

**In the Matter of the Grievance Arbitration Between**

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Law Enforcement Labor Services, Inc.,

St. Paul, Minnesota,

Scott Patrick, grievant

and

**BMS Case #12-PA-1279**

City of Mendota Heights, Minnesota

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**Before:** Arbitrator Harley M. Ogata

**Date and Place of Hearing:** January 10, 2013  
Mendota Heights City Hall  
Mendota Heights, MN

**Final Date of submission of Briefs:** February 14, 2013

**Advocates:**

**For the Employer:**

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**For the Union:**

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This is a grievance arbitration between the above named parties in accordance with procedures outlined in the collective bargaining agreement. The grievance involves a one day suspension from employment of Scott Patrick (grievant), a police officer employed by the above named city (employer). The parties agreed that the matter was properly before the arbitrator.

### **ISSUE**

Whether the employer violated the collective bargaining agreement by suspending the grievant for one day from his employment as a police officer without just cause. If so, what is the appropriate remedy?

### **FACTUAL BACKGROUND**

The basic framework of the facts in this matter are not in dispute. However, there is a major division between the parties over the details and nuances of what happened on the day in question.

Here are the facts in summary form. January 12, 2012 was a very snowy day and the road conditions in Mendota Heights were poor. Paige Krieger (Krieger), a Mendota Heights citizen, was recruited by her son to give him a ride to school. On the way, her car began sliding on a hill and she was unable to advance any further and became stuck on the side of the road.

Her son called 911 and requested roadside assistance from the police department. Her son hitched a ride to school from another vehicle that he helped push up the hill. The grievant, responding to the call for assistance, arrived on the scene. A series of conversations between the grievant and Krieger ensued, ultimately ending with Krieger being placed in handcuffs in the back of the grievant's patrol car and Krieger being cited with driving without a license and disorderly conduct.

As stated earlier, the retelling of the content and tone of the interactions between the grievant and Krieger vary greatly between the two participants. Ultimately, the employer determined that the grievant's actions warranted a one day suspension.

There were two people who were present for the entirety of the interactions between Krieger and the grievant on the day in question. Those two are the grievant and Krieger. A snowplow operator witnessed part of the interactions, but was not privy to the verbal interchange between the two. Not surprisingly, each party to the entirety of the interchanges between the two recite the facts in a light favorable to their perspective.

The grievant first interacted with Krieger when he pulled up alongside her vehicle, which was parked on the side of the road. The road had a very small shoulder, so the car was sticking out into the road. He stopped his vehicle and talked to her through his open window.

In the grievant's experience, most of the problems like this are due to worn tires or the traction control being engaged. He asked Krieger questions pertaining to these two issues. Krieger testified that she was surprised by the tone of the questions and felt that the officer was treating her like she was stupid and that all she wanted was assistance to move her car. She had been stuck by the side of the road for an extended period of time and she was going to be late for work. The grievant testified that he was making a sincere attempt to assist her. He reported that she responded negatively to his attempts to assist and that he was surprised by her attitude. At a minimum, the parties were not communicating well at this point.

The grievant then moved his patrol car and parked behind her, with his lights flashing. He got out of his car and testified that he tried to show her how to operate her traction control properly. He then asked her for her license. Krieger had left her purse at home in her haste to take her son to school. She informed the grievant of that fact and told him that she was late for work. Both parties testified and reported that the interactions between the two deteriorated further at this point. Neither party could understand why the other party was acting like they were.

The grievant walked back to his patrol car with the intent of citing Krieger for the offense of driving without a license. He ran a check on her and learned that she had a valid license, but decided to cite her anyway, even though under the statute in question, all she had to do was to produce her license and the

citation would be dismissed. The grievant also testified that he had not cited anyone for this offense in at least the past two years.

According to Krieger's testimony, she had been stuck on the side of the road for about 45 minutes by this time. At this point, by her own testimony, Krieger left her vehicle and raised her voice, gestured with her arms and questioned what was going on. She testified that she asked whether the grievant was going to arrest her. She then testified that the grievant said that if that is what she wanted and proceeded to handcuff her. Finally she testified at the hearing that he threw her against the car in handcuffing her and that she fell on the ground because of the ice.

