

Voluntary Labor Arbitration Proceeding

In the Matter of Arbitration Between

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 509

-and-

COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF
CHILDREN AND FAMILIES

Arbitration #8715, OER #15-43150


AWARD OF THE ARBITRATOR

The undersigned arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and having been duly sworn and having heard the proofs and allegations of the Parties, AWARDS as follows:

The State failed to meet its burden of proving that it had just cause to terminate the employment of the grievant, [REDACTED]

The State shall reinstate [REDACTED] to the position from which she was terminated; shall reduce the discipline of [REDACTED] to a written warning for driving 10 m.p.h. over the posted speed limit, while transporting a DCF client; and shall make the grievant whole for all wages and benefits she lost as a consequence of her unjust termination.

The arbitrator retains jurisdiction for ninety days for the sole purpose of addressing any disputes that may remain regarding the back pay and benefits due to [REDACTED] pursuant to this award.


Philip Dunn, Arbitrator

Date: February 1, 2017

Appearances: Ian O. Russell, Esq., PYLE ROME EHRENBERG, PC, for the Union
Michael Downey, Esq., HRD Labor Counsel, for the Employer

STIPULATED ISSUE

Was there just cause for the termination of [REDACTED]
If not, what shall the remedy be?

EVIDENCE PRESENTED

Prior to the termination of her employment in the summer of 2015, [REDACTED] had worked as a social worker for the Massachusetts Department of Children and Families (DCF) for six years. The incident which led the State to terminate the employment of [REDACTED] occurred on March 17, 2015. Prior to that date, [REDACTED] had received no discipline during her employment with DCF.

[REDACTED] is a sergeant with the Massachusetts State Police. His regular assignment is to supervise 19 K-9 state police officers in the western half of Massachusetts. In that capacity, he does not routinely perform traffic enforcement work on the highways. However, whenever he is traveling while on duty and in uniform, if he sees a significant traffic violation, he is charged with enforcing those laws.

Testimony of [REDACTED]

[REDACTED] reported the following. On March 17, 2015, at 11:40 a.m., he was on duty, in uniform, and was driving a marked State Police cruiser from western Massachusetts to Boston for a meeting. [REDACTED] was entering from I-290 East onto I-495 North in Hudson. As he came from the entrance ramp onto I-495, a VW minivan sped past him. The average speed of cars on I-495 is around 75 MPH; however, this VW minivan was traveling much faster. Traffic on I-495 was light at that time.

██████████ accelerated to catch up to the minivan. It took him some distance, "to the top of the hill," before he caught up to the minivan. He settled in a distance behind the minivan to clock its speed, without turning on the emergency, blue lights of his State Police cruiser. He clocked the minivan as traveling at 90 to 95 MPH, then up to 100-105 MPH. ██████████ followed the van for four to five miles, all at those high speeds, without his emergency, blue lights on;¹ throughout this entire period, the minivan stayed in the far left lane.²

██████████ then turned on his blue lights as the minivan was traveling through the township of Bolton, but the van thereafter continued in the far left lane for another two to three miles, still traveling at 100 MPH. Finally, the minivan pulled over into the center lane, still traveling at 90 MPH, and then pulled over to the breakdown lane and stopped, by then in the township of Boxborough.

██████████ stopped his cruiser behind the minivan, and approached the driver. She produced her driver's license, which identified her as ██████████. As she took out her license, ██████████ saw that she also had a state-issued identification card. Upon his request,

¹ In seeming contrast, however, when DCF Area Director ██████████ spoke with ██████████ on March 23, he reported the following. "██████████ passed the Sgt. at a high rate of speed so he turned on his lights and siren (emphasis added) and followed ██████████ for 9 miles before she stopped. ██████████ reached a speed of 95 MPH. When he was able to read ██████████'s license plate, the Sgt. clocked her as 105 MPH." ██████████ Report, State Exh. 2.

However, DCF Case Investigator ██████████ testified that when she interviewed ██████████ – some time after ██████████ had interviewed him – ██████████ stated to her (consistent with his testimony at the arbitration hearing) that with his emergency lights still off, he clocked ██████████ for five miles, then turned on this emergency lights, and then it took four more miles before ██████████ pulled over.

² For purposes of issuing a citation, the minimum distance over which a police officer must follow while clocking a vehicle's speed is one-quarter mile. When asked why he followed for five miles before turning on his blue lights to stop the van, ██████████ explained that the longer for which a speeding vehicle is clocked, the stronger is the evidence to uphold the citation. He acknowledged that it is dangerous for a van to be traveling at 100+ miles per hour, but "it is a balancing of better proof and safety concerns," so that is why he waited through four to five miles before turning his blue lights on to get the van's operator to pull over.

she showed it to [REDACTED] and it identified her as an employee of the Department of Children and Families (DCF). [REDACTED] was not able to produce a registration document for the van.

[REDACTED] observed that there was a teen-aged male sitting in the front right passenger seat of the minivan. He asked [REDACTED] if this passenger was her son, or a ward of the state.

[REDACTED] responded that the passenger was not her son. [REDACTED] then addressed the passenger, asking his name. [REDACTED] said to the young man, "You don't have to speak with

him." [REDACTED] told the young man that he was not in trouble. The passenger then spoke with [REDACTED] and gave his name.

[REDACTED] asked [REDACTED] for the name of her supervisor at DCF. [REDACTED] declined to give the sergeant that information.

[REDACTED] then issued a civil citation to [REDACTED]. He wrote onto the citation that she had been driving "100+ MPH" in a posted, 65 MPH zone, which he had determined by a "5 mile clock" of the speed of her vehicle. He checked off boxes indicating that her speed had been "clocked" and was "estimated;" he left blank the box one would check off to indicate that radar had been used.³ He noted on the citation that [REDACTED] had stated to him that she

³ During cross examination, [REDACTED] stated that he did not recall if he had used his radar while clocking the van. The citation itself documented that [REDACTED] had **not** used radar while clocking [REDACTED] vehicle.

However, after DCF Investigator [REDACTED] interviewed [REDACTED] (for a second time) on April 9, 2015, she documented the following in her investigatory report.

[REDACTED] reported that he **had** in fact used his radar gun (emphasis added) to confirm the speed on his odometer. He stated that he wanted to confirm his speed with the radar gun because the radar gun is calibrated and certified. He stated he used the radar gun on his own car when he was directly behind [REDACTED]'s car which was in the left, high speed lane and got a reading in excess of 100 miles an hour. He stated that the radar gun uses a wide beam on a multi-lane road, which makes it difficult to use in that capacity. It was perfect for a singular reading of the odometer in his car, which was directly behind [REDACTED]."

The State, however, did not place into evidence any documentation of radar readings from when [REDACTED] was following behind [REDACTED] car.

had been driving 75 MPH. He also cited her for having no registration document in her possession. The civil citation assessed to [REDACTED] a fine of \$40 for the lack of a registration document, and a fine of \$355 for driving at 100+ MPH in a 65 MPH zone.⁴

While [REDACTED] was writing up the citation, a second state trooper arrived at the scene of the stop. That officer had responded because [REDACTED] had radioed in that he was following a speeding vehicle which had not promptly stopped after he had put on the blue lights of his police car.

[REDACTED] then allowed [REDACTED] to proceed on her way. However, later that day, the sergeant filed with the Registry of Motor Vehicles a "Threat of License Revocation," which is used to obtain the immediate revocation of a driver's license when there is cause to believe that the driver will present an immediate threat to safety if allowed to operate a vehicle.

[REDACTED] based his decision to file the "Threat of License Revocation" on four considerations: (1) she was driving at over 100 MPH; (2) she had a young person in the van with her; (3) as a DCF employee, she had a duty to keep the child safe; and (4) she seemed to be oblivious to speed at which she had been driving.

The sergeant also called and spoke with the on-duty, State Police captain in charge of Troop C, which is the troop with responsibility for the geographical area where [REDACTED] had stopped [REDACTED] for speeding. He discussed with the captain whether he should notify DCF of the speeding citation that he had issued to [REDACTED] for operating over 100 MPH

⁴ Sgt. [REDACTED] testified that he was on the way to Boston for a work meeting, and because of the extra time it took him to pull [REDACTED] over and to issue her a citation, he ended up being late to the meeting in Boston.

while she had a DCF client with her in the vehicle. The captain advised that [REDACTED] should notify DCF.

[REDACTED] followed that advice. On March 20, 2015, he spoke by phone with a staff member at the DCF's office of the Ombudsman. That report from Sgt [REDACTED] triggered a DCF investigation, which ultimately led the State to terminate the employment of [REDACTED] for the following reason: "On or about March 17, 2015, you placed a child in Department custody at risk when you transported the child in your car traveling at an excessive rate of speed.... Your actions ... were reckless and could have resulted in serious harm to a client or to the public."

Testimony of [REDACTED]

On March 17, 2015, [REDACTED] was assigned to transport a DCF client, a 16 year old male, from a DCF facility in Natick to another facility in Littleton. [REDACTED] was driving her 2010 VW Routan (a mini-van) to perform this task.⁵ The young man in her care was seated in the right front passenger seat. At about 11 a.m. she entered onto I-495 North in Westboro. As she headed north on the highway, she at first was traveling in the center lane. There were not a lot of cars on the road at that time, but there were some, so after a while [REDACTED] moved into the far left, passing lane. The posted speed limit is 65 MPH. She was traveling along with the flow of traffic.

As she was driving through Bolton, she saw in her rear-view mirrors a police car with its emergency lights flashing. She was surprised to see the police lights on; she did not know why

⁵ [REDACTED] testified that her 2010 Routan at that time was in "fair" condition. She explained that the "whole body" of the van would shake as she accelerated; the faster she drove the van, the more it would shake.

she was being stopped. She turned on her right signal, and slowly changed lanes so as to do so safely. She pulled into the breakdown lane and stopped her vehicle.

On cross examination [REDACTED] stated that it "took me some time to pull all the way over and into the breakdown lane." She was nervous after having seen the blue lights. She "could not say how many miles or minutes" it took for her to finally stop in the breakdown lane.

After she stopped her van, two state troopers at the same time approached her vehicle, one on each side. The second trooper had pulled up in a separate police cruiser within a minute of the first. [REDACTED] came up to her car window, and spoke with her while the other trooper spoke with the DCF client who was in the passenger seat. [REDACTED] did not say to the DCF client, "You don't need to take to the officer."

[REDACTED] stated to [REDACTED] that she had been traveling at 105 MPH. He asked [REDACTED] how fast she believed she had been going. She honestly replied, no more than 75 MPH, explaining that car shakes at speeds higher than that. [REDACTED] told [REDACTED] that he would pull her license. [REDACTED] asked for the name of her supervisor, and she gave him that information. She reported that she worked out of the DCF office in Hyde Park. He wrote her a citation and left before she had a chance to find the van's registration which was in the vehicle's glove box.

After the troopers pulled away, [REDACTED] asked the DCF client if he was okay, and he stated that he was. [REDACTED] called her supervisor and left a message reporting the traffic stop.

[REDACTED] then proceeded along to Littleton, to deliver the young man as assigned.

[REDACTED] appealed the citation, and had a hearing before a court magistrate. After that hearing, the magistrate made a determination that the State had proven (beyond a

reasonable doubt) only that [REDACTED] had been traveling at up to 10 MPH over the posted speed limit of 65 MPH, and accordingly assessed her a fine of \$105 rather than \$355 as Sgt. [REDACTED] had written on the March 17, 2015 citation. The magistrate dropped the charge of not having the registration documents with her, because those documents had in fact been in her glove box on the day in question; [REDACTED] simply had been unable to find that document in her glove box before the police officer had written up the citation.

The Union filed a grievance which asserted that the State have acted without just cause when it terminated the employment of [REDACTED]. That grievance remained unresolved through the lower steps of the grievance procedure, leading to this arbitration proceeding.

DISCUSSION

The State in this case has the burden of proving that the grievant committed misconduct of sufficient severity to provide the State with just cause to summarily terminate her employment. The State relies exclusively on the testimony and earlier reports of Sgt. [REDACTED] to prove that the grievant in fact was driving at such high speeds and for such an extended period of time, with a young man in her care as a passenger in her car, that the State acted with just cause when it summarily terminated her employment without benefit of progressive discipline. The Employer's case in this proceeding thus depends exclusively upon the credibility and reliability of Sgt. [REDACTED] reports and testimony.

I conclude that the testimony and reports of Sgt. [REDACTED] were so contradictory and illogical as to leave the State without sufficient proof that the grievant committed the offenses for which she was terminated. I base this conclusion upon the following considerations.

First, Sgt. [REDACTED] testified that he followed behind the grievant's car and clocked her speed for about five miles, even though she was driving at a dangerously high speed of 100 to 105 miles per hour, before he turned on his blue lights in order to get her to pull over and stop her vehicle. The logic of letting her continue for that long, if traveling at such a dangerously high speed, is hard to discern. As the sergeant himself noted, so long as a police officer clocks a vehicle for at least a quarter mile, that is sufficient to support a conviction for speeding. Why, then, would he have kept his blue lights off and just followed along for such a long distance, when it logically would have been safer to get the car stopped as quickly as possible?⁶

The sergeant explained that he waited for five miles in order to have a better evidentiary case to support the citation for driving at that high a speed. It is a balance that an officer makes, he explained, whether to stop the vehicle more quickly to get the driver to cease the dangerous activity sooner, or to clock the vehicle's speed for longer to build a better case in court.

