

AMERICAN ARBITRATION ASSOCIATION
ARBITRATOR MARY ELLEN SHEA

In the matter of the arbitration between: *
*
CITY OF METHUEN *
* AAA 01-19-0002-0776
and *
METHUEN POLICE PATROLMEN’S ASSOCIATION *
*

INTRODUCTION

A demand for arbitration was filed by the Methuen Patrolmen’s Association, pursuant to the parties’ collective bargaining agreement and in accordance with the rules of the American Arbitration Association. The parties jointly selected Mary Ellen Shea to act as single neutral arbitrator in the matter. Hearings were conducted on November 20, 2019, December 12, 2019, and January 3, 2020 in Methuen, Massachusetts.

The City of Methuen (City) was represented by Assistant City Solicitor Anne L. Randazzo; assisted by City Solicitor Richard D’Agostino. Appearing for the City were Alfred Donovan, APD Management; and Chief of Police, Joseph Solomon.

The Methuen Patrolmen’s Association (Union) was represented by Attorney Daniel Fogarty assisted by Attorney Lekzi Nesmith. Appearing for the Union was Officer Arthur L. Hardy III, the Grievant and Union President.

The parties submitted post-hearing briefs at which time the record was closed.

THE ISSUES

The parties stipulated to the following statement of the issues to be decided:

- Was the City’s decision in May 2019 to suspend Officer Arthur Hardy for 270-working days supported by just cause?
- If not, what shall be the remedy?

Was the portion of the Union's May 9, 2019 grievance concerning administrative leave timely filed?

If so, did the City violate the parties' collective bargaining agreement by denying Officer Hardy earnings from overtime, details, court time and other forms of compensation by placing him on administrative leave from January 31, 2019 until May 5, 2019?

If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

The parties' July 1, 2017 through June 30, 2020 collective bargaining agreement contains the following pertinent provisions:

ARTICLE IV MANAGEMENT RIGHTS

It shall be the function of the Police Chief to determine the mission of the Police Department of the City, set standards of services to be offered to the public, and exercise control over the Police Department's organization and operations. It shall be the right of the Police Chief to direct the employees, and take disciplinary action against any employee for cause. The Police Chief retains the right to determine methods, means and personnel by which the Police Department's Operations are to be conducted so long as said means, methods and rules governing said personnel do not violate any provision of this Agreement.

This Article shall not be construed as to preclude any employee covered by this Agreement from grieving over any decision made by the City concerning wages, hours or conditions of employment Where said decision violates a provision of this Agreement.

ARTICLE V NON-DISCRIMINATION

Section 1. Neither the Union nor the City shall discriminate against any employee covered by this Agreement on account of race, religion, creed, color, national origin, sex, age, sexual orientation, gender identity or membership or non-membership m' the Union.

Employees shall not be discharged or discriminated against by the City in any way for having exercised the rights provided them under General Laws, Chapter 150E.

Section 2. In accordance with Section 504 of the Rehabilitation Act of 1983 and 31 U.S.C. 6702 et seq., the City and the Union agree not to unfairly discriminate against any handicapped person. Most specifically, the City and the Union agree that this contract is in no way, nor should be interpreted in any way, as having the effect of discriminating against any qualified handicapped person In terms of employment opportunity, salary or equal treatment, for the purposes of contractual benefits, including fringe benefits; nor is this contract to be interpreted in any way as having

the effect of defeating or substantially impairing the accomplishments of the objectives of Section 504 as mentioned above.

ARTICLE VI RIGHTS AND PRIVILEGES

All rights and benefits in existence on execution of this Agreement, except as may be altered or modified by the provisions hereof, shall continue in effect during the term of this Agreement.

Notwithstanding anything in this Agreement to the contrary, the provisions of this Agreement supersede any conflicting or inconsistent rule, regulation or order promulgated by ordinance or by-law to the extent permitted by General Laws, Chapter 150B.

ARTICLE VIII RULES AND REGULATIONS

The Rules and Regulations of the Police Department of the City of Methuen are hereby recognized by the City of Methuen and by the Methuen Police Patrolmen's Association, as the basic rules by which the department shall operate. The Police Chief further agrees that if at any time after the signing of this Agreement, he should change or modify or amend any of the rules heretofore in existence, then the said Police Chief shall, prior to the implementation of said rule, give to the Union a seven (7) day notice, in writing, of the proposed change or amendment; if the Union thereafter feels aggrieved by this rule change and submits the matter to grievance procedure as set forth in this Agreement, then the Police Chief hereby agrees that he shall stay the operation of the proposed rule change until such time as the grievance procedure is completed.

MPD POLICY AND PROCEDURE No. 420 PRELIMINARY INVESTIGATIONS

Subsection C

Officers shall look for any item of evidentiary value which may reveal how the crime was committed or anything which may connect a particular person to the scene. This would include, but is not limited to the following:

1. Weapons, shell casings, tools, clothing, shattered glass, stains, fingerprints, tool impressions, tire markings, etc.;

Subsection D

Physical evidence shall not be moved or touched pending the arrival of evidence technicians unless absolutely necessary to assure its preservation.

1. If it is necessary to move or take custody of physical evidence, a careful notation shall be made of its exact location and position at the scene.
2. If it is necessary to move any item of physical evidence, the item shall be handled in such a manner as to prevent any alteration of its condition or the accidental impression of fingerprints.

MPD POLICY AND PROCEDURE

No. 800 COLLECTION AND PRESERVATION OF EVIDENCE

Section A

The nature and seriousness of the crime will determine the need and extent of processing required for a particular crime scene. Not all crime scenes require processing; upon review of the circumstances of the crime, the supervisors and/or detectives at the scene will determine the specific needs of the crime and investigation, he shall also be responsible for the appropriate crime scene processing.

Section B

Normally the crime scene will be processed by an investigator or detective. The investigator/detective will be responsible for the protection, collection, recording and preservation of evidence. Depending upon the severity of the crime and investigation, he shall also be responsible for assuring that the State Police or any other appropriate investigative agency is notified.

MPD RULES AND REGULATIONS

RULE 5.1 – Incompetence

No employee shall fail to maintain sufficient competency to perform his duty and to assume the responsibilities of his position. Incompetence may be demonstrated by, but is not limited to, the following:

1. A lack of knowledge of the application of laws required to be enforced;
2. An unwillingness to perform assigned tasks;
3. The failure to conform to work standards as established by job descriptions and department policies and procedures for the employee's rank, grade, and position.
4. Repeated infractions of the rules and regulations, job descriptions, or policies or procedures.

BACKGROUND

Officer Arthur Hardy had been employed by the Methuen Police Department since 1996 when he was suspended for 270 work days for rules violations in connection with his handling of a call on August 1, 2018.

There is little dispute about Officer Hardy's actions on August 1, 2018, as most of his actions were recorded by his body camera. Officer Hardy was dispatched to 195 Haverhill Street when a resident called after finding bullet holes in the exterior of his home. When he arrived, Officer Hardy examined the damage which appeared to be bullet holes and searched the area for

related evidence. While searching the area, Officer Hardy found holes in a neighboring house at 205 Haverhill Street that also looked like bullet holes. After getting no response to his knocking at 205 Haverhill Street, Officer Hardy examined the holes more closely. Thinking there was something in them, he dug with his fingers trying to extract the object. Officer Hardy radioed the station to report the bullet holes in both houses at which time detectives were dispatched to the scene. Meanwhile, the resident of 195 Haverhill Street offered a pair of pliers, which Officer Hardy used as he continued trying to retrieve the object from the exterior wall of 205 Haverhill Street.

Before the detectives arrived, the resident gave Officer Hardy a small piece of metal he thought might be a bullet fragment that was found by a neighbor a couple weeks earlier. Before Officer Hardy had a chance to bag the small fragment, he accidentally dropped it in the grass near the porch of 205 Haverhill Street. Officer Hardy searched the area but could not find it. He tried finding the fragment using different methods. He used a grid search method and when a local service arrived to mow the lawn, Officer Hardy arranged for them to collect the clippings. He sifted through the clippings but still did not find the fragment.

When the detectives arrived, Officer Hardy reported all his observations and his actions. The detectives proceeded to process the scene, including using scent dogs in an effort to locate the dropped metal fragment. Once the detectives took charge of the scene, Officer Hardy was dispatched to other calls.

About a half hour before the end of his shift, Officer Hardy returned to the station where he proceeded to write up reports of each call he handled that day. Officer Hardy could not finish the report about the call to 195 Haverhill Street and planned to complete it the following

morning. Officer Hardy testified that he would have been able to complete the report on overtime, but none was not being approved during that time unless absolutely necessary.

The next morning, the Captain told Officer Hardy he needed to finish the report about the 195 Haverhill Street call. Officer Hardy prepared an additional report with more information, but he did not mention the metal fragment he received and lost in either report.

On September 10, 2018, Chief Solomon notified Officer Hardy that he was initiating an internal investigation, "into your actions in connection with the alleged improper collection and preservation of evidence regarding your handling Methuen Police Department Call #673 884."

The Chief hired Alfred Donovan, a retired Massachusetts Police Chief, who has a private investigation firm. Mr. Donovan conducted an investigation, and submitted his findings on October 10, 2018:

This Investigator finds that Officer Arthur Hardy's failure to wait for the Methuen Police Detectives to process the evidence and crime scene generally on August 1, 2018, at 195 Haverhill Street and 205 Haverhill Street, and the fact that he attempted to retrieve bullet fragments out of the wall after calling detectives to the scene, was a violation of the above referenced Policies and Procedures and Rules and Regulations.

This Investigator further finds that the fact that Officer Hardy took possession of a shell or bullet casing or fragment from Mr. Roy on August 1, 2018, and failed to document, report or secure the item whether relevant to the case under investigation was incompetence and a violation of the MPD Rule #5.1 .

Joint Exhibit #3

On November 15, 2018, the Chief notified Officer Hardy that he was to appear for a disciplinary hearing on November 27, 2018. The Chief indicated the action being contemplated "may include suspension of duties of up to five (5) days and or referral of the matter to the Mayor." According to the Chief, Officer Hardy was being charged with violations of:

MPD Policy Procedures No. 420 (Preliminary Investigations) subsection D:
Physical evidence shall not be moved or touched pending the arrival of evidence technicians unless absolutely necessary to assure its preservation.

MPD Policy Procedures No. 800 (Collection and Preservation of Evidence)

Sections (IV Processing Evidence at the Scene) under Section A:

...Normally the crime scene will be processed by an investigator or detective. The investigator/detective will be responsible for the protection, collection, recording and preservation of evidence. Depending upon the severity of the crime and investigation, he shall also be responsible for assuming that the State Police or any other appropriate investigative agency is notified.

The MPD Rules and Regulations Manual under Rule 5.1 – Incompetence:

No employee shall fail to maintain sufficient competency to perform his duty and to assume the responsibilities of his position. Incompetence may be demonstrated by, but is not limited to, the following:

1. A lack of knowledge of the application of laws required to be enforced;
2. An unwillingness to perform assigned tasks;
3. The failure to conform to work standards as established by job descriptions and department policies and procedures for the employee's rank, grade, and position.
4. Repeated infractions of the rules and regulations, job descriptions, or policies or procedures.

Joint Exhibit #4

On January 24, 2019, Mayor James Jajuga notified Officer Hardy of a Mayoral level hearing scheduled for February 1, 2019, to consider the same charges listed in the Chief's letter and the following contemplated action:

Notice of Contemplated Action The action contemplated herein may include suspension of duties and or discipline up to and including termination from service. You are advised by this notice to appear for the hearing on the day, time, and place listed above and you are advised of your rights to provide evidence defending the charges.

Joint Exhibit #5

On January 30, 2019, Officer Hardy was notified that he would be placed on administrative leave, in part, because two additional internal investigations were being initiated:

This department has initiated two internal investigations into allegations concerning the performance of your duties and your fitness to perform your duties. As you are aware there is also a mayoral level hearing pending into prior allegations concerning the performance of your duties and your fitness to perform your duties. As your precise involvement in the incidents under investigation is still unclear, I am taking the following actions concerning your status.

You are advised that upon service of this notice you are being placed on paid administrative leave. You will remain on paid administrative leave status until I have notified you that the investigation is completed or I have rendered a decision of whether to impose discipline.

Joint Exhibit #6

Throughout this period of time, the parties had discussions in an effort to resolve the matter, which were not successful. On May 1, 2019, the Mayor notified Officer Hardy of his decision to issue discipline:

Enclosed you will find the report of Hearing Officer Paul Fahey which outlines the evidence and findings made as a result of the hearing held on March 7, 2019 which hearing reviewed your handling of an investigation of a call for shots fired on August 1, 2018 at 195 Haverhill Street.

The hearing officer found the following violations: 1. That you failed to wait for the Methuen Police Detectives to process the evidence and crime scenes at 195 and 205 Haverhill Street on August 1, 2018; 2. that you attempted to retrieve evidence which appeared to be bullet fragments out of a wall both before and after calling for the detectives; 3. that you took possession of evidence after calling for the detectives, that being what appeared to be a bullet casing, and then lost that evidence; and 4. that you failed to include all of this information in your formal report.

All of these actions violated the Methuen Police Department Rules and Regulations, specifically being:

Policy and Procedures No. 420, (Preliminary Investigations) Section V, (Preserving Evidence) subsections C and D;

Policy and Procedures No. 800 (Collection and Preservation of Evidence), Section IV, (Processing Evidence at the Scene) and Section V (Preserving Evidence) Sections A-D.

Furthermore, when taken in totality, your handling of this investigation as described in your report as determined by the Hearing Officer's findings, along with prior discipline for similar violations, constitute incompetence as defined in Rule 5.1 of the Methuen Police Department Regulations Manual.

After careful review and consideration, I have determined that there is just cause to discipline you for your handling of the investigation on August 1, 2018 at 195 Haverhill Street. These latest violations, when coupled with your progressive disciplinary record, necessitate that I suspend you without pay for a period of nine months of working days, for a total of 270-working days. During this suspension

without pay, all of the other limitations imposed as a result of your being placed on administrative leave, will remain in full force and effect. Your period of unpaid suspension shall begin on Sunday, May 5, 2019.

Joint Exhibit #7

On May 19, 2019, Officer Hardy grieved the suspension decision:

The Methuen Police Patrolmen's Association files the following grievance on behalf of its member, Officer Arthur Hardy. The City of Methuen violated the parties' Collective Bargaining Agreement, including but not limited to Articles IV, V, and X, the past practice of the parties, and G.L. c. 31 by suspending Officer Hardy for 270-working days without just cause by a letter from Mayor James Jajuga dated May 1, 2019. Additionally, the City violated the parties' CBA, including but not limited to Articles IV, V, and X, the past practice of the parties, and G.L. c. 31 by unreasonably placing Officer Hardy on administrative leave, by continuing such leave for an unreasonable period of time, and by failing to meet the pre-disciplinary procedural requirements of the CBA and G.L. c. 3.

The MPPA respectfully insists that the City immediately rescind the May 1, 2019 Letter and Officer Hardy's suspension, reinstate Officer Hardy to full duty, and make him whole, with interest, for all lost wages, benefits, and all other compensation, including but not limited to overtime and paid details, and award Officer Hardy any other appropriate remedy.

Joint Exhibit #8

The grievance was denied and the matter remained unresolved. Thereafter, the grievance proceeded to arbitration.

POSITIONS OF THE PARTIES

THE CITY

The City argues the 270-working day suspension of Officer Hardy was supported by just cause and urges the grievance be denied. The City argues the Union's May 9, 2019 grievance concerning administrative leave was untimely filed and urges it be denied.

The City points out that the suspension imposed on Officer Hardy was a proper managerial action initiated by the Chief who conducted an Internal Administrative Investigation. The discipline decision was also preceded by a disciplinary hearing pursuant to MGL, c. 31, Sec. 41 during which Officer Hardy was represented by counsel.