The grievant testified and gave statements indicating that once he ran her identification, he recognized her from a previous police call, probably a "domestic". During the course of the hearing, the grievant made clear that he knew her to be a somewhat unstable personality and that others in the department knew her in that light as well.

He further testified that she was confrontational and posed a safety hazard in the street. He testified that he ordered her to go back into her car and that she refused, leaving him no choice but to handcuff her and cite her for disorderly conduct. There is some conflict in his statements throughout this matter as to how many times he ordered her back into her car before arresting her. In his incident report, the grievant indicated that he ordered her back into her car three times. In his statement during the investigation, he indicated that he told her

once. Finally, he believed the entire episode on the road took only about one minute.

## **DISCUSSION**

The grievant was suspended for one day for two reasons. First, it was alleged that no probable cause existed for arresting Krieger for disorderly conduct. Second, it was alleged that he violated Mendota Heights policy 106 by engaging in conduct unbecoming an officer.

There was much testimony and evidence concerning the first allegation. The advocates for both parties spent a considerable amount of energy trying to prove or disprove that the grievant was correct in arresting Krieger for disorderly conduct under the criminal code. The arbitrator finds much of this argument both unpersuasive and inconclusive concerning the issue of whether there is just cause to issue the one day suspension.

The arguments of the parties show that it is a close call whether there was probable cause to issue the citation or not. A good argument could and has been made both ways. In either event, the grievant's conduct in issuing the citation and the interactions he had with Krieger are more informative of whether there is just cause to issue the one day suspension.

Having said that, it is noteworthy that this is not a circumstance where the alleged disorderly conduct in question rises to a significant level. There is no allegation that Krieger engaged in cursing, fighting, or other provocative conduct. Indeed, the grievant testified that Krieger's conduct never intimidated him.

Virtually all of the cases cited by the parties contained some elevated level of misconduct involving fighting, cursing, or repeated confrontational behavior towards officers of the law.

In addition, the conclusion that it is a close call underscores the question of whether it was necessary for the grievant to arrest Krieger under these facts. The act of the arrest is the single most significant action in this matter and gets to the core of whether the grievant's conduct was reasonable or not.

The recitation of the facts by the two principals is so divergent on each point of interaction that it is difficult to determine what actually happened. Suffice it to say that each person's version is fraught with putting themselves in the best possible light, while laying blame on the other person for escalating or exacerbating the situation.

After carefully reviewing the record, the arbitrator can come to a few conclusions about the facts. There should be little doubt that the driving conditions were very poor on the day in question. The grievant downplayed this, but the fact that the snowplow operator labeled it 9.9 on a scale of ten is telling.

The grievant's underlying reason for handcuffing Krieger was that she posed a safety risk standing in the road in a spot at or across the middle of the road. This placement of her position is contradicted by his testimony that she stood about three feet from her car as it was parked on the right side of the road. Granted, her car had to be sticking out in the road due to the fact that there was very little shoulder at this point, but it would still not put her in the middle of the

road. Additionally, if the grievant was that concerned about the safety issue at that spot, he should not have pulled up next to her car initially to talk with her about her tires and traction control. His car would have been a much greater safety problem.

It is also clear from the testimony that Krieger was in a frustrated state when the grievant arrived, even though she denied this under oath. She stated that she was scared, not frustrated or angry. She did admit that she gestured at the grievant, talked loudly and that she felt that the grievant made her feel stupid. The tenor of her testimony and her emotions displayed when she recited the events show that she was in a heightened emotional state when the events took place. Parts of her testimony of the events were clearly not credible, especially when she stated that the grievant threw her against the car when he was handcuffing her. This testimony was not consistent with anything else she had stated in the past and would have clearly been a basis for the discipline of the grievant had it been alleged before.

The arbitrator's overall impression of the grievant from the testimony given at the hearing is that he would not purposely try to demean a citizen under the initial circumstances described in this incident. While it is true that he did have a somewhat similar incident (similar in terms of a poor interaction with another citizen being alleged) twelve years prior, the grievant testified that he would handle that matter differently now. In other words, he learned from his mistake in the past.

