

In the Matter of the Grievance Arbitration Between

Law Enforcement Labor Services, Inc.
Andrew Landon, Grievant,

And

City of Richfield, Employer

Before:

Harley M. Ogata

BMS Case No. 10-PA-0172

Date and Place of Hearing:

April 29, 2010
Richfield City Offices
Richfield, Minnesota

Advocates:

For the Union:

Isaac Kaufman
Law Enforcement Labor Society, Inc.
327 York Avenue
St. Paul, Minnesota 55130

For the Employer:

Marylee Abrams
Abrams and Schmidt
3820 Cleveland Avenue North, Suite 100
Arden Hills, Minnesota 55112

Factual Background

This matter came before this arbitrator under the grievance procedure contained in the collective bargaining between the parties. The parties agreed that the matter was properly before the arbitrator.

The grievant, Andrew Landon, is a police officer with the Richfield Police Department (RPD). He has been a patrol officer since 2001 and has served as the RPD canine officer for the last 4 years. This grievance came before this arbitrator because the grievant was suspended without pay for one 12 hour day as a result of actions taken by the grievant on June 21, 2009. The RPD suspended the grievant for failing to terminate a car pursuit in the early morning hours in downtown Minneapolis.

Prior to the incident in question, the grievant had been given an oral reprimand on March 14, 2009 for using excessive speed through a residential neighborhood during a pursuit originating in Savage, Minnesota.

On June 18, 2009, the grievant attended an eight-hour advanced training on the issue of pursuits. The training had both a classroom component and a field driving component. The training was not remedial in nature and was required as a part of every officer's ongoing training requirements under

Minnesota law. This was the third such training that the grievant participated in on pursuits. In addition, the grievant has served as a Field Training Officer, training new officers on the Richfield Pursuit Policy.

On June 21, 2009, at about 1:40 A.M., the grievant heard a radio call concerning a pursuit that involved an officer from Dakota County chasing a suspect on Interstate 35W. The Dakota County officer was the only officer in pursuit at that time. The pursuit was proceeding through Richfield's jurisdiction. The grievant received permission from his supervisor to engage in the pursuit in assisting the officer from Dakota County.

The grievant initially had some trouble establishing communication with the Dakota County officer and had to try different radio channels available to law enforcement. Once he finally established communication, the grievant informed the other officer that he would radio the details of the pursuit so that the other officer could concentrate on driving. Because the grievant tried a number of channels, radio communication with his own dispatcher and supervisor was interrupted.

As the pursuit neared downtown Minneapolis, a number of Minneapolis police joined the chase. The suspect exited the freeway and the pursuit slowed down because of traffic on the ramp. At this point, the Dakota County officer

attempted a pursuit intervention technique (PIT) which spun the car around 180 degrees, but failed to result in ending the chase.

The suspect proceeded towards the downtown bar district on and around 1st Avenue. The time was nearing the closing time for bars. There was heavy vehicle traffic on the streets at that time and a lot of pedestrians were out as well. As the chase got close to the area, the Minneapolis radio officer in charge ordered his squads to terminate the pursuit. The Dakota County officer's supervisor also ordered a termination. The Richfield supervisor ordered termination, but the grievant testified that he did not hear the order.

The grievant became the lead car in the pursuit at this point. The Dakota County officer continued in the pursuit with lights on but no siren. The pursuit speed was slowed to a trickle by this time by traffic in the area. The suspect drove a block or so after the Minneapolis police terminated and then turned a corner. A block later, traffic blocked the street's three lanes.

Instead of stopping, the suspect squeezed through two cars with his large SUV and slightly pushed each car aside. After moving through the two cars, a state patrol car then attempted another PIT maneuver, turning the suspect's car 270 degrees around. The suspect continued driving.

The grievant followed the car for another couple of blocks before the suspect was stopped by a police blockade and was apprehended. The entire

pursuit was recorded on the grievant's car camera and was introduced into evidence at the hearing, including the audio portion of the recording.

Discussion

There really is no factual dispute between the parties. The decision in this case boils down to a determination of whether the grievant exercised proper judgment in failing to terminate the pursuit at the same time that the Minneapolis and Dakota County officers pursuits were terminated by their superiors. For the reasons below, the arbitrator finds that the grievant's exercise of judgment under these circumstances does not warrant the one-day suspension imposed by the RPD.

Richfield Policy #218 (policy) states in relevant part:

[O]fficers must carefully exercise their discretion to initiate, conduct, and continue a pursuit. . .

When operating an emergency vehicle in pursuit, the officer **shall** always weigh the risks involved against the nature of the offense which caused the pursuit. Pursuit **shall** be terminated when the risks of pursuit outweigh the desirability of apprehension. . .

The responsibility for the decision to stop a violator or pursue a violator rests with the individual officer. In arriving at the decision the officer must carefully consider all factors involved, including the seriousness of the offense, the possible consequences and most importantly, the safety of the general public. (emphasis in original).

