
In the Matter of the Arbitration between *
*
Dunstable Police Union, NEPBA #7 *
*
and *
*
Town of Dunstable *
*
(Grievant: Darrell Gilmore – Discharge in *
Violation of Article 14, Section 2) *

AAA# 01-18-0002-1684
Decision & Award

BEFORE: Beth Anne Wolfson, Arbitrator

APPEARANCES

For the Town: Marc D. Terry, Esq.

For the Union: Thomas E. Horgan, Eq.

WITNESSES

James Dow, Chief of Police
Timothy Ialeggio, Patrolman
Charles Chaprales, Master Patrol Officer
Nicholas Papageorgiou, Sergeant
Erik Hoar, Sergeant
Bernadette Georges, Former Administrative Assistant to the Chief of Police
Jeffrey Zeizel, LICSW
Darrell Gilmore, Grievant

A hearing in this matter was held on November 15, 2018 and January 15, 2019, in Dunstable, Massachusetts, before the undersigned Arbitrator, who was designated by the parties pursuant to the provisions of their collective bargaining agreement (CBA). The parties were afforded full opportunity to present evidence and make argument in support of their respective positions. Both parties submitted post-hearing briefs, and the hearing was declared closed on March 8, 2019.

ISSUES

- 1) Dis the Town violate Article 14, Section 2 of the Collective Bargaining Agreement when it terminated Grievant Darrell Gilmore on April 4, 2018?
- 2) If so, what shall be the remedy?

PERTINENT CONTRACT PROVISION

ARTICLE 14
PROBATIONARY PERIOD; DISCIPLINE

...

Section 2

Employees who have successfully completed the probationary period shall not be disciplined except for just cause.

...

Jt. Ex. 1

DUNSTABLE POLICE DEPARTMENT
RULES AND REGULATIONS

RULE 13.03

POSSESSION OR USE OF ALCOHOL

Dunstable Police Officers shall not possess and/or use alcohol on duty other than in an authorized duty capacity. Dunstable Police Officers shall not report for duty or be on-duty while under the influence of intoxicating liquor or with an odor of alcoholic beverage on their breath.

RULE 7.03

INSUBORDINATION

Dunstable Police Officers shall not be insubordinate. Insubordination shall include: any failure or deliberate refusal to obey a lawful order (written or oral) given by a superior officer.

...

Jt. Ex. 9g

FACTS

Grievant was hired by the Town as a police officer in 1998. Around the summer of 2001 he was promoted to the rank of sergeant and held that position at the time of his termination effective April 4, 2018. At the time of the incident leading to Grievant's termination, he was working the day shift on Saturday and Sunday, the evening shift on Monday, Tuesday, and Wednesday, and was off on Thursday and Friday. At the time of his termination in 2018, Grievant was the Union President. During the relevant time period, the Police Department had eight full-time employees: Chief James Dow; Sergeants Darrell Gilmore (Grievant), Erik Hoar and Nicholas Papageorgiou; and four patrolmen positions, which included Matt Tully, Timothy Ialeggio, and Charles Chaprales. The Department also had between five and six reserve officer positions.

According to Grievant, for at least the past 10 years officers have been evaluated twice a year. The Union submitted into evidence 12 evaluations covering the period from January 4, 2008 through January 20, 2016, all of which designated Grievant as "outstanding" in every category.¹ The parties submitted as joint agreements two documents concerning what I assume were the only instances of discipline in Grievant's file. The first, dated August 16, 2006, was a letter to Grievant from then Chief James Downes, concerning unauthorized use of the Department's emergency telephone line. Grievant was offered the choice of a 2-day appealable suspension or an 8-hour tour of foot duty on the Rail Trail on a specific date. According to the letter, Grievant accepted the foot duty and expressed remorse. The letter also noted that the then Chief accepted Grievant's apology. The other instance of discipline was a 30-day suspension

¹ I note that included in the documents entered by the Union was a memorandum dated April 24, 2015, from the Chief to Grievant and signed by Grievant, which acknowledged receipt of 23 evaluations for the period from July 1, 2001 through February 10, 2015. Of the evaluations received into evidence, there was one each for the years 2008, 2009, 2012, and 2016, two each for the years 2010, 2011, 2013, and 2014, and none for the year 2015.

memorialized in a “Last Chance Agreement,” dated June 7, 2017, signed by the Town Administrator, Grievant, and a Union representative. That Agreement concerned Grievant’s use of the Criminal Justice Information Systems (CJIS) “for non-criminal justice/non-work related purposes.” That Agreement specifically states, “4. **Last Chance**. Sgt. Gilmore shall be terminated, without recourse to the grievance and arbitration process, if he uses CJS for any non-criminal justice/non-work related purpose.” [Jt. Ex. 11a, paragraph 4]

On Friday evening, February 23, 2018, Tully received a call concerning shots fired. He responded to the address and found that his brother had shot himself. The Chief learned of this from Papageorgiou when the Chief returned a missed call from him after 10:00 PM. Papageorgiou also told the Chief that he had tried to call Grievant, but could not reach him. He also said he had called Ialeggio, Hoar and Chaprales. The Chief asked how Tully was doing and was told not well. The Chief, who was coming back from a social dinner, drove about 2 miles to his house to drop off his girlfriend and then proceeded to the station. On his way into the station, the Chief called Grievant and told him what had happened. According to the Chief, he had awakened Grievant with calls in the past and Grievant had a history of having a difficult time waking up. The Chief thought, however, that Grievant’s response was different this time. His speech was slurred and he was having a difficult time understanding what the Chief was telling him. Because of this, the Chief told Grievant they were all set, he did not need Grievant, and if he did, he would call Grievant. The Chief stated that he did not know whether Grievant had been drinking, or was sick, or whether something else was going on. On cross-examination, the Chief admitted he never asked Grievant whether he had had any drinks. The Chief also stated he thought Grievant was in disbelief trying to understand what had happened. The Chief acknowledged on cross-examination that he did not say to Grievant “I order you to stay home.”

