

IN THE MATTER OF ARBITRATION BETWEEN

LAW ENFORCEMENT LABOR SERVICES, INC.)	ARBITRATION
)	AWARD
and)	
)	SCOTT RINGHOFER
)	DISCHARGE
)	GRIEVANCE
)	
STEELE COUNTY)	
)	BMS CASE NO. 07-PA-0220

Arbitrator:	Stephen F. Befort
Hearing Date:	August 5, 2008
Date post-hearing briefs received:	August 29, 2008
Date of decision:	September 19, 2008
	APPEARANCES
For the Union:	Mark W. Gehan
For the Employer:	Joan M. Quade

INTRODUCTION

Law Enforcement Labor Services, Inc. (Union) is the exclusive representative of a unit of deputy sheriffs and sergeants employed by Steele County (Employer) in its Sheriff's Office. The Union claims that the Employer violated the parties' collective bargaining agreement by discharging Deputy Scott Ringhofer without just cause. The grievance proceeded to an arbitration hearing at which the parties were afforded the

opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer have just cause to discharge the grievant for misconduct? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE IX DISCIPLINE

9.1 The following disciplinary procedures shall apply:

A. The EMPLOYER will discipline permanent employees for just cause only. Just cause will be reduced to writing when applied pursuant to this Article. Discipline will be in any one of the following forms:

- (1) Discharge
- (2) Demotion
- (3) Suspension
- (4) Written reprimand
- (5) Oral reprimand

RELEVANT EMPLOYER POLICY LANGUAGE

PROFESSIONAL CONDUCT OF PEACE OFFICERS

Policy

Law enforcement effectiveness depends on community respect and confidence. Conduct which detracts from this respect and confidence is detrimental to the public interest and should be prohibited. The policy of this department is to investigate circumstances which suggest an officer has engaged in unbecoming conduct, and impose disciplinary action when appropriate.

Principle One

Peace officers shall conduct themselves, whether on or off duty, in accordance with the Constitution of the United States, the Minnesota

Constitution, and all applicable laws, ordinances and rules enacted or established pursuant to legal authority.

Rationale:

Peace officers conduct their duties pursuant to a grant of limited authority from the community. Therefore, officers must understand the laws defining the scope of their enforcement powers. Peace officers may only act in accordance with the powers granted to them.

Rules:

1.4 Peace officers, whether on or off duty, shall not knowingly commit any criminal offense under any laws of the United States or any state or local jurisdiction in which the officer is present.

Principle Four

Peace officers shall not, whether on or off duty, exhibit any conduct which discredits themselves or their department or otherwise impairs their ability or that of other peace officers or the department to provide law enforcement services to the community.

Rationale:

A peace officer's ability to perform his or her duties is dependent upon the respect and confidence communities have for the peace officer and law enforcement in general. Peace officers must conduct themselves in a manner consistent with the integrity and trustworthiness expected of them by the public.

Rules:

4.5 Peace officers, *while off duty*, shall not engage in any conduct which the peace officer knows, or reasonably should know, constitutes an unwelcome sexual advance or request for sexual favor, or unwelcome sexually motivated physical contact or other unwelcome verbal or physical conduct or communication of a sexual nature.

4.7 Peace officers shall not commit any acts, which as defined under Minnesota law constitute sexual assault or indecent exposure. Sexual assault does not include a frisk or other search done in accordance with proper law enforcement procedures.

FACTUAL BACKGROUND

Scott Ringhofer has worked for Steele County as a Deputy Sheriff since 1998. His uncle, Gary Ringhofer, currently serves as Steele County Sheriff. The County discharged the grievant in July 2006.

