

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

MARSHFIELD POLICE PROTECTIVE ASSOCIATION (MPPA),
WISCONSIN PROFESSIONAL POLICE ASSOCIATION (WPPA)

and

CITY OF MARSHFIELD

Case ID: 531.0002

Case Type: MA

AWARD NO. 7975

(Jared Beauchamp Discharge)

Appearances:

Roger Palek, Attorney, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, appearing on behalf of WPPA.

Jill Pedigo Hall and James Macy, Attorneys, von Briesen & Roper, 10 East Doty Street, Suite 900, Madison, Wisconsin, appearing on behalf of City of Marshfield.

ARBITRATION AWARD

Marshfield Police Protective Association (MPPA), Wisconsin Professional Police Association (WPPA) (hereinafter referred to as the Association) and the City of Marshfield (hereinafter referred to as the City or the Employer) were parties to a collective bargaining agreement that 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 instant grievance. Pre-hearing conference calls were held on November 10 and December 15, 2020. A hearing was held via Zoom on December 16 and 17, 2020. The hearing was transcribed. Thereafter, the parties filed briefs, and the City filed a reply brief, whereupon the record was closed on April 6, 2021. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

ISSUES

The Association frames the issue as follows:

Is the fitness test that was used to terminate Officer Beauchamp compliant with the standards that the parties negotiated and agreed to in Appendix C of the collective bargaining agreement and if not, what is the remedy?

The City frames the issue as follows:

Did the City violate Article 3 or Appendix C of the 2018-2020 collective bargaining agreement between the City and the Union when the City terminated the Grievant's employment for his failure to maintain the essential physical function requirements of his job as a Marshfield Police Officer?

I have not adopted either sides proposed framing of the issue. Instead, the issues which will be decided herein are the following:

1. Was the time standard of 2:15 for the quarter mile run portion of the City's annual job function test (AJT) validated and job related?
2. Did the City meet its burden of proof to establish that the time standard of 2:15 for the quarter mile run portion of the AJT complied with the first paragraph of Appendix C?
3. Did the City violate the collective bargaining agreement when it discharged Jared Beauchamp for failing the timed run portion of the AJT?
4. If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2018 – 2020 collective bargaining agreement (hereinafter CBA) contained the following pertinent provisions:

ARTICLE 3 – RESERVATION OF RIGHTS

1. The officers recognize the right of the City and the Chief of Police to operate and manage its affairs in all respects. The officers recognize the exclusive right of the Chief of Police to establish reasonable departmental rules and regulations.
...
3. The City and the Chief of Police, and the Police and Fire Commission shall retain all rights and authority to which by law they are entitled.
...
5. The City possesses the sole right to operate the City government and all management rights repose in it. These rights, which are normally exercised by the Chief of Police include, but are not limited to, the following:

- A. To direct all operations of City Police Department.

B. To hire, promote, transfer, assign and retain officers in positions with the City and to suspend, demote, discharge and take other disciplinary action against officers pursuant to the authority and under the rules, regulations, and policies of the Marshfield Fire and Police Commission.

C. To relieve officers from their duties because of lack of work or for other legitimate reasons.

...

E. To introduce new or improved methods or facilities.

F. To change existing methods or facilities.

...

J. To establish reasonable work rules.

6. Nothing in this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate with the Association concerning the above areas of discretion and policy.

APPENDIX C

Effective May 1, 2019, Marshfield Police Department officers will be required to pass an annual job-specific fitness test to measure their ability to perform the necessary minimum physical requirements for specific job tasks.

1. Upon failure of the test, the officer will be placed on light-duty assignment at the discretion of the Chief, and will be subject to re-test within ninety (90) calendar days. If the medical treatment provider of the officer identifies a specific medical restriction that caused the employee to fail the test or fail to take the test, then the City will consider reasonable accommodation as required by law. The City may also send the employee for medical examination by a different provider selected by the City and at the cost of the City.

2. At the time of the testing during the pre-test assessment, if the officer has an existing medical condition that prevents testing in the determination of the tester, and for which the employee is not already seeking medical treatment, then the City will provide the officer the initial consultation, if necessary, through the testing provider's services, if available, or the City may choose an alternative initial consultation for the officer at the City's cost. If the officer's condition needs further consultation, assessment, diagnosis, or treatment, then the officer or his/her medical insurance shall bear those costs. If the officer does not cooperate or use the services available from the City's testing provider for the initial consultation, then the City shall not be obligated to provide an alternative consultation, or bear any other cost.

3. Any discharge from service for failure to pass the test or take the test, unless related to misconduct by the officer (for example, cheating or falsification of injury) shall be considered nondisciplinary, shall be decided by the Chief of Police pursuant to Article 3, Section 5(C), and shall be subject to Article 27, Grievance Procedure.

This provision shall have no effect on a disciplinary discharge which shall be subject to the procedures outlined in Wisconsin Statutes Chapter 62.13(5).

BACKGROUND

The City operates a police department for the public safety of its citizens. The Association is the bargaining representative for the City's law enforcement personnel.

Jared Beauchamp was a police officer for the Marshfield Police Department until he was terminated on January 24, 2020. He was terminated because he did not pass the City's Annual Job Function Test (hereinafter AJT). Specifically, he failed one part of the test: the requirement of running one-quarter mile in 2 minutes and 15 seconds. This case involves his discharge.

Marshfield is one of ten communities in Wisconsin where the Fire and Police Commission (PFC) has optional powers under Wis. Stat. § 65.13. Unlike a general PFC with more limited powers, the Marshfield PFC has total control over the management and operation of the Police Department. The PFC is not a party to the CBA involved here.

This case also involves the City's AJT requirement. The AJT requires that all officers take and pass the AJT in order to continue in employment as an officer of the Marshfield Police Department. The City is one of just a handful in the state that has a mandatory AJT requirement.

The following history of the AJT is germane to this matter. In December 2015, Police Chief Richard Gramza notified all department officers of his plan to implement a job function test for department officers. Originally, this test was envisioned as a voluntary test. By 2016 though, that had changed, and it was no longer envisioned as voluntary but rather a mandatory test.

Not surprisingly, Chief Gramza's fitness testing idea was not well received by the Association or rank and file officers. Despite their opposition, Chief Gramza's fitness testing idea continued forward.

In March 2016, Gramza asked for PFC approval to enter into a contract with a professional testing provider for the creation and validation of a job function test that would test for physical readiness qualifications of the Marshfield police officers. Following PFC approval, the City retained Traci Tauferner. She is a licensed and certified athletic trainer and strength and conditioning specialist who was also certified in a variety of areas of functional fitness, job function testing and job function design testing. Prior to working with Marshfield, Tauferner had developed job function testing for other Wisconsin Police and Fire Departments.

A. The Development of the Job Function Test

Following her retention, Tauferner created a job function test (JFT) that was specific to the job functions for Marshfield police officers. Her goal was to create a test that accurately tested an officer's ability to perform all essential functions of the job.

Here is how that process unfolded. Starting in June 2016, and using the City's police officer job description, Tauferner interviewed Chief Gramza, Assistant Chief Patrick Zeps and two officer volunteers, Libby Abel and Michael Topness, to learn what they identified as the physical job functions of the job of police officer. With those same officers, she then measured the physical demands identified through the interview process. Following the interviews and measurement activities, Tauferner created the functional job description for the Marshfield police officer that identified the essential job functions of the position. From that, she created the first version of the JFT, effective July 1, 2016, for the purpose of testing the officers' abilities to perform what they had identified as the essential functions of their job.