He said “I need you to stay home,” which the Chief testified he would define as an order.

The Chief went to the scene of the suicide and saw Tully pacing. He took Tully into his care, had him lock his car and told him they were going to secure his weapon. He asked the Fire Chief, who was present, to stay with Tully while he went inside to check with Papageorgiou and make sure he was going to follow procedure for reporting the incident and securing the scene. When the Chief went back outside Hoar had arrived. The Chief drove Tully back to the station and Hoar followed in his vehicle. The Chief intended to get Tully changed and then he and Hoar were going to take Tully to his parents to notify them. When the Chief came back out of the station he saw Grievant pulling in. Grievant got out of his car and embraced Tully. According to the Chief, it was very emotional. Grievant then approached the Chief and asked if there was anything he could do. The Chief swore at Grievant and said he needed Grievant to stay home. He then told Grievant to go inside and sit at his desk. He said there was nothing Grievant could do at the scene and nothing for him to see. He also told Grievant to wait until the Chief called him or came back to get him. At the time of their conversation, the Chief and Grievant were about four feet apart. When specifically asked on cross-examination, the Chief stated that he did not smell alcohol on Grievant. He also agreed that he never wrote in his subsequent report that he observed Grievant staggering or unbalanced when he walked into the station. After speaking to Grievant, the Chief left with Tully and Hoar followed in his car.

After notifying the Tully family, the Chief called Papageorgiou around 11:45 PM to see how things were going at the scene. Papageorgiou told the Chief that Chaprales made a complaint about Grievant being under the influence of alcohol. Papageorgiou told the Chief he sent Grievant home because he observed signs of somebody who was impaired and he smelled alcohol. The Chief then called Grievant at home to check on him. By this time it was midnight

or 12:15 AM. According to the Chief, during their conversation Grievant acknowledged that Papageorgiou had told him Chaprales had made a complaint. Grievant said he had had a couple of drinks earlier and had gone to bed early. The Chief did not ask Grievant what he drank or how many drinks he had. The rest of the conversation consisted of Grievant asking the Chief if he could call his therapist for Tully and the Chief said he could. The Chief next saw Grievant about 8:00 or 8:15 AM the next morning (Saturday) when Grievant reported for his shift. They did not talk about the complaint against Grievant until the following Monday night when Grievant reported for work. In the interim, the Chief spoke to the officers who were present over the weekend, called a fellow Chief on Sunday night, and then spoke to Town Administrator Hutton on Monday, February 25, 2018, to start the process of putting Grievant on paid administrative leave pending an internal affairs investigation.

With respect to the officers who accused Grievant of being under the influence of alcohol, the first one to allegedly observe this was Ialeggio, who graduated from the police academy in 2017 and has been employed as a full-time patrolman by the Town since July 17, 2017. Although he was scheduled to work midnight to 8:00 AM on February 23-24, 2018, he was called in by Papageorgiou a little after 10:00 PM on February 23rd because of the incident with Tully's brother. Ialeggio arrived at the station before 11:00 PM. He saw the Chief and Grievant talking outside, with Tully was close by. Ialeggio went downstairs to the locker room to get dressed and Grievant came in shortly after to get dressed. According to Ialeggio, as soon as Grievant entered the locker room, the room smelled like the odor of an alcoholic beverage. Ialeggio testified he did not have a flashlight, so he asked Grievant once if he had one. Grievant said several times that he had gone to bed early and the Chief had woken him up when he called. Grievant then told Ialeggio he had a flashlight in his car and said he needed to find his car keys.

According to Ialeggio, it took Grievant about 10 seconds to locate them on the bench. He gave the keys to Ialeggio, who then went to Grievant's car to retrieve the flashlight, which was where Grievant told him it was located. Ialeggio testified that when he got the flashlight, Grievant's car smelled of a heavy odor of alcoholic beverages. On cross-examination Ialeggio testified that he did not see any open alcoholic beverage containers or any beverage containers of any kind in Grievant's car. After Ialeggio returned Grievant's keys, they both proceeded upstairs. According to Ialeggio, Grievant was a little slow, seemed a bit unsteady on his feet, and was holding on with both hands. He also said Grievant's speech was slurred and a little delayed.

According to Ialeggio, Grievant stayed at the station and he went to the suicide scene. Ialeggio was told to stay at the intersection of the street where the suicide occurred and Main Street, to only allow authorized personnel in, and to log everyone who was coming in. At 11:17 PM Grievant drove by Ialeggio in his personal vehicle, and about 10 minutes later he drove by Ialeggio when he left. The only time he mentioned his concern about Grievant was sometime after Grievant had left. Ialeggio went to the house to relieve someone from another agency and said something to Papageorgiou. On cross-examination, Ialeggio admitted that he never said Grievant was driving erratically, he did not arrest Grievant for driving under the influence or for carrying a weapon under the influence, and he did not report Grievant to anyone at the point when he watched Grievant drive away from the scene of the suicide.

This was not the first time Ialeggio had made such a complaint against Grievant. The Chief testified that in October of 2017 Ialeggio alleged that when Grievant came to work at 8:00 AM he smelled an odor of alcohol and noticed signs of impairment. The Chief was called and went to the station within two hours of Grievant reporting to work. He met with Grievant and found no evidence that Grievant had been drinking.

Chaprales, the officer who made the complaint against Grievant, graduated from the police academy in 2005, and has been employed by the Town for a little over 10 years. Because he has been employed more than five years he is a Master patrol officer. On cross-examination Chaprales agreed that during the internal affairs investigation he admitted he had conflicts with Grievant. Although he denied that Grievant returned his written reports for revisions more often than other supervisors, he did admit that he thought it was unfair that Grievant got more of a pay raise than other officers when Grievant, as Union president, negotiated the recent CBA. The Chief also testified that he was aware of conflicts between Grievant and Chaprales stemming from both Chaprales not agreeing with orders given him by Grievant and from issues Grievant had with Chaprales' report writing errors. According to the Chief, Grievant, as a supervisor, was justified in bringing to his attention the concerns he had with Chaprales' reports.

On the night of February 23, 2018, Chaprales was scheduled to work the midnight to 8:00 AM shift, but was called in around 10:00 PM because of the suicide incident. Sometime after that, as Chaprales came up the stairs from the locker room, he saw Grievant come in with his uniform shirt on a hanger. The two men had a quick conversation of about 3 to 5 minutes. They were about 10 feet apart during the conversation and Grievant was above him on the stairs. Chaprales observed Grievant had slurred speech, his eyes were half shut, and Chaprales could smell an odor of alcohol coming from the area where Grievant was standing. When Chaprales arrived at the incident scene, he advised Papageorgiou of his interaction with Grievant and what he had observed. About 10 to 15 minutes later, while standing on the porch of the incident house with Papageorgiou and Fire Chief Rich, Chaprales saw Grievant drive up in his personal vehicle, exit his vehicle, and walk toward the house. According to Chaprales, Grievant made a comment three times about an ATV belonging to Tully. At that time, Grievant was between 15 and 20 or

10 and 15 feet away and Chaprales could not smell alcohol (the differences in distance were based on his answers on direct and cross, but in any event Chaprales said he was over 10 feet away). Papageorgiou then pulled Grievant away from Chaprales and Rich and spoke to him. After Papageorgiou spoke to Grievant, he got in his car and left. When specifically asked on direct examination, Chaprales said in his judgment, Grievant showed signs of intoxication, but he could not make a judgment as to how intoxicated he was. On cross-examination, Chaprales agreed that when he made his written report during the investigation he did not say he observed Grievant swaying or unsteady on his feet as he walked from his car to the porch. Chaprales testified that there was no one at the station to notify and he did not call anyone about Grievant at that time; however, he notified Papageorgiou about his interaction with Grievant when he reported to the suicide scene. Chaprales also testified that he never attempted to take Grievant's keys or stop him from driving because Papageorgiou said he would take care of it.

Papageorgiou, who has been a Town police officer since 2003, was promoted to sergeant in July of 2017. On February 23, 2018, he was working the 5:00 PM to midnight shift. He responded to a medical call with possible gun involved, which turned out to be the suicide of Tully's brother. Sometime after 11:00 PM Chaprales arrived on the scene, and 15 to 20 minutes later Grievant drove in, but apparently Papageorgiou did not observe how he was driving. Before Grievant had arrived, Chaprales told Papageorgiou that that Grievant was very intoxicated in the station, he had observed him to be unsteady on his feet and slurring his speech, and something had to be done. Papageorgiou advised that they would deal with it later. Grievant walked toward Papageorgiou, who was standing on the top step of the porch. Chaprales and Rich were at the bottom of the steps. Grievant stood with those two men and asked how they all were doing. Grievant then saw an ATV there and said it was Jimmy Tully's (the uncle) ATV, a comment he

repeated. According to Papageorgiou, Grievant was about 6 to 8 feet away and they had a conversation for no more than 5 minutes. As Grievant was talking Papageorgiou could smell an alcoholic odor coming from the area where the three men were standing. He also stated he had not smelled it before Grievant arrived. Grievant was calm, but he was shuffling back and forth while standing, and his speech was a little slurred. Papageorgiou walked away with Grievant to the middle of the yard, told him he could smell alcohol coming from him, to which Grievant responded, "You do?" He did not ask Grievant if he had been drinking. Papageorgiou then asked Grievant to leave, which he did. On cross-examination, Papageorgiou stated that during their private conversation he did not observe Grievant slur his words because he only said two words. He also stated he did not look at Grievant's eyes and Grievant's uniform was not disheveled. The Chief called to check in about an hour later and asked if Grievant had come by. Papageorgiou told the Chief what had happened and that he had sent Grievant home. Papageorgiou stated that he thought Grievant was very intoxicated, and that he did not take action to arrest him or to make sure he didn't drive because he was too concentrated on the scene of the incident.

The Town also called Hoar as a witness. He has worked for the Department for 15 years and was promoted to sergeant in July of 2017. He is friends with the Grievant and socialized with him outside of work. Although he was not working the night of February 23, 2018, he was called around 10:00PM by Papageorgiou because of the suicide incident. Hoar went first to the station. Before arriving he had a very brief phone conversation with Grievant when he called Hoar as Hoar was pulling into the station. According to Hoar, Grievant sounded the same as he had the numerous times Hoar had talked to Grievant when he had just woken up. They also had a brief conversation in the station parking lot later. Hoar was waiting for Tully to change so he

and the Chief could take him home. Hoar saw Grievant pull into the lot, so he went outside. Hoar asked Grievant if he was okay because he seemed a little tired and a little out of it. Hoar testified on direct that he asked Grievant if he had been drinking, but on cross-examination he said he could not smell alcohol on Grievant's breath. Hoar also testified that Grievant told him he had gone out earlier with his cousin for dinner but had been in bed for several hours. At the time of their conversation, Hoar was about 3 to 5 feet away from Grievant. Hoar told Grievant he should not be there. Hoar explained he has known Grievant for a long time, he gets very emotional, this was a tough scenario for all of the Department members, and Grievant does not handle things like this very well. Hoar thought it would be best for Tully and Grievant if he left. Hoar did not see Grievant again until 8:00 AM the next morning when Grievant came in for his regular shift.

Grievant testified that Friday, February 23, 2018, was one of his scheduled days off. He was scheduled for his regular Saturday shift, from 8:00 AM to 4:00 PM on Saturday, February 24, 2018. Around 4:00 PM on the 23rd Grievant's cousin came to his house. The cousin visited for about an hour and 15 minutes. During that time the cousin had a beer and Grievant had two drinks of vodka and soda with cranberry juice. Those were the only alcoholic drinks Grievant had that day. The cousin left shortly after 5:00 PM and Grievant then cooked his dinner. He ate around 6:00 PM and was finished around 30 minutes later. After dinner, Grievant did the dishes and went upstairs to his bedroom. He watched a little TV then took his blood pressure medicine around 7:00 PM and went to bed. Grievant testified that he began taking 100 mg of Metoprolol in July of 2015 and on February 23rd he was still taking that dosage. His doctor had directed him to take his medication before bed and he followed her directions. According to Grievant, he has not been awakened in the middle of the night after taking this medication. Once he takes it, he

sleeps well and gets between 8 to 10 hours of sleep. On both direct and cross-examination Grievant stated that after learning what the other officers were alleging about his behavior on February 23rd he made an appointment to see Dr. Attar, who has been treating Grievant since 2008. According to Grievant, he knew from the prescription bottle that his medication could cause dizziness and he wanted to talk to his doctor about that. Grievant saw Dr. Attar on March 26, 2018, and for purposes of his termination hearing, Dr. Attar wrote a letter, dated that day, which stated in part that one of the medications Grievant took for hypertension makes him very drowsy and causes him to fall asleep, and for that reason he takes it in the evening around bedtime.

On February 23rd Grievant fell asleep around 7:30 PM. On cross-examination Grievant stated that when he was going to work the 8:00 AM shift the next day he would go to bed around 8:30 or 9:00 PM, but he was tired and went to bed earlier. He also testified that he rarely gets calls late at night because he does not work the midnight shift. On the apparent few occasions there had been a call he slept through it and seen a voice mail on his cell phone the next morning. On February 23rd, around 10:22 PM the Chief called Grievant. According to Grievant, the phone woke him, but he was having a hard time waking up and understanding the Chief. During the call the Chief told him patrolman Tully's brother had committed suicide. Grievant knew the Tully family personally and the news was shocking. Grievant testified that the Chief did not give him any orders or instructions prior to ending the call and did not tell him not to come into the police station. After Grievant hung up he noticed that he had missed a call from Papageorgiou at 10:20 PM. He also had a voicemail from a missed call from the Groton Police Department at 10:08 PM stating that there had been a shooting. Grievant got his police bag and uniform and headed out the door. He felt he should go to the station because the Department is so small, he

was Union president, and one of their members had suffered a trauma. Grievant drove to the station in his personal vehicle. On the way he called the Groton Police Department, but they did not have much information. Grievant also tried to call the Chief and Hoar, but neither man answered. Grievant arrived at the station around 10:40 PM.

In the parking lot at the station, Grievant spoke to Hoar briefly and gave Tully a hug. He then spoke to the Chief. According to Grievant, he apologized to the Chief because he had just awakened, was groggy, and could not believe what had happened. The Chief told him things were evolving quickly and they wanted to get to the parents and grandparents to make the notification before they found out through a third party. Grievant said when they spoke they were standing close and whispering because Tully was standing in the parking lot. Grievant denies that the Chief ordered him to stay in the station until he reached out to him. Grievant said the Chief did say Grievant would not want to see the brother the way he was. After speaking with the Chief, Grievant went into the station.

Once inside, Ialeggio asked Grievant if he could take the last cruiser because he had to block off the road and Grievant said yes. Grievant then went down to the locker room and Ialeggio came in and said he had forgotten his flashlight. Grievant gave him the keys to Grievant's car and told him where he could find Grievant's flashlight. According to Grievant he did pat his pockets before he realized his keys were in front of him because he was changing and starting to take things out of his pockets. Once Ialeggio got the flashlight, he returned Grievant's keys and left. Grievant went upstairs to his desk for about 5-6 minutes and then headed to the scene to check on Papageorgiou and Chaprales. According to Grievant, he briefly saw Chaprales in the stairwell as he was coming upstairs and Chaprales was heading out the door. Grievant went to the scene of the incident, which is only a few minutes from the station, by driving his

personal vehicle.

When Grievant arrived at the house he said hello to Fire Chief Rich, Papageorgiou and Chaprales. He asked where the witnesses were and was told they had been brought to another house on the road. During the conversation he asked about the ATV and was told it was “Jimmy’s,” but it did not register right away that they meant Jimmy Tully. According to Grievant, Chaprales became belligerent and told Grievant to move his personal vehicle in case Chaprales had to leave. Papageorgiou came off the porch and he and Grievant had a conversation on the side lawn. At that time, Papageorgiou said Chaprales had complained that he could smell alcohol on Grievant. Grievant replied that he could not believe Chaprales was going to start trouble in the middle of this event. Papageorgiou then said he could smell some alcohol. At this point, Grievant said Chaprales likes to cause trouble and there was nothing he could do there, so he would go back to the station and stand by if needed. Grievant then left by driving his personal vehicle and went back to the station. Grievant arrived back at the station around 11:00 PM. He called Bernadette Georges, the then Department secretary, and told her what was happening. He also called a former Town patrolman who was good friends with Tully. Grievant left the station around 11:30 PM, made some phone calls on the way home, and arrived home around midnight. At 12:12 AM on February 24, 2018, the Chief called Grievant. Grievant told the Chief he was home. They talked about Tully and the Chief said he had tried calling the crisis team, but they hadn't called back. Grievant asked whether he should call Jeffrey Zeizel, a clinical social worker from whom Grievant had sought treatment for exposure to trauma on the job, and the Chief said yes. After they hung up, Grievant called Zeizel and left a message on his voicemail. Both Georges and Zeizel testified that during their conversation and the voicemail, respectively, Grievant was clear and understandable and was not slurring his words.

Grievant reported for work on February 24, 2018 at 8:00 AM. The Chief came in around 9:00 or 9:30 AM and they spoke briefly about the crisis team. Grievant did not find out that Chaprales had filed a complaint against him until he spoke to Union Representative Russ Taylor that afternoon. Around 4:00 PM he had another conversation with the Chief, during which the Chief said Chaprales had filed a complaint against Grievant via e-mail around 2:00 PM. Grievant replied it was out of spite because Chaprales wanted him out as Union president. According to Grievant, the Chief never said anything about violating an order and did not ask if Grievant had been drinking, but Grievant told the Chief he'd had a couple of drinks earlier and was fine. Grievant also testified that he had served as Chaprales' supervisor and in that capacity had brought to both the former and current Chiefs' attention concerns about Chaprales' report writing mistakes. Grievant denies being unfit for duty on February 23rd and denies being intoxicated on that night. On cross-examination Grievant testified that he never heard the Chief tell him not to report to work or to stay at the station once he got there.