This policy clearly puts the onus on the patrol officer to exercise proper judgment weighing a number of factors, most important of which is the safety of

the public. It is also clear from the testimony at the hearing, that this is one of the most important policies of the RPD.

The evidence shows that some police departments' policies state that termination will occur at the order of the officer's superiors. The RPD policy is different in that it places a burden on the pursuing officer to exercise independent judgment properly in the ongoing decision to pursue or not to pursue.

The employer cites at least four factors indicating that the grievant's judgment was flawed:

1. He knew there was heavy civilian traffic in the area he was entering and that it was bar closing time, thereby increasing the issue of public safety as a factor.
2. He did not know the reason the suspect was being pursued so he could not properly weigh the nature of the offense versus the risk of continuing the pursuit.
3. He was outside his jurisdiction at the time he entered downtown Minneapolis.
4. He knew that the Minneapolis and Dakota County supervisors had called off the pursuit for their officers.

All of these factors point directly to the determination by the RPD that the grievant failed to exercise good judgment under the circumstances. For the following reasons, the arbitrator agrees that a reasonable person could conclude, in retrospect, that the grievant should have terminated under the circumstances, but that given the totality of the circumstances, the imposition of a one-day suspension under these facts is excessive.

The arbitrator has reviewed the audio/video recording of the pursuit many times. The judgment call in question largely occurs during a one-minute interval of time commencing with the termination of the pursuit by the Minneapolis police and the apprehension of the suspect at the blockade.

First, it is notable from a review of the video that the grievant "pursued" the suspect during this one-minute time frame, but that the rate of speed of the vehicles was quite slow. At no time did the arbitrator believe that the grievant disregarded the safety of civilians by the use of excessive speed.

It is also clear from the testimony of witnesses from both the employer and the grievant that the employer does not seriously dispute the fact that the grievant did not hear the attempts by the RPD supervisor to order termination of the pursuit. Had the grievant heard the directives and disregarded them, the decision on this matter would be different.

The use of a PIT maneuver by the state patrol in the middle of the 1st Avenue bar district, at closing time, would heighten the belief that the apprehension of the suspect was highly desirable. Combined with the use of a PIT maneuver by the Dakota County officer earlier and the fact that the maneuvers did not result in the suspect stopping, supports the notion that a reasonable pursuer could conclude that apprehension of this suspect is important.

The length of time that the grievant continued the pursuit is relevant as well. The grievant testified that he believed the suspect would abandon his car and run at the point where his progress was clearly impeded by traffic. This occurred very shortly after the pursuits by the Minneapolis and Dakota County officers were terminated. The arbitrator notes as well that the Dakota County officer continued in the pursuit with lights flashing, but sirens off. Combined with the PIT maneuver from the state patrol, the short length of time that the grievant continued the pursuit bears on the finding that his exercise of judgment did not warrant the discipline imposed.

Nothing in the video indicates that the grievant disregarded the safety of civilians during this time period. If the pursuit had continued much longer and at higher rates of speed, the decision in this case might be different. The stark reality of the video leads the arbitrator to the conclusion that the grievant was mindful of the factors listed under the policy and that he exercised his best good judgment under these circumstances.

This decision rests on a couple of other mitigating factors as well. First, the grievant clearly was given the authority to engage in the pursuit by his supervisor. The only question here concerns whether he should have terminated earlier.

Second, the fact that the grievant is a canine officer has some bearing on this decision. In radio contact with other officers in the pursuit, a potential tentative plan was established whereby the grievant would take the lead in apprehending the suspect if he fled on foot.

Finally, the demeanor of the grievant on the tape and during his testimony led the arbitrator to conclude that he diligently attempted to perform his duties within the confines of what he understood to be the pursuit policy and that he was not cavalierly disregarding the safety of the public. Indeed, it was striking to the arbitrator to note the difference between the tapes of the Savage pursuit and the instant one. In the Savage pursuit, where the grievant was given an oral reprimand, the rate of speed appeared to be overly excessive and aggressive, given the nature of the pursuit. In the instant matter, the grievant appeared to be more cautious while maintaining contact in pursuit.

In general, the employer has the right and responsibility to establish what it considers proper decision making for the officers it employs. The proper use of judgment cannot be left entirely up to the decision making of the officer or there would be no standard applicable for officers to use as guidance in the future.

In cases where an employee clearly steps outside the bounds of appropriate decision making, the use of harsh discipline, skipping lesser forms of discipline, is warranted. For example, if the grievant was found to disregard a

clear directive of a supervisor, a suspension of some type would be warranted, even without the imposition of any prior discipline for like behavior.