The outside investigator, Mr. Donovan, conducted a full investigation, including interviews, reviews of Officer Hardy's first report, his body camera footage and the department Rules and Regulations and Policies. Officer Hardy admitted he poked his finger and later a pair of pliers into what appeared to be bullet holes, in violation of department policies regarding evidence collection. Officer Hardy continued digging into the holes after calling for the detectives, in violation of department policies regarding the conduct of an investigation.

Officer Hardy filed an incomplete report about the call to 195 Haverhill Street. When asked to provide additional information, Officer Hardy failed to identify whether the second report as a "supplemental" or "amended" report and he failed to report that he had received evidence (metal fragment) from the resident, which he then lost.

The City contends these actions amount to clear violations of the rules and regulations and policies and procedures of the Methuen Police Department. The City also contends the actions, when taken together, amount to "incompetence" in violation of Rule 5.1. The City concludes that Officer Hardy's actions and admissions are more than enough to establish just cause for discipline. The City argues that the 270-working day suspension was the appropriate penalty for these rules and policy violations based on Officer Hardy's prior disciplinary record, including a 30-day suspension less than two years earlier.

The City rejects the assertion that the 270-working day suspension represents disparate treatment when compared to discipline imposed on other officers during the preceding five years. While the Chief conceded that no other employee had been suspended for 270-working days, he pointed out that he proposed discharge for similarly serious discipline, which was resolved when the officers facing discharge opted to resign or retire, instead.

Officer Hardy's cavalier attitude toward evidence handling and his insistence that he was "just doing his job" further support a finding of just cause. Officer Hardy's lengthy employment as a police officer, his assignments to the detective bureau and the DEA task force establish that he knew or should have known how to properly conduct an investigation, preserve evidence, and follow department rules and policies. Officer Hardy's actions are indicative of a "cowboy" who knowingly violated the rules, tried to minimize the seriousness of his actions, and is now unwilling to accept the consequences of his actions.

The City argues the portion of the grievance related to administrative leave was not timely filed and should be denied. Officer Hardy received notice that he was being placed on administrative leave on January 30, 2019, and the contract required that his grievance be filed within 10 days, but it was not filed until May. Once the ten days had passed, the Union lost the opportunity to raise the issue of Officer Hardy being placed on administrative leave. For this reason, this portion of the grievance should be denied. If the grievance is deemed timely, the City argues there was no violation of the collective bargaining agreement when Officer Hardy was placed on administrative leave. The City contends that administrative leave is not mentioned in the contract and, for that reason, the decision to impose administrative leave is a reserved management right recognized by Article IV.

In conclusion, the City asserts there was just cause to suspend Officer Hardy and asks that the grievance be denied in its entirety.

THE UNION

The Union argued that the 270-working day suspension of Officer Hardy was not supported by just cause and that the May 9, 2019 grievance concerning administrative leave was timely filed. The Union contends that Officer Hardy's actions conformed to established and

accepted department practice and that the City unreasonably placed him on administrative leave on January 31, 2019.

Officer Hardy has worked for the Methuen Police Department since 1996. He served in various assignments including the U.S. Marshals Service, the DEA, and as a Narcotics Detective within the department. Despite his service, commendations and commitment to community policing, the Chief was hostile to Officer Hardy because of his activity as a Union officer and because the Chief blamed Officer Hardy for changes affecting the department in connection with his DEA assignment. Officer Hardy's testimony that the difficult relationship with Chief Solomon since 2011 continued when he became Union President was not rebutted. The Union points out that Officer Hardy's union activity closely aligned with the department's decision to initiate an investigation against him, indicating improper motivation.

The Union argues that the City's investigation was flawed. Mr. Donovan had not made notes of many of his investigative actions and could not recall information when asked. He could not recall who hired him or what documentary evidence was provided him. Mr. Donovan recorded and transcribed his interview with Officer Hardy, but did not make a record of the interviews he conducted with any others. Mr. Donovan gave conflicting answers about his actions when he visited 195 Haverhill Street and had no notes that could help clarify his testimony. Mr. Donovan concluded that Officer Hardy had failed to properly report his actions on August 1, 2018, a conclusion hampered by the City's failure to provide Mr. Donovan with both reports Officer Hardy had filed. Mr. Donovan testified he was unaware that Officer Hardy had filed the initial report at the end of his shift on August 1 (the report given to Mr. Donovan) and had completed the report the following morning (which was withheld from Mr. Donovan).

The Union contends the City failed to prove that Officer Hardy had actually received a copy of the policies he was accused of violating or that he received any training related to them. Testimony established that officers do not receive extensive training on department policies or rules. Regardless of the written policies, testimony established that officers routinely investigated and collected evidence just as Officer Hardy had on August 1, 2018, and that this practice was commonly known to and accepted by department superiors.

Officer Hardy's handling of a very similar call in 2012 is evidence that the practice of officers conducting investigations and collecting evidence has been known to and accepted by the department's superior officers even though the practice was contrary to the written policies Officer Hardy is now accused of violating. Officer Hardy's report of a 2012 call reveals he took the same actions then as he did in 2018. Officer Hardy's 2012 report was reviewed by a superior officer and he did not receive any negative feedback or discipline about his handling of evidence during that call. For this reason, Officer Hardy had no reason to believe that he would be subject to discipline for handling the 2018 call the same way he had handled (and reported) a nearly identical call in 2012.

