

**Brodsky #3**

**VOLUNTARY LABOR ARBITRATION TRIBUNAL**

In the Matter of the Arbitration between

Union

-and-

The Employer

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Hearing Dates: 3/15/00 5/24/00

**BACKGROUND**

The grievant, Sergeant Employee 1, has been employed by the Employer since 8-06-84. She is a member of Union. Prior to the subject discipline, Sgt. Employee 1 had a clean disciplinary record.

On Sunday, 7-11-99, while off-duty, Sgt. Employee 1 accompanied her friend, Friend 1 fishing in City A, State A. Friend 1 drove his 1993 Gold Buick Century. Prior to arriving at the fishing area, Sgt. Employee 1 wrapped her off duty bellyband (holster) around her departmental issued P228 Sig Sauer Duty Weapon (which was loaded with a round of ammunition) and placed it in her green backpack which contained fishing items and other various equipment. She placed the backpack in the backseat of Friend 1's vehicle and draped a flannel shirt and a sweatshirt over the backpack. Sgt. Employee 1 left her home with Friend 1 at approximately 1630 hours. When the two arrived at the Bridge Parking Area, they exited the vehicle, removing two fishing poles and locked the vehicle. After approximately two hours, Friend 1 and Sgt. Employee 1

returned to the vehicle. They then drove to a Party Store, a few miles away and purchased pops. They were in the party store for approximately 10 minutes.

Friend 1 and Sgt. Employee 1 then drove around City A. They returned to Sgt. Employee 1's residence at approximately 2130 hours. It was at that time that Sgt. Employee 1 noticed that her backpack, including her weapon, was gone. Sgt Employee 1 then reported the apparent theft to the City A and Burns Township authorities. She also spoke to Sgt. Employee 2 in Any County. She filed an incident report with the Employer Sheriff's Department on July 7-12-99 at the Jail Division III, where she is assigned.

At 1447 hours on 7-12-99, Employee 3, Sgt. Employee 1's Commander, faxed the incident report to Lieutenant Employee 4 in Internal Investigations. On 7-20-99, the case was issued a report concerning the subject case on 7-27-99. The case assigned to Detective Employee 5. After investigating the incident, Detective Employee 5 was then forwarded on 8-26-99 to Commander Employee 6, who handles police determination hearing in the subject case. Notice was provided to the grievant and her Union representative discipline. Commander Employee 6 recommended administrative review and a on 8-27-99 that the hearing would be held on 9-16-99. Sgt. Employee 1 was charged with violation of the following Sheriff's Policies and Procedures:

### **3.5 Unsatisfactory Performances 9.2 Use of Weapons**

The hearing was held on 9-16-99. Sgt. Employee 1 was present and represented by representatives Lt. Employee 7 and Executive Lt. Employee 8. On 9-17- 99, the findings of the administrative review and determination were issued. They stated:

It is the findings of the hearing that Sergeant Employee 1 is guilty of the charges cited and shall serve a one (1) day suspension without pay as corrective action. The amount of \$557.50 for the replacement of the stolen weapon and ammunition shall be made to the department forthwith as required by all employees.

On 9-23-99, the Union filed a grievance in Step 3 on Sgt. Employee 1's behalf demanding that the discipline be rescinded and that the grievant be made whole. Union also requested that Sgt. Employee 1 be reimbursed for the cost of the weapon and ammunition. On 11-9-99, Sgt. Employee 1 was issued a discipline report for a one (1) day suspension without pay. The suspension was served on 11-23-99.

The grievance was appealed to arbitration and Employee 5 by Arbitrator Deborah M. Brodsky on March 15, 2000 and May 24, 2000. Both parties had the full opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and present oral and written argument. Mr. O delivered an oral closing statement on behalf of the Employer on May 24, 2000. Mr. H filed a written post-hearing brief on the Union's behalf. This brief was received by the Arbitrator on July 17, 2000.

