

**IN THE MATTER OF ARBITRATION
BETWEEN**

CITY OF ST. PAUL

Employer,

and

**ST. PAUL POLICE FEDERATION,
Federation.**

**ARBITRATION DECISION
AND AWARD,
(Fish Termination)**

BMS Case No. 13PA0880

Arbitrator:

Andrea Mitau Kircher

Date and Place of Hearing:

September 18 and 19, 2013
Bureau of Mediation Services
St. Paul, Minnesota

Date Record Closed:

October 11, 2013

Date of Award:

November 11, 2013

APPEARANCES

For the Federation:

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INTRODUCTION

The St. Paul Police Federation (“Federation” or “Union”) and the City of St. Paul (“Employer” or “City”) are signatories to a Collective Bargaining Agreement (“CBA” or “Contract”), Employer Exhibit 6, effective January 1, 2011 through December 31, 2012.

This case arises under the grievance provisions of the Contract.

The Employer discharged Officer Jon Fish (“Grievant”) by a letter dated February 15, 2013, and the Federation duly filed a grievance February 19, 2013 on his behalf. The Grievance alleges that the discipline imposed was excessive and lacked just cause. The Employer denied the grievance, and an arbitrator was duly selected. The arbitrator convened a hearing on September 18 and it continued on September 19, 2013. The parties agree that the arbitrator has jurisdiction to hear and decide this matter.

During the hearing, exhibits were accepted as part of the record; witnesses were sworn, and testimony was presented subject to cross-examination. The parties agreed to file simultaneous briefs by email on October 11, 2013, whereupon the record closed.

ISSUE

Did the Employer have just cause to discharge the Grievant? If not, what is the appropriate remedy?

BACKGROUND

The City of St. Paul employs approximately 600 full-time police officers and has a well-developed system of training, promoting, and supervising them. As a paramilitary organization, it operates not only under a CBA, but also under a code of conduct and numerous other statutes, rules and regulations. It has a system for investigating its own officers when it receives complaints about police misconduct.

The Grievant was hired as a police officer in February 2007. He worked without serious incident at his job until 2012, when he became the subject of three complaints from members of the public. These complaints were sustained after police department internal affairs investigations, and the Grievant was discharged from his position on February 15, 2013.

The incidents underlying these complaints were that the Grievant had 1) retained a department-owned preliminary breath test (PBT) machine for a year, from August 2011 through August 2012, without permission and for his personal use; 2) allegedly used excessive force and illegally entered a residence while responding to a citizen complaint of loud music in February 2012; and 3) in October 2012, while off-duty with two friends and admittedly inebriated, fired a number of shots from his .40 caliber pistol into a fire-pit in his backyard in St. Paul at 2:45 a.m. and then lied to investigating officers, telling them that the shots were not real bullets, but were instead “blanks”.

The Chief of Police, Thomas Smith, was presented with the results of these investigations at approximately the same time. The head of Internal affairs, Commander Colleen Luna, gave him investigation results, recommending a finding of improper conduct on the PBT complaint in December 2012. City Ex. 33. On January 22, 2013, she submitted a 67-page packet of information on Incident 2, sustaining the complaint of excessive force and improper conduct. City Ex. 34. On the same day, she submitted to him the results of the internal affairs investigation of the gunshot incident, which had been held in abeyance since October, until the criminal investigation was concluded, recommending that all the complaints be sustained. After reviewing the data, Chief Smith accepted the recommendations and decided to discharge the Grievant as set out in the notice of intent to terminate dated February 1, 2013. City Exhibit 8.

Written documents and oral testimony provided specific descriptions of each incident and are part of the extensive record provided by the City. The relevant details are set out in summary below.

Incident 1. PBT Usage. In August 2012, the Department received a complaint by a person who wished to remain anonymous, that the Grievant was using a preliminary breath analyzer instrument in a bar when he was off-duty. The allegation was that he used it at the bar to begin discussions with women by offering to test their alcohol concentration with the PBT. He was said to be very intoxicated at the time. City Ex. 33. Senior Commander Steve Frazer investigated the allegation and learned that the Grievant had taken the PBT from Central District inventory in August 2011, and had used it at a charity golf outing without seeking permission. The Grievant retained possession of the PBT for a year, using it again in August 2012, at the golf tournament sponsored by a bar. The Grievant stated that he had used it to collect money for charity. The idea was to have golfers pay \$1.00 to determine how intoxicated they were. The most intoxicated person was awarded a free ride home. City Ex. 33, p. 4. The investigator did not determine the truth of the allegations about using the PBT to start conversations with women at the bar. During the investigation, Officer Fish admitted he had taken the instrument without permission and kept it in his possession for a year. He stated that he believed that using a PBT and volunteering at the charity golf tournament were advantageous to the Department because these actions promoted positive feelings in the community toward the police department. The investigator recommended a finding of Improper Procedure and that the complaint should be sustained. The investigator, Commander Frazer, reached this conclusion in August, (City Ex. 33) but apparently the Internal Affairs division did not present it to the Chief for final action until December 10, 2012.

(Testimony, Cmdr. Luna)

Incident 2. The Bidwell loud music incident. In the fall of 2012, around the time of the “shots fired” incident, internal affairs received a complaint from an attorney alleging that his client, Rafael Diaz, had been the victim of excessive police force and illegal entry into his home on February 5, 2012. An internal affairs investigation was begun November 6, 2012, about the February incident. The incident stemmed from a loud music call from neighbors near the Diaz home on Bidwell Avenue. The Grievant was the officer who answered the call. He was faced with a number of noisy, drunken people who had been attending a super-bowl party. They did not cooperate with the Grievant’s request to quiet down. The Grievant was unable to de-escalate the situation, and resorted to use of force. He used a chemical (mace) on the angry homeowner and called for back-up assistance. He and a back-up officer entered the front door during the brouhaha; the Grievant used his taser to disable the homeowner while his partner handcuffed the homeowner inside the front entranceway to his house. The officers allegedly felt threatened by the shouting, angry partygoers.

The November internal affairs investigation found that the Grievant had used excessive force and had improperly entered the house without reasonable cause. It is also apparent that the incident was known to the Grievant’s supervisor prior to the Diaz complaint, because the Grievant’s May 14, 2012, performance review mentions the facts of the incident, and merely quibbles about the Grievant’s report writing. He was asked to correct his report and did so. No discussion of excessive force appears in this performance review, and the Grievant worked unrestricted on the streets without further incident. The November internal affairs findings of fact about this incident were

thorough and were presented to the Chief on the same day as the findings about the “shots fired” incident.

Incident 3, “shots fired” by Grievant in his own backyard at 2:45 a.m. On October 19, 2012, the department received an anonymous citizen complaint about the sound of gunshots fired at approximately 2:45 a.m. The citizen, who lived near the Grievant’s home on Randolph Avenue in St. Paul, knew that a police officer lived in the area of the gunshots and was concerned about retaliation if he complained about this neighbor to the police. After some discussion within the Department, the matter was referred to Commander Frazer who was the Grievant’s superior at the time. The Grievant was called in and Frazer questioned him preliminarily. The Grievant admitted he had been drinking that night with friends and that they had built a fire in his back yard. He admitted getting his own pistol, showing it to his friends, and discharging a whole magazine into the fire pit in the early morning hours. He declared that he had fired blanks, not actual bullets when he spoke to Commander Frazer and told the same story to the internal affairs investigators and the criminal investigators who questioned him thereafter. Prior to questioning, he signed a Garrity warning. The warning includes a statement that if the officer makes a false statement, he will be subject to disciplinary action, but his statements may not be used against him in a criminal proceeding.

It is illegal to discharge a firearm in a City. City Ex. 54. A criminal investigation was begun, and it was discovered from available evidence that the Grievant’s explanations about firing blanks instead of bullets could not be true. The Grievant was forced by circumstances to admit he had lied during the investigation. The City followed through on its criminal prosecution of the case, and in January 2013, a judge granted him

a stay of adjudication, fined him \$100, and placed him on probation for one year. City Ex. 56. By then the Grievant had begun an alcohol treatment program and counseling, and the Court required him to complete that program. *Id.* After resolution of the criminal matter, the internal affairs investigation was conducted and the investigating officers concluded that the complaints against the Grievant for improper procedure and improper conduct in the “shots fired” incident should be sustained. Firing a weapon in the backyard and lying about it violates a number of St. Paul Civil Service Rules (*see, i.e.* Rule 16.B sec. 18 that prohibits false statements in any official City business) in addition to the criminal code. This conduct also violates a number of Department General Orders. For example, a standard of the Minnesota Peace Officer Standards and Training Board (“POST Board”), a state agency that sets out applicable standards for peace officers, includes 230.13, “Conduct Unbecoming a Peace Officer.” These standards are part of the officers’ training, and it is undisputed that the Grievant received training on the standards applicable to him as a peace officer. The standards require that peace officers comply with relevant laws and ethical standards, so that the public will be able to have respect, confidence, and trust in them. Principle Four is cited by the Chief as one of the Grievant’s violations:

Principle Four: Peace officers shall not, whether on or off duty, exhibit any conduct which discredits themselves or their department or otherwise impairs their ability or that of other officers or the department to provide law enforcement services to the community.

Rationale: A peace officer’s ability to perform his or her duties is dependent upon the respect and confidence communities have for the officer and law enforcement officers in general. Peace officers must conduct themselves in a manner consistent with the integrity and trustworthiness expected of them by the public.

City Ex. 22.

The Chief, in his letter of intent to terminate, dated February 1, 2013 to the Grievant, points out that his behavior was unlawful, violated enumerate rules and policies, and subjected the Department to adverse public scrutiny. City Ex. 8. The adverse public scrutiny included media articles about the Grievant firing his weapon into a fire pit in a residential area of St. Paul while drinking with friends. City Ex. 57.

The Grievant has successfully completed an alcohol treatment program and requests reinstatement and a second chance after admittedly making a mistake. The record demonstrates that he has been successful in many aspects of his work, especially community outreach, and his file contains commendations from within the department and enthusiastic letters from members of the public whom he has assisted throughout the years.

FEDERATION POSITION

The Federation and the Grievant do not dispute the facts underlying incidents number one and three above. They do dispute that the Grievant's actions during incident number two constituted violations of policy. Regarding incident number three, the Federation alleges that the Grievant's actions were regrettable, that he has apologized for them, learned from his mistakes, and most importantly, taken steps to address the alcohol abuse problem that led directly to this behavior. The Federation asserts that the Grievant deserves a second chance and should not have been terminated for his actions.

The Federation argues that the City failed to engage in progressive discipline. It claims that in light of the Grievant's previous record and his immediate efforts to deal with his alcohol abuse, under the principles of labor law, the City should have attempted to correct the Grievant's behavior rather than to immediately terminate his employment.

Additionally, the Federation contends that discharge is a disproportionate penalty; other St. Paul police officers who have drinking problems or have been caught lying about a work related matter have been accorded second chances. Thus, the argument continues, the level of discipline imposed was without just cause and far more harsh than the situation warranted.

EMPLOYER POSITION

The City argues that it had just cause to discharge the Grievant because he engaged in egregious misconduct. The City alleges that he had a police preliminary breath analyzer in his possession for a year without permission and used it for his own purposes. The City argues he improperly entered the home of a citizen and used excessive force to effectuate an arrest when no crime had been committed. The City alleges that the Grievant discharged a firearm when intoxicated in a residential area of the city and lied to his supervisor, criminal investigators and Internal Affairs to try to minimize the extent of his misconduct. The City claims that the Grievant had reasonable notice that the conduct was a violation of the rules governing his position as a police officer. Further, the City maintains that it conducted a full and fair investigation establishing that the Grievant committed the extreme misconduct, and therefore, the penalty of termination is appropriate.

DISCUSSION AND DECISION

The Contract specifies that the City should discipline employees only for just cause and in accordance with the concepts of progressive discipline. City Ex. 7. An employer may terminate an employee for “just cause” in two types of situations: a single incident of very serious misconduct or as the final step in the progressive discipline

process.¹ 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, fairly investigated, and in accordance with its own policies. The Grievant must be aware that the conduct for which he is disciplined is wrong, in that it violates the law or workplace standards, and also, the employer must treat him the same as similarly situated employees. The arbitrator is to determine whether the employer has met its burden of establishing by substantial evidence that it acted reasonably when it discharged the grievant.

The Employer presented considerable evidence through testimony and documents that the undisputed facts occurred. The Grievant simply admitted taking the PBT machine when asked about it. He eventually admitted discharging a firearm in his backyard in St. Paul. He admitted that this conduct was a mistake and apologized. He has taken steps to deal with a drinking problem upon which he blames his decision to discharge a weapon in his back yard in the middle of the night, awakening and frightening his neighbors. In addition to these facts, there was an aggravating factor in the "shots fired" incident that troubled his Employer considerably. That is, the Grievant attempted to minimize his actions by telling several department investigators that he fired blanks, when in truth, he fired bullets. He admitted firing bullets, not blanks, only after investigators discovered clear evidence of the fact.

Chief Smith testified that he would have considered the "shots fired" incident to be sufficient for discharge if that had been the only incident of misconduct before him for

¹ See, Discipline and Discharge in Arbitration, Norman Brand, ed., ABA Section of Labor and Employment Law, BNA, 1999, at 68. Citations omitted.

determination. That testimony is helpful in reframing the core inquiry. Was this incident alone sufficient to constitute just cause for discharge, both procedurally and substantively? If so, the other two incidents need not be part of this analysis.²

The City's process while investigating the "shots fired" incident was correct in that it was timely, followed its own procedures, and appears to have been fairly conducted. The Federation does not dispute this aspect of the case.

As to the substance of the misconduct, it is clear that the Grievant had sufficient training and information to understand that firing his pistol to while away the time at 2:45 a.m. in a residential neighborhood violated law and both City and POST Board rules. Failure to tell the truth during the early part of the investigation shows additional poor judgment. Notes taken by officers during the investigation reveal that the Grievant used language calculated to minimize the incident and to garner sympathy. For example, 1) He characterized the outing with his friends as a celebration of the return of his buddies from Iraq (later adding that one got back about a year ago, and the other a couple of months ago); 2) He described the incident as a case of "boys will be boys." Ex. 35, at 8. After the criminal aspect of the case was concluded, the Internal Affairs Office interviewed the

² The PBT incident occurred in August 2012, was considered by supervisors then, and did not result in any discipline until it was belatedly considered as part of the reason for discharge. Procedurally, this incident should have been dealt with when it was discovered, resulting in a minor disciplinary action for violating the department's procedures and/or using poor judgment.

With regard to the Bidwell incident, the Union points out that the City, through the Grievant's supervisor, was aware of the facts concerning the Grievant's use of force when the incident occurred in February 2012. It is mentioned in his 2012 performance review, dealt with as a "report writing" issue, and not addressed as a disciplinary matter. (Union Exhibits, Grievant's performance review, 2012, p.029-034.) The complaint from an attorney representing Mr. Diaz in November 2012, after the "shots fired" incident, gave the City an opportunity to review the matter a second time. As a result, the Grievant was found to have used excessive force and illegally entered the house. The parties dispute the outcome and weight of this decision. Because I agree with Chief Smith, as set out below, that the discharge was warranted by the Grievant's actions in the third incident alone, it is not necessary to reach conclusions regarding the Bidwell incident.

Grievant again on January 18, 2013. Notes of investigating officers at that interview record his explanation about why he had told earlier investigators that he had fired “blanks” into the fire pit. The notes indicate he said that “blanks” just came out of his mouth, and it just snowballed. He noted that he thought if he just kept telling himself and others that they were blanks maybe that would be the truth.” City Ex. 35, p. 9. The Grievant testified at the hearing, and none of this was disputed. He stated that the reason he lied was that he was worried about being fired, and he just panicked.

The Grievant was on notice that it was important for him to tell the truth at the investigatory interviews. He signed the Garrity warning admonishing him to tell the truth before the investigatory meeting, and the City even provided evidence that the Grievant had passed a test at the Police Academy that describes the Garrity Warning. (City Ex. 32). Even if the Grievant somehow did not understand his obligation to tell the truth, he was personally advised to do so by at least one superior, Cmdr. Frazer.

The Chief was disturbed by the Grievant’s failure to use good judgment in this incident and his failure to tell the truth. At the hearing his testimony was particularly compelling regarding the necessity for police officers to be honest and known for their integrity. A paramilitary organization must earn and maintain the public trust or citizens will be afraid to come to the police for help. They need to know they can trust a police officer when he arrives. This public perception cannot be maintained when news articles expose conduct unbecoming an officer such as the Grievant’s. The Chief also emphasized how important it is that officers be able to trust each other so they can work together safely for the public good. The Grievant’s response to the investigators ran contrary to this important goal.

The Federation argues that the penalty of discharge is too severe for the misconduct committed. The Chief objects to reinstatement for a number of reasons. Essentially, he stated that conduct revealing such bad judgment in an experienced officer is hard to understand. Blaming it on a drinking problem that had not been noticed in the workplace previous to being caught in this misconduct does not erase that lack of judgment, and may not be cured by a course of treatment for alcoholism. The Chief also explained that shooting your weapon into a fire pit must be considered a dangerous or potentially dangerous action. First, when police officers take out their firearms it is always important and fraught with consequences. They cannot use it lightly, and in this situation, bullets could ricochet off a hidden rock and injure someone. Second, if awakened citizens had not felt intimidated and had dialed 911 to report shooting in the neighborhood, the police responding would have been armed as well as the Grievant, and the consequences could have been deadly.

The Federation's arguments about discrepant punishment have been duly considered. Although the City still has on staff some employees who have lied about their conduct or who are struggling with substance abuse, none of those cited appears to be similarly situated to the Grievant. His situation uniquely combines poor judgment, potentially dangerous, inexplicable conduct with a deadly weapon in a residential neighborhood, and lying to superiors about the extent of his misconduct when confronted with it the next day. It is not unreasonable for the Chief to take into account the public scrutiny aspect of the Grievant's conduct. When trying to establish that the City of St. Paul maintains a police force with integrity, fairly enforcing the law, there is little justification for reinstating an employee who has committed misconduct of this sort. The

City had just cause to dismiss the Grievant because police officers are held to a high standard of conduct, even off-duty. By discharging 10 rounds of live ammunition in his backyard and lying about it to his investigating superiors, the Grievant committed a violation of the criminal law, created a potentially dangerous situation, and adversely affected his reputation for honesty and the public image he was sworn to uphold. The incident is sufficiently egregious to constitute a reasonable basis for discharge despite the lack of previous progressive discipline. Unfortunately for the Grievant, his remorse and his efforts to deal with his substance abuse are not sufficient to overcome the City's decision denying reinstatement at this time.

AWARD

The Grievance is denied.

Dated: November 11, 2013

Andrea Mitau Kircher
Arbitrator