McDonald # 4

ARBITRATION

Employer

T. Sunflower, T. Daisy, J. Forsythia

And **(Police Officers/ Discharges)**

Union

DECISION AND AWARD

PATRICK A. McDONALD
Arbitrator

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IL INTRODUCTION

This particular dispute arose when Mr. Terry Sunflower, Taylor Daisy and John Forsythia, Police Officers with the Employer Police Department, were discharged on or about August 28, 2007. Grievances were filed protesting that action. (Joint Exhibits 2, 3 & 4). The matters were not able to be settled through the initial steps of the grievance procedure and hence, were submitted for final and binding arbitration in accordance with the Collective Bargaining Agreement in force between the parties to this dispute. The grievances were consolidated for a hearing. Your undersigned arbitrator was jointly selected by the parties to receive evidence and render a final and binding decision. An evidentiary hearing was held on March 5, 2008 at the administrative offices of the Employer. At that time, both parties were ably represented and had the full opportunity of presenting testimony and exhibits. They supplemented this opportunity with extensive and helpful post hearing briefs. This matter is now ready for decision and award.

III. FACTS

In August of 2007, the Internal Affairs Unit of the Employer Police Dept talent received a complaint alleging that Eileen Buttercup, an Emergency Communications Officer, had sexual relations with a number of police officers and other department employees while on duty and/or on Employer property. The Internal Affairs Unit initiated an investigation, which included interviews with not only Ms. Buttercup, but fifteen other individuals.

During the course of the Internal Affairs investigation, Ms. Buttercup was interviewed by Sergeant Brian Daffodil and Lieutenant Phillip Mulberry, in the presence of her union representative on August 21, 2007. A transcript was made of the investigatory interview. (Employer Exhibit 12). During the interview, Ms. Buttercup implicated and specifically named five police department employees, including two of the grievants, Officers Sunflower and Daisy. She denied having any sexual contact with Officer Forsythia, the third grievant in this matter.

In continuing the investigation, all three of the grievants were interviewed.

During the interview of Officer Sunflower, he admitted that the allegations that he had sexual relations with Ms. Buttercup while on duty and/or Employer property, were true. (Joint Exhibit 13). During his testimony at the arbitration hearing, Officer Sunflower testified that he now believes he had only four incidents of sexual contact with Ms. Buttercup, rather than the five or six incidents that he had first mentioned in the investigatory interview. The first occasion included oral sex in the women's bathroom on the third floor of the Police Department Headquarters Building while he was on a break during his shift. The three additional occasions occurred when he and Ms. Buttercup prearranged to meet in Police Headquarters and had sexual intercourse in the bathrooms on the third and fourth floor.

During the investigatory interview with Officer Taylor Daisy, the grievant

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'In addition to being employed by the Employer, Ms. Buttercup was also the wife of Employer Police Officer Barry Buttercup.

admitted that the allegations that he had sexual relations with Ms. Buttercup while on duty and/or Employer property, were true. (Joint Exhibit 14). Officer Daisy indicated that he used MDT, or mobile digital terminal messages, to prearrange meetings and locations to meet Buttercup while he was on duty and in uniform. One occasion involved oral sex, while the other two occasions included sexual intercourse outside his police cruiser. [2]

The third interview with Officer John Forsythia occurred on Wednesday, August 22, 2007. Contrary to what Ms. Buttercup had stated during her interview, Officer Forsythia admitted the allegations that he had engaged in sexual relations with Ms. Buttercup while he was on duty and/or Employer property, were true. There were two such incidents. The first incident involved oral sex with Ms. Buttercup in the bathroom off of the break room on the fourth floor of the Employer Police Department Headquarters Building. According to Forsythia, on that occasion, neither he nor Buttercup were on duty. The second occasion occurred while he was on duty and he and Ms. Buttercup had prearranged, using a computer assisted dispatch (CAD), to meet in a private parking lot near Godfrey and Chestnut Streets near his police cruiser in the early morning hours. (Joint Exhibit 15).

