

OPINION AND AWARD OF THE PANEL
Proceeding Pursuant to the
MINNESOTA VETERANS PREFERENCE ACT

In the Matter of the Employment Termination of

Daniel R. Strickland

AND

City of Brooklyn, Park, Minnesota

Panel Members:

DAVID S. PAULL (Neutral Appointee)
JAMES K. MARTIN (Employer Appointee)
RYAN L. KAESS (Veteran Appointee)

Issued March 1, 2013
BMS Case No. 13-VP-153

OPINION

Preliminary Matters

In a letter dated May 2, the City of Brooklyn Park, Minnesota (City), terminated the employment of Daniel R. Strickland. At the time of his termination Officer Strickland was a probationary police officer. Because he is a veteran, Mr. Strickland exercised his right, pursuant to the Minnesota Veterans Preference Act (VPA), *M.S. 197.46. et.seq.*, to have the City's employment action reviewed in accordance with that law. By letter dated June 25, 2012, Mr. Strickland requested a hearing and the appointment of a three member panel to determine the matter. The City appointed James K. Martin, Esq. to serve as a panel member. Mr. Strickland selected Ryan L. Kaess, Esq. Subsequently, Mr. Martin and Mr. Kaess jointly select the undersigned as the panel's third member.

A hearing was conducted in Brooklyn Park, Minnesota, on Tuesday, December 11 and Wednesday, December 12, 2012. Mr. Strickland was represented by Robert Fowler, a lawyer with offices in St. Paul, Minnesota. The City was represented by Susan E. Torgerson, a lawyer with office in Minneapolis, Minnesota.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. A court reporter was present to record the proceedings. After the witnesses were heard and the exhibits were presented, the parties submitted

simultaneous written closing statements. The closing statements were timely mailed and received. Thereafter, the matter was deemed submitted and the record closed.

Issue

The parties agreed on the exact statement of the issue to be resolved:

Was the termination of Officer Daniel R. Strickland for just cause and if not, what is the appropriate remedy?

No procedural issue was raised by either party.

Findings of Fact

The City

The City, a municipality of approximately 76,000, is located on the west bank of the Mississippi River in Hennepin County, Minnesota. Currently, the police department consists of approximately 160 employees. 108 of these employees occupy “sworn” positions, including approximately 60 patrol officers and 48 sworn administrative employees. In addition to the chief of police, the City employs 2 deputy chiefs, 2 inspectors, 4 lieutenants and 9 sergeants.

Officer Strickland

Officer Strickland (Officer Strickland or Veteran) was hired by the City as a probationary law enforcement officer on September 21, 2011. Prior to applying for a position with the City, and for a period of approximately 6 years, Officer Strickland was a law enforcement officer for Carter County.

Officer Strickland is an honorably discharged marine. He was separated from the armed forces in approximately April of 1990. His honorable service as a marine qualifies him for protection under the Minnesota Veterans Preference Act, *M.S. 197.46 et.seq.*

Additionally, prior to his employment by the City, Officer Strickland had served as an instructor in the Law Enforcement Continuing Education Program (LECE) at Hennepin Technical College (HTC). He had served in this capacity since August 2007.

Outside Employment for Trainees

Before the decision to hire Officer Strickland, and as one of the final steps in the hiring process, the City scheduled a “chief’s interview” with Chief Michael Davis and two deputy chiefs, Deputy Chief Craig Enevoldsen and Deputy Chief Jeff Ankerfelt. During the interview, Officer Strickland was asked about outside work. After disclosing his activities at HTC, Officer Strickland was told that City policy prohibits any outside employment during the field training process. He was further advised that toward the end of his field training, he might be considered to participate in outside employment if he was progressing satisfactorily. As a new employee, Officer Strickland was to maintain his probationary status for a 12 month period.

After his hire, Officer Strickland entered the City’s police officer training academy. After participating in the academy for a few weeks, Officer Strickland moved into the field training program. This aspect of his training began in October of 2011 and was divided into 4 sections or phases.

Prior to learning of his employment by the City, Officer Strickland had scheduled several hours of teaching at HTC. Once he was hired by the City, Officer Strickland cancelled all previously scheduled teaching assignments at HTC.

The training manual at page 3.4, contained the following standing order:

You may not engage in outside employment during the time you are in field training. Our training program is extensive and demanding and requires frequent overtime. We want your attention, your alertness, and your energy; all of these things suffer when you take on the obligation of extra jobs.

At the hearing, Officer Strickland confirmed that he received a copy of the training manual. He further confirmed that he was advised that information about the City's policies and procedures were available to him online. He was aware of the standing order prohibiting outside employment during field training. He stated in his testimony that, at the time of the interview with the chief, he had no intention of working at HTC during training.

