In Re the Arbitration Between:

City of Port Orchard, Washington,

Employer,

and

Port Orchard Police Guild,

Union.

GRIEVANCE ARBITRATION OPINION AND AWARD
(McKinney Grievance)

- Pursuant to **Article 6** of the collective bargaining agreement effective January 1, 2013 through December 31, 2015 the parties brought the above captioned matter to arbitration.
- The parties appointed James A. Lundberg as their neutral arbitrator from a Washington PERC list of arbitrators.
- The grievance was submitted on February 13, 2015.
- The parties agree that the matter is properly before the arbitrator for a final and binding determination and raised no procedural issues.
- The arbitration hearing was conducted on February 2, 2016 at the City of Port Orchard, Washington.
- Final briefs were submitted by e-mail transmission on March 11, 2016 and the record was closed.

APPEARANCES:

FOR THE EMPLOYER
Sharon Cates
Lighthouse Law Group
1100 Dexter Avenue North, Suite 100
Seattle, WA 98109

FOR THE UNION
Reba Weiss
Cline & Casillas
520 Pike Street, Suite 1125
Seattle, WA 98101

ISSUE:

Whether the Employer had just cause to discipline grievant, Marvin McKinney? If not, what is the appropriate remedy?

FACTUAL BACKGROUND:

On **December 14, 2007**, a woman reported being raped within the jurisdiction of Port Orchard, WA Police Department. The case was assigned to Sgt. E.J. Martin, an experienced police investigator. Several officers assisted the Sergeant in gathering evidence, including Detective[1] Marvin McKinney, the grievant. A "rape kit" was obtained from Harrison Hospital and it was properly transferred and logged into the Port Orchard Police Department evidence room.

Detective McKinney was asked to interview a suspect and directed to take a Buccal (cheek) swab of the suspect to obtain DNA evidence. On January 28, 2008 Detective McKinney interviewed the suspect and took the buccal swab. In the interview, the suspect admitted having sex with the rape victim but claimed that the sex was consensual. The grievant had never processed a buccal swab from a suspect. Conducting the interview and taking the buccal swab were grievant's only involvement with the rape case.

When Detective McKinney returned to his unit, the Sergeant's shift had ended and he had left for the day. Detective McKinney did not know what specific steps to take with the DNA evidence he had obtained. Hence, he contacted the Sergeant, who told him to put the swab on his desk.

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[1] Grievant was on "rotation" as a detective at the time. When discipline he was working as a patrol officer.

The instructions given by the Sergeant to Detective McKinney were patently wrong. Detective McKinney should have secured the evidence and logged it into the secure evidence room in order to preserve the chain of custody. Since evidence becomes worthless when the chain of custody is broken, it is critical that a police officer or detective properly secure and log all evidence. Detective McKinney could have contacted his supervisor for instruction over how to process the evidence at the time but failed to do so.

The Sergeant in charge of the investigation not only gave Detective McKinney a wrong instruction but further compounded the problem by placing the improperly handled swabs in the case file. No attempt was made by Detective Martin to secure DNA evidence that could be used in court. In fact, the entire investigation stalled for roughly seven years.

On or about **July 15, 2014** the "rape kit" from the December of 2007 rape investigation was found in the Port Orchard Police Department evidence room in the refrigerated storage area. Inquiry was made into whether the evidence needed to be retained.

Essentially, the investigation was reopened. The "rape kit" was processed and the alleged victim was interviewed. The swabs taken by the grievant were found in the case file and the interview information reported by the grievant became part of the investigation. As part of the investigation, the suspect was located in Kentucky. Since he was outside of local law enforcement's jurisdiction, a probable cause affidavit was completed and sent to authorities in Kentucky. Based upon the probable cause affidavit prepared by Port Orchard Police, a warrant issued for the

suspect and cheek swabs were taken to obtain DNA evidence. Ultimately, the suspect pled guilty to "assault-fourth degree with sexual motivation."

An article appeared in The Kitsap Sun newspaper on January 9, 2015, which talked about the above situation. The first paragraph of the article said "*Charges were filed recently in an alleged rape that occurred in 2007, after critical evidence in the case was discovered in the refrigerator of the Port Orchard Police Department evidence room.*" The article explains that the suspect was being held on bond after being extradited from Kentucky. The article also inaccurately says that two investigators, one now retired and Marvin McKinney, were assigned to the case. In fact, Mr. McKinney was not assigned to the case but was assigned to contact the suspect, interview him and obtain cheek swabs. Mr. McKinney was not leading or directing the investigation. In general, the January 9, 2015 article gave an unflattering picture of the Port Orchard Police Department.[2]

On January 12, 2015 Sergeant Holden was asked to look into Officer McKinney's involvement in the rape case. Sergeant Holden contacted Officer McKinney who told him that he had been asked by Detective Martin to obtain a statement from the suspect and a DNA sample. The grievant recalled not knowing how to process the DNA sample and that Detective Martin told him to leave the sample on his desk. Detective Martin, now retired, had no specific recollection of the case. According to the investigative report, Officer McKinney found the swabs in the case file, which was among ninety older case files previously assigned to Sergeant Martin. The ninety files had been placed in boxes but not reviewed, since Sergeant

[2] Actually, the Department capably and competently followed up. The case was pursued, the suspect was arrested and a conviction obtained.

Martin's retirement approximately five years earlier. Sergeant Holden concluded that Officer McKinney violated **General Order 2010** of the Port Orchard Police Department by "Placing unlogged evidence on Detective Martin's desk with no follow up to make sure it was received."

On January 20, 2015 Marvin McKinney was given a written reprimand by the Chief of Police of Port Orchard, Washington. The "Personnel Action Report" says *"Detective McKinney took a DNA sample from a rape suspect. Detective McKinney had a conversation with another Detective, left the evidence on their desk, and did not follow up with the other Detective to make sure that they got it. As a result, procedure established in G.O. 2010 was not followed, the DNA evidence was not logged into evidence, and it was not securely stored."*

By written notice dated February 13, 2015 the Union grieved the discipline issued to Officer McKinney. The Union asked that the discipline be set aside. The parties were unable to resolve the dispute through the grievance process and the dispute was brought to arbitration for a final and binding determination.

SUMMARY OF EMPLOYER'S POSITION:

The Employer asserts that it demonstrated by sufficient evidence that it had "just cause" to impose a written reprimand on Officer McKinney. The Employer's analysis relies upon the seven tests articulated by Arbitrator Daugherty in ***Enterprise Wire and Enterprise Independent Union*, 46 LA 359 (3/28/1966).**

According to the testimony of the Department Commander, all employees of the Port Orchard Police Department are trained on all of the General Orders of the Department. **General Order 1440** places employees on notice that a violation of

Department rules is cause for discipline. There is no dispute that grievant had received training over the Department rules.

General Order 2010 specifically identifies how evidence must be handled in order to be secure and preserve the chain of custody. The rule is reasonably related to the effective operation of the Department. A break in the chain of custody can cause the evidence to be excluded from a trial. There is no dispute over the reasonableness of **General Order 2010.**

When McKinney's involvement in the sexual assault case came to the attention of the Department Commander, he directed Sergeant Holden to investigate what mistakes, if any, had been made. Sergeant Holden thoroughly reviewed the case records and found that McKinney had failed to secure the DNA evidence (buccal swab evidence) and he did not follow up with Detective Martin to verify that Detective Martin secured the evidence. The grievant admitted that he did not follow the procedures outlined in **General Order 2010**. The investigation followed the evidence, was thorough and complete.

There is no evidence of bias in the investigation. The Department Commander, Chief and the investigating Sergeant all testified that the investigation was fair and objective. When the investigation was initiated, the Commander had no predetermined outcome in mind. There were no other witnesses who could have been contacted or other sources of evidence. The evidence clearly demonstrated that McKinney had violated **General Order 2010**.

