

CONNECTICUT STATE BOARD OF MEDIATION AND ARBITRATION
LABOR DEPARTMENT

38 WOLCOTT HILL ROAD
WETHERSFIELD, CONNECTICUT

TRANSMITTAL MEMORANDUM

Madison, Town of
and
AFSCME Co. 4
Local 1836

Case # 2023-A-0047 Foito, Daniel

22-03

ARBITRATION AWARD

This Award is also being sent via first class mail to each party representative pursuant to SBMA regulation Sec. 31-91-47.

Copies were sent to the following parties:

John M. Walsh, Jr., Esquire

Attorney Linda J. Yelmini

Gabriel J. Jiran, Esquire

Marc S. Mandell, Esquire

Debra Ferrante, HR Manager

Santo Franzo

S. Wise, Admn Coord; J. Miller, Staff

Town Clerk*

File

*When applicable, this transmittal is filed with the town clerk in accordance with Section 31-98, Chapter 560, of the Connecticut General Statutes.

CONTACT PERSON

Julie Ferrigno

STATE OF CONNECTICUT
DEPARTMENT OF LABOR
STATE BOARD OF MEDIATION AND ARBITRATION

ARBITRATION AWARD

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| In the Matter Of: | : | Case No. 2023-A-0047 |
| TOWN OF MADISON | : | DATE OF AWARD: July 6, 2023 |
| And | : | Hearing Dates: December 15, 2022 |
| AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 1836, COUNCIL 4, AFL-CIO | : | January 18, February 17, February 20, March 6, March 20 and April 3, 2023 |
| Grievant: Daniel Foito | : | |

APPEARANCES: Gabriel J. Jiran, Attorney at Law (For the Town)
John M. Walsh, Jr., Attorney at Law (For the Grievant)

I. ISSUE: (Agreed to by the Parties)

Did the Town of Madison have just cause to discipline the Grievant, Dan Foito?

If not, what shall be the remedy, consistent with the collective bargaining agreement?

II. BACKGROUND:

The American Federation of State, County and Municipal Employees, Council 4, Local 1836 (hereinafter referred to as the "Union") filed a grievance on behalf of its member Officer Daniel Foito (hereinafter referred to as "Officer Foito" or the "Grievant"). The Union claimed that the Town of Madison (hereinafter referred to as the "Town")

terminated Officer Foito “unjustly and without cause” in violation of (but not limited to) Article 15 of the Collective Bargaining Agreement (hereinafter referred to as the “CBA”), MMPD Policies 3.6.6 and 3.6.10 [Jt. Ex. 3]. On November 3, 2022, Officer Foito executed an Arbitration Waiver and was thereafter represented by Attorney John M. Walsh, Jr.

The parties mutually agreed to waive Steps One and Two of the grievance procedure. The grievance was denied at Step Three. After some rescheduled hearings, evidentiary arbitration hearings were held on February 17, February 20, March 6, March 20 and April 3, 2023 at which both parties were provided an opportunity to present evidence, provide testimony and cross examine witnesses.

The parties agreed to filed Briefs by May 9 and Reply Briefs by May 16. Both dates were extended at the request of the Union to May 26 for the Briefs and June 5 for the Reply Briefs. The Panel received the parties’ Briefs by the extended due dates. The Panel held an Executive Session on June 13 via ZOOM.

The parties have complied with the grievance and arbitration provisions of the CBA. This grievance is properly before the Connecticut State Board of Mediation and Arbitration.

III. STATEMENT OF FACTS:

Officer Foito was a Patrolman First Class Officer with the Town and had been employed for approximately nine (9) years at the time of his termination. Officer Foito had received no prior discipline.¹

Prior to that time, Officer Foito had been employed for approximately twenty-five (25) years as a Patrolman in the Town of Clinton. Chief John “Jack” Drumm (hereinafter referred to as “Chief Drumm”) of the Madison Police Department (hereinafter referred to as the “MPD”) had worked with Officer Foito in Clinton and was supportive of the Grievant’s application to work for the MPD.

Officer Foito was out of work on June 5, 2021 due to a work related injury. He received a telephone call from Officer Christopher Dube (hereinafter referred to as “Officer Dube”) who was a fellow K9 officer. Officer Dube indicated that Officer Robert Strickland (hereinafter referred to as “Officer Strickland”) had called in sick for his shift beginning at midnight on June 6 after having competed in a bike race earlier on June 5. Officer Dube indicated he would have been angry if he was ordered in. Officer Foito indicated that he did not think that Officer Strickland calling in sick was a contract or policy violation. Officer Dube indicated he may have forwarded the Facebook posts (Tab 3, pgs. 81-82) to Officer Foito.

Shortly thereafter, Officer Foito received a call from Sergeant Kim Lauria (hereinafter referred to as “Sgt. Lauria”). The issue of Sgt. Lauria having to fill the

¹ The Panel specifically excluded from evidence an unsigned Last chance agreement that Officer Foito may have received during this employment with the Town of Clinton. The Panel finds it wholly inappropriate for the Town to include any reference to that Agreement in its Brief.

midnight shift came up in the conversation. Officer Foito indicated that Officer Dube had told him about Officer Strickland's bike ride. Either immediately or in a following call, Sgt Lauria asked Officer Foito to forward the Facebook posts to her, which he did. Sgt Lauria then reported the incident to her direct supervisor, Lt. R. Neal Mulhern. An "Inquiry" as conducted (Tab 14) and it was found that "no evidence was developed that Officer Strickland feigned illness" in violation of the MPD Standard of Conduct. Further the Inquiry found "(a)lthough the optics of Officer Strickland's social media postings around the times of his sick time usage is poor it isn't a violation."

Officer Strickland was told of the Inquiry on June 15 in a meeting with Lt. Mulhern and Captain Harkins.

Officer Strickland made a verbal claim to Chief Drumm that he felt he was being targeted. On or about June 16, 2021, Chief Drumm ordered Captain Joseph Race (hereinafter referred to as "Captain Race") to conduct an Internal Affairs Investigation into the claim. Four (4) employees were subjects of the IA: Sgt. Lauria, Officer Foito, Officer Dube and Officer Natasha Pucillo (hereinafter referred to as "Officer Pucillo"). Captain Race prepared an Internal Affairs Investigation Report (Tab 3), dated October 20, 2021 which was also signed by Chief Drumm. The IA Report indicated:

"As to Officer Foito:

Officer Foito committed no violation of Madison Police Department policies or Standards of Conduct."

The only individual who received a Discipline Recommendation was Officer Pucillo. The recommendation was that Officer Pucillo receive a Written Warning.

On June 16, 2021, Officer Strickland posted on Facebook what has been referred to a FB #1 (Tab 15). On either June 16 or 17, Officer Strickland posted on Facebook what has been referred to as FB #2 (Tab 16). On June 19, Officer Strickland made another post on Facebook which was referred to as FB #3 (Tab 22, p. 25). Officer Foito consistently claimed that there was another Facebook post that he felt was more threatening, however, no one was able to produce a copy.

FACEBOOK POST #1

RB TeamU Strickland

15 hrs · 🌐

SO YOU INTERPRET MY SILLINESS/KINDNESS AS WEAKNESS.....Well, I have a message for you, you invalid coward-ass misfit(s) 🤡 📢

First and foremost, I apologize to all my true fb friends and family if I may offend you or embarrass you, never my intentions. To those who feel they need to distance themselves from me in my everyday life or social media.....I get it, I understand....."it's the optics" for you!!

Those who truly know my character, I'm a silly dude who often live life without issues and drama. You know I'm a positive guy and will give the boots and shirt off my body for anyone who may need it more than I do.

An individual or individuals have surfed my social media's platforms: Facebook, STRAVA and Instagram account in an attempt to disrupt my personal & professional life, that's just NOT GOOD!!

Now, I'm under somewhat of a "gag-order" but I wanted to address this individual or individuals misfits!!!

Being that YOU attempted to use my social media platform as a pipeline to really and try to jam me up at work and home, it's only fitting to address your SORRY NO GOOD DUMB ASS!!! I don't know who you are yet or how many of you there are, but I will PROMISE YOU THIS. When I learn who you are and I will learn who you are, you have MY ABSOLUTE WORD that I will have a VERY SUCCESSFUL & PROFESSIONAL conversation with your STUPID COWARDLY ASS. You are probably someone who has broke bread with me, smile and laugh in my face etc. If you have a FUCKIN PROBLEM with me let's sit down and chat it out COWARD!!! If you may have issues with others I may be connected to then leave me the FUCK ALONE!!! But it's to late for that NOW!!

I'm willing to take an "L". are you PUNK ASS???

#fuckupissues#nurbakyd

FACEBOOK POST #2

RB TeamU Strickland

14 hrs · 🌐

BTW, I know I now may be a TARGETED or DEMONIZED for my previous post for standing up for myself, but if you won't standup for yourself against the bad, the ugly or unjust.....then you will fall for anything!!!