Officer Strickland testified that he believed he would be able to work at HTC toward the end of his field training. Officer Strickland testified that he misunderstood the Deputy Chief's statement that such a request "might be considered" if he was making satisfactory progress. He further testified that, due to this misunderstanding, he did not "knowingly" violate the standing order.

Field Training Procedures

The training manual defines the relationship between the trainee and the field training officer. The manual instructs that each trainee is considered a student, and not a partner of the training officer. The purpose of the program, the record reflects, is to prepare the student to patrol and enforce the law as an individual officer, as a single patrol unit. The record makes it clear that, while the training officer does ride with the trainee, this is done primarily in the capacity of an observer and evaluator. The training officer does not step in to act as a law enforcement partner except in serious situations.

The training officer uses two basic reporting tools during the evaluation process – the Daily Observation Report (DOR) and the supervisory memo. The record establishes

that the DOR is a more objective measurement of trainee performance. The supervisory memo is based on the training officer's opinions, and therefore more subjective in nature.

Officer Strickland's Trainee Performance

The record indicates that Officer Strickland successfully completed phases 1, 2 and 3 of his training and that his average scores in Phase 4 were above the level necessary to pass. However, several issues emerged during the field training period.

First, Officer Ewert noted, in Phase 1, that Officer Strickland seemed "pretty laid back and taking it easy." It was reported that Officer Strickland had to be prompted on several occasions to stay proactive in making traffic stops or engaging the community. Officer Ewert reported that Officer Strickland had stated that he did not stop many vehicles in Carver County and "wasn't used to being busy."

In Phase 2, several new issues arose. It was reported that Officer Strickland had left work prior to consulting with his training officer. In this regard, it was noted that Officer Strickland had expressed concern over whether he would be able to leave on time. On another occasion, he looked at his cell phone while reviewing his lesson plan with his training officer. At one point, he had to be warned not to speak ill of one of his training officers.

Officer Strickland confirmed that on December 14, 2011, he did leave without advising Officer Guderian, his field training officer. Officer Strickland testified that he and Officer Guderian had miscommunicated. When he was unable to locate him, Officer Strickland testified, he left for the day. The next day, Officer Strickland testified, Officer

Guderian showed him how to page him and there was no further incident. In a report, Officer Guderian disputed Officer Strickland's assertions that there was a miscommunication.

In late January, 2012, the City determined to extend Officer Strickland's participation in Phase 3. Officer Strickland, it was determined, had not demonstrated that he could work as a solo patrol officer and handle all of the workload. The extended period began on or about January 30, 2012, and ended on February 11, 2012. Officer Fricke was assigned as the training officer for this extended period.

Over the course of the first three phases of his training, Officer Strickland received 10 scores of 2 or less on his DOR's. Five of these occurred in the 3rd phase of training. However, he successfully completed the first three phases. At the time he was placed on leave for the investigation, Officer Strickland had scored an average of 4.46 on his Phase 4 DOR's. The minimal passing score is 4.

In the law enforcement training community, an officer receives a NRT when he or she repeatedly makes the same mistakes or does not show any improvement. None of Officer Strickland's DOR reports contained the NRT designation.

Violation of the Outside Employment Policy

In early January of 2012, Officer Strickland agreed to teach a class at HTC. He did so without first clearing the activity with a supervisor. Officer Strickland testified that he thought he could accept teaching assignments at HTC because he was the end of his training.

At mid-shift on March 5, 2012, Officer Strickland advised his training officer, Officer Andrew McComb, that he had taught classes at HTC during his field training. Officer McComb reported Officer Strickland's statement to Sergeant Robert Roushar, the Field Training Sergeant. Sergeant Roushar consulted with Deputy Chief Enevoldsen, who directed that Officer Strickland be sent home for the remainder of the shift.

Sergeant Roushar spoke with Officer Strickland that evening at a City facility. Officer Strickland advised Sergeant Roushar that he had worked at HTC on one occasion since beginning his field training. After he arrived home and had a chance to consult his calendar, Officer Strickland noted that he had taught at HTC not once, but a total of 3 times during his field training.

