

BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

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IN THE MATTER OF THE ARBITRATION)	
)	
Between)	
)	Case# 04-PA-670
CITY OF WEST ST. PAUL)	
)	
And)	
)	John Remington,
)	Arbitrator
LAW ENFORCEMENT LABOR SERVICES)	
)	
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THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over a letter of reprimand issued to Grievant Kevin O'Neill, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Minnesota Bureau of Mediation Services, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on January 6, 2006 in West St. Paul, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file written closing post hearing arguments which they did subsequently submit to the Arbitrator on February 6, 2006. The parties agreed to grant the Arbitrator an extension of time to file his award.

The following appearances were entered:

For the Employer:

Ann Antonsen

Consultant

Manila Shaver

Chief of Police

For the Union:

Marylee Abrams

General Counsel

THE ISSUE

DID THE EMPLOYER HAVE JUST CAUSE TO DISCIPLINE GRIEVANT KEVIN O'NEILL AND, IF NOT, WHAT SHALL THE REMEDY BE?

PERTINENT CONTRACT PROVISIONS

ARTICLE V EMPLOYER AUTHORITY

5.1 The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules, and to perform any inherent managerial function not specifically limited by this AGREEMENT.

ARTICLE X. DISCIPLINE

10.1 The EMPLOYER will discipline employees for just cause only. Discipline will be in one or more of the following forms:

- A) Oral reprimand;
- B) Written reprimand;
- C) Involuntary transfer;

- D) Suspension;
- E) Demotion; or
- F) Discharge.

10.3 Written reprimands, notices of suspension, and notices of discharge which are to become part of an employee's personnel file shall be read and acknowledged by signature of the employee. Employees and the UNION will receive a copy of such reprimands and/or notices.

10.6 Grievances relating to this Article maybe initiated by the UNION in Step 3 of the grievance procedure under Article VII.

POLICE DEPARTMENT POLICIES AND PROCEDURES

117-Knowing, Observing, and Obeying all Directives, Rules, Policies, Procedures, Practices and Traditions

Members shall display an affirmative effort to consistently observe and comply with the directives, rules, policies, procedures, practices and traditions established for the effective, efficient, and safe operations of the West St. Paul Police Department. This rule applies to policies, procedures, and practices that are written as well as those established by past patterns and practices.

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Illustrative examples of non-violations:

Management allows for defensible deviations from policies, procedures and practices provided the member is capable of providing (in writing) justifiable reason(s) for such deviations. This means that the member provides factual information and data that such deviations were truly necessary and justified by the uniqueness of the event and the necessity for increased effectiveness, efficiency or safe operating procedures.

119- Courteous and Respectful Behavior Toward Superior Ranked Personnel

Members shall be subordinate and display courtesy and respect in words, deeds, gestures and actions towards superior ranking officers or persons in superior ranking positions.

CITY POLICY

7.3 SICK LEAVE

7.3(1) **ELIGIBILITY.** Regular full-time employees shall be eligible for sick leave with pay at the rate of eight hours for each calendar month of full-time service or fraction thereof.

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7.3(4) **REASONS FOR LEAVE.** Sick leave may be granted to an employee scheduled to be at work when the employee is unable to perform work duties due to illness, disability, the necessity for medical dental, or chiropractic care, childbirth, or pregnancy disability, