

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
MARQUETTE UNIVERSITY POLICE ASSOCIATION  
and  
MARQUETTE UNIVERSITY (POLICE DEPARTMENT)

Case ID: 579.0000  
Case Type: MA

(Perry Perkins Discharge Grievance)

AWARD NO. 7960

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**Appearances:**

Andrew Schauer, Staff Attorney, Wisconsin Professional Police Association, for the Association.

Marna Tess-Mattner, Attorney, Schmidt, Rupke, Tess-Mattner & Fox, S.C., for the Employer.

**ARBITRATION AWARD**

The Marquette University Police Association, hereinafter referred to as the Association, and Marquette University (Police Department), hereinafter referred to as the Employer or MUPD, were parties to a collective bargaining agreement which provided for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held in Milwaukee, Wisconsin on December 3, 2019. The hearing was transcribed. Afterwards, the parties filed briefs and reply briefs whereupon the record was closed on February 25, 2020. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

**ISSUE**

The parties stipulated to the following issue:

Was Officer Perkins' termination for just cause as required by Article 4, Section A, of the Collective Bargaining Agreement? If not, what is the remedy?

### **PERTINENT CONTRACT PROVISIONS**

The agreement being interpreted here is the parties' 2016-2019 collective bargaining agreement (CBA). It contained the following provisions:

#### **ARTICLE 4 – MANAGEMENT RIGHTS**

- A.** The management of Marquette University, the control of its properties, and the maintenance of order and efficiency is the sole responsibility of the University. Nothing in this Agreement shall be intended or interpreted as a waiver of any of the usual inherent and fundamental rights of management regardless whether the same were exercised previously, and the same are hereby expressly reserved to the University. University and the Department policies are controlling unless this collective bargaining agreement shall control. The University has the exclusive right, directly or by delegation to the Marquette University Police Department, to establish and implement policies, to organize, direct and manage the Marquette University Police Department, and to direct the work force, including but not limited to the right to hire, train, assign, supervise, promote, transfer, suspend, discharge for just cause...
- B.** The University may establish and enforce reasonable work rules and policies in connection with its operations and the maintenance of discipline, providing such rules are not contrary to the terms of this Agreement. If there is a disagreement between the University and the Association as to what constitutes "reasonable" under this section, the grievance procedures of this Agreement shall apply.

#### **ARTICLE 10 – DISCIPLINE**

- A. Just Cause.** No bargaining unit employee shall be disciplined except for just cause.
- B. Progressive Discipline.** The University shall apply progressive discipline; however, the listing of disciplinary levels in this Article does not preclude starting disciplinary action at a higher

level when the seriousness of the incident warrants such discipline, nor does it preclude imposing discipline more than once at a particular level, depending upon the totality of the circumstances.

**C. Discipline Levels....**In no case shall discipline be imposed before the bargaining unit employee has been informed of the violation and given an opportunity to respond. Discipline other than for unacceptable attendance shall be imposed at any of the following levels, up to and including discharge, depending upon the severity of the violation:

\* \* \*

(4) Discharge. The bargaining unit employee is involuntarily separated from employment with the University. A written record of the discharge shall be maintained in the bargaining unit employee's official personnel file in the Human Resources Department.

**D. Human Resources.** The Department shall consult with the University's Human Resources Department prior to imposing any discipline, but the final decision as to the discipline remains with the Department.

### **PERTINENT DEPARTMENT POLICY**

The Employer has a policy regarding its ride-along program. It provides in pertinent part:

#### **11.3.00 Purpose**

The purpose of this Policy is to provide a citizen with firsthand knowledge of the patrol function and a broader knowledge of basic police procedures. It further serves to supplement classroom training in basic police procedures through observations and conversations with police officers during the performance of routine patrol functions. Additionally, it fosters mutual respect between the community and the criminal justice system.

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H. Scene Guidelines

Officers shall adhere to the following guidelines when determining whether to allow a ride-along to enter a scene:

1. Ride-alongs may not accompany officers into private residences or into any other place not readily open to the public when the officer's legal basis for entering is not based upon consent (e.g., warrant execution, exigent circumstances, community caretaker, etc.).
2. Ride-alongs may accompany officers into private residences or into any other places not readily open to the public when:
  - a. The owner/resident or other person in control of the premises expressly consents to the ride-along's entry.
  - b. The ride-along is directly assisting the officer in the performance of the officer's duties (example, intern assisting with searching or evidence collection during search warrant execution).
3. Ride-alongs may accompany officers any place that is open to the public, subject to state and local laws (i.e., underage persons not to enter taverns).
4. Ride-alongs may not exit the squad car during a traffic stop prior to the occupants being secured, unless it is necessary to ensure their safety or approved by a supervisor.

### **BACKGROUND**

Marquette University (hereinafter MU) is a private university in Milwaukee, Wisconsin and has its own state-certified police department. The Association is the exclusive bargaining representative for the police officers in that department. Perry Perkins was a police officer in that police department until his discharge on February 19, 2019. This case involves his discharge.

MU had a Public Safety Department prior to May 1, 2015, at which time it was authorized to have a state-certified police department to handle its law enforcement needs. Thus, the Marquette University Police Department (hereinafter MUPD) has existed only since May 1, 2015. Unlike municipal police departments, MUPD's unique mission is to protect the MU community,

with the “number one priority” being the students. That means that MUPD police officers are employed to protect MU students.

On September 13, 2016, MU and the MUPD hired Perry Perkins as a police officer. He had prior law enforcement experience with the Dane County (Wisconsin) Sheriff’s Department, where he was employed for three and one-half years. During his employment with the MUPD, he received only one performance evaluation in 2017 because he was in training during 2016 and the 2018 evaluation would have been completed in March of 2019, after his employment was terminated.

