

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the matter of the arbitration between:

TOWN OF MILLBURY

-and-

MILLBURY POLICE ASSOCIATION, LOCAL 128

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ARB-14-4037

Arbitrator:

Zachary See, Esq.

Appearances:

Sharon Seigal, Esq.

Representing Town of Millbury

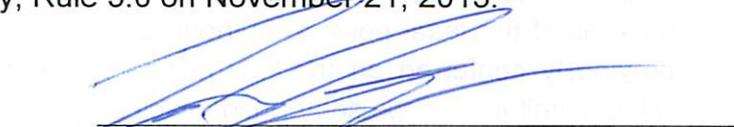
Leigh Panettiere, Esq.

Representing Millbury Police Association,
Local 128

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The Town violated Article VII of the collective bargaining agreement by imposing a five-day suspension on Officer Frank Piscitelli. The grievant shall be paid for the three days loss of pay and seniority he incurred as a result of his May 2014 suspension, and all references to a five-day suspension shall be removed from his personnel file and replaced with a two-day suspension for violating department policy, Neglect of Duty, Rule 5.0 on November 21, 2013.


Zachary See, Esq.
Arbitrator
July 13, 2015

INTRODUCTION

A unilateral petition for Arbitration was filed by the Millbury Police Association, Local 128 (Union) on September 25, 2014. Under the provisions of M.G.L., Chapter 23, Section 9P, the Department of Labor Relations (DLR) appointed Zachary See, Esq. to act as a single neutral arbitrator with the full power of the DLR.¹ The undersigned Arbitrator conducted hearings at the Millbury Public Library on December 17, 2014 and March 30, 2015. Officer Frank J. Piscitelli, III. (Piscitelli) testified for the Union. Chief Kenny Howell (Howell), Lieutenant Donald P. Desorcy (Desorcy), and Dispatcher Patricia Gibson (Gibson) testified for the Town of Millbury (Town). The Arbitrator and the parties conducted a site visit to the Millbury Police Department on March 30, 2015.

The parties' briefs were received by May 15, 2015.

THE ISSUES

1. Did the Town violate Article VII of the collective bargaining agreement by imposing a 5-day suspension on Officer Frank Pisitelli?
2. If so, what shall the remedy be?

¹ Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the ... the board of conciliation and arbitration ... including without limitation those set forth in chapter 23C, chapter 150, chapter 150A, and chapter 150E of the General Laws."

RELEVANT CONTRACT LANGUAGE

The parties' July 1, 2013 through June 30, 2016, Collective Bargaining Agreement contains the following pertinent provisions:

ARTICLE VII
DISCIPLINE & DISCHARGE

There shall be no discipline or discharge except for just cause.

THE FACTS

Piscitelli is a bargaining unit member and police officer employed by the Town. Piscitelli has served the Town for over twelve years and previously worked as a dispatcher for the Sutton Police Department. The Town had never disciplined Piscitelli prior to May 2014.

Pursuant to Massachusetts General Law, Chapter 123, Section 12, under certain circumstances a police officer who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person. In reference to this law, the Millbury Police Department refers to calls requesting some type of assistance for an individual alleged to be mentally unstable as "Section 12" calls. It is Millbury Police Department's usual protocol to send two officers to respond to a Section 12 call, depending on the availability of officers, the nature and urgency of the call, and whether a weapon is involved.

Millbury Police Department Rules and Regulations state:

5.0 - Neglect of Duty

Officers are required to be attentive to and not neglect their sworn duties. Officers must not absent themselves from their assigned duty without leave. They must not leave their post or assignment without being properly relieved; likewise, they must take suitable and appropriate police action regardless of whether they are on or off-duty when any crime, public disorder or other

incident requires police attention or service and they are capable of responding. Examples of neglect of duty include but are not limited to: failure to take appropriate action on the occasion of a crime, failure to report criminal activity that has been reported to an officer, medical emergency, public disorder or other act or condition deserving attention; failure to render medical assistance consistent with one's training; absence without leave; failure to report to duty at the time and place designated; unnecessary absence from one's assignment during a tour of duty; failure to perform duties or comply with any job description, rule or regulation, general, special or other order; or failure to conform to department policies and procedures.

