

AMERICAN ARBITRATION ASSOCIATION

CITY OF NEW BRITAIN : CASE #12 390 0035 08

AND :

JEFFREY WALSH, LOCAL #1165 :
AFSCME, COUNCIL 15, AFL-CIO : JUNE 8, 2010

DECISION

FACTS

This grievance arbitration is between Jeffrey Walsh ("Grievant"), AFSCME Council 15, Local 1165 ("Union") and the City of New Britain ("City"). The parties were represented by counsel, appeared at numerous hearings before the arbitrator, presented testimony through witnesses and submitted documentary evidence. The parties had the opportunity to cross-examine witnesses.

The City hired Grievant to work in the New Britain Police Department ("NBPD") in January, 2005. Prior to the incident presented in this grievance, Grievant was a good officer who had never been disciplined. Overall, Grievant received praise for his skills as a police officer prior to the incident in question.

Grievant received extensive training as a military police officer in addition to his NBPD training, and received various awards for his military service, including two Valor Presidential Achievement Awards for service in Iraq.

On June 4, 2007, Grievant and Officer Anthony Hoskie ("Hoskie") were dispatched to 109 Torkom Drive, New Britain, to respond to a report of a domestic disturbance pursuant to a call from a neighbor. Upon entering the residence, Grievant and Hoskie observed Christopher Roguz ("Roguz") holding onto an elderly female. Grievant reported that Roguz was intoxicated and belligerent. Roguz was also arguing with his brother, Mark.

As a result of Roguz's belligerent behavior Grievant handcuffed him behind his back without incident while inside the residence. Grievant attempted to lead Roguz from the residence but Roguz became more belligerent and, once outside the residence, Roguz spit directly into Grievant's face. Prior to the spitting incident and while they were still in the residence, Roguz was informed by Grievant that he was being arrested for disorderly conduct.

While Roguz was being escorted down the stairs of the residence he began yelling and threatening Grievant saying: "your family is going to pay for this" and "I am going to f--- your daughter and your mom" and, according to Roguz, his face was slammed into the wall twice by the "white cop" followed by a third time. Grievant and Hoskie, however, claim that Roguz tripped and

slammed into the corner to the right of the door.

After being spit at in the face by Roguz after exiting the residence, Grievant had to wipe the spit out of his eyes so he could see while pushing Roguz away. During a struggle between Roguz, Grievant and Hoskie, outside the residence, Grievant struck Roguz on the back of his head with his police baton. At some point in the confrontation, Grievant also hit Roguz in his face with his hand. The strike to the face and the blow to the head occurred while Roguz was handcuffed behind his back.

Roguz was transported by ambulance to the hospital and arrived for medical treatment at 1:42 a.m. Roguz had a laceration on the back of his head approximately four inches long running vertical on the center line of his head (City Exhibit 31). Roguz was diagnosed at the hospital with a closed head injury, 8 c.m. scalp laceration, nasal fracture, facial contusion and right knee contusion (City Exhibit 3). Roguz, however, never lost consciousness. Grievant transported Roguz to the NBPD after Roguz received hospital medical treatment and they arrived at the NBPD at 4:34 a.m. (City Exhibit 12). A medical opinion (Dr. Garver) concluded that the baton strike was a direct blow to the head from above and behind.

Officer Paula Keller ("Keller"), who was on duty the evening of the incident, needed to be relieved for a short time from her assignment in the field and she asked Grievant if he could relieve her. She ultimately called Grievant on his cell phone and after a short discussion Grievant told her that he would be on his way to give her a break. Grievant arrived at Keller's location and told her the following:

"He always gets the "██████ up calls". Keller said she asked Grievant what happened. She stated that Grievant told her that the guy spit on him so he punched him in the face and broke his nose. Keller said Grievant also told her he "hit the guy in the back of the head with a baton and the guy got ten staples in the back of his head... Grievant mentioned the guy was handcuffed when this happened---(City Exhibit 27).

At police headquarters, Sergeant Portalatin ("Portalatin") read Hoskie's report of the incident and believed the amount of force appeared to be excessive (City Exhibit 12). Portalatin brought the incident to the attention of Lieutenant Steck ("Steck") (City Exhibit 12). Portalatin asked Grievant how he struck Roguz on the head with his baton. Grievant stated that Hoskie was struggling with Roguz when Grievant pulled out his baton and attempted to strike Roguz on his leg but Roguz must have fallen and the baton blow landed on Roguz's head. (City Exhibit 12).

Steck also asked Grievant what happened and Grievant asked whether spitting in the face was a felony and Grievant kept repeating that he "spit in my face" (Testimony of Steck, February 11, 2009, pages 20, 21, 22).

Portalatin told Steck that at the time of the injuries Roguz was handcuffed behind his back and Hoskie's report was not consistent with Grievant's statements nor with the injuries sustained by Roguz (February 11, 2009 Transcript, page 23).

Steck reported the incident to Chief Gagliardi. Grievant was told by Steck to remain at the police station to finish his report. Grievant remained at the station with his Union Representative and the Union's lawyer. By early morning, Chief Gagliardi ordered that a criminal investigation be initiated into the circumstances surrounding the incident between Roguz and Grievant.

Grievant, on advice of his Union Representative and lawyer did not file his report of the incident and Chief Gagliardi advised in writing that a disciplinary hearing would be scheduled to address the failure to file an incident report. Grievant's attorney advised Grievant not to complete his incident report until he received his Garrity warnings. Grievant was also instructed by his attorney to delete from the computer the portion of his report already written.

Grievant was placed on administrative leave by letter dated June 4, 2007 (City Exhibit 1) and arrested by warrant and charged with assault 2nd degree. The criminal charge against Grievant was ultimately dismissed. An internal investigation was started by the NBPD.

By letter dated November 2, 2007 Grievant was terminated from the NBPD because he used a baton to strike a handcuffed individual already under arrest on the back of the head and because he failed to file a police incident and prosecutor's report (City Exhibit 1).

CITY POSITION

The City argues that Grievant violated the NBPD Rules of Conduct and Policies and his conduct constitutes just cause for termination. The City points out that the investigation into Grievant's actions of June 4, 2007 were initiated as a result of two supervisors sensing something was wrong with the explanation by Grievant of the circumstances surrounding the incident.

First, the City argues, Portalatin heard the dispatch call to 109 Torkom Drive and felt there was no need for her presence as the call did not present any extenuating circumstances. After she heard a call for a medic, she believed the injury resulted from the domestic incident. Neither Grievant nor Hoskie called for a supervisor. After Portalatin was told by Hoskie that Roguz spit on Grievant, she went to see Roguz in the booking room and noticed his extensive injuries. After reviewing Grievant's report, she believed the degree of force used on the handcuffed Roguz was excessive. Portalatin told Grievant that he should have called for a supervisor and Grievant had no response to Portalatin's statement.

Steck had concerns after Grievant inquired whether "spitting" constituted a felony. Grievant repeated the spitting statement a couple more times to Steck.

Steck advised the Chief of what happened and the Chief concluded, after reviewing all the doctor's reports, photographs and other evidence, that Grievant used excessive force not done for a legal purpose.

The City argues that the investigation the NBPD conducted determined that Grievant provided many different and conflicting versions of the incident. These versions, by Grievant, according to the City, included:

1. Grievant's repeated statement that Roguz spit on Grievant's face, and whether the spitting constituted a felony (testimony of Steck, February 11, 2009, Transcript, pages 20-22);

2. Grievant attempted a baton strike to the leg but Roguz must have fallen and the strike hit his head (City Exhibit 12);

3. The third version told by Grievant was in his deleted police report – Grievant attempted to strike Roguz on the upper arm and back area but Roguz jerked his head and hit the baton (City Exhibit 27);

4. The fourth version is contained in the internal affairs investigation in which Grievant explains he tried to strike Grievant in the shoulder area which was slippery due to the rain causing the baton to slip off onto the back of Grievant's head (City Exhibit 33);

5. The fifth version is contained in Grievant's testimony at the hearing before the arbitrator on June 16, 2009 wherein Grievant stated he tried to hit Roguz in the elbow but the blow glanced off and struck him on the head.

