
IN THE MATTER OF ARBITRATION

OPINION AND AWARD

between

CITY OF COLD SPRING, MINNESOTA

**BMS Case No. 11-PA-1261
(Termination of David
Sutherland)**

and

**LAW ENFORCEMENT LABOR
SERVICES, INC.**

Gil Vernon, Arbitrator

APPEARANCES:

On Behalf of the City: Thomas G. Jovanovich, Attorney –
Rajkowski Hansmeier

On Behalf of the Union: Isaac Kaufman, General Counsel –
LELS, Inc.

I. ISSUE

The issue presented by the grievance before the Arbitrator can be framed as follows:

“Did the City of Cold Spring have just cause to terminate the grievant? If not, what is the appropriate remedy?”

II. BACKGROUND AND FACTS

The grievance before the Arbitrator protests the City’s termination on June 15, 2011 of the Grievant’s employment as a police officer. Grievant was hired by

the City in September 2006 after completing a career with the Minnesota State Patrol.

Initially, he was a part-time officer filling open patrol shifts. In July 2008 he was moved to the full-time position of School Resource Officer (“SRO”) for the ROCORI School District, which serves the cities of Rockville, Cold Spring and Richmond. At the time of his promotion, Grievant received and signed a pre-employment letter outlining the terms and conditions of the SRO position, as well as a job description for the position. The position is unique in that he was an employee of the City but the School District Administrators had a central role in his supervision. For example, the SRO pre-employment letter provided that the School District’s administrative staff would conduct reviews of Mr. Sutherland’s performance on a quarterly basis. He was to serve a one-year probationary period. He satisfied the probationary period and until the events that resulted in this case had no formal discipline on his city employment record.

Grievant’s first performance evaluation (which is not a form of discipline) in February 2009 by the Superintendent of Schools was positive. In 2010 evaluation concerns were expressed in several areas about his phone availability during school hours, keeping staff apprised of his whereabouts, his attendance at school functions and regular attendance on student contact days.

The SRO/Grievant was officed at the high school building but naturally the demands of the position took him outside that building to the middle school and elementary school. He was provided a phone so he could be contacted and had a police radio.

The precipitating event in this case occurred on April 12, 2011. This matter led to subsequent events which in turn triggered an investigation of Grievant's conduct surrounding the April 12, 2011 incident and his conduct generally.

On the morning in question, two students at ROCORI Middle School reported to the Attendance Secretary that they had seen a seventh-grade student point a gun at another student. The Principal was informed immediately. It took a little bit of time to identify the student suspect because his name was unknown to the reporting students. The Principal had the secretary call the suspect student's classroom teacher and had her send the student (to be referred to as "J.C.") to the office. He was unaccompanied. This gave the student suspect unsecured access to his locker. There were a couple of ways the student could have walked to the principal's office and the route he chose did indeed pass by his locker. After passing his locker, he was intercepted by Principal Schmidt and School Counselor Melissa Bergquist. They returned to the locker. The student opened it and Schmidt observed a gun sticking out of a backpack. She removed the gun. They

returned to the office. The principal placed the gun in the filing cabinet and the counselor sat with the student in another office.

Principal Schmidt and/or the secretary attempted to call Grievant Sutherland three times. He failed to answer his phone and was not able to be located until approximately 25 minutes after the first call. Grievant indicated in his testimony that he heard the phone but did not check it as he was in the process of interviewing a student at the elementary school concerning a disciplinary matter. Calls were then placed to other officials including the Superintendent of Schools. The Superintendent was on the scene before Grievant and he considered whether to call a “code red” or school lockdown but decided against it.

Grievant learned of this upon his arrival a few minutes after the secretary got through to him to say (without explanation) he was needed at the middle school. The Chief of Police Phil Jones who had also been alerted arrived a few minutes later.

The Grievant’s conduct from this point forward came under scrutiny later and was a focal point of the investigation and termination decision. The nature of his conduct isn’t particularly disputed and to the extent it is the following represents what the Arbitrator believes to be relevant facts.