The Union argues that Officer Hardy had determined that the metal fragment he received from the resident had no evidentiary value to the investigation. The policy he allegedly violated only relates to the handling of items of evidentiary value. For this reason, it was improper to discipline Officer Hardy for any actions related to handling an item that had no evidentiary value.

The Union rejects the assertion that Officer Hardy's initial report was incomplete or violated any policy or rule. The department did not provide Officer Hardy with enough time to complete his report at the end of the August 1 shift. This was not an unusual situation as the

department was not granting overtime due to budget constraints. Officer Hardy submitted the additional information the following morning, which was a common practice. Captain Hagar received and reviewed the completed report on August 2 and did not advise Officer Hardy that it was incomplete or needed more information.

The Union points out that there have been no lengthy suspensions in the department during the previous five years even though discipline has been issued for similar rules violations. Rather, the evidence indicates the department has consistently issued reasonable, low-level discipline for rules violations; even in cases where the employee's willingness to conform their behavior was not evident as it is with Officer Hardy. The 270-day suspension of Officer Hardy is clearly excessive when compared to other discipline actions taken by the department. For example, Officer M.T. was suspended for 30 days for violating Rule 5.1 and other policies when he hit a parked car, even though it was the 8th time the officer was involved in an avoidable motor vehicle accident with a police cruiser.

The Union also argues that Officer Hardy's prior disciplinary record established that lesser, progressive discipline achieved its desired goal of correcting his behavior. Prior discipline was issued for different reasons and not for his processing of evidence on a call. The Union contends this demonstrates that the severe penalty issued in this case was excessive because it was neither necessary nor appropriate.

Regarding the decision to place him on administrative leave, the Union contends its grievance was timely and should be sustained. The Union points out that Officer Hardy was allowed to continue working during and after Mr. Donovan's investigation and during the City's disciplinary process and only placed him on administrative leave much later, on January 31, 2019. The City stated that the decision to place Officer Hardy on administrative leave was based

on the decision to initiate two new internal investigations in addition to Officer Hardy's pending disciplinary hearing at the Mayor's level. The two additional internal investigations were never conducted and nothing came of them. In fact, the Chief could not even recall the allegations that prompted the decision to initiate those investigations, the City's stated reason for placing Officer Hardy on administrative leave. For these reasons, the Union argues that Officer Hardy was improperly placed on administrative leave because the decision was made long after the initial investigation had been completed and prompted by "new" investigations that were never conducted. Because he was placed on administrative leave, Officer Hardy was unreasonably denied earnings from overtime, details, and court time from January 31, 2019 through May 5, 2019.

For these reasons, the Union asks that the arbitrator sustain the grievance, rescind the May 1 Notice of Suspension, reinstate Officer Hardy and make him whole, with interest, for all lost wages, benefits, and all other compensation including but not limited to overtime, paid details, court time and all other forms of compensation. The Union also asks that the arbitrator retain jurisdiction for any disputes about the remedy.

DISCUSSION

The first question is whether the City's decision in May 2019 to suspend Officer Arthur Hardy for 270-working days is supported by just cause. The City has the burden of proving the charges of alleged rules violations, described as:

1. [Officer Hardy] failed to wait for the Methuen Police Detectives to process the evidence and crime scenes at 195 and 205 Haverhill Street on August 1, 2018;
2. [Officer Hardy] attempted to retrieve evidence which appeared to be bullet fragments out of a wall both before and after calling for the detectives;
3. [Officer Hardy] took possession of evidence after calling for the detectives, that being what appeared to be a bullet casing, and then lost that evidence; and
4. [Officer Hardy] failed to include all of this information in [his] formal report.

The City argues these actions taken together, amount to incompetence in violation of Rule 5.1 – Incompetence as well as violations of Policy No. 420 and Policy No. 800 regarding proper evidence collection procedures and proper investigative procedures.

The Union correctly argues that Mr. Donovan's investigation seemed less than satisfactory. When he testified, Mr. Donovan could not recall many facts, he had not kept notes to refresh his memory, and he did not employ consistent investigative techniques. In addition, his conclusion that Officer Hardy had not filed a complete report was hampered because the City only provided him with one of the two reports Hardy filed. There is no evidence, however, that the failings of the investigation resulted in harm to the disciplinary process or to Officer Hardy's rights because the parties do not disagree about the details of Officer Hardy's actions on August 1, 2018.

The parties are in general agreement about Officer Hardy's actions on August 1, 2018. They do not agree whether Officer Hardy should be disciplined for those actions. Specifically, the Union and Officer Hardy do not deny the actions attributed to Officer Hardy. They deny the City's assertion that the actions violated department policies or amounted to misconduct warranting a 270-day suspension.

The Union's argument that the City's decision to discipline Officer Hardy was retaliatory (for protected activity as a Union officer and an earlier assignment to the DEA) is not supported by the evidence. Despite the claim of a strained or hostile relationship, Chief Solomon's actions toward Officer Hardy since 2011 and during the investigation and disciplinary process indicated a positive regard for and trust in Officer Hardy, rather than hostility. For example, the Chief recommended Officer Hardy for a commendation in 2013 and, in November 2018, he offered him a Motorcycle Specialist position.