The City maintains the correct version is the first version set forth above. The City argues that Grievant was upset because Roguz spit in Grievant's face and the strike to the head was done in retaliation.

The City also points to Grievant's inconsistent recollection about his conversations with Officer Kelleher ("Kelleher"). Grievant, the City asserts, testified that he did not speak to Kelleher about the case after being placed on administrative leave. Kelleher's cell phone records disclose Grievant called her on June 23, 2007 and spoke with her for 32 minutes (City Exhibit 41). Kelleher also stated Grievant called her a second time on June 23, 2007.

The City points to Dr. Garver's testimony as being supportive of the City's position (City Exhibit 39). Dr. Garver testified that the blow to Roguz was a direct hit to the back of the head and inconsistent with Grievant's statement that the blow was to the lower shoulder blade area.

The City also argues that Grievant's failure to file a police report and a prosecutor's report is a violation of the NBPD Rules of Conduct and Policies and the Connecticut General Statutes. The City points to City Exhibit 2, which is the Police Department Policy requiring detailed reports establishing probable cause to make an arrest. Moreover, the City alleges Section 46b-38d(a) of the

Connecticut General Statutes requires the filing of a report when an officer responds to a family violence incident.

UNION POSITION

The Union points to the danger of a non-compliant handcuffed subject who spits in the face of an officer. (Transcript at 52-53, Steck's testimony). The Union asserts that Steck's testimony confirms that even a handcuffed individual can present a real threat to the safety of an arresting officer.

The Union also alleges that the testimony of Chief Gagliardi was contradictory, i.e., the Chief wanted to avoid "bleed over" between the internal affairs investigation and the criminal investigation when, in fact, there was "bleed over". The Chief cited Roguz as offering nothing more than "passive resistance" when struggling with Grievant and Hoskie which the Union claims was untrue; and the Chief's concession that no officer was ever terminated for failure to file a police report. These errors by the City as testified to by the Chief, the Union argues, resulted in a flawed investigation and unfounded charges against Grievant.

The Union argues that Roguz's physical and violent resistance to arrest resulted in Grievant's use of force and the fault for the occurrence and the injury is with Roguz and not Grievant. The Union further argues that Chief Gagliardi testified that officers who failed to file reports were suspended, but none were terminated. They further argue that the City was guilty of disparate treatment since it did not impose discipline on Hoskie.

The Union describes Grievant's testimony as being accurate and he merely attempted to strike Roguz to subdue the combatant and did not intend the blow to land on Roguz's head. The Union adopts the theory that the blow of the baton glanced off Roguz's left arm and the tip of the baton clipped the back of his head, causing the laceration (Union's Brief, page 13). Moreover, the Union argues, Grievant delivered one blow with his hand to Roguz's face to avoid being spit on a second time.

The Union alleges that any difference between Grievant's initial unsigned and deleted report and his later reporting were not material.

The Union maintains that Grievant's response to a non-compliant handcuffed prisoner was consistent with Grievant's training, according to Sergeant Pearson, the training officer. The Union also argues that its expert, Trooper Todd McGhee, established that Grievant acted in accordance with his training and the blow likely first landed on Roguz's left arm before glancing off the back of his head (Union Brief at page 15). The Union cites Kelleher's testimony as supporting Grievant's position.

The Union urges the arbitrator to apply the "clear and convincing" standard as the City's burden to establish just cause.

The Union also urges the arbitrator to conclude that Grievant's use of force was reasonable under the circumstances and Connecticut General Statutes Section 53a-22 allows police officers to use physical force to make arrests.

The Union points to the testimony of Sergeant Pearson at Transcript, Page 294, wherein he states that there is no prohibition against using an impact weapon on a handcuffed non-compliant suspect in any of the police training that was afforded to Grievant since such a person still poses a serious threat to the officers' safety. They argue that the NBPD's use of force policy is silent on the issue of when specifically a baton may be used and only establishes a reasonableness standard.