Six months into his employment with MUPD, on March 23, 2017, Perkins received a verbal warning for violating the MUPD’s vehicle pursuit policy. Afterwards, he received remedial training on vehicle pursuits. Less than six months after receiving the verbal warning and remedial training, on September 7, 2017, Perkins was suspended without pay for three working days (36 hours) for again violating the MUPD’s vehicle pursuit policy. In that incident, he operated his squad on urban streets at speeds in excess of 50 miles per hour over the speed limit, through twelve red lights, without braking or even slowing. Perkins received no other discipline from the MUPD prior to his termination in this matter. Specifically, Perkins was never given any discipline for violating the Employer’s ride-along policy. Perkins received a commendation in May of 2018, along with several other officers, for their involvement in a carjacking incident.

This case involves the MUPD’s ride-along policy. As the term suggests, a “ride-along” occurs when someone requests an opportunity to ride-along in the officer’s squad to see what police officers do. That policy is designed to protect the safety of civilians participating in ride-alongs. It imposes certain limitations to try to reduce the risk to civilians of their being harmed while riding along with police officers. The usual procedure when someone requests a ride-along at the MUPD is a lieutenant typically receives the inquiry and forwards it to the appropriate sergeant supervising the shift on which the ride-along will take place, and the sergeant assigns it to a police officer. MUPD employees also may initiate ride-along requests for relatives or friends pursuant to Section D of the MUPD’s ride-along policy, with the approval of the employee’s immediate supervisor or shift commander.

Prior to the incident at issue in this case, Perkins had taken civilians with him in his squad for ride-alongs 10-15 times before. Insofar as the record shows, during those ride-alongs he had not let the civilian exit the squad car during a traffic stop for any reason or let the civilian search a vehicle. Also, other than being asked as a new employee to read and sign off on the ride-along policy, Perkins did not receive any training from the MUPD on this policy.

### **FACTS**

On January 18, 2019, Sergeant Laboy, who was Perkins’ immediate supervisor, received an email from his lieutenant informing him that a male civilian had requested a ride-along with Perkins on that date. That man did not come in for his ride-along that evening due to that day’s weather conditions. During roll call on that date, however, Perkins told Laboy that he was instead

taking an employee of Sendik's (a grocery store on the MU campus) out for a ride-along. Perkins did not tell Laboy that the Sendik's employee was also a MU student. This was not the usual procedure, and typically does not occur during roll call on the date the ride-along is planned. Laboy asked Perkins who authorized this ride-along, because Perkins was already scheduled for another ride-along that day. Perkins responded that he "spoke to the Chief." The "Chief" that Perkins referenced in his short statement to Laboy was Chief Hudson, who had only been with the MUPD for several weeks. Laboy did not contact Hudson to confirm whether she had authorized the Sendik's employee for a ride-along because Laboy knew that there had been some retail thefts at that grocery store. Laboy therefore thought it was plausible that the Chief had authorized a ride-along by a Sendik's employee. Perkins' statement that he "spoke to the Chief" led Laboy to believe the Chief had approved the ride-along. However, Chief Hudson did not authorize Perkins to take a particular Sendik's employee on a ride-along. What had happened days earlier was that Perkins had stopped in the Chief's office and asked her whether it was a good idea to have Sendik's employees go on ride-alongs in light of recent retail theft problems at the store. The Chief responded that she thought that it would be a good idea. That was the extent of their brief discussion. During this discussion, Perkins did not ask the Chief to approve a particular person for a ride-along.

Although Perkins did not ask the Chief to approve a particular person for a ride-along, it was apparent that Perkins had a particular person in mind when he raised the foregoing question with the Chief. The particular person that Perkins had in mind for a ride-along was Sendik's employee Jennifer Marban. Marban is a Sendik's employee who also is a MU student. At the time, Marban was a junior studying criminal justice. Marban had met Perkins when he patrolled around Sendik's. Marban and Perkins were friends. Marban had contacted Perkins directly and set up a ride-along with him for January 18, 2019.

That day about 6:30 p.m., Marban arrived at the MUPD station for her ride-along with Perkins. Prior to the ride-along, Marban had no connection with the MUPD. While the MUPD employs interns, Marban was not an intern. After she arrived, Perkins got a ballistic vest for Marban to wear during the ride-along. Perkins also had Marban sign the standard liability waiver form that MUPD has all ride-alongs sign. Perkins also gave Marban some instructions to follow during the ride-along. Then they commenced the ride-along. It was snowing at the time.

About 10:20 p.m. that night, while Perkins was on patrol in his squad with Marban, Perkins made a traffic stop. What happened during that stop is identified in detail below.

The stop in question occurred in the 1000 block of N. 17<sup>th</sup> Street, which is close to the MU campus. The traffic stop was recorded by the dash camera in Perkins' squad and by other police cameras in the area.

Perkins stopped the vehicle in question for not having the headlights turned on and for going straight through an intersection from the turn lane. When Perkins stopped the car, he did not know why the driver did not have his lights on, or why he went straight through the intersection from the turn lane. Additionally, when Perkins stopped the car, he could not see into the stopped

car (even though his headlights were shining into the car) because both the rear window of the car and the driver's side windows were covered with snow.

Immediately after the car stopped, the driver got out of the vehicle. Perkins directed the driver to get back into his car. The driver complied with Perkins' directive and got back into his car. While that was happening, another vehicle pulled up behind Perkins' squad. The driver of that car was connected to the driver that Perkins had stopped. Perkins directed that driver to pull his car in front of the car he had stopped. The driver of this second car complied with Perkins' directive and drove from behind Perkins' squad to a space in front of the car that Perkins had stopped. Shortly after that happened, MUPD police officer Robert Hatch arrived on the scene as backup. Hatch parked his squad behind Perkins' squad. Both squads had their lights activated and headlights on.

