
In the Matter of Grievance Arbitration

Between

**CITY OF FOREST LAKE, MINNESOTA
(POLICE DEPARTMENT) ("Employer")**

and

**LAW ENFORCEMENT LABOR SERVICES, INC.,
LOCAL NO. 111 ("Union")**

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BMS Case No. 10-PA-1612
Grievant: Scott Graff
Issue: 10-Day Suspension

Award and Opinion of:

Lon Moeller,
Arbitrator

Preliminary Statement

A grievance arbitration hearing was held on November 22 and 23, 2010, at the City of Forest Lake City Hall, located at 210 North Lake Street in Forest Lake, Minnesota. The Employer and Union appeared through their designated representatives and offered evidence through exhibits and the testimony of witnesses, who were subject to cross-examination. The record was closed upon the submission of the parties' closing statements to the Arbitrator on November 23, 2010.

Appearances

For the Employer:

Marylee Abrams, Attorney and Spokesperson
Richard Peterson, Sergeant
Greg Weiss, Sergeant
Clark Quiring, Police Chief

For the Union:

Brooke Bass, Attorney and Spokesperson
Matthew Smith, Police Officer
Scott Graff, Grievant
Bruce Peterson, Sergeant

I. Background and Facts

The Grievant, Scott Graff, started working for the Employer as a Police Officer on March 1, 2003. At issue in this grievance is the Employer's June 7, 2010 decision to issue Officer Graff a 10-day suspension (Employer Exhibit 26). The facts leading up to that decision are summarized as follows.

On the morning (somewhere between 6:30 A.M. and 7:00 A.M.) of April 28, 2010, two to three Forest Lake Police Officers asked Sergeant Richard Peterson if he had seen "the video" made by Officer Graff and another officer. When Sergeant Peterson said he had not, the officers took Sergeant Peterson to a computer in the Police Department and accessed the video from one of the officer's work e-mail account. The video turned out to be a parody of the *Star Wars* movie in which the battle was between the Union (the "union rebels") and the Employer (the "evil MANAGEMENT EMPIRE") over contract negotiations (Employer Exhibit 9).¹

Sergeant Peterson brought the video to Chief Clark Quiring's attention, who told Sergeant Peterson to start a "fact finding" investigation. During his fact finding investigation, Sergeant Peterson found the *Star Wars* video in Officer Graff's folder in the Police Department's "I" drive – a shared computer drive – and printed Officer Graff's activity logs from the I drive. Also on the morning of April 28th, Sergeant Greg Weiss learned of the *Star Wars* video from three other Forest Lake Police Officers who were attending a training program with Sergeant Weiss in Scott County. When he returned to the Police Department, Sergeant Weiss – the Department's Internal Affairs Officer – took over the fact finding investigation from Sergeant Peterson.

Sergeant Weiss signed the Initial Complaint Form for the investigation (Employer Exhibit 1). He interviewed Officer Graff and other officers in the Department (Employer Exhibits 12-20). Sergeant Weiss' investigation ultimately led to the discipline of seven Forest Lake officers who worked on the overnight shift²: (1) Officer #1 (10-day suspension and demotion in rank – Employer Exhibit 27); Officer #2 (Five-day suspension – Employer Exhibit 25)³; Officer #3 (written reprimand – Employer Exhibit 24); Officer #4 (coaching notice – Employer Exhibit 21); Officer #5 (coaching notice – Employer Exhibit 22); Officer #6 (coaching notice – Employer Exhibit 23); and the Grievant, Officer Scott Graff (10-day suspension) (Employer Exhibit 26). Officer #2 and Officer Graff were also removed from their positions as Field Training Officers.

The Union filed a grievance on June 15, 2010, challenging Officer Graff's suspension (Joint Exhibit 2, p. 1). The grievance was denied by the Employer and appealed by the Union to arbitration (Joint Exhibit 2, pp. 2-3). There are no issues of timeliness or procedural arbitrability. The matter is now before the Arbitrator for a final and binding decision on the merits.

¹ The parties' most recent contract ran from January 1, 2008 through December 31, 2009 (Joint Exhibit 1). At the time of the grievance arbitration hearing, interest arbitration was scheduled for the 2010-2011 contract year.

² Prior to the arbitration hearing, the parties entered into a protective order and agreed pursuant to the Minnesota Data Practices Statute §13.01, et. seq., the names of these officers would not be used in the Arbitrator's award and that those officers would be identified by initials or numbers. The Arbitrator has used numbers to represent these officers.

