to Sheriff Lester in tears. Sheriff Lester, while clearly believing Detective Staton was suffering from some form of mental and emotional distress whatever the source, did not take his responsibilities under Article 13 or Policy 302 seriously. Article 13, Section 5 requires the Employer to consider rehabilitation and to make it a priority. Detective Staton requested help directly and indirectly, yet Sheriff Lester failed to resort to the Agreement as source of direction for his next steps in assisting Detective Staton. The failure to do so undermines the Employer's argument that just cause existed for the discharge decision.

Ultimately, Sheriff Lester required Detective Staton to submit to the fitness for duty examination. This was the only investigation relied upon in making the discharge decision. The Employer said the investigation was fair and objective. However, the arbitrator finds that the investigation was unfair, insufficient, and lacked objectivity. Dr. Watson's report is unfair because its' basic premise undermines a fair assessment of Detective Staton's work history and psychological well-being. Dr. Watson stated his approach to evaluating Detective Staton was to compare her to a new hire in terms of mental/emotional and psychological makeup. A comparison to a new hire makes no sense in light of Detective Staton's 18 year service as a police officer and detective. It is highly unlikely that a new hire would have seen or experienced

what an 18 year veteran police officer has experienced on the job. Furthermore, the fact that Detective Staton repeatedly stated that she was barely functioning due to workplace stress, comparing her to a new hire ignores and requires the dismissal of her specific concerns regarding her work environment. Dr. Watson wrote:

> "The FEDE focus here is to assess whether factors relating to her work history and her psychological-emotional makeup would warrant an equivalency to a positive new-hire recommendation. It is my professional opinion that if one's work history and psychological-emotional makeup would warrant an equivalency to a positive new hire recommendation, then that person would warrant a fitness for duty recommendation." (Jt. Ex. 10 at p. 2)

Even though Dr. Watson asserted his evaluation focused on assessing whether factors relating to Detective Staton's work history, he ignored the fact that she had an excellent performance record up until 2018 when things started to unravel at work. Had he really considered her work history he could not have ignored her many years of satisfactory performance. He would also have recognized that the Employer had not issued any formal discipline based on any of the issues raised about her performance between 2018 and the time of her fitness for duty evaluation. As importantly, he would not have taken such great pains to dismiss her characterization of her experience in the workplace. A closer look at the specifics of Dr. Watson's report makes this point more clearly.

First Dr. Watson's report summarily dismisses any possibility that Detective Staton suffered any specific workplace trauma at all. "Normally for FFDEs, the officer has experienced some traumatic event in the course of work…" (Jt. Ex. 10, p. 1) While, Dr. Watson acknowledges that Detective Staton laid out what she described as a hostile work environment, Dr. Watson simply concludes without evidence or support that whatever Detective Staton was experiencing in the workplace could not have been the cause or have anything to do with her performance between 2018 and 2020. Moreover, he appears to speculate as to whether she was ever psychologically and emotionally grounded.

> "It is this Evaluator's opinion that such Admin behaviors…would not trigger extended poor work performance(s) as historically seen with RS. That is, if RS was originally functioning as a well-grounded, psychologically and

> emotionally stabilized and such behaviors did indeed occur over a period of time." (Id. at p. 2; emphasis added)

Dr. Watson goes on to both characterize the conclusions reached in the City-County Investigation into Detective Staton's harassment complaint as truthful and irrelevant to his determination of Detective Staton's emotional and mental condition. However, he did not hesitate to conclude that since Detective Staton continued to press her concerns that it was the workplace that was the source of her distress that doing so meant her prognosis for improvement was poor.

> "RS, however, did not accept the conclusions of the HR-Michelle efforts as valid and continued with her previous assertions. BSB Admin claims they continued towards HR and toward BSB Admin. They were repeated to me, by RS, more than once during the evaluation process. Again, this denial predicts poor prognosis that RS would benefit from Admin attempts to help her change her behaviors, then and now. For that reason, there was not a focus to explore and suggest possible remedial actions at this point in time." (Id., Emphasis added)

Dr Watson, dismisses the relevance of Detective Staton's workplace concerns and characterizes them as a side issue even as he proceeded to draw conclusions regarding her fitness based on her refusal to accept HR's conclusions. The fact that he drew conclusions about her continued efforts to say her workplace was the source of her mental health issues makes those concerns appear absolutely relevant to his determination of her fitness for duty. His approach to the evaluation points out the unfairness and insufficiency of it. As he stated in his report: "It is important to note that assessment of any pertinent causal factors to RS chronic work performance was, a side issue of interest in this FFDE, and not the primary focus." (Id. at p. 3, Emphasis added) This was Dr. Watson's position even as he concluded that Detective Staton's continued disagreement with HR's conclusion that what she experienced in the workplace did not rise to the level of harassment "does not bode well for any Admin belief her work performance could, or would, improve on any self-directive mode." (Id.)