Over the next 14 months, Tauferner worked on validating the JFT. She started by taking Officers Topness and Abel, and Chief Gramza and Assistant Chief Zeps, through the functional job description and the JFT line-by-line to see if they replicated the physical demands of the job of the Marshfield police officer. Additionally, she met with members of the Association's leadership, specifically Jason Parks, Kevin Hamill, and Michael Topness, and had them review the initial JFT and the functional job description. Prior to that meeting, Tauferner sent an email to Assistant Chief Zeps – for forwarding on to the officers – that contained questions concerning the physical requirements of the job of Marshfield police officer. She also attached the July 1, 2016 functional job description and the JFT for their review and comments. The Association leadership who attended the meeting provided responses to her questions and feedback.

Tauferner then began the process of testing validation. Over the next 18 months, Tauferner conducted five separate rounds of validation testing. The first occurred in July 2016 when Chief Gramza, Assistant Chief Zeps and officers Topness and Abel ran through the initial JFT. Based upon feedback they provided, the test was modified. On August 26, 2016 eight officers participated in a validation test of that revised JFT. Tauferner recorded the officers' recommended changes to the test directly on the test form. Following that validation test, Tauferner again revised the test, including changing the order of testing, and removing and lowering physical demands. Another battery of testing validation was conducted in March 2017.

On March 10 and March 11, 2017 all police officers on the force were required to run through the JFT unless there were extenuating circumstances – such as a medical excuse – which prevented them from participating. This testing took about 20 to 25 minutes and officers were paid for participating in the testing process. Tauferner again recorded the feedback from the officers as it was being given.

Afterwards, using the feedback she received during the testing, Tauferner again revised and simplified the JFT. After that, more modifications followed. The JFT was finalized on August 10, 2017. Because of the officers' input throughout 2016 and 2017, the final JFT settled on in August 2017 was a significantly easier test than the initial test. In other words, the final JFT was not as difficult to pass as the initial test.

One of the last changes made to the JFT before it was finalized was setting a time standard and removal of obstacles for the quarter mile timed run. From July 2016 through July 2017, no time standard was set for the quarter mile run in the validation tests. Instead, the "officers were asked to run the quarter-mile as though they were either pursuing somebody that was a danger to

the community, or they were retreating from someone who was pursuing them, or that they were trying to run towards danger if somebody was needing assistance, or if you were needing to render aid to somebody, that they would be running toward that person.” Hearing Transcript, Day 1, p. 30. As a result of the validation tests run by all active officers, roughly 80 percent of the officers were able to run the distance of a quarter mile in two minutes eight seconds. Approximately 90% of the officers were able to complete the distance in two minutes 15 seconds (hereinafter this number will be referenced as 2:15). Chief Gramza ultimately set the time standard for the quarter mile run at 2:15.

In October and November, 2017, officers participated in one more test so they could familiarize themselves with the final test. This test included the timed quarter mile run at 2:15. Of the 33 officers who took that “familiarization” test in October and November 2017, two individuals failed the test.

While the JFT was being developed and validated, Chief Gramza communicated via emails with officers regarding the development and components of the JFT, changes made to the test following validation testing, and reminding officers of the validation or practice test dates. Additionally, he discussed the test at every Annual Meeting starting in December, 2015.

The City also provided assistance and benefits to officers to prepare for the annual JFT. Chief Gramza negotiated a free membership at a local gym for any officer who was willing to use it. He allowed officers to work out on duty during paid normal work hours. In the validation testing process, off-duty officers were paid overtime for an hour of time for participating in the 15-20 minute test. Additionally, all officers were provided free access to athletic training and sports medicine services for needed assistance in learning exercise techniques, assistance in passing specific portions of the job function test, and treatment for physical injuries and ailments. Some officers made use of these services. Finally, the City updated the Police Department exercise and weight room equipment so that officers did not need to go to another gym if they were not comfortable doing so.

Tauferner was scheduled at the Police Department weekly to provide the services referenced above. Additionally, Tauferner developed and provided officers with a six-week exercise and strengthening program designed to assist officers in successful completion of the March 2017 JFT test.

B. The PFC Adopts the JFT

In March 2018, after the JFT had been finalized, the PFC considered and adopted it in an open session meeting. Before that happened, the Association had seen the final Policy draft and test standards. As a result, the Association knew that the JFT and AJT set minimal qualifications for the job of police officer. They further knew that the AJT established an annual test that would be required for determining if an officer met the minimum qualifications for the job. They further knew that if an officer failed to pass the standards test, the officer would not be qualified for the job and would be terminated. With that knowledge, the Association elected to not appear at that PFC meeting to formally challenge the JFT’s adoption by the PFC. Additionally, the Association

subsequently never objected to the PFC's adoption of the JFT Policy and has never filed a prohibited practice challenge to the PFC's authority to pass it.

The JFT Policy provided that the mandatory annual job testing requirement would become effective on May 1, 2019. That date was more than a year after issuance of the Policy and almost two years after the JFT was finalized. Immediately after the JFT was adopted and issued in March 2018, it was made available to all officers. Each officer was required to review the Policy and sign off to indicate that the officer had received it.

C. Bargaining Over the Fitness for Duty Policy and the Job Functions Test

From November 2017 till mid-June 2018, the parties engaged in bargaining over a successor CBA. In September 2017, the Association had given notice to the City reserving its rights to bargain over proposed issues regarding the AJT. At the outset of bargaining, the Association acknowledged that the City had the right to implement an annual fitness test. The parties went on to have numerous face to face discussions about that testing.

During bargaining, one of the Association's proposals was that the test standards finalized in August 2017 (including the quarter mile timed run standard of 2:15) and adopted by the PFC in March 2018 would be incorporated into the 2018-2020 CBA. The obvious inference of the Association's proposal to have the individual AJT standards incorporated into the CBA demonstrated their knowledge of and agreement to those standards. Aside from that inference, there is also the fact that Association negotiators told City negotiators that the reason the Association wanted the test standards placed in the CBA is because they did not want the test to change over time or get harder. The City declined to put the specific standards into the CBA on the grounds that by law, the standards were left to the PFC. By doing that, the City made it clear to the Association that it was preserving its management right to set qualifications.

Other proposals which the Association made were as follows. One was that the annual job test would be voluntary and incentive based. The City rejected that proposal as a matter reserved to the PFC. The Association also proposed that the AJT testing standards could be changed or lowered because they did not constitute essential functions under the law. The City rejected that proposal on the grounds that it was a matter reserved to the PFC. Another was language reflecting that the testing standards do not constitute essential job functions required for a Marshfield police officer. The City rejected that proposal. Another was that the requirements of the AJT would not exceed the standards currently in place by the Wisconsin Law Enforcement Standards Board (LESB) for new academy recruits. The City rejected that proposal. Another was that the testing standards do not constitute essential job functions under the just cause standards of Wis. Stat. § 62.13. The City rejected that proposal. Another was that proposed time-off discipline or discharge based on a failure to pass would solely be within the purview of the PFC. The City rejected that proposal. Another was that the ultimate determination of just cause under Wis. Stat. § 62.13 would be made by the PFC. The City also rejected that proposal.

In bargaining, the Association also exercised its right to bargain over the impact of the AJT. First, the Association expressed concerns over placement of an officer failing the test on light duty as to whether it constituted discipline. At the time of the Association's proposal, the Policy already

included a provision allowing the Chief the discretion to place an officer who initially did not pass the test on light duty and allow a retest within ninety days. Second, the Association also sought to have any location where an officer was performing exercise be considered a workplace for purposes of workers compensation. Although the City did not agree to make such an arrangement part of the CBA, it did allow officers injured while working out to prepare for the AJT to file workers compensation claims. Third, the Association sought to allow officers to work out during work hours to prepare for the AJT. The City agreed to that proposal. Fourth, the Association sought to allow officers to buy fitness clothing or equipment with their clothing allowance. The City agreed to that proposal. Finally, the Association proposed that the CBA include a provision that officers would be reimbursed up to \$250 per year for a gym or fitness club membership. The City declined to include the requested benefit on the grounds that the City was already providing free memberships to Association members, which it thought was a better benefit. By bargaining over those impact items, the parties defined the circumstances under which an officer who failed the test would ultimately be terminated, including a consideration of possible need for temporary accommodation due to medical restrictions.

Ultimately, based upon the remaining differing positions of the parties, the WPPA filed for interest arbitration. A mediation session was conducted on June 14, 2018. At that meeting, the parties settled on terms for a successor CBA. The settlement terms relevant here were a new provision entitled Appendix C, language allowing officers to purchase fitness equipment and clothing with their clothing allowance, and what the City considered “significant” wage increases. Appendix C mirrors the Policy adopted by the PFC. The first paragraph of Appendix C provided thus:

Effective May 1, 2019, Marshfield Police Department officers will be required to pass an annual job-specific fitness test to measure their ability to perform the necessary minimum physical requirements for specific job tasks.

This paragraph was followed by three other paragraphs that deal with what happens if an officer fails the annual fitness test. This language also sets out the procedure under which an officer would be terminated if unable to pass the AJT.

Following the mediation session, both sides ratified the tentative agreement.

D. The Final Practice Tests

Officers had five opportunities to take practice JFT tests to ensure they could pass the AJT. These five opportunities occurred in August 2018, October 2018, December 2018, February 2019 and April 2019. Officers were required to participate in at least one such scheduled practice test and no officer took a practice test in this period more than once. In the practice period between August 2018 and April 2019, only one of the 39 officers taking the test failed. In January 2019, Tauferner revalidated the test once more. After doing so, it was not changed from the August 2017 version.

On May 1, 2019, the AJT requirement “went live.” Thereafter, Tauferner conducted all AJT testing. Four officers failed their first AJT attempt after the test “went live.” Three of the officers

who failed – Zupanc, Leu-Martinek, and Meek – subsequently passed the AJT. Two of those officers sought strength and conditioning assistance from Tauferner immediately after failing and were successful in passing the AJT afterward. Officer Leu-Martinek passed one week later after working on her own. The remaining officer who failed their first AJT attempt after the test “went live” was Beauchamp.

FACTS

Beauchamp did not participate in any of the validation or practice tests before May 1, 2019. On April 8, 2019, he was released to full duty following non work-related shoulder surgery. He then appeared for a practice test on April 24, 2019, wearing a knee brace. He told Tauferner that the brace was not fitting correctly and that he was going to get fit for a new brace the next day. He provided no medical restrictions that day, which was two weeks after he had been fully released to return to work. Despite providing no medical documentation supporting a deferral, Tauferner gave him a deferral from testing because she thought it would be unsafe for him to participate based upon what he told her.

The City notified Beauchamp in May 2019 that he was scheduled to take the AJT on August 14, 2019. On July 25, 2019, he declined Tauferner’s offer of assistance to help him prepare for the AJT, and he never sought her out for strengthening and conditioning prior to taking the first AJT.

On August 12, 2019 – two days before his scheduled test date – Beauchamp sent an email to Chief Gramza and Human Resources Director Jennifer Rachu seeking an accommodation for the running portion of the AJT “due to a work-related knee injury and the aggravation and pain caused by running.” He asked to swim or bike instead of running. Since Beauchamp had been released to full duty without any restriction in early April, and had not provided Rachu with any medical information or diagnosis to indicate he should not run, she responded and asked him to provide the same prior to the test. The record shows that Beauchamp had reported a work-related knee injury in October 2012. In the Report of Injury he completed himself and filed, Beauchamp indicated that his injury was a knee strain that he had suffered when he was putting on a shoe. Insofar as the record shows, this was the only knee injury he ever sustained.

Beauchamp did not respond to Rachu or provide any medical restrictions prior to August 14, 2019. On that date, he appeared for the AJT and told Tauferner that he had pain when running and that he had just contacted his physician the day before, August 13, 2019, to request an accommodation for the run. Based upon Beauchamp’s statements, for which he again provided no medical documentation, Tauferner again deferred him from testing and notified Rachu of the deferral. Later that day he texted Tauferner that he did not have an appointment to see his physician until August 22, 2019.

On August 16, 2019, Beauchamp responded to Rachu’s August 12, 2019 request for medical information. Therein, he told Rachu “[j]ust to make things clear, I did not make a medical deferral for anything.” He then informed her that he had an appointment with his doctor for the next Thursday.

On August 22, 2019, Beauchamp’s physician, Dr. Corteen, medically cleared him to take the AJT. Dr. Corteen did so after reviewing a report of an x-ray of Beauchamp’s right knee that

had been taken that day. Beauchamp later provided the clearance document to Tauferner and she scheduled him to take the AJT on August 26, 2019.

On August 26, 2019, Beauchamp ran the quarter mile test in 3 minutes 40 seconds. That was 1 minute 25 seconds slower than required to pass the running test.

Following his failure of the AJT, in accord with the Policy and Appendix C, Chief Gramza provided Beauchamp with light duty. Additionally, Rachu sent Beauchamp an email confirming that per the Policy and Appendix C he would be placed on light duty and that he would need to retest within 90 days.

After failing the AJT, Beauchamp did not immediately seek assistance from Tauferner. He finally reached out to Tauferner for strengthening and conditioning assistance in mid-September. However, even after he sought assistance from Tauferner, he worked out only sporadically from September 18, 2019 until November 11, 2019, often cancelling appointments with Tauferner or simply not showing up for appointments. Tauferner documented this in a series of Intervention notes between September 16, 2019 and November 21, 2019. Those notes reflect that between September 1, 2019 and November 7, 2019, Beauchamp met with Tauferner once every two weeks. Even though inconsistent in his efforts, during the span of time he worked out with Tauferner, Beauchamp made progress toward meeting the AJT quarter mile run standard. On November 7, 2019, Beauchamp “unofficially” took the run portion of the AJT. While he still failed the test, he ran the quarter mile in 2 minutes 50 seconds. That was about one full minute faster than he had run the AJT on August 26, 2019. Four days later, on November 11, 2019, Beauchamp stopped working out in any way to prepare for the running test of the AJT.

Under the terms of the Policy and Appendix C, Beauchamp was required to pass the AJT by November 25, 2019 – 90 days after he failed his first AJT attempt on August 26, 2019. Beginning about November 14, 2019, Beauchamp began to assert that he was not feeling well. He told Gramza and Tauferner that he had a stomach ailment or the flu. Although he did not provide any medical information to the City that reflected any related medical restrictions from his ailment, Gramza and Rachu considered Beauchamp’s claimed gastrointestinal illness and voluntarily offered him an extension of the AJT deadline until December 6, 2019. In doing this, Beauchamp did not ask for the extension. On November 22, 2019, Rachu sent an email to Beauchamp confirming the extension and informed him that he would need to take the AJT before December 6, 2019.

On December 4, 2019, Beauchamp came to Rachu’s office and told her that he had a medical condition for which he would be seeking treatment, that he was going to take the rest of the week off, and that he would not be available on December 5 or 6. He submitted a work excuse signed by a nurse practitioner that took him off of work until December 16, 2019, but which did not identify any medical basis for the excuse and which indicated he would have no restrictions upon his return. He also submitted an FMLA request form to the City seeking leave from December 4, 2019 until an “unknown” date. That same day (December 4, 2019), Beauchamp also called Tauferner and informed her that he had “gone to the hospital with chest pains and high blood pressure.” He told her that an EKG had been performed and “came back with abnormalities.” He stated that he was scheduled “for a two-day stress test with dye Thursday and Friday.” Based solely

upon his representations, Tauferner granted a medical deferral. There is no record that Beauchamp took these alleged tests on the dates he indicated.