³ Officer #2's five day-suspension was upheld in grievance arbitration (Employer Exhibits 31 and 32).

II. Statement of the Stipulated Issues

Did the Employer have just cause to issue a 10-day suspension to Officer Scott Graff? If not, what should the remedy be?

III. Position of the Employer

The Employer argues that Officer Graff was suspended for just cause. Officer Graff admittedly scripted (Employer Exhibit 6), produced and “starred in” the *Star Wars* video (Employer Exhibit 9).⁴ The *Star Wars* video was, however, just the tip of the iceberg when it came to Officer Graff. Sergeant Weiss’ investigation found that Officer Graff put several photographs (taken with the Department’s camera and using Department equipment) on the Police Department shared I drive (Employer Exhibits 8b, 8c, 8d, 8f and 11). One of the photographs (dated December 22, 2009) showed Officer Graff – wearing his uniform in the Department’s squad garage – in a sexually suggestive pose (Employer Exhibit 8e). Like all Forest Lake officers, Officer Graff has attended sexual harassment training (Employer Exhibit 33). Sergeant Weiss discovered other videos in Officer Graff’s I drive folder, videos that Officer Graff again both edited and “starred in.” One of the videos showed Officer #4 being towed from a marshy area behind the High School where Officer #4’s squad car became stuck in the mud. Officer Graff helped to narrate the video (using an Irish or Scottish accent) and added parts of the sound track from the movie *Top Gun* to the video (Employer Exhibit 11). Another video captured several night shift officers (including Officer Graff) wearing the Department’s “drunk goggles”⁵ and racing around the front lobby area of City Hall (Employer Exhibits 9 and 10). A third video of Officer Graff hitting a dusty chair in the Department with his baton was found on the I drive (Employer Exhibit 10). Sergeant Weiss additionally discovered that Officer Graff and other night shift officers participated in a gambling pool, betting on different teams in the Minnesota State High School Hockey Tournament.

Next, the Employer argues that Officer Graff’s actions were not the type of “practical jokes” Forest Lake police officers have been part of over the years. The *Star Wars* video was filmed on work time and made with Department equipment. A picture of a Forest Lake city council member (Employer Exhibit 8a) was portrayed at the end of the video as the emperor of the “evil empire.” Officer Graff used a Department rain jacket and broom as props in the video. His activity logs show that this video was made and edited during the time Officer Graff was supposed to be on a plain clothes assignment to monitor several local businesses that had been the target of graffiti. The extensive and unusual time gaps (Employer Exhibit 4, p. 1) in Officer Graff’s activity log for April 10th – April 11th and April 23rd – April 24th (Employer Exhibit 7, pp. 1-3) show that he used a minimum of 5.75 hours of on duty time to create and produce the *Star Wars* video. He admitted e-mailing the *Star Wars* video to three Forest Lake officers. Chief Quiring testified that the video was “divisive” and had an “anti-management” tone. Officer Graff had been warned during his February 2010 performance appraisal about letting “disagreements with decisions made by administration and feelings toward administration affect

⁴ Officer Graff played the character of Darth Vader in a scene with Officer #1. Although Officers #3 and #4 were listed in the credits of the *Star Wars* video as “Best Boy” and “Key Grip” respectively, neither was involved with making the video.

⁵ “Drunk goggles” are used by officers to teach students about the effects of intoxication.

your attitude while at work” and was advised that co-workers had commented on his “negative attitude” (Union Exhibit 7, p. 2). The Areas for Further Development section of Officer Graff’s 2010 performance appraisal includes the following comments:

Throughout the year you disagreed with decisions that were made by administration. With respect to your opinion, focus on “letting go” of some of these disagreements and feelings toward administration. Do not let the negative attitude toward these issues affect the ability you have (Union Exhibit 7, p. 6).⁶

Chief Quiring testified that he looked at several factors when deciding upon discipline for Officer Graff and the other officers identified in the Employer’s investigation: (1) the officer’s years of law enforcement experience; (2) his/her past discipline; (3) the officer’s level of responsibility in the Department; and (4) his/her involvement in the videos and other incidents uncovered during the investigation. Officer Graff is a senior officer (seven years with the Employer) and served the Department as a Field Training Officer, someone junior officers looked to for guidance and mentoring. The many photographs (including one that was sexually suggestive) and videos Officer Graff took on work time using Department equipment raised questions about his commitment to serving the residents of the Forest Lake area. He had previous discipline – coaching and two written reprimands for not properly filling out his time sheets (Employer Exhibits 30 and 34). Officer Graff clearly “crossed the line” in this case and, as a result, violated several Department policies and general orders (Employer Exhibits 4, 5 and 26). Under the circumstances, a 10-day suspension for Officer Graff is appropriate.

In conclusion, the Employer maintains that Officer Graff’s 10-day suspension was for just cause and, accordingly, asks that the grievance be denied.

IV. Position of the Union

The Union argues that Officer Graff was not suspended for just cause. It emphasizes that Officer Graff is a well-respected Police Officer with an excellent work record (Union Exhibits #2- #7). He understands Police Department policies and has raised policy questions with his supervisors (Union Exhibit #1). He has received “That a Way” recognition by the Department (Union Exhibits #12, #15 and #16) and been recognized for his work by members of the public (Union Exhibit #13).

Officer Graff, the Union contends, was attempting to bring the night shift closer together and to alleviate stress caused by the nature of the officers’ work through the use of humor. His *Star Wars* video is not “anti-management” and is a parody intended to be an “internal joke” for Forest Lake Police Officers. Officer Graff, a fan of the *Star Wars* movies, was simply trying to be “funny” and not “political” in making the *Star Wars* parody. The picture of the city council member in the video was taken from the City’s website. Officer Matthew Smith testified that he “chuckled a little bit” when he first saw the video and described Officer Graff as “light hearted” and a “jokester.” Sergeant Bruce Peterson, who is a Union Steward, said that he thought the video was funny when he first saw it.

⁶ Chief Quiring also noted in Officer Graff’s 2010 performance appraisal “Only you can affect your attitude. Life is too short to be unhappy” (Union Exhibit 7, p. 8).

The Union disputes the Employer's claim that Officer Graff spent 5.75 hours of on duty time making the *Star Wars* video. Forest Lake Police Officers are entitled to 75 minutes of break time during an 11-hour work shift. The *Star Wars* video was a "cooperative effort" between Officer Graff, Officer #1 and Officer #2. Officer Graff helped to script the video and used applications from his iPhone for the light saber and Darth Vader sound effects. Officer #2 shot the video scene involving Officer Graff and Officer #1. His (Officer #2's) motorcycle helmet was used as a prop. Officer Graff and Officer #2 downloaded the video to a Department computer and edited the video using a "movie maker" program.

Next, the Union maintains there has been a history of practical jokes and pranks in the Forest Lake Police Department. Sergeant Weiss admitted that officers have placed a stuffed moose in various law enforcement vehicles and that the "moose has made the rounds" over the years. He also testified about situations when caution tape was attached to squad cars before they left the Department. Several witnesses referenced the display of stop sticks in the squad garage that had been run over by Forest Lake Police Officers.

Officer Graff testified that the video of Officer #4 being towed out of the mud was, like the *Star Wars* video, the product of a "cooperative effort." He and Officer #3 videotaped the squad being pulled out of the mud. Officer Graff and Officer #2 worked together to edit the video, adding background music from the movie *Top Gun* and creating a PowerPoint presentation. By Officer Graff's estimation, the videotaping took approximately 15 minutes and the production of the PowerPoint presentation took another 10 to 15 minutes.

The Union points out that Officer Graff's photographs and videos were only posted in his I drive folder. While Officer Graff did send some of the photographs and videos to his personal e-mail, and e-mailed the *Star Wars* video to three Forest Lake officers, he did not forward them to anyone outside of the Department. Prior to this grievance, the Employer did not have a policy about what could or could not be posted on the I drive. There is no evidence that members of the public saw the videos, the photographs or the drunk goggles races. The drunk goggles races were done during the officers' dinner break (approximately 7:00 P.M.) and well after City Hall was closed. It took, according to Officer Graff, "seconds" to download the drunk goggles video to the Department's computer. No one from the public complained about Officer Graff being unresponsive to calls. The video of Officer Graff hitting a dusty chair with his baton was made five years ago when he was helping Officers #1 and #2 clean the Police Department break room. Money won by Officer #1 from the Minnesota State High School Hockey Tournament pool was used to buy dinner for officers on the night shift.