The Employer has counseled and disciplined Mr. Ringhofer on a number of occasions during the course of his employment. The pertinent incidents include the following:

1. In July 2005, Scott Ringhofer was placed on a corrective action plan for not meeting performance goals and objectives despite employment counseling.
2. In October 2005, the Employer gave the grievant an oral warning for installing an unapproved stereo in his squad car without obtaining prior permission.
3. Also in October 2005, the Employer reprimanded Scott Ringhofer for making inappropriate comments and degrading the Sheriff's Office policies while at the courthouse.
4. On November 27, 2005, Scott Ringhofer called in sick at 1:15 a.m. for a scheduled 7:00 a.m. shift. Around 4:00 a.m., Scott County 911 received a call from the local Perkins Restaurant that Scott Ringhofer, a male friend and two females were intoxicated, loud, and about to drive a vehicle. A Rice County detective conducted an independent investigation into the incident because of the potential conflict of interest. During the investigation, Mr. Ringhofer admitted to the incident and admitted to lying about being sick. The Employer issued Mr. Ringhofer a 3-day suspension for this incident.
5. Early in 2006, Sheriff Ringhofer spoke to the grievant about the sick call incident and also about observing Scott at a local wedding party speaking very loudly and drinking beer from a pitcher. After the Sheriff suggested that the grievant should consider contacting the County's Employee Assistance Program, Scott Ringhofer yelled, "this is f***ing bullshit!" The Sheriff orally warned the grievant that he would not tolerate any further incidents of insubordinate conduct in the future,

The incident leading to Mr. Ringhofer's termination arose out of a May 4, 2006 party celebrating the 30th birthday of Josh Ernste, an employee of the Steele County Sheriff's office. The party was at the South Park Lanes bowling alley in Owatonna. In

addition to Ernste, the party was attended by a number of other employees of the Sheriff's office, including Scott Ringhofer, Matt Mollenhauer, Richelle Olson-Cowden, and Jennifer Peterson.

Ringhofer, Mollenhauer, Olson-Cowden and Peterson were conversing as a group in an area away from the others at the party. Their interactions included considerable sexual banter and horseplay, particularly between Ringhofer and Olson-Cowden. At one point, Ringhofer ordered a pizza. When it arrived, Olson-Cowden teased, "what do I have to do to get a piece of pizza?" She then shook her breasts and asked if that would be sufficient. Getting no response, Olson-Cowden placed her hand in front of Ringhofer's crotch.

At this point, the evidence is disputed. According to the Employer, Ringhofer removed his penis from the fly of his pants and put it in Olson-Cowden's hand. Ringhofer denies this claim and contends that he put his hand into his pants and stuck his thumb out the fly and into Olson-Cowden's hand.

Sheriff Ringhofer requested assistance from the Dakota County Sheriff's Office to conduct an independent investigation of the bowling alley incident. Captain Brad Wayne and Sergeant Rob Shingledecker investigated and took statements from each of the four employees except Scott Ringhofer who refused based upon advice of counsel.

The investigators interviewed Matt Mollenhauer concerning the event, and his statement was recorded and transcribed. Mr. Mollenhauer told the investigators that he saw Scott Ringhofer take out his penis and place it in Ms. Olson-Cowden's hand. Upon observing this event, Mollenhauer stated that he turned and told the grievant, "I cannot believe you just did that."

The investigators also interviewed Ms. Olson-Cowden who reported, "I think he placed his penis in my hand, but like I said I did not look down so I can't say that with all certainty." The following day Pam Otto, Captain of the Steele County Detention Center, questioned Olson-Cowden about the incident. According to a statement provided by Ms. Otto, Olson-Cowden told her that "she put her hand in front of Ringhofer's crotch and smarted off to him. The next thing she knew she felt his dick in her hand."

The investigators submitted a report of their findings on May 16, 2006. The report concluded as follows:

In summary, after speaking with Sergeant Olson-Cowden, Correctional Deputy Jennifer Peterson, and Correctional Deputy Matt Mollenhauer, it is apparent in this case that Deputy Scott Ringhofer exposed himself at the Sout Park Bowling Alley in Owatonna, Minnesota on May 4, 2006. According to Deputy Mollenhauer's testimony, he placed his penis in the hand of Correctional Sergeant Olson-Cowden. It appears that the only party admitting to witnessing the exposing was Deputy Matt Mollenhauer.

The County Board voted in July 2006 to terminate Scott Ringhofer's employment. In a termination letter dated July 5, 2006, Sheriff Ringhofer noted that the reasons for termination included conduct violating "Principles 1 (1.4) and 4, Section 4.5 and 4.7 of the Professional Conduct of Peace Officers," as well as his prior conduct of calling in sick when drunk and creating a public disturbance.

