

IN THE MATTER OF ARBITRATION BETWEEN

City of Bloomington,)	
)	
Employer,)	
)	
and)	TAYLOR DISCHARGE
)	GRIEVANCE
)	
Bloomington Police Officers Federation,)	
)	
Union.)	
)	BMS CASE NO: 08 PA 1165
)	

Arbitrator: Stephen F. Befort

Hearing Dates: February 2 – 3, 2009

Post-hearing briefs received: March 6, 2009

Date of Decision: April 16, 2009

APPEARANCES

For the Federation: Ann E. Walther

For the Employer: Sandra H. Johnson
Lisa C. Netzer

INTRODUCTION

The Bloomington Police Officers Federation (Union) is the exclusive representative of a unit of peace officers employed by the City of Bloomington (Employer). The Union initially brought this grievance claiming that the Employer violated the parties' collective bargaining agreement by suspending Officer Michael Taylor for twenty days without just cause. While that grievance was pending, the Employer discharged Officer Taylor, and the Union added a second grievance

challenging the discharge decision. Finally, the Union added a third grievance claiming that the Employer's decision to assign Officer Taylor to administrative duties following the twenty-day suspension constituted a demotion without cause. These three grievances proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses, video recordings, and the introduction of exhibits.

ISSUES

1. Whether the Employer had just cause to suspend the grievant for twenty days due to the January 2008 incident at the Mall of America? If not, what is the appropriate remedy?
2. Whether the Employer had just cause to discharge the grievant? If not, what is the appropriate remedy?
3. Whether the Employer violated the party's collective bargaining agreement by assigning the grievant to permanent administrative duties following the imposition of the twenty-day suspension? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 18. DISCIPLINE

Section 1: The employer will discipline for cause only. Discipline will be one or more of the following forms:

- A. Oral reprimand
- B. Written reprimand
- C. Suspension
- D. Demotion or
- E. Discharge

ARTICLE 6. GRIEVANCE PROCEDURE

Section 7. The arbitrator will have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issues submitted in writing by the CITY and the FEDERATION, and will have no authority to make a decision on any other issue not so submitted.

The arbitrator will be without power to make decisions contrary to or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The arbitrator's decision will be submitted in writing within 30 days of the submission of briefs by the parties, unless the parties agree to an extension. The decision will be binding on both the CITY and the FEDERATION and will be based solely on the arbitrator's interpretation or application of the express terms of this contract and to the facts of the grievance presented.

ARTICLE 3. MANAGEMENT'S RIGHTS

The FEDERATION recognizes the prerogative of the CITY to operate and manage its affairs in all respects in accordance with laws and regulations of appropriate authorities including personnel policies and work rules.

These management rights include but are not limited to the following:

- A. To utilize personnel, methods, procedures, and means in the most appropriate manner possible.
- B. To manage and direct the employees of the Police Department.
- C. To hire, schedule, promote, transfer, assign, train, or retrain employees in positions in the Police Department.
- D. To suspend, demote, discharge, or take other appropriate disciplinary action against the employees for just cause.
- E. To determine the size and composition of the work force and to relieve employees from duties because of lack of work or other legitimate reasons.
- F. To determine the mission of the CITY and the Police Department and the method, means, job classifications and personnel by which it is to be accomplished.
- G. To determine policy as to the function and program of the employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and direction and number of personnel.

All management rights not specifically limited or abrogated by the terms and provisions of this AGREEMENT remain vested solely and exclusively in the CITY.

ARTICLE 8. SENIORITY

Section 11. At present there are three four-month bidding periods. Whereas service to the public or good cause may require the establishment of a different number or length of bidding periods, the CITY agrees that, prior to the implementation of such a change, management will meet and confer with the representatives of the FEDERATION concerning proposed changes in the duration and length of bidding periods. During each two-year period each officer

shall serve at least once on two of the four current shifts (day, mid, dog, night power). Remaining shifts will be bid on a seniority basis, only for Police Officers who have completed their initial twelve-month probationary period; provided the CITY reserves the right, in limited circumstances, to assign officers without regard to seniority if the good of the department requires it. If the CITY alters the length of time of shifts, the proportions set out herein shall be maintained.

FACTUAL BACKGROUND

The Employer hired Michael Taylor as a police officer in 1991. From 1991 to 1998, Officer Taylor received positive performance evaluations which frequently praised him for being an aggressive officer. Beginning in 1999, the performance evaluations became decidedly more mixed. Supervisors often marked Officer Taylor down for problems in attitude, judgment, and relationships, and in both 2003 and 2006 he received overall “below expectations” ratings.

Since 2003, Officer Taylor has been implicated in a number of performance incidents. The Employer responded to some of the incidents by imposing discipline, while addressing others as “performance matters.” According to department policy, a “performance matter” involves a minor rule violation and is not classified as formal discipline. This section first summarizes those incidents that occurred in the 2003 to 2007 period, and then turns to a description of the disciplinary incidents at issue in this proceeding.

Background Incidents: 2003 – 2007

In 2003, Officer Taylor was assigned to the Special Investigations Unit (SIU). While negotiating a car purchase with a used car salesman, Officer Taylor revealed that he was “going to do a buy” as part of an undercover drug sting operation. To back up his claim, Officer Taylor displayed a wad of bills to the salesman. The Employer issued

Officer Taylor a performance matter on December 8, 2003 for this breach of confidentiality. Due to this and other botched investigations, the Employer reassigned Officer Taylor to the more structured environment of a uniformed patrol officer during the following month.

In February 2004, Officer Taylor was attempting to check a hotel guest registry when a female hotel clerk refused to turn over the records. Officer Taylor leaped over the hotel's front desk and applied a lateral vascular neck restraint on the clerk. According to the grievant, he did so only after the clerk bit him on the arm. In any event, the witnesses to the event thought that Officer Taylor had overreacted, and the incident generated considerable public ill will. The Employer gave Officer Taylor another performance matter for this incident.

Because of this incident and a number of other instances in which Officer Taylor lost his temper in dealing with members of the public, the Employer asked the grievant to submit to a fitness for duty evaluation with a licensed psychologist. Following the evaluation, the Employer placed Officer Taylor on a six-month performance improvement plan during which he received intensive counseling from a professional coach and psychologist. In April 2005, Officer Taylor returned to patrol duty.

Deputy Chief Perry Heles testified that in the two months following Officer Taylor's completion of the performance improvement plan, he again engaged in a pattern of conduct resulting in a series of citizen complaints alleging unprofessional behavior. The Employer, as a result, reassigned Officer Taylor to work in the jail. Deputy Chief Heles stated that the move was made to place Officer Taylor in a less stressful setting with the hope that this would alleviate his anger problems.

On August 15, 2005, Officer Taylor failed to appear in court in response to a subpoena. The Employer issued the grievant a disciplinary written reprimand for this breach of duty.

Following a period without significant performance incidents while he was working in the jail, Officer Taylor returned to patrol duty in the summer of 2006. A few months later - in September 2006 - Officer Taylor received another written reprimand due to his performance in handling an intoxicated and unruly detainee. Officer Taylor failed to handcuff the detainee while transporting him to the detoxification center. When the detainee became belligerent, Officer Taylor did not call for assistance, but instead engaged in a physical altercation in which he again applied a lateral vascular neck restraint.

In October 2006, a citizen complained about Officer Taylor's conduct during a traffic stop. The citizen, a young African-American female, claimed that Officer Taylor used profanity and verbally berated her with respect to an outstanding traffic warrant. According to the citizen's complaint, Officer Taylor threatened to arrest her if she lodged a complaint against him with the department and to take her children to St. Joseph's Home if she did not immediately take care of the warrant. Because the complainant declined to give a statement, no further investigation was undertaken, and the Employer handled the incident as a performance matter rather than as an event warranting discipline.