Beauchamp also provided the City with an additional work excuse taking him off work from December 13, 2019 until December 20, 2019. On December 18, 2019, the City received an FMLA medical certification from the same physician indicating Beauchamp would need to have leave until December 23, 2019, solely for the purpose of recovering from a test which showed his heart function to be normal. The certification released him to work with no restrictions on December 23, 2019. Based upon the FMLA documentation provided, the City granted FMLA to Beauchamp from December 4, 2019 until December 23, 2019.

During the period of his absence due to testing, Beauchamp did not communicate with Gramza or Rachu regarding the test date or to seek a deferral. However, following the receipt of the series of medical releases and certification, Rachu and Gramza discussed the matter of resetting the AJT testing deadline for Beauchamp. They again decided that because Beauchamp had not had an opportunity to prepare for the AJT between December 4 and December 23, it would be appropriate to provide him with additional time to prepare. They decided to provide him with an additional three weeks to prepare for the AJT.

On December 19, 2019, Rachu sent Beauchamp a letter recapping the medical information the City had received and the fact that the City had been provided no medical restrictions that would prevent him from taking the AJT. In the instant hearing, Beauchamp acknowledged that in 2019, he had not received any restrictions from his doctor regarding his knee. He also said that the only treatment he had received for his knee was a cortisone shot administered in August 2019. As of December 23, 2019, he would be fully released. Rachu's letter also informed Beauchamp that if he did not pass the AJT by January 10, 2020, he would be discharged in a non-disciplinary discharge per the CBA. Rachu attached a copy of Appendix C to the letter.

On December 23, 2019, Beauchamp's FMLA leave expired. That same day, he stopped by during Tauferner's onsite training hours at the Police Department and scheduled his test dates. He told her that he knew what he needed to do for training and would work on his own.

Beauchamp took the AJT on January 9, 2020 and again on January 10, 2020. He failed the timed run test both days. On the first day, his running time was 3:13 and on the second day it was 2:49. Prior to taking the test, he completed the routine Job Function Questionnaire, responding "No" to the following questions:

1. Do you currently have any condition that may prevent you from safely participating in the Job Function Test, a description of which has been provided to you?
2. Do you currently have any physical restrictions that may prevent you from safely participating in the Job Function Test, a description of which has been provided to you?

3. Are you currently taking any medications that may prevent you from safely participating in the Job Function Test, a description of which has been provided to you?

Following his failure of the AJT retest, Rachu and Gramza determined that they would allow Beauchamp an opportunity to discuss any additional ideas he might have regarding what might help him to pass the AJT. Accordingly, on January 13, 2020, Gramza sent a letter to Beauchamp setting a meeting on January 14, 2020 for that purpose. That meeting was rescheduled so that various Association representatives could attend the meeting.

The due process meeting occurred on January 23, 2020. Five Association representatives attended it with Beauchamp. In that meeting, no one from the Association asked for additional time to allow Beauchamp to continue to prepare or made any suggestion that would have allowed Beauchamp to continue to stay employed and try the test again. Instead, Association representatives simply argued that the job function test should not exist, and that the timed running standard should be lowered to one he could pass.

Following the meeting, the City decided to discharge Beauchamp per Appendix C and the Policy based upon his inability to pass the AJT. A discharge letter was sent to Beauchamp on January 24, 2020.

The Association grieved Beauchamp's discharge. The grievance was subsequently appealed to arbitration.

The record shows that Beauchamp never filed a civil rights charge or complaint against the City alleging that his discharge was discriminatory or retaliatory under State or Federal law. Additionally, the only legal challenge the WPPA filed against the City's use of the AJT was a Charge of Discrimination it filed with the EEOC on November 20, 2019. The charge filed by WPPA challenged the practice of the tester taking an officer's blood pressure as part of the AJT pretest screening. The charge was dismissed by the EEOC on August 14, 2020. WPPA did not challenge the dismissal.

Some additional facts are addressed in the DISCUSSION.

DISCUSSION

Introduction

Prior to being terminated, the grievant was a 20-year veteran of the police department with no disciplinary history. Most discharges are for disciplinary reasons, but that is not the situation here. Beauchamp was discharged for a non-disciplinary reason. That makes this case unique.

Effective May 1, 2019, Marshfield police officers are required to pass an annual job specific fitness test. Beauchamp did not pass that test. Specifically, he failed the timed run portion of the test. He was supposed to run a quarter of a mile in 2:15. After taking this portion of the test several times, the fastest he could run it was 2:49. Thus, he was 34 seconds beyond the cutoff

point. The Association contends that the fitness test that was used to terminate Beauchamp is not compliant with the standards that the parties negotiated and agreed to in Appendix C. Building on that premise, the Association asks me to ignore the timed run standard set by the PFC. The Association also asks me to ignore the PFC rule and contract language that says when an officer fails the minimum standards test the officer's employment is terminated. The City obviously disagrees. It contends that by failing the running test that means he is not capable of performing the essential functions of the job of a Marshfield police officer. It asks me to uphold the test and his discharge.

There is a lot at stake in this case. While of course Beauchamp's job is on the line, what else is involved is the City's AJT. The Association challenges its validity and contends it is "fundamentally flawed". In their brief, the Association avers that the City of Marshfield is the only department in the state with such a mandatory fitness test. The Association further avers that "mandatory fitness tests with punitive measures are virtually nonexistent because they do not work and are a magnet for lawsuits." Conversely, the City contends that its AJT is legal, validated and appropriate. Because each side has so much on the line regarding those two matters, the parties essentially went to war in this case. Each side called an expert witness. The hearing was long and contentious, there were reams of exhibits, and the parties filed extremely lengthy briefs.

One more preliminary comment is in order. Normally in a discharge case, I review the discharge using a just case standard. I'm not going to do that here because this was a non-disciplinary discharge. I'll identify the standard I'm going to use later in my discussion.

Here is how my discussion is structured. In Part 1, I will address the City's creation and implementation of the AJT. In that section I will also address whether the portion of the test involved here (i.e., the timed quarter mile run at 2:15) was validated and job related. In Part 2, I'll address the relevant bargaining history. In Part 3, I'll address Beauchamp's discharge. Part 4 is my final conclusion.

Part 1

Many law enforcement departments address physical fitness as one component of overall professional development. Oftentimes, the focus is an incentive-based program with coaching, nutrition, wellness and lifestyle goals. That is not the situation here. As already noted, the City decided to require its police officers to pass a mandatory annual physical readiness test. This test constitutes a continuing job qualification. Under the City's test, if an officer does not pass it they are considered to not have the minimum level of physical readiness required to do their job safely and effectively and are terminated.

The part of the test that is at issue here is running a quarter mile in 2:15. The run is based on the premise that one of the most essential functions of a police officer's job is to run in pursuit. The Association disputes that contention. In its view, the idea that officers are involved in foot races is a "myth and a product of television and movies."

I've decided to begin my discussion on the City's mandatory physical readiness test with this general overview of the topic. Physical readiness is considered a job qualification for every

police officer. To do their job safely and effectively, a police officer needs to maintain a minimum level of physical readiness. To illustrate that point, it is noted that an aspiring officer candidate in Wisconsin must pass two fitness tests required by the Wisconsin Department of Justice, Training and Standards Bureau (TSB) staff of the Law Enforcement Standards Board (LESB), before the candidate can serve. As stated in TSB's August 2019 announcement to cadet candidates, "[a]n individual who can pass the Physical Readiness Test is considered able to perform the physical duties of a Wisconsin patrol officer." An officer candidate must demonstrate physical readiness by passing the Academy entrance exam of minimum essential job qualifications, including the requirement that an officer must be able to run 300 meters in 82 seconds. To successfully graduate from the Academy, the candidate must be able to meet the exit standard of running 300 meters in 68 seconds.

The State identifies this physical readiness not only as an entrance requirement to the profession but specifies that it is a qualification that officers must be able to meet throughout their careers. As stated in the TSB *Physical Readiness Training Handbook*, February, 2015 (Training Handbook):

The Law Enforcement Standards Board (LESB) requires *incumbent* law enforcement officers (officers) to have a minimum level of physical readiness in order to perform the essential functions of the job. To ensure that officers can safely perform those physical tasks, the LESB has validated a Physical Readiness Test (PRT) with standards that predict the minimum levels of safe and effective performance. (Emphasis added.)

Association Ex. 45, p. 3.

The Training Handbook identifies "[p]ursuit running for short and long distances, over uneven terrain, and up stairs" as a critical job task. It then advises officers that "[t]he inability to perform these tasks would obviously mean you are unable to perform your duty. Perhaps less obviously, that lack of physical readiness would also place yourself and others at risk for potential injuries and loss of life." See Training Handbook (*emphasis added*.) LESB identifies the test standards, including the minimum pursuit running standards, as predicting "the ability to perform the essential and crucial physical tasks of the job of the officer at a minimum level of safety and effectiveness." *Id.*

The LESB standards and testing, and the Training Handbook, were created by the company FitForce through its contract with the State of Wisconsin. FitForce is a public safety employee fitness testing service provider. FitForce President John Smith testified as the Association's expert witness in the instant hearing regarding the validation process his Company used to determine the standards of the LESB test. He explained the validation studies his Company created as having a purpose of defining "a certain amount of basic physical readiness that can be identified that predict the ability to perform the job of a police officer, in this case in Marshfield, at a minimum level of safety and effectiveness." Hearing Transcript, Day 2, p.179.

In validating the standards and testing that LESB adopted, FitForce surveyed 1165 incumbent Wisconsin police officers. Association Ex. 43, Sec. D, p. 5. One initial validation step

involved the officers completing a job task analysis where the officers rated the frequency and criticality of 45 physical tasks FitForce had identified as performed by officers. If a task was assigned a value between 4 and 5, it was described as falling between “Urgent” and “Crucial”. *Id.* A value of 4 for criticality was described as an “Urgent” task, defined as “[i]nability to perform this task may place yourself or others in jeopardy of personal harm and/or property loss/damage.” *Id.* A value of 5 for criticality was described as a “Crucial” task, defined as “[a]bility to perform this task may prevent injury or death.” *Id.* Pertinent to this matter, the task of “running/sprinting in pursuit or as a backup for short distances” was valued between 4 and 5. *Id.* at 8. On this basis, FitForce identified “sprinting as back up short distances” as an “essential function or bona fide occupational qualification” of a Wisconsin patrol officer. *Id.* at 15. Further, using past research and validation studies, FitForce established a 300-meter run field test as the predictive test for the sprint run standard. *Id.* at 17. Thus, a short-timed sprint run was established by the Association’s expert, and adopted by the State, as an essential function of the job of a Wisconsin patrol officer.

Given the State’s 2015 requirement that an officer must meet its physical readiness standards as an essential function of the job, the PFC decided to adopt a policy that would ensure its officers met a qualification of physical readiness specifically to serve as a Marshfield police officer. However, as recognized by Smith (FitForce’s President), and in the Association Exhibit Training & Standards Transportability Report (2015), “[i]t is not sufficient for an agency to merely adopt the test of standards produced in another location, i.e. unilaterally applying another agency’s test.” Association Ex. 43, p. 21 and Hearing Transcript, Day 2, p. 182. Because of that, the City decided not to simply rely on the State standards. Instead, as was its right, the City developed its own test of specific standards applicable to the Marshfield Police Department. Just because the City did not use the Fitforce test or hire Fitforce to develop the test does not make the City’s test *per se* unreasonable.

While it’s the City’s position that “the legitimacy of the AJT and the test developer are not at issue here”, I find it necessary to address one aspect of the AJT, namely the timed quarter mile run at 2:15. In the discussion that follows, I will address how the City created and implemented that portion of their mandatory test for the physical readiness qualifications of its incumbent officers and show how it echoes the recommendations of FitForce and the State.

First, the Association challenges the application of the AJT to Beauchamp, arguing that the City violated the CBA by creating and using a Marshfield – specific job function test for physical readiness instead of implementing the LESB testing and standards developed by FitForce. Association Attorney Palek made this point in his opening argument:

In 2015 the State of Wisconsin had just hired national experts who put together standards for the LESB training and standards department, a validated lengthy test that did exactly when [*sic*] [Chief Gramza] was purporting to do. It was designed for new recruits. It was designed for implementation on the local level. It was an extremely scientifically based and accurate and validated test. Those standards were sitting there, and the cost to the city would have been zero.

Hearing Transcript, Day 1, p.12.

So at the point that we're talking about what Mr. Beauchamp did or what he didn't do, the question is not what he did or didn't do, the question is: Is he being measured against the standards that were outlined and agreed to in the contract? Were these minimum physical standards? Were these specific job duties that were being addressed? That is what we're going to find out. We're going to find out what an athletic trainer can do. We're going to find out what two or three years of work by national experts on the LESB can do. We can determine what meets the language of the contract and what doesn't meet the language of the contract.

Hearing Transcript, Day 1, p.14.

Based on these contentions, it is the Association's view that the City was not using the "job-specific fitness test" required under Appendix C unless it utilized the LESB standards in its testing for patrol officer qualifications. The problem with this claim is that absent express contractual language to the contrary, employers have the right to define and also change the minimum qualifications of a job. Broadly speaking, the employer can establish the requirements or qualifications for a position provided they are reasonably related to the duties of the position. This can occur so long as those qualifications: (1) are job related; (2) are not unreasonable, arbitrary or capricious; and (3) the establishment of the qualifications does not violate the CBA. Thus, the Association has the burden to show that because the City set its own physical readiness qualifications in the AJT, specifically running a quarter mile in 2:15, the City did not meet these requirements.

I find that the Association did not make such a showing. First, the standard under challenge here, a timed short distance running test, was even adopted by the LESB as an "essential function or bona fide occupational qualification" of a Wisconsin patrol officer. Association Ex. 43, Sec. D, p. 15. That being so, it is a qualification set by the State that is - in the words of the Association's opening statement - "an extremely scientifically based and accurate and validated test." Hearing Transcript, Day 1, p. 12. Because meeting a timed sprint run standard has been deemed by the State and the Association as a valid job qualification, the City's similar (but easier to pass) timed run qualification is per se job related. Accordingly, the use of such a standard as part of the AJT is not only reasonable, but could also be deemed as required, given the State's adoption of the sprint run standard as a "crucial" essential function of a Wisconsin patrol officer.

Second, even if the State had not adopted such a standard, the CBA does not limit the City in setting the specific job qualifications of a Marshfield police officer. Article 3 of the CBA allows the Police Chief to set "reasonable rules" which would include reasonable job qualifications and in accord with "the rules . . . and policies of the Marshfield Fire and Police Commission" can also retain or discharge officers. The City's discretion to set rules is governed by the requirement of reasonableness. Given that the State has adopted a physical readiness standard for incoming and incumbent officers in the State of Wisconsin, I find it was reasonable for the City to have created and implemented its own job function test program (in particular, running a quarter mile in 2:15) to ensure that Marshfield police officers were able to meet physical job qualifications for their position.