Meanwhile, a Rice County prosecutor filed criminal charges against Mr. Ringhofer for criminal sexual conduct. In support of this charge, the Dakota County investigators questioned Scott Ringhofer, who gave a compelled statement with his attorney present. He again denied placing his penis in Ms. Olson-Cowden's hand.

Following Mr. Ringhofer's termination, rumors began to circulate that Mr. Mollenhauer was thinking about changing his version of the incident. Captain Wayne

testified that he and Officer Shingledecker again spoke with Mr. Mollenhauer who, although indicating that this situation was making him ill because he was Scott's friend (Mollenhauer and Ringhofer have been friends since high school and are frequent fishing companions), once again confirmed that the events recounted in his prior statement were true.

On August 31, 2007, a Kastigar Hearing was held in Rice County in the criminal matter. At that hearing, Matt Mollenhauer changed his story and for the first time indicated that he, in fact, did not see Scott Ringhofer take out his penis at the bowling alley. Instead, Mollenhauer claimed that the Dakota County investigators coerced him with a warning about potentially adverse job consequences into stating that he had observed genital contact during his prior statement. Because of this testimony, the prosecutors dismissed the criminal case against Mr. Ringhofer. Mr. Mollenhauer's testimony at the arbitration hearing was consistent with that given at the Kastigar hearing.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to dismiss the grievant for engaging in repeated acts of misconduct. The Employer points out that a thorough and credible investigation concluded that Mr. Ringhofer placed his penis in the hands of a female co-worker in a public bowling alley. Even though Mr. Mollenhauer subsequently altered his story, the Employer claims that his initial statement is credible, while his claim that the earlier statement was given under duress is not. In addition, the bowling alley incident occurred after Mr. Ringhofer previously had been suspended for three days for calling in sick when, in fact, he was drunk and disorderly. Under these circumstances, the

Employer argues that the reinstatement of Mr. Ringhofer would seriously compromise its ability to maintain discipline and morale in the Sheriff's Department.

Union:

The Union maintains that the Employer has failed to carry its burden of proof in terms of establishing just cause to warrant discharge. The Union argues that the only evidence offered by the Employer to show that Mr. Ringhofer placed his penis in Ms. Olson-Cowden's hand is a statement made by Mr. Mollenhauer to the two Dakota County investigators. This statement, however, is hearsay in nature and was not subject to contemporaneous cross-examination. Moreover, Mollenhauer subsequently repudiated this statement, and in his testimony at the arbitration hearing, he stated that the Dakota County investigators had bullied him and threatened him with adverse job consequences if he did not confirm the allegations against Ringhofer. The Union, accordingly, urges that the grievant be reinstated to his former position and be made whole.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003).*

A. The Alleged Misconduct

The Employer terminated Mr. Ringhofer for engaging in inappropriate public acts of a sexual nature at the South Park Lanes bowling alley on May 4, 2006. The parties agree that Ringhofer and Olson-Cowden engaged in sexual banter and horseplay during the course of that evening, but they disagree as to whether the conduct in question included genital contact. The two Dakota County investigators, after interviewing several witnesses, concluded that Ringhofer had engaged in such conduct. Ringhofer, on the other hand, alleges that he only placed his thumb in Olson-Cowden's hand.

The Union maintains that the Employer's claim of genital contact lacks proper evidentiary support because it is based solely on hearsay evidence. The only eye-witness account describing genital contact was the statement provided by Mr. Mollenhauer to the two Dakota County investigators during the 2006 investigation. Mollenhauer, however, subsequently repudiated that statement during an August 2007 Kastigar hearing as well as in his testimony during the arbitration hearing in this matter. Mollenhauer testified in both instances that the investigators coerced him into making the investigatory statement, but that, in actuality, he never observed Ringhofer place his penis in Olson-Cowden's hand. Based on these circumstances, the Union argues that Mollenhauer's statement is hearsay and should not be admitted as evidence to show the truth or falsity of the County's misconduct allegation. In the alternative, the Union contends that even if the statement is admitted into evidence, it should be given little weight as compared to the non-hearsay testimony submitted at the arbitration hearing.