Lastly, the Union claims that a 10-day suspension is a disproportionate disciplinary penalty. Officer Graff apologized at the arbitration hearing for his actions. The officer who shot and helped produce the *Star Wars* video (Officer #2) received a five-day suspension. Officer #2 is wearing a rubber glove on his head in the picture with Officer Graff wearing an oxygen mask (Employer Exhibit 8f). He participated in the drunk goggles races. Officer #2 has more seniority (11 years) with the Employer than Officer Graff (seven years) and took both the photograph and video of Officer Graff hitting the dusty chair in the Department with his baton. Prior to his five-day suspension, Officer #2 had been coached for hanging a rubber chicken out of his squad car while working on an assignment for the Washington County Sheriff's Office.

Officer #1, who like Officer Graff received a 10-day suspension, was the Sergeant in charge of Officer Graff's patrol team. Prior to this 10-day suspension, Officer Graff had only been given a written reprimand for not properly completing his time sheets.

In conclusion, the Union asks that the grievance be sustained. For a remedy, it requests that Officer Graff be made whole, including removal of the 10-day suspension from his personnel file and appropriate back pay.

V. Discussion and Analysis

Article 10 – DISCIPLINE of the parties' Agreement provides that "The Employer will discipline employees for just cause only" (Joint Exhibit 1, p. 6). The Employer has the burden of proof under the contractual just cause standard to show that (1) Officer Graff violated Department policies and general orders rules as outlined in his Employee Disciplinary Notice (Employer Exhibit 26) and (2) a 10-day suspension was appropriate under the facts presented by this grievance.

Officer Graff's involvement with the *Star Wars* video triggered management's investigation and was a key aspect of the Employer's decision to give him a 10-day suspension. Of specific concern to the Employer was the amount of time (an asserted 5.75 hours) Officer Graff spent working on the *Star Wars* video, the "political" and "mean-spirited" nature of the video and the impact the *Star Wars* video had on the Department. Chief Quiring testified that the *Star Wars* video created a wedge between officers that "hurt the Department in the long run."

The scene with "Darth Graff" and Officer #1 in the *Star Wars* video was shot on April 10th. Editing work on the video was done by Officer Graff and Officer #2 on April 23rd. Officer Graff testified he spent approximately 80 minutes over a two-day period (April 10th and April 23rd) gathering the audio clips/photograph and downloading the video shot by Officer #2 for the *Star Wars* video. Filming of the scene between Officer #1 and Officer Graff as Darth Vader, according to Officer Graff, took approximately 10 minutes "from start to finish."

The properties function of the files Officer Graff created and saved to his folder on the I drive (Union Exhibit 10) show the following:

- First "raw" footage video of the Darth Graff scene created April 10th at 10:08 P.M.
- Second "raw" footage video of the Darth Graff scene created April 10th at 10:14 P.M.
- *Star Wars* theme music created April 10th at 10:41 P.M.
- Sound track ("Imperial" file) from *Star Wars* movie created April 10th at 10:47 P.M.
- Picture of Forest Lake city council person created April 23rd at 11:44 P.M.
- Audio clips from *Star Wars* movie ("Memo" file) created April 23rd at 11:58 P.M.
- Final version of *Star Wars* video saved on April 24th at 12:17 A.M.

Sergeant Weiss inferred from the activity logs that Officer Graff spent at least 5.75 hours of duty time creating and editing the *Star Wars* video. During Sergeant Weiss' investigation, Officer Graff and Officer #2 admitted the time they spent working on the *Star Wars* video could have exceeded their break time (Employer Exhibit 4, p. 2; Employer Exhibit 25, p. 1). Officer #2's log for April 10th – 11th shows a time gap between 22:49:10 and 1:07:06 (Employer Exhibit 7a, p. 1). There are additional time gaps in Officer #2's April 23rd activity log, including a time when he was cleared by Officer #3 (Employer Exhibit 7a, p. 2). Officer Graff was out of service on April 10th when he was working the plain clothes assignment (Employer Exhibit 7, p. 2). On April 23rd, Officer Graff was back at his regular patrol duty; however, there is an open block of time in his activity log - 22:42:59 on April 23rd to 1:23:35 on April 24th (Employer Exhibit 7, p. 3 and Union Exhibit 9, p. 2).

The Employer's claim that Officer Graff spent at least 5.75 hours of on-duty time creating and editing the *Star Wars* video over two days is not specifically demonstrated by this record. Since he was in his own vehicle during the April 10th special detail, Officer Graff was out of service from the time when the special detail started until the time he returned to the Department at 3:28:02 (Employer Exhibit 7, p. 2). Officer Graff testified that he started the plain clothes assignment after it turned dark, described what he did on that special detail and said he returned to the Police Department to take his break. Nothing in the record pinpoints the amount of time that Officer Graff spent on each of the different parts of the *Star Wars* video. It is possible that Officer Graff could have worked on the *Star Wars* video on April 10th within his 75 minutes of break time.

