WASHINGTON STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration between:	
CITY OF WALLA WALLA POLICE DEPARTMENT,	
Employer,	
and	PERC Case No. 138040-R-23
WALLA WALLA POLICE GUILD,	
Union.	

Appearances:	
For City of Walla Walla:	Britaney R. Garrett Summit Law Group, PLLC
For Walla Walla Police Guild:	Jim Cline Alea Burner Cline & Associates
Arbitrator:	Susan J.M. Bauman

Pursuant to the Collective Bargaining Agreement between the City of Walla Walla, Washington, hereinafter "City", "Employer" or Walla Walla, and the Walla Walla Police Guild, hereinafter "Union" or "Guild", for the period January 1, 2019 through December 31, 2021[1], the undersigned was appointed to hear and decide a dispute between the parties regarding the termination of a police officer, Grievant. A hearing was held on March 25 and 26, 2024, in Walla Walla, Washington. The hearing was transcribed. Both parties had the opportunity to present evidence and make arguments. At the end of the hearing the parties submitted the case on written briefs, the last of which was received on May 24, 2024, whereupon the record was closed. Based upon all the evidence presented and arguments made, the Arbitrator renders this Opinion and Award.

[1] At the time of the hearing, the parties had successfully negotiated a successor agreement.

ISSUE

The parties stipulated that the issue to be decided is:

Did the City terminate the Grievant for just cause? If not, what shall the remedy be?

RELEVANT PORTIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 30 – DISCIPLINARY ACTIONS AND PROCEDURE

30.01 Employees can be disciplined only for just cause. Forms of discipline include, but are not limited to: written reprimand, disciplinary probation; suspension, disciplinary demotion, and discharge. Discipline will normally be progressive, however any level of discipline may be imposed based on the totality of the circumstances and just cause.

RELEVANT PORTIONS OF WALLA WALLA POLICE DEPARTMENT POLICY MANUAL

POLICY 340

Policy 340.2 Policy
The continued employment or appointment of every member of the Walla Walla Police Department shall be based on conduct that reasonably conforms to the guidelines set forth herein. Failure to meet the guidelines set forth in this policy, whether on- or off-duty, may be cause for disciplinary action.

Policy 340.5.8 Performance
(c) Failure to participate in, or giving false or misleading statements, or misrepresenting or omitting material information to a supervisor or other person in a position of authority, in connection with any investigation or in the reporting of any department-related business.

Policy 340.5.9 Conduct
(m) Any other on- or off-duty conduct that any member knows or reasonably should know is unbecoming a member of this department, is contrary to the good order, efficiency, or morale, or tends to reflect unfavorably upon this department or its members.

Policy 340.5.10 Safety
(g) Concealing or knowingly failing to report any on-the-job work-related accident or injury as soon as practicable but within 24 hours.

FACTS

The facts of this case are not in dispute. Walla Walla, Washington is a small community in eastern Washington. The Walla Walla Police Department (WWPD) is comprised of many individuals who were born and raised in Walla Walla. WWPD officers wear a patch on their sleeves that reads "Service, Pride, Integrity" and the Department strives to maintain these core values and maintain its status as a respected institution in the community.

ML, the Grievant herein, was raised in Walla Walla. He began his service as a police officer in the WWPD on June 14, 2021, and until the events giving rise to his termination, he was a successful officer with a clean personnel record. He is a religious individual who is quite close to his family. He is described by his colleagues as an eager, hardworking officer who enjoys his work. He especially enjoyed patrolling and stopping individuals who might be driving while under the influence. In May 2023 he received an award for the most DUI arrests by anyone in the WWPD.

At the time in question the Grievant worked from 6 pm to 6 am on a two week rotating schedule. He worked Monday, Tuesday, Friday, Saturday, and Sunday the first week, and Wednesday and Thursday the following week. On May 8, 2023, the Grievant visited his family in the late morning/early afternoon to help with chores on the family's property. He also sat and smoked cigars with his father who shared some disturbing information with him – that he had been unfaithful to his mother. This shook him to the core, but he still reported to work at 6 pm that evening.

During the shift, Grievant was observed by a fellow officer, PG, to be somewhat out of sorts, not himself, not his usual joking and fun to be around. PG asked if something was wrong, but the Grievant did not share what he had learned from his father. Grievant went about his shift with nothing unusual happening until the early hours of May 9.

After the Grievant and Officer JM, in separate patrol cars, went to check out an area near Mill Creek and a bridge that was frequently inhabited by homeless persons, JM left and Grievant spent a few minutes thinking about his family situation and whether he had a moral obligation to tell his mother or his sisters what his father had told him, or if he needed to do more to encourage his father to come clean with his mother. He was deeply disturbed by the situation and in a quandary as to how to handle it. Grrievant was then dispatched to a call and in backing up to leave the area, he accidentally hit a bollard with the side of his patrol car. Though he was aware that he had hit something, he did not stop to look to see if there was damage or to report the accident to his sergeant, as required by policy.

Instead, the Grievant decided that he would report the accident when he returned for his next shift which was scheduled for Friday, May 12. He felt that he could not report the accident without getting emotional and thought that after his two days off, he would be able to discuss the situation with his sergeant without crying. In making the decision not to report the accident at the time, Grievant was aware that the WWPD policy required reporting at once, or at least within 24 hours of the accident happening.

Grievant responded to a call-in to work overtime on May 11. He worked for about three hours but did not report the accident. In fact, when on a call at a local middle school with Officer JW, JW asked Grievant if he knew anything about the damage. Grievant denied having any knowledge. JW went on to report the damage to shift supervisor LM and completed a "blue form" used for such purposes on which he indicated that he did not cause the damage and did not know how it came about.

When Grievant returned to the police department after patrolling, LM asked him about the damage to the vehicle and while Grievnat acknowledged that he was aware that there was damage, he did not acknowledge that he had caused the damage.

Although Grievant's next shift was not scheduled to start until 6 pm on Friday, May 12, he reported to the WWPD earlier that day to attend the DUI awards ceremony. He drove to the ceremony with his shift sergeant, NS. While en route, NS asked Grievant about the vehicle. Grievant, again, denied knowledge of how the patrol car was damaged. He did not want to engage in a conversation about it on the way to the Awards ceremony because he felt that he would get too emotional and would be embarrassed if he showed up at the ceremony crying or appearing that he had been crying. The Grievant planned to tell NS everything after they returned to the police department after the ceremony.

Upon return and changing, Grievant found that NS had left, probably to get some sleep before reporting for the night shift at 6 pm that evening. The Grievant looked for a sergeant to report to and found that Sergeant BS was available. Grievant went to his office, shut the door, and proceeded to acknowledge that he had caused the damage to the vehicle and explained the reasons for his delay in reporting and the situation with his family. Greivant was very emotional at this meeting. Sgt. BS listened to Greivant and then told him to go home and get some sleep and report back at 7 pm.

When he reported to work later that day, Grievant immediately went to see Sgt. NS and told him everything and apologized for having been untruthful about the accident and, in essence, lying to him about it. The Grievant included that he had lied to both JW and LM as well as NS about the situation. Again, he explained why he had behaved as he did and acknowledged that what he had done was wrong, was in violation of WWPD policy, and was behavior not consistent with the "Service, Pride, Integrity" foundation of the WWPD.

After his meeting with NS, Grievant also talked with fellow officers JM and PG. He expressed his sincere regret for his actions to them as well. He was extremely emotional in his talks with these officers.

On Saturday morning he was supposed to go to LM's home to assist with some re-modeling. Grievant arrived at the house and immediately asked LM if they could speak privately. Grievant, again, explained what had happened and apologized to LM for having been untruthful in response to questions about the damage to the vehicle. Later that day, Grievant had a similar conversation with JW, again becoming extremely emotional and, again, apologizing for his actions.

On May 15, 2023, the Department placed Grievant on administrative leave, pending an internal investigation (IA) by Sergeant NS. The investigation included interviews with PG, JM, JW, LM and the

Grievant. NS issued a report sustaining findings that Grievant had violated Department policies on safety, performance and conduct. He concluded his report with a recommendation that "discipline should occur short of termination."

The IA report was sent to Captain KB for review. KB concurred in NS's findings and forwarded a report to Chief CB. By letter dated June 8, 2023, the Chief concurred with NS's findings and told Grievant that he was recommending termination. Grievant was given a *Loudermill* hearing with Guild representation present. Grievant again took responsibility for his actions and apologized for his conduct. He also explained the context: his discussion with his father and his conundrum as to how to proceed. The following day, Chief CB sent a letter to City Manager EC in which he recommended that Grievant be terminated. A second *Loudermill* hearing was held on June 26 with EC. Grievant again had Guild representation and explained the same series of events that he had expressed to others in his chain of command, including his father's infidelity, his emotional state at the time of the accident, and his intent to report it on his regular May 12 shift. He took full responsibility for his actions and was, again, apologetic. Four days later, EC notified Grievant that she concurred in the Chief's recommendation and was upholding the termination.

The Union filed a timely grievance in this matter. The parties were unable to resolve the issue and the instant arbitration ensued.

Additional facts are included in the Discussion, below.

POSITIONS OF THE PARTIES

The City:

The City acknowledges that it has the burden of proving that each of the seven factors of just cause have been appropriately addressed, and that the standard of proof is a preponderance of the evidence. As to each factor, the Employer finds that the answer is yes, and, accordingly, it had just cause to terminate the Grievant.

The employee had notice of the probable consequences of his conduct. Grievant acknowledges his duty to report on-the-job accidents within 24 hours and to be truthful during investigations. In fact, the Guild has expressed its clear understanding that untruthfulness typically leads to discharge. The Grievant signed a written acknowledgement of receipt of the policies and knew what was expected of him.

The employer's rule, order, and policy is reasonable. Neither the Grievant nor the Guild have questioned the reasonableness of the policy on truthfulness which aligns with the laws of the State of Washington.

The employer conducted a fair and objective investigation. It was conducted by Sgt.NS, an experienced officer who the Grievant has known for a long time and who he respects as a man and an officer. Sgt. NS interviewed the Grievant approximately 11 days after the accident, after Grievant had been placed on administrative leave and was notified that he was the subject of an internal investigation for misconduct.

Sgt. NS provided written notice of his intent to interview the Grievant 48 hours in advance of the interview, in accordance with provisions of the CBA. The Grievant appeared at the interview with his Union representative, Det. KL.

The questions asked concerned what Grievant had done, and why he had done so. The Grievant responded unequivocally and consistently with the information he had previously provided to Sgt. NS. Sgt. NS also interviewed Officers JW and LM. All interviews were consistent with one another. It was a fair and objective investigation.

There is substantial evidence to support the employer's decision. There is no dispute about the Grievant's failure to report the accident and his untruthfulness about it. Grievant lied, either affirmatively or by omission, during the WWPD's inquiry into the damage to Car 438. He lied to JW and Sgt. NS and "deflected" LM's inquiry on May 11. Grievant cannot argue that he was truthful here, characterizing his actions as "delay" or "deflection" does not change the fact that he lied, he was dishonest.

The Employer has applied its rules and regulations evenly to all employees. At hearing, there was no evidence suggesting that the City has treated other officers differently under the same or similar circumstances. The only direct comparator involved a veteran WWPD officer and long-time friend of the current Chief, DL. DL was found to have lied about being at a football game when he was supposed to be patrolling. He ultimately confessed to his misdeeds, but only after repeatedly lying in the course of the investigation. He, like the Grievant, was slated for termination. He ultimately resigned in lieu of termination.

Consistently, when credibility concerns were raised about the integrity of a DUI report prepared by former probationary officer SA, he was terminated from the FTO program, even though it was unclear whether his misrepresentations were the unintentional result of a language barrier, as opposed to deliberate untruthfulness.

The only other evidence presented concerning potential officer dishonest involved Detective LW whose truthfulness was called into question by defense counsel in a criminal trial who, in an effort to get a search warrant suppressed, alleged "reckless omission of facts" from the probable cause affidavit. The matter was scrutinized by the Chief and the US Attorney on the case who each found no fault with the affidavit. The Ninth Circuit agreed and overturned the lower court's ruling at the suppression hearing thereby dispelling any legitimate concerns about Det. LW's truthfulness.

The degree of discipline matches the seriousness of the offense. For police officers, dishonesty is a "cardinal sin" violation supporting termination absent compelling mitigating circumstances. WWPD officers know, "if you lie, you die." Prior to hearing, the City and the Guild were in agreement about upholding a strong stance on untruthfulness issues. Since then, the Guild has walked back its position, relying on *Kitsap Cnty. Deputy Sheriff's Guild v. Kitsap Cnty,* 167Wn. 2d 428, 432, 219 P.3d 675 , 676-77 (2009), ostensibly for the proposition that termination for untruthfulness is, *per se*, against public policy The decision does not make such a broad pronouncement and is distinguishable.

Kitsap County did not involve allegations of deliberate untruthfulness, much less admissions or findings to that effect, like the present case. The individual in question had a long history of concerns about his ability to be truthful once he had developed paranoia and delusions of persecution. It was obvious, in hindsight, that the Deputy was disabled and incapable of performing his job. The arbitrator found him to be incapacitated and not fit for duty at the time of discharge, a substantial and mitigating factor for the observed behavior. The arbitrator found that the County should have recognized this and referred him for counseling and fitness for duty exams.

This is very different from the Grievant's situation. There is no indication that the Grievant suffered from a mental health disability at the time he made false statements to other officers. To the contrary, Grievant testified that he had no concerns about his ability to comprehend events or questions posed, assess probable cause, or carry out his duties as a patrol officer on May 9 or the following days. This was confirmed by numerous other witnesses. Grievant understood what was expected of him, knew his statements were false and misleading, and made them anyway. Grievant was deliberately, knowingly dishonest.

Kitsap County tacitly acknowledged that statutory provisions requiring officers to discharge their duties truthfully and the negative implications for *Brady* listed officers are legitimate policy considerations in connection with officer terminations.

<u>The employer considered any mitigating factors, such as the employee's work record, discipline history, lack of intent to cause harm.</u> The Police Chief and the City Manager labored over the decision of whether to terminate the Grievant for no less than 12-15 hours, discussing whether his circumstances warranted leniency. They went back and forth as to whether he could be rehabilitated. They considered him as a person: a Walla Walla native son; an eager, well-liked young officer with many friends on the force. Everyone had hoped he would have a long, fruitful career at WWPD. The decision makers did what they could to try and keep him on the force. They carefully considered the mitigating factors. They determined that the Grievant's credibility within the department and as a State witness had been irrevocably tarnished, such that he could no longer fulfill his role of a WWPD officer. The Chief expressed concern that all officers are under stress at times and that if the first thing you do under stress is lie, you should not be a police officer.

Though mitigating evidence was presented and carefully considered by the decision makers, the mitigating factors were simply insufficient to override the seriousness of the dishonesty.

The City asks that the grievance be denied and the termination upheld.

The Guild:

The Guild also references the seven tests for just cause but expands upon them to 19 factors to be considered. While concurring that the employer has the burden of proof, the Union contends that a higher standard of clear and convincing evidence must be established before the industrial equivalent of "capital punishment", termination, can be upheld.

The Employer has failed to prove by clear and convincing evidence that it consistently enforced the rules on untruthfulness. Consistent enforcement of a rule by the employer is a prerequisite to the imposition of severe discipline. All employees who engage in the same type of misconduct must be treated essentially the same unless there is a reasonable basis for variations in the assessment of punishment. The WWPD has failed to consistently enforce its policies on truthfulness, at least as to statements made outside the formal discipline interview process.

While in the Academy, SA, a probationary officer, was observed driving nearly 100 miles per hour in a city-owned vehicle. When he was pulled over by a Washington State Patrol trooper, he denied that he was speeding. SA called his sergeant and reported the incident and again reported that he had not been speeding. He later told the Chief the same thing. An internal investigation was commenced and when confronted with all the information gathered, he admitted that he knew he had been speeding all along. Despite his admitted dishonesty, the final investigative report did not sustain any findings of untruthfulness. Had SA been found to have been untruthful, Chief CB testified that he would have explored the option of termination. The most reasonable inference is that the Chief and the Department intentionally avoided entering a finding of untruthfulness to extend some leniency and a second chance to Arroyo.

Though SA kept his job, his integrity and overall competence remained in question. In fact, his probation was extended. Later, he was asked to perform a field sobriety test. In his report, SA claimed certain things that were not confirmed by a review of his body camera footage. When confronted with the evidence, he changed his story several times. Finally, SA was terminated without ever completing his probationary period.

The Department's treatment of SA is in stark contrast to its treatment of the Grievant. While still in the Academy and on probation, SA lied three different times – to the trooper, to his Sergeant, and to the Chief – about speeding. He later admitted that he knew he was speeding the whole time. The Department now seeks to terminate the Grievant for the same failure of full honesty in a non-internal investigation context. With SA, the Department took supposed mitigating factors into consideration – he was anxious, experiencing tunnel vision, and confused. When examining the instant situation, despite the fact that he was under even greater personal stress, mitigating factors were not considered.

The SA and Grievant's situations share a common circumstance that makes them analogous while importantly distinguishing them from other investigatory untruths.Grievant's statements were not made during any formal internal investigation; they were made during hallway discussions.

The 48 hour notice period prior to an interview for a formal investigation recognizes the human element involved in investigations. It allows time to reflect and prepare for an interview, to gain composure and be prepared to offer a full and proper account of conduct. These safeguards were not afforded in the Grievant's hallway conversations.

Both SA and Grievant were caught without advance notice and provided reactive, less than truthful, statements. The Department has a responsibility to treat all employees fairly and consistently. It does not have cause to punish the Grievant with the harshest penalty while allowing SA to repeatedly violate the same rule with impunity.

The Employer has failed to prove by clear and convincing evidence that it conducted a thorough and fair investigation. To conduct a thorough and fair investigation the employer must obtain all relevant information. Sergeant NS's investigation was appropriate and fair, but the Department and the City failed by forwarding an incomplete file and making erroneous assumptions. It failed to transcribe and submit complete witness statements that described the gravity of the mitigating factors and a complete account of the Guild *Brady* explanation. At the arbitration hearing, the City Manager conceded that she did not review any recordings or the *Loudermill* transcript.

The Department's investigation was premised on false assumptions about Grievant's potential *Brady* status and ability to testify as a witness. The investigation included interviews with JM, PG, JW, LM, BS and Grievant, but despite the evidence, the Department premised its decisions on outside perceptions of Grievant's potential *Brady* status.

Chief CB testified that Grievant's potential *Brady* status was a consideration in his decision to recommend termination. City Manager EC, the ultimate decision maker, expressed concerns and said it would be problematic for the Department to have an officer on the *Brady* list.

The City did no meaningful investigation into what the *Brady* requirements actually are. There is no evidence that the City researched the applicable law when it concluded that *Brady* disqualified Grievant from employment by the WWPD. Notably, at least two WWPD officers, LW and SE, were on the *Brady* list at some time during their employment. How these employees were utilized was not researched by the City either. The City made assumptions and failed to investigate them.

The Employer has failed to prove by clear and convincing evidence that the discipline imposed is proportionate to that imposed on other employees. In other cases that the Department deemed serious misconduct, it decided to rehabilitate employees, rather than proceed with termination. In 2023, the Department received a report making several allegations against Officer MG. The allegations included that he had been engaging in cannabis use, had provided marijuana to his minor child, and he allowed his dog to access the drug as well. Several weeks into the investigation, MG became truthful with the Department and acknowledged his use and provision to his minor daughter.

The Department purportedly maintains a zero tolerance policy on marijuana use. However, it was determined that a five-day suspension was appropriate. In making this decision, the Department

considered mitigating factors including MG's fear of losing custody of his children and a contentious divorce between his current wife and her ex-husband, who was also the citizen reporter.

The Guild supported this measured, reasoned approach to the situation. Grievant was not provided the same measured, reasoned treatment. He was terminated without any opportunity to rehabilitate himself and with his mitigating factors not being considered by the Department.

The Employer has failed to prove by clear and convincing evidence that it has undertaken progressive discipline. One of the most important measures of just cause is the determination as to whether the discipline imposed is related to the seriousness of the offense and the service record of the employee. The penalty should fit the crime. Progressive discipline is a key requirement of just cause. Discipline is intended to correct, not to punish. The discharge penalty is reserved for very serious, repeated, misconduct. Generally, suspension is required before discharge.

The penalty imposed on Grievant was not progressive. All steps of progressive discipline were skipped. The Guild concedes that Grievant's conduct is a serious matter and that a lower-level action like a reprimand might not be deemed sufficient. But the record is devoid of any evidence that a lesser form of discipline such as a suspension would have been insufficient under these circumstances. At the time of his termination, Grievant was young and relatively new to the profession. While he excelled in many respects, he also had a lot of room to grow. Grievant acknowledged at the hearing that he made poor choices. These poor choices, however, are not indicative of malice or an inability to do the job of police officer. Rather, they represent immaturity and Grievant's stated desire to not have a public emotional reaction at work. Through this experience, Grievant has shown the ability to learn from his mistakes and take accountability.

Grievant's amenability to correction should be viewed in the context of his relative immaturity at the time. Besides his relative youth, Grievant had an additional maturation factor in that his religious and sheltered family upbringing had shielded him from some of the coarser aspects of the real world.

The real question is whether Grievant is correctable. The testimony from co-workers was emphatically yes. Fellow officers testified that they trust him and that the fact that he owned his mistake is a good character trait. Grievant remains committed to the Department and the Walla Walla community. He is an officer that can be rehabilitated. He has learned and grown from a difficult situation. Lesser discipline is appropriate to coach Grievant to make better choices in the future.

The Employer has failed to prove by clear and convincing evidence that the penalty is reasonable. Just cause requires that the penalty fit the offense. In addition to progressive disciplinary considerations, the totality of the circumstances must be considered. The actual nature of the offense, not just the label attached to the alleged policy violation must be assessed.

Considering all the factors, termination is not the appropriate penalty for Grievant's misconduct. He had a clean work record over his two-year tenure. His colleagues recognize his strong work ethic and believe him to be an asset to the Department. He was recognized for his work policing DUI matters.

Although Grievant made errors in failing to report the accident when it happened, he has taken accountability for his actions. He voluntarily reported both the accident and evasion before the Department determined he was responsible. He personally apologized to each of the officers involved. He has been forthcoming and honest, even about the difficult and intensely personal family circumstances that contributed to his emotional state at the time.

Untruthfulness and misrepresentation exist on a continuum. Not all forms of untruthfulness are equally disdainful. The Department is laudable in seeking to maintain high standards. However, the Washington Supreme Court in *Kitsap* recognized the reality that not all untruths are equal. The Court recognized that that a "one size fits all" requiring discharge for untruthfulness would deprive arbitrators the ability to apply just cause in a meaningful way.

People lie or shade the truth for many reasons. The Department has a right to adopt high standards and the Guild supports that effort. The role of police officers requires that they have high levels of integrity. But just cause also requires that the law enforcement employers accept that these officers have humanity. In evaluating the totality of the circumstances, the context and intent of the alleged untruthfulness must be considered.

Grievant made mistakes, but they were not generated by ill intention or bad motives. His mistakes were bad judgment generated from an unusual and unique event involving great personal stress. There was no deceitful heart. His true character was revealed by the prompt way he confessed to his misconduct and without prompting went to each individual involved in the incident to come clean, apologize and ask for forgiveness. Grievant has been clear that he has a lot of respect for the Department, including those who participated in the termination decision. Should he be reinstated there is every indication that he will be an honest, eager, and exemplary police officer.

<u>The Employer has failed to prove by clear and convincing evidence that the discipline imposed sufficiently weighed mitigating factors.</u> Unusual circumstances may explain the employee's conduct. The employer must weigh the impact of such factors, such as personal or family circumstances, is determining the level of discipline to impose.

The Department did not consider the mitigating factors in issuing the termination decision. The information Grievant learned mere hours before the accident was shattering to him. It disturbed his personal moral code, religious beliefs, and core relationship with his father. It also left him with concerns about his responsibility to other family members. He was involved in a minor car accident. Though he knew he would not be punished for it, but he was keenly aware of his emotional state and made a poor choice to delay reporting, opting instead to report it at his next regularly scheduled shift to a sergeant with whom he was comfortable.

These factors impacted Grievant and his decision-making, but the ultimate decision maker, City Manager EC wrote in the termination letter, "you did not provide any new or different information or provide any mitigating factors." She was wrong. There is a difference between assigning little weight to mitigating

factors and denying their existence entirely. Just cause requires the employer to review the entirety of the circumstances, as they did with SA and MG.

The Employer has failed to provide by clear and convincing evidence that it does not bear some degree of fault for the conduct alleged. The Department bears some responsibility for the circumstances leading to Grievant's termination. Just cause requires that the employer consider its responsibility. Here, however, the City failed to properly identify and address the mitigating circumstances, requiring overturning the termination.

The Department failed to recognize and respond to Grievant when he was clearly unfit for duty. At a minimum, when an employee seems emotionally upset, the supervisor should probably call them in and talk to them to see what the situation is. When Grievant arrived at work on May 8, he was visibly upset. So much so that Officer PG asked him on two separate occasions how he was doing. However, no supervisor inquired how he was doing that evening. Even days later, at the DUI banquet, Sergeant BS could still tell that Grievant was not his normal self. On the evening that he disclosed the accident and was, by all accounts, in tears and incredibly upset, nobody at the Department inquired as to whether he should remain on duty for the rest of his shift. The Department has a responsibility to its employees, and the public, to intervene when an employee appears to be emotionally upset, perhaps not fit for duty. Had the Department complied with its own policy, it may have been possible to help Grievant and avoid the entire situation that developed. When the Department has violated its own policies and contributed to the misconduct, its actions must be considered when assessing an appropriate penalty.

The Employer has failed to prove by clear and convincing evidence that the motivation behind the discipline is well reasoned and in good faith. Just cause requires that discipline must be imposed in good faith and in a sensible, reasonable manner. When an employer is unable to explain clearly what legitimate interests require it to discipline an employee in the designated manner, the discipline may be overturned by an arbitrator. This is also true when an employer relies upon inadmissible or unsubstantiated evidence or demonstrates improper motivation for imposing discipline.

The Department failed to investigate its assumption that *Brady* status was some type of *per se* disqualifier from police employment. As seen in *Kitsap*, the State Supreme Court has rejected the claim that *Brady* is a *per se* disqualifier. RCW 10.93.080 makes clear that the Department may not impose disciplinary or other adverse action solely because an officer's name is placed on the *Brady* list.

