

**IN THE MATTER OF ARBITRATION
BETWEEN**

**LAW ENFORCEMENT LABOR SERVICES
EMPLOYEES UNION, LOCAL 349,**

Union,
and

**THE COUNTY OF RAMSEY,
MINNESOTA,**

Employer.

**ARBITRATION DECISION
AND AWARD
BMS Case No. 10-PA-0387
(Five-day Suspension)**

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	September 15, 2010
Date Record Closed:	October 6, 2010
Date of Award:	November 5, 2010

APPEARANCES

For the Union:
Brooke Bass, Staff Attorney
Law Enforcement Labor Services, Inc.
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St. Paul, MN 55130

For the Employer:
Marcy Cordes, Manager
Ramsey County Labor Relations
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INTRODUCTION

Law Enforcement Labor Services, Inc. (“LELS”) or (“Union”) and the County of Ramsey, Minnesota (“Employer” or “County”) are parties to a Collective Bargaining Agreement (“CBA”), Joint Exhibit 1. The CBA was in effect between these parties at the time of the incident from which this grievance arises. On July 29, 2009, the Grievant

received a notice of a five-day suspension, and the Union timely filed a grievance that the parties were unable to resolve. In accordance with the CBA, the matter was referred to arbitration. The parties duly selected the undersigned as the arbitrator from a list provided by the Minnesota Bureau of Mediation Services.

On September 15, 2010, the Arbitrator convened a hearing at the Ramsey County Government Center in St. Paul, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file briefs simultaneously by U.S. mail on October 6, 2010, and the record closed when the Arbitrator received the briefs.

ISSUE

Was the five-day suspension for just cause? If not, what is the appropriate remedy?

FACTS

The Grievant was hired by Ramsey County in August 2007, in the Emergency Communications Center (“ECC”) in the job class Telecommunicator. He works the midnight shift in this position, answering 911 calls from the public for emergency police, fire and ambulance services. The job requires interpersonal skills, concentration and effective management of details in a stressful environment. The ECC supervisor on his shift is Catherine Carbone.

The County imposed a five-day suspension upon the Grievant for possessing alcohol on duty. The Grievant disputed the County’s charge, denying that he had alcohol in his possession at work, and the Union filed a grievance on his behalf.

It is not clear when the incident giving rise to the disciplinary action occurred. The County imposed the suspension by a letter dated July 29, 2009. At that time, it had

concluded an internal investigation and decided that a five-day suspension was appropriate. The letter to the Grievant of July 29 explains the reason for discipline. It states that on June 19, Supervisor Carbone was notified by a co-worker (now identified as Beth Kregel) that on an earlier date at work, the Grievant had offered Ms. Kregel a drink from an open can of energy drink with alcohol in it. At the hearing, Ms. Kregel stated that she smelled the contents of the can and handed it back without tasting it, and that it smelled like Kahlua.

Supervisor Carbone did not know when the incident Ms. Kregel described had occurred. Ms. Kregel did not come to her directly with this information. Instead, three other employees took Ms. Carbone aside in June and told her that Ms. Kregel had talked to them at a “girls’ weekend” about the Grievant offering her an alcoholic drink, but that Ms. Kregel did not know what to do about this information, because she did not want to get anyone in trouble. Ms. Kregel told these coworkers that on the midnight shift the Grievant had offered her a drink from his can, which he told her contained alcohol. After hearing this story, Supervisor Carbone took the information to the Operations Manager, Denise O’Leary, on June 23 and she conducted an investigation. Two employees were alleged to have had alcohol at work, the Grievant and another employee, Adam Senarighi, with whom he regularly took breaks. Following an orderly protocol, Manager O’Leary looked in the lockers of the named employees, but found no alcohol in the Grievant’s locker. She did find small airline bottles of alcohol in Mr. Senarighi’s locker in a paper bag. These bottles contained various flavors of vodka. The bottle containing orange flavored vodka was partially empty. After interviewing the two alleged drinkers and some 10-15 other employees, the employee with alcohol in his locker was

disciplined, and that matter is not at issue. The Grievant, on the other hand, denied the charge and did not have alcohol in his possession on the day of the search, but after investigating the allegations, the County believed it had sufficient evidence to impose a five-day suspension.

UNION'S POSITION

The Union alleges that the County had insufficient evidence to support its conclusion that the Grievant was drinking or possessed alcohol at work, and consequently, the suspension cannot stand. The Union argues that the evidence is unclear and contradictory, that the Grievant was not observed to be impaired by alcohol, and he had no alcohol in his possession. Further, the Union notes, the only employee who allegedly had first hand knowledge of the Grievant's alcohol use changed her story in many particulars; for example, her testimony changed about what type of alcohol she was offered; and whether she had tasted or only smelled the drink. The Union contends that the County's investigation was inadequate and the facts upon which its case is based were insufficient to prove that the Grievant had alcohol in his possession at work. Thus, the Union argues that the suspension was not for just cause, and the Grievance should be sustained.

EMPLOYER POSITION

The Employer argues that the Grievant was in possession of an alcoholic beverage at work, that several employees had heard this, and Ms. Kregel, a friend of the Grievant, had been offered a drink, had smelled, and tasted it. The County argues that just because the Grievant denied using alcohol at work and did not have alcohol in his possession in June on the day his locker and tote bag were searched does not mean that the incident

described by Ms. Kregel never occurred. Based on the findings of the investigation, the suspension should be upheld.

DISCUSSION AND DECISION

The Union does not differ with the County about the need for a rule prohibiting alcohol at work or about the fact the Grievant and other employees were aware of the rule. Its principle argument is that the County did not prove that the Grievant was drinking or possessed alcohol, so it did not have just cause to discipline him. The Union's brief frames its argument in two ways: first, as a failure of due process, claiming the County did not conduct an adequate investigation, and second, as a failure to present substantial evidence that the Grievant violated the rule prohibiting possession of alcohol. Because I find that the County did not present sufficient uncontroverted evidence on the merits to uphold the discipline, I will not discuss whether the investigation itself violated due process.

No one doubts that the Employer is rightly concerned about drinking alcohol at work in an emergency communications center. The public deserves to have emergency services delivered efficiently, and not by employees who are to any degree alcohol impaired. In particular, drinking alcohol is incompatible with the job duties of Telecommunicators who work in a stressful environment and must be capable of fast reactions and consistent attention to detail.¹

The question is whether the County provided substantial evidence that the misconduct occurred.² The County must produce sufficient evidence to overcome the Grievant's denial that he had alcohol in his possession and that he drank it at work.

¹ Job Description, Employer's Exhibit 2 and testimony.

² *Discipline and Discharge in Arbitration*, Norman Brand, ed., ABA Section of Labor and Employment Law, 1998, at 189.

Evidence supporting the County's decision to discipline the Grievant rests on the statements and testimony of one co-worker, Beth Kregel. Ms. Kregel created suspicion that the Grievant committed misconduct, but because of inconsistencies in the story's retelling and because of timing peculiarities with no explanatory detail, I am not persuaded that substantial evidence supports the allegations of misconduct.

More specifically, this matter came to the attention of Supervisor Carbone on June 19, 2009, when three employees (hereafter, the "Complainants") told Ms. Carbone that they had attended a "girls' weekend" with Ms. Kregel. At this event,³ Ms. Kregel told the Complainants that the Grievant had offered her a drink at work.⁴ Later, when interviewed by management, at least two of the Complainants stated that they heard about this offer of liquor in February.⁵ It is unclear from the testimony why the Complainants did not approach the supervisor with this information some months before June. The time lag tends to dilute the likelihood that the information was accurate and raises the unanswered question of what motivated this disclosure in June. Nonetheless, upon hearing this information, Supervisor Carbone spoke to Ms. Kregel herself, and passed on the information to her superiors. No one apparently spoke to the Grievant about the allegation informally. Instead, Ms. O'Leary began an investigation that continued from June 23 until July 29 when the suspension was imposed.

The evidence against the Grievant is inconsistent. The Union, in its post-hearing brief, listed numerous inconsistent details. Among the most notable inconsistencies were that Supervisor Carbone testified that the Complainants told her that Ms. Kregel had

³ It was not clear when this "girls' weekend" occurred.

⁴ The only mention of a date when the alleged offer of a drink occurred is in the Employer's interview with coworker, Tianna Opheim, who stated she first heard about it from Beth Kregel in February.

⁵ Interview with Jennifer Schmitt and Tianna Opheim. Investigation Report, Employer Exhibit 4.

been offered an alcohol infused drink and that she had tasted it, and that it smelled and tasted like alcohol. Later, Ms. Kregel stated under oath, that she had only smelled it; she had not tasted it. She stated it smelled like Kahlua. At another point in the investigation, it appears that Ms. O’Leary understood the complainant to be that the alcohol offered “tasted like vodka and Mountain Dew.”⁶ Based on general knowledge, Kahlua does not smell or taste anything like Mountain Dew or orange flavored vodka, both of which coworkers apparently believed were in the drink offered, according to the complaint and investigation report.⁷ Although there may have been more than one incident of drinking at work, and employees may have drunk different flavors of alcohol in different flavored drinks, the testimony of the only witness to admit to smelling alcohol in the Grievant’s can of energy drink said it tasted like Kahlua.

On June 26, Ms. O’Leary looked in the lockers and bags of the two employees alleged to have alcohol at work. Flavored vodka was found in the locker of the other employee who was disciplined. Found in the Grievant’s possession was an unopened can of energy drink, which the Grievant described as Monster Khaos, an orange flavored drink. A can of this drink was opened at the hearing, and it did not smell or taste like Kahlua.

Other than the contradictory information about what the Grievant may have been drinking some months before the investigation, there is no evidence that he appeared inebriated or smelled of alcohol. Although Ms. Carbone reported to Ms. O’Leary that Beth told her that the Grievant had been drinking “nightly”, Ms. Kregel testified that she did not remember saying that. As part of the investigation, a supervisor, Bryan Linn, told

⁶ Employer Exhibit 3.

⁷ Employer’s Exhibits 3 and 4.

Ms. O'Leary that he goes on break with Mr. Senarighi and the Grievant and had never seen or been offered alcohol while on duty, nor has he smelled alcohol on them.

In summary, the only facts upon which the County bases its suspension are that a coworker told other coworkers that the Grievant had offered her a drink from a can that he told her contained alcohol. She stated it smelled like Kahlua. She may or may not have tasted it. Orange flavored vodka and some other types of vodka were found in Adam Senarighi's possession, and he frequently took breaks with the Grievant. No one else noticed or was willing to testify to the use of alcohol among the employees in the area, including a supervisor who took breaks with the alleged miscreants. There was no evidence that the Grievant was observed to be inebriated or that he smelled of alcohol.

For an employee in the ECC to use alcohol at work is a serious infraction, proof of which could have a long-lasting impact on the Grievant's career. The County employees charged with resolving this complaint made a good faith effort to look into the allegations, but the incontrovertible evidence they were able to present was insufficient to bridge the gap between a suspicion of misconduct and substantial proof of it. Without substantial evidence of misconduct, there is no just cause for discipline.

AWARD

The grievance is sustained. The five-day suspension should be rescinded and the Grievant should be made whole.

Dated: November 5, 2010

Andrea Mitau Kircher
Arbitrator