While Perkins and Marban were still in his squad, Marban asked Perkins if she could get out of the squad when he was questioning the driver of the stopped car. Perkins said that she could. When Perkins told Marban she could exit the squad, all he knew about the driver of the stopped car was that he had complied with his directive to get back into his car (after he initially got out).

Perkins and Marban then exited the squad at the same time. Marban initially walked over to the sidewalk on the right of the squad, and later moved to a position where she was closer to the back bumper of the stopped car. While she stood there, Marban was silhouetted by the squad's headlights, takedown light, side light and the red and blue emergency lights which were all on. While Marban stood there, Perkins and Officer Hatch (who by then had exited his squad) talked with the driver of the stopped car. The driver said his vehicle was having electrical problems. After Perkins obtained the driver's license from the driver, Perkins and Marban returned to their squad and Hatch returned to his squad.

Perkins then ran the driver's name through a computer database and in doing so, learned that Fond du Lac County had a warrant out for the driver's arrest for possession of marijuana, but that Fond du Lac County would not extradite from non-adjacent counties. Thus, Perkins could not arrest the driver on that basis. After learning that, Perkins decided to search the vehicle because he suspected there were drugs in it. He then told Marban that "the car smells like weed; we're gonna search it." Perkins, Marban and Hatch then got out of their squads again and walked up to the stopped vehicle, with Marban standing between Perkins' squad and the stopped vehicle. When she did so, Marban was again silhouetted by the lights coming from the squad.

At that point, Perkins asked the driver for consent to search the vehicle, to which the driver responded, "You can search the vehicle; you can do whatever the fuck you want." Perkins then had the driver get out of the car whereupon Perkins patted him down. No contraband was found in his possession. Perkins then turned the driver over to Officer Hatch, who walked the driver past Marban and put the driver in the back of Perkins' squad. The driver was not handcuffed at any time during this process.

After that, Perkins asked Marban if she would like to search the vehicle, and she replied in the affirmative. Perkins then gave her latex gloves which she put on. Marban then got into the

stopped car. She first sat in the driver's seat while Perkins was outside the vehicle standing next to her. While Perkins held a flashlight which illuminated the area, Marban then searched under the dash, under the seats, in the glove box, and in the center console. When Marban searched the latter two areas, she moved things around. Marban then got out of the front seat of the car and moved to the back seat where she searched the back seat on both sides. When Marban searched the back seat, Perkins was still outside of the vehicle standing next to the car holding the flashlight. Finally, Marban and Perkins searched the trunk of the car. As they did that, they stood next to each other. No contraband was found during the search. After the search was over, Marban and Perkins returned to Perkins' squad, and Perkins released the driver of the stopped car from the back seat of his squad.

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The next day, Marban told her boss at the grocery store (Robert Hovanec) about her ride-along experience from the prior evening. Specifically, she told Hovanec that the officer had stopped a car, that there was a warrant for the driver's arrest, that the car smelled like marijuana, and that the officer had let her search the vehicle. After Hovanec heard Marban's account of her ride-along, Hovanec was concerned enough by what he heard to later seek out a MUPD officer. When he did so, Hovanec posed the following rhetorical question to the MUPD officer: "If I was a ride-along and you did a stop and there was a suspicion of marijuana and the guy had a warrant, would you let me search the car?" That officer had some "safety concerns" regarding what Hovanec told him about Marban's ride-along, so he later reported the matter to his supervising sergeant, who in turn forwarded the information to Assistant Chief Kranz and Chief Hudson. Hudson then directed Kranz to initiate an internal investigation, and Kranz assigned the investigation to Detective Lieutenant Erwin.

Erwin subsequently began his investigation into the matter.

While that investigation was ongoing, Chief Hudson reviewed videos of the stop referenced above from Perkins' vehicle dashboard camera and from the MUPD's Communication Information Center (CIC). When she did that, Chief Hudson had these concerns about what she saw on the videos: the windows of the stopped car being covered with snow, thereby obstructing the view into the vehicle; a second vehicle pulling over; the first driver exiting his vehicle right away; Marban being out of the squad and standing silhouetted in the squad's headlights; and Marban's search of the vehicle. Chief Hudson then reviewed her concerns with Assistant Chief Kranz and Elizabeth Sides from MU's human resources department. Collectively, they decided to put Perkins on paid leave pending Erwin's completion of his investigation of the January 18, 2019 ride-along event. On the next day that Perkins reported to work (January 28, 2019), Hudson met with Perkins in a very short meeting and notified him that he was being placed on paid administrative leave pending investigation of misconduct charges against him relating to that ride-along event.

As noted above, Erwin was assigned to investigate the matter. In doing so, he reviewed videos recorded by the dash camera in Perkins' squad and by a camera in the MUPD's CIC and included in his investigative report details of what he saw on the videos. He also interviewed five



people in addition to the officer who first reported being contacted by the Sendik's store manager; reviewed Perkins' personnel records; reviewed the MUPD's ride-along policy; and reviewed the records of the traffic stop in question. One of the people who Erwin interviewed was Marban. At the hearing, the parties stipulated that Marban's statements from her investigative interview would be considered her testimony in this case. In her interview, Marban stated that she "felt safe during the traffic stop," and that "she hoped she did not do anything wrong that is going to get someone into trouble because she didn't know any better." Upon completing his investigation, Erwin submitted his report to Assistant Chief Kranz. It was not Erwin's role to make any recommendations in connection with his report and he did not do so.

After Chief Hudson received Erwin's report, she met again with Assistant Chief Kranz and Elizabeth Sides from human resources. After considering lesser discipline than termination, the three jointly decided to discharge Perkins. Those three Employer representatives met with Perkins and his union representative on February 19, 2019 and notified them that Perkins employment was terminated. The basis for the discharge was that Perkins let the ride-along exit the squad before the driver was secured and let the ride-along search the vehicle. The Employer alleged that those two actions violated MUPD's ride-along policy.

The Association subsequently grieved the discharge. The grievance was appealed to arbitration pursuant to the parties' CBA.

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The record shows that when Perkins and Marban searched the trunk of the car that night, Laboy was in the CIC (the department's dispatch center) for several minutes. At the hearing, a former dispatcher testified that as he watched the video of that unfold, Laboy watched it too. Laboy testified he does not remember watching any video of the traffic stop in question that night.

Perkins was the only officer disciplined in this matter. Officer Hatch (who was present during most of the traffic stop and for the entire search of the vehicle) was not disciplined. Neither was Laboy.

## **DISCUSSION**

The parties stipulated that the issue to be decided here is whether there was just cause for Perkins' discharge. I answer that question in the affirmative, meaning that I find the Employer did have just cause to discharge him. My rationale follows.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase "just cause" is not defined in the parties' CBA, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of "just cause," one commonly accepted approach consists of addressing these two elements: first, did the employer prove the

employee's misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was justified under all the relevant facts and circumstances. That's the approach I'm going to apply here.

Before I address what happened on the day in question, I've decided to review the following background information to give context to what happened. On January 18, 2019 Perkins gave a ride-along. As the name implies, it is an opportunity for a non-law enforcement officer (i.e. a civilian) to see police work up close and personal. This was not a new work experience for Perkins; he had done it 10 to 15 times before. Each of those prior ride-alongs was apparently without incident. Additionally, in none of those ride-alongs had Perkins let the ride-along exit the squad during a traffic stop or let the ride-along search a vehicle. Here, though, Perkins let the ride-along do both those things. The propriety of his doing that is at issue herein.

Before I address those matters though, I'm first going to address what I call the permission issue. What I'm referring to is whether Perkins had obtained permission for Marban to go with him on a ride-along on the date in question. Simply put, he had not. The following facts show this. On the day in question Perkins told his supervisor (Laboy) that he was taking a Sendik's employee on a ride-along on that shift. That was not the normal procedure (i.e. for a patrol officer to simply inform a supervisor that a ride-along was going to occur that day), so Laboy asked Perkins who had authorized that ride-along. Perkins responded that he "spoke to the Chief." Not surprisingly, this statement led Laboy to believe that the Chief had, in fact, approved Marban for the ride-along on that date. However, the Chief had not, in fact, approved a specific person for a ride-along with Perkins on the day in question. While Perkins' statement to Laboy may not have been an outright lie, it certainly did not accurately reflect what the Chief had said to Perkins. That's problematic, of course, because a subordinate is not supposed to intentionally misrepresent the statement of a supervisor. Employees who do that can fairly be disciplined for same. Here, Perkins misled Laboy into believing that the Chief had approved Marban for a ride-along on the day in question when she had not. That being so, the Employer could have disciplined Perkins for misrepresenting to Laboy that the Chief had approved Marban's ride-along with Perkins for the day in question when in reality, she had not. To do that, all the Employer had to do was reference it in the discharge letter. However, it did not do so. That was the Employer's call to make. Having chosen not to reference the permission matter in the discharge letter means that it was not a basis for the discharge. Building on that premise, the undersigned will not comment further on the permission matter in this discussion or use it as a basis to justify the discharge.

### **The First Element of Just Cause**

As previously noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct. Attention is now turned to making that call.

MUPD contends that "in two instances during the ride-along on January 18, 2019, Perkins jeopardized the safety of a civilian student and placed her in danger." While it will be addressed in more detail later, it suffices to say here that the two instances involve: 1) letting Marban exit the squad during the traffic stop before the vehicle's driver was secured, and 2) letting Marban search

the stopped vehicle. MUPD contends that by doing those two things, Perkins violated the MUPD's ride-along policy.

Sometimes when an employee is charged with workplace misconduct, they successfully argue that their conduct was not misconduct because the employer did not have a work rule proscribing the conduct they engaged in. That is not the case here. In this instance, MUPD has adopted a very detailed policy dealing with ride-alongs. That policy provides in pertinent part:

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2. Ride-alongs may accompany officers into private residences or into any other places not readily open to the public when:
  - a. The owner/resident or other person in control of the premises expressly consents to the ride-along's entry.
  - b. The ride-along is directly assisting the officer in the performance of the officer's duties (example, intern assisting with searching or evidence collection during search warrant execution.)

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4. Ride-alongs may not exit the squad car during a traffic stop prior to the occupants being secured, unless it is necessary to ensure their safety or approved by a supervisor.

This policy and its application here will be discussed later.

I now return to the charges made in the discharge letter.