The Union concludes by stating that the City incorrectly chose to side with Roguz and his brother despite inconsistencies in their statements while Grievant, on the other hand, had no disciplinary history, was a decorated and respected officer and he accurately reported the events of June 4, 2007 (See Union Brief, page 35-36).

DISCUSSION

The sole issue in this arbitration for the arbitrator is "was officer Walsh terminated for just cause? If no, what shall the remedy be?"(Joint Exhibit 1). The arbitrator is bound by the Collective Bargaining Agreement ("CBA") which provides "no employee shall be discharged, terminated,

demoted, suspended or disciplined in any matter excepting for just cause (Article VIII, 8.0, Joint Exhibit 2).

The parties have submitted numerous reports, statements, photos, transcripts and other documentary evidence. The documentary evidence consisted of six (6) joint exhibits, forty-three (43) City exhibits and twelve (12) Union exhibits. In addition, the arbitrator was provided with transcripts of the testimony introduced at the hearings. All of the evidence and transcripts have been carefully reviewed by the arbitrator prior to reaching a decision in this matter. After such review, the arbitrator concludes that Grievant was terminated for just cause for the reasons more specifically set forth in this award.

It is conceded by all parties that Grievant immediately placed Roguz in handcuffs when the officers (Grievant and Hoskie) initially entered the Roguz residence. Grievant placed the handcuffs on Roguz with his hands behind his back as Roguz was acting in a belligerent manner and was arrested for disorderly conduct. The incident that subsequently occurred arose after Roguz was placed in handcuffs behind his back. While it is apparent that Roguz was belligerent, difficult, threatening and insulting, his conduct mostly occurred with his hands handcuffed behind his back. Moreover, there were two officers (Grievant and Hoskie) at the scene to escort Roguz out of the residence and into the police vehicle for the ride to headquarters. Once Roguz was told he was under arrest, he took on an even more belligerent and threatening attitude. Grievant was justified in using reasonable force to subdue the prisoner but the arbitrator disagrees with Grievant and the Union that "reasonable" included the use of the baton.

The arbitrator cannot ignore the disciplinary interview of Grievant on August 28, 2007 (Joint Exhibit 5). In that interview, Grievant stated in response to questioning by Chief Gagliardi with Grievant's counsel in attendance:

"Officer Walsh: What happened is, he goes over, grabs onto him to try and get him to the ground. I wipe my eyes out and as soon as I wipe my eyes out I see that they are struggling. They were both standing up facing each other at that time. I go over to help Hoskie get him on the ground. I go to grab onto him and I get pushed back. Then when I get pushed back, I go back a couple steps and then I see Hoskie bent over with basically, I don't know what side his head was on, but he had his left arm

around Christopher's waist and his right hand around his, I think his left leg. (Chief says ok) and so Hoskie was bent over and Christopher Roguz was on top of him. At that time I saw Chris take his left leg and wrap it around Hoskie's legs as if he was going to trip him and take him to the ground. So I pulled my asp out and I go to hit in the back left arm, in this area and now Christopher is bent over as well and he has no shirt on and he's all sweaty and everything and I go to swing at an angle that is in the green area back here. It hits the green area at a 45 degree angle and goes up and hits the back of his head. Immediately they went down to their knees and I immediately put my baton away and now their both on their knees still struggling to get to the ground. At that time Christopher, now Hoskie and Christopher are face to face trying to get him on the ground and I'm to the side, to Christopher's left side. Christopher goes to hawker state, (Jeff makes a throat sound) like that and he turns towards me. He already spit on me once and I didn't want him to spit on my partner. I feared for his safety. I didn't want him to attract anything else and I didn't want him to spit on me again, so I went and punched his face to get his face away from me, in trying to de-escalate the force, to eliminate it right away instead of just continuous sit there and stop and struggle and everything else like that. They both immediately fall to the ground. And that was it." (Emphasis added)

This account by Grievant needs to be viewed in the context of Dr. Garver's opinion of how the blow to Roguz's head occurred. Dr. Garver testified in his deposition (City Exhibit 39) at Page 55, that based on a standard of reasonable judicial probability the injury to the back of Roguz's head is not consistent with what Grievant wrote in his memo to Captain Tuttle on July 19, 2007. Dr. Garver's opinion is consistent with a direct blow to the head rather than an indirect blow off Roguz's shoulder.