It appears that Ms. Buttercup resigned her position as an Emergency Communications Operator, effective August 23, 2007. Upon her resignation, her case was subsequently closed administratively by the Internal Affairs Unit.

'At the arbitration hearing, Officer Daisy acknowledged that while having sexual relations, he had removed his gun belt and lowered or removed his trousers while engaging in such sexual activities. The prearranged meetings occurred between 1:00 a.m. and 3:00 a.m.

In addition to the resignation of Ms. Buttercup, the Employer also accepted the resignation of Nicholas Clover, effective August 27, 2007. Mr. Clover was a ECO in the same department as Ms. Buttercup. (Employer Exhibit 17). As a result, the Internal Affairs Unit closed its case administratively on that employee as well. Officers Patrick Amaryllis and David Wisteria also resigned on September 4, 2007 and October 3, 2007, respectively. (Employer Exhibits 18 & 19).

The Employer issued a seven (twelve hour) day suspension to Police Officer Adrian Ipomoea. The Employer indicated that it had concluded that there was evidence that encounters had taken place with Ms. Buttercup on Employer property, but that there was no evidence of either oral sex or sexual intercourse having occurred, (Employer Exhibit 20). According to the testimony of Sergeant Brian Daffodil of the Internal Affairs Department, other cases were investigated and it was determined that the charges were unfounded. As a result, those cases were closed accordingly.

Finally, Disposition Reports and Action Reports were issued for Officers Sunflower, Daisy and Forsythia, recommending discharge from employment for engaging in indecent conduct while on duty and/or Employer property, conduct unbecoming an officer, and/or conducting personal business while on duty. (Joint Exhibit 7 & 8). These Disposition Reports were signed with acknowledgment of the recommendations by Employer Manager Kaden Juniper on September 13, 2007. According to the Employer, each employee was afforded due process rights to be heard prior to a final decision being made by the

Employer Manager. Each officer took advantage of these Loudermill Rights to present additional evidence and be heard directly in his own defense prior to a final decision being made by Mr. Juniper. [3] Hearings took place on Thursday and Friday, September 27, 2007 and September 28, 2007. Following those hearings, and after consulting with various professionals for their perspective, Juniper said he made his decision to discharge the officers. Each officer received notice of that determination by letter dated October 2, 2007. (Joint Exhibits 10 a, b, c).

IV. RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 4 - MANAGEMENT RIGHTS

Section 1. Except as otherwise specifically provided herein, the Management of the Employer and the direction of the workforce, including, but not limited to the right to hire, the right to discipline or discharge for just cause, the right to decide job qualifications for hiring, the right to layoff for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for the Employer employees to perform such work), together with the right to determine the reasonable methods, processes and manner of performing work, are vested exclusively in Management. In exercising these functions, Management will not discriminate against any employee because of his or her membership in the Union.

Section 2. Rules of conduct not inconsistent herewith and in effect at the date of this Agreement shall be continued. Management shall have the right to amend, supplement, or add to said rules during the teat' of this Agreement, provided however, that Management shall first consult with the Union prior to any such amendments. Such rules shall be reasonable and shall relate to the proper performance of a Police Officer's duties and shall not be applied in a discriminatory manner. It is recognized that rules covering off-duty conduct are related to proper performance of a Police Officer's duties.

'See Cleveland Board of Education vs. Louderrnill, U.S. Supreme Court, 1-IER cases, 424, March 1985).

ARTICLE 10 - DISCHARGE AND DISCIPLINE

Section 1. In cases of discharge or discipline, a representative of Management shall give prompt notice thereof to the employee and to the President of the Union. In cases of letters or warning or verbal warning memoranda, such letters shall be given to the affected employee and placed in the employee's personnel file.

Section 5. Management shall not discipline or discharge any employee except for just cause.

MANUAL OF CONDUCT

9.0 COURTESY AND DEMEANOR

9.4 While on duty or in uniform, employees shall maintain exemplary military bearing and, except when acting pursuant to orders from proper authority, wear uniforms and other clothing and equipment in compliance with established Departmental Rules, Orders, and Procedures.

13.0 DILIGENT PERFORMANCE OF DUTY

13.3 Employees of the Department will not devote any of their duty time to any activity which does not relate to a police function nor shall they conduct personal business while on duty or upon Employer property except with the proper authorization or in accordance with Departmental Procedures.

18.0 UNBECOMING CONDUCT

18.1 Employees shall not conduct themselves in a manner which:

a. Brings the Department into disrepute.

b. Reflects unfavorably upon the employee as a member of the Department and impairs their ability to perform a law enforcement function.

c. Damages or affects the reputation of any employee of the Department.

d. Impairs the operation or efficiency of the Department or any employee.

EMPLOYER RULES AND REGULATIONS

Committing any of the following violations will be sufficient grounds for disciplinary action, up to and including discharge, depending upon the seriousness of the offense in the judgement of Management.

9. Engaging in obscene or indecent conduct.

V. CONTENTIONS OF THE PARTIES

A. For the Employer

Case Union Number: 0-00-Terry Sunflower.

The Employer contends that Mr. Sunflower admitted to engaging in sexual activities with a Department employee who is the wife of a fellow officer while he was on duty and/or Employer property on at least four separate occasions. These actions occurred in the Employer Police Department Headquarters Building after being arranged through the use of a computer assisted dispatch.

In doing so, the Employer asserts that Sunflower failed to maintain exemplary military bearing while on duty or in uniform in violation of Manual Provision 9.4. The Employer maintains that he also devoted duty time to an activity not related to his police

function and conducted personal business while on duty, in violation of Manual Provision 13.3. In addition, Sunflower engaged in unbecoming conduct which brought the Employer Police Department into disrepute and reflected unfavorably upon him and other members of the Department. This, in turn, damaged his reputation and impaired the operation and efficiency of the Department, in violation of Manual Provision 18.1.

The Employer asserts the grievant also engaged in indecent conduct in violation of Employer Rules and Regulations Section 2, Rule 9. By such actions, Sunflower met the definition of *"indecent conduct"* and his discharge is warranted for that infraction alone. His actions were certainly grossly unseemly, or offensive, to manners and morals in the community. Hence, the Employer asks that the discharge be upheld and the grievance denied.

Case Union Number: 0-00-Taylor Daisy

The Employer points out that the grievant has admitted to engaging in sexual activities with a Department employee who is the wife of a fellow officer while on duty and/or Employer property on three separate occasions. All of these actions occurred within the boundaries of the Employer outside a police cruiser after such rendezvous were arranged through the use of a mobile digital terminal.

In carrying out such actions, the Employer maintains that Daisy failed to maintain exemplary military bearing while on duty or in uniform, in violation of Manual Provision 9.4. The Employer also asserts that the grievant, Daisy, devoted duty time to an activity not related to his police function and conducted personal business while on duty and/or

Employer property, in violation of Provision 13.3 of the Manual of Conduct. The grievant also engaged in unbecoming conduct, which brought the Employer Police Department into disrepute and reflected unfavorably on him as a member of the Department, damaged his reputation and impaired the operation and efficiency of the Department, in violation of Manual Provision 18.1. Finally, according to the Employer, Daisy engaged in indecent conduct in violation of Employer Rules and Regulations Rule 9 of Section 2.

The Employer argues further that Daisy's actions certainly meet the dictionary definition of *"indecent, " as* being grossly or unseemly or offend the manners and morals of the community. Hence, his conduct and discharge is warranted for that infraction alone. It therefore requests that the discharge be upheld and the grievance denied.

Case Union Number: 0-00-John Forsythia

According to the Employer, the grievant, John Forsythia, admitted to engaging in sexual activities with a Department employee who is the wife of a fellow police officer while on duty and/or Employer property on two separate occasions. All of the acts occurred after being arranged through the use of computer assisted dispatch.