First, the Employer faults Perkins for letting Marban exit the squad before the driver was secured. The record establishes that Marban exited the squad before Perkins had even gotten out of the squad himself and approached the stopped car. At that point in the traffic stop, all Perkins knew about the male driver was that the driver had exited his car but had promptly returned to his car after Perkins ordered him to do so. Aside from that one act by the driver, Perkins did not know anything else about the driver. That meant all of the following matters were still unknown. First, Perkins did not know the identity of the driver. Second, because of that, Perkins did not know if the driver was a fugitive or was wanted on criminal charges, or whether he was armed, or whether he had contraband in the car, or whether he had a history of using weapons or attacking others. Third, while all those unknowns applied to the driver, Perkins did not even know how many people were in the stopped car because both the rear window and the driver's side windows of the car were covered with snow. That meant Perkins could not see into the car to determine the number of occupants. If there was more than one occupant in the car, all those unknowns would apply to them as well. Finally, those same unknowns applied to the second vehicle that pulled ahead of the stopped vehicle. It was in that context - with all those dangerous unknowns and where Perkins had not yet secured the driver - that Perkins first let Marban exit the squad.

Perkins stated reason for allowing Marban to exit the squad before he secured the driver was that the driver had been “cooperative” when he (Perkins) told him to return to his car after he had initially gotten out of it. As Perkins saw it, since the driver had returned to his car after being asked to do so, that initial cooperation meant that he would be cooperative throughout the traffic stop. However, that was not how Assistant Chief Kranz saw it when he viewed the videotapes of the traffic stop. Kranz testified that, “It’s always a red flag when somebody jumps out of the car at the beginning of the traffic stop.” Kranz elaborated on his premise as follows: “when somebody exits the [vehicle] immediately upon a traffic stop, that means they’re trying to separate themselves from something that’s in the car . . . [i.e. contraband]...When they get back into the car, they’ve now put themselves back in contact with whatever that possible contraband may be. . . .” Because of that, Kranz did not think that the driver’s initial cooperation meant that the driver’s cooperation would continue for the balance of the traffic stop.

The MUPD’s ride-along policy requires that a ride-along remain in the squad during a traffic stop until the occupants of the stopped vehicle are secured (i.e. patted down and placed in a squad car). Once the occupants have been secured, then the risk of harm to a civilian ride-along is greatly reduced. Here, Perkins allowed Marban to exit the squad and stand silhouetted in the squad’s headlights so she could observe him talking with the driver **before** Perkins even approached the vehicle, obtained the driver’s identification, or patted him down.

That was problematic. Here’s why. Although Perkins did not know it yet, there was a warrant out for the arrest of the driver. If the driver of the stopped vehicle did not want to be arrested for that outstanding warrant, he conceivably could have attacked anyone who came out of the squad. If that had happened, Marban could have been a target because she was the first person out of the squad and was silhouetted by the squad’s headlights. The driver would not have known that she was a civilian ride-along.

The ride-along policy allows ride-alongs to exit the squad during a traffic stop prior to the vehicle’s occupants being secured only if (1) it is necessary to ensure their safety, or (2) it is approved by a supervisor. I will address these points in inverse order.

First, Perkins testified that he believed it was within his discretion to allow Marban to leave the squad before the driver of the vehicle was secured, without asking for his supervisor’s approval. However, he was wrong, because it was not within his discretion to do that. The policy does not state an officer may exercise discretion as to when a ride-along may exit the squad. The policy provides only two situations in which a ride-along may exit a vehicle prior to securing the occupants: permission of a supervisor, or for the safety of the ride-along. There is no dispute that Perkins did not seek, nor did his supervisor give, permission for Marban to exit the vehicle before the driver was secured.

The focus now turns to the other exception (i.e. whether Marban had to exit the vehicle for her own safety). Although Perkins claimed that he wanted Marban out of the squad because she would be safer where he could see her, the fact is that he did not direct her to exit the squad. Rather, Marban asked if she could get out of the squad, and Perkins agreed. While the dash cam video

confirms that Marban said something about “getting out,” it reveals no comment from Perkins telling her he wanted her to be out of the squad so he can see her. This casts doubt upon his claim that he wanted her outside of the squad so he could see her, because if that were true he would have told her that he wanted her out of the squad whenever he got out of the squad. That did not happen.

Additionally, there is no indication that Perkins ever told Marban where to stand. If she was off to the side of the squad, it would have been difficult for him to see her past the flashing squad lights. Her statement says nothing about him directing her where to stand, and she states that she moved from the passenger side to the driver’s side of the stopped vehicle. The dash-cam video shows her standing in various places, including in the squad’s headlights between the squad and the stopped vehicle, on the curb, and on the driver’s side of the stopped vehicle.

While there could conceivably be circumstances in which a ride-along would be safer outside the squad than remaining inside it, such as if the squad were to catch on fire or, as Perkins’ counsel suggested, a “crane falling on the car”, no such exigent circumstances occurred in the situation involved here. I therefore find that Perkins had no legitimate reason for letting Marban exit the squad while he first approached the stopped vehicle or at any other time prior to securing the driver in the back of the squad. As for Perkins contention that Marban would have been “a sitting duck” if someone started shooting into the squad because the MUPD squads are not equipped with ballistic paneling and bulletproof windows, it was the view of the MUPD law enforcement supervisors at the hearing that if that had happened, Marban would have had more protection and been safer inside the squad than standing outside of it. Their view conflicted with Perkins and the WPPA business agent who thought Marban was safer outside the squad. After weighing their conflicting testimony, I concur with the MUPD supervisors that had that happened, Marban would have been safer in the squad than standing outside of it.

The ride-along policy requires that ride-alongs remain in the squad (with two exceptions) during traffic stops until the occupants of the stopped vehicle are secured. While there are two exceptions stated in the policy, I find that neither of the exceptions applied in this case. Building on that premise, I further conclude that Perkins placed Marban at risk of harm by allowing her to leave the comparative safety of the squad and stand silhouetted in the headlights. Perkins’ claim that Marban was safer standing outside the squad than she would have been in the squad is not persuasive. By allowing Marban to exit the squad before the driver was secured, Perkins violated Section 4 of the ride-along policy. It also showed poor judgment from a police officer whose job is to protect MU students. The fact that Marban was not harmed as a result of exiting the squad and standing outside the squad is irrelevant to the question of whether Perkins violated the ride-along policy.