## **ISSUE**

Did the Employer possess just cause to issue Sgt. Employee 1 a one (1) day unpaid suspension and require her to reimburse the Employer \$557.50 for violation of Rules 3.5 and 9.2 when her department issued weapon was reported stolen on or about 7-11-99').

DEBORAH M. BRODSKY

Attorney - Arbitrator

## **DISCUSSION AND FINDINGS**

The Union insisted that the Employer failed to conduct a timely investigation. Lt. Employee 8 testified that the subject disciplinary package did not include a "request for investigation" form from Division III Commander Employee 3. Commander Employee 3 did, however, fax the incident report to Internal Affairs Lieutenant Employee 9 and Lieutenant

Employee 4. The Union argued that if the fax was sent pursuant to Section E 2.2 of the Sheriff's Policy Manual 1 (as a request for investigation), then the investigation should have been completed by 7-26-99, 14 days later. The investigation was not completed by Detective Employee 5 until July 27, 1999.

Internal Affairs Detective Employee 5 testified that his orders to investigate a case may be in writing or may be oral. He stated that he was assigned to the subject case on 7-20-99, as reflected in his report. Moreover, it is unclear when Lieutenant Employee 4 actually received the fax from Commander Employee 3. The fax was transmitted at 1447 hours on 7-12-99. Testimony revealed that Internal Affairs does not have its own fax machine and it utilizes the fax machines of other departments within its building. No evidence was submitted to show that Internal Affairs actually laid hands on the fax on 7-12-99. After all, the fax was not sent until nearly 5:00 p.m. on 7-12-99 and went to another department. It is unclear when Lieutenant Employee 4 actually received the fax.

Once the case was assigned to Detective Employee 5, he conducted the investigation with dispatch, completing it within 7 days of its initiation. Considering that this was not the only investigation being conducted at the time, it appears that Internal Affairs expeditiously completed the investigation (well within the Section E 3.1 fourteen day time constraint).

The cases cited by the Union are distinguishable from the subject case. In the Carter Case (98-005), the detective investigating the case requested thirteen extensions to submit his report. Detective Employee 5 requested no extensions and completed his report within the allotted time. Moreover, in the twenty-five year old Marrone Case (75-0007), the grievant was not advised of his allegedly incorrect conduct for six months.' Such was not the situation with Sgt. Employee 1. She apparently knew that the incident was under investigation from the start. Moreover, the

record indicates that the Employer moved with due promptness when processing the charges levied against her. The Administrative Review and Determination Hearing was scheduled in accordance with the labor agreement. There was no contractual violation committed by the Employer in processing Sgt. Employee 1's case.

Furthermore, there was much discussion at the arbitration hearing regarding when Sgt Employee 1 actually served her one-day suspension. This matter is not before the Arbitrator. The subject grievance was filed on 9-23-99.

1. A pertinent section of the CBA requires the divisional commander to prepare a report summarizing the incident within five of her regular duty days.
2. The other case. ***Mazglad and Pacheco***, alluded to by the Union (that was cited in Carter) was not provided to the Arbitrator, so she is unable to draw conclusions regarding its relevancy to the case at hand, discipline report until 11-9-99 and her suspension was served on 11-23-99. The timing of the suspension was not part of the subject grievance and the parties did not agree to incorporate into this case.

Thus, the Arbitrator rules that the subject grievance is procedurally arbitrable and will now examine the merits of the case.

The Union argued that Detective Employee 5 did not thoroughly investigate the incident, since he did not view the vehicle after the incident. His investigative report notes the following:

When asked if there were any signs of forced entry on the vehicle, Sergeant Employee 1 [sic] stated that there were no signs of forced entry.

When asked if the vehicle was left unlocked, Sergeant Employee 1 stated that the vehicle was locked when it was left unattended.

When asked for an explanation as to how the weapon could have been stolen, Sergeant Employee 1 stated that someone told her that the listed vehicle had a reputation of being easily broken into without signs of forced entry, by pushing in the window.

