

Law Enforcement Labor Services, ) **ARBITRATION AWARD**  
the Union )  
)  
-and- ) Madson Termination  
)  
Three Rivers Park District, ) BMS Case No.09-PA-0004  
the Employer. )

Arbitrator: Barbara C. Holmes

Hearing Date: May 27, 2009

Post Hearing Briefs due: June 19, 2009

Date of Decision: July 17, 2009

Appearances:

For the Union: Isaac Kaufman, General Counsel  
Law Enforcement Labor Services, Inc.

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

## INTRODUCTION

Law Enforcement Labor Services, Inc. (herein, the Union), as the exclusive representative, brings this grievance challenging the discipline of its member Shannon Madson by the Three Rives Park District (herein, the Employer). An arbitration hearing was held at which both parties had a full opportunity to present evidence through the testimony of witnesses, the introduction of exhibits and the submission of post-hearing briefs.

## **ISSUES**

1. Did the Employer violate the Grievant's rights under the Peace Officers Discipline Procedures Act? If so, what is the appropriate remedy?
  
2. Did the Employer have just cause to discipline the Grievant? If not, what should be the remedy?

## **FACTUAL BACKGROUND**

The Three Rivers Park District is a public entity that manages approximately 27,000 acres of park lands in the Twin Cities metropolitan area. The Employer maintains its own police force, including a Mounted Patrol Unit that patrols the park lands on horseback.

The Grievant attended the University of Minnesota and obtained a degree in Fisheries and Wildlife. She then attended and graduated from a law enforcement training program. In August of 2005 she was hired as a Parks Services Officer and promoted to the position of Parks Police Officer in June of 2006. Parks Police Officers are required to carry a firearm in carrying out their duties. In March of 2007 she completed a training program to become part of the Employer's Mounted Patrol Unit.

In September of 2007, as part of her work duties, the Grievant attended the 2007 Mounted Patrol Clinic held at the Zuhrah Shrine Ranch in Maple Plain, Minnesota. This 4-day clinic was attended by various mounted patrol units in the state and was hosted by the Employer. The purpose of the clinic was to improve and advance the various skills needed for a mounted patrol officer. Most of the witnesses at the hearing were co-workers of the Grievant and also attended the clinic. The training portion of the clinic ended late Saturday afternoon and was followed by a banquet at which alcohol was served. After the banquet many of the clinic participants remained at the location to socialize. Alcohol was still available for their consumption.

Around midnight the Grievant's co-workers Blau, Hise, Miller and Hogg decided to take the Employer's horses for a trail ride. Upon returning from the ride they rode the

horses to the open doors at the west end of an indoor horse riding arena located on the premises where the clinic was held. They observed the Grievant and another male individual sitting on a hay bale on the opposite side of the arena engaging in conduct of a sexual nature. After some discussion the four co-workers rode across the arena to where the Grievant and the other male individual were located in an attempt to disrupt the sexual conduct. The Grievant and the other male individual stopped the conduct and left the arena.

Approximately twenty minutes later the Grievant and the male individual walked to the area where the other co-workers were located. The Grievant left the male individual and returned to her car where she “passed out.” Sometime later the same male individual was seen getting into the Grievant’s vehicle and “making out” with her. He then got out of the Grievant’s car and no more contact between the two was observed. The witnesses identified the male individual as a Hennepin County Deputy Sheriff who had participated in the clinic.

The conduct between the Grievant and the male individual was not reported to the Employer by any of the four co-workers named above. However, one of the co-workers mentioned it to another employee and a “rumor mill” developed. Eventually an employee brought the incident to management’s attention. In consultation with the human resources office Lt. Gullickson conducted an investigation into the matter. During the course of the investigation the Employer was made aware of the midnight trail ride taken by Blau, Hise, Miller and Hogg while they were intoxicated. They subsequently each received a 4-day/40 hour unpaid suspension for this misconduct.

