

IN THE MATTER OF ARBITRATION)
)
 Between)
)
 LAW ENFORCEMENT LABOR)
 SERVICES, INC., Union)
)
 And)
)
 CITY OF BLAINE, MINNESOTA,)
 Employer)

OPINION AND AWARD

BMS CASE No. 08-PA-0724

Appearances:

For the Union: Marylee Abrams, Law Enforcement Labor Services, Inc., St. Paul,
Minnesota

For the Employer: Scott Lepak, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota

Procedures:

The undersigned was chosen as Arbitrator in the present matter through the procedures of the Minnesota Bureau of Mediation Services. A Hearing was held in this matter on May 19th through 21st, 2008 at the City Building in Blaine, Minnesota, commencing at 9 a.m. each morning. With the simultaneous submission of post-Hearing briefs on June 13, 2008, the Record in this matter was closed.

The Parties are signatories to a labor agreement effective from January 1, 2006 through December 31, 2007, which covers all the events involved in this matter.

RECEIVED BMS-

27 AUG 03 11:14

Essential Structure of the Case

The Employer contends that this case contains three “prongs” on which to base the termination of the Grievant: (1) his overall performance record over his career as a Blaine police officer, (2) an incident of disorderly or unprofessional conduct involving use of vulgar language to a private citizen, and (3) lack of or failure to obtain certification of fitness for duty as a police officer. While the first “prong” is relatively free-standing, the latter two are connected by Grievant’s request for a medically-based leave of absence growing perhaps out of pressures that precipitated the offensive incident, but certainly led to the apparent need for certification of fitness for duty.

Essential time line and events

Joseph Langevin has been a police officer with the Blaine, Minnesota. Police Department for some five to six years. On the late afternoon of September 7, 2007, while off duty and driving his private vehicle, Officer Langevin was called by his mother, Mary Ann French, to come to her home to help in a neighborhood altercation. Testimony indicated that a long history of disputes had existed between the French household and their next door neighbors, the Portzes. Mrs. French also called the police, so that by the time Langevin arrived in the cul-de-sac where his parents live, two squad cars had already arrived on the scene. Partially as a result of this, Langevin parked his vehicle more or less in front of the house of the neighbor, Christina Portz, with whose husband the altercation had arisen. As he left his vehicle and headed across the cul-de-sac toward his parents, Langevin addressed vulgar comments to Mrs. Portz, who was standing in her driveway talking with Officer Joseph Skyy, one of the earlier arrivals. Testimony by Langevin, Portz and Skyy indicates that the comments may have included terms such as “bitch,”

“idiot,” and “bullshit,” but definitely included the adjective “fucking,” probably more than once.

This is roughly a consensus picture of the September 7 incident. There are other elements suggested by various witnesses and/or participants on which agreement is neither achieved or necessary—was officer Langevin speeding (in this case, driving faster than the posted 30 mph limit) as he drove into the cul-de-sac? Where did he park his vehicle relative to the Portz’s driveway? Was his mother crying and/or hysterical? The vulgar comments directed at Mrs. Portz are the crucial element of the September 7 incident and there is little question about their specific nature.

It is not clear how much the “stress, traumatic deaths and scenes” that were apparently troubling Officer Langevin during this time period, and which led to his Sept 18 request for FMLA leave, may have contributed to his state of mind as he addressed his comments to Mrs. Portz. The expression, “stress, traumatic deaths and scenes,” was apparently used by Officer Langevin in an FMLA leave report he wrote on October 1. The expression is quoted and the report cited (and noted as “enclosed”) in HR director Dussault’s October 15 letter to Dr. Thomas Campion. [Tab 48 in City’s Evidence Book] The “stress, traumatic deaths and scenes” had involved the suicide of a Blaine police officer, an unnerving vehicle stop on Interstate 35W where firearms were involved, and being involved in the recovery of the mangled body of a police officer killed by a driver—all it seems within the previous year or so. In any event, several witnesses (Officers Rowe, Grace and Johann) testified that by September 16 and 17 he had taken solace in the bottle. His fellow officers got him to stop drinking and told him he needed help. Thus on Sept. 18, Langevin met with then-chief of police David Johnson to request

a leave of absence. Johnson testified that he told Langevin the leave would be granted and that Langevin would need to be recertified as fit for duty before returning to work.