Very soon after the Chief’s arrival Grievant expressed his concern in a critical way about how Principal Schmidt had handled the situation. More

particularly, he believed a “code red/lockdown” should have been implemented. The Chief found this inappropriate and advised Grievant that this was not the time and place to criticize the Principal and that Grievant needed to focus on the investigation and advised him that they would talk about this later. Indeed, there were witnesses to be interviewed, the suspect needed to be placed into custody and reports created in part for the purposes of obtaining a warrant to search the suspect’s home.

Sometime just before or after this conversation (the sequence isn’t critical) Grievant went to the high school to retrieve his tape recorder (needing to take witness statements). While at the high school, Grievant told the High School Principal that a student had brought a gun to the middle school and that there had been no lockdown. Grievant denied mentioning the lack of a lockdown critically but instead said he mentioned it for safety purposes since the suspect had a sibling in the high school building. High School Principal Jensen’s written report indicated Grievant was “visibly frustrated and angry” during the conversation. Grievant reportedly told the High School Principal that Schmidt had mishandled the situation and that there should have been a lockdown. He was quoted in the report as saying she needed to be held “accountable for not putting the school in lockdown . . .”.

The principal's report also indicated there was a second conversation between him and Grievant during which he again complained about how Schmidt mishandled the situation. Grievant went on to describe in detail what he had learned including the caliber of the gun, that it was loaded and even how Schmidt had carried the handgun (under her armpit) to the office after taking it from the locker. The report also indicated Grievant stated he was going to speak up regarding the incident and that "he may fall on the sword" for it but he had to speak his mind.

The day after the incident on April 13, Grievant approached the City Manager Paul Hetland in the hallway outside the library in city hall that also houses the police department. Grievant and Hetland both testified about the exchange. Grievant believed it was important to provide Mr. Hetland with accurate information about the gun incident at the middle school, in case he got different information from other sources. With this in mind, he told Mr. Hetland about J. C. being allowed to leave his classroom without an escort, about the failure to order a lockdown of the school building, and about Principal Schmidt's handling of the gun found in J. C.'s locker. During the course of the conversation, Sutherland stated "I may lose my job, but I will answer any questions if asked". Hetland thought this comment was odd so he wrote it down on a piece of paper.

Also, on April 13, 2011 Grievant, using his Department-issued cell phone, sent an email to his wife. It said “hope you can read them”. Attached to the email were three witness statements taken during the course of the investigation into the April 12 school gun incident. These included one statement form Principal Schmidt (taken by Chief Jones) and two from student witnesses. A return email from Grievant’s wife later that day indicated she had read at least part of the statements as she replied: “Interesting – the person doing the interview is nervous sounding with all the um’s and ah’s”. These messages were found on Grievant’s cell phone during the investigation.

It is undisputed that Grievant on April 14 had a conversation about the school incident with Mike Austreng who is a school board member and runs a printing operation that includes publication of the local weekly newspaper. Grievant said he went to the print shop to pick up some business cards his wife ordered. Austreng did not testify. However, Grievant testified he discussed the school incident and in particular how it had traumatized the middle school counselor and that she had not been offered or provided any counseling or other support by the school district. Chief Jones testified he interviewed Austreng as part of the investigation into Grievant’s conduct. According to the report, Austreng indicated he had talked to Grievant “a little”. Based on details Austreng

relayed to the Chief about the incident, he concluded Grievant had shared significant information with Austreng.

On April 15 the Superintendent of schools wrote the following letter to the Chief:

Chief Jones,

On behalf of the ROCORI School District, I am writing to inform you of concerns regarding the performance of School Resource Officer Dave Sutherland. I begin by reminding you that there have been issues, in the past, of poor performance by Officer Sutherland. As you are aware, the school district has been dissatisfied with his performance for a number of reasons in the last year.

More specifically, we are very dissatisfied and upset with his behavior during and after the recent crisis involving a gun at the Middle School. There are a number of reasons for the high level of dissatisfaction, but I will detail two in specific.

First, when the situation at the Middle School unfolded, school personnel could not contact him for over 20 minutes—primarily because he didn't answer his cell phone. Officer Sutherland has been told on prior occasions that he needs to be available via phone, which is why we provide him with one, and to check in with administrative personnel as to his location. The inability to contact him during this recent crisis could have resulted in harm to students and staff.

Second, a core part of Officer Sutherland's job description is to build appropriate and positive relationships with key school personnel. The central people with whom he needs to establish positive relations are the building principals. Rather than cooperating with school staff and assisting with the investigation during the recent crisis, Officer Sutherland has criticized the Middle School Principal's actions—beginning the very day of the incident. We have also learned that he has continued to openly criticize the Principal to school staff in the days that have followed.

Our contract for the School Resource Officer is with the City of Cold Spring Police Department. At this point, we believe that Officer Sutherland's presence on school property is creating discord among staff. Rather than assisting the school and its mission to provide a safe environment for the students and staff, his actions are detrimental to that mission.

Based on the issues outlined above along with other concerns, we are asking the Cold Spring Police Department to instruct Officer Sutherland that he not be present on school property. We are also asking that the Cold Spring Police Department investigate Officer

Sutherland's past performance, his conduct during the gun crisis at the Middle School and his behaviors after the gun crisis.

Thank you for your attention in this matter and we look forward to prompt resolution. If you have any questions or concerns, please feel free to contact me at staskas@rocori.k12.mn/us or (320)685-4901.

On April 29 Grievant was placed on administrative suspension with pay while his conduct was investigated.

The Chief sent a memo concerning the findings of his investigation into Grievant's conduct on May 24, 2011. It examined a wide range of subjects beyond that covered by the Superintendent's April 15, 2011 request. The City Council met in closed session to discuss the matter on June 14, 2011 and pursuant to a resolution passed that day the City Attorney sent the following termination letter to Grievant:

Dear Officer Sutherland:

This letter is to inform you that your position as a Police Officer with the Cold Spring Police Department has been terminated, effective Tuesday, June 14, 2011, by a vote of the Cold Spring City Council.

Enclosed please find the following:

1. Resolution Terminating the Employment of Officer David Sutherland; and
2. Memorandum from Chief Phil Jones to the City Council recommending termination with the investigative findings, dated May 24, 2011.

The reasons for your termination are set forth in the above memorandum. They are:

1. Failure to comply with the Minnesota Data Practice Act;
2. Submitting a time card and receiving pay for a day in which Officer Sutherland was not on duty;
3. Persisting in a pattern of not answering the telephone provided by the School District in a timely manner and failing to answer the telephone provided by the School District in a timely manner on April 12, 2011, and

- therefore failing to provide a timely response to a critical incident;
- 4. Failing to focus on the investigation arising out of the ROCORI gun incident on April 12, 2011;
- 5. Failing to follow the chain of command; and
- 6. Taking off School contact days for other employment.

The support for the above matters may be found in the attached memorandum from Chief Phil Jones, dated May 24, 2011, as well as in the entire investigation file conducted by Chief Jones, and the statement you provided as part of the internal affairs investigation.

Subsequently, a grievance was filed protesting the City's action. It could not be resolved and was ultimately appealed to arbitration. A hearing was held on February 14 and 15, and April 4, 2012. Post hearing briefs were received May 1, 2012. Subsequently, objections concerning the propriety of arguments and evidence resulted in several other submissions. The last of these was received on May 21, 2012.

III. RELEVANT LABOR CONTRACT, CITY POLICY AND STATUTORY LANGUAGE

A. The Labor Contract

ARTICLE 10 – DISCIPLINE

10.1 **Cause and type:** The Employer will discipline an Employee 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

10.2 **In writing:** Suspensions, demotions and discharges will be in written form.

B. The City Policy

A. PRINCIPLE ONE

Peace Officers shall conduct themselves, whether on or off duty, in accordance with...All applicable laws, ordinances and rules enacted or established pursuant to legal authority.

2. Rules

- a) Peace Officers shall not knowingly exceed their authority in the enforcement of the law.
- b) Peace Officers shall not knowingly disobey the law or rules ...In such areas as interrogation... and preservation of evidence, except where permitted in the performance of duty under proper authority.
- d) Peace Officers, whether on or off duty, shall not knowingly commit any criminal offense under any laws of...state or local jurisdiction...