HEY DUMBASS, NOW GO & RUN TELL DAT 🤡 🗣️ 🗣️

FACEBOOK POST #3



On August 20, 2021, Sgt. Lauria and Officer Pucillo filed a complaint with human resources claiming that they were being subjected to a hostile working environment and felt threatened by the Facebook posts of Officer Strickland and certain conduct he

exhibited toward them following the inquiry into his sick leave usage. There was no evidence that Officer Foito had any role in the decision they made to file the complaint with human resources.

On that day, Chief Drumm assigned Captain Race to conduct an Internal Affairs investigation into the allegations. Officer Strickland was placed on paid administrative leave pending investigation. Captain Race found that the charges were unfounded (Tab 22) Due to the serious nature of the allegations having been determined to be unfounded, Chief Drumm commissioned an outside investigation by an independent investigator.

An independent investigation was performed by Attorney Giovanna Tiberii Weller and was introduced as an Exhibit and will be referred to herein as the "Weller Report". As part of her investigation, Attorney Weller interviewed eighteen (18) individuals. Attorney Weller testified at the hearing. None of the witnesses she interviewed as part of her investigation testified at the hearing other than Officer Foito and Chief Drumm. Additionally, no notes, transcripts, witness statements or recordings were provided.

Attorney Weller found that Officer Foito violated the MPD Standards of Conduct 2.1.10 Respect, 2.1.11 Civility, 2.3.2 Conduct Unbecoming An Officer and 2.3.18 Criticism and Malicious Gossip. Attorney Weller also found that neither Officer Foito, Sgt. Lauria nor Officer Pucillo or the group of them created a hostile work environment. The Police Commission held a meeting on August 10, 2022 and terminated Officer Foito effective September 2, 2022.

III. PERTINENT LANGUAGE FROM THE COLLECTIVE BARGAINING AGREEMENT and MPD STANDARDS OF CONDUCT

ARTICLE 14

GRIEVANCE PROCEDURE

Section 10. At the option of the grievant, grievances involving discharge, suspension and demotion following disposition by the Chief of Police may be processed beginning with Step Two. No employee shall be suspended, discharged, demoted or otherwise disciplined except for just cause. [Tab 30]

MADISON POLICE DEPARTMENT

Standards of Conduct/Disciplinary Charges; hearings and Procedures

2. STANDARDS OF CONDUCT

Standards of conduct shall apply both to members and employees of the Department. Members of the Department shall be deemed to be those persons who have been sworn for duty. Employees of the Department shall be deemed to be those persons who are unsworn and who have been engaged to perform specific duties for the Department.

2.1 REQUIRED CONDUCT

In addition to the specific duties of each individual rank and assignment, all sworn members of the Department shall:

2.1.10 RESPECT

Extend the proper courtesy and respect toward all members of the Department and civilians at all times.

2.1.11 CIVILITY

Be civil, orderly, diligent, discreet, courteous, and patient as a reasonable person is expected to be in any situation and shall not engage in any altercation, physical or otherwise, whether on duty or not, with any other member or employee of the Department.

2.3.2 CONDUCT UNBECOMING AN OFFICER

Conducting him/herself in a way which reflects discredit upon the member as a police officer or upon his fellow officers, or the Police Department, or which tends to indicate that the officer is unable or unfit to continue as a member of the Police Department or tends to impair the operation of the Police Department or its officers.

2.3.18 CRITICISM AND MALICIOUS GOSSIP

Criticizing any other member or employee of the Department, except in the line of duty as a superior to a subordinate, or maliciously gossiping about any superior, order, policy, procedure, case or event that should remain police information; causing to discredit, lower or injure the morale of personnel in the Department, or that of any individual of the Department, or speaking slighly of any race, nationality, or religion. [Tab 32]

V. DISCUSSION

The Grievant's counsel advances two arguments in support of the claim that there was no just cause to discipline Officer Foito.

A. Lack of Due Process

First Grievant's counsel argues that Officer Foito's due process rights were violated. Counsel cites Otero v. Bridgeport Housing Authority, 297 F.3d 142 (2d Cir.2002) which quotes from Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-41, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Loudermill held that the pretermination process "need not be elaborate" or approach the level of a "full adversarial evidentiary hearing," Id. at 545, 105 S.Ct. 1487, but "due process does require that before being terminated such an employee [be given] oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story," Id. At 546, 105 S.Ct. 1487.