There was nothing wrong with Detective Employee 5 taking Sgt. Employee 1 at her word. She should be capable of identifying forced vehicle entry. Lt. Employee 7 explained that sometimes the only evidence of forced vehicle entry are marks on the metal, rubber or glass of the vehicle. He noted that a Slim Jim can often open a locked door in a matter of seconds

Regardless of how the vehicle was entered, someone took the backpack with the weapon and ammunition in it. The Employer issued loaded weapon was in Sgt. Employee 1's control. It disappeared and she is held ultimately responsible. It is clear that Sgt. Employee 1 would have been in violation of Memo #91-5 and General Order #92-07, had she left her weapon at home on 7-11-99. She followed the regulation when she took the weapon with her. Leaving the weapon in an unattended vehicle that apparently is a model that is easily broken into was not a responsible action.'

It is notable that Sgt. Employee 1 left her house at approximately 1630 hours to fish with Mr. Friend 1. She did not notice that her weapon (and the backpack that held it) was missing until approximately five hours later. Would not one think that Sgt. Simpson would have checked on her weapon (or at least turned around to view her backpack) either after fishing, or before and/or after going to the party store') If she had, she would have at least been able to more closely pinpoint the time and/or the location of the apparent theft. Sgt. Employee 1 opted not to testify at her arbitration hearing to lend insight to her actions on 7-11-99.

3. Although it is not clear if Sgt. Employee 1 was aware of this fact about the 1993 Buick Century before the incident.

Rule of Conduct Section E, 9.2 states:

Use of Weapons: Officers shall not use or handle weapons in a careless, imprudent or improper manner. Officers shall use weapons in accordance with law and established departmental procedures.

Sgt. Simpson's acted carelessly regarding safeguarding her weapon on 7-11-99. This was evidence of unsatisfactory performance(s) under Rule 3.5.

A loaded handgun in the possession of an unauthorized individual is an accident or a crime waiting to happen. As Under sheriff Watts so aptly noted, "babies are killing babies" and the Employer must foster safety and security in the community. The Employer is politically and morally obligated to ensure that its weapons do not fall into criminal hands. Thus, the Employer had just cause to discipline Sgt. Employee 1 for her actions on 7- 11-99.

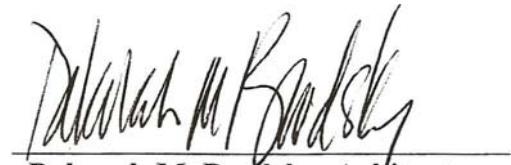
The next prong of just cause to review is whether or not the discipline meted to the grievant was appropriate.

It is clear that Sgt. Employee 1 had an unblemished disciplinary record prior to the subject discipline. She appears to be a dedicated officer of the law, who unfortunately had a lapse in judgment regarding safeguarding her weapon while off-duty. During this lapse, the loaded weapon was evidently stolen. Sgt. Employee 1 then properly immediately reported the theft to all relevant agencies. Under Sheriff 1 took Sgt. Employee 1's commendable past record into consideration when he determined a one-day suspension to be appropriate for the grievant. The Union did not prove that Sgt. Employee 1 was treated disparately. In the Case (99-006) the grievant received a two-day suspension for leaving his Employer issued service revolver in the glove compartment of his car while he went into a nightclub. When he returned he discovered

the car had been broken into and the weapon stolen. The Grievant had a previous oral reprimand on his record at the time. Although Grievant is from a different bargaining unit, the Employer took the facts into account when it issued him a two-day suspension. In the subject case, it appears that the severity of the situation could not justify any lesser discipline than a one-day suspension.

In addition, Commander Employee 6 testified that it is departmental policy that employees pay for their lost or stolen Employer issued equipment. No evidence to the contrary was presented. Moreover, the Employer pointed out that reimbursement for weapons and ammunition is not considered to be discipline.

In sum, the Employer possessed just cause to issue the subject one-day suspension to Sgt. Employee 1 for violation of Rules 3.5 and 9.2 resulting from her actions on 7-11-99. The Employer also properly requested \$557.50 in reimbursement monies from the grievant. The grievance is denied.



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Deborah M. Brodsky, Arbitrator