This record does, however, support the claim that Officer Graff exceeded his break time (75 minutes per shift) to work on the *Star Wars* video on April 23rd – 24th. Officer Graff testified that the officers on his patrol team normally took their dinner break around 7:00 P.M. (19:00 hours). On April 23rd, Officer Graff took his dinner break at 19:21:26 and was available for call at 20:45:33 (Union Exhibit 9, p. 1). Union Exhibit 10 shows later in the shift the city council member's photograph (11:44 P.M.), audio clips from the *Star Wars* movie (11:58 P.M.) and the final version of the *Star Wars* video (12:17 A.M.) were created and saved to Officer Graff's I drive folder. Given the gap in Officer Graff's activity log during this time, the creation times of these files on the I drive and Officer Graff's scheduled break, it is clear that Officer Graff returned back to the Department after his break to work on the *Star Wars* video, time when he was "on the clock."

Officer Graff's actions went beyond isolated attempts at humor to relieve stress on the night shift. His use of Department equipment – camera, drunk goggles, rain coat, rubber gloves, broom stick, video camera, oxygen mask and computers – was not "for its intended use." His editing work on the *Star Wars* video exceeded his break time. Officer Graff was admittedly on duty when he worked on the *Top Gun* video. Officer Graff neglected his duty with the Department and acted in a way that fell short of the level of professionalism the Department expects of its Police Officers. The *Star Wars* video, as Officer Graff admitted, created "a rift between certain people" in the Police Department. Officer Graff's violation of Department policies and general orders warranted some measure of discipline.

The just cause standard requires that discipline relate to the nature of an employee's workplace offense and that "similarly situated" employees be disciplined in a fair and reasonably like fashion. The remaining question is whether a 10-day suspension for Officer Graff was appropriate under the facts presented by this grievance.

Chief Quiring testified about the factors he considered when deciding upon discipline for the seven officers. The Sergeant in charge of Officer Graff's patrol team (Officer #1) was issued a 10-day suspension. Officer Graff collaborated with Officer #2 in making the three videos found in Officer Graff's I drive folder. Officer #2 participated in the drunk goggles races, is seen wearing a rubber glove over his head in a photograph with Officer Graff and participated in the Minnesota State High School Hockey Tournament pool. He was given a five-day suspension.

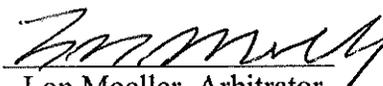
The Employer explained its decision to give Officer Graff twice the suspension of Officer #2 by pointing to Officer Graff's previous discipline for not properly filling out his time sheets and the sexually suggestive picture of Officer Graff found in his I drive folder. Officer Graff had been coached (December 18, 2009) and received two written reprimands (June 17, 2009 and May 27, 2010) for not completing and signing his time sheets. The picture of Officer Graff in a sexually suggestive pose was another attempt at humor. Although it was posted to Officer Graff's I drive folder in December 2009, there is no evidence that the picture was distributed between officers, shared with others outside of the Department or displayed as a screen saver on Department computers. No officer complained to management about the picture.

This record does not fully explain how Officer Graff should be given the same measure of discipline as Officer #1 who supervised the night shift patrol team and who, as Chief Quiring noted, "set the tone." Officer Graff is better compared with Officer #2. Years of law enforcement experience and level of responsibility were considered in the discipline decision because the Employer expects more of its senior Police Officers. Officer #2 has approximately four more years of service with the Forest Lake Police Department than Officer Graff. Both Officer #2 and Officer Graff were Field Training Officers. Unlike Officer Graff, Officer #2 had not been previously disciplined by the Employer.

The appropriate discipline for Officer Graff lies somewhere between the 10 days issued to Officer #1 and the five days given to Officer #2. Based on this record, and a comparison of the two most "similarly-situated" night shift officers (Officer Graff and Officer #2), an appropriate level of discipline for Officer Graff's violation of the applicable Department policies and general orders is a seven-day suspension.

VI. Award

For the reasons set forth above, the grievance is sustained to the following extent: Officer Graff's 10-day suspension is to be converted to a seven-day suspension and he is to be made whole for three days of pay.


Lon Moeller, Arbitrator

Dated at Iowa City, Iowa this
21st day of December 2010