The Grievant was interviewed and stated that she was so intoxicated that evening that she did not remember what happened to her. After the investigation was completed the Grievant informed the Employer that she was filing a criminal complaint for sexual assault against the male individual involved in the sexual activity. The Employer chose to refrain from making any disciplinary decision until the criminal investigation was resolved. The Employer did not allow the criminal investigator from the Hennepin County Sheriff’s Office to use its investigation report and the criminal investigator did not talk to all of the eye witnesses. The criminal investigation determined there was no criminal activity. Lt. Gullickson finalized his investigative report and provided it to

upper management with a recommendation that the Grievant receive a 1-day suspension and participate in the employee assistance program.

On April 4, 2008, the Grievant received a letter of discipline with a 4-day/40 hour suspension imposed. This discipline was grieved and ultimately appealed to arbitration.

## **POSITION OF THE PARTIES**

**Employer:** The Employer claims that it did not violate the Peace Officers Discipline Procedures Act because that procedure only applies when a “formal statement” is being taken of an officer. It believes that because the Grievant’s statement was not recorded it was not a “formal statement.” Furthermore, the Employer argues that Grievant was clearly informed of the nature of the charges against her prior to her investigatory interviews.

With regard to its disciplinary action, the Employer argues that the Grievant was aware of the rules regarding her required conduct as a peace officer. The Employer contends that the required conduct is necessary to gain the respect and trust of the public so that laws may be enforced in a an orderly manner. The Employer also claims that a reasonable employee would know that becoming excessively intoxicated and engaging in a sexual activity in a public place at an event sponsored by the employer would discredit the employee and the employer.

The Employer states that its witnesses established that the Grievant was intoxicated and had sexual relations with another in the public indoor riding arena. It believes that the level of discipline given to Grievant was appropriate because of the seriousness of the offense. The Employer also noted that the misconduct committed that same evening by Blau, Hise, Miller and Hogg resulted in a similar 4-day/40 hour unpaid suspension.

**Union:** The Union claims the Peace Officers Discipline Procedures Act was violated by the Employer because it did not have a written signed complaint from anyone about the Grievant’s conduct before it interviewed her. The Union argues that this shortcoming should result in the Grievant’s suspension being reversed.

As to the discipline received by the Grievant, the Union believes that there is strong evidence that the Grievant was a victim of criminal sexual conduct. It argues that because she was so intoxicated she could not legally consent to participate in the sexual activity. The Union relies on several unpublished opinions of the Minnesota Court of Appeals that hold that a victim of a criminal sexual conduct act cannot be held to have consented to the conduct if the victim is extremely intoxicated. The Union argues that her statements to others to “keep that guy away from me” and “this guy keeps following me” indicate that she was not a willing participant. The Union contends that the Grievant cannot be disciplined for a non-consensual act.

Because of the pivotal issue of Grievant’s consent, the Union also argues that the Employer’s investigation was incomplete because it did not interview the male individual who engaged in the sexual activity with the Grievant.

The Union also argues that even if it is determined that the Grievant’s conduct violated the Employer’s policies, the 4-day/40 hours suspension was overly severe. It points out that the Grievant has never been disciplined and has had positive performance evaluations. The Union believes the seriousness of the Grievant’s misconduct does not rise to the level of the misconduct of her co-workers who went for an unauthorized midnight trail ride that evening.

## **DISCUSSION AND OPINION**

The Union asserts that the Employer violated the Minnesota Police Officers Discipline Act because it took a formal statement from the Grievant without having a signed written complaint regarding the Grievant’s conduct. Furthermore, the Union asks that the suspension be reversed because of this alleged violation. This Act provides in pertinent part as follows:

(b) "Formal statement" means the questioning of an officer in the course of obtaining a recorded, stenographic, or signed statement to be used as evidence in a disciplinary proceeding against the officer. ...

**Subd. 5. Complaint.**

An officer's formal statement may not be taken unless there is filed with the employing or investigating agency a written complaint signed by the complainant stating the complainant's knowledge, and the officer has been given a summary of the allegations. ...

**Subd. 16. Action for damages.**

Notwithstanding section 3.736 or 466.03, a political subdivision or state agency that violates this section is liable to the officer for actual damages resulting from the violation, plus costs and reasonable attorney fees. The political subdivision or the state is deemed to have waived any immunity to a cause of action brought under this subdivision, except that the monetary limits on liability under section 3.736, subdivision 4, or 466.04 apply.