Having said that, it is also clear from the grievant's own testimony that his attitude toward Krieger changed once he learned who she was and remembered her from a prior incident and from anecdotal evidence and in response to her demeanor. The grievant's response to certain questions during the hearing indicate that he is a person who would have a low tolerance for someone was acting in a way that questioned his authority. For instance, under cross examination, the grievant was asked whether he did anything more to help Krieger other than talk to her about her tires and traction control, he responded that he "didn't give her a backrub." He also described Krieger in unflattering terms, and said that everyone knew she was "nutty." Whether this is true or not, the fact that he had this attitude surely affected his interactions on the day in question. Again, this was all exacerbated by Krieger's emotional state.

It is worth remembering that this whole incident arose as a result of a citizen requesting assistance due to a roadside condition. The fact that it ended in the citizen being arrested and handcuffed in the rear of a patrol car is a bit extreme considering there really wasn't any verbal or physical violence occurring in the time leading up to the arrest. If things had gotten so out of hand that there was no other choice but to handcuff the citizen, that might be another matter. Here, it appeared to be more a battle of wills, with the grievant having more authority to exercise. The arbitrator finds that the grievant did not initiate the poor interactions, but did not do enough to attempt to calm the situation and instead he allowed a frustrated, emotional person dictate his responses. It is

unfair to the grievant to say that he was the cause of the escalation of events here, but the arbitrator finds that he could have done more to deescalate. This is the fundamental mistake here and the grievant would do well to understand and acknowledge that. Being placed in handcuffs is a big deal to ordinary citizens. It should not be engaged in lightly.

The employer asserted, and the arbitrator assumes, that police officers are trained in de-escalation techniques. Krieger's actions, even in the light most favorable to the grievant, did not escalate to the level that should necessitate handcuffing and arrest. More importantly, the grievant should have done more to calm the situation down prior to arresting her. By his own account, the whole incident where Krieger stood by her car and disobeyed him took only about one minute.

As indicated earlier, the nuances concerning what happened during this incident are in direct dispute. Assuming the facts in the light most favorable to the grievant, the arbitrator would still reach the same conclusion here. In the best light to the grievant, one could conclude that Krieger was uncooperative and hostile from the beginning. The grievant responded positively and tried to get her on her way the best way he knew. She responded negatively. He ran a check on her license after she failed to provide one. She left her car and acted confrontationally to his request to return to her car. She was arrested after refusing to return to her car and threatened him with a lawsuit.

Assuming all these facts as true, there still does not appear to be enough justification for the grievant to arrest Krieger after a one minute discussion on the side of a road without any allegation that she engaged in verbal threats, violent behavior, or anything close to that level of conduct. Further, the arbitrator is troubled by the fact that the grievant chose to write a citation for a seldom used, easily rectified violation (no license) when he believed there was a safety issue on the road and it would have been simple to just get Krieger back on the road and on her way to work, especially considering he knew that she could produce a license at a later date.

The grievant is a long term professional in the field of law enforcement and it seems to the arbitrator that he should have the skills to handle this type of factual situation short of an arrest. This is why the arbitrator finds much of the discussion concerning whether there was probable cause to cite Krieger for disorderly conduct unavailing. Even if the facts and circumstances ultimately rose to meet the minimal requirements of that criminal statute, it seems that things should not have resulted in an escalation to this level in the first place. Further, even if it had, more care and time could have been taken to deescalate the situation prior to simply handcuffing her and putting her in the back of the squad car.

The employer has the inherent right to establish standards of conduct for its employees. Here, it has determined that the grievant's conduct fell short of what is expected of him. The grievant vehemently disagreed with the conclusion

that his conduct was incorrect, given the circumstances. Under the analysis enumerated above, the arbitrator finds that the grievant could have done more to deescalate the situation short of arresting Krieger. The employer has the right to set that standard.

Having said that, the arbitrator finds that the imposition of a one day suspension under these facts to be excessive. Chief Aschenbrenner testified that the one day suspension was imposed specifically because the grievant had a history of prior discipline. The grievant had a written reprimand imposed because of an incident involving a minor in 2000. That incident had some similarities with the current allegations in that it involved the grievant treating the juvenile in a brusque, condescending manner.

Chief Aschenbrenner testified that he imposed a one day suspension under the principles of progressive discipline. There was a dispute about the use of the prior discipline due to the fact that there is a city policy which states that minor disciplines will be removed after three years "if no such period is specified." The written reprimand in question states that the reprimand will remain in the grievant's file indefinitely until the chief chooses to remove it. Thus, this discipline remains in the file. However, the grievant has not received any further disciplines that involve similar circumstances since that time which makes the reprimand quite stale. (He has received an oral reprimand concerning a time discrepancy).