The evidence of McKinney's violation of **General Order 2010** is over whelming. The rule requires careful securing, storing and accounting for evidence.

The grievant admitted that he simply placed the buccal swabs on Detective Martin's desk. The buccal swabs were eventually found in the investigation file, not properly stored in the evidence room. There is no evidence that the buccal swabs were ever inventoried. There is substantial evidence, which includes the grievant's own statement, that **General Order 2010** was violated.

Employees have been treated evenhandedly by the Department, when violations of **General Order 2010** have occurred. First, all employees are trained to follow the General Orders and have access to the General Orders. When violations of General Orders have come to the attention of the Department Commander, he has consistently taken disciplinary action against those employees. Moreover, if Detective Martin had not retired, he also would have been disciplined. The Department has treated all employees equally.

The level of discipline imposed on the grievant was appropriate under the circumstances. It is true that the Department Commander has given education or warnings to others who have violated **General Order 2010**, which are lower levels of discipline than the Written Reprimand imposed on grievant. However, the Chief took the entire situation into consideration, before he imposed discipline. He considered the fact that a significant amount of time had passed and ruled out any discipline that would result in a monetary loss. He also took into consideration McKinney's experience with the Department, the fact that he was working as a Detective at the time, the fact that the evidence was part of a sexual assault investigation and the fact that the grievant admitted violating **General Rule 2010**. Since the grievant's conduct made the DNA evidence worthless to the investigation,

the Chief believes that the Written Reprimand was the lowest level of discipline he could have issued in this case. The degree of discipline was reasonably related to the seriousness of the violation.

The Employer established that all elements of the Daugherty seven tests for just cause **Id.** have been met, and asks that the grievance be denied.

SUMMARY OF UNION'S POSITION:

The investigation of grievant's conduct was not fair and evenhanded. The grievant was the "target" of the investigation. The initial order from the Department Commander to Sergeant Holden directed the Sergeant to "look into Officer McKinney's involvement in this case." While the Commander backpedaled from the statement at hearing, when he testified "I asked to look into the case. At this point – we're in semantics now, how he[3] words things." However, Sergeant Holden was asked the following question and gave the following answer:

Q. (Ms. Weiss) So... Commander Schuster did ask you to specifically look into Officer McKinney's involvement in the case?

A. (Sgt. Holden) Yes.

The Union contends that the investigation focused only on the grievant and no consideration was ever given to the misconduct of any other employee or any other employee's failure to act.

According to other Department policies, supervisors are required to follow up on the reports made by their Detectives. There is no evidence that the supervisor of Detective Martin and Detective McKinney reviewed the sexual assault case report

[3] Referencing Sergeant Holden's notes.

from 2007. In fact, the current Department Commander was Detective Martin's supervisor in 2007 and there is no evidence, documentary or otherwise, that he did anything to be sure that the investigation progressed. Similarly, the current Chief supervised the evidence room. The entire inquiry began, because a "rape kit" from an old case had not been processed and was discovered in the evidence room refrigeration unit.

Detective Martin not only gave Detective McKinney inaccurate information, regarding the handling of the DNA evidence but he failed to pursue the investigation at any level. The investigation essentially ended, when the suspect admitted having sexual intercourse with the victim but claimed it was consensual. No sanctions were imposed on Detective Martin, despite his failure to pursue the investigation of a very serious offense.

The grievant had no part in the improper handling of the "rape kit" that was lost for approximately seven years. The evidence that grievant mishandled would merely have corroborated what the suspect already admitted. The suspect's DNA on a buccal swab was the same DNA that was found in the "rape kit." The delay in processing the sexual assault case was not caused by the grievant's mishandling of the buccal swabs. The mishandling of the "rape kit" and the failure of Detective Martin to pursue an investigation caused the seven-year delay in prosecuting the case. The grievant's mishandling of the buccal swabs was a minor violation as compared to the other breakdowns that occurred in the investigation. The Union argues that there was "plenty of blame to go around." In the final analysis, the

grievant was the only employee available to discipline, as Detective Martin had retired. Hence, he became the "scapegoat."

The discipline of grievant was neither fair nor evenhanded. In other instances where rape kits were lost, the Department did not order investigations to determine who was responsible for the lost rape kits. Other officers have placed evidence into another officer's "box", instead of properly logging the evidence but have not been issued Written Reprimands. Other violators have been given a letter of education or a warning, not reprimands. In this case, the enforcement of the rule and imposition of discipline did not occur until more than seven years after the incident. The rule was not strictly enforced in the past and has not been strictly enforced, since the grievant was disciplined.

The grievant was disciplined for not following **General Order 2010** but **General Order 2010** does not require that a Detective follow up to be sure than another Detective has done his job. In this case, a more senior Detective directed the grievant to leave the evidence on his desk. The more senior Detective did not cause the evidence to be logged and secured and it was not the grievant's role to oversee the senior Detective's decisions. It was the more senior Detective who failed to pursue the investigation not the grievant.

The Union submits that the grievant was the "scapegoat" in this situation and treated disparately. Hence, the grievance should be upheld and the reprimand expunged from the grievant's record.

OPINION:

The purpose of discipline is to correct an employee's behavior. In this case, the grievant clearly mishandled evidence by not following **General Order 2010**. However, there is no reason to believe that imposing the Written Reprimand on the grievant seven years after he mishandled corroborative evidence in a rape case would do anything to correct the employee's behavior. No evidence was presented to demonstrate that the grievant mishandled any other evidence in the seven years between, when he mishandled the buccal swabs and the discipline was imposed. In fact, no evidence of any other misconduct by the grievant was offered at hearing. The body of evidence submitted at hearing leads to the conclusion that the grievant made a mistake, when he failed to properly process the buccal swabs in 2007 and the mistake was not repeated in the next seven years. Consequently, the incident is "stale" and imposition of discipline seven years after the occurrence serves no reasonable purpose.

The grievant's mistake did not cause harm to either the victim or the course of the investigation, as no investigation took place, until after the misplaced "rape kit" was discovered. Moreover, the DNA evidence was obtained for the purpose of corroborating the suspect's admission that he had sexual intercourse with the victim. The grievant's mistake was easily cured by obtaining additional buccal swabs, which is what happened. If the senior Detective investigating the rape in 2007 would have caught the break in the chain of custody created by the grievant's failure to secure and log the buccal swabs, a second sample could easily have been obtained from the suspect in 2007. The seven-year gap between sampling was not

caused by the grievant. In fact, the breakdown in the investigation is readily traced to Detective Martin. The grievant's mistake should have been addressed by either Detective Martin or a supervisor in 2007 and treated as an educational opportunity. The grievant should have been counseled to review **General Order 2010** and apply it to the manner in which he handled the buccal swabs and probably should have been required to go back to the suspect, obtain a second sample and secured and log the sample in accordance with **General Rule 2010**.

Testimony at hearing demonstrated that other employees in similar situations have been counseled with a letter of education or warned but not given a Written Reprimand. The evidence supports a finding of disparate treatment.

In this case there is clear evidence of disparate treatment, the incident for which the discipline was imposed was so remote that meaningful behavioral correction is unlikely, there is no evidence that the rule violation reoccurred over a period of seven years and the level of discipline is too harsh based upon discipline imposed upon other similarly situated employees. Hence, the arbitrator finds that the Employer did not have just cause to impose a Written Reprimand upon the grievance.

The grievance should be upheld and the Written Reprimand removed from all records relating to the grievant, whether held in an official personnel file or other file maintained by the Employer.

AWARD:

1. ***The grievance is hereby upheld.***
2. ***The Written Reprimand shall be removed from (expunged) all records relating to the grievant, whether held in an official personnel file or other file maintained by the Employer.***
3. ***Pursuant to Section 6.6 of the collective bargaining agreement the arbitrators fees and expenses are to be paid by the Employer.***

Dated: March 25, 2016

James A. Lundberg, Arbitrator