Apparently, on February 23, 2018, the Chief told Grievant he was putting him on paid administrative leave pending an internal affairs investigation.² On March 12, 2018, Grievant was informed by letter from the Chief that, as part his Professional Standards Review based on an internal complaint, he was to submit a detailed written report to the Chief, at the request of the independent investigator retained by the Town, describing his involvement in the events of the unattended death investigation on February 23, 2018.³ [Jt. Ex. 2] Subsequently, Gregory J. Foley, Sr., Detective Captain, Retired, of the Massachusetts State Police submitted to Frederick Ryan, Principal of the Ryan Strategies Group, LLC, a written report dated March 20, 2018, the

² I have discerned this from the Chief's testimony as no documentary evidence of this was submitted into the record.

³ The Chief's letter listed eight questions that the Grievant was to answer as part of his report.

subject of which was “Dunstable Police Department/Independent Investigation.”⁴ [Jt. Ex. 9] By letter dated March 28, 2017 (sic) Town Administrator Tracey Hutton notified Grievant that the Board of Selectmen would enter into Executive Session on April 4, 2018, to discuss discipline, and advised, among other things, that Grievant could be present, have counsel or a representative present to advise him (but not actively participate), speak on his own behalf, and could request the discussion be held in open session. [Jt. Ex. 3] By letter dated April 4, 2018, from Hutton to Grievant, Grievant was advised that the Board unanimously voted to terminate his employment, effectively immediately, for the reasons described in the investigative report. [Jt. Ex. 4]⁵ On April 17, 2018, Grievant, as Union Steward, filed a grievance on his behalf alleging his termination was without just cause, in violation of Article 14, section 2 of the CBA. [Jt. Ex. 5] By letter dated May 3, 2018, Hutton notified Grievant that on April 30, 2018, the Personnel Board met to hear his grievance and provided the following written response: “In regards to the incident on February 23, 2018, and only examining at the facts of that isolated incident and assuming you have no prior record of discipline, the Board is recommending that the Board of Selectmen revisit their decision.” [Jt. Ex. 6] By letter dated May 22, 2018, Hutton notified Grievant that the Board of Selectmen denied his grievance at Step 3. [Jt. Ex. 7] By letter dated May 25, 2018, Attorney Horgan filed with the American Arbitration Association a Demand for Arbitration on behalf of Grievant. [Jt. Ex. 8] The matter now comes before this Arbitrator for decision.

⁴ Neither Foley nor Ryan was called to testify at the arbitration.

⁵ Foley concluded that Grievant had violated Rule 7.02 relating to Insubordination and Rule 13.03 relating to Possession or Use of Alcohol.

POSITIONS OF THE PARTIES

Town

The Town asserts it did not violate the just cause provision in Article 14 of the parties' CBA when it terminated Grievant. Grievant had notice of the Department's Rules and Regulations regarding insubordination (Rule 7.02) and reporting for duty under the influence of alcohol (Rule 13.03). He violated those rules on February 23, 2018. Specifically, during his phone conversation with Grievant on February 23, 2018, the Chief told Grievant to stay put unless the Chief told him otherwise. Instead, Grievant came to the station. When he asked the Chief what he could do, the Chief responded that he needed him "to stay the f--- home," and then ordered Grievant to go inside the station and not do anything until the Chief told him otherwise. By then leaving the station and reporting to the scene of the incident, Grievant made a direct and knowing violation of the Chief's order. The Town contends Grievant, therefore, twice ignored directives from the Chief, violating Rule 7.02 (failure to obey a lawful order given by a superior officer).

The Town also argues that, based on the accounts of Officers Ialeggio and Chaprales, and Sergeants Papageorgiou and Hoar, as well as the testimony from Mr. Zeizel, the only logical conclusion is that Grievant was under the influence of alcohol. Grievant's claim that he was not drunk, but rather simply groggy because of a medicine he had been taking for years is nothing short of an alcohol-induced fantasy. The Town asserts reporting with the odor of alcohol on one's breath is an undeniable violation of Rule 13.03. The evidence in this case, however, demonstrates with equal and stunning clarity that Grievant was intoxicated in violation of the same Rule. Although Grievant attempted to deflect responsibility for his own misconduct by claiming Chaprales made the initial complaint in retaliation for previous actions Grievant took

against him regarding his report writing ability, and that Chaprales wanted Grievant out as Union President, there is no credible evidence of such an impure motivation. Furthermore, even if there was, that does not change the fact that Grievant reported for duty under the influence of alcohol.

Finally, the Town contends Grievant's termination was commensurate with his offense. Grievant, by his conduct, violated two Department Rules: he violated two separate orders, and was under the influence of alcohol on duty and smelled of alcohol on duty. The Town points out that carrying a firearm under the influence is a crime (see M.G.L. ch. 269, § 10H). Reporting for work under the influence also raises the specter of an unprofessional officer and department, and places lives at risk. In fact, Grievant was lucky he did not get into a car accident, which could have resulted in loss of lives. Furthermore, insubordination, particularly in the context of handling a critical incident such as the one on February 23, 2018, undercuts the paramilitary structure of a well-functioning police department by demonstrating an incomprehensible and unacceptable placement of one's own intentions over the best interest of the Department and the community it serves. In addition, Grievant was brought up on termination charges once before, which resulted in a Last Chance Agreement. Although the nature of the offense was different – an abuse of authority with respect to Grievant's access to criminal justice history information by repeatedly using it for personal purposes – it demonstrates that Grievant exhibits extremely poor judgment. In this case, Grievant's only excuse for his poor judgment was that he was drunk, which of course is no excuse at all.