During the intervening twelve years, the grievant has received positive evaluations and other commendations, both from the public and internally. Under these facts, using prior discipline from over twelve years ago as a basis for supporting a progressive discipline of a one day suspension is unwarranted. Having said that, the facts and circumstances of this matter would justify a written reprimand with the further admonition that recurrences of this type of behavior would warrant progressive discipline.

The arbitrator is somewhat troubled by the failure of the grievant to recognize that he could have done more here. This indicates that he has little insight into why this might be a problem for a public entity like the city of Mendota Heights. In the light most favorable to him, it wasn't his fault that the citizen was predisposed to being frustrated and somewhat out of control. The fact that this encounter ended up in his arresting the citizen should give him reason to contemplate what he could do to deescalate this type of encounter in the future. He appears to be a highly professional officer who should be able to handle this type of situation. He appears to have learned from the incident in 2000 and it would serve him well to learn from this one as well.

A written reprimand is therefore an appropriate discipline because it serves two purposes. First, it advises the grievant of the conduct that is expected of him in the future. Second, it forms the basis for further, progressive discipline should the conduct be repeated. Progressive discipline is meant to correct behavior, not to punish.

A suspension from employment is a serious discipline. It is one step short of being fired and should be used in two main circumstances. First, it should be used in progressive discipline in an attempt to change a pattern of behavior that is found unacceptable by the employer. In this type of situation, the conduct in question is normally recurring, but not so egregious that an immediate termination or a skipping of lesser forms of discipline are warranted. Nevertheless, it should be viewed as a last step before termination and a warning that the behavior pattern needs to be changed.

In the second set of circumstances, the conduct in question is deemed so harmful to the employer's business that skipping lesser forms of discipline is warranted. In these cases, the suspension is again the last step or chance given to an employee prior termination.

In the instant matter, the employer is alleging conduct that is not so egregious that a suspension is warranted standing alone. The employer is alleging an error in judgment and the consequences of the error are not so severe as to rise to the level of a suspension given that the arbitrator has determined that prior disciplines given to the grievant are stale. If the past disciplines here were not determined stale, a suspension would have been in order.

The union made due process arguments regarding inadequate notice and lack of a fair investigation. The notice issue concerns the fact that the employer cited the wrong case number on its notice to the grievant regarding the

investigative interview. Further, the union cited the fact that the employer cited the wrong policy section on an original issue pertaining to the use of video cameras in squad cars.

The record shows that neither of the above mistakes caused prejudice to the grievant. The grievant was fully prepared at the investigative interview with his defense and could have called for a continuance if he was somehow surprised. He was represented by counsel at the interview. Finally, the allegation concerning the potential issue on the use of video cameras was not a basis for any discipline in this matter and was dropped by the employer.

The union alleged that the grievant was further prejudiced by the fact that the employer did not record its interview of Krieger. It alleged that this meant it could not adequately point out inconsistencies in her testimony at the hearing. However, there is no legal requirement that any and all employment interviews be recorded and the arbitrator finds nothing else extraordinary about this practice.

Further, the union cited due process concerns because it alleged that the person in charge of the investigation, Sgt. Convery's father was alleged to be Krieger's father's "best friend". Additionally, the union alleged that the discipline was imposed as retaliation for a complaint being filed against the chief a few weeks before the investigation. This complaint was not signed by the grievant, but he is the steward in that group. As to these allegations, the arbitrator would

refer the parties to the section in the decision that a written reprimand would be warranted even if the facts in the light most favorable to the grievant were true.

Finally, there was a dispute about the admissibility of evidence that was submitted by the union between the day of the hearing and the submission of briefs. The evidence consisted of four other Mendota Heights disorderly conduct cases. They were submitted in support of the union's argument that there was probable cause to issue the disorderly conduct citation in the instant matter. For the reasons enumerated in this decision, the arbitrator decided this case based on other criteria, so the issue of whether the evidence should be allowed is therefore moot.

### **CONCLUSION**

For the foregoing reasons, the grievance is sustained in part.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'H. Ogata', with a long horizontal stroke extending to the right.

Harley M. Ogata

Dated: March 1, 2013