This issue was not first raised by the Guild during the *Loudermill* hearing. Captain KB's memo makes clear that the Department should consult with legal counsel prior to a determination on discipline to determine whether retention with discipline was a viable option. Further, the final page of the Chief's termination notice expressly asserts that Grievant would be impeached by defense counsel. This is erroneous.

The Chief's operative assumption was wrong, and *Brady* listed officers, including Detective LW and Officer SE, were listed at some point in their careers. This did not, however, result in the termination of either person. EC admitted that before deciding on the appropriate punishment for Grievant, she had not taken

the time to investigate how the Department had handled *Brady* listed officers in the past. The same is true of Chief CB.

The evidence rules surrounding previous witness untruthfulness is complex and involves the interaction of several different evidence rules. In almost all cases, such previous witness untruthfulness, including that by police officers, is inadmissible. The rules of evidence do not allow collateral impeachment as to specific prior bad acts, including prior untruths, outside extraordinary circumstances. In this case, the City has failed to provide any testimony that Grievant has a reputation for an untruthful character. In fact, witnesses testified to his fundamentally honest character.

The Chief's statement in the termination letter that Grievant would be impeached is simply wrong. His reliance on the erroneous assumption is the typical illogical reason that supports overturning the termination for lack of just cause. The City has not established by clear and convincing evidence that a judge would admit any evidence of a sustained untruthfulness verdict into a trial at which Grievant would testify.

The Union asks that the grievance be sustained, and that the Grievant be reinstated with back pay, including overtime, and prejudgment interest.

DISCUSSION

The Grievant was a young, enthusiastic police officer for the City of Walla Walla. He had served for just under two years when a discussion with his father led to the events that resulted in the termination of his employment. The essential facts of the case are not in dispute: The Grievant came to work and displayed behaviors that were different from his normal ebullient self. This was noted by one of his fellow officers who asked him if he was alright. Grievant shrugged off the question as he did not want to discuss his family situation, his father's infidelity, with members of the police force. Apparently, none of the command staff noticed that Grievant was "off", or at least they didn't ask him about it or ascertain whether he was fit for duty that shift, 6 pm until 6 am, May 8 through May 9, 2023.

Grievant, with his mind very much on his family situation, went out on patrol. Around 1 am, after checking Mill Creek, an area known to have homeless encampments, with a fellow officer, the Grievant remained behind and pondered his situation. He was then dispatched to a call and, on leaving the area, he accidentally hit a bollard. He was aware that he hit something and aware that WWPD policy required that he report accidents to his sergeant within 24 hours of the occurrence. Grievant was concerned that he would become emotional if he had to speak with his sergeant about the accident and made a very poor decision that he would wait until he reported for duty on his next shift to report the accident. Police officers in Walla Walla work a two week rotating schedule so that when he left work on the morning of Tuesday May 9, he was not due to report for duty until Friday, May 12, significantly more than 24 hours after the accident.[2]

[2] Had Grievant been due to report to work at 6 pm on May 9 and reported the accident at that time, probably nothing untoward would have happened.

On Thursday May 11, Grievant responded to a call for someone to work overtime and he worked for approximately three hours. During that time, he was asked by co-worker JW if he knew anything about the damage to the patrol car. He denied knowledge. When he returned to police headquarters, he was asked by officer-in-charge LM if he knew anything about the damage. Grievant, again, failed to acknowledge that he caused the damage. On Friday, May 12, he reported to police headquarters to ride along with Sergeant NS to an awards ceremony where he was to be honored as having issued the most DUI citations of any officer on the Walla Walla Police Department. En route to the ceremony, Sergeant NS asked him if he knew what happened to the patrol car and, for the third time, he denied knowledge of how the car became damaged. It was only after returning to headquarters after the ceremony and unable to locate his supervisor, Sergeant NS, that Grievant revealed to Sergeant BS that he was the one who had damaged the patrol car. Later that evening, at the beginning of his shift, around 7 pm, he met with Sergeant NS and acknowledged having damaged the vehicle, having lied to Officers JW and LM and to Sergeant NS. He expressed his sincere regret for his behavior, apologized for it, and explained the family circumstances that led to his poor choices and violations of Department rules. He was very emotional during his conversations with both Sergeant BS and Sergeant NS.

The WWPD terminated Grievant's employment, effective June 30, 2023, and the Guild timely filed a grievance which was denied at all levels. The parties agree that the issue to be decided is whether there was just cause to terminate the Grievant. They agree that Daugherty's seven tests of just cause are the standard to be used in deciding this matter. They agree that the Employer has the burden of proving its case but disagree on the standard of proof to be used: the Employer argues for the preponderance of the evidence while the Guild contends that clear and convincing evidence should be the standard. The Guild cites numerous authorities for its position. In this case, as shown below, there is clear and convincing evidence that there was not just cause for the termination.

1. Did the employer have notice of the probable consequences of his conduct?

There is no question that the Grievant was aware of the Department policies that required him to report an accident within 24 hours of its occurrence. There is also no question that he knew that truthfulness is always required of police officers. The Grievant and the Guild are also aware that "you lie, you die" is a known tenet in policing. As a rule, absent mitigating circumstances, Grievant was, or should have been, aware that being untruthful could result in termination. As an officer in the WWPD, Grievant wore a patch that said "Service, Pride, Integrity." He knew that he was expected to always be truthful, and he signed an acknowledgement that he had received a copy of the Department policies including those in question regarding accidents and truthfulness.

The Grievant was on notice that his behavior could result in discipline, up to and including termination.

2. Is the employer's rule, order, or policy reasonable?

Neither the Guild nor the Grievant has questioned the reasonableness of the policies with respect to truthfulness which mirror the Washington law that requires law enforcement officers to be honest in the performance of their duties. With respect to the rule on reporting of accidents, in general a 24 hour rule

is reasonable. However, it would not be unreasonable for the rule to require the reporting at the start of an officer's next shift which may be more than 24 hours from the occurrence of the accident. Nevertheless, there is no question that the employer's policies are reasonable.

3. Did the employer conduct a fair and objective investigation?

Insofar as the internal investigation conducted by Sergeant NS is concerned, the investigation was fair and objective. However, as the Guild points out, the termination decision was colored by more than the basic facts of the case. There was a concern, first expressed in Captain KB's report to Chief CB, regarding Grievant's ability to testify in court proceedings after a finding of untruthfulness resulted in his being placed on the *Brady* list:

> A review of the investigation shows it to be complete and impartial. I concur with the recommendations for findings of sustained on each allegation, with consideration for performance history and mitigating circumstances. Furthermore, if possible, may we request a review from legal counsel prior to a determination of findings and/or punishment to confirm if retention with discipline is a viable option. An honest and impartial review of the investigation leads me to believe the options of discipline will be restrictive in nature due to the specific allegation of 340.5.8 Performance (c) with a recommended finding of sustained.