Turning to Officer Hardy's actions on August 1, 2018, there is little disagreement about what he did on that day and it is not necessary to discuss the details, which are summarized in the investigator's report, in the footage from the body camera, in the disciplinary documents and in the grievance history. It is not necessary to repeat the details here since there are no significant disagreements about them. The question that remains is whether the City had just cause to suspend Officer Hardy for 270 days for his actions on August 1, 2018.

There should be no doubt that a veteran police officer is expected to understand the importance of protecting and preserving evidence and should understand the basics of evidence collection. There should be no doubt, for example, that regardless of any written policies or rules, a veteran police officer should know better than to alter or disrupt evidence of a possible crime (such as the bullet holes in the exterior of 205 Haverhill Street) by digging into the holes with bare fingers or with a bystander's pair of pliers, possibly disrupting or altering forensic evidence. These actions demonstrate Officer Hardy's lack of basic knowledge and/or a cavalier attitude about the protection and preservation of evidence and support the City's charge that he violated Rule 5.1 – Incompetence:

No employee shall fail to maintain sufficient competency to perform his duty and to assume the responsibilities of his position....

The evidence also supports the City's assertions that:

1. [Officer Hardy] failed to wait for the Methuen Police Detectives to process the evidence and crime scenes at 195 and 205 Haverhill Street on August 1, 2018;
2. [Officer Hardy] attempted to retrieve evidence which appeared to be bullet fragments out of a wall both before and after calling for the detectives; and
3. [Officer Hardy] took possession of evidence after calling for the detectives, that being what appeared to be a bullet casing, and then lost that evidence;

While the evidence supports the City's claim that Officer Hardy's actions amounted to incompetence, the evidence does not support the charge that he "knowingly violated" Policy 420

and/or Policy 800 (City Brief, page 7) when he did not wait for the detectives and he “moved, touched, [and] handled” evidence because the City has not established that either policy had been consistently applied and consistently enforced. When imposing discipline for rules violations, an employer must establish that the rules have been made known to the employees and that the rules have been consistently applied and enforced.

According to Chief Solomon, Policy 420 and Policy 800 have not changed since they were issued to Officer Hardy on January 8, 1996 when he signed a form acknowledging their receipt (City Exhibit #6). The Chief testified that Officer Hardy also had access to “Digital Headquarters,” where both policies have been available electronically since May 18, 2011 (City Exhibit #5). This proves that Officer Hardy received both policies and it is assumed that he was instructed to become familiar with them. This does not mean the City has met its burden of proving that discipline for violating Policy 420 and Policy 800 was warranted.

The Union does not deny that Officer Hardy received the department policies but argued that, throughout his career with the department, these policies have not been consistently applied or strictly enforced. When rules violations are overlooked, the failure to enforce the rules sends a signal that some rule violations will not be punished. In this regard, Officer Hardy had taken similar actions during another call (about bullet holes in the exterior wall of a home). In that case (2012), Officer Hardy submitted a written report of his actions, which described actions similar to those he took in this case (2018):

Officers Formal Report, August 13, 2012

On 8-13-2012 at approximately 1843 hrs., Mr. _____ called the Methuen Police Station to report that he received damage to the exterior part of his residence by a stray bullet.

When I arrived, I spoke with Mr. _____, who reported that sometime since 8-10-2012 until the time of this report, an unknown person shot a bullet into their residence causing damage to the wooden exterior siding. A secondary look

of the residence revealed a second gunshot to the second floor area that bounced off the wooden exterior and was not located in the flower bed/bark mulch area.

I removed the bullet from the side of the house and placed it into an evidence bag. This bullet will be turned over to the State Police Lab in an attempt to identify a suspect that fire the weapon.

Det. John Delano responded to the scene and took photos of the areas that were struck by the bullets.

At this time, we have no suspects and believe this incident is an isolated incident. Det. Delano and I believe the bullets were fired in Lawrence and the bullet struck the home. The bullets never entered into the residence due to the distance and lack of velocity.

The bullet was placed into an evidence locker and will be sent to the State Lab for further testing analysis.

Union Exhibit #1

According to the Chief, all reports are reviewed by a Captain. Even though the same policies were in effect in 2012, Officer Hardy was not disciplined or counseled for actions the City now insists violate those policies:

Policy 420:Physical evidence shall not be moved or touched pending the arrival of evidence technicians unless it is absolutely necessary to assure its preservation.

Policy 800: Items of evidence shall not be handled unless health or safety factors require the immediate security or removal of an item.

On August 1, 2018, Officer Hardy again responded to a call about bullet holes in the exterior of a house. As he had in August 2012, Officer Hardy did not wait for a detective before conducting an inspection, removing a bullet from the exterior of the building, or recovering evidence. As he had done in 2012, Officer Hardy described his actions in his written report, which was reviewed by a superior officer. Officer Hardy was not disciplined or counseled in 2012, despite the fact that Policies 420 and 800 were in effect at that time.

There was no evidence or testimony that any superior officer talked to Officer Hardy in 2012 about his handling and collection of evidence or that his actions violated written departmental policies. Specifically, Officer Hardy was not disciplined, counseled or told that

department policies required him to wait for the detectives and prohibited him from moving, touching, or handling evidence. The department's response to Officer Hardy's handling of a similar call in 2012 supports the Union's argument that the written policies were not consistently applied and enforced and that Officer Hardy's actions in 2012 were acceptable to his superior officers and did not require correction or counseling. The City's decision that Officer Hardy's conduct in 2012 did not warrant any response undermines its current argument that nearly identical conduct in 2018 warrants severe discipline. The City's failure to address similar conduct in 2012 or to put Officer Hardy on notice that Policy 420 and Policy 800 would thereafter be consistently applied and enforced supports the Union's argument that Officer Hardy's conduct was consistent with established practices that were known to and accepted by his superior officers.