Under these circumstances, the arbitrator finds that the grievant exercised what he believed to be good judgment, given the circumstances, and reasonable people could disagree. The arbitrator specifically finds that the employer has the right to indicate to its officers that in circumstances where all other apparent police jurisdictions call off a pursuit, it is expected that its officers would do so as well. Clearly, there are numerous fact situations which could alter this rule, but under these facts, the employer has the right to inform this officer that it disagrees with his decision and to warn him not to repeat it in the future.

However, nothing in these circumstances would indicate that the grievant's actions were so outside the bounds of common sense that it would warrant a suspension. A written warning from the employer in this regard will serve as ample notice that the employer will expect him to terminate under like circumstances in the future.

The union offered other defenses to the imposition of the discipline with which the arbitrator disagrees. First, the union argued that the employer conducted an unfair investigation because it failed to take a formal statement from the grievant and failed to give him a Garrity warning. As a result of this, the

union argues that the RPD failed to get the grievant's side of the story before administering the suspension and violated his due process rights.

The arbitrator finds that the grievant's due process rights were not violated. Nothing in the common law of the shop or Minnesota law would require the RPD to conduct its investigation under the Peace Officers Discipline Procedures Act (PODPA) under Minn. Stat. § 626.89. Under the PODPA, an officer is afforded certain procedural and substantive due process rights whenever a formal statement is taken by unit of government. A formal statement must be recorded, stenographic or signed if it is to be used against the officer in a subsequent disciplinary hearing. In this case, no formal statement was requested.

Instead, the employer offered the grievant the chance to give an informal statement stating his position on the issues in question. He declined, which is his right, so long as the statement is not compelled. If the grievant chooses not to make an informal statement, then the employer must act with the information available to it at that time. The union is free to provide countervailing evidence at the arbitration, but cannot claim that the fact that the grievant voluntarily withheld the statement violates his due process rights.

Next, the union argued that "where failure to cooperate in giving a formal statement or in answering questions truthfully could result in discipline up to and including termination, the officer must be given a Garrity warning, i.e., he must be

advised that the statement cannot be used to prosecute him criminally.” Union Brief at p. 13.

The efficacy of Garrity has waned since the United States Supreme Court announced this decision. But even under its strongest interpretation as it pertains to rights of public employees, Garrity only applies in circumstances where the results of the investigation could lead to criminal prosecution. That was never the case in this matter. The employer is not obligated to give an employee Garrity rights where there is no possibility of criminal prosecution. If the employer is not compelling an employee to give a statement under threat of discipline for failure to give the statement, the employee has the free choice to give one or not. Garrity was decided to avoid the dilemma where an employee was required to give a statement or face discipline and thereby being compelled to “waive” the 5th Amendment’s right against self incrimination.

Finally, the union argued that the grievant and other officers had not been adequately trained in the area of what constitutes giving due regard to the safety of the public in making judgment calls such as the one in question here. The arbitrator finds that the employer has provided adequate training in this regard. The arbitrator sees some merit in this argument as it applies to these facts, but finds that it serves as no basis for the decision herein.

First, the policy is sufficiently clear and in depth concerning this issue. The policy requires the use of good judgment on the part of the officer, balancing a number of factors that a reasonable officer should be able to apply under numerous factual circumstances. In this regard, the policy is no less clear than the reasonably prudent person standard applicable in much of the law.

Second, the employer provides the training that is required under Minnesota law. The union is arguing that the employer needs to provide more examples of circumstances where pursuit termination would be required to provide an adequate basis for officers to make these decisions. However, as the participants in this arbitration know, those circumstances are multi-varied and multi-layered. Ultimately, the officer will be held to a reasonable officer standard. What would a reasonable, prudent officer do under the same circumstances? These determinations will always be made after the fact.

On the other hand, the union's argument might be that the imposition of a suspension under these facts leads the grievant to believe that he does not know the policy as well as he thought. In that circumstance, the grievant now believes that he needs more training so that he clearly does understand the ins and outs of proper decision making under these types of situations so as to avoid future issues. The arbitrator believes that a suspension should normally be reserved for a serious breach of the rules and not for a straight judgment call, such as this, that is deemed in error after the fact.

The grievant thought he understood what was required under the policy and that he believed he was following that policy in the ever fluid circumstances that night. It's clear from the testimony and evidence that pursuits require controlled aggression under acutely tense circumstances. In a close call such as the instant matter, a written warning serves the dual purpose of warning the grievant about future conduct, balanced with not sending too harsh of a message which could lead to indecision and overly hesitant responses in the future.

Decision

For the foregoing reasons, the grievance is sustained in part and the one day suspension is hereby reduced to a written warning as provided for in the collective bargaining agreement between the parties. The grievant's 12-hour loss of pay will, therefore, be reinstated and his record cleared of the suspension.

Dated: June 27, 2010

A handwritten signature in black ink, appearing to read "H. Ogata", with a stylized flourish extending to the right.

Harley M. Ogata