If, as Dr. Watson's acknowledges, the causal factors related to Detective Staton's work performance were simply a side issue, then it stands to reason, he was unable to make a conclusion as to exactly what Detective Staton was suffering from and whether it was a temporary or permanent condition. What Dr. Watson, for some strange reason, was able to

conclude was that Detective Staton took no responsibility for her work performance and as a result was not fit for duty. Of course, drawing such a conclusion, means that the causal factors relating to her work performance were actually central too his evaluation process.

> "It is not likely that one will change their behavior for a sustained time, if one does not see or acknowledge their causal role in their performance level (s). Additionally, conclusions drawn from the psych testing, et al., would similarly predict poor prognosis for RS to benefit from attempts to help her improver her work performance….or that she would show effective insight into her role." (Id.)

Dr. Watson's report both dismisses Detective Staton's concerns about conditions in the workplace and draws negative conclusions about her ability to improve and do her job simply because she continued to assert that those concerns were real. Ironically, the summary report of HR's investigation into Detective Staton's workplace harassment claims reveals that there were indeed problems there that had an impact on her mental and emotional well-being and her performance. For example, the City-County Investigative Summary includes the following:

> "At the conclusion of the investigation, it is more likely than not, the issues raised by the complainant have **a job-related**, reasonable and alternative explanation. Concerns raised by the complainant seem to be rooted in less than optimal communications between involved parties and interjection of emotional feelings. The complainant, at times, seems hypersensitive, resulting in some actions by others being magnified out of proportion to the message intended. Communication and written follow-up are recommended to avoid possible miscommunications in the future. It is important to recognize that individuals interpret body language, choice of words, or lack of words, to form a belief of the message being sent. The message may not always be the same as the intent of the communicator. While the described behavior issues are uncomfortable and upsetting to the complainant, nothing so far indicates it results in harassment or hostile environment as defined by EEO law." (The City-County Investigation Summary, December 2019 at p. 2; Emphasis added.)

Unlike Dr. Watson, the investigator of Detective Staton's harassment complaint did recognize that she was upset and struggling with behavior she was experiencing in the workplace. In short, her report of troubling workplace experiences that interfered with her performance was in fact genuine and it was unfair for Dr. Watson to conclude she had a poor prognosis for improving her performance simply because she repeatedly tried to articulate her

workplace concerns during the evaluation process. One last example from the summary of the harassment investigative summary will suffice to make the point. The summary includes the following:

> "The co-worker that is accused of the uncomfortable and violent behavior apologized to the complainant. The accused admitted that they were upset that day because of the case they were working and admitted to throwing the body camera into their private office." (Id.)

Detective Staton, therefore, had legitimate concerns about conduct she experienced in the workplace whether or not that conduct rose to the level of harassment. Dr. Watson, not only ignored her concerns but punished her for raising them. During the hearing one Union witness when testifying regarding the possibility that Detective Staton might return to the position of patrol offer said, since he would serve as her supervisor, he would want to make sure she did not partner with a female patrol officer with whom she was friends. I raise this testimony to again demonstrate that Detective Staton's experiences in the workplace are real. Even before Detective Staton has been given an opportunity to return to patrol, the person who would serve as her supervisor has concluded she cannot be assigned work with her friend without any foundation, other than that they are friends. Again, whether those actions rise to the level of harassment or discrimination is not for this arbitrator to decide. The Parties mutually agreed that the issue of whether Detective Staton was discriminated against is not before the arbitrator. The arbitrator simply points out these examples as real indicators that Detective Staton did and may continue to experience workplace conduct that produces stress and impacts her performance.

As the harassment investigator concluded, it is the manner in which the communication is delivered and perceived by the person hearing it that can sometimes lead to conflict in the workplace. Making supervisory/personnel decisions based on nothing more than a friendship sends a negative message without evidence that two would not be able to do their jobs, if assigned patrol duties together. This potential supervisor concluded without evidence that Detective Staton would not be able to be successful if allowed to serve with a friend.

Dr. Watson concluded without evidence that Detective Staton would perform poorly in the future simply because she refused to give up her claim that she the victim of a hostile work environment and that led to her performance issues. Dr. Watson's report cannot be used to make

the case that the Employer's discharge decision is supported by just cause. Given that Dr. Watson gave less than substantive information on which to make a decision, it is not surprising that Sheriff Lester could not use the report to satisfy the requirement imposed upon him by Policy 302, namely to determine whether Detective Staton was suffering from a temporary or permanent psychological condition. Dr. Watson failed to identify any particular malady with which Dr. Staton was struggling. Dr Watson's speculation is rampant and obviously infuses his conclusions with bias. One last example will suffice. When discussing the results of the personality inventories given to Detective Staton, Dr. Watson speculates:

> "It is possible that RS intentionally gave responses that painted a very negative picture of herself. Sometimes, individuals want to "look bad," deficient in some way…If she did, paint a negative picture of herself, then any such attempt would be considered as malingering. Such a conclusion would also not warrant a positive recommendation." (Id. at p. 7)

In short Dr. Watson simply creates out of thin air the notion that Detective Staton lied on the personality inventories in an attempt to make herself look bad and be declared unfit for duty. To drop that impression into the report with zero supporting evidence creates an impression that Detective Staton is bent on sabotaging herself. There was no need to create such an impression especially when there was simply no evidence to support that conjecture. The fitness for duty evaluation, therefore, must be rejected as completely unreliable support for the Employer's discharge decision.

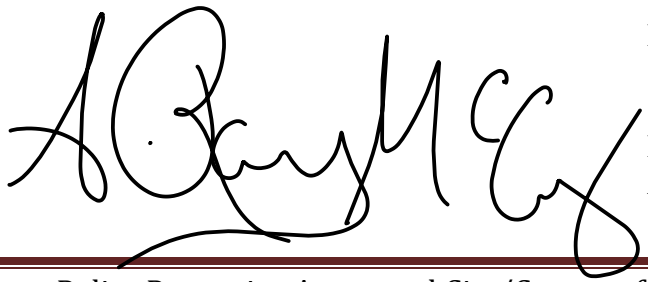
Finally, the seven tests of just cause includes an examination of the questions whether the discipline was warranted and whether mitigating circumstances exists to deviate from a discharge decision. Given the requirements of Policy 302 and Article 13, Section 5 of the Agreement, the arbitrator finds that discharge was not supported by just cause. Policy 302 requires the Employer to identify whether Detective Staton is suffering from a temporary or permanent condition. Depending on the classification different outcomes will follow. Without that determination, it cannot be concluded that just cause exists for this discharge. Article 13 makes clear the Employer first goal is rehabilitation. That can take many forms. The arbitrator concludes that because the Employer completely and utterly ignored Article 13 of the Agreement, the discharge must be overturned.

Finally there is no need to consider mitigating circumstances because doing so generally implies the Grievant violated a work rule and discipline is required but might be mitigated given the work record and other factors favorable to the discharged employee. Were that the case, the arbitrator would most certainly consider Detective Staton's long and positive performance record spanning 2001 through 2017 as well as the fact that she has no disciplinary record even given the issues raised about her performance between 2018 and 2020, as mitigating factors.

It was not Detective Staton who violated Policy 302 or Article 13 but the Employer. Article 13 basically acknowledges that police officers can face significant stress and get burned out on the job and as a result the Employer cannot simply throw them out when that happens but must give rehabilitation serious consideration. This the Employer did not do. The Employer instead simply moved to discharge. For that reason and those laid out above, the arbitrator concludes the discharge was not supported by just cause in violation of Article 10 of the Agreement.

AWARD

Based on the foregoing, the grievance is sustained. The Employer will immediately reinstate Detective Staton and make her whole for all lost wages and benefits from the date her paid leave ended. The Employer will restore all of Detective Staton's rights associated with her status as detective including the right to elect to return to the patrol division should she choose to do so. The Employer will also provide an evaluation of Detective Staton's psychological and mental health in an effort to determine what rehabilitation strategies might be available to her as called for in the Agreement. In short, the Employer must make every effort to assist Detective Staton through her difficult psychological and emotional challenges. The arbitrator shall retain jurisdiction, as requested, to assist with the implementation of this award.



Respectfully submitted, August 9, 2021

By: Arthur "Ray" McCoy
Arbitrator