While not specifically referencing *Brady*, it is clear that Captain KB was concerned with the Grievant's ability to testify at hearings and trials. After the *Loudermill* hearing that was held on June 13, 2023, the Chief sent the Grievant a Notice of Intent to Terminate Employment on June 14, 2023. Again, without specifically referencing *Brady*, the Chief wrote:

> Because of the sustained policy violation findings, notices must be sent to the City Attorney, Prosecuting Attorney, and to CJTC regarding your dishonesty which will now create potential impeachment material and require disclosures of dishonesty with all your cases that you work. This has created issues that the Walla Walla Police Department may struggle to overcome regarding proving honesty while working cases and/or serving as a witness. I have worked in this career for 24 years and questions about honesty will be among the first asked of you on cross examination by defense counsel. Defense counsel can, and likely will, confront you about your dishonesty in this incident and will make it much more difficult to be successful in the courts when accepting your testimony as credible. While you may be able to potentially navigate the court system with hearings and arguments to allow you to testify, it will not change that I will struggle to accept your information as fact and to be confident you are being truthful. Dishonesty is a serious violation of trust, ethics, and the core values of the City.

Although the Chief testified that he had 12-15 hours of discussion with his command staff and the City Attorney before coming to his recommendation to terminate the Grievant, he provided no information to indicate that he discussed the *Brady* implications as suggested by Captain KB. The record is devoid of any

investigation into what, if any, the impact of being placed on the *Brady* list would have on Grievant's ability to work as a police officer in Walla Walla. The Chief did testify that "the fact that he was a *Brady* officer was a consideration. It wasn't the sole factor on my determination for decision-making." Also, "I didn't terminate or plan on termination because of a *Brady* issue." However, the lack of comprehension of a *Brady* listing is evident in the testimony of the final decision maker, City Manager EC:

> Maintaining an officer on staff that has a finding or a finding that policy was violated for untruthfulness, for lying. I see a real challenge of how does that officer continue being an officer, especially when our core values don't align with the City and the police department. One of those is integrity. If you're going to lie, how are you maintaining your integrity and how do we have a police officer remain on staff that isn't living up to that core value.
> Also, if you're having a police officer on staff that is untruthfulness [sic] or potentially on the Brady list, and that officer is – it starts becoming problematic to have that officer being involved in the general duties that we hired them to do, whether that's patrol, investigating a particular case. And if we were to maintain that officer on staff, we have now limited what that officer can do, and putting a burden on the rest of the department to pick up – that workload.

The lack of understanding of the impact of being *Brady* listed is particularly evident in the question asked of City Manager EC, "Does the Walla Walla Department have like a fully desk job for officers? Is there an evidence locker position or, you know, or even just a traffic position?" EC responded in the negative, but the question implies that an officer who is *Brady* listed is unable to perform the duties of a police officer. That is not the case.

The City's investigation with respect to fully understanding the impact of being *Brady* listed was incomplete. It was not fair to the Grievant.

4. Does substantial evidence support the employer's decision?

As noted, the underlying facts are undisputed. The Grievant had a motor vehicle accident which he failed to report on a timely basis, and he told three different members of the WWPD that he knew nothing about the damage to the car. This is clear evidence of wrongdoing in violation of the WWPD policies.

5. Has the employer applied it rules and penalties evenly to all employees?

Although there are no other employees of the WWPD who have engaged in exactly the same behaviors, there are a number of individuals who have violated policies and who have received different treatment than the Grievant in this matter.

Years ago, the Department employed an officer, DL, who chose to attend a football game rather than patrol the city, his assignment that night. At the time, Chief CB was the captain of patrol and observed his good friend at the football game and knew that DL had not been assigned to provide security at the

game. When confronted by CB about his attendance at the game, DL lied and said he had only been there for part of the game. DL continued to tell this falsehood throughout the internal investigation that was undertaken by the department. It was only when he was confronted with the recommendation of termination that he appeared at his *Loudermill* hearing with a letter of resignation.

DL's situation is different from that of the Grievant herein since the Grievant admitted, prior to the initiation of an internal investigation, that he had not told the truth about the accident. He had mitigating circumstances, his family situation, and the untruths were told in passing conversations, not during a formal investigation or one-on-one meetings with a supervisor who was already aware of what had happened.[3] CB knew when he questioned DL that DL had been at the game the entire time. CB knew that DL was lying, but gave him a chance to acknowledge his misdeeds, which he declined to do. The Grievant was, rightly or wrongly, trying to avoid telling what happened because he felt that to do so would also require him to tell the entire story about his father's infidelity, something he didn't want to do because he knew he would become emotional about it, which he did. The Grievant voluntarily came forward and told the truth prior to the initiation of an internal investigation, much before he was noticed for the *Loudermill* hearing. Unlike with DL, supervisors did not know who had damaged the patrol car until the Grievant came forward.

Closer in time to the instant case is the situation with a probationary officer, SA. SA was driving a city car home to Walla Walla from the Academy in Spokane when he was stopped for speeding. The Washington State trooper advised SA that he had been clocked going 96 miles per hour. SA denied that he was speeding. While still at the traffic stop, SA contacted Sergeant L and told him that he wasn't speeding. He also left a phone message for Sergeant BS in which he contended that he was going 75-80 using cruise control, still well over the speed limit, but denied that he was doing 96. SA also told Chief CB that he had not been speeding. Only when told that the trooper had used forward radar and clocked him at 96 mph, looked for a place to turn around and took 5 miles to catch up to him, did SA finally admit that maybe he had been going faster than 75 to 80 at some point in time. SA also initially claimed that he was traveling with classmates, but later changed that part of his narrative. SA attributed the inconsistencies in his situation to "high anxiety during the stressful events such as being stopped by law enforcement for the first time, during which he gets tunnel vision making it hard for him to hear and understand what is said."[4]

Even though SA was clearly untruthful about his speeding, he ultimately took full responsibility for having exceeded the speed limit and having lied about it. He was given verbal counseling and coaching and asked to write a memo to the Chief "documenting why your actions in this case were not in line with the department core values or behaviors we expect from our employees. Please also document why you believe your actions could make our department look bad if the general public were aware of you speeding in a city vehicle without cause or responding to a critical emergency."

[3] It could be argued that the conversation with Sgt.NS in car on the way to an awards ceremony, constitutes a one-on-one conversation. However, it was not a "meeting" to determine what happened but, rather, a question asked and answered while Grievant and NS were travelling together in a car.

[4] Quoted from April 2, 2023, memo from Captain KB to Chief CB.

For reasons that are completely obscure, the internal investigation did not sustain a violation of policy 340.5.8 Performance (d) – Being untruthful or knowingly making false, misleading or malicious statements that are reasonably calculated to harm the reputation, authority, or official standing of this department or its members. It is also not clear why there was not an allegation of a violation of policy 340.5.8 Performance (c) – Failure to participate in, or giving false or misleading statements, or misrepresenting or omitting material information to a supervisor or other person in a position of authority, in connection with any investigation or in the reporting of any department-related business, the policy Grievant was found to have violated.