The Dunstable Police Department simply cannot be compelled to retain an officer whose judgment is suspect to such lapses. It should also be noted that Grievant was not a rookie, but rather a police officer with 20 years' experience. It is well established that just cause discipline systems are intended to rehabilitate employees rather than simply to punish them. In this case,

however, Grievant has shown twice in 10 months that he presents a significant risk to the integrity and reputation of the Police Department and that he does not have the professional judgment to be entrusted with the authority and responsibility of a police officer. Termination under these circumstances is appropriate.

Union

The Union contends the Town has failed to establish just cause for terminating Grievant. It has the burden of showing Grievant was guilty of the charged violations and that the penalty imposed was appropriate under all circumstances. It argues arbitrators typically use the so-called seven-part test to determine if just cause exists, which is a conjunctive test. In this case, the Town has not proved any of the seven parts.

With respect to Rule 7.02, relating to insubordination, the Union asserts the Town failed to establish that an order was given to Grievant by the Chief to stay at home on the night of February 23, 2018. Grievant testified he does not recall being directed to stay home during the initial telephone conversation. The Chief was unable to clearly identify the reason why such an order would have been necessary. Furthermore, given the emotional and shocking state of disbelief Grievant was in at the time the Chief told him of Officer Tully's brother's suicide, it is reasonable to conclude that if a directive was given, which the Union does not admit, Grievant did not hear it. According to the Chief, when Grievant showed up at the police station, he hugged Officer Tully in the parking lot and then asked the Chief what he wanted Grievant to do. The Chief responded "I needed you to stay home." When he asked Grievant if he was okay, Grievant responded he was "tired and upset." The Chief testified he then directed Grievant to go into the police station and await further instructions from him. Grievant denied such an order was given. During a subsequent phone conversation between Grievant and the Chief on

February 24th, the Chief never mentioned anything about Grievant having violated any direct orders or being insubordinate. Even assuming such an order was given by the Chief, termination for failing to adhere and or understand the order, especially given the tragic circumstances that had occurred, is not an appropriate punishment. There is, however, no evidence to suggest Grievant ever failed to adhere to a lawful Department order given by the Chief or any other superior. Termination in this instance would be inconsistent with the principles of progressive discipline, especially in the absence of any prior warning or discipline of a similar nature.

With respect to Rule 13.03, relating to the possession or use of alcohol, the Union contends the Town failed to prove that Grievant reported for duty while under the influence or that he had an odor of alcohol coming from his breath. The Town relies on the written reports and testimony of Sergeants Papageorgiou and Hoar, and Officers Chaprales and Ialeggio to support its assertion that Grievant was intoxicated. Ialeggio never mentioned that he smelled alcohol on Grievant's person, but rather only that he smelled an odor of alcohol coming from the locker room while standing 5-6 feet away from Grievant. Ialeggio testified that it took Grievant a couple of seconds to find his keys, but admits Grievant accurately described where to find his flashlight. Ialeggio also testified that when he went to Grievant's car to retrieve a flashlight he observed a heavy odor of alcohol coming from Grievant's car, but he did not observe any empty containers of any kind in the car. Ialeggio's actions on the night of February 23rd do not reflect a belief that Grievant was impaired. After speaking to Grievant, Ialeggio failed to notify a superior officer or anyone else of his suspicion.

In addition, Ialeggio observed Grievant driving his personal vehicle on two separate occasions that night and failed to take any action to stop Grievant from driving during a time he believed Grievant was under the influence or while Grievant was carrying a firearm. The Union

asserts Ialeggio's actions were completely inconsistent with those that a trained law enforcement officer would be required to take in a similar circumstance. If Ialeggio believed Grievant had been drinking, and was uncomfortable taking action with respect to his superior on his own, he could have reported his suspicions to another supervisor, which he did not do. Finally, Ialeggio had previously accused Grievant of smelling like alcohol at work and the Chief ultimately determined that his accusation was unfounded.

With respect to Chaprales testimony, the Union argues he claimed to smell an odor of alcohol coming from the area in which Grievant was standing, while they were in a stairwell and Chaprales was positioned about 10 feet away from and below Grievant on the stairs. That is not the same as smelling alcohol coming directly from Grievant. While Chaprales also testified that Grievant has squinty eyes and that Grievant had at some point slurred his speech, he admitted these could be an indication of being tired or exhausted, rather than intoxicated. Furthermore, all of the witnesses testified that they were aware of conflicts between Chaprales and Grievant, stemming from work-related issues involving Grievant's supervisory role over Chaprales, as well as the fact that Chaprales was not happy with Grievant's actions as Union president and lead negotiator on the last CBA.

Hoar testified he told Grievant he should not be at the station because of how emotional he knew Grievant would be in handling the difficult situation involving Officer Tully' brother's suicide. He was not basing his statement on a belief that Grievant had been drinking and he did not observe Grievant slurring his speech either during their conversation in the station parking lot or a phone call they had had just prior to that. Papageorgiou testified he ordered Grievant to leave the scene of the suicide after receiving a complaint from Chaprales that Grievant might be intoxicated. Papageorgiou also admittedly allowed Grievant to drive away in his personal

vehicle. The Union contends his testifying that he could smell alcohol on Grievant was more likely based on the statement made to him by Chaprales.

Finally, the Union argues Grievant's medication for high blood pressure, taken before going to bed, and then being awakened could result in the symptoms he is alleged to have demonstrated, rather than from being under the influence of alcohol. For these reasons, the Union contends Grievant was terminated without just cause, therefore, the grievance should be upheld and Grievant should be reinstated to his position and made whole by receiving all contractual obligations, including pay for his administrative leave.