The Employer maintains that by his actions, Forsythia failed to maintain exemplary military bearing while on duty or in uniform, in violation of Manual Provision 9.4. Forsythia also devoted duty time to an activity not related to his police function and conducted personal business while on duty and/or Employer property, in violation of Manual Provision 13.3. The Employer further asserts that the grievant, Forsythia, engaged in conduct unbecoming an officer, which brought the Employer Police Department into

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disrepute, reflected unfavorably onto him, and as a member of that Department, damaged his reputation and impaired the operation and efficiency of the Department, violating Manual Provision 18.1. Finally, the Employer maintains that the grievant engaged in indecent conduct, violating Employer Rules and Regulations Rule 9 of Section 2.

In summary, the Employer argues that grievant Forsythia's actions meet the definition of indecent conduct and that discharge is warranted for that infraction by itself. If therefore requests that the discharge of the grievant, John Forsythia, be sustained and the grievance be denied.

According to the Employer, at the hearing, on these three matters, the Union presented a number of prior cases making a claim for the first time that there was disparate treatment of the grievants in this case. According to the Employer, none of these cases involved multiple situations of prearranged meetings with a female employee of the Employer Police Department where sexual activities took place. Moreover, none of those cases involved a violation of Section 2, Rule 9 of the Employer Rules and Regulations where a finding of indecent conduct was sustained. The only case involving sexual intercourse took place with a female employee of Paradise Tan in Case _____, in which an undercover agent engaged in sexual activity with a professional employee of that establishment. Hence, the Employer submits that these cases are dissimilar to those presented in this matter and do not present cause for disparate treatment.

In summary, while the Employer acknowledges that the grievants were otherwise

exemplary officers with clean service records, and are sincerely remorseful for those actions, the fact is that the gravity of the proven offenses is quite heavy and serious. The discharges should only be disturbed if the retained right of the Employer to issue discipline lacks rationality and fairness. In this case, all of the grievants were grown men who failed to live up to their solemn signed oaths of office. It therefore requests that the discharges of Terry Sunflower, Taylor Daisy and John Forsythia be sustained.

For the Union

The Union submits that these cases are unfortunate in that each of the grievants fell victim to the enticements of Ms. Buttercup, who appeared to be quite skilled at enticing men, since she was sexually involved with at least six Employer Police Dept _____ [went employees. According to the Union, by some definitions, Ms. Buttercup's track record would earn her the label of a *"sexual predator."* While recognizing that the grievants are responsible for their actions and deserve some discipline for their misconduct, the Union asserts that the Employer overreacted when it made a decision to terminate the employment of all of these competent and experienced officers who had otherwise outstanding work records.

Concerning the charges, the Union refers first to Section 18.1, Unbecoming Conduct. It points out that to the extent, a violation of any part of this rule is based upon their misconduct becoming public knowledge, the Union believes the application of this

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rule is grossly unfair. This is so, according to the Union, because the grievants did nothing to cause their misconduct to become public knowledge. There was nothing adherent in their misconduct which caused it to become public knowledge. Somehow, however, the investigation was leaked to the media. According to the Union, if the Employer is allowed to bolster charges when otherwise private information is leaked to the press, it will potentially provide an incentive for certain Employer employees to leak information regarding misconduct investigations in the future.

The Union also refers to Section 2, Rule 9 of the Employer Rules and Regulations concerning engaging in indecent conduct. According to the Union, this rule fails to give fair notice as to what conduct is really prohibited. *"Indecent conduct"* is subject to many possibly interpretations. The definition of "indecent conduct" is dependent on one's belief system and moral code. For example, according to the Union, drawing a picture of Mohamed would be considered indecent conduct in some situations. Eating pork might be considered indecent conduct with other belief systems. This is just such a rule. One is left to guess what might be considered indecent or offensive and by what standard. Hence, the Union urges the arbitrator to find this rule to be unreasonable and unenforceable on its face.