The next day, Deputy Chief Enevoldsen called Officer Strickland sometime between 11 AM and 1 PM. He advised Officer Strickland that he was being placed on leave pending an investigation into his conduct. During that phone call, Officer Strickland advised Deputy Chief Enevoldsen that he had misstated the number of occasions on which he had worked at HTC – that it had actually been 3 occasions. In addition to the mid January occasion which he had scheduled in early January, Officer Strickland noted two additional occasions in February in which he served as an instructor at HTC. The record reflects that Officer Strickland worked at HTC on the following dates:

Thursday, January 19, 2012 (5 hours)

Friday, February 3, 2012 (10 hours)

Wednesday February 22, 2012 (3 hours)

The record also indicates that Officer Strickland scheduled himself to act as an instructor at HTC on March 6, 2012. Officer Strickland had expressed to his field trainer the previous evening that he hoped to be done on time as he needed to work the double shift at HTC the following day.

During the week before Officer Strickland served as an instructor at HTC in January, Officer Hjelm was acting as his field trainer. Officer Hjelm reported that Officer Strickland asked him if he could drive during the January 17th shift. The reason given by Officer Strickland was that he might be “tired” on that day. Officer Hjelm refused and reminded him that it was his responsibility to drive the squad car. Officer Strickland admitted that he had asked Officer Hjelm to drive during the training shift, but claimed that he had asked only that he drive for half a day. Officer Hjelm disputed Officer Strickland’s recollections in this regard and recalled that Officer Strickland had asked him to drive for a full day.

At the hearing, Officer Strickland was asked why he did not call Sergeant Rouchar back immediately after he discovered he had taught at HTC 3 times, rather than only once. Officer Strickland testified that he had an uneasy relationship with Sergeant Rouchar. He knew that Deputy Chief Enevoldsen was calling him the next day and felt it would be better to discuss the issue with him.

The record reflects that Officer Strickland openly discussed his appearances as an instructor at HTC with his supervisors and co-workers. In addition of Officer McComb, Officer Strickland discussed his HTC activities with Officer Fricke during Phase 3 training. Officer Fricke testified that he had an obligation to inform his supervisor when

he was told by Officer Strickland that he had engaged in outside employment. However, he confirmed that he never did so until he was asked to prepare a supervisory memo.

Additionally, Officer Strickland discussed his HTC activities with Sergeant Lehman during the academy phase of his training. Sergeant Lehman, like Officer Fricke, did not report what he had learned to supervision. Instead, he advised Officer Strickland to “do what your conscience tells you.”

Officer Strickland testified that he saw several other officers at HTC while he was serving as an instructor. There is no mention of Officer Strickland’s activities at HTC in his DOR’s.

The Investigation

The investigation of Officer Strickland’s conduct was delegated to Sergeant Mark Bergeron and Lieutenant Barritt. As Deputy Chief Enevoldsen testified, the focus of the inquiry was to determine the scope and degree of Officer Strickland’s outside employment, his knowledge of the rules, the degree to which he was untruthful and his overall training performance.

The process also requires a review of the investigation report by a disciplinary panel. In this case, the review was performed by Deputy Chief Enevoldsen, Deputy Chief Ankerfelt, Inspectors Todd Milburn and Mark Bruley, and Lieutenant Eric Nelson. The panel concluded that Officer Strickland had willfully violated the policy and standing order on several occasions. The panel concluded that Officer Strickland had been untruthful in his interactions with Sergeant Roushar. The panel recommended that

Officer Strickland be terminated and the recommendation was passed on to the City Manager.

On April 12, 2012, Officer Strickland was provided a *Loudermill* hearing by the City.¹ Officer Strickland admitted during his meeting with the City Manager that his conduct was wrong, but that he did not believe that he was violating any policy at the time. Noting that he had cancelled all 2011 teaching assignments, he stated that he though he would be off field training by the time he signed up for the February dates and that, for that reason, he did not “knowingly” violate the policy or standing order.

On the question of whether he was “truthful,” City Manager James D. Verbrugge remarked in the *Loudermill* hearing that while he believed Officer Strickland on the issue of his understandings regarding outside employment, this was not the only matter to consider:

In terms of integrity, I believe you when you say that this is what I thought, okay. Now, I also, in reading the report and the recommendation . . . I empathize with the officers who are conducting the [investigation] in saying that it strains, credulity a little bit . . . I appreciate having somebody in your face, a stressful situation, especially if it’s a relationship that has been particularly constructed before then, I get that . . . I look down the road and I think about that point in time when an officer’s on the stand and asked to provide testimony . . . think about the future of a police officer who has had some question of whether they were fully truthful, intended or not intended . . . and the question is can a police officer ever recover from an incident whether they weren’t fully truthful?”

¹ This hearing is a special proceeding first established and required by the U.S. Supreme Court in the case of *Cleveland Board of Education v. Loudermill et. al.*, 470 U.S. 532 (1985). The case held, among other things, that certain public-sector employees have a “property” interest in their public employment and are consequently entitled to be advised of the charges, an explanation of the adverse evidence and an opportunity to present their side of the story in “some kind of hearing.”