I find that a “formal statement” as defined above was not taken because the Grievant did not sign a written statement not was the interview between the Grievant and Lt. Gullickson recorded in any manner. Furthermore, even if it were found that the Employer violated this statute, the remedy is for actual damages, not reversal of the discipline.

Regarding the disciplinary action, Section 20.1 of the parties’ collective bargaining agreement states that the Employer must have just cause to discipline the Grievant. The analysis to determine whether or not just cause exists typically involves two distinct steps. The first step is to determine whether the Employer has submitted sufficient proof to show that the employee engaged in the alleged misconduct or other behavior warranting discipline. If the alleged misconduct is established by a preponderance of the evidence, the next step is to determine whether the level of discipline imposed is appropriate, taking into account all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS 905 (5<sup>th</sup> ed. 1997).*

**A. The Alleged Misconduct.**

The allegation of misconduct asserted by the Employer in the letter of discipline is that the Grievant “engaged in inappropriate and unprofessional physical conduct.” In that regard the Employer claims that this conduct was in violation of its Public Safety Section Procedure Manual, Section 2.1300. The specific provisions of the section that the Employer claims were violated are:

Members shall maintain a level of conduct in their affairs which is in keeping with the highest of standards of the law enforcement profession.

Sworn members shall adhere to standards of conduct as promulgated by the Minnesota Board of Peace Officer Standards and Training in their “Professional Peace Officers’ policy (Appendix S).

[Appendix S]

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

In its letter of discipline to the Grievant the Employer did not detail the specific behavior upon which the discipline was based except to reference the internal investigation and that this investigation “revealed that excessive alcohol intoxication admittedly played a significant role in your behavior.” Similarly, the 2<sup>nd</sup> and 3<sup>rd</sup> Step Grievance failed to detail the specific behavior upon which the discipline was based. During the course of the disciplinary process and at the hearing the Employer has characterized the Grievant’s conduct as a “sex act”, “having sex”, “*in flagrante delicto*”, and “sexual activity”. There is a wide range of conduct that could be considered “sexual activity” and a corresponding range inappropriateness. An analysis of the exhibits and testimony must be made to determine what the Employer specifically proved before the inappropriateness of the conduct can be determined.

Lt. Gullickson interviewed the four co-workers regarding the Grievant’s conduct that evening. He then summarized their testimony in the investigative report. He reported the following descriptions of what the four co-workers saw when they first entered the arena and saw the Grievant across the arena in the company of another male individual. (Emphasis has been added.)

[Blau] described the conduct as “**making out, kissing, and sitting on the hay bales.**” ... Blau described [the Grievant] **sitting on the lap of the other individual facing him, with one leg on each side.** ... Blau also observed approx. **6 inches of skin exposed on the [the Grievant’s] back or “perhaps” the top of her buttocks.** ... the other individual who was observed to have his hands on the back of [the Grievant] lifting up her shirt or slightly lowering her pants.... Blau **did** observe **that [the Grievant] had a shirt and pants on.** ...

Hogg stated that he looked inside and observed [the Grievant] and another individual on the hay bales on the east side of the horse arena.... [The Grievant] was standing upright with one foot on the ground and the other foot on a hay bale standing directly in front of the other party... **the other party was sitting facing [the Grievant] with [the Grievant's] pelvic area in front of his face. ... [The Grievant's] buttocks and thighs were exposed and he pants were down. ... [Hogg] thought they were having intercourse. ... As the group entered the arena ... [Hogg] stated that [the Grievant's] pants were off. ...**

Hise stated that he recalled seeing ... [the Grievant and the other male individual] **in “very close proximity”** to each other on the hay bales. Officer Hise described the activity as **kissing and “some type of embrace.”** Officer Hise recalled **seeing clothing but couldn't say for certain if they were fully clothed.**

Miller stated ... that she saw [the Grievant] **sitting on the lap of a male party ...facing the other individual.** Officer Miller stated that she remembered **seeing “bare legs” and remembered seeing [the Grievant] wearing a coat.**

There is little agreement amongst these witnesses as to the Grievant's state of dress or conduct. The reported state of dress ranges from being fully clothed to having her pants off. Similarly the conduct observed ranges from kissing and embracing to sexual intercourse. Each of these witnesses also admitted to being intoxicated that night. Given the lack of consistency in the witness statements as reported by the Employer and the diminished credibility of the witnesses due to their intoxication, I find that the Grievant was engaged in some sort of sexual activity involving enthusiastic kissing and embracing and that this activity took place in a public area. Because the testimony regarding the Grievant's state of dress was not just inconsistent but contradictory, the Employer failed to prove that the Grievant was less than fully clothed.