Here, Officer Foito and the Union were given a copy of the Weller Report in advance of the hearing before the Police Commission. He was given an opportunity to “give his side of the story”. The Weller Report charges Officer Foito with violating four (4) Standards of Conduct listed in Section III of this Award. Therefore, he was given his full due process rights with respect to those charges. While Chief Drumm was recommending termination, the Police Commission did not have to consider or agree with his recommendation. It is only the Police Commission that can terminate an officer in the Town of Madison.

B. Lack of Just Cause

Officer Foito’s letter of termination dated September 2, 2022 [Jt. Ex. 2] does not contain a listing of the reasons that the Town of Madison terminated him. The only statement by the Police Commission in the letter is that it “considered the information in Attorney Weller’s report as well as the responses from you and/or your Union representatives and has determined that your employment with the Madison Police Department is hereby terminated effective immediately.” Presumably the Police Commission did not believe the letter needed to articulate the reasons for Officer Foito’s termination and relied exclusively on Attorney Weller’s Report. Therefore, Officer Foito’s termination is based on the four (4) reasons articulated therein.

Attorney Weller found Officer Foito violated Conduct Standards:

2.1.10 Respect

2.1.11 Civility

2.3.2 Conduct Unbecoming An Officer

2.3.18 Criticism and Malicious Gossip

The un rebutted testimony of Officer Foito indicated that he and Officer Strickland were friends. They had celebrated holidays and family events together. They had socialized off duty on numerous occasions. At some point the friendship appears to have cooled, however they remained Facebook friends. Additionally, Officer Strickland was Facebook friends with Officer Foito's wife. [N.B. being Facebook friends does not indicate friendship.]

Regarding the use of sick leave by Officer Strickland on June 6, it is also undisputed that Officer Foito told Officer Dube that the fact that Officer Strickland called out was not a violation of the CBA or the sick leave policy. Further, Officer Foito catalogued several reasons why Officer Strickland could have become sick following the Bike Race.

After seeing the Facebook Posts, Officer Foito told Officer Pucillo to "be careful" because Officer Strickland was "posting threats against them" on Facebook and that Officer Strickland had posted he was "willing to get fired and take a hit" to get retribution against them. [Weller Report, pg. 2]

Officer Foito did not tell either Sgt. Lauria or Officer Pucillo that Officer Strickland had threatened to kill them. Officer Foito did not encourage Sgt. Lauria and/or Officer Pucillo to file a complaint against Officer Strickland.

Attorney Weller concludes that Officer Foito “appears to be involved in much of the controversy concerning Ofc. Strickland, while managing to keep himself at arms’ length from actual controversy.” [Weller Report, pg 26] Presumably this is based upon a number of things: (1) warning Officer Pucillo to “be careful”; (2) placing a comment on Officer Strickland’s sick leave call out on February 15, 2022 that it was 65 minutes before the start time of the shift; (3) his belief that there was another possibly more threatening Facebook Post and (4) holding on to that belief despite the fact that he did not have a copy and no one except perhaps one of the other officers remembered seeing it.

(1) Warning Officer Pucillo to be careful. Officer Strickland told Attorney Weller and others that he believed that the question of his sick leave usage was made by a family member with whom he had recently had a dispute. [Weller Report – Finding of Facts, ¶ 38] This, quite honestly, defies belief. How would this family member know that he had taken sick leave on June 6. Facebook Post #1 is directed to “invalid coward-ass misfit(s).” Officer Foito was out due to a work-related injury and Sgt. Lauria had previously been out and returned on light duty.

It refers to “optics”. Lt. Mulhern and Captain Harkins told Officer Strickland that the optics of the Facebook Posts regarding the Bike Ride and calling in sick the same day were not good. The reference to Strava indicates that the individual(s) follow him on this exercise Application. (Pucillo) Officer Strickland indicates in the Post that he didn’t know the identity of the “questioner(s)”, but he clearly has a strong suspicion that it is someone at work. Officer Strickland concludes Facebook Post #1 as follows: “I’m willing to take an ‘L’, are you PUNK ASS??? #fukupissuesinurbakyrd.”

Additionally, he ends Facebook Post #2 with a swearing emoji, an extended middle finger and a snake. Finally in Facebook Post #3, Officer Strickland indicates that he knows who the knows identity of the "questioners" and they are three (3) in number. Although there were no names in any of the Facebook Posts, Officer Strickland likely believed they were Sgt. Lauria, Officer Pucillo and Officer Foito.