The Union also points out that the discipline imposed was not progressive discipline. In this case, all three grievants were experienced police officers with good work records. Officer Daisy had approximately six and one-half years of experience, Officer Forsythia had eleven years of experience and Officer Sunflower had twelve years

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of experience. None of the grievants had a prior disciplinary record. All of the grievants were cooperative and honest during the investigation. Indeed, according to the Union, without their honesty and cooperation, it is unlikely that the Employer would have had a factual basis upon which to issue discipline.

The third prong of the Union's defense involves a charge of disparate treatment. Just cause required that basic fairness be such that employees who engage in similar misconduct and violate similar rules receive similar discipline. While just cause allows some disparity in treatment for similar rule violations, when the disparity is extreme, even if the facts are not identical, the disparity and treatment becomes unreasonable so as to violate just cause.

In this matter, the Union introduced four cases demonstrating that the Employer has disparately treated the grievants. (Union Exhibits 22, 24, 25 and Joint Exhibit 20). According to the Union, all of these cases involved serious misconduct. Yet, the grievants only received suspensions. In three of the cases, the suspensions were one week, while the forth involved a one month suspension.

The Union asserts that what the Employer did was politically and personally expedient. However, that is not an element of just cause. The media's involvement in this case does not justify the gross disparity between the discipline the grievants received and the discipline the individuals discussed received in the four cases cited. As a result, the Union maintains that suspensions to other employees, anywhere from the duration of one week to one month, would have been reasonable and supported by just cause. The Union therefore requests that the arbitrator sustain these three grievances and order the Employer to reinstate the grievants to work, **taking into account the applicable factors of each** individual case.

V I . I S S U E S

1. **In each case involving Officers Sunflower, Daisy and Forsythia, was there cause for discipline? If not, what is the remedy?**

2. **If there was cause for discipline, was discharge appropriate considering all the circumstances?**

V I I . DISCUSSION AND DECISION

Arbitrators have used a number of standards in determining the quantum of required proof in cases concerning discharge. Certainly the employer in any discharge case has the burden of moving forward with the presentation of facts and at a minimum establishing a prima facie case. The quantum of required proof as aforestated varies according to the charges involved and the arbitrator. In general, arbitrators use the *"preponderance of evidence"* rule or some other similar standard. (See Kroger Company, 25 LA 906 [Smith, 1955].) Many arbitrators, however, require a higher degree of proof where the alleged conduct is of a type recognized by criminal law or results in the discharge of the grievant.

In deciding the amount of proof to be produced, I do not believe that labor arbitration should be bound by criminal law doctrines such as *"beyond a reasonable doubt"*. At the same time, I do believe that in cases as serious as this involving discharge,

and certainly involving a person's reputation, a degree of proof above and beyond that normally used should be required. As such, I am convinced that the best standard is requiring that the employer carry the burden of demonstrating *by "clear and convincing evidence"* reasons that would justify the serious penalty of discharge. (Duval Corp., 55 LA 1089 [Black], 1970; A & P Co., 45 LA 968 [Volt, 1965]; Vernor's, Inc., 80 LA 596 [McDonald, 1983]; and Renaissance Center Partnership, 76 LA 379 [Daniel, 1981].)

In meeting this burden, circumstantial evidence is available and many times plays a large part in producing the necessary just cause for discharge. By the same token, while it has been recognized that it is not necessary that knowledge or notice of all of the elements of a particular action be established by direct evidence and that circumstantial evidence can be used to establish the elements of a particular action, in order to protect an accused, such circumstantial evidence must do more than give rise to mere suspicion. (See NLRB v Shen-Valley Packers, CA 4, 1954, 33 LRRM 2769.)

Of course, regardless of the type of evidence utilized, the burden remains on the employer to establish the elements of the action which form the basis for discharge.