Third, while the City set a higher level of physical qualifications for its police officers after May 1, 2019 than it had in place before that, it was entitled to make that change because the decision to change the level of competence at which it wants its jobs performed is also within the power of an employer. If it were otherwise, an employer could never change the level of competence it requires of its employees. Since there is no contract language in this CBA that limits the City's right to dictate and change qualifications, and the City's change in qualifications was not unreasonable, I find that the City could change the qualifications for the police officer position.

Finally, the Association argues that the test developed and used by the City (i.e., the AJT) was not a "job-specific fitness test" that tested for the "necessary minimum physical requirements" that a Marshfield patrol officer must meet. While this claim will be addressed in more detail in the following paragraphs, it is mentioned here because those terms are not defined in Appendix C or anywhere else in the CBA. Since those terms are not contractually defined, management has the discretion to define its "job-specific fitness test" and the "necessary minimum physical requirements" of the job of a Marshfield police officer. Said another way, in the absence of a contractual definition, the City is allowed to define those terms.

The focus now shifts to the test which the City created and applied to officers in 2019 and 2020. I've decided to begin this section by noting that the use of objective tests to measure qualifications is within the discretion of management and is generally favored over reliance on subjective judgments. Such tests are given arbitral deference where they meet the generally accepted minimum standards for relevance, fairness and accuracy.

Here's how the City's outside consultant – Tauferner – created and validated the AJT. Tauferner used the Marshfield police officer job description as her starting point in developing the job function test. From there she interviewed officers to develop a functional job description that identified the physical tasks involved in the performance of the job. After developing the functional job description, she created the first job function test (JFT) that required performance of those critical tasks termed "job function demands." She then obtained Association member feedback – including Association leadership – on the job relatedness of the JFT.

After creating the initial JFT in July 2016, Tauferner sought input from the officers who participated in the validation, practice or ultimate AJT testing. Between July 2016 and August 2017, Tauferner conducted validation testing of the JFT, polling the officers who took the test about whether it accurately reflected what they do in their job. She then made changes to the test based upon that officer feedback. Ultimately, the test was modified numerous times. The final version of the JFT was created on August 10, 2017 (about a year after the test validation process started). On that date, the time standard for completion of the quarter-mile run was set for the first time. It was set at 2:15 (or 135 seconds).

In October and November 2017, officers were required to participate in familiarization testing. When they did so, they were told that they were taking the finalized JFT. Then, between August 2018 and April 2019, the City provided officers the opportunity to take a practice test on five different occasions.

Having reviewed how Tauferner created the test, the focus now turns to the validity of the test which she constructed and the City applied to its officers in 2019 and 2020.

While both sides invite me to address, and rule on, the validity of the AJT in its entirety, I've decided not to do that. Instead, I'm going to make a much narrower finding on the test's validity than what each side sought from me. Specifically, I'm just going to rule on the validity of the timed quarter mile run at 2:15. My basis for doing so is that that was the only part of the AJT that Beauchamp failed. That being so, I conclude that it is the only part of the test that needs to be validated in this case. Thus, the validity of the rest of the AJT is left for another day and another discharge.

Turning now to that narrow question, I make the following findings about running a quarter mile in 2:15.

First, including a short sprint run in the AJT passes muster for this reason: FitForce identified the timed testing of a short sprint run to be reflective of a crucial physical task that is an essential job qualification of a Wisconsin patrol officer. This established that the short timed run was job related

Second, the length of the short sprint run (i.e., a quarter mile) also passes muster. That distance equates to about three city blocks. The reason it was selected by the City as the length for the running test was because it was identified as the approximate distance officers would pursue someone on foot before they decided to end a foot chase.

Finally, setting the time standard for a quarter mile run at 2:15 also passes muster. While 2:15 is simply a number selected by Chief Gramza, that number was not plucked out of thin air. It has the following bases of support in the record. First, in the validation tests run by all active officers, roughly 80% were able to run that distance in two minutes, 8 seconds and approximately 90% of the officers were able to run it in two minutes, 15 seconds. Second, as the test was modified over time, the final number selected (i.e., 2:15) for that timed run became less restrictive. Thus, the final number selected ended up being easier than the numbers set in the LESB standard for Wisconsin's patrol officer candidates in the 300-meter run (i.e., 82 seconds to enter the Academy and 68 seconds to graduate from the Academy). That means that the timed running portion of the LESB test is more challenging than the timed run in the Marshfield AJT. Third, although the Association now argues that the time standard of 2:15 for the quarter mile run is unreasonable, that claim is undercut by what happened in bargaining in 2018. What I'm referring to is that when the Association bargained with the City over the AJT, the Association proposed that the standards of the JFT as it then existed (including the timed run standard of 2:15 for a quarter mile run) be made a part of the CBA. The reason the Association wanted that time included in the CBA was they were concerned that the timed run standard might become more stringent/harder in the future. While the timed run standard of 2:15 was not ultimately included in the CBA, the fact that the Association proposed its inclusion in the CBA establishes that the number of 2:15 was a number that the Association once found acceptable and could live with. That, in turn, makes the number reasonable under the circumstances.

Based on the above, I find that the time standard of 2:15 for the quarter mile run in the City's AJT was validated and job related.

I'm now going to address some other matters related to that portion of the test.

First, it is noteworthy that there was a high pass rate for this part of the JFT. Of the 33 officers who took the first test in the "familiarization" phase in October and November 2017, only two individuals failed this part of the test, a 94% pass rate. In the practice period between August 2018 and April 2019, only one of the 39 officers taking the test failed this part of the test – a 97% pass rate. After the AJT was implemented in May 2019, in the first set of testing in 2019 and 2020, only one officer (Beauchamp) ultimately failed this part of the AJT – a 98% pass rate. Given that this part of the City's test was passed by everyone in the bargaining unit except for Beauchamp, the Association is hard pressed to successfully claim that this part of the test was unfair.

Next, the record shows that Tauferner – who was the only individual conducting the testing – administered and evaluated this part of the test uniformly. Insofar as the record shows, Tauferner scored each test uniformly and there is no claim or inference otherwise. There is also no evidence that any officer other than Beauchamp was provided any special consideration or exception in the testing process.

Finally, while I will address this point in more detail in Part 3, I've decided to note here that Beauchamp's repeated and persistent failure to pass the timed quarter mile run qualification standard of the AJT, when set against the successful completion of this part of the AJT by every other officer who took the test, showed that the test accomplished its designated purpose. It identified an incumbent officer who could not perform a critical function of his job (i.e., quickly run in pursuit). When Beauchamp stated "I have always been slow," that does not allow for bypassing the need to meet an essential function of the job. Although I will address the point again in Part 3, the record shows that for a while, Beauchamp worked at improving his fitness. When he did, his speed improved. Later though, he elected not to use the help provided and stopped working on his fitness. When he subsequently failed to pass the timed run test of the AJT, that showed that the test had measured what it was designed to measure.

Part 2

The focus now turns to the relevant bargaining history. I begin by noting that when the parties negotiated what became their 2018 - 2020 CBA, the standards of the job functions test (which measured the ability to do the essential functions of the job) were final, had already been adopted by the PFC via its Fitness for Duty Policy, and were known to the Association.