Due to the growing number of citizen complaints concerning Officer Taylor, Commander Hinrichs issued a directive on October 12, 2006 requiring Officer Taylor to

record all of his future conversations with the public. The directive stated, in part, as follows:

Per our conversation/discussion on 10/12/2006, you are being ordered to use an in-squad camera and audio recorder beginning immediately. . . . The camera/audio recording **shall be used** whenever you have contact with a citizen under any circumstances in the course of your official duties. The camera/audio recording **shall remain on** during the entire contact with the citizen.

(Emphasis in original.)

On December 26, 2006, Officer Taylor failed to show up for a scheduled work shift. The Employer suspended the grievant for two days for this incident, but the discipline was reduced to one day during the grievance process.

The annual performance evaluation for 2006 gave Officer Taylor an overall rating of “below expectations.” As a result, the Employer placed Taylor on a performance improvement plan for 2007.

In May 2007, Officer Taylor pulled over a Hispanic male and two minor children. He eventually arrested the adult male for vehicle registration and insurance violations. The videotape of the incident shows that Officer Taylor directed a number of derogatory and profane remarks at the arrestee. After arresting the adult male, Officer Taylor allowed the two minor children, aged two and twelve years old, to walk home alone at 1:30 a.m. The Employer issued Officer Taylor a three-day suspension, which subsequently was reduced to two days, for this incident.

Disciplinary Incidents at Issue

The Twenty-Day Suspension

On January 12, 2008, the Bloomington Police Department (BPD) dispatch office broadcast that a “bait car” had been activated by a suspected car thief at the Mall of

America (MOA). Officer Taylor was nearby and responded in his patrol car as did K-9 Officer Mike Larson. MOA security officers also were alerted, and an MOA officer on bike patrol attempted to maintain visual contact with the bait car until the BPD officers arrived. In general, the BPD and MOA work cooperatively on security matters, with the BPD having principal jurisdiction over matters of criminal law enforcement.

When Officer Taylor arrived on the scene he observed the bait car enter the MOA east parking ramp. As Officers Taylor and Larson followed in pursuit in their respective vehicles, a MOA bike officer happened to get in between the two BPD officers. Officer Taylor radioed dispatch and asked them to “tell the Mall to get their guy out of here!”

Once Officers Taylor and Larson caught up to the bait car, Officer Taylor asked dispatch to kill the engine on the bait car. Officer Taylor then arrested the suspected thief while Officer Larson held his dog nearby. During this time, a MOA security officer came within a few feet of the dog, and Officer Taylor yelled at the officer to “get out of here!” After the arrest was completed and the suspect placed in a squad car, Officer Taylor told a nearby MOA security officer to “get a MOA supervisor up here now!”

At this point, Officer Taylor turned off his recording equipment. He testified that he never activated the recording equipment when dealing with MOA security, believing that they were not “citizens” covered by the Employer’s recording directive.

In compliance with Officer Taylor’s request, three MOA security supervisors met with him in the parking ramp. According to the testimony of one of the supervisors, the grievant was very loud and angry. She testified that Officer Taylor engaged in a profane tirade in which he yelled that he would arrest the “fucking ass” of any MOA officer who got in the perimeter of a police action in the future.

The Employer's investigation of this incident concluded that the grievant's actions violated department standards in dealing with the public and damaged working relationships with MOA security. The investigation also found that Officer Taylor's deactivation of the recording equipment prior to his confrontation with the MOA supervisors amounted to insubordination in violation of the recording directive. The Employer imposed a suspension of twenty days without pay for this incident.

The Discharge Decision

Following the MOA incident, the Employer placed Officer Taylor on an administrative assignment. He was forbidden to carry a weapon and his power of arrest was removed. He was assigned to work in the BPD Report Writing Room in a cubicle with eight-feet high walls. In addition, the Employer issued the following directive in an April 7, 2008 memorandum:

You are not to have contact with the public while on-duty. . . . You will be assigned a work area in the Officer's Report Writing area, and will handle administrative duties as assigned. These duties may include, but will not be limited to: vehicle forfeiture administration, records data entry, and kennel maintenance. In the absence of Administrative Officer duties, you will stay in your work area. Consider this a permanent assignment.