The Termination

In his letter dated May 2, 2012, City Manager Verbrugge advised Officer Strickland of the decision to terminate him. “This action is begin taken,” Mr. Verbrugge wrote, “based on both misconduct and incompetence, as shown in the report of internal investigation . . .” The letter also contained the following:

Based on your willful misconduct, whereby you violated city and department policy by engaging in outside employment without authorization, and based on your misleading your supervisors when confronted about your outside employment, and based on your inability to consistently and competently perform the essential functions of a police officer to be released from field training, I concur with recommendation to propose the termination of your employment.

Positions of the Parties

The City

The City first addresses what it believes to be the “legal standard” that applies to this case. Reference to *M.S. 197.46* is made and the City notes that this “standard has been equated” with the standard for terminating a public employee for “just cause.” The City takes the position that the term “just cause” is best defined by the Minnesota jury instruction guidelines, providing that “A termination is for good cause if [the employee] breached the standards of job performance that [the employer] established and uniformly applied.” *See*, 4 Minn. Practice CIVJIG 432 (1999).

On the merits, the City contends that it has shown by substantial evidence that Officer Strickland engaged in misconduct or was incompetent to perform his job and that the termination was “reasonable.” The “substantial evidence test,” the City maintains, requires the panel to consider “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion when considered in its entirety.” The City equates the “just cause” standard to the “reasonableness” test. The City further seeks to equate misconduct to just cause.

Compliance with “all polices and requirements” is especially important as an “indicator of [Officer Strickland’s] fitness for the position.” The Deputy Chief testified that integrity is the heart of law enforcement, the City asserts, a concept which must be endorsed. Officer Strickland knew he would not be allowed to work outside from the outset, the City argues, and cancelled his future scheduled work times.

He also knew he needed to ask special permission to work on the outside, a fact that is well established by his testimony indicating that he thought he had the required permission. He repeatedly admitted that he violated the standing order and the policy, the City asserts, and knew that he was not in compliance.

The City contends that he did not “report accurate information” to his Sergeant and told others that he had permission when he knew he did not. “His excuses, justifications, half truths and failure to be consistent and straight forward about the situation are all sources of considerable concern for the Department and the City.”

Because it believes the term “incompetence” is not clearly defined by the law, the City turns to a legal dictionary. The definition refers to a “[L]ack of fitness, legal qualification or fitness to discharge the required duty” among other things, and the City contends that Officer Strickland is “unfit to serve as a law enforcement officer.” To the City, the review of his “overall performance was proper to put his misconduct in proper perspective,” but “in the end, the misconduct overshadowed the entire situation for [Officer Strickland].”

The City contends that an alternate form of discipline may not be substituted unless the evidence “demonstrate extenuating circumstances . . . Thus the Panel’s job is to determine whether the employer acted reasonably and whether any extenuating circumstances exist to justify a modification of the sanction.” The burden to show such circumstances is on the employee, the City maintains.

The City notes that a panel has “substantial discretion” in determining what constitutes an extenuating circumstance, but that a modification is not “compel[led]” by

such a status.” The City contends that Officer Strickland has failed to provide any such evidence and does not argue that they exist.

The City takes the position that its action was taken only after an extensive investigation “with a proper formal interview” and a *Loudermill* meeting. “An officer who cannot be truthful is unfit to meet the standards of the Brooklyn Park Police Department,” the City argues, “he lied to his Sergeant about his actions when they were discovered, lied about having permission . . . and lied about when he had worked [outside of his police department job].”

The City seeks to have its decision upheld.

The Veteran

To state his position regarding the definition of “just cause,” the Veteran first refers to a number of Minnesota court cases. Cases are cited to support the position that necessary cause in cases under the Veterans Preference Act (1) must relate to the administration of the office, (2) must be of a substantial nature, (3) show that the officer is not a fit or proper person to hold office, (4) must relate to the manner in which the employee performs his duties, (5) must be based on inadequate performance of duties and (6) must relate directly to the job being performed and the ability to adequately perform the job.

Reference is also made to the collective bargaining definition of “just cause.” The Veteran suggests that the factors used by arbitrators in collective bargaining grievance proceedings are pertinent to Veterans Preference cases. Cases containing a well-known

and well-established seven part test for just cause commonly accepted in collective bargaining settings are cited.