I do not address the issue of characterizing the Grievant's conduct as “on duty” or “off-duty” because the alleged violated rule applies to both on and off-duty conduct. The determinative fact is that the sexual activity occurred out in the open in a public place where others viewed it. I find that the sexual activity engaged in by the Grievant that evening was inappropriate and constitutes misconduct.

The Employer also faults the Grievant for being publically intoxicated. This accusation is sufficiently supported by the testimony of the witnesses and the Grievant.

The Union argues that the Grievant cannot be disciplined for conduct to which she did not consent. It has offered non-precedential criminal cases to support its position. I choose not to follow these cases and instead find that the Grievant became intoxicated by her own choice and is therefore responsible for her acts of employee misconduct that follow from that voluntary intoxication.

### **B. The Appropriate Level of Discipline**

The next step is to determine whether the level of discipline imposed is appropriate, taking into account all of the relevant circumstances. I find that the 4-day/40 hour unpaid suspension is not supported by the evidence for the following reasons.

I have found that the Grievant's sexual activity of enthusiastic kissing and embracing in a public area was inappropriate and constitutes misconduct. But I do not find that her conduct can fairly be characterized as "having sex" or a "sex act" as asserted by the Employer. Therefore, I find a lesser degree of inappropriateness than that found by the Employer in determining the Grievant's level of discipline.

Chief McPhee testified that he thought the misconduct of the Grievant was comparable to the misconduct of her 4 co-workers because it occurred at the same event, excessive alcohol was involved and the conduct was "similar." Because the Grievant's 4 co-workers were given a 4-day/40 hour suspension for their misconduct that evening, Chief McPhee imposed the same penalty upon the Grievant for her misconduct. However, I find the misconduct of Blau, Hise, Miller and Hogg to be of a more serious nature than the Grievant's misconduct. They took the Employer's horses out on an unauthorized midnight ride while they were intoxicated. The risk of injury to themselves and the horses exposed the Employer to a much greater financial and public relations liability than the Grievant's misconduct.

The damage done by the Grievant was primarily to her personal reputation. While the testimony of several witnesses said that her conduct that evening negatively impacted how they subsequently related to her at work, I find their attitude to be unreasonably judgmental. If the Grievant had a habit of conducting herself in that manner their attitude would be more understandable. But testimony established that her

behavior that evening was extremely unusual and uncharacteristic. Additionally, while her misconduct that evening could have been viewed by other members of the public and damaged the reputation of the Employer, there was no evidence that anyone but her co-workers witnessed her sexual activity.

At the arbitration hearing Chief McPhee testified on cross examination that the Grievant's sexual activity that evening was less of an issue than her public intoxication. Witness testimony established that attendance at the Mounted Patrol Clinic was a work assignment for the Grievant and her co-workers. Although they were probably not required to stay for the banquet and socializing as part of the work assignment, these activities were closely related to the work assignment. The Employer stated that it "hosted" the Clinic and that the alcohol served at and after the banquet was provided by an outside sponsor of the event. Thus, the Employer created a situation where alcohol-related misconduct was more likely to occur. I find the seriousness of her public intoxication is mitigated because the Employer allowed alcohol to be served at the clinic's location.

As stated earlier, ultimately the Grievant remains responsible for the amount of alcohol she consumed and the resulting misconduct. For that reason I find that the appropriate level of discipline is a 1-day/10 hour unpaid suspension.

### **AWARD**

The Grievant's 4-day/40 hour unpaid suspension is reduced to a 1-day/10 hour unpaid suspension. The Grievant shall be made whole with regard to the reduction in the penalty.

DATED: July 17, 2009

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Barbara C. Holmes  
Arbitrator