Officer Langevin sought therapy promptly and continued it. [Tab 47 in Employer Exhibits, which will henceforth simply be noted by tab number] Shortly thereafter, he indicated that he thought he was ready to return to duty, which activated the process for certification of fitness for duty. HR assembled a list of three police officer testing organizations and invited Langevin to choose any one. He picked the organization that would perform the tests closest to his home, and thus Champion, Barrow and Associates (CBA) got the nod. Dr. Gary Liaboe, CBA's local associate, conducted the interviews involved and administered the test instruments, which were then evaluated at CBA's head office in Champaign, Illinois. In a report signed by CBA's president and head psychologist, Dr. Michael Campion's opinion was that Langevin was not ready to return to duty as a police officer, and that his condition was "not remediable." [Tab 49]

The employer subsequently terminated officer Langevin. Thereafter, the union retained the services of Dr. Gordon Dodge to perform a second evaluation and to critique CBA's earlier work. Thus, this case involves much detailed back and forth between the "Dueling Psychologists." As a part of this, we learned what is the ultimate insult one clinical psychologist can hurl at another: "Dr. Dodge has *countertransference issues* with my approach," said Dr. Campion on cross-examination. This charge is repeated in the exhibit at Tab 53 of the City's book of exhibits..

Analysis: Grievant's overall performance record

The Blaine Police Department uses a 20 item form for the annual evaluation of officers, with each item rated from 1 (worst) to 5 (best). According to then-chief Johnson on direct examination, a score of 3 is satisfactory on an item. But, the average across all 20 items is greater than 3, so that Langevin's first evaluation in 2002 produced a total score of 59 which is "fairly low for a first year employee." When asked whether Langevin's 2003 score of 60 was "good for a second year," Johnson's answer was no. The witness didn't know whether Langevin's 2004 score (64) was "average for the third year." Testimony and exhibits fully support early problems with Grievant's performance—he was even given numerical targets for various activities {Tab 8; Tab 10 shows he exceeded the targets}. We note that his first three annual evaluations were done in the month of June, on or around his employment anniversary.

When Grievant's appraisal dropped to 61 in 2005, we also note that the evaluation was not completed until October, roughly one-third of the way through another year and separated by a considerable gap from the activities being assessed.

Perhaps the evaluations and other management efforts to spur his activity levels (especially "self-initiated" activities) were having their intended effects as his score rose to 72 in the 2006 evaluation, and the usual negative written comments disappeared from the form (there remains a single-sentence note of general caution). Then-chief Johnson on direct examination agreed that 72 was satisfactory. Former Acting Interim City Manager Robert Therres, who participated in drafting the letter of termination [Tab 55], testified that the 2006 appraisal was not

mentioned in that letter, because it was “not an area of concern.”

We then encounter another anomaly: according to Therres, the 2006 performance evaluation is the last one. (City HR director Terry Dussault was asked on cross-examination if there was no later performance appraisal: response—“I’d have to check.” This occurred on the first day of a three-day Hearing, and nothing materialized in the following days.) Indeed, there is no 2007 evaluation in the file. The September 7 incident comes nearly three months after Langevin’s employment anniversary, the appropriate time for an annual appraisal. We must assume that there was a repeat of the 2005 experience with greatly delayed evaluations, although no questions were asked on this issue. The only question asked about the 2007 evaluation was posed to the grievant on direct examination, who opined that it would have been better than it was in 2006. What else could he have said?

Beyond the annual appraisals, the record includes one brief suspension (in 2003) and two verbal reprimands [Union Exh. 12] and a number of letters of appreciation and commendation [Union Exh. 13]. Overall, however, the record reflects the likelihood that grievant’s personality traits may have made him a sometimes prickly person, possibly resulting in him being a somewhat resistant (and hence slow) learner in the employment relationship, but one who could be managed to success—witness his last performance appraisal.

This Arbitrator cannot sustain termination based on Officer Langevin’s overall performance record.

Analysis: the September 7, 2007 incident

The incident of September 7 has been described in sufficient detail earlier—we do not need to revisit it at this point. There was also conflicting testimony whether a comment from a police officer to a private citizen which may have included the terms *bitch*, *idiot*, *bullshit*, but which surely included the term *fucking* constituted disorderly conduct or unprofessional behavior, sufficient to merit discharge.

No issue of nexus was raised regarding discipline for off-duty conduct, but the Grievant was well-known to be a Blaine Police officer by those affected, notably Mrs. Portz, so argument down the nexus line would fail.

The union advances in testimony and Brief argument the idea that vulgar language, especially swearing, is a part of “police culture,” at least as practiced in the Blaine Police Department. They even elicited a reply of “oh my, yes” from then-chief Johnson when asked if he ever “used profanity at work.” There is plenty of literature about workplace cultures and rough language is one of the more prominent variables. And all of us possess and practice a number of different “English languages” (more properly, I think, levels of diction), and we usually succeed in keeping the appropriate “language” matched with the audience at hand. This Arbitrator thinks that the citizens and police department of the city of Blaine are entitled to share an expectation that the language of “police culture” stay inside the department’s walls.