The Veteran similarly argues that a collective bargaining standard for the burden of proof should be applied. Cases are cited to support this position. The Veteran argues that, because the City is a governmental entity and a public employer, it additionally owes a duty to preserve employee rights pursuant to the principals of substantive constitutional due process.

On the merits, Officer Strickland contends that the City did not have just cause to terminate him. In support of his general contention, the Veteran first takes the position that the evidence demonstrates that he was not failing his officer field training. Phases 1, 2, and 3 of his training were successfully completed, he notes, and he was on track to complete the entire program successfully.

This evidence directly contradicts the City's contention that he was "not performing at an acceptable level," Officer Strickland asserts. There were "only ten total instances" over the course of several months where he received scores of "2" or less on the DOR reports, the Veteran maintains. The scores were improving, and the City chose to advance Officer Strickland to the next level. "That signifies that the belief that he had satisfactorily completed his 3rd phase of training . . . [The City cannot] go back . . . and claim that he was failing that portion."

While Officer Strickland's phase 3 training was extended, he refers to evidence tending to show that it is common for police departments to extend various phrases of training. Officer Strickland received no "NRT" designations, he notes, which are usually issued when there is no improvement. The lone number "2" score in his final DOR,

argues the Veteran, was given because he failed to make himself available for other calls quickly enough. However, the DOR does not note that at the time, Officer Strickland was not able to make himself available because he was discharging other required duties.

While certain of the supervisory memos were adverse, the Veteran notes, there were “glaring inconsistencies” between the DORs and the supervisory officers’ performance memos. Where the DOR is an objective measurement of performance, the FTO memos are more subjective, the Veteran contends, implying that they are of less value. The DOR reports, suggests the Veteran, indicate that Officer Strickland was “four days away from completing the program, and there is absolutely no indication in those reports that he was failing.”

With regard to work performance, the City failed to meet five of the seven tests used for just cause in collective bargaining cases, according to the Veteran. The City sought to justify the termination in part by criticizing Officer Strickland for asking the field training officer to perform driving duties. However, Officer Strickland contends, this was done to permit him to become geographically familiar with the City. If that was wrong, the Veteran suggests, there was no adequate notice as to that matter. Further, the City did not conduct a fair investigation, the Veteran asserts, because it based its decision to terminate on the FTO reports, rather than “studying the objective performance documented in the daily observation reports.”

The Veteran takes the position that he did not knowingly violate the outside employment policy. Reference is made to the statements of City Manager Verbrugge in the Loudermill hearing in which he states “in terms of integrity, I believe you when you said that this is what I thought, okay.” The Veteran asserts that this “admission”

demonstrates conclusively that the City believed he was not knowingly in violating of the outside employment policy.

The Veteran notes that he was asked to fill in for someone at HTC and had no belief he would be paid. When he first started to work for the City's police department, he asserts, he cancelled all of the classes he was scheduled to teach. "The teaching of an occasional continuing law enforcement related class isn't really outside employment when viewed in the totality of the circumstances," Officer Strickland argues. The activity was not engaged in "on a regular basis to supplement . . . income." One of the reasons he agreed to "help out" in the first place, the Veteran asserts, was "for the purpose of improving his skills as a law enforcement officer and to assist the training of fellow officers."

The Veteran analogizes his activities at HTC with "an attorney teaching a CLE course." The Veteran notes that he needed a certain number of continuing education hours in order to maintain his law enforcement license and that he was able to earn up to "24 hours of credit" by engaging in this activity. The City's police department required its officers to be licensed, the Veteran points out.

Officer Strickland received conflicting information from the Deputy Chief, he contends. Although the City contended that he was obligated to disclose his outside employment on a special form, he was never issued the form but was expected to "find it on the City's internet."

The Veteran contends that his involvement with the Law Enforcement Continuing Education Course did not impact his job performance. Two of the three appearances were on days in which he was not scheduled to work and the third was after hours.

Officer Strickland admits to asking Officer Fricke if he would be able to leave on time on a day in which he was scheduled, but also affirmed that he would stay as long as necessary.

In addition to the admission, the Veteran contends, the City's position cannot be sustained because it failed to prove that proper notice of the rule was given and because of the conflicting information.

The Veteran contends that he was not dishonest concerning his outside activities and that his conduct "displayed integrity." Upon consulting his calendar and realizing that he had worked at HTC on more occasions than he first stated, he advised the Deputy Chief the next business day. Officer Strickland did not try to hide his activities from his FTO's and co-workers, indicating there was no intent to lie.