It appears that the Department has used different policies and standards in its treatment of a probationary employee who told falsehoods to a State Trooper as well as to members of the Department when they were investigating SA than it used with respect to a two-year veteran of the WWPD who had, until May 9, 2023, been an exemplary officer. Not only has the WWPD not applied its rules and penalties evenly to all its employees, but it seems to have bent over backwards in dealing with a probationary employee.[5] SA's error, speeding, could have significant impact on the public's perception of WWPD officers. Grievant's error, hitting a bollard, produced physical damage to a vehicle with no impact on public perception of the WWPD. It is true that SA reported the traffic stop immediately, but both he and Grievant told falsehoods during preliminary discussions with members of the WWPD. Grievant freely admitted what he had done prior to the initial of an internal investigation. SA did not.

Another comparator is Officer MG who was accused of using marijuana and providing some to his minor daughter and his dog. MG admitted this usage and advised that he suffered from anxiety and was self-medicating with cannabis. After the State declined to prosecute, an internal investigation took place and charges of Use of Medication and Laws, Rules and Orders were sustained. The disciplinary actions taken by the WWPD included five (5) days suspension without pay, transition from night shift to day squad, requirement of a "fit-for-duty" return to work from a health care provider, and a Last Chance Agreement requiring confirmation from the SAP/Counselor that he was complying with his treatment plan. The Guild was fully in support of this resolution of this matter which clearly acknowledged the mitigating circumstances of MG's mental health condition and his law and policy violations in treating it.

The only other evidence presented regarding disciplinary actions or untruthfulness involved Detective LW. His truthfulness was called into question when defense counsel moved to get the results of a search warrant suppressed, claiming "reckless omission of facts" from the probable cause affidavit. Although the District Court agreed with the defense, both Chief CB and the US Attorney on the case found no issue with Detective LW's truthfulness. The Ninth Circuit ultimately overturned the District Court, and there is no lingering question of Detective LW's truthfulness.

These examples demonstrate that the City has not applied its rules and penalties evenly to all employees. The LW case is important only because the Detective was *Brady* listed during the pendency of the appeal

[5] It should be noted that even after SA was essentially given a pass on the speeding and lying about it, he was given an extended probationary period because his performance did not meet expectations. SA was ultimately terminated due to submitting a report on a DUI traffic stop which differed significantly from what was viewed on his body camera. It is this latter matter which the City argues is equivalent to the termination of the Grievant.

from the District Court. He was able to continue to perform his work as a detective during that time. The MG case is important because it demonstrates that the WWPD can, and has, taken into consideration mitigating factors such as family troubles and stress when assessing penalties. The SA case demonstrates that the City made certain choices with respect to one (probationary) officer, allowing him to continue to be employed even though he lied to a Washington State Patrol trooper and at least two members of the WWPD and engaged in a very dangerous activity, driving at 96 miles per hour, while determining that the Grievant who backed a car into a bollard and denied having done so for three days can no longer be a police officer. The Grievent acknowledged his wrongdoing prior to the initiation of an internal investigation, SA did not.

The City has not applied its rules and penalties evenly to all employees.

6. Does the degree of discipline match the seriousness of the offense?

As a general rule, just cause requires that progressive discipline be utilized to correct, rather than punish, an employee who has violated rules, regulations, or policies. There are exceptions, however, for situations that are so egregious that continued employment is not feasible. As a general rule, in police work, lying results in termination of employment. However, in most police departments, including the WWPD, neither the collective bargaining agreement nor the department policies provide that untruthfulness will result in immediate termination. That is appropriate as the totality of the circumstances must be considered to determine whether termination is the proper outcome. The employee's employment record, the length of service to the department, the nature of the infraction and the circumstances surrounding the rule violation must be taken into account, as well as the possibility and probability of rehabilitation of the employee in question.

The Grievant came forward and acknowledged his wrongdoing. He did not wait until he was asked, again, by a supervisor or another officer if he knew about the damage to the patrol car. He went to see Sergeant NS at the start of his next regularly scheduled shift, just as he had planned to do when the incident occurred. The City argues that he did not come forward for three days and that he was untruthful three times. That is correct, but the fact is that he reported the accident, voluntarily, when he reported for his next regularly scheduled shift, three days after the accident. This does not excuse the fact that he should have reported the accident immediately, or at least within 24 hours of its occurrence. It does, however, demonstrate that the Grievant knew that he needed to report the situation.

When Grievant reported to Sergeant BS, after the DUI banquet, and to Sergeant NS at the start of his next shift, he also voluntarily reported that he had lied to Officers JW and LM, and to Sergeant NS while driving to the DUI ceremony. That is, the Grievant "owned" his misbehavior. He did not try to blame others for it, he admitted that he had the accident and that he had lied. When Grievant was speaking with Sergeant NS, NS only was aware, after Grievant acknowledged the accident, that Grievant had lied to him earlier that day. It was the Grievant who told NS that he had made the same false statement to two other individuals. Would the Chief's recommendation for termination been the same had there been only one instance of untruthfulness? Did the City punish the Grievant more harshly because he told the truth that he lied to two other individuals?

In looking carefully at all the circumstances, including the mitigating factors, the undersigned cannot find that the punishment, termination, was appropriate under the totality of the circumstances. The City has referred to the undersigned's Award in the *City of Port Angeles v. Teamsters Local 589,* PERC Case 136079-R-22 (2023) (*PAPD*) in support of its decision to terminate the Grievant. In *PAPD* the Grievant failed to file a report about a claim of sexual assault. Only when other incidents came to light regarding the same alleged offender did the Grievant come forward. When initially questioned about the incident, he provided one reason for his failure to file the report. When further questioned, "the Grievant provided many different and, to some extent, conflicting reasons for why he failed to file a report after his initial contact with" the complainant. In fact, the Grievant was unable to be consistent with his own statements at the time of the arbitration hearing. The situation in the WWPD is not at all similar to that in *PAPD*, and the same penalty is not appropriate.[6]

There is no question that the Grievant violated policies and should be disciplined for so doing. The discipline should be, as recommended by Sergeant NS, something less than termination.

7. Did the employer consider any mitigating factors, such as the employee's work record, discipline history, lack of intent to cause harm, etc.?

Although Chief CB testified that he considered mitigating factors, including the Grievant's work record, lack of disciplinary history and the family situation Grievant was dealing with on the night of May 9, the ultimate decision maker was City Manager EC. Her memorandum of June 30, 2023, entitled "Approval of Recommendation for Termination of Employment" reads as follows:

> This memorandum sets forth my decision to approve Chief [CB's] recommendation for the termination of your employment effective June 30, 2023. My decision is based on a review of the following information and Loudermill Hearings:
>
> 1. The Investigative Report IA-23-02, submitted by Sergeant N[] S[] and Captain K[] B[].

[6] In *PAPD*, I stated that "A record of failing to provide complete and accurate answers, which is clearly the case herein, can lead to impeachment of the officer when called as a witness in a case the City is prosecuting. The PAPD cannot afford to have members of the force who cannot be called to testify in hearings, officers who are likely to be subject to intense cross-examination about their record of truthfulness and honesty." In that case, *Brady* listing was never mentioned, and there was no argument made that *Brady* listing does not necessarily result in impeachment of police officer witnesses who have been found to be untruthful. Further, the untruthfulness in *PAPD* concerned untruthfulness in connection with the filing of police reports and interactions with the public which is not the case in this matter. Further, in the instant case, the Grievant came forward of his own volition, admitted the accident and the untruthful statements he had made. He was consistent in his statements throughout the investigation, the two *Loudermill* hearings, and the arbitration hearing. His statements aligned with those of other witnesses. The same cannot be said of the Grievant in *PAPD*.

2. Your response in the Loudermill Hearing on June 13, 2023, that Chief B[] conducted with you, Captain K[] B[], Detective /Union President K[] L[], and J[] C[], Guild Attorney.
3. Chief B[]'s Notice of Intent to Terminate Employment memo, dated June 14, 2023.
4. Your response in the Loudermill Hearing on June 26, 2023, that I conducted with you and Detective /Union President K[] L[] and P[] T[], HR Director.

During the Loudermill hearing held on June 26, 2023, you did not provide any new or different information or provide any mitigating factors. Therefore, your employment is terminated effective immediately.

Given Ms. EC's statement that the Grievant did not provide any mitigating factors, there is no question that the city failed to consider the mitigating factors that the Grievant did present. There is also no question that Grievant's behavior between May 9 and May 12 was inconsistent with his normal functioning within the department, a deviation that can only be attributed to his disturbing conversation with his father prior to going on shift on May 8.[7]

It is interesting to note that the City Manager's memo states that she relied, in part, on Grievant's response during the *Loudermill* hearing conducted by Chief CB. However, she also testified that she only reviewed paper documents that were provided to her by the Chief and did not listen to any audio recordings. At the hearing in this matter, the City was prepared to offer an audio recording of that *Loudermill* hearing as the City did not have a transcription of it. A transcript prepared by the Guild was introduced instead.

The fact that the City Manager stated that she relied on a report that she did not receive, and that there were no mitigating factors presented by the Grievant, calls into question whether the Grievant received the due process considerations to which he is entitled, and can only lead to the conclusion that the termination of the Grievant was not for just cause.

Conclusion

As the City correctly observed, this is a "fraught decision" for the undersigned.[8] There is no question that the Grievant failed in his duty to the WWPD and the citizens of Walla Walla when he knowingly told false statements to three members of the WWPD about the accident because he wanted to avoid having to discuss the familial situation he was dealing with: his father's admission of infidelity. Ironically, because the Grievant chose to not report his accident when it occurred, or within 24 hours thereof, his father's

[7] In her testimony at hearing, the City Manager was able to describe what she called extenuating circumstances, including that the Grievant's father was having an affair.

[8] Throughout the hearing, the facts of the *PAPD* case came to mind. As noted, this case is distinguishable from that case, not only on the facts of what actions were taken by the Grievant, but also the arguments made by the parties notably with respect to *Brady*, and most particularly with the failure of the final decision maker to acknowledge the extenuating circumstances and her alleged reliance on information that she had not received.

behavior has become public knowledge. When the Grievant reported to work on May 8, a few hours after his discussion with his father, it was clear to Officer PG that something was wrong with the Grievant. This should also have been obvious to the command staff.[9]

As fully discussed above, there was not just cause for the Grievant's termination: the investigation into the impact of *Brady* listing was incomplete and the City relied on an erroneous assumption that as a *Brady* officer, Grievant would not be able to perform the tasks of a police officer; the City has not applied its rules and penalties evenly to all employees; the ultimate decision maker contends that there were no mitigating factors to reduce the penalty assessed against the Grievant and asserted that she relied on the information that was not provided to her.

This case is difficult because there is no question that the Grievant violated the rules and policies of the WWPD. The fact that there is not just cause to terminate him requires that he be reinstated. Nothing on the record indicates that he cannot be rehabilitated, and, in fact, some witnesses testified to the fact that the Grievant had grown and matured as a result of having been terminated. The difficult question is whether a lesser penalty should be imposed upon the Grievant, one that takes into consideration the impact of being *Brady* listed, the way similarly situated employees have been treated, and the mitigating circumstances. Upon reflection of all the above, it is decided that the Grievant shall be treated in a manner like that of SA: A verbal counseling and coaching, with the requirement that he also write a memo to the Chief detailing how he should have acted at the time of the events of May 8-9 and how he will respond to stressful events in the future.[10] Further, at the discretion of the Chief, given that the Grievant will not have served as a police officer for almost a year before he is reinstated, the Grievant is to undertake any refresher courses and training that are assigned to him.

In reinstating the Grievant to the WWPD, the undersigned is fully cognizant of the fact that Chief CB has stated that he no longer trusts the Grievant and is concerned about cases that he may be assigned to and how he will be able to testify in court. Hopefully, time will restore the Chief's trust in the Grievant and he will come to feel about the Grievant in a manner like that of the officers who testified that they trust him now more than ever.

Accordingly, based on the above and the record in its entirety, the undersigned issues the following

AWARD

The City of Walla Walla Police Department did not have just cause to terminate the Grievant. The grievance is sustained.

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[9] Sergeant NS noted that the Grievant seemed "off" on May 12. Did he not recognize this on May 8? Why did he not speak with the Grievant and assess his fitness for duty at that time?

[10] The Chief expressed a real concern about how the Grievant will act is the event of being faced with a stressful situation in the future. None of us have a crystal ball but, perhaps, having the Grievant think about this while writing his memo will help establish a framework for a more fitting response to stress in the future.

The Grievant is to be reinstated with full back pay and benefits, including overtime and interest in accordance with applicable law, less any interim earnings he may have received during the period June 30, 2023, until the date of his reinstatement. In addition, verbal counseling and coaching shall be provided to the Grievant as deemed appropriate by the Chief. The Grievant is directed to write a memo to the Chief detailing how he should have responded to the events of May 8-9, 2023, and how he will respond to stressful situations in the future and is to attend any refresher courses and training that the Chief assigns to him.

The undersigned will retain jurisdiction over this matter solely for the purpose of resolving issues as to remedy for a period of 60 days from the date of this Award.

Dated at Madison, Wisconsin, this 18th day of June 2024.

__/s/____Susan J.M. Bauman_____
Susan J.M. Bauman