

In the Matter of the Grievance Arbitration Between

Law Enforcement Labor Services, Inc.,

St. Paul, Minnesota,

Richard Rud, grievant

BMS case No. 14PA0103

And

City of International Falls, Minnesota

Before: Arbitrator Harley M. Ogata

Date and Place of Hearing: December 2, 2013,
Koochiching County Courthouse
International Falls, Minnesota

Date of brief submission: December 18, 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 (CBA). The grievance involves a one day suspension of Richard Rud (grievant) from his employment with the above named city (employer). The parties agreed that the matter was properly before the arbitrator.

ISSUES

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 facts in this matter are not in dispute. The grievant is an E911 corrections officer whose main duties are to patrol and supervise the jail and to answer incoming 911 and other calls to the law enforcement service center in Koochiching County.

The employer suspended the grievant for one day for failure to conduct well being checks on detainees in the jail in a manner required by state regulations and county policy.

For purposes of resolving this dispute, the arbitrator accepts the underlying facts as outlined by the union, which are not contravened in relevant part by the employer's factual recitation. In relevant part, the union stated the facts in its brief thusly:

Well being checks are required both by State regulations and County policy. (Exs. 1 and 2) The State Policy requires such checks at least once every 30 minutes while the stricter County policy requires them every 25 minutes. On May 29, 2013, the State Department of Corrections requested the County provide it with documentation of the previous day's well being checks as part of a random audit. (Ex. 4) In reviewing various sources, Jail Administrator Florence Hervey concluded that there had been a period on May 28, 2013 where checks were not made on schedule. Hervey initially determined that no checks had been made during a 108 minute period between 8:09 a.m. and 9:48 a.m. based upon the shift log report. (Ex. 5) After reviewing video, which showed an unlogged round at 8:11 a.m., and accounting for discrepancies in time clocks, Ms. Hervey concluded that the actual period was 87 minutes. (Ex. 12) Officer Rud does not dispute that he did not conduct a round during that 87 minute period.

At the time, Officer Rud was working with a fellow E911/Corrections Officer, Carrie Geiss. The expectation of the County was that Officers Rud and Geiss were jointly responsible for conducting rounds. However, there was no policy or procedure in place explaining which of the two were to conduct any given round. In general it was left to the two employees to work rounds out between themselves. The 8:00 round recorded in the shift log was conducted by Officer Rud (Ex. 7) whereas the unlogged 8:11 a.m. round had been conducted by Officer Geiss. Union Steward Tim Millette and Officer Rud both explained the myriad duties of E911/Corrections Officers, which involve both dispatch and jailer duties and which may interfere with their ability to conduct a round. It is undisputed that Officer Rud was involved in processing and releasing inmate Stephen Rutkowsky during a significant part of the 87 minute period. Officer Rud explained the required steps in doing so and that his involvement with Rutkowsky was extended due to problems with the fingerprint machine. Indeed, Officer Rud had complained about the length of time it took to process Rutkowsky in his shift log before he even knew that that the [sic] 87 minute period would come under review. (Ex. 6)

No one disputes that well being checks are an important duty of E911/Corrections Officer. [sic] The record shows that the County periodically would remind officers of the importance.

As indicated earlier, the grievant was on duty with a fellow E911 officer, Carrie Geiss on the day in question. Both parties agree that both officers were jointly responsible for conducting rounds. Unfortunately for the grievant, the State Department of Corrections was conducting an inspection of the center for that day and had requested a shift log. As a result of that shift log inspection, the discrepancy noted above was discovered. After an investigation, the grievant received the one day suspension in question.

The employer had issued four prior written documents to the grievant that outlined instances in which he had failed to conduct the necessary well being checks as required by the state regulation and county policy. The union claims the prior documents are not disciplinary and therefore cannot be used as a basis of progressive discipline. The county asserts that no progressive discipline is required under the contract and that even if progressive discipline is required, the written documents satisfy that requirement.

For the following reasons, the arbitrator agrees with the employer's second argument.

DISCUSSION

Article 19, DISCIPLINE, Section 1 of the CBA could not be more sparse: "[T]he Employer will discipline employees for just cause only." Notably, the language contains no enumeration of the types of discipline that can be imposed. Additionally, there is no language indicating that progressive discipline must be utilized.

The employer first argues that the arbitrator is not empowered to impose on the contract a system of progressive discipline, when none is called for under the contract. The arbitrator rejects this argument and notes that progressive discipline is an inherent element of just cause. As a matter of course, discipline in the workplace setting should be corrective in nature and not punitive unless the behavior in question is such that it is so outside the bounds of what is expected of an employee that intermediate steps would be either fruitless or not warranted.

Here, the infraction is of the type that would necessitate progressive discipline and a jump to a harsher form of discipline (such as a suspension) is only warranted if prior warnings from the employer did not cause the grievant to conform to the standards required of the job.