The termination should be reversed due to supervisory activity, the Veteran contends. Officer Fricke knew about two of the three teaching appearances, the Veteran points out, and said nothing about it. Additionally, the Veteran asserts, Officer Fricke testified that he did have an obligation to inform the administration, and still did not do so. When he advised another officer that he was planning to teach at HTC, the officer told him to do what "his conscience tells you," but did not state that the activity was prohibited.

The Veteran contends that two incidents "stood out" in support of Deputy Chief Enevoldsen belief that there were issues regarding integrity – seeking permission to leave early and the FTO driving incident. The leaving early issue was resolved when the FTO advised him on how to page and there never was another problem, the Veteran suggests,

and the driving issue was related to Officer Strickland's lack of knowledge of the town. Neither gives rise to integrity issues, according to the Veteran.

There was also no evidence that Officer Strickland did not act with integrity, the Veteran suggests. As an example, reference is made to the search conducted by his FTO that he thought was illegal, as was eventually confirmed by the city attorney.

Finally, the Veteran argues that the City did not apply the correct standard. It applied the probationary standard, but did not apply the cause standard accorded to veterans.

For a remedy, Officer Strickland seeks reinstatement to the training program at the same stage he left it. In the alternative, he seeks reinstatement plus a reduced discipline, such as a written reprimand or a one day suspension. The Veteran notes that there are a number of factors providing a basis to reduce the discipline including (1) several supervisors were aware of his teaching activity and took no action, (2) the ambiguity in regard to whether he could teach (3) the City Manager's belief that he could teach and (4) his skill and experience as a police officer.

Discussion

Legal Standard

The Veteran's Preference Act provides that a public employee who qualifies under the law may be discharged only for "incompetency or misconduct," regardless of the existence of probationary status. *See, M.S. Section 197.46*. The hearing provides the formal opportunity to elicit evidence relating to the issue of whether or not the employer can show that it acted "reasonably" in discharging the veteran.

The Minnesota Supreme Court has interpreted *M.S. Section 197.46* as providing a benchmark equivalent to the "just cause" standard which governs the discharge of public employees pursuant to the *Public Employment Labor Relations Act, M.S. Chapter 179A*. The Court has made it clear that the incompetence or misconduct must be "substantial" and relate directly to the public interest. In *Ekstedt v. Village of New Hope*, 292 Minn. 152, 193 N.W. 2d 821 (1972), the Court ruled that:

. . . the cause [for discharge] must be one which specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interest of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. [As cited by Hearings Officer Stephen F. Befort in *Patton and Department of Military Affairs*, BMS Case No. 11-VP-0473 (2012)].

The public employer carries the burden to establish the existence of the statutory grounds to support the discharge by substantial evidence. *Johnson v. Village of Cohasset*, 263 Minn. 425, 116 N.W. 2d 692 (1962).

In *Rolshouse v. City of Brooklyn Park*, BMS Case No. 10-VP-1227, Hearings

Officer Andrea M. Kircher ruled:

Generally, just cause requires that the employer act reasonably and in compliance with due process in its handling of discharge procedure; that is, the employer's actions must be thorough, timely, consistent, non-discriminatory, and in accordance with its own policies. There must be a full and fair investigation into the misconduct.

However, the panel's duty here does not end with the inquiry into whether the City acted reasonably. Even where the City acted correctly in determining that substantial misconduct or incompetence occurred, the deciding authority must also determine whether circumstances exist to justify a modification of the discipline:

. . . the task of the hearing board is twofold: first, to determine whether the employer has acted reasonably; second, to determine whether extenuating circumstances exist justifying a modification in the disciplinary sanction. *Matter of Schrader*, 394 N.W. 2d 796 (Minn. 1986)

In this case, the City cites to four items of misconduct or incompetence as set forth in the investigation summary, in order to justify the termination of Officer Strickland's employment:

- A "willful" violation of the policy and standing order prohibiting outside employment during field training;
- Intentionally misleading and lying to Sergeant Roushar concerning the number of times he served at HTC as an instructor;
- A failure to display the ability to competently perform the functions of a solo patrol officer;

- “significant and alarming integrity issues . . . desire to minimize, deflect, argue, or out and out lie about his misconduct or performance weakness . . . reverts to perceived miscommunication, perceived misunderstandings or lack of knowledge . . . [has not] taken the opportunity to seek clarification.

The statutory and case law that has become the legal standard in cases of this type requires the determination suggested by *Ekstedt*, that these allegations touch the “qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office.”

In this regard, it must be recognized that the allegations set forth by the City against Officer Strickland are significant and relate directly to his ability to discharge assigned duties. The policy, designed to make sure that the trainee is devoting full energy and concentration to the essential training process, is important. It was very clearly stated. Officer Strickland does not deny knowledge of it. So to, are the allegations that call into question Officer Strickland’s ability to be truthful and perform the duties of his job. To paraphrase the comments of City Manager Verbrugge in the *Loudermill* hearing, a police officer’s integrity and ability to be truthful is of prime importance.