The Employer relied on two subsequent incidents in deciding to discharge Officer Taylor. Each of these incidents is described below.

The Dog-Walking Incident

On August 19, 2008, two department supervisors observed Officer Taylor walking a dog housed in the City's animal control kennel in a nearby city park. When confronted, Officer Taylor stated that he simply was performing assigned kennel maintenance duties. He also stated that the animal control officers assigned to the kennel had requested that he walk dogs when time permitted. The Employer's investigation

concluded that the grievant's actions violated the directive against having contact with the public as well as violating the restrictions concerning his assigned work areas.

The Netting Incident

On August 5, 2008, Officer Taylor was walking one of the city's kennel dogs in a nearby city park when he observed two juveniles using a net to catch fish from a creek. Believing that this activity was unlawful, Officer Taylor contacted dispatch and asked for the Department of Natural Resources (DNR) tip line. During the call, Officer Taylor told the dispatcher that he "didn't want Admin to know that I'm down here walking dogs."

Officer Taylor then confronted the juveniles, misrepresented that he was an off-duty police officer, and confiscated their net. Later that same day, Officer Taylor transmitted an email message to the DNR and met with the mother of one of the juveniles. The Employer conducted an investigation which concluded that the grievant's actions violated the prohibition on public contact as well as the limitation on assigned work areas.

As a result of these two incidents, the Employer placed Officer Taylor on paid administrative leave effective August 28, 2008. The Employer discharged Officer Taylor on October 8, 2008.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to support its disciplinary actions. The Employer maintains that Officer Taylor's rant to the MOA security supervisors seriously damaged important working relationships between the BPD and the MOA. In addition, the dog-walking and netting incidents involved clear violations of the

Employer's directive that Officer Taylor refrain from any contact with the public. The Employer asserts that these incidents must be viewed in the context of Officer Taylor's long history of suspensions, reprimands, and performance matters. According to the Employer, the grievant has exhibited an ongoing pattern of abusive behavior coupled with an unwillingness to accept supervision. Given that Officer Taylor has failed to acknowledge fault or correct behavior in spite of prior attempts at corrective action, the Employer argues that additional discipline short of discharge will not be effective. Finally, the Employer maintains that the Union's demotion claim is without merit in that Officer Taylor continued to receive the same wages and benefits following the reassignment to administrative duties.

Union:

The Union essentially acknowledges that Officer Taylor engaged in the conduct alleged by the Employer, but claims that such conduct does not warrant the severity of the discipline imposed by the Employer. The Union concedes that the grievant's use of profanity during the MOA incident was inappropriate, but argues that such does not merit a twenty-day suspension. The Union stresses that the Employer had never imposed any discipline greater than a two-day suspension previously and that a jump from two days to twenty days is inconsistent with basic notions of progressive discipline, particularly for an employee with eighteen years of service. The Union additionally claims that the incidents relied upon by the Employer for its discharge decision were very minor in nature. In this regard, the Union maintains that the dog-walking incident was not inconsistent with Officer Taylor's assignment to perform "kennel maintenance," while the netting incident involved appropriate law enforcement action that constituted only a

minor infraction of the Employer's "no public contact" directive. With respect to the third grievance, the Union argues that the Employer's assignment of Officer Taylor to demeaning administrative duties such as kennel maintenance constituted a demotion without cause. The parties stipulated at the hearing that this third grievance would be moot if the arbitrator found just cause for the discharge.

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 decisions. 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 Twenty-Day Suspension

The Alleged Misconduct

The Employer alleges two factual grounds as the basis for the twenty-day suspension. First, the Employer contends that Officer Taylor engaged in an angry and profane tirade that berated as well as threatened MOA security officers. As a corollary matter, the Employer also asserts that this tirade bypassed the established chain of command for addressing operational concerns involving the two organizations. Second, the Employer alleges that Officer Taylor purposefully deactivated his recording

equipment prior to the confrontation in direct contravention of the Employer's earlier recording directive.