So, that brings us to an evaluation of what to make of an incident when that expectation is not met. And here we turn to two witnesses whose former jobs involved making just that sort of

judgement. Both former Acting Interim City Manager Therres and former Police Chief Johnson were asked whether or not the September 7 by itself constituted sufficient grounds for termination. Their responses were:

Therres: No. (Follow-up question—if you look at the whole totality?) Yes.

Johnson: Yes, the September 7, 2007 events *alone* were enough to terminate him.

(Follow-up—why?) There are so many recurring and repeating themes in his record: low production, bad attitude, inability to take correction, etc.

Both answers are remarkably similar in that they only see the September 7 incident as a part of a larger whole. By itself, the September 7 incident does not rise to the level of constituting sufficient grounds for dismissal.

Analysis: Fitness for Duty Evaluation and Certification

As mentioned above, on September 18, 2007, Officer Langevin met with Police Chief Johnson to request a medical leave of absence. Johnson testified that he told Langevin that his request would be granted and that he would need to be evaluated for fitness for duty before he could return to work. This in turn set the stage for the spectacle of the dueling psychologists.

On the surface, the duel should be a one-sided affair. CBA is an organization dedicated to psychological testing and evaluation, with extensive experience (more than 20,000 cases according to Dr. Champion) in evaluation of police officers; Dr. Dodge's experience in this area is somewhat limited (his primary area of recent interest has evidently been in trauma and disaster psychology). The selection of CBA to perform the evaluation was arrived at through fairly clear and transparent processes—the professionals in the City's HR function developed a list of police officer evaluation organizations, asked Mr. Langevin to choose one, and sent a formal charge

letter to CBA. By contrast, Dr. Dodge appears to be an occasional consultant to LELS on officer evaluation.

There is a considerable amount of technical argument involved in Dr. Dodge's review of CBA's evaluation report, written and signed by Dr. Michael Campion, president of CBA, and in Dr Campion's written [Tab 53] and oral responses to Dr. Dodge's comments. For the most part, these jabs and counter-punches are not central to the issue at hand.

It is clear to this Arbitrator that, whatever the merits of Dr.Dodge's report, it is not available to serve as the fitness of duty certification required for Officer Langevin to return to work. It is clearly the employer's duty to ensure the psychological health and stability of its police officers. And the Employer has sought to do this through the clear and transparent processes outlined above. The process by which CBA was chosen cannot be faulted. The Dodge report cannot serve as a substitute for the CBA report, even if the latter is deemed to be flawed.

And flawed it is. Not perhaps in the various psychometric ways that have led the Parties to spill so much ink in their Briefs: whether the Thurstone test is appropriate for police officer work or whether the Millon can be used in a non-clinical setting on non-psychiatric patients, for two examples among many. But the CBA evaluation report is flawed in the more fundamental sense that the raw materials have been defective.

All participants in the debate have stressed that a psychological evaluation is a multi-faceted exercise, containing at least face-to-face interviews based in part upon a structured set of

questions, several standardized instruments aimed at different aspects of a person's psychological make-up, and review of employment performance data. (For the second component, CBA used the Minnesota Multiphasic Personality Inventory-2, Thurstone Test of Mental Alertness and Millon Clinical Multiaxial Inventory-III.) The overall evaluation is built up from synthesis of all three components. The overall result looks like this:

Officer Langevin has low-average cognitive ability. He has a strong desire to be a police officer, but appears to demonstrate performance deficiency. His low cognitive ability affects his judgment, and increases stress levels when the demands of his responsibility levels increase. He appears to have difficulty performing with consistency to the critical demands of a Blaine Police Officer. The accumulation of his low performance as a Blaine Police Officer is significant when it comes to his ability to handle the stress of the job. He appears to have a low frustration tolerance that may cause him to struggle with making appropriate decisions in intense situations. He struggles with a general sense of unhappiness. He lacks self-confidence, but comes across as insincere. His background information indicated that there were issues during his probation that made him a marginal candidate to complete his probationary period successfully. His low self-confidence and lower cognitive scores may also cause him difficulty in multitasking.

It is the evaluator's opinion based on a reasonable degree of psychological certainty and with the information available at the time of the examination that Officer Langevin is not ready to return to duty. It is the evaluator's further opinion that cognitive and emotional deficiencies could impact officer safety. It is also the evaluator's opinion that his current cognitive and emotional condition is not remediable with regards to him functioning as a Blaine Police Officer.

[Tab 49, p. 10]

The quoted paragraphs are the overall summary of the evaluation performed by CBA. As can be seen, it is a blend of test results ("low-average cognitive ability"), interview findings ("strong desire to be a police officer"), and background information ("the accumulation of his low performance"). By the Arbitrator's count, the first twelve-line paragraph contains at least six statements based directly on a review of Officer Langevin's performance-related background information.