On November 21, 2013, Piscitelli worked a midnight to 8AM shift. He served as the Acting Sergeant, and received an additional 10% of his base pay as an hourly rate, as the senior officer on the shift. Gibson, who has worked for the Town as a dispatcher for approximately fifteen years, worked as dispatcher during this shift with Piscitelli. Gibson and Piscitelli had worked together before and had a professional relationship without incidents.

At approximately 12:33AM Gibson received a call at her desk in the dispatcher area at the police station on the business line (as opposed to the emergency line). The Director at the Carpenters Training School on Holman Road requested service regarding an emotionally unstable female student, approximately 28 years of age. The Director stated he was concerned that the student might harm herself, she had a knife that the school recently took away, and he was not sure how to handle the situation. Gibson dispatched an ambulance and Officer Michael Healy (Healy), who was on patrol, to the school at approximately 12:36AM. After Healy confirmed the dispatch, Gibson stated over the radio that a knife had been confiscated from the female and that she was reported as emotionally very unstable. Piscitelli sat in the squad room at the

police station within earshot of Gibson's desk where she received the call and dispatched the ambulance and Healy over the radio. Piscitelli's radio was off during this time.

Gibson then personally informed Piscitelli of the call from the Carpenters Training School back in the squad room where Piscitelli sat at a computer reviewing the prior shift's log. Gibson told Piscitelli that a knife was involved. After Gibson informed Piscitelli of the call for service, Piscitelli stated that he did not need to respond because the knife had been confiscated and he finished reading the prior shift's log. Gibson returned to the dispatcher area. Piscitelli next went to the parking lot, dropped his duty bag in his cruiser, walked to his personal vehicle to obtain necessary documents, and then walked back to his cruiser. Piscitelli's radio was on during this time. After leaving the police station, he reported on the radio and drove toward the Carpenters Training School.

Meanwhile, the following information dispatched over the radio: At approximately 12:40AM, the ambulance arrived at the Carpenters Training School, and Healy arrived at approximately 12:43AM. At approximately 12:48AM the ambulance reported that it was transporting the female to a hospital, and then Healy cleared the scene at approximately 12:49AM. At approximately 12:53AM, Piscitelli reported he was on and available. At approximately 12:54AM Gibson reported a call from State Police regarding an erratic operator on Route 146, and Piscitelli and Healy subsequently confirmed receipt of the new call.

On February 12, 2014, Healy provided a written statement to Desorcy stating in part that after Healy cleared the Section 12 call from the Carpenters

Training School on November 21, 2013, Piscitelli stated over the radio that he was on and available. Desorcy subsequently investigated the November 21, 2013 incident, and provided Howell a report on March 24, 2013 concerning a violation of a Police Department Rule, which included Healy's written statement, a February 20, 2014 statement from Gibson, and a March 18, 2014 statement from Piscitelli. Gibson wrote that she informed Piscitelli in person of the Carpenters School call and that Piscitelli signed onto the radio after Healy cleared the call. Piscitelli wrote that Gibson informed him that Healy went on a Section 12 call "which is not normally a two person call, absent any other information," and that "I am confident she did not say there was a knife involved, otherwise I would have left the station forthwith. Upon finishing reading the log, I left the station and signed on the air." Desorcy's report found that Piscitelli neglected his duties by not immediately responding to a potentially dangerous medical call with Healy.

On May 8, 2014, Howell suspended Piscitelli for five days without pay for violating Millbury Police Department policy, Neglect of Duty, Rule 5.0, by failing to respond to a potentially life threatening situation involving an emotionally unstable individual who had recently been in possession of a knife, as well as failing to respond as the Acting Sergeant. The Union grieved Piscitelli's suspension on June 4, 2014, which was denied by Howell on June 24, 2014 and denied by the Town Manager on August 29, 2014.