OPINION

Under the just cause standard, such as the one in Article 14, section 2 of the parties' CBA, arbitral review of terminations for just cause is done *de novo*. The investigator's report was, therefore, considered within the context of that standard of review. The issue before me is whether the Town had just cause to terminate Grievant. Termination is the most extreme industrial penalty – an employer can exact no greater penalty. The Town asserts that it had just cause to terminate Grievant based on his actions on February 23, 2018. Specifically, it alleges that Grievant was insubordinate, in violation of Rule 7.03, when he did not stay home after the Chief told him to, or stay at the station when told to by the Chief. In addition, the Town alleges Grievant reported for duty when he was under the influence of alcohol, in violation of Rule 13.03. The Union contends that the Town failed to sustain its burden of proving just cause for Grievant's termination because it failed to prove Grievant reported for work under the influence of alcohol or that he had the odor of alcohol on his breath. Furthermore, the Town failed to establish that an order was given by the Chief to Grievant to stay home or to stay at the station,

and even if such an order was established, termination, particularly in light of the tragic circumstances of that night, is not an appropriate punishment. In a discharge case such as this the burden is on the Town to prove that, pursuant to the parties' CBA, it had just cause to discharge Grievant. For the reasons stated below, I find that the Town has failed to sustain its burden of proving it had just cause to terminate Grievant.

Rule 13.03 - POSSESSION OR USE OF ALCOHOL – states, “Dunstable Police Officers shall not possess and/or use alcohol on duty other than in an authorized duty capacity. Dunstable Police Officers shall not report for duty or be on-duty while under the influence of intoxicating liquor or with an odor of alcoholic beverage on their breath.” The Town does not assert that Grievant engaged in behavior that violated the first sentence of this rule, but does claim that Grievant’s action on the night of February 23, 2018, violated the second sentence. In order to have committed such a violation, Grievant would have to have either reported for duty “while under the influence of intoxicating liquor,” or would have had to have reported “with an odor of alcoholic beverage on [his] breath.” I find the record evidence does not support a conclusion that Grievant either reported for work while under the influence or that he had an odor of alcoholic beverage on his breath.

With respect to the latter, *i.e.*, alcoholic beverage odor on Grievant’s breath, the record is devoid of any such evidence. Grievant was not scheduled to work until 8:00 AM on February 24th, however, when the Chief called to notify him of Tully’s brother’s suicide, Grievant got up and went to the station, as did all the other officers who were not already working the shift when the incident occurred. The Chief, who was one of the first persons to speak to Grievant at the station, testified that he did not smell alcohol on Grievant. Hoar, who also spoke to Grievant when he first arrived at the station, also testified that he did not smell alcohol on Grievant’s

breath. Ialeggio testified when Grievant entered the locker room the room smelled like the odor of an alcoholic beverage. Although he twice stood close enough to Grievant to obtain and then return Grievant's car keys, he never testified that there was an odor of alcoholic beverage on Grievant's breath. This was not the first time Ialeggio had made such an allegation against Grievant. In October of 2107, Ialeggio complained that when Grievant came to work at 8:00 AM he smelled an odor of alcohol and notices signs of impairment, a complaint the Chief investigated upon being called and found to be baseless.

Chaprales gave similar ambiguous testimony. He stated that when they were 10 feet apart on the stairs inside the station he smelled an odor of alcohol coming from the area where Grievant was standing. A short time later, however, when they were both at the suicide scene and Chaprales was again standing at least 10 feet away from Grievant he could not smell alcohol. Papageorgiou, who was present at the same time, testified in a similarly ambiguous manner, directly contradicting Chaprales. He stated that while he was on the top step of the house porch and Grievant was standing at the bottom of the steps with Chaprales and the Fire Chief, Papageorgiou could smell an alcoholic odor coming from the area where the three men were standing, which was not present before Grievant arrived. Again, none of these trained police officers testified that Grievant had "an odor of alcoholic beverage on [his] breath." Given the other testimony and actions or inactions of Ialeggio, Chaprales and Papageorgiou, I credit the testimony of the Chief and Hoar over their testimony, and find the Town failed to demonstrate by a preponderance of the credible evidence that Grievant reported for duty with an odor of alcoholic beverage on his breath in violation of Rule 13.03.

With respect to the former, *i.e.*, reporting for duty while under the influence of intoxicating liquor, I also find the Town failed to sustain its burden of proving that Grievant had

acted in this manner. As stated above, I do not find persuasive any of the testimony regarding the odor of alcohol emanating from Grievant. Although Ialeggio, Papageorgiou, and Chaprales all testified they observed Grievant to be unsteady on his feet, and each one either stated Grievant repeated something he said a few times, or that his speech was slurred, or that his eyes were partially shut, interestingly neither the Chief nor Hoar testified that they observed any of these characteristics or actions during their in-person interactions with Grievant. At most, the Chief testified that when he first called Grievant he thought his reaction was different from other times when he woke Grievant with a phone call; however, the Chief did not inquire as to Grievant's condition. Of course, this was a highly unusual and tragic situation where the Chief called Grievant to inform him that a young man Grievant knew, and whose brother was a fellow officer, had committed suicide. Hoar, who knows Grievant well, testified that when he first spoke to Grievant over the phone he sounded the same as the numerous times he had spoken to Grievant when he had just been awakened. In addition, Hoar testified that this was a tough scenario for all of the Department members and that Grievant gets very emotional and would not handle well something like the suicide of someone he knew.

Even more telling is that all five of these officers, from the least experienced patrolman to the Chief, saw Grievant driving his vehicle and none of them testified that Grievant's driving was erratic or demonstrated he was in any way impaired. In fact, the three officers - Papageorgiou, a 15-year member of the Department who, as sergeant, was the ranking officer at the scene, Chaprales, who by virtue of his years as a patrol officer is a Master patrol officer, and Ialeggio - who testified in detail to the presence of an odor of alcohol near Grievant and to their observations that Grievant showed signs of impairment never attempted to stop Grievant from driving any of the times they saw him get in or out of his car or drive. They never took away his

keys, got him a ride home, or put him in protective custody. I find their actions, or rather their blatant inaction, on February 23rd, as well as the testimony of the Chief and Hoar, the other Department sergeant, severely undermines the testimony that those three officers observed Grievant showing signs of impairment from alcohol. Based on the above, I conclude that the Town failed to demonstrate by a preponderance of the credible evidence that Grievant reported for duty while under the influence of intoxicating liquor in violation of Rule 13.03.