The Union does not dispute the core of these factual allegations. That is, the Union acknowledges that Officer Taylor engaged in an angry confrontation with MOA security supervisors and that he turned off his patrol vehicle's recording equipment prior to this confrontation.

The Union, however, disagrees with the Employer's characterization of this incident in two respects. First, Officer Taylor's testimony minimized the amount of profane utterances and additionally claimed that his alleged threat to arrest interfering MOA security officers in the future was uttered in a tongue-in-cheek manner. Second, the Union asserts that Officer Taylor's deactivation of the recording equipment did not violate the previously issued recording directive. That directive instructed the grievant to use the recording equipment "whenever you have contact with a citizen." The Union argues that MOA security personnel are not "citizens," but fellow, albeit unsworn, law enforcement personnel. In this regard, Officer Taylor testified that he has never used the recording equipment when communicating with MOA security personnel.

Based upon the record, the Employer has carried its burden of establishing that the grievant engaged in the conduct alleged as the basis for this discipline. It is undisputed that Officer Taylor directed a tirade at the MOA security supervisors and the weight of the testimony establishes that it was delivered in an over-the-top angry manner that was liberally laced with profane statements. It also is clear from the record that Officer Taylor deactivated the recording equipment just prior to delivering this tirade, and that the Employer's recording directive instructed that "if you are unsure or there is

any doubt as to whether or not you should be recording you shall record the contact.”

Under these circumstances, it is more likely than not that Officer Taylor deactivated the recording device with the specific purpose of avoiding the creation of a record that would memorialize the about-to-ensue confrontation.

The Appropriate Remedy

Both parties make cogent arguments concerning the appropriate remedy for this incident. The Employer contends that a significant penalty is warranted because the incident damaged important working relationships with MOA security, thereby resulting in the potential for impaired law enforcement efforts at the nation’s largest shopping mall. The Union, on the other hand, maintains that Officer Taylor’s loss of temper resulted in no actual harm and that a twenty-day suspension is grossly excessive for what, in reality, is a relatively minor disciplinary incident.

The key to this issue is the notion of progressive discipline. In general, an employer should strive to correct performance deficiencies by an increasing ladder of discipline and other efforts. In this regard, the Union points out that the Employer never issued any prior discipline to Officer Taylor more serious than a two-day suspension such that an immediate leap to a twenty-day suspension is unwarranted in the context of the MOA incident.

While this argument is not without some merit, the overall record reveals a troubling pattern of misconduct coupled with considerable Employer efforts at correction. On no less than four occasions prior to the MOA incident, Officer Taylor engaged in threatening or abusive altercations with members of the public. It is true, as the Union points out, that the Employer handled two of these altercations as performance matters

rather than as disciplinary events. Nonetheless, these altercations reveal a decided lack of self-control and a growing potential for harm and liability. It also is significant to note that the Employer made numerous attempts over a five-year period to assist Officer Taylor to overcome these problems. The Employer's efforts included coaching, assignments to more structured environments, performance improvement plans, and the provision of a personal psychologist.

Given this extensive history, the Employer certainly had cause for alarm when Officer Taylor engaged in yet another abusive incident at the MOA. The Employer was in a position in which it needed either to terminate Officer Taylor or somehow impress upon him that he was running out of chances to correct his behavior. While a twenty-day suspension is an exceptional sanction, it was supported by just cause in this instance.

B. The Discharge

The Alleged Misconduct

The Employer's claim of misconduct with respect to the discharge grievance is premised upon Officer Taylor's involvement in two incidents: the dog-walking incident and the netting incident. The Employer argues that the grievant's conduct in each matter violated its "no public contact" directive and warrants the next and ultimate step on the disciplinary ladder.

Following the MOA incident, the Employer reassigned Officer Taylor to only administrative duties, including data entry and kennel maintenance. The Employer assigned Officer Taylor to work in the Report Writing Room and directed him to have no contact with members of the public.