POSITIONS OF THE PARTIES

THE EMPLOYER

The Town argues that Officer Piscitelli failed to respond to a Section 12 call for service and violated Millbury Police Department Rule 5.0, Neglect of Duty. The Town also argues that Piscitelli's lack of knowledge about the presence of a weapon constitutes neglect of duty, and that as the officer in charge he should have known that two officers were required to respond to a Section 12 call. Lastly, the Town argues that Piscitelli's testimony is not credible, specifically regarding his denial that Gibson told him a knife was involved in the call, his denial that he told Gibson that he did not need to respond to the call since the knife had already been confiscated, and his testimony that he arrived at Holman Road while Healy and the ambulance were still there.

THE UNION

The Union argues that the Town failed to prove that there was just cause for Piscitelli's suspension, and that Piscitelli responded to the call in a timely manner. The Union also argues that at the time of the call, Piscitelli didn't know that a weapon was involved, had no way of knowing, and that the weapon is immaterial because it had already been taken away. Furthermore, the Union argues that the Town's discipline violated Piscitelli's right to due process and the principle of progressive discipline. The Union seeks a remedy that reverses the five-day suspension, makes Piscitelli whole, with interest, for the five days' lost pay, any lost overtime, details, court time and/or other benefits, and retroactively restores his seniority.

OPINION

I find that the Town's five day suspension imposed on Piscitelli violated Article VII of the Agreement and that the remedy shall be a reduction to a two day suspension.

The Town had just cause to suspend Piscitelli for neglect of duty because Piscitelli failed to be attentive to his duties as Acting Sergeant and take appropriate police action on November 21, 2013. But because Piscitelli has no prior discipline, I find no just cause for a five day suspension, and reduce the suspension to two days.

Failure to be Attentive to Duties

On November 21, 2013, Piscitelli was required to be attentive to his sworn duties and to take suitable and appropriate police action for an incident requiring police service. As Acting Sergeant, Piscitelli had a duty to know what was happening on his shift. Yet, despite being within earshot of the dispatch area, Piscitelli claims he did not hear Gibson on the phone with the Carpenters School nor hear the radio dispatch indicating that a knife was involved in the Section 12 call. Piscitelli was not fully aware of the circumstances of the Section 12 call despite being available for the call, sitting in the empty squad room reading the prior shift's log, and subsequently being informed of the call in person by Gibson. By not being aware of the circumstances of the Section 12 call on November 21, 2013, Piscitelli neglected his duty to be attentive to his responsibility to take appropriate police action.

Piscitelli admitted that Gibson informed him in the squad room that she had just received a Section 12 call and dispatched Healy. Based on the

unpredictable nature of such a Section 12 call, it is Millbury Police Department's usual protocol to send two officers when they are available. Piscitelli admitted in his March 18, 2014 statement that he would have left the station "forthwith" if he knew there was a knife involved in the Section 12 call from the Carpenters School, but that instead he finished reading the log.² The Union argues that Piscitelli did not know and had no way of knowing that a knife was involved. I do not find this argument persuasive because the Town showed that despite Piscitelli's personal radio being turned off, he could have heard Gibson state over the police station radio that a knife was involved. There is no dispute that Gibson announced on the radio that a knife was involved. Desorcy, Gibson, and the site visit to the station all corroborate that one can hear the dispatcher on a call from the squad room where Piscitelli sat. Piscitelli acknowledged in his testimony that you can often hear radio traffic from the dispatch area in the squad room.

In the early hours of November 21, 2013 during the time of this call, Gibson and Piscitelli were the only people at the station. There were no other calls for service. Had Piscitelli been attentive to the call and information dispatched over the radio, he would have known that a knife was involved.