Given the importance of performance data in shaping the evaluative blend that constitutes

the overall summary, it seems critical that those data be complete and accurate, insofar as possible. And to this standard, the actual process that produced the CBA report falls woefully short.

1. The “Materials Reviewed List” at the beginning of the CBA report contains only the 2002 and 2003 annual performance appraisals. [Tab 49, p. 1], Dr. Champion confirmed in his testimony that those for 2004, 2005 and 2006 were not supplied by the employer. Would the opinion expressed in the second paragraph that his condition is “not remediable” have been so easy to reconcile with the 2006 performance appraisal?

2. The packet of letters of achievement, appreciation and recognition [Union Exh. 13] is not on the Materials Reviewed List, and Dr. Champion confirmed in testimony that it was not received. (This packet contains about 20 pages, but often there are more than one letter per incident--e.g., parents expressing appreciation for prompt and effective medical service for a child, and then a note from a supervisor saying “great job!”)

3. Perhaps more surprising than the omission of the letters of appreciation is the inclusion of one item on the Materials Reviewed List: the Memo from Sgt. Stephen Johnson of 02.19.04 (also appearing in Tab 14). This memo details an incident leading to an investigation in which Officer Langevin was exonerated. That latter fact is certainly attested by the Notice of Findings of 03.17.04 [Tab 13], also included in the Materials Reviewed List, but it doesn't fully dispel the “where there's smoke, there's fire” suspicion.

Of the three deficiencies mentioned, clearly the most important is the matter of missing

performance appraisals. The overall “accumulation of his low performance” turns out to be based on only two years’ of data—Officer Langevin’s first two years. This would appear to contravene point 10 of the Psychological Fitness-for-duty Evaluation Guidelines promulgated by the International Association of Chiefs of Police Police Psychological Services Section in 2004, which refers to “past and recent performance, conduct, and functioning.” [Union Exh. 4, p. 3] . The “information available at the time of the examination” was seriously incomplete. In its report, CBA seems to have missed this problem.

It should be noted in passing that “commendations” and “testimonials” are specifically mentioned in point 10 of the just-referenced Guidelines as items that might be included in the “background and collateral information” about the Grievant’s employment.

Is this important? Recall the expression used in the first sentence of the second paragraph to qualify the recommendations based on the examination’s results: this is an “opinion based on a reasonable degree of psychological certainty.” When asked on direct examination what might be the definition of “psychological certainty,” Dr. Champion’s response was clear and definitive: “51%.” In a situation where an event’s outcome is even slightly more likely to come out one way rather than not—and this is called “psychological certainty”—then, yes, these defects in the information supplied to CBA are important enough to reject CBA’s resulting report.

Where do we go from here?

Thus far, the Grievance has been sustained on the first two “prongs” of the City’s case for

the termination of Joseph Langevin. The problem is that the remedy sought by the Union and the Grievant—reinstatement—is simply not available. The Grievant requested FMLA leave for counseling to deal with “stress, traumatic deaths and scenes;” quite naturally, the Employer requires certification of fitness for duty before putting him to work. Although we have rejected the CBA psychological evaluation as flawed, we are left without a fitness for duty certification.

The Employer’s request for a fitness for duty evaluation is based not only on common sense and a fear of legal liability, but is firmly rooted in the PFFD Guidelines referenced earlier.

Point 1 of those Guidelines states:

Referring an employee for an FFDE is indicated whenever there is an objective and reasonable basis for believing that the employee may be unable to safely or effectively perform his or her duties due to psychological factors. An objective basis is one that is not merely speculative but derives from direct observation, credible-third party report, or other reliable evidence. [Union Exh. 4, p. 1]

Hence, a positive fitness for duty evaluation is essential if Officer Langevin is to return to work with the Blaine Police Department.

The Employer is directed to arrange for a fitness for duty evaluation, following the same or a similar process that it used before for the selection of an evaluating organization. Since the defects in the CBA evaluation stemmed from the Employer’s failure to provide complete and recent information, the Employer shall bear the costs of this evaluation. Should Officer Langevin receive a full and unqualified certification of fitness for duty—exemplified by the summary statement provided by HR director Dussault in his October 24, 2007 letter to CinDee Torkelson [Tab 52B]—he shall be reinstated and made whole.

AWARD

The Grievance is sustained. The remedy sought cannot be awarded, but provision is made for replacement of the flawed CBA fitness for duty evaluation by another such evaluation.

Given at St. Paul, Minnesota this 25th day of August, 2008



James G. Scoville, Arbitrator.