In addition, the arbitrator had the benefit of a demonstration at the June 16, 2009 hearing of how the baton strike occurred. Grievant demonstrated on an individual at the hearing with three different "make believe" strikes to the shoulder on the individual. One strike was to the shoulder area, the second slightly below the shoulder and the third was at the elbow. The arbitrator, after observing the in hearing demonstrations by Grievant using a baton, concludes that it is highly unlikely the baton could have moved from the shoulder — arm area to Roguz's head and cause the type of wound sustained by Roguz. The wound is consistent with a direct blow to the head. The testimony of the Union's expert (Trooper McGhee) that the blow was intended for the elbow area was speculative and not believable.

Additionally, the arbitrator is mindful of the different explanations provided by Grievant as to how the baton strike to Roguz's head occurred. Those explanations included (1) repeating the

statement "he spit in my face"; (2) attempted to strike Roguz in the leg; (3) intended a strike in the upper arm and back area (deleted incident report of Grievant); (4) attempt to strike lower shoulder; (5) attempted to strike in the elbow and the blow glanced off and landed on the head. The various explanations raise serious questions about the credibility of Grievant's testimony.

Moreover, the arbitrator finds Kelleher's statement, taken on June 11, 2007, seven (7) days after the incident (City Exhibit 5) persuasive. Kelleher states in part: "He (Grievant) told me the guy spit on him, so he punched him in the face and broke his nose.... He told me he hit the guy in the back of the head with a baton and the guy got ten staples in the back os his head.... After we were talking he told me that he hit the guy in the head. Off. Walsh mentioned that the guy was handcuffed when this happened. When I heard this, I said, "he was handcuffed?"

After questioning Grievant about why he did not taser Roguz, Kelleher concludes by stating "I didn't ask Off. Walsh why he hit a handcuffed prisoner in the head with his baton." The issue at hand is "why did Grievant use a baton on a prisoner who was handcuffed behind his back while he had the assistance of another officer? The arbitrator is mindful that an officer is permitted to use force in certain situations, but the force used in this situation was unreasonable and caused injuries which were unjustified in view of all the circumstances. Roguz was handcuffed behind his back at all times relevant to the occurrence; two (2) officers were present to maneuver Roguz from the residence to the police vehicle. The arbitrator feels that Roguz did not need to be hit with force by a baton in order to be transported to police headquarters under all the circumstances in this matter. It is also apparent that Grievant was upset with the conduct of Roguz, especially regarding the spitting episode. The arbitrator recognizes that under certain circumstances, a handcuffed prisoner could present a danger, but the facts of this incident do not rise to the level of requiring the use of a baton to subdue the individual and, accordingly, the City had just cause to terminate Grievant.

The arbitrator further concludes that Grievant was not in compliance with police department regulations and State law when he failed to file his report of the incident. Garrity warnings do not apply to the required filing of reports pursuant to an arrest. It is clearly the arresting officer's

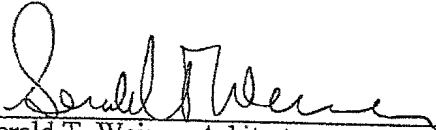
obligation to file the report.

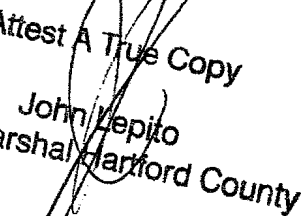
In conclusion, and after a review of all the evidence and by clear and convincing evidence, Grievant was terminated for just cause.

DECISION

The grievance is dismissed.

June 8, 2010


Gerald T. Weiner, Arbitrator


Attest A True Copy
John Lepito
State Marshal Hartford County