² Piscitelli wrote in his March 18, 2014 statement that Gibson told him that Healy went on a Section 12 call, and that Gibson did not say a knife was involved "otherwise I would have left the station forthwith. Upon finishing reading the log, I left the station..." Piscitelli testified on cross examination that he finished reading the log, logged off the computer, and then left the station. But on re-direct examination, Piscitelli stated that he did not continue to read the log after Gibson told him about the Section 12 call, rather he finished the reading "process." I find Piscitelli's testimony on this point to be vague and inconsistent, and therefore I do not credit this assertion.

Piscitelli admits that if he had known that a knife was involved, he would have left the station immediately. But he did not.

Additionally, Gibson testified that she told Piscitelli in person that a knife was involved, and that Piscitelli stated that he did not need to respond because the knife had been confiscated. Piscitelli denies that Gibson informed him personally about the involvement of a knife, and denies stating that he didn't need to respond to the call. I find Gibson's testimony more credible because she has no reason to distort the truth, and because of Piscitelli's vague and inconsistent account of his actions after Gibson informed him of the call as noted above. Had Piscitelli been attentive to Gibson's account of the details of the Section 12 call from the Carpenters School, he would have known that a knife was involved and left the station immediately. But he did not. Therefore, I find that Piscitelli failed to be attentive to his duties and as a result failed to immediately respond to the Section 12 call.

Failure to Take Appropriate Police Action

The Town had just cause to discipline Piscitelli because he did not immediately leave the police station upon learning of a Section 12 call while he sat as Acting Sergeant in the squad room. Piscitelli admits that he did not leave the station immediately after he was informed of the Section 12 call for service at the Carpenters School on November 21, 2013, and that he finished reading the prior shift's log before he left the squad room. While there is no dispute that Piscitelli did actually leave the station on November 21, 2013, the Union did not show that Piscitelli actually left to respond to the Section 12 call.

Piscitelli's March 18, 2014 written statement states that Gibson told Piscitelli that Healy went on a Section 12 call, "which is not normally a two person call, absent other information." The Union failed to show that the Section 12 call from the Carpenters School is not normally a two person call, or that this particular Section 12 call did not require an immediate response from available officers. The Town showed that due to the unpredictable nature of Section 12 calls, normally two officers respond. While the Union argues that Piscitelli did eventually respond to the call in average time when compared to other Section 12 calls, there is no dispute that Piscitelli did not immediately respond to the call and that Healy cleared the call before Piscitelli ever arrived at Holman Road. The time it took Piscitelli to drive to Holman Road and any discrepancy among the accuracy of the clocks in the police station on November 21, 2013, does not excuse the fact that Piscitelli failed to immediately respond to the call. The Town did not discipline Piscitelli for responding slowly, rather for his decision to not respond the moment he was aware of a Section 12 call for service, which I agree is a neglect of his duties as an officer and Acting Sergeant.

Furthermore, the Union did not show that Piscitelli actually responded to the Section 12 call from the Carpenters School. When Gibson informed Piscitelli of the Section 12 call, Piscitelli did not immediately leave the station and never indicated to Gibson that he was going to respond to the call. Furthermore, by the time Piscitelli does radio in as "on and available" it is not clear that he is responding to the Carpenters School call, especially considering Healy had already cleared the call. Piscitelli admits that after he was informed of the Section

12 call personally by Gibson, Piscitelli chose to finish the reading "process" instead of immediately leaving the police station. It is not clear that Piscitelli's subsequent departure from the station was in response to the Section 12 call. Driving to the scene of an incident after another officer cleared the scene is not responding to the incident. Therefore, I agree with the Town that Piscitelli failed to take appropriate police action by not responding to the Section 12 call on November 21, 2013.

Due Process Rights

The Union also argues that Piscitelli's discipline violated his due process rights. I disagree. The Union argues that the Town denied Piscitelli the opportunity during the investigation to respond to the allegation that he refused to go to the Section 12 call from the Carpenters School. However, the Town didn't discipline Piscitelli for any statement to Gibson that he didn't need to go, rather he was disciplined for his inaction after being informed of the Section 12 call. It is true that Gibson's February 12, 2014 written statement does not state that Piscitelli explicitly refused to respond to the call. However, her statement does include that Piscitelli signed on the air for service after Healy cleared the call at the Carpenters School. Furthermore, in Piscitelli's own March 18, 2014 statement he states that he did not leave the station immediately upon Gibson informing him of the Section 12 call. Piscitelli was not disciplined for stating he didn't need to respond, he was disciplined for not responding. Therefore I do not find that Piscitelli's due process rights were violated in this instance.