(2) Placing a comment on Officer Strickland's sick leave call out on February 15, 2022 that it was 65 minutes before the start time of the shift

Attorney Weller viewed this as evidence that Officer Foito held some type of animus toward Officer Strickland. Perhaps this is true or it could have been for another reason. As the policy requires officers to call in at least sixty (60) minutes before the start of their shift if they are sick, the note could be read to attempt to prove that Officer Strickland was not in violation of that requirement. Officer Foito testified that he did not know why he put the note regarding the amount of notice provided by Officer Strickland. As Officer Foito indicated to Officer Dube, Officer Strickland did not violate the call-in procedure with regard to June 6 and provided reasons for his possible illness on that occasion, it is hard to assess any inappropriate motive regarding this note.

(3) Officer Foito's belief that there was another possibly more threatening Facebook Post and (4) holding on to that belief despite the fact that he did not have a copy and no one except perhaps one of the other officers remembered seeing it.

Clearly Officer Foito believed there was another Facebook Post and he continued to believe that at the time of the hearing when he testified. Officer Foito consistently held

that it was similar in language to Facebook Post #1 although he viewed it as somewhat more threatening. Whether there was or was not another Facebook Post, Officer Foito believed and continues to believe that one existed.

Not unlike most other collective bargaining agreements, this collective bargaining agreement does not define “just cause”. Quoting from a prior arbitration award: (Town of Madison and AFSCME Council 4, Local 1159, Case No. 2020-A-0208) “Just cause is typically defined as: ‘A reason that is legally acceptable or sufficient’ and whether the employer was guided by reasonableness and fairness. In its simplest form, there must be satisfactory proof that the employee engaged in the act upon which the discipline is based. “Just cause” is one which is not for any arbitrary, capricious, or illegal reasons and which is one based on facts. For example, if the proof is insufficient that the employee committed a violation, discipline cannot stand. If the evidence is sufficient to demonstrate that the employee is ‘guilty’ of the conduct alleged, then the next question, generally speaking, relates to whether the penalty is for just cause.”

The Union in its brief utilizes the Black’s Law Dictionary definition of “just cause” of: “A cause outside legal cause, which must be based on reasonable grounds [and] there must be a fair and honest cause or reason regulated by good faith. Fair, adequate, reasonable cause. Legitimate cause.” Black’s Law Dictionary, 775 (5th ed. 1979). Black’s Law Dictionary has since combined “just cause” with “good cause” having found that courts have generally determine that the terms are synonymous. The 2016 edition of Black’s Law Dictionary no longer defines “just cause”. However, in any event, the employer must have a reasonable ground for discipline which is also fair. The Connecticut Supreme Court has articulated and adopted this standard.

In determining whether just cause exists, many arbitrators utilize the Seven Elements of Just Cause first outlined by Arbitrator Carol Daugherty in ***Enterprise Wire Co.***, 46 LA 359 (1966). Under a traditional view, if any of the questions proffered under the *Daugherty* test is answered in the negative, then just cause does not exist. Today, this formulaic analysis of the Test has been rejected by many arbitrators. The Union argues for the adoption of the traditional application of the *Daugherty* test in its brief.

The Panel is not constrained by the *Daugherty* test and rejects its formulaic application. However, that does not negate the *Daugherty* test as it can be helpful in determining whether just cause exists. The Union addressed the *Daugherty* test in its brief, however, the Panel does not find it necessary to address those arguments in this case.

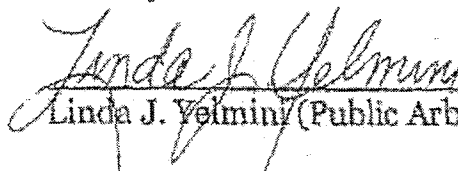
Although Attorney Weller found that neither Officer Foito, Sgt. Lauria nor Officer Pucillo individually nor as a group created a hostile work environment, Chief Drumm testified that they did indeed create one. As the Police Commission's letter of termination indicates complete reliance on the Weller Report, the claim of hostile work environment cannot stand.

Based upon the evidence presented, the Panel unanimously finds that Officer Foito did not violate Conduct Standard 2.1.10, 2.1.11, 2.3.2 or 2.3.18.


VI. AWARD

For the reasons set forth herein, the Panel unanimously finds that the Town of Madison did not have just cause when it terminated Officer Daniel Foito. Officer Foito shall be reinstated with full back pay from the date of his termination less appropriate reduction for outside earnings.

BY THE ARBITRATION PANEL:

 6/29/2023
Linda J. Velmini (Public Arbitrator & Chairperson)


Marc S. Mandell (Management Arbitrator)


Santo Franzo (Labor Arbitrator)