That explanation of his delay in stopping the grievant's vehicle, however, brings us to the second, even more compelling reason to find that Sgt. [REDACTED] testimony and reports were not sufficiently reliable to support a termination decision. If the sergeant's concern (as he claims) was to develop indisputable evidence to support in court the officer's assertion that the grievant was traveling for five miles at 100 to 105 miles per hour, the very best evidence available obviously would have been to flip on the police cruiser's radar equipment to precisely

⁶ It also is noteworthy that Sgt. [REDACTED] on March 23 reported to DCF Area Director Taylor, "'Ms. [REDACTED] passed the Sgt. at a high rate of speed so he turned on his lights and siren (emphasis added) and followed Ms. [REDACTED] for 9 miles before she stopped.'" That March 23 report by [REDACTED], as documented by Ms. [REDACTED], indicated that [REDACTED] turned on his blue lights immediately upon [REDACTED] passing by him on I-495, and then followed [REDACTED] for 9 miles all the while with his vehicle's blue lights on. [REDACTED] story in this regard, then, appeared to change over time.

measure and document the actual speed of the grievant's car. The activation of the radar equipment's electronic documentation presumably would have left little doubt as to the speed of the grievant's car, given that the cruiser's radar equipment is regularly calibrated precisely so that its readings will provide in court a reliable proof of speed.

Notwithstanding its availability to him, Sgt. [REDACTED] initially documented (on the citation itself) that he did not use radar to calculate (and document) the speed at which the grievant's car was traveling; he only relied on manual clocking and estimation of speed, he wrote. Why did he not do so, if he was so concerned about collecting the best evidence to support a conviction for speeding at 100 to 105 miles per hour? That is puzzling indeed. But, what is all the more puzzling about this case is that less than a month later, when he was interviewed by DCF Investigator [REDACTED] on April 9, he reported that he had used his cruiser's radar on March 17 to determine the exact speed at which his vehicle was traveling, as he was following along at a consistent distance behind [REDACTED] van.⁷ Then, adding still further to puzzling reversal of the sergeant's claims of whether he in fact did or did not use his radar that day, Sgt. [REDACTED] testified at the arbitration hearing that he could not recall whether or not he had used radar to determine the speed of his cruiser and thus of Ms. [REDACTED] car as he followed along behind it.

It is enormously significant, then, that the State in presenting its evidence in this arbitration proceeding did not place into evidence any recorded data from the radar equipment

⁷ The sergeant testified that his cruiser's radar would have precisely measured (and documented) his vehicle's speed in relation to fixed objects such as road signs or trees at the sides of the highway; the radar precisely measures relative speed of one thing in relation to another. The speed differential between his cruiser and the grievant's car, of course, was roughly zero, since he was, he testified, maintaining a fixed distance behind Ms. [REDACTED] as she traveled along I-495.

in [REDACTED] cruiser, from the time and date that he was clocking the speed of Ms. [REDACTED] van. Either [REDACTED] in fact did not use his radar equipment, when quite clearly he should have done so to establish reliable proof of how fast his and [REDACTED] vehicles were traveling; and then he falsely told the DCF investigator, perhaps out of embarrassment for his own omission, that he had used his radar. The Employer then (quite understandably) relied on that false information – that the allegation against [REDACTED] was supported by radar-generated data – in making its determination to terminate [REDACTED]

Or, [REDACTED] did use the radar, as he accurately reported less than a month later to Investigator [REDACTED] but then the actual radar-generated data was not presented at the arbitration hearing. If the latter is the case, the unavoidable inference to be drawn is that the radar data would not have supported the claims [REDACTED] was making about the speed at which [REDACTED] had been driving on March 17, 2015. Either way, the lack of radar data, in conjunction with [REDACTED] shifting position that he did not use his radar, or that he did use it, or that he can't remember if he used it, fatally undermines the Employer's case in this proceeding.⁸

In sum, for all the reasons discussed above, the State failed to meet its burden of proof in this proceeding. Given the lack of sufficient proof, the State lacked just cause to terminate the grievant. Based, however, on [REDACTED] admission that she was traveling consistently at 75 m.p.h., while sitting out in the passing lane so as not to be slowed by other vehicles, the State had just cause to give [REDACTED] a written warning for driving 10 m.p.h. above the posted speed limit while transporting a DCF client in her vehicle.

⁸ This may well explain why the Clerk Magistrate found that the only proven offense was that Ms. [REDACTED] had driven on March 17, 2015 at 75 m.ph. on a road with a posted speed limit of 65 m.p.h.

By way of remedy, the State shall reduce the discipline of [REDACTED] to a written warning for driving 10 m.p.h. over the posted speed limit, while transporting a DCF client. The State shall reinstate [REDACTED] and make her whole for all wages and benefits she lost as a consequence of her unjust termination. The arbitrator retains jurisdiction for ninety days for the sole purpose of resolving any disputes that may remain regarding the back pay and benefits due to [REDACTED] pursuant the this award.

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