In so finding, I am aware that Marban later told the MUPD’s investigator that she “felt safe during the traffic stop.” However, whether she felt safe is not a factor in deciding whether the ride-along policy was violated. More significant is her statement to the investigator that “she hoped she did not do anything wrong that is going to get someone in trouble, **because she didn’t know any better.**” The emphasized part is what is important here. An untrained ride-along lacks the knowledge and experience to realize how much danger exists in every traffic stop. The ride-along policy’s requirement that the ride-along stay inside the squad until all occupants of the vehicle are

secured is a means of limiting the ride-along's exposure to the risk of harm in every traffic stop. While Marban didn't know any better, Perkins should have.

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Before I address the second charge against Perkins, I've decided to emphasize the following facts to give context to what happened next. After Perkins learned there was a warrant for the driver's arrest for the possession of marijuana, he told Marban that he suspected drugs might be present in the vehicle, so he wanted to search it.

While a search was conducted, I'm first going to address how that happened. It unfolded as follows. Perkins simply asked the driver for consent to search the car, to which the driver responded, "You can search the vehicle, you can do whatever the fuck you want." While the driver certainly gave Perkins consent to search the car, it is expressly noted that the driver did not say that someone else could search the car. That is important, of course, because it was not Perkins that ultimately searched the car. [Note: the topic of consent as it relates to the ride-along policy will be addressed later.]

Here's what happened next. After Perkins obtained the driver's consent to search the car, Perkins asked Marban if she wanted to search it. Not surprisingly, Marban said she would. What is important about this verbal exchange is that it was Perkins who invited Marban to search the vehicle; Marban did not ask to conduct the search. This verbal exchange differed from the one dealing with Marban's exiting the squad because in that one, it was Marban who asked to exit the squad.

While the Employer does not fault Perkins for searching the car, it does fault him for letting Marban do it. The focus now turns to other claims relating to the search.

Perkins claims that he and Marban discussed how to search a vehicle while they were patrolling in the squad, so he thought she would be able to safely conduct the search. He also felt that because he was right behind her shining a flashlight and telling her where to look, she was safe. Assistant Chief Kranz disagreed, testifying that "there's a lot of threats within that vehicle that can do harm to somebody who's not trained to conduct that kind of search." For example, the ride-along could have come into contact with potentially lethal drugs such as fentanyl and heroin, as well as weapons and needles. Kranz also felt that shining a light and showing Marban where to search did not provide adequate safety for her, because there are many places within a vehicle where people might hide contraband, "and the only way you're going to come across that is by putting your hand in there and feeling around where that object might be." He then went on to say:

The police are afforded vast powers as law enforcement officers. The two most powerful things we have - people think we have a gun and can kill people - and that's not the most powerful thing. The two most powerful things we have is the ability to stop and detain somebody against their will and the ability to search and seize property.

And a lot of training goes into doing that correctly and being able to go to a court of law and articulate what you just did and the seizure of that property. And it's governed by a lot of rules that takes months to learn, and I don't know how a ride-along who's been in a squad car for a couple hours can properly search a car and then testify in court as to what they found legally.

Even if Perkins was trying to encourage Marban's interest in a law enforcement career, letting her search a vehicle with no training other than some conversation while patrolling with him that night was, at a minimum, ill advised.

That said, before the search started, Perkins did two things to protect Marban during the search. First, he gave her latex gloves to wear. Second, he told her not to touch any illicit materials if she found them. As he sees it, those acts on his part were sufficient to protect Marban during the search. I find otherwise for the following reason.

While Perkins may have been looking where Marban was looking during the search, it was not his fingers that were reaching into spaces and probing around things; it was hers. That fact was crucial because at that point, Marban was doing the search and Perkins was essentially an observer. It is not supposed to be that way. As previously noted, the ride-along is not supposed to search the vehicle – the trained police officer is. Here, though, those roles were reversed. To the extent that Perkins thought that it was okay to do that here, he was just plain wrong. Marban should not have conducted any part of the search. This case would have been much harder for me to decide if Marban had been outside the car looking over Perkins' shoulder as he searched the vehicle. However, that is not what happened here. There simply was no legitimate or lawful reason for Perkins to let Marban search the vehicle; Perkins should have done it himself.

When Perkins let Marban search the vehicle, he not only exposed Marban to unnecessary risk, he also jeopardized any potential criminal prosecution that may have resulted from drugs being found in the vehicle. Particularly if Perkins truly had a "hunch" that the vehicle might contain marijuana, any possible criminal charges that may have resulted from the search would have been compromised by having a civilian conduct the search.

While no contraband was found during the search and Marban was not injured, that does not matter or excuse Perkins' actions. He unnecessarily exposed Marban to a risk of harm by letting her search the vehicle. He was supposed to be protecting her, not putting her in harm's way. That, in turn, exposed MU to liability.

The final question relating to the car search is whether the Employer's ride-along policy permitted it. In their briefs, both sides debate whether a vehicle constitutes a "place not readily open to the public" within the meaning of Section H.1 of the policy. However, in my view, the key question is not whether the stopped vehicle was a public or private place, but whether the driver's consent for Perkins to search the vehicle permitted Marban to search the vehicle under the terms of the ride-along policy. I find it did not. Here's why. The policy states that ride-alongs may accompany officers into "places not readily open to the public" only if the person in control of the "premises" (usually not a term applied to a vehicle) "expressly consents to the ride-along's entry."

While Perkins claimed that the driver's statement that "You can do whatever the fuck you want" meant that he had "blanket consent" to do whatever he wanted, I find that did not constitute "express consent" to the ride-along entering the driver's vehicle, much less searching it. In so finding, it is specifically noted that there is no evidence in the record that the driver was even aware that the person standing behind his car was a ride-along, so he could not give knowing consent to have the ride-along enter and search his car.

The policy also states in Section H.2.b that a ride-along may accompany an officer into a private residence or other place not readily open to the public "when the ride-along is directly assisting the officer in the performance of the officer's duties . . ." The sentence then goes on to provide an example, and the stated example is an intern assisting with a search or evidence collection during a search warrant execution. The Association argues that Marban assisted with the vehicle search, and therefore was in compliance with H.2.b of the ride-along policy. I find otherwise for this reason: a civilian ride-along is not the same as an intern within the meaning of H.2.b. That is because interns are paid employees of the MUPD who have undergone background checks and received training and exposure to "just about every aspect of law enforcement" work. In contrast, a ride-along has no employment relationship with the MUPD and has not undergone a background check. Here, of course, Marban was a ride-along, not an intern. That is an important distinction. What the Association is essentially trying to do here is read the word "intern" out of existence in H.2.b after the word "example" and substitute the word "ride-along" in its place so that the phrase reads "ride-along assisting with searching or evidence collection . . ." The problem with that, of course, is that the language in that part of H.2.b does not say "ride-along"; it says "intern". Thus, H.2.b does not authorize a ride-along to search a vehicle. That means that Perkins violated that section of the ride-along policy when he let Marban search the vehicle.

The foregoing discussion establishes that the Employer's ride-along policy imposes certain limitations on a ride-along's activities. On the night in question, Perkins ignored those limitations when he 1) let the ride-along exit the squad during a stop before the driver of the stopped car had been secured; and 2) when he let the ride-along search the vehicle. By doing those two things, Perkins violated the ride-along policy. If Perkins had simply kept Marban in the squad until he had secured the driver of the stopped car, he would not have violated the ride-along policy. Similarly, if Perkins had simply let Marban watch the search – rather than conduct it – I probably would not be reviewing a discharge.<sup>1</sup>

### **The Second Element of Just Cause**

I previously indicated that in reviewing the appropriateness of the discipline under a just cause standard, I was going to consider all the relevant facts and circumstances. In my view, the phrase "relevant facts and circumstances" encompasses procedural due process, progressive discipline and disparate treatment. Those matters will be addressed in the order just listed.

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<sup>1</sup> In this case, I don't need to decide if it violates the ride-along policy for a ride-along to simply observe a search conducted by an officer, because that is not what happened here. As already noted, Marban conducted the search here; she did not merely observe Perkins do it. That's a huge difference.



I begin my discussion on the first matter referenced, procedural due process, with the following introductory comments. When the term due process is used in the grievance arbitration context, it generally refers to employers treating employees fairly during the disciplinary process. Unfair treatment of an employee during the disciplinary process undermines the process and may lead an arbitrator to reverse the discipline imposed by the employer.

One implicit aspect of due process which is sometimes addressed in arbitration awards is whether the employer conducted a fair investigation before it acted against the employee. In this case, it was noted in the facts that the MUPD conducted an investigation. Sometimes a union argues that the employer's investigation was not thorough, fair or complete. In this case, the Association makes no claim that the investigation was not thorough or complete. The Association implies that the investigation was not fair because of how it started.

In this regard, the Association correctly notes that the investigation was not started because of any concerns that Laboy or Hatch had with what Perkins had done, or because Marban had qualms with how she was treated, or because the driver involved in the stop filed a complaint with the MUPD. Instead, the Association emphasizes that the investigation started because Marban's boss at the grocery store heard about what happened on her ride-along, and he spoke to a MUPD officer about what Perkins had done. That officer "had some safety concerns", so he reported the matter to a department supervisor. That is how the investigation started.

While the Association implies that the Employer's investigation was tainted because of how it started, I find otherwise. In my view, the store manager's rhetorical question to the MUPD officer about Marban's ride-along, and the officer's subsequent concern upon hearing what Perkins had done, were the reactions of reasonable people to the situation created by Perkins. That is because ride-alongs are supposed to observe what an officer does, not perform the officer's duties. The grocery store manager's rhetorical question to the MUPD officer about Marban's ride-along shows that even a layperson understands that a police officer is not supposed to let a ride-along search a car. I therefore find that the Employer's investigation was not tainted or unfair because of how it started. That being so, MUPD's investigation passes muster.

Having found no due process violation, the focus now turns to progressive discipline. It is noted at the outset that unless serious misconduct is involved, the normal progressive disciplinary sequence is for employees to receive a warning and a suspension prior to discharge. That had happened to Perkins. In 2017, he got a verbal warning and a three-day suspension. The Association emphasizes that the prior discipline was not for violating the ride-along policy. That's true, it wasn't. That prior discipline was for violating the Employer's vehicle pursuit policy. While that prior discipline was for violating a different policy than is involved here, that does not matter. That is because this CBA does not require that subsequent discipline be for the same reason as prior discipline.

Having just noted that the prior discipline was for violating a different policy than is involved here, there is something about that prior discipline that is applicable here. It is this. In that prior discipline, the Employer faulted Perkins for using poor judgment and recklessly

disregarding the safety of others. The same thing can fairly be said about what happened here, because Perkins used poor judgment and disregarded Marban's safety during the traffic stop.

Next, while there are some CBAs that specify that a three-day suspension must always be followed by a longer suspension (prior to discharge), this CBA does not contain such language. This CBA expressly states in Article 10, Section B, that the Employer may impose discipline at any level when the seriousness of the incident warrants it. As the Employer sees it, the appropriate level of discipline in this case was discharge. The Association disagrees and contends that discharge was excessive. I'll address those competing claims below.

The Association argues that discharge is too severe a punishment and what Perkins did warrants, at most, a written warning. I disagree. In my view, Perkins' misconduct was very serious. Building on that premise, his two violations of the ride-along policy cannot be considered minor infractions. His actions were, in a word, indefensible. I don't think it is a hyperbole to say that police officers across the board know that they are not supposed to let a ride-along search a car; that is their job. If Perkins did not understand that at the time, he does now.

In prior cases where I overturned a discharge, one reason I did so was because a charge made against the employee was not substantiated. I could have done that here if even one of the two charges made against Perkins had not been substantiated. However, that did not happen. As my discussion shows, I found that the Employer substantiated both of the charges that it made against Perkins and cited as the basis for his discharge. Since those charges were substantiated, I lack that objective basis for overturning the discharge. Similarly, I have reduced discipline numerous times in cases where the employee was a long-term employee who had a clean work record (prior to the incident being reviewed). Neither of those situations exists here, so I lack that objective basis as well for overturning the discharge.

The focus now turns to the third matter referenced above, disparate treatment. It is noted at the outset that the principle of equal treatment dictates that an employer must enforce rules and assess discipline in a consistent manner; employees who engage in the same type of misconduct are to be treated the same unless a reasonable basis exists for variations in the assessment of punishment. In order to prove disparate treatment, it is necessary to show that other similar factual situations have occurred where the employer imposed either less or no punishment. That was not shown here. In this case, the Association did not establish that any other police officer in the bargaining unit had ever let a ride-along exit the squad before the driver was secured or let a ride-along search a vehicle. The absence of such evidence means that no one else in the bargaining unit has committed the same type of misconduct that Perkins did. The Association also did not show that anyone else in the bargaining unit has been charged with violating the ride-along policy. When those points are considered together, I have no factual basis for finding that Perkins was treated more harshly than anyone else. In so finding, I'm aware that Hatch and Laboy were not disciplined for their involvement in this matter. However, their involvement in this matter was far different than Perkins. Laboy was not even present at the site of the vehicle stop. While Hatch was present, he was not in control of the ride-along; she (Marban) was solely Perkins' responsibility. Aside from that, the record is devoid of any evidence of those officers' service records and their disciplinary histories with the MUPD. Without evidence of those officers' service records and disciplinary

histories, it is impossible to ascertain what factors may have weighed in the decision to not impose discipline on them. Given the foregoing, I find that Perkins was not subjected to disparate treatment in terms of the punishment imposed.

The above discussion shows that Perkins received procedural due process, was progressively disciplined, and was not subjected to disparate treatment.

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Finally, the focus turns to the Association's remaining arguments.

First, in his opening statement at the hearing, the Association's counsel characterized the Employer's safety concerns as "nonsense" because Marban was not injured that night. I disagree. Just because she was not injured that night does not lessen the significance of what happened. Marban could have been injured. Thankfully, she was not. The just cause standard does not require that someone be injured before discharge is imposed.

Second, the Association contends that management was also at fault herein. According to the Association, "if it is found that Perkins' behavior is in fact a violation of the [ride-along] policy, it is as much of an indictment of his supervisors as it is of him." What the Association is referencing in this claim is this: when Perkins and Marban were searching the trunk of the stopped car, a dispatcher in the Department's dispatch center was watching the event unfold on one of his 20 camera monitors. During that time period, Laboy came into the dispatch center for two to three minutes. The dispatcher testified that while he was there, Laboy watched the video he was watching. What the Association wants me to do here is use the dispatcher's testimony that Leboy watched the video he was watching as the basis for finding that Laboy **knew** that Perkins let the ride-along search the stopped vehicle that night, and did nothing to intervene/stop it. I can't make that requested finding for these reasons. First, Laboy testified that he does not remember watching any video of the traffic stop in question. Second, it would be one thing if the dispatcher had specifically pointed out to Laboy what he was watching, and turned the camera monitor he was watching toward Laboy. However, neither of those things happened. Third, it would be one thing if Laboy had said something to the dispatcher that indicated that he understood the significance of what was happening on the video such as, "look at that, Perkins is letting a ride-along search a car." However, Laboy didn't say anything like that; in fact, he said nothing to the dispatcher. Given the foregoing, I conclude that even if Laboy did "watch" a portion of the video of the traffic stop that the dispatcher was watching, that still does not establish that Laboy understood that Perkins was letting the ride-along search the vehicle. Said another way, we don't know what Laboy did or did not see on the video screen. That being so, there simply is insufficient proof to support the Association's claim that Laboy **knew** that Perkins was letting the ride-along search the vehicle that night and did nothing to intervene/stop it.

Having reviewed those defenses and found them unpersuasive, I find that no compelling reason was established for overturning Perkins' discharge. That being so, his discharge passes muster with the undersigned.

Accordingly, then, it is held that the severity of the discipline imposed here, discharge, was not excessive, disproportionate to the offenses, or an abuse of management discretion, but rather was commensurate with the employee's proven serious misconduct. The Employer therefore had just cause within the meaning of Article 4, Section A of the CBA to discharge Perkins.

In light of the above, it is my

**AWARD**

That Officer Perkins' termination was for just cause as required by Article 4, Section A of the CBA. Therefore, the grievance is denied.

Issued at Madison, Wisconsin, this 1st day of May, 2020.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Raleigh Jones, Arbitrator