Officer Hardy testified that his conduct on August 1, 2018 was consistent with how he typically handled a call involving a possible crime. Nor is there any testimony or evidence that the department conducted training about Policy 420 and/or Policy 800 when handling calls involving a possible crime. Officer Hardy testified that he understood it was part of his job when responding to such a call, to continue investigating, including the identification and collection of evidence until detectives took over the scene. The City did not have just cause to discipline Officer Hardy for violating department Policies 420 and 800 when he did not wait for the detectives to investigate or to collect evidence because the City had failed to consistently apply and enforce those policies. In particular, the City did not enforce the policies with regard to Officer Hardy who had been known to investigate, handle and collect evidence before detectives arrived on scene.

The charges against Officer Hardy also included the allegation that he “failed to include all” information about his actions in his formal report. (It is not necessary to determine whether Officer Hardy’s second report should have been marked as “supplemental” or “amended,” because this is not a charge against him.) The evidence and testimony established that Officer Hardy did make a full report to the detectives when they arrived on scene. When he filed his written reports, however, Officer Hardy did not report that he received a piece of metal from the homeowner who thought it might be a bullet fragment. He did not report that he accidentally dropped the fragment. He did not report that he could not locate the dropped fragment. Officer Hardy testified that he omitted this information from the written reports because he was certain the piece of metal was not a bullet fragment and was unrelated to the call.

Officers may decide to omit information from their reports when, in their professional judgment, the information is irrelevant. In this instance, however, Officer Hardy spent a considerable amount of time and energy, employing multiple search methods in an effort to locate the piece of metal he accidentally dropped. The acts of receiving the fragment, losing it, and then searching for it, represented a significant portion of Officer Hardy’s actions handling that call. The City’s assertion that the information should have been included in his written report is not unreasonable. However, this is not a situation where Officer Hardy took steps to conceal information about his actions. He had already fully disclosed all the information about the metal fragment and his efforts to locate it to the detectives when they arrived on scene, a mitigating factor that should be considered when determining the appropriate level of discipline for failing to also include the information in his written report.

In summary, the City has not met its burden of proving that Officer Hardy was guilty of violating Policy 420 and/or Policy 800 because the policies had not been consistently applied and

enforced. The City has established there was just cause to discipline Officer Hardy for violating Rule 5.1 Incompetence for his poor handling of the call to Haverhill Street on August 1, 2018 and for his failure to include all information in his written report. However, the City has not established that the imposition of a 270-day suspension was reasonable for the proven charges because Officer Hardy's actions did not amount to rules violations so serious that they warranted such severe discipline.

It is the employer's burden to establish that the penalty imposed on Officer Hardy was reasonable. Measures of reasonableness include the employee's prior disciplinary record and whether the discipline imposed was comparable to the discipline imposed on others for similar offenses. In this regard, the City has not established that a 270-day suspension for violation of Rule 5.1 - Incompetence and failure to file a complete report was comparable to discipline imposed on others.

In the first disciplinary hearing notice (Joint Exhibit #4), the Chief listed the charges and notified Officer Hardy the contemplated disciplinary action for those charges "may include suspension of duties of up to five (5) days." The Chief testified that the parties engaged in settlement discussions, but when the discussions broke down and the matter was referred to the Mayor, the Chief urged the Mayor to discharge Officer Hardy. The Mayor's disciplinary notice (Joint Exhibit #5) listed the same charges as those in the first disciplinary notice in which the Chief recommended a 5-day suspension. No explanation was offered for why the Chief changed his discipline recommendation from a 5-day suspension to a 270-day suspension, a much more severe disciplinary action than first contemplated for the same alleged rules violations. The City argues that Officer Hardy's conduct warranted severe discipline because it was comparable to the conduct of five non-probationary employees who faced discharge during the previous five

years.¹ Based on the Chief’s testimony and Union Exhibit #4, the reasons those officers faced severe discipline were:

Sgt. T.H.	Not listed. Prior discipline for rules violations Professional Conduct, Orders, General Requirements, Incompetence
Cpt. K.L.	Conduct Unbecoming and Insubordination
Ofc. J.L	Insubordination
Ofc. H.S.	Not listed. Prior discipline for Insubordination
Ofc. M.W.	Embezzlement and Larceny
Lt. M.W.	Conduct Unbecoming and Conflict of Interest

Four of the six employees’ records indicated charges of insubordination or criminal conduct, which are among the most serious charges imposed by employers. It is not reasonable to compare charges such as insubordination or criminal conduct with the charges of violating Rule 5.1 – Incompetence and failing to file a complete report. The City has not demonstrated that the proven charges against Officer Hardy were comparable to the charges against employees who faced severe discipline.