It was in that context that the Association made the following proposals which were rejected by the City:

- The AJT would be voluntary and incentive-based;
- The existing AJT test, including the quarter-mile timed run standard of 2:15, would be incorporated into the CBA;

- Language reflecting that the testing standards do not constitute essential job functions/requirements for a Marshfield police officer;
- The AJT standards will never exceed the LESB new recruit standards in place as of 2018;
- Testing standards do not constitute essential job functions under the just cause standards of Wis. Stat. § 62.13;
- Proposed time-off discipline or discharge based on a failure to pass is solely within the purview of the PFC; and
- The ultimate determination of just cause under the statute would be made by the PFC.

Thus, in bargaining, by refusing to include the test standards in the language of the CBA, the City made clear to the Association that it was preserving its management right to set qualifications. Conversely, in setting process provisions, the parties effectively bargained over the impact of the AJT, thus defining the circumstances under which an officer who failed the test would ultimately be terminated, including a consideration of possible need for temporary accommodation due to medical restrictions. Both sides therefore knew that failure to pass the AJT meant a termination from employment. While the Association tried to change that result, it was not successful in gaining that change.

If the Association felt that the language it negotiated with the City in Appendix C relative to the AJT was insufficient, it could have proceeded to interest arbitration instead. It did not do so. Additionally, if the Association believed the PFC and City did not have the right to set the test standards and implement the AJT, it could have filed a Petition for Declaratory Ruling with the WERC. It did not pursue that right.

What the Association is doing in this case is attack the existence and test standards of the AJT that it was unsuccessful in negotiating into the 2018-2020 CBA. As previously discussed, the Association proposed and the City rejected a voluntary program. The Association also proposed and the City rejected inclusion of AJT standards into the CBA, reserving for itself its right to set job qualifications. Despite that bargaining history, the Association now asks me to essentially modify the bargained-for language of Appendix C and the PFC policy to identify the State standards as the only acceptable test under the CBA.

I'm not going to do that. It is a basic arbitral principle that a party cannot gain in grievance arbitration that which it proposed but did not gain at the bargaining table. In this case, the Association now questions the validation of the AJT and its test standards, but the bargaining history is clear. It proposed that the AJT be voluntary. The City rejected that proposal. The Association proposed in multiple bargaining sessions to have the AJT standards included as contract terms – the same ones that it is now seeking to declare invalid – and the City rejected that proposal. The Association also proposed that the LESB standards should define the City test standards and the City did not accept that limitation. The Association also proposed that the “test standards . . . not . . . constitute essential job functions/requirements.” The City explicitly denied that request. In the end, the parties agreed to the following language for the first paragraph of Appendix C:

Effective May 1, 2019, Marshfield Police Department officers will be required to pass an annual job-specific fitness test to measure their ability to perform the necessary minimum physical requirements for specific job tasks.

This paragraph was identical to the first paragraph of the AJT policy adopted by the PFC in March 2018.

The parties' 2018 bargaining history referenced above, as well as the plain language of Appendix C quoted above, establishes that the Association accepted the existence and implementation of the AJT without restrictions. The Association understood that it was not getting the option of determining the AJT standards or defining essential functions of the job. Instead, the first paragraph in Appendix C allowed the City to define the makeup of a "job-specific fitness test" and the "necessary minimum physical requirements" of the job of a Marshfield police officer. In its brief, the Association spends about 30 pages arguing for something that was rejected in the final bargain between the parties. Consequently, the Association's claim is unavailing.

The Association also argues in its brief that the standards it sought to include in Appendix C related solely to the meaning of the language of the first sentence of Appendix C, not the job specific physical test standards of the JFT (Association brief, pages 10 - 27). I do not find that argument persuasive for this reason. As was just noted, it is clear from the record that the language that became the first paragraph of Appendix C came verbatim from the first paragraph of the PFC Fitness for Duty Policy that the PFC adopted in March 2018. Thus, it (i.e., that language) was not refined at the bargaining table as suggested by the Association. When that language was adopted at the mediation session, the Association had full knowledge of the actual test and test standards that would apply to officers.

Part 3

In his opening statement at the hearing, Attorney Palek made clear that the Association wanted to take the focus from Beauchamp's failure to attain minimum physical readiness, and his failure to pass the timed run portion of the AJT, and instead focus the arbitration solely on the validity of the entire AJT. He stated:

Frankly, what we are here for, you know, even though Mr. Beauchamp is the first person that was terminated, he is the least and the most important person here because this is about what the contract says, this is about what was created, it is about the test, it's about the standard, it's about essential job functions, it is what two parties agreed to in their contract language . . . the question is not what he did or didn't do.

Hearing Transcript, Day 1, p. 11.

However, since I found that the timed quarter mile run at 2:15 in the City's AJT was validated and job related, the focus now turns to whether Beauchamp's discharge violated the CBA.

Here is an overview of my findings. First, I find that the City met its burden of proof to establish that the timed quarter mile run at 2:15 portion of the AJT met the standard set in the first paragraph of Appendix C. Second, I find that the City was entitled to terminate Beauchamp for failing to maintain the minimum level of physical readiness required by the City in order to do his job safely and effectively. His failure to pass the quarter mile timed run at 2:15 established that he didn't have the minimum level of fitness required of a Marshfield police officer under the AJT.

It would be one thing if Beauchamp had put forth a sincere, good faith effort to meet the timed running standard. However, it appears from the record that Beauchamp decided he could not and would not pass that portion of the AJT from its inception, without even attempting a practice test. He also disregarded and failed to use the free training assistance from Tauferner to prepare for the first test. About a month after his initial AJT failure, he sought minimal assistance. He put forth an inconsistent effort that lasted for just a seven-week period during the four and a half months he was given to retake the test. Inexplicably, just when he started to show significant progress toward passing the timed run portion of the AJT by running almost a minute faster than he had previously, he ceased using her assistance and stopped working out to prepare for the AJT re-test. At the hearing, he admitted that on November 11, 2019, he stopped preparing in any way toward passing the AJT. It is unclear why he did that. Nonetheless, by stopping working out, he ensured the failure he had predetermined because, as he admitted at the hearing, he believed that he should have been the exception to the quarter-mile timed run qualification. Thus, Beauchamp thought he should not be required to meet the timed run standard of the AJT because he could not perform that task. That's problematic, of course, because it means that Beauchamp believes he is not accountable to the City for his lack of minimal physical readiness. However, he is.

It would also be one thing if the record showed that the City did nothing to help Beauchamp try to pass the timed running test. I'm persuaded though that the City went above and beyond the requirements identified in Appendix C. Once again, here was the City's obligation under that language:

Upon failure of the test, the officer will be placed on light-duty assignment *at the discretion of the Chief*, and will be subject to re-test within ninety (90) calendar days. If the medical treatment provider of the officer identifies a *specific medical restriction* that caused the employee to fail the test or fail to take the test, then the City will consider reasonable accommodation *as required by law*. (Emphasis added.)

Immediately after Beauchamp failed the AJT time running test, he was placed on a light duty position. While he was on light duty, the City allowed him to meet with Tauferner for conditioning during work hours. Additionally, the City gave him not one, but two, extensions of the re-test deadline. The City offered these extensions despite Beauchamp not seeking them himself, and also not providing medical evidence of any medical restrictions that were impacting his ability to be successful. In fact, his orthopedic physician had fully released him to work in April 2019, and in August 2019 had released him to participate in the AJT. Thus, Beauchamp did not present a situation where there was a medical basis for which a reasonable accommodation might be required by law as identified in the CBA.

The foregoing shows that Beauchamp was given multiple opportunities and an extended time period to pass the timed run portion of the test.