The Union is correct in characterizing Mollenhauer's statement as hearsay in nature. Mollenhauer's statement is an out-of-court declaration that was not subject to

contemporaneous cross-examination. Minn. R. Evid. 801(c). That conclusion, however, does not end the matter. Arbitrators are not bound by formal rules of evidence, and arbitrators frequently admit hearsay “for what it is worth.”

The crucial issue in this matter concerns the admissibility and weight to be given to hearsay that constitutes the sole evidence offered in support of an employer’s claim of misconduct. Arbitrators have adopted varying approaches to this question.

The Union urges that the analysis adopted by this arbitrator in *City of Minneapolis and Int’l Ass’n of Firefighters Local 82*, 121 LA (BNA) 77 (Befort, 2005) should be followed with respect to the hearsay evidence in question. In the *City of Minneapolis* case, the employer terminated a fire fighter for allegedly engaging in inappropriate sexual contact with a citizen client. The employer did not call the citizen as a witness at the arbitration hearing, but instead sought to introduce her story through the second-hand oral testimony of a department supervisor. I sustained the grievance finding that the hearsay evidence did not outweigh the fire fighter’s credible sworn testimony to the contrary.

In the *City of Minneapolis* arbitration award, I summarized the range of arbitral viewpoints with respect to the evidentiary issue as follows:

The leading treatise on labor arbitration -- Elkouri & Elkouri, *HOW ARBITRATION WORKS* (6th ed. 2003) -- summarizes the pertinent arbitral principles as follows:

In discharge or discipline cases, witness testimony concerning the facts that led to the disciplinary action comprises the most important evidence. . . . An employer’s decision to rely solely on hearsay evidence in a case where it has the burden of proof has been deemed insufficient to sustain its case.

Id. at 349. In discussing the weight to be given to hearsay evidence, the authors state:

. . . In many cases very little weight is given to hearsay evidence, and it is exceedingly unlikely that an arbitrator will render a decision supported by hearsay evidence alone. Further, hearsay evidence will be given little weight if contradicted by evidence that has been subjected to cross-examination. In *IBP, Inc.*, the arbitrator agreed “that hearsay evidence has a place in the arbitration setting, [but] it cannot outweigh otherwise apparently credible live testimony such as that given before the Arbitrator at hearing by a Grievant.”

Id. at 367-68 (citing *IBP, Inc.*, 112 LA 981 (Lumbly, 1999)). Similarly, the authors comment as follows on the absence of testimony from a sole accuser:

. . . Where an employer failed to have the single accusing witness appear, however, the arbitrator expressed concern because of the accuser’s absence and found insufficient evidence to support the employee’s discharge.

Id. at 382 (citing *St. Charles Grain Elevator Co.*, 84 LA 1129, 1132 (Fox, 1985); *Veterans Admin. Med. Ctr.*, 82 LA 25, 27 (Dallas, 1984)).

A number of Minnesota arbitrators have issued opinions that are consistent with and echo these principles. In *Beverly Industries d/b/a Metro Care and Rehabilitation Center and United Food and Commercial Workers Union Local 653*, 100 LA 522 (Berquist, 1993), the grievant, a nursing assistant with a poor work record, was terminated for refusing to assist in lifting a patient. At the arbitration hearing, the employer did not call any of the grievant’s supervisors or co-workers to testify, but instead relied upon their written statements. Arbitrator Berquist sustained the grievance, stating:

. . . arbitrators are careful in the admission and consideration and the giving of weight to hearsay because of its inherent unreliability and to insure that it does not result in a lack of due process and a fair hearing to the grievant. This is particularly so when the offered hearsay evidence is critical, essential and material to a determination of the case and is not of a peripheral character, and also particularly so when there is no corroborating evidence of any substance to support the truth of the hearsay evidence.