The Union argues that Piscitelli's due process rights were also violated because the Town never reviewed comparative response times of other Section 12 calls before imposing discipline on Piscitelli. However, as previously noted, the Town did not impose discipline for slow response time, rather, Piscitelli was disciplined for failing to respond upon being informed of a Section 12 call. That Piscitelli got into his cruiser and drove to Holman Road in a certain amount of time on November 21, 2013, does not resolve the fact that he chose to finish reading the prior shift's log instead of responding immediately to a Section 12 call. Therefore, I do not find that Piscitelli's due process rights were violated when the Town imposed discipline without reviewing comparative response times.

The Union also argues that Piscitelli's due process rights were violated because the Town failed to investigate the November 21, 2013 incident and impose discipline in a timely manner. The reason the Town waited until February, less than three months after the incident, to investigate is because Desorcy hadn't received any written statement concerning the incident until Healy's statement on February 12, 2014. While Desorcy may have received verbal allegations regarding Piscitelli's conduct on November 21, 2013, Desorcy waited to receive a written statement prior to conducting an investigation. Because the Town investigated a November 21, 2013 incident upon receiving a written complaint in February 2014, and Piscitelli received proper notice and an opportunity to be heard regarding the allegations against him, I do not find that Piscitelli's due process rights were violated.

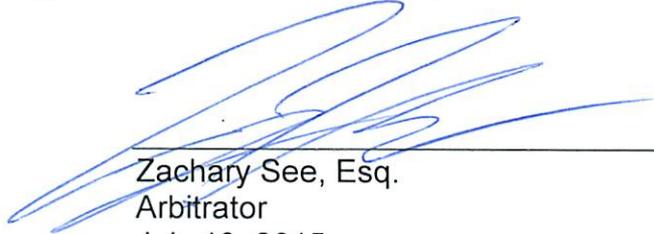
Discipline

Finally, the Union argues that a five-day suspension violates the principle of progressive discipline. Piscitelli had no prior discipline in his twelve years of service with Millbury Police Department, which I find to be a mitigating factor. In light of this, the Town's five-day suspension is excessive. However, Piscitelli was serving as the Acting Sergeant on November 21, 2013 and had a duty to know what was going on during the shift and take appropriate action. Piscitelli should require no reminder of his duties, particularly given his level of experience and responsibility. Piscitelli should have known that it is more appropriate for a second officer, when available, to immediately respond to a Section 12 call instead of sitting in the squad room and finishing reading the prior shift's log. Piscitelli's failure to be attentive to the circumstances that morning and to take appropriate action warrants a suspension. Furthermore, Piscitelli's failure to recognize the unpredictable danger inherent to a Section 12 call, with or without the presence of a knife, warrants a multiple day suspension. Accordingly, I find that the Town did have just cause to discipline Piscitelli for neglecting his duties as an officer and Acting Sergeant, and a two day suspension is warranted.³

³ I decline to grant the Union's request to make Piscitelli whole with interest for lost pay, any lost overtime, details, court time or other benefits because I find that a multiple day suspension is warranted in this case, and that the Employer did not act egregiously or in bad faith by initially imposing a five-day suspension.

AWARD

The Town violated Article VII of the collective bargaining agreement by imposing a five-day suspension on Officer Frank Piscitelli. The grievant shall be paid for the three days loss of pay and seniority he incurred as a result of his May 2014 suspension, and all references to a five-day suspension shall be removed from his personnel file and replaced with a two-day suspension for violating department policy, Neglect of Duty, Rule 5.0 on November 21, 2013.



Zachary See, Esq.
Arbitrator
July 13, 2015