The Employer first alleges that Officer Taylor committed misconduct by walking a kennel dog in a nearby City park. The Employer argues that Officer Taylor's action in walking a dog outside to the City government grounds violated his territorial assignment as well as the directive to have no contact with the public.

I find this contention to be without merit. The Employer stripped Officer Taylor of all law enforcement duties and assigned him to perform, among other duties, kennel maintenance activities. He spent most of his time confined to a cubicle with nothing to do. When one of the animal control officers suggested that he walk some of the kennel dogs, Officer Taylor obliged. Having been assigned to kennel maintenance duties, it is difficult to see how walking a kennel dog constitutes misconduct. It also is difficult to see that walking a dog in a city park without more amounts to prohibited public contact. In short, this asserted basis for discipline cannot be sustained.

The netting incident is different in nature. Here, Officer Taylor went beyond walking a dog in the City park to confront the juveniles engaged in the fish netting activities, contacted DNR officials to report the alleged illegal conduct, and then met with the mother of one of the juvenile perpetrators. By these activities, Officer Taylor clearly and knowingly violated the Employer's prohibition on public contact while on duty.

In his defense, Officer Taylor testified that he simply could not turn his back on illegal activities while he remained a law enforcement officer. The Union additionally argues that the incident was very minor in nature and that no one was harmed by Officer Taylor's actions. The Union further points to the grievant's eighteen years of service as an additional factor militating against discharge.

While these arguments certainly have some force, I ultimately conclude that the discharge should be upheld for three reasons. First, Officer Taylor's actions in this incident once again continued a pattern in which he was unable to comply with supervisory instructions in controlling his actions in dealing with public. Here again, the five-year pattern of inappropriate behavior weighs more heavily than does the immediate incident. Second, it is clear from Officer Taylor's testimony that he does not acknowledge any wrongdoing in this string of incidents. Except for two incidents in which he did not report for duty as instructed, Officer Taylor denied any personal responsibility for the incidents in question. This denial of responsibility makes it difficult to believe that any disciplinary action short of discharge will be effective in correcting his behavior. Finally, the relationship between the grievant and his supervisors has deteriorated to the point that any attempt at repair would be a very remote prospect at best. Neither party trusts the other; neither believes that the other will act in good faith. While I certainly sympathize with the grievant concerning the environment in which he was placed during the last few months of his employment, his failure to seize any of the lifelines offered to him since 2003 ultimately provides the Employer with adequate cause for his termination.

C. The Demotion

The Union's third grievance claims that the Employer's transfer of Officer Taylor to an administrative assignment following the MOA incident constituted a demotion without cause in violation of the parties' collective bargaining agreement. In support of this contention, the Union points to the fact that the grievant was removed from all law enforcement duties, forbidden to carry a weapon, restricted from any contact with the

public, assigned to a cubicle with eight-foot high walls, and primarily assigned to clean dog cages in the City's kennel. The Employer maintains that the reassignment did not constitute a demotion since the employer continued to provide the grievant with the same wages and benefits as in his previous assignment.

At the arbitration hearing, the parties stipulated that this grievance would be moot if the arbitrator found that just cause existed to support the Employer's discharge decision. Given the resolution of the discharge issue as indicated above, the demotion issue is moot and no award will be made on the demotion issue.

In spite of this outcome, I feel compelled to comment on the Employer's reassignment of Officer Taylor. The Employer reassigned a sworn officer with more than seventeen years of service to clean dog cages. The Employer stripped him of his gun and his uniform. It prohibited him from any interactions with the public or any fellow peace officers. The Employer, in short, required Officer Taylor to bear the law enforcement version of a scarlet letter. The Union suggests that the likely motivation for this extreme action is that the Employer was trying to force Officer Taylor to quit. If this contention is accurate, the Employer should be aware that this is a problematic human resources strategy that is not likely to serve its long-term interests. If the Employer truly believed that Officer Taylor no longer could be trusted in dealing with the public, it should have terminated his employment at that point.

AWARD

The grievance is denied.

Dated: April 16, 2009

Stephen F. Befort
Arbitrator