

IN THE MATTER OF THE ARBITRATION BETWEEN;

LAW ENFORCEMENT LABOR SERVICES

AND

CITY OF FOREST LAKE

OPINION AND AWARD OF ABRBITRATOR

BMS Case No. 10PA1611

**RICHARD A. BEENS
ARBITRATOR
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APPEARANCES:

FOR THE UNION:

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FOR THE EMPLOYE

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JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement between Law Enforcement Labor Services, Inc. (“LELS” or “union”) and the City of Forest Lake (“city” or “employer”).¹ Patrick Ferguson (“Grievant”) is a member of the union and employed by the city as a licensed police officer.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on October 4 and 5, 2010 in Forest Lake, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Following oral closing arguments, the record was closed and the dispute deemed submitted.

SYNOPSIS

On April 28, 2010, two supervisors in the City of Forest Lake Police Department became aware that Grievant and several other officers had been involved in writing, filming, and editing a video that made reference to an ongoing labor dispute and contained a photo of a city councilman. The police chief subsequently ordered an internal affairs investigation which resulted in seven officers, including Grievant, receiving disciplinary action. Grievant was given a five day suspension which he now grieves on

¹ Joint Exhibit 1.

the grounds the city lacked just cause.²

ISSUE

The parties stipulated that issue before the arbitrator is:

Did the Employer have just cause to issue a five day suspension to Officer Pat Ferguson?

BACKGROUND FACTS

The City of Forest Lake is a Minnesota municipal corporation located in Washington County. The city police department has 25 sworn officers, including the chief. Non-supervisory officers are represented by Law Enforcement Labor Services. Police headquarters are located within the city hall.

On the morning of April 28, 2010, two Forest Lake Police Department Sergeants were separately made aware of a “Star Wars” video that was found on the I-drive, a computer network used exclusive for local police work. The video contained references to an ongoing labor dispute between the city and union members. Scrolling across the screen was, *“It is a period of contract negotiations. A rebel bargaining unit striking from a not so secret base have won yet another victory against the evil MANAGEMENT EMPIRE.”* This was followed by a short scene apparently filmed in the police garage. Two officers appear, one dressed as Darth Vader and the other, a sergeant and supervisor,

² Joint Exhibit 2.

in full police uniform. The Darth Vader character is first shown manipulating a “light saber, “and then slaying the sergeant who exclaims, “*I know nothing.* “ The final scene is a still photo of a Forest Lake city councilman with a voice-over saying, “*Everything is proceeding as I had foreseen.*”³ On-screen credits detailed involvement of five city police officers including the supervisory sergeant and Grievant, Patrick Ferguson. He was listed as the producer of the video.

When informed of the video, the police chief, Clark Quiring, immediately ordered Sgt. Gregory Weiss to conduct an internal affairs investigation. He filed an Initial Complaint Form and began the investigation on May 1, 2010.⁴ Two days later, Weiss interviewed Grievant after advising him of his Garrity rights.⁵ During the course of the interview, Grievant acknowledged that he had played a primary role in writing, filming and editing the “Star Wars” video and that it had been done on a department computer. He also asserted the video was not done out of spite or for any political purpose, but as a joke. Grievant also admitted that the filming and editing had been done while all the participants were on duty.⁶ During that period of time the officers were supposedly engaged in a special operation aimed at catching graffiti artists who had been defacing city business buildings.⁷ Through an analysis of computer and employee time records,

³ Employer Exhibit 6.

⁴ Employer Exhibit 1.

⁵ Employer Exhibit 2.

⁶ Employer Exhibit 4.

⁷ After repeated strikes by graffiti “taggers,” three local business owners were asked to pay for cleaning their buildings in the hope the “taggers” would strike again while under police surveillance.

Sgt. Weiss was able to determine that Grievant had spent a total of 5.7 hours over two days while on duty working on the video.⁸

Sgt. Weiss also found a large number of other personal photos and video clips on the department's I-drive. Many depicted or related to other police personnel, but some also involved Grievant. Several photos showed him wearing a medical kit rubber glove over his head. Three video clips were found showing Grievant and several other officers in the lobby of city hall and engaged in foot races while wearing "drunk goggles."⁹ Even though the activity occurred after dark, portions of the foot races could have been visible to the public through the front and back glass doors of the city hall lobby. The officers were all in uniform, apparently on duty.

As a result of the internal affairs investigation, six officers and one supervisor received disciplines ranging from "Coaching letters" to 10-day suspensions to demotion.¹⁰ Grievant received a 5-day suspension which is the subject of the present grievance.¹¹

Grievant has been in law enforcement for a total of 27 years, the last 11 as a Forest Lake patrol officer. He had no prior disciplines and has received uniformly good performance reviews during his tenure.¹² In addition, Grievant has received several

⁸ Employer Exhibits 7 and 8.