The long suspension (270 work days) is also inconsistent with the discipline imposed on employees charged with more comparable rules violations (incompetence and filing reports), who received suspensions ranging from 1 to 5 days:

EA	1 day suspension	Incompetence and Filing Reports
EA	1-day suspension	Incompetence, Filing Reports + other charges
TB	5-day suspension	Incompetence + other charges
KD	2-day suspension	Incompetence + other charges
KD	1-day suspension	Incompetence, Failure to Document + other charges
TF	3-day suspension	Incompetence + other charges
TH	3-day suspension	Incompetence + other charges
DL	1-day suspension	Incompetence + other charges
KM	1-day suspension	Incompetence
KM	1-day suspension	Incompetence + other charges
JW	1-day suspension	Incompetence, Reporting Accidents + other charges
MW	5-day suspension	Incompetence + other charges
MW	1-day suspension	Incompetence + other charges

¹ In each instance, an agreement was reached allowing the officer to resign or retire, rather than be discharged.

If Officer Hardy had a clean disciplinary record, a similarly short suspension might be appropriate, but during the prior five years, Officer Hardy had been disciplined several times, including 2 reprimands, a 1-day suspension, and a 30-day suspension:

Oct. 2015	Written Reprimand
5/9/16	1-Day Suspension
9/10/16	Written Reprimand
12/21/16	30-Day Suspension

In addition, Officer Hardy had been disciplined for similar reasons. In 2016, he received a written reprimand for failing to properly report a traffic stop. In 2016, he received a 30-day suspension for mishandling evidence at the scene (an unattended death). Given the department's progressive discipline policy and the fact that this was not the first time Officer Hardy had not handled evidence competently or had failed to file a complete report, it is reasonable to impose progressive discipline (a longer suspension than previously imposed). The 270-work day suspension shall be reduced to a 60-day suspension.

The second question is whether the portion of the May 9, 2019 grievance concerning administrative leave was timely filed. The parties' contract requires a grievance be filed within 10 days of the event giving rise to the grievance. The City argues that the portion of the grievance related to administrative leave is not arbitrable because it was not filed within 10 days of January 30, 2019, the date Officer Hardy was placed on administrative leave. The City's argument would be correct if the decision to impose administrative leave had been a discrete, one-time occurrence. It was not. The decision to place Officer Hardy on administrative leave was first made in January and the decision recurred every pay period until May. The alleged violation (the imposition of administrative leave) was a "continuing" violation and so a new 10-day time limit was established each time the decision recurred until May 4, 2019, the last day Officer

Hardy was on administrative leave. The latest date for filing a grievance would have been no later than ten days after the last day of administrative leave. Since the last day of administrative leave was May 4, and the grievance was filed on May 9, 2019, the grievance was timely filed.

While the concept of a "continuing violation" allows a grievance to be filed any time the alleged violation continues, back pay only accrues from the date the grievance was actually filed. In this case, the grievance was filed after the alleged violation had already ended. Any remedy is rendered moot since none would be payable even if the grievance were sustained on the merits. For this reason, it is not necessary to address the merits (whether the City violated the parties' collective bargaining agreement by denying Officer Hardy earnings from overtime, details, court time and other forms of compensation) because no remedy would be payable even if the grievance is sustained on the merits.

REMEDY

The City did not meet its burden of proving that Officer Hardy violated Policy 420 and/or Policy 800. The City did establish that Officer Hardy's actions on August 1, 2018 amounted to incompetence in violation of Rule 5.1 – Incompetence and that he failed to submit a complete report. The City did not establish just cause to impose a 270-working day suspension because the proven rules violations did not warrant such a long suspension.

Given Officer Hardy's prior disciplinary record and the department's adherence to a progressive discipline policy, the 270-working day suspension will be rescinded and replaced by a 60-day suspension without pay. To be consistent with evidence that other suspensions imposed by the City (including Officer Hardy's prior 30-day suspension) were based on calendar days, rather than working days, the suspension to be imposed is for 60-calendar days.

The City is hereby ordered to rescind the 270-working day suspension and to remove any reference to it from Officer Hardy's record. Officer Hardy will be suspended without pay for 60 days and will serve the unpaid suspension from May 5, 2019 through July 4, 2019. The City is ordered to make Officer Hardy whole for all wages and benefits lost, including overtime, detail, court pay, etc. from July 5, 2019 to present, less any interim earnings he would not have earned but for the rescinded suspension.

The portion of the grievance concerning administrative leave was timely filed but is denied on the merits because it was filed after the administrative leave had already ended and no remedy is payable even if the grievance is sustained on the merits.

The arbitrator will retain jurisdiction for ninety (90) days for the limited purpose of resolving disputes about the implementation of the remedy.

AWARD

The City did not meet its burden of proving that Officer Hardy violated Policy 420 and/or Policy 800.

The City did establish just cause to discipline Officer Hardy for incompetence in violation of Rule 5.1 – Incompetence and for his failure to submit a complete report.

The City did not establish just cause to impose a 270-working day suspension.

The City is hereby ordered to rescind the 270-working day suspension and to remove any reference to it from Officer Hardy's record. Officer Hardy will be suspended without pay for 60 days and he will serve the unpaid suspension from May 5, 2019 through July 4, 2019.

The City is ordered to make Officer Hardy whole for all wages and benefits lost, including overtime, detail, court pay, etc. from July 5, 2019 to present, less any interim earnings he would not have earned but for the rescinded suspension.

The portion of the grievance concerning administrative leave was timely filed but is denied on the merits because it was filed after the administrative leave had already ended and no remedy is payable even if the grievance is sustained on the merits.

The arbitrator will retain jurisdiction for ninety (90) days for the limited purpose of resolving disputes about the implementation of the remedy.

Mary Ellen Shea, Arbitrator
April 16, 2020