The second and third specifications of misconduct or incompetence are similarly the types of matters that “touch” qualifications or performance. The fourth specification also raises the requisite issues, to the extent that “alarming integrity issues” are alleged.

Violation of the Outside Employment Policy - Officer Strickland's Veracity

The record clearly shows that Officer Strickland violated the outside employment policy and standing order. He admits that he did. He further admits that, aside from his claimed understanding that he could work at HTC near the end of the instructional period, he was generally aware of the prohibition against outside work during training.

In addition to the issue of whether the violation of this policy reasonably justified the discharge, Officer Strickland's honesty and integrity is questioned. The City contends that Officer Strickland was lying when he advised Sergeant Rouchar that he had taught at HTC only once. The investigatory panel concluded that Officer Strickland was not being truthful because "[O]ne could easily not recall the difference between 4 and 6 shifts or 7 and 9 shifts, but the inability to recall you worked there more than just one time is not plausible in our opinion." The City similarly regards Officer Strickland's explanation for the policy violation - that he thought he was on safe ground in teaching at HTC near the end of his training based on his incorrect understanding that he could do so - as a lie. Thus, the credibility of Officer Strickland's statements regarding his outside employment is directly in issue.

Determining Officer Strickland's credibility is not a subjective process. Rather, there exists a rather well-established compilation of rules setting forth the pertinent considerations. Officer Strickland, as well all those who testified or filed reports, must be evaluated according to their respective *interests* in the outcome. The ability of each witness to *observe* events, as well as the accuracy of their *memory* and their relative ability to *communicate* what they have seen, are important factors. Such additional

factors as the witness's demeanor and the manner of their testimony are also considered. *See generally, Elkouri & Elkouri, How Arbitration Works*, (Fifth Ed, 1997) pp. 442-449. *See also, South Penn Oil Co.*, 29 LA 718 (Duff, 1957); *Mark VII Sales*, 75 LA 1062 (O'Connell, 1980).² *See also*, Minn. Prac. CRIMJIG 3.12 and *State v. Larson* 281 N.W.2d 481 (Minn. 1979)(criminal instructions are equally valid for civil cases).

The making of a credibility determination might easily be misunderstood by the case participants. The considerations referred to above have been developed over the years because an impartial finder of fact will never know with absolute accuracy and certitude who is telling the truth and who is not. The observations and memories of witnesses can be influenced by a variety of physical and emotional elements including pre-conceived ideas and a variety of other subconscious influences. A credibility determination does not necessarily brand one witness truthful and the other to be a liar. Rather, making the required determinations is an objective process in which the selected impartial determines what most probably occurred, based on the evidence in the case. This is especially true where, as here, the evidence is evaluated against a standard of evidence which is less demanding than that which is required in criminal cases.

In this dispute, the question of whether or not Officer Strickland lied to his supervisors with regard to the violation of the outside employment policy must be resolved in his favor. The cases teach that Officer Strickland's testimony must be considered in the context of his goal to reverse the City's decision to discharge him. To be sure, this is significant interest which could motivate Officer Strickland to make false statements.

² LA refers to Labor Arbitration Reports (Bureau of National Affairs).

However, in this case, the record contains substantial evidence to indicate that Officer Strickland was not speaking falsely when he claimed that he thought it was acceptable for him to work at HTC near the end of his training and therefore did not intentionally violate the policy.

The pertinent evidence in this regard relates to Officer Strickland's behavior during the training period. The record contains no evidence to show that Officer Strickland attempted to conceal his activities at HTC. In fact, during the time he was teaching, other officers from the City's police department observed him. It was Officer Strickland who advised Officer McComb about his teaching activities at HTC. There was no evidence to suggest that prior to Officer Strickland's disclosure, Officer McComb had any reason to suspect that he was working at HTC. Officer Strickland also advised Officer Fricke of his activities at HTC, as well as Officer Lehman.

Officer Strickland's open and candid attitude toward his activities at HTC is objective evidence to indicate that he understood that it was permissible for him to teach at HTC near the end of his training. Clearly, Officer Strickland's understanding in this regard was incorrect. But there is no evidence to show that Officer Strickland ever tried to conceal his actions, which would be expected if Officer Strickland was knowingly attempting to violate the outside employment policy or to speak falsely about his actions. Officer Strickland's conduct was not consistent with the conclusion that he was failing to tell the truth.