B. PRINCIPLE TWO

Peace Officers shall refrain from any conduct in an official capacity that detracts from the public's faith in the integrity of the criminal justice system.

- 1. **Rationale:** Community cooperation with the police is a product of its trust that officers will act honestly and with impartiality. Police officer...must act in a manner that instills such trust.
- 2. **Rules.**
 - f) Peace Officers learning of conduct or observing conduct that is in violation of any law or policy of this agency shall take necessary action and report the incident to the officer's immediate supervisor, who shall forward the information to the CLEO.

H. PRINCIPLE EIGHT

Peace Officers shall observe the confidentiality of information available to them due to their status as Peace Officers.

- 1. **Rationale:** Peace Officers are entrusted with vast amounts of private and personal information or access thereto. Peace Officers must maintain the confidentiality of such information to protect the privacy of the subjects of that information, and to maintain public faith in the officer and agencies commitment to preserving such confidences.
- 2. **Rules**
 - a) Peace Officers shall not knowingly violate any legal restriction for the release or dissemination of information.

- b) Peace Officers shall not, except in the course of official duties or as required by law, publicly disclose information likely to endanger or embarrass victims, witnesses or complainants.
- c) Peace Officers shall not divulge the identity of persons giving confidential information except as required by law or agency policy.

C. MN Stats Section 13 Government Practices

1. 13.09 Penalties

Any person who willfully violates the provisions of this chapter or any rules adopted under this chapter is guilty of a misdemeanor. Willful violation of this chapter by any public employee constitutes just cause for suspension without pay or dismissal of the public employee.

2. 13.82 Comprehensive Law Enforcement Data

Subd. 2 Arrest Data – The following data created or collected by law enforcement agencies which documents any actions taken by them to cite, arrest, incarcerate or otherwise substantially deprive an adult individual of liberty shall be public at all times in the originating agency:

* * *

(j) the name, age, sex and last known address of an adult person or the age and sex of any juvenile person cited, arrested, incarcerated or otherwise substantially deprived of liberty;

* * *

Subd. 7 Criminal Investigation Data – Except for the data defined in subdivisions 2, 3, and 6, investigative data collected or created by a law enforcement agency in order to prepare a case against a person, whether known or unknown, for the commission of a crime or other offense for which the agency has primary investigative responsibility is confidential or protected nonpublic while the investigation is active.

IV. OPINION AND DISCUSSION

The arguments of the Parties are extensive and address all the issues covered by the termination letter and more. At the outset, the Arbitrator will set aside those

issues deemed not to be particularly relevant, appropriate and/or persuasive. First, as ruled twice during the proceeding, the City's reliance on Grievant's use of the DVS data as a cause for Grievant's termination was not relevant to this proceeding. The evidence related to this was discovered after Grievant's termination. It therefore cannot be part of this proceeding which is to evaluate whether the City had just cause to terminate Grievant for the reasons expressed in writing in the June 15 letter of termination. If Grievant were to be reinstated the DVS evidence may be a proper reason to consider additional discipline but it is not relevant here and now.

The Union had three procedural objections which should be dismissed. The first relates to an alleged violation of the open meeting requirements as they apply (or don't) to the City Council's meeting where they discussed the termination and later resolved to affect it. This is not a contractual matter and has no bearing on the just cause issues before the Arbitrator. Similarly, contentions about the Grievant's fifth amendment rights which relate to the Chief's issuance of a Miranda Warning to Grievant at the end of his internal affairs statement (which was preceded by a "Garrity" warning) are not material to the just cause question. That any subsequent criminal proceeding might be tainted and subject to dismissal is not a contractual matter.

The third procedural argument of the Union is a just cause issue. This concerns the nature of the investigation. Both Parties in this regard mention the “seven question test” of just cause. One of the questions or tests of just cause is whether the employer’s investigation was conducted fairly and objectively. This is, generally speaking, a due process consideration.