⁹ "Drunk goggles" are designed to simulate the feeling of intoxication and are used by the police in school education programs.

¹⁰ Employer Exhibits 21 through 27.

¹¹ Employer Exhibit 25.

¹² Union Exhibits 4, 5, and 6.

commendation letters.¹³ He also performed well when assigned to the Washington County Drug Task Force from 2006 through 2008.¹⁴ Grievant and another officer have designed and taught a course for the Minnesota Board of Peace Officer Standards and Training.¹⁵

All witnesses, including the investigating officer and Police Chief uniformly describe Grievant as a “good cop.”

Grievant also has a well-earned reputation within city hall and the police department as a practical joker and prankster. His professed goal is to make fellow workers laugh every day he comes to work. He sent fake/joke letters to the Chief on several occasions and has left joking, disguised voice-mail messages to a number of people, including the city administrator.¹⁶ On other occasions, Grievant hung stuffed animals and other purportedly humorous items in the police garage.¹⁷ Once, when the grass in front of the city hall/police station became unusually long, Grievant erected a sign saying, “Cut Your Own Hay.” He also added the theme song from “Top Gun” to a brief video depicting another officer’s squad car being towed out of a muddy field.

¹³ Union Exhibits 1, 2, 3, and 17.

¹⁴ Union Exhibits 18 and 19.

¹⁵ Union Exhibit 18. The course was entitled “The Anatomy of an Indoor Marijuana Grow.” Grievant gained expertise in the subject while serving for three years on the Washington County Drug Task Force.

¹⁶ Union Exhibits 8, 9, and 10. Two of the letters related to Grievant’s ostensible appointment as a SKYWARN weather spotter and a later revocation from the position. Another letter purported to inform the Chief that his wife had won a “...brand new Millennium Quilting System.

¹⁷ Union Exhibits 11, 12, and 13.

Finally, at the arbitration hearing, Grievant introduced a video showing him spraying “silly string” on a female officer who had just passed her probationary period.¹⁸

¹⁸ Union Exhibit 15.

APPLICABLE CONTRACT AND POLICY PROVISIONS

Collective Bargaining Agreement¹⁹

ARTICLE 10 - DISCIPLINE

10.1 *The EMPLOYER will discipline employees for just cause only. Discipline will be in one or more of the following forms.*

- a. *Oral reprimand;*
- b. *Written reprimand;*
- c. *Suspension;*
- d. *Demotion; or*
- e. *Discharge.*

FOREST LAKE POLICE DEPARTMENT GENERAL ORDERS²⁰

B. Personal Use of Computers, Networks, or Electronic Mail

- 1. *Incidental and occasional personal business use of department computers or networks is permitted only as determined by the Director of Public Safety; however, such use will be in accordance with this and other city policies.*

- 2. *The personal usage privilege will be limited such that it:*
 - a. *Is done on the employee's personal time*
 - b. *...*
 - c. *Does not interfere with the employee's job activities*
 - d. *Does not interfere with other employees job activities*
 - e. *Is not for political, religious, personal financial profit, or other promotional activities, or does not result in the consumption of department resources.....*

¹⁹ Joint Exhibit 1.

²⁰ Employer Exhibit 5. Only those General Orders or portions thereof applicable to this arbitration have been reproduced.

PRINCIPLE FOUR

Police Officers shall not, whether on or off duty, exhibit any conduct which discredits themselves, the Forest Lake Police Department, or otherwise impairs their ability or the ability of other Officers of the Forest Lake Police Department to provide law enforcement services to the City of Forest Lake.

6.5 *Forest Lake Police shall:*

B. Maintain a neutral position with regard to the merits of any labor dispute, ...while acting in an official capacity.

3.05 Neglect of Duty

Officers, while on duty, shall not engage in personal business, read for personal purposes, play games, watch television or movies, or otherwise engage in entertainment, except as may be required in the performance of duty or approved by a superior officer.

4.01 Use of Department Equipment

Employees shall utilize Department equipment only for its intended purpose, in accordance with established departmental procedures, and shall not abuse, damage, or tamper with Department equipment...

OPINION

The stipulated issue to be resolved in this arbitration is whether the five day suspension of Grievant was for just cause. The parties' collective bargaining agreement provides, "*The Employer will discipline employees for just cause only.*"

It is well established in labor arbitration that, where an employer's right to discharge or suspend an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a

“preponderance of the evidence” standard. That standard will be applied here.

In determining the question of whether the employer acted with “just cause,” the arbitrator is called upon to interpret the phrase as a term of art which is unique to collective bargaining agreements. While the arbitrator may refer to sources other than the contract for enlightenment as to the meaning of just cause, his essential role is to interpret the contract in determining whether or not a given action was proper.

A “just cause” consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he is was discharged or disciplined. Other elements include a requirement that an employee know or could be reasonably expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge. Last, there must be a reasonable relationship between the employee’s misconduct and the punishment imposed.

There is overwhelming evidence, including Grievant’s own admissions, that he violated a number of departmental policies. He used department computers and drunk goggles for other than their intended purposes in direct violation of the departments General Orders.²¹ Despite his protestations to the contrary, the “Star Wars” video is a blatantly political work advancing union interests to the detriment of management.²² This would be a perfectly appropriate exercise of Grievant’s free speech rights had it been done while off duty. However, and most importantly, it was created in 5.7 hours over two

²¹ General Orders, Section B, Personal Use of Computers... and Principal Four, Section 4.01.

²² Principal Four, Section 6.5.

days while Grievant was on duty. Significantly, he does not challenge the reasonableness of the underlying departmental rules or claim to be unaware of their existence. Even more significantly, Grievant does not deny the video was written, filmed and edited while on duty and on the public payroll.²³

Grievant's only stated defense is that the production was simply intended as a joke designed to brighten department morale. Police work is undoubtedly a stressful profession. Officers frequently deal with the underbelly of society. They are called to intervene in explosive domestic disputes, deal with drunk drivers, and every other stripe of criminal behavior. The need to make critical, on the spot judgments in sometimes dangerous circumstances makes it one of the most stressful jobs imaginable. An increasingly armed public only adds to the pressure. Reports of police officers being injured or killed in the line of duty occur all too often. It is also a truism that humor (often "inside" or dark) helps relieve tension and make the daily grind more bearable.

No reasonable person would hold that all humor must be confined to off-duty hours. No one would object to humorous banter, mutual ribbing, or even occasional practical jokes during works hours. These are essential stress relievers and bonding agents in the day-to-day workplace. However, these moments of levity should not interfere with performance of the employee's regular duties.

Using 5.7 hours of duty time to produce a 30 second political and personal video is beyond the pale of reasonableness. Clearly, these hours were not directed at completion of the graffiti operation underway at the same time. While Grievant might

²³ Principal Four, Section 3.05, Neglect of Duty.

find the video humorous, to the outside observer it is simply a feckless diatribe – an amateurish venting of some officers’ angst vis-à-vis the “evil MANAGEMENT EMPIRE.” Again, it would be well within Grievant’s rights if done while off duty. But, under the present facts, it is a gross misuse of the taxpayer’s dollar.

Engaging in footraces while on duty and wearing “drunk goggles” is similarly unacceptable. The fact that the public may or may not have observed the races is irrelevant. Departmental equipment was misused and duties were neglected in either case. (As an aside, the participants may not have been aware that injuries sustained while engaging in on-duty horseplay are not compensable under Minnesota Workers Compensation law.²⁴) I find the employer had just cause to discipline Grievant.

Last, the union asserts the 5-day suspension is not appropriate for an 11 year employee with a good work record and no prior disciplines. While an arbitrator has the power to determine whether or not an employee’s conduct warrants discipline, his discretion to substitute his own judgment regarding the appropriate penalty for management’s is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he must conclude the employer exceeded its managerial prerogatives and impose a lesser penalty. In reviewing the

²⁴ See *Van Buren v. City of Willmar*, Minnesota Worker’s Compensation Court of Appeals, (April 30, 2010).

discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors including employee's length of service, his work record, and the seriousness of the misconduct.

Chief Quiring testified that he took these very factors into account before issuing the 5-day suspension to Grievant. He was aware of Grievant's longevity with the force, his work record and the lack of any prior disciplinary actions. All of these factors were part of Chief Quiring's calculus in determining Grievant's punishment. He also acknowledged that grievant was a "good cop." His testimony on this issue was thoughtful and credible. While the collective bargaining agreement sets out the continuum of punishments ranging from oral reprimand to discharge, it does not robotically require absolute progressive discipline. Management has discretion to match the punishment to the level of misconduct. Grievant broke a significant number of departmental regulations. Viewed separately, some of the violations might warrant a simple reprimand given Grievant's otherwise spotless record. However, viewed as a whole, they demonstrate a serious lack of judgment and disregard for department rules. The use of 5.7 hours of duty time for purely personal reasons, standing alone, would warrant the penalty imposed. In my view, the 5-day suspension imposed is, if anything, lenient and well within the bounds of reasonableness. Under these facts, I find no reason to revisit Chief Quiring's judgment and disciplinary decision.

AWARD

The grievance is DENIED.

DATED: November 1, 2010

/s/ Richard A. Beens _____

Richard A. Beens, Arbitrator