A similar conclusion is appropriate regarding Officer Strickland's initial statement that he had taught at HTC only once during the training period. The view of the investigation panel was that this statement was a deliberate lie because it was not likely,

in their view, that Officer Strickland could have forgotten that he had worked 3 shifts rather than one. Officer Strickland insists that he did forget and corrected the error within a short time after discovery.

The two positions are alike in that they depend on assertions upon which reasonable people may disagree. In this case, however, it was incumbent on the City to establish by substantial evidence that Officer Strickland deliberately lied about the number of shifts. The evidence presented is not sufficient in this regard. This conclusion is reinforced by the undisputed fact that the original statement was corrected by Officer Strickland less than 24 hours later. The corrective action more probably supports the conclusion that Officer Strickland was merely mistaken and not attempting to deceive.

The City has suggested that Officer Strickland failed to speak truthfully in two other instances, raising additional issues of integrity. The first of these incidents was the alleged “miscommunication” with Officer Guderian resulting in Officer Strickland leaving work without checking in. The second was length for which he requested to Officer Hjelm to drive during a shift.

On the basis of this record, the allegations that Officer Strickland deliberately lied or attempted to deceive his supervisors in regard to these matters are not sustainable. There is no evidence to suggest that Officer Strickland did not miscommunicate with Officer Guderian. In this regard, it is noted that Officer Guderian was not presented as a witness. Officer Hjelm did testify and provided evidence that Officer Strickland requested that he drive for the whole day and not just a half a day, as recalled by Officer Strickland. But there is no other relevant evidence in this regard on which to base a conclusion. Neither incident is referred to in the DOR reports.

Poor Training Performance

The final basis offered in support of Officer Strickland's discharge refers to his performance as a trainee. In the final recommendation, the City's investigation review panel maintained that Officer Strickland has "repeatedly not taken . . . direction . . . repeated examples of inadequate performance . . . training was not progressing well."

The evidence certainly suggests that Officer Strickland's performance during training raised a number of issues. However, the evidence is not sufficient to support his discharge. At the time he was placed on leave for the investigation, Officer Strickland had scored an average of 4.46 on his Phase 4 DOR's - .46 better than the minimal passing score. No NRT's were noted on his record. Officer Strickland had in fact successfully completed 3 phases of his 4 phase training.

Propriety of the Discipline

The evidence in this record is sufficient to support the allegation that Officer Strickland engaged in misconduct when he taught at HTC without specific permission during the training period. The allegations relating to integrity, charging that Officer Strickland was disingenuous regarding his activities at HTC and other aspects of his training, were not supported by sufficient evidence to form a basis for the discharge. Likewise, there was insufficient evidence to establish the allegations relating to Officer Strickland's performance during training.

The final task is to review the discipline and determine its propriety with regard to the existence of any “extenuating circumstances.” Such extenuating circumstances are present here and do provide a basis to modify the level of discipline.

As the record shows, rather than act in a surreptitious manner and attempt to hide his activities at HTC, Officer Strickland was completely open about his work at that facility. Other officers employed by the City saw him at HTC. Officer Strickland made statements to Officer Fricke and Officer Lehman disclosing that he was engaged in teaching at HTC.

Although Officer Fricke testified that he had a duty to report Officer Strickland’s activities at HTC once he learned about them, neither he nor Officer Lehman made any such report.

The failure of Officer Strickland’s supervisors to engage him about his activities at HTC or report the activity to the City appeared to contribute to his mistaken belief that his activities were acceptable at the time. The failure to enforce the prohibition of outside work rule in a timely manner sent the wrong message to Officer Strickland. Rather than put him on the right course, his mistaken belief was reinforced.

This rule took the form of a standing order and was clear. However, the failure to timely enforce even a well documented rule has still been held to form the basis for an important determination – that, based on the lack of timely enforcement, an employee might reasonably (although incorrectly) conclude that actions that do not comply with the rule are nevertheless acceptable. *See, Heritage Cable Vision of San Jose and IBT LU 296, 112 LA 1 (Feller, 1999); General Telephone Company of California and CWA, 86 LA 138 (Maxwell, 1985)*

Here, Officer Strickland's confusion about how the rule was enforced might have been ameliorated if he had been counseled at an opportune time.

Having carefully considered the testimony and exhibits received into evidence, as well as the written arguments of the parties, it is the majority opinion of the panel that Officer Daniel R. Strickland should be reinstated and the disciplinary penalty for his failure to comply with the outside work policy should be reduced to a three day suspension without pay.

March 1, 2013
St. Paul, Minnesota

David S. Paull, Arbitrator