The “seven question test” is a commonly used guideline but its original conception by Arbitrator Carroll Daughtery was based on his experience before the National Railroad Adjustment Board. It is sufficient to say here that the system of employee discipline under the railroad contractual and statutory scheme make the direct and strict applicability of those very specific requirements difficult in the public and private sector “just cause” environment. See Chapter 3 “Arbitral Discretion: The Tests of Just Cause” by John E. Dunsford in the 42nd annual proceedings of the National Academy of Arbitrators (1990 – BNA Books) for a complete discussion. This, of course, is not to suggest the Employer’s disciplinary investigation is not subject to scrutiny on general grounds. It is.

In this case, the nature of the investigation did not violate Grievant’s industrial due process. Grievant had an opportunity to address the charges against him and offer a defense prior to his termination. Moreover, the nature of the investigation did not inhibit the Arbitrator’s ability to properly understand and assess the substance of the evidence on its merits.

This is not to say that the investigation didn't range into subjects that the Arbitrator believes for several reasons should have little or no bearing on whether the penalty of termination was for just cause.

The investigation, while not fatally flawed with respect to fundamental contractual due process, was misdirected in some respects. The Arbitrator would like to sideline these subjects before addressing the central issues in this case which relate to the Data Practices Act and Grievant's open criticisms (bordering on a campaign) of the school district's handling of the incident. In this last respect the Grievant's judgment was seriously deficient with respect to 'time and place'.

The issues that the Arbitrator doesn't believe to have a material bearing on the question of whether just cause exists for termination relate to: (1) the time card allegation, (2) a pattern of not answering his department cell phone, (3) taking off school contract days for other employment. In a word, these matters are just stale.

These allegations had never been investigated in any reasonably contemporaneous manner to the alleged events. They also don't relate to the school district's central complaint. Even if they had in two of the three cases, if proven, such matters would be subject to progressive discipline. Of course, based on the record progressive discipline was non-existent. Moreover, the time card allegation goes back to one day in July of the prior year. It isn't or shouldn't be surprising

Grievant had difficulty having a comprehensively consistent recollection. Thus, the delay in prosecuting this makes it difficult to prove the allegations.

Regarding the phone availability issues, the Arbitrator doesn't doubt that the School District's frustrations were real. However, it is difficult to find this subject to be a matter of disciplinary significance when Grievant was never even given a formal verbal or written warning. Moreover, while his excuse for not answering his phone right away probably sounded like the same old song, a short period of unavailability doesn't in and of itself justify discipline in this case even as an additive of aggravating circumstance. There is no evidence he wasn't in a meeting that required his attention.

The remaining charges are, particularly in combination with each other, quite another matter. They are legitimate subjects of great concern. Without a doubt data collected such as witness statements in the course of an investigation are confidential. The reasons for this are not only clear in the Data Practices Act and from department policy but from a basic common sense notion of police professionalism. Sending witness statements to his wife, particularly in electronic form which easily facilitates intentional or non-intentional distribution, is clearly a violation of Department policy and Minnesota 'law'. Notably, this is the same 'law' among others Grievant is sworn to uphold. The Data Practices Act says willful violations of its requirements constitutes "just cause" for suspension

without pay or dismissal of the public employee. And Grievant's defense that he didn't intend for his wife to read them just isn't credible.

Whether Grievant violated the Data Practices Act with the city manager, high school principal, or Tom Rollins or the newspaper owner/school board member is a closer call. The Union's impressive expert witness educated the Arbitrator over the distinctions that exist between protected investigative data sourced from confidential materials and unrecorded mental impressions formed by public employees. This exception is commonly known as the "Keezer" doctrine. Even respecting the Union's argued application of the doctrine to these facts, the Grievant is left with a huge problem. Even his own expert's testimony is damning with respect to his sharing of written witness statements.

Most important is a stark fact. The record reflects an admission by Grievant that he transmitted the witness statements in violation of the applicable law. He was asked on cross examination if he knew the statements were confidential on both counts: that they related to a criminal investigation and because of the minor involved. He acknowledged they were non-public. He was also asked if he knew it was illegal. His answer was: "probably". He acknowledged as a follow up question that he knowingly broke the law.