Herein lies the central dispute in this case. The union argues that the four written documents issued to the grievant did not constitute formal discipline as required under a progressive discipline analysis and under the contract. The arbitrator does not agree with this premise for the following reasons.

As stated earlier, the purpose of requiring progressive discipline is to correct behavior that the employer finds unacceptable. Under this analysis, the employer should impose the least harsh discipline available that would accomplish that purpose. The discipline should be designed to provide the employee with notice of what he did wrong, what he can do to correct the error and provide him an opportunity conform his behavior to that standard in the

future. It should provide fair warning to the employee that failure to correct that behavior could and will result in further discipline. If the employee has repeated instances of failing to meet those standards, the employer should administer increasing levels of discipline in an attempt to correct the behavior. Over time, if the employee fails to correct the behavior, the employer is justified in concluding that further attempts would prove fruitless and the employee can ultimately be discharged.

Here, the grievant received a written document on September 7, 2007 outlining his failure to conduct adequate numbers of well being checks on three separate days. He is directed to “correct this violation and follow DOC rules.”

On April 29, 2008, he was issued another written document outlining another instance where he failed to conduct the required number of well being checks. He is told that “[f]uture failure to do so could result in discipline.”

On August 12, 2008, he was issued another written document wherein he is informed of 2 days in which he failed to conduct the required well being checks and was told that “[t]his is unacceptable.”

Finally, on June 18, 2009, he was issued another written document that states that he missed his required number of well being checks on three days.

The union would like the arbitrator to impose a formalistic progressive discipline policy which would include specific, formal types of discipline on the parties where there is none in the language of the contract. Indeed, the discipline language in the CBA is as basic and nonformalistic as can be. It

simply states that discipline can only be administered for just cause. It contains no other language. It does not enumerate what types of discipline can be administered. It does not contain any language requiring that discipline needs to be in a certain format.

It is true that these documents do not state that they constitute formal discipline or that they do not contain the words “this is a written reprimand.” However, there is nothing in the contract that requires such language or that requires that discipline be in a certain format. The arbitrator finds that, taken as a whole, the documents provide what is required of a progressive discipline analysis. They provide notice of the conduct found unacceptable, they direct the grievant to conform, and they indicate that discipline will result if corrective action is not taken. Most importantly, they impose a series of warnings to the grievant that are clearly designed to give him an opportunity to change without being punitive. The behavior did not abate.

If the CBA contained language establishing a more formal order of discipline types and ordered them in terms of severity, the arbitrator might be more inclined to find that the documents fell short of what was required in a progressive discipline analysis. Here, there is no requirement for written warnings to be in the form of a “written reprimand.”

Unfortunately, the warnings did not have the desired effect. The grievant admittedly failed again on the date in question. At this point a one day suspension seems warranted in a further attempt to get the grievant’s attention

and hopefully create an environment where he also understands that failure to do so could result in his discharge if the conduct continues. A one day suspension is the least onerous discipline the employer could impose here in furtherance of progressive discipline given the previous warnings.

The union posits other arguments in favor of overturning the suspension. It first argues that it did not have an opportunity to challenge the contents of the four memos because they were not characterized as discipline. The grievant could have grieved the memos and if the employer took the position that they were not grievable because they were not discipline, then that would have lent credence to their basic argument that they were not disciplinary in nature. Additionally, even if the memos were not grievable, the grievant has the right under Minn. Stat. §13.04, subd. 4 to contest the accuracy or completeness of the memos.

Next the union indicates that the most current memo is dated May 20, 2010, making the memo of little use in further discipline because it is stale. Under the facts of this case, the arbitrator finds that the length of time here is not excessive for such use. Here, there were four memos issued citing a number of failures to conduct well being checks. The grievant offered nothing in the form of testimony that would lead the arbitrator to believe that the conduct will abate. The sheer volume of the instances lead to the conclusion that something further needs to be imposed so that the grievant understands the rules that govern his conduct.

The union next argues that the grievant was busy processing and releasing an inmate during the 87 minutes in question and therefore did not have time to do well being checks. The union further argues that the other officer could or should have conducted those checks for the two person team. The arbitrator notes that the grievant should know that partners are jointly responsible for conducting well being checks. In the memo issued to all E911 Correction Officers dated July 25, 2012, Officers were told to “[r]emember that you are also liable for any checks your partner may not have made.” (emphasis in original). In carefully reviewing the actions of the grievant regarding the inmate’s release and related problems associated therewith, it is clear to the arbitrator that there was enough time within the 87 minutes to either conduct a quick well being check or, at the least, enough time to seek out his partner and assure himself that she would complete the checks.

This argument reinforces the reason why the arbitrator believes the one day suspension is necessary. The grievant needs to take responsibility for his own actions and all prior warnings to provoke that response have been unavailing. Hopefully, in the future, this will occur given the seriousness of the level of discipline being imposed here.

For the foregoing reasons, the grievance is denied.

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

January 2, 2014