Rule 7.03 – INSUBORDINATION – states, “Dunstable Police Officers shall not be insubordinate. Insubordination shall include: any failure or deliberate refusal to obey a lawful order (written or oral) given by a superior officer.” With respect to the first purported order, based on the record evidence, I find the Chief did not clearly give an “order” to Grievant to stay home. When the Chief spoke to Grievant over the phone at 10:22 PM Grievant had just awakened from an apparent deep sleep. In fact, after speaking to the Chief, Grievant noticed that he had missed two prior phone calls: a call and voicemail from the Groton Police at 10:08 PM and the call from Papageorgiou at 10:20 PM. Not only did Grievant have to rouse himself, he had to process the awful news that fellow officer Tully’s brother, a young man Grievant knew, had just committed suicide. Although Grievant testified that the Chief did not give him any orders or instructions prior to ending the call, and did not tell him not to come into the station, it is the Chief’s testimony that points out the flaw in the Town’s assertion. According to the Chief’s testimony on direct, what he said to Grievant was that they were all set, that he did not need Grievant, and if he did he would call. He also testified he thought Grievant was in disbelief and was trying to process what had occurred. When pressed on cross-examination, the Chief stated he had said “I need you to stay home,” but admitted he never used the word “order.” Given the circumstances necessitating the call, as well as the Chief’s varying description of his

words on direct and cross, and in light of Grievant's testimony that he did not understand he was being given an order, I conclude that Grievant did not fail or deliberately refuse to obey an order from the Chief at that time. Indeed, Grievant's actions demonstrated his desire to be with his fellow officers, not to work the suicide. After Grievant got dressed, he went to the station, not to the suicide scene. Grievant was the most senior officer after the Chief. In addition, he was Union president of a small bargaining unit in an equally small Department. One of the members of this very small Department had just suffered the unspeakable trauma of being the first officer on the scene of his own brother's suicide. All of the other Department members who were not already on duty were being called and coming in. It is understandable that Grievant would want to be with his fellow officers at the time of a tragedy that touched all of them.

Upon arriving at the station Grievant gave Tully a hug. The Chief then had a conversation with Grievant during which he told Grievant to go inside, sit at his desk and wait until the Chief called or came to get him. Although the Chief did not use the word "order" I find this time his direction to Grievant, given in person and after Grievant was fully awake and dressed, although still grappling with a highly emotional, tragic situation, was clear. Even though Grievant did not recall the Chief giving him that direction, his first actions after speaking to the Chief were to follow what he had been told. Grievant went into the station, got into his uniform, and went upstairs to his desk.

In the interim, the Chief and Hoar took Tully to his parents' house in order to notify the family. Papageorgiou was already at the scene of the suicide. When Chaprales and Ialeggio left the station, they joined him there. After sitting at his desk for a short period of time, Grievant also drove to the scene. From the record testimony, it is apparent that Grievant did not take any official action regarding the suicide, but rather just went to be with the other members of his

Department. Unfortunately, if he was looking for solidarity or moral support that was not forthcoming from those three officers. After another short period of time, Grievant left the scene and returned to the station. Ultimately, because he was scheduled to work the 8:00 AM shift the next morning, Grievant returned home. Based on the record evidence, I find Grievant's actions did not rise to a "deliberate"⁶ refusal to obey an order by the Chief. Grievant did, however, fail to obey the "order" when he briefly left the station and went to the suicide scene.

The Town determined it had just cause to terminate Grievant's employment based on his violating Rules 13.03 and 7.03. I have found Grievant did not violate Rule 13.03, and violated Rule 7.03 in only one instance when he failed to completely obey an "order" given him by the Chief in the station parking lot. I find, therefore, that the Town did not have just cause to terminate Grievant effective April 4, 2018. I also find that the Town did have just cause to discipline Grievant for failing to stay in the station on February 23, 2018.

In order to determine the appropriate level of discipline, I will consider the nature of the infraction, Grievant's length of service, his employment record, including positive evaluations and any other instances of discipline, any mitigating factors, and any discipline of other members of the Department for the same or similar infractions. As stated above, I find Grievant violated Rule 7.03 in once instance by failing to stay in the station on February 23rd after being told to do so by the Chief. At the time of his termination Grievant was a 20-year veteran of the Department, who had attained the rank of sergeant 17 years prior. Grievant had received numerous "outstanding" evaluations, and had two instances of discipline. In August of 2006, he was given an 8-hour tour of foot duty for unauthorized use of the Department's emergency telephone line. Although there is no information in the record and no provision in the parties'

⁶ The adjective "deliberate" is commonly understood to mean "done consciously and intentionally."

CBA concerning how long an instance of discipline stays in an employee's file, I note that this discipline issued 12 years prior to Grievant's termination, therefore, I consider it so stale as to be irrelevant for progressive discipline. Although Grievant received a Last Chance Agreement in 2017, unlike most such agreements, its application was specifically limited to the underlying action that formed the basis for the discipline. By requesting that I consider it in making my determination on discipline in this matter the Town is seeking more than it bargained for. I have considered, however, that Grievant's infraction occurred on the night of the suicide of one of its member's brothers, compounded in tragedy because the first officer on the scene was the deceased's brother. Grievant was connected not only by his fellow officer, but also by his familiarity with the deceased. I also note that even the Town's Personnel Board, upon considering the facts of the incident underlying his grievance in this matter, recommended that the Board of Selectmen revisit their decision, assuming Grievant had no prior record of discipline. At the time of their recommendation, they were considering not only the Rule 7.03 violation I have found, but also the purported violation of Rule 13.03 and the purported second violation of Rule 7.03, both of which I have found are without merit. Finally, no evidence was offered during the hearing concerning discipline of other Department members for the same or similar infractions. In light of all of the above, I conclude that a letter of reprimand is appropriate.

AWARD

The Town did not have just cause to terminate Grievant, Darrell Gilmore on April 4, 2018. The Town did have just cause to issue a formal letter of reprimand to Grievant for violating Rule 7.03 by failing to obey the order of the Chief to stay at his desk in the station on

February 23, 2018.