Because Arbitrator Berquist found that it was unfair to deny the union and the grievant the opportunity to test the credibility of the statements through cross-examination, he ruled that he would only consider the grievant’s testimony in determining whether the employer had carried its burden of proof. *See also Ramsey County and Teamsters Local 320*, 88 LA 1103 (Miller, 1987) (the non-appearance of the complaining parties at the arbitration hearing deprived the grievant and the union of “their full rights to a full and complete appraisal of the facts on which their action was based.”).

In another case, an employer terminated a Head Start teacher for two instances of alleged misconduct. At the arbitration hearing, the employer did not call the complaining parties to testify, but instead elicited their information through the testimony of the investigator. Arbitrator Gallagher ruled that the grievant's sworn testimony outweighed the hearsay evidence and sustained the grievance. *AFSCME Council 14 and Ramsey Action Programs, Inc.*, BMS Case No. 99-RA-7 (Gallagher, 1999).

In this case, it is not necessary to invoke a blanket rule that hearsay evidence alone cannot support a just cause determination. Instead, following Arbitrator Gallagher's example, it is sufficient to find that the hearsay evidence in question is insufficient to outweigh the grievant's own sworn recitation of events.

City of Minneapolis and Int'l Ass'n of Firefighters Local 82, 121 LA at 80-81.

While I believe that this passage accurately depicts arbitral precedent, I also believe that Mr. Mollenhauer's statement to the investigators in this case is far more credible than the hearsay statement relied on by the employer in the *City of Minneapolis* case. I reach this conclusion for several reasons.

First, Mr. Mollenhauer's statement was given in the course of an official investigation. The investigators apprised Mollenhauer of the purpose of the interview and posed probing questions that reflected their expert training and experience. And, a court reporter preserved Mollenhauer's statement in a verbatim transcription.

Second, Ms. Olson-Cowden's statement and testimony lend support to Mr. Mollenhauer's original remarks. In her statement, she stated, "I think he placed his penis in my hand, but like I said I did not look down so I can't say that with all certainty." What she did know for certain, however, both in her statement and in her testimony at the arbitration hearing, is that Mollenhauer exclaimed, "I can't believe you did that!" in response to Ringhofer's actions.

Third, the Dakota County investigators confirmed Mollenhauer's story during a

second conversation. Following Mr. Ringhofer's termination in July 2006, rumors began circulating that Mollenhauer was considering changing his story. The investigators visited Mollenhauer and questioned him about these rumors, but he once again confirmed that his initial statement was accurate.

Fourth, unlike the hearsay summary presented in the *City of Minneapolis* case, Mollenhauer was subject to extensive examination by both parties at the arbitration hearing. Of particular significance, I found that the explanation he gave for his change in testimony not to be credible. Mollenhauer testified that he was subject to continuous pressure and remarks by the investigators to confirm that Mr. Ringhofer made genital contact with Ms. Olson-Cowden. He testified that the investigators stopped the recording to tell him what they wanted him to say. The evidence, however, belies this explanation. The auditory playback of the tape revealed no tension or discomfort in the participants' conversation. The tape exhibited no sounds of stopping and starting. Moreover, the taped interview concluded in the thirteen minutes noted on the transcript, strongly suggesting the absence of any gap in recording time.

In sum, I find that Mr. Mollenhauer's initial statement, although technically hearsay in nature, constitutes credible evidence given the record of this case taken as a whole. Based on this record, it is far more likely that Mr. Mollenhauer altered his story because of his friendship with Mr. Ringhofer, than because of any coercion exerted by the Dakota County investigators. As a result, I believe that the Employer has carried its burden of establishing that the grievant engaged in the conduct alleged as the basis for discipline in this matter.

B. The Appropriate Remedy

The Employer also has established that termination is an appropriate sanction in this case. Mr. Ringhofer's public misconduct significantly inhibits his ability to carry out law enforcement duties and tarnishes the reputation of the Sheriff's office. Although this incident occurred in an off-duty context, it has a clear nexus with his job as a peace officer. In addition, Mr. Ringhofer's misconduct was similar in nature to prior disciplinary events, particularly the Perkins incident that resulted in a three-day suspension. Under these circumstances, notions of progressive discipline warrant the ultimate discharge penalty.

AWARD

The grievance is denied.

Dated: September 19, 2008


Stephen F. Befort
Arbitrator