The clear language which the parties agreed on and set forth in Appendix C unequivocally states that an officer that fails the AJT will be terminated. The City followed that language when it terminated Beauchamp for failing the timed run portion of the AJT. While Beauchamp and the Association contend he should continue to be employed by the City as a police officer because he's been doing it for 20 years, the sad fact of the matter is that he is no longer qualified to continue to serve in that position because his lack of minimal physical readiness means he is unable to perform an essential function of his job. That is because the timed sprint or pursuit run was identified as an essential job function of a Marshfield police officer in the validation process. It was also established by the Association's expert, and adopted by the State, as an essential function of the job of a Wisconsin patrol officer. Because of this, the City rejected the Association bargaining proposal that the AJT test standards not be regarded as essential job functions. Beauchamp's inability to run quickly to prevent or escape danger presented a hazard not only to himself, but also to any citizen or coworker facing such harm since he would not arrive quickly enough to prevent the harm.

Finally, although the City asks me to not address the Association's discrimination claim, I have decided to do so in order to complete the record.

I find that Beauchamp was not discriminated against or treated unfairly in either the testing process or in his termination. My basis for so finding is as follows. Beauchamp is not an individual with a disability under any law. Thus, the City did not discriminate against him in the job function testing process or otherwise. In addition, the CBA does not provide for litigating discrimination cases through the grievance procedure. The Association's remote reference to the Management Rights clause allowing the City to exercise its rights does not provide the jurisdiction they seek.

Jurisdiction issue aside, the Association adopts the novel position of just "assuming" Beauchamp is disabled (*see*, Association Brief, p. 62). However, that position is unsupported by the case law cited in the Association Brief (pp. 60-64). My reading of those cases is that Federal and State law require an individual with a disability to have a medically identifiable physical impairment; thus, medical evidence is required under State and Federal law to establish disability. Here, though, such medical evidence does not exist. The best the Association can point to is a comment from Beauchamp's doctor indicating that Beauchamp may never be able to pass the timed running portion of the test. In making that statement, the doctor did not identify a medical restriction. That being so, the inference is that the doctor simply recognized the reality that Beauchamp might never attain the required fitness level needed to pass the AJT. An individual simply being overweight, obese or out of shape does not mean he or she is disabled under any stretch of the law.

It is also appropriate here to address the circumstances, nature and extent of Beauchamp's so-called "line of duty injury." In its brief, the Association described the "injury" as follows: "While there have been other officers whose ailments were fleeting and minor in nature, and thus they were able to tune themselves up well enough to pass the test, the Grievant's injury was not minor, nor was it fleeting." Association Brief, p. 60. Based upon that language, one would think

that Beauchamp had incurred a traumatic life-long injury as the result of a tragic on-duty incident. However, the facts are quite different. In fact, the “line of duty” in which Beauchamp was engaged was getting dressed for work. The facts of his injury are that on October 23, 2012, he came to work, and instead of having completed getting dressed and putting his duty shoes on at home, he waited until he got to work to do so. In Beauchamp’s own words, here is what happened:

While getting ready for duty, I was stretching my right knee due to the knee being stiff from a prior strain which occurred several weeks prior to this date. I pulled my lower right leg into the hamstring stretching the knee putting my footwear on. I suddenly felt extreme pain in the knee along with burning sensation, leaving me with limited movement and pain to the right knee.

City Ex. 43.

At the hearing, Beauchamp testified that this narrative constituted his report of what the Association has characterized as his “line of duty” injury, and thus, is the “injury” upon which the Association bases its case. He was putting on his shoe. The City did not contest Beauchamp’s workers compensation claim. As recognized in the workers compensation forum, he fully recovered and no “injury” exists.

More significantly, Beauchamp’s own testimony undermines the Association’s “assumption” that he is disabled in any sense of the word. At the hearing Beauchamp admitted that he had no physical restrictions and was fully released to work. Additionally, he signed documents indicating the same. That means Beauchamp was not an individual with a disability. Instead, he was simply unfit and had convinced himself that no amount of effort would change that reality.

Moreover, even if he were an individual with a disability, the City was not required to modify the AJT and lower its run standard just for Beauchamp because that standard is an essential function of the job. Under Title I of the ADA, a purpose of reasonable accommodation is to allow a disabled employee to perform essential functions. As noted by the Association’s expert, “We believe an officer who cannot meet the agency’s physical readiness standards would have a very difficult time proving that they are both disabled and able to perform all of the essential functions of the job.” Association Ex. 43, Sec. B, p. 7.

The Association could have raised their discrimination claim in State or Federal forums. It did not do so. Instead, it brought the claim before me. I find the claim lacks merit.

Part 4

Here is my overall summary of this Award. The City created a mandatory physical readiness test for its police officers. It could do that. One component of that test includes a timed quarter mile run to be completed in 2:15. Officers are required to pass this annual job function test (AJT) per the Department’s Fitness for Duty Policy and the first paragraph of Appendix C of the CBA. If an officer does not pass any portion of the AJT, they are deemed unqualified to perform an essential function of the job of a Marshfield police officer and are terminated. The penalty just

noted for failing to pass this AJT (i.e., termination) is referenced in both the Fitness for Duty Policy and Appendix C of the CBA.

While both sides asked me to rule on the validity of the AJT in its entirety, I've decided not to do that. Instead, I've decided that the only part of the AJT that needs validation in this case is the timed run portion of the test (specifically the requirement that officers run a quarter mile in 2:15 or less). The reason I made that finding is because that was the only portion of the test that Beauchamp failed. I find that that portion of the test was validated and job related. As the test developed and changed over time, the number selected for the time standard (i.e., 2:15) became less restrictive. It ended up being easier than that set forth by the State Standards Bureau. In other words, the timed running portion of the LESB is more challenging than the timed run in the Marshfield AJT. Although the Association now claims that the timed run time standard of 2:15 for the quarter mile is unreasonable, that claim is undercut by what happened in bargaining in 2018. What I'm referring to is that the Association tried unsuccessfully to get that specific test standard written into the CBA. That fact establishes that a time standard of 2:15 for the quarter mile run was once a number that the Association found acceptable and could live with. That makes the number reasonable under the circumstances.

While I just addressed one aspect of the parties' 2018 bargaining history, there is even more bargaining history that is relevant to the outcome here. After the AJT was finalized, the PFC adopted it in March, 2018 and it became the City's Fitness for Duty Policy. The parties then bargained the impact of that policy and the AJT. The end result of their bargaining was the language included in Appendix C. That language sets out the procedure under which an officer would be terminated if unable to pass the AJT. It also provides for a retake prior to any termination. That language further allows for a grievance to go to arbitration to assure that the contractual process for a non-disciplinary termination was followed.

The City complied with that process when it terminated Beauchamp after he failed the timed run component of the AJT. He was not treated unfairly by the City. Officers who had difficulty with the test were given individualized training. Those that took advantage of that training passed the test. The City provided Beauchamp even more time, leeway and opportunity than any other officer to pass the test. However, he elected to decline the individualized training offered to him and stopped training altogether. Subsequently he failed the required timed run portion of the test. By the clear language of Appendix C, that resulted in his non-disciplinary termination. Consequently, the City did not violate the CBA by terminating Beauchamp for failing the timed run portion of the AJT. He was required to run a quarter mile in 2:15 and he did not do so.

In light of the above, I issue the following

AWARD

1. That the time standard of 2:15 for the quarter mile run portion of the City's annual job function test (AJT) was validated and job related;

2. That the City met its burden of proof to establish that the time standard of 2:15 for the quarter mile run portion of the AJT complied with the first paragraph of Appendix C;

3. That the City did not violate the CBA when it discharged Jared Beauchamp for failing the timed run portion of the AJT; and

4. That the grievance is denied.

Issued at Madison, Wisconsin, this 14th day of June, 2021.

Raleigh Jones, Arbitrator