In this case, the three grievances were consolidated for hearing. At the same time, the Union requests that the arbitrator consider the unique merits of each grievance individually when rendering my award. I certainly will honor that request. At the same time, however, there are many things that are of a similar nature, which caused the consolidation in the first place. For example, the complaints filed by the Employer against each of the grievants is

similar in nature. Each of the complaints charges each grievant with a violation of Section 9.4, Section 13.3., and Section 18.1 of the Employer Police Department Manual of Conduct. (Joint Exhibits 8a, 8b and 8c). At the same time, Section 2, Rule 9 of the Employer Rules and Regulations, is also cited as having been violated. (Joint Exhibits 8a, b, and c).

The stipulated facts regarding the misconduct of the grievants is contained in Exhibits 13, 14 and 15). The Union stipulated to the facts contained within those exhibits with certain clarifications. Likewise, all of the grievants had sexual relations with the same person, Eileen Buttercup, the wife of a fellow Employer police officer.

In reviewing the complaints, I have also read carefully those sections of the Department Manual of Conduct cited in the complaints. For example, Section 9.4 speaks in terms of employees maintaining exemplary military bearing while on duty or in uniform and wearing their uniforms and clothing and equipment in complaint with established Departmental rules, orders and procedures.

In reviewing the facts of each individual grievant, it is clear that Officer Terry Sunflower engaged in sexual activities with Ms. Buttercup while he was on duty and/or Employer property on four separate occasions. There is no need to detail such activities, inasmuch as they have been stipulated to and have been mentioned in the factual presentation of this case. Suffice it to say, that Officer Sunflower was not maintaining exemplary military bearing, or wearing his uniform in compliance with Departmental rules and orders, when he was engaged in such sexual activities.

Much the same can be said for Officer Taylor Daisy when he was engaged in similar sexual activities with the same, Ms. Buttercup.

Officer John Forsythia admitted to engaging in sexual activities of a similar nature with Ms. Buttercup on two separate occasions. As a result, I do conclude that all three grievants violated Section 9.4 of the Manual of Conduct.

The next section of the Manual cited in the complaints for each of the grievants was Section 13.3. That section indicates that,

"Employees will not devote any of their duty time to any activity which does not relate to a police function, nor shall they conduct personal business while on duty or upon Employer property, except with the proper authorization or in accordance with Departmental procedures."

Once again, it appears quite clear from the evidence and the stipulations that while engaging in sexual activities with Ms. Buttercup, Officers Sunflower, Daisy and Forsythia were conducted *"personal business"* while on duty or upon Employer property and such activities did not relate to a police function,

The final Manual of Conduct section cited for each of the grievants is Section 18.1, which is Conduct Unbecoming an Officer. This rule, obviously, is of a general nature and relates to a violation of Rules 9.4 and 13.3, in terms of each grievants' activity.

There appears to be little question but that the conduct of each of the grievants did bring the Department into disrepute, did reflect unfavorably upon each of the grievants as a member of that Department, did damage and affect the reputation of employees of the

Department, and impaired the operation of the Department. The Union understandably argues that each of the grievants did nothing to cause their misconduct to become public knowledge. Somehow, the media became aware of this investigation. None of the parties acknowledged responsibility for the leaking of this information to the media. No evidence was received into the record concerning the responsibility for such information being given to the media. Yet, the fact is that the media did become aware of this information and because of the number of police officers and employees involved, gained local prominence.

I am confident that each of the grievants was not thinking about the consequences of his conduct when those sexual activities occurred. Yet, at the same time, one could argue justifiably that once these acts were discovered, the attendant publicity would bring each of the officers into disrepute, as well as the Police Department. In any event, I do find that the evidence supports the conclusion that Rule 18.1 was violated, in that the actions of the each of the grievants is conduct unbecoming a police officer for the Employer.'

Rule Number 9 of Section 2 of the Employer Rules and Regulations was also cited to each grievant in their complaint. Rule Number 9 speaks in terms of *"engaging in obscene or indecent conduct."* The Union argues that this rule is so general that it fails to give fair notice as to what conduct is prohibited. In such a situation, it

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"See Palsgraf vs. Long Island Railroad Company, 248NY339, 162 NE 99 (1928),

argues that the rule would be unreasonable on its face. The Union further argues that the term *"indecent conduct"* is subject to many possibly interpretations. While I agree with the reasoning of the Union to an extent, I find that Rule 9 is similar to Section 18.1 of the Manual of Conduct, in terms of being violated when other rules in the Manual of Conduct have been violated. The term *"indecent conduct"* obviously refers the mores of the community in which each of the grievants is working. The example cited by the Union relate more to religious beliefs than do the general rules of conduct. In reviewing the activities of each of the grievants, I do conclude that such activity meets the definition of *"indecent conduct,"* and as a result, violates Rule 9, Section 2 of the Rules and Regulations of the Employer.

Having found the rules of conduct were violated and that there is cause for discipline, is discharge of each of the grievants appropriate considering all of the circumstances?

Let us examine the cases of each grievant individually.

Grievance: 0-00 - Officer Terry Sunflower

In reviewing this matter, an arbitrator looks at a number of circumstances and considers a number of factors. In this case, the charges are of a serious nature. The grievant, on four separate occasions, engaged in sexual activity with the afore mentioned Ms. Buttercup. All of the acts occurred in the Employer Police Department Headquarters Building, after being arranged through the use of the computer assisted dispatch. At the

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time of the incident, Officer Sunflower had approximately twelve years of experience. No prior disciplinary record was submitted. Officer Sunflower admitted during his testimony that he wanted to be a police officer. He acknowledged making a *"big mistake,"* and stated, *"I won't make it again."* He indicated that he was having marital difficulties at the time that his activities with Buttercup took place. He acknowledged that he was aware that Buttercup was married to a fellow Employer police officer at the time he had the sexual activity with her. Sunflower, likewise, admits that after the first sexual activity with Buttercup, the other three occasions were premeditated after being arranged through the use of the CAD.

Grievance: 0-00 - Officer Taylor Daisy

In the case of Officer Daisy, sexual activity occurred on three separate occasions. The activity occurred outside a police cruiser in the Employer after being arranged through the use of a mobile digital terminal (MDT) with Ms. Buttercup.

At the time of the incident, the grievant had approximately six and one-half years of experience and had no prior discipline on his record. During his testimony, he indicated that he wanted to come back to work, he loves to help people, and knows he can be effective. He said *"I made a mistake, I won't make it again."* To his credit, the grievant did not blame anyone else for his mistake.

Officer Daisy testified that he was aware that Ms. Buttercup was married, but she told him that she was getting a divorce. The grievant appeared to be cooperative and

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honest during the investigation.

Grievance: 0-00 - Officer John Forsythia

Officer Forsythia admitted to engaging in sexual activities on two separate occasions. The first occasion occurred in the Employer Police Department Headquarters Building. According to Forsythia, both he and Buttercup were off duty at the time. The second occasion occurred outside a police cruiser within the Employer, after being arranged through the use of a computer assisted dispatch (CAD).

Officer Forsythia had approximately eleven years of experience at the time of this incident. He previously had been a Sergeant and Platoon Leader with the U.S. Army with ten years of experience prior to joining the police force.

The grievant had no prior disciplinary record. During his testimony, he stated *"I still want to be a police officer, that's where my heart is. This has been a life-changing event. My word is good."*

On cross examination, Officer Forsythia acknowledged that his actions were *"uncharacteristic of him."* It was a *"bad decision."* He said that Buttercup and his wife know each other, as his wife is a Detective with the Employer Police Department. He was unaware that other police officers had a sexual relationship with Ms. Buttercup.

The Union points out that the discipline imposed in each of the cases was not progressive or corrective. The Union emphasizes the fact that under a progressive disciplinary system, both the Employer and the employee gain in maintaining the

employment relationship. In this case, all three grievants were experienced officers and had good work records.

In considering misconduct, offenses are generally of two general classes; those which are extremely serious offenses, and those less serious infractions. As to the second category, it is clear that the concept of corrective or progressive discipline is recognized and should be followed in the absence of contractual language to the contrary. I fully subscribe to that principle.

In the first category of cases, however, which involve serious offenses, arbitrators usually sustain discharges without the necessity of demonstrating prior warnings or corrective discipline. The charges in these cases are serious charges. They were highly publicized through no fault of either the grievants, the Union, or the Police Department. As I stated earlier, no evidence was produced indicating responsibility for the media obtaining information concerning these matters. The fact is, however, that the matters did obtain a great amount of local attention, sparked as usual, by a media frenzy. Such discipline and such publicity will damage each of the grievants as potential witnesses if they were reinstated as police officers. Without my editorializing on such a situation, suffice it to say that we must deal with the facts as we find them. In this set of circumstances involving these serious charges, I do conclude that the Employer's actions are not unreasonable simply because prior corrective action was not taken.

Finally, the Union, while effectively representing each of the grievants,

emphasized four cases in which it submits are of a similar nature, yet resulted in suspensions rather than discharges. (See Union Exhibits 22, 24, 25 and Joint Exhibit 20). I have examined the cases cited to me and introduced into evidence. Obviously, the facts of those cases are not identical. In three of the cases, a seven day suspension was administered. In the fourth case, a month suspension occurred. Unfortunately, in disparate treatment situations, it is difficult to ascertain all of the factors an employer considers in deciding on discipline and a decision. Employers take into consideration many factors, including its ability to prove their case. Many of these factors and considerations are not known or revealed in reviewing a personnel report or a complaint disposition report. In any event, while I commend the Union for making such an argument, I do conclude that it is not controlling in this case and that the facts of the four cases cited, while having some similarities, have sufficient differences so as to not make the discipline disparate in nature.

It is apparent from a reading of this discussion of this decision that this case has not been an easy one to decide for this arbitrator. Each of the grievants was an experienced police officer. Each had a good disciplinary record. Unfortunately, each grievant succumbed to the temptations of the moment. While each grievant knew that Buttercup was the wife of a fellow Employer police officer, yet, each of them prearranged a rendezvous for sexual gratification while on duty.

A test in this type of situation is whether considering all the factors and

circumstances, the actions of the Employer are reasonable or arbitrary and capricious. I do conclude that the actions of the Employer fall within the *"reasonable"* range. While I have great sympathy for each of the individual grievants, this is not the test. Such sympathy is not sufficient by itself to set aside the discharges and the discipline imposed by the Employer.

VII, AWARD'

Grievance: 0-00 - Officer Terry Sunflower

The Employer has sustained its burden of demonstrating, by clear and convincing evidence, violations of the Police Department Manual of Conduct and the Employer Rules and Regulations. It has met the standard of just cause under Article 10 of the Collective Bargaining Contract. This grievance is therefore denied and the discharge upheld.

Grievance: 0-00 - Officer Taylor Daisy

The Employer has sustained its burden of demonstrating, by clear and convincing evidence, violations of the Police Department Manual of Conduct and the Employer Rules and Regulations. It has met the standard of just cause under Article 10 of the Collective Bargaining Contract. This grievance is therefore denied and the discharge upheld.

[5] 1n accordance with Article 8, Section 4, the fees and expenses of the arbitrator are to be paid by the Union.

Grievance: 0-00 - Officer John Forsythia

The Employer has sustained its burden of demonstrating, by clear and convincing evidence, violations of the Police Department Manual of Conduct and the Employer Rules and Regulations. It has met the standard of just cause under Article 10 of the Collective Bargaining Contract. This grievance is therefore denied and the discharge upheld.

Respectfully Submitted,

Patrick A. McDonald

PAM/clbh

Dated: May 8, 2008