Part of Grievant's defense for sending his wife the statements was he wanted to preserve the record in case he had to 'protect' himself regarding his role in the

gun-at-school event. This self preservation instinct isn't hard to understand but to send the statements to another person outside the department certainly isn't legal conduct. Worth mentioning again is the lack of credibility of his claim he didn't intend for his wife to read them. Saying "hope you can read these" is a far stretch from any precaution not to read them but only to store them for his protection later on.

In addition, the evidence is convincing the Grievant wasn't just trying to protect himself by backing up some documents. It isn't an exaggeration to say he was on a bit of a campaign to criticize the school district's handling of the matter. Among other comments he made evidencing this was his remark to the City Manager. This raises the relevancy of the remainder of the charges against Grievant.

The timing of his criticisms and the manner in which he shared them outside the chain of command as the Superintendent's letter indicated was disruptive. His breach also had the potential to undermine the investigation and/or prosecution.

Certainly, some degree of understanding should be extended given the circumstances. The school and entire community (of which Grievant is a member as well as a parent of a school student) was still burdened with the memory of a unfathomable tragedy, a school shooting in 2003 that claimed the life of two high

school students. Grievant and everybody else no doubt would have the natural instinct to do what they could to contribute to the prevention of a repeat nightmare.

Grievant, however, on the day in question was, in so many words, warned that his criticisms were a distraction. Grievant thereafter had plenty of time to reflect and to get his reaction under check but yet his criticisms continued. Grievant obviously felt strongly that a “code red” or “lockdown” should have been called. However, there was no immediate need to express it. The situation on the scene was stable once he arrived.

There was also no compelling need to express it to anyone in the days following the incident. As for any notion that he needed some protection or that there was a cover-up he had to acknowledge there was no evidence of this by Chief Jones or anyone else. He may have felt the district would minimize its responsibility (particularly the principals). However, he also acknowledged that after the prior event the School District went through many debriefings with administrative staff, teaching staff and the public.

So it was reasonable to think that the April 12 incident would also be publicly reviewed. Indeed, the Superintendent testified that after the April 12, 2011 gun incident, the School District also went through a process of debriefing. This was done with the Police Department and school staff as well as the public. As for the Principal, the Superintendent candidly acknowledged that she should

have gone to the student's classroom rather than requesting that he come to the office on his own, such that he had access to the gun. Yet the Grievant didn't attend any of the meetings and there is no reason to believe that at the appropriate time and place his concern couldn't have been voiced inside and outside the Department and within the community.

There is also no reason to believe that anyone connected with the incident within the Department and the School District wouldn't have been just as anxious as Grievant to be better prepared in the future. This isn't to say there may not have been disagreements as to the right course for future policy. Indeed, the Union offered an expert witness who agreed with Grievant. Chief Jones disagreed with the expert. These divergent opinions aside, it was the Superintendent's decision to make at the time and for good reasons he did not call for a lockdown. The gun was retrieved and the situation stable. So the Superintendent and the Principal were in a good position to weigh the benefits and risks of a lockdown. Grievant was not on the scene soon enough to have offered his opinion when it could have counted. His criticisms did nothing to calm the immediate situation.

Clearly, Grievant committed misconduct. He broke the law and policy. His actions were unprofessional and were unproductive. The remaining question is whether the penalty of termination was unreasonable.

Certainly, the Government Data Practices Act intersects with the collective bargaining agreement in that it states a “Willful violation by any public employee of this Chapter constitutes just cause for suspension without pay or dismissal of the public employee”. Thus, the City argues the termination must be upheld. On the other hand, the most favorable reading of the Statute for Grievant is—that while dismissal by any employer is authorized—it isn’t required and that it does not specifically restrict the Arbitrator’s authority to make a contrary finding having taken all the factors of just cause into consideration.

Regardless, in this case the Arbitrator cannot conclude that the Employer’s decision as to penalty was unreasonable. Grievant is a relatively short-term employee with a record that contains no particular mitigation such as long and/or commendable service. His misconduct was committed conscious of the law and in spite of it. The violation and his lack of professionalism wasn’t momentary. In sum, there was just cause for discharge.

AWARD

The grievance is denied.

Gil Vernon
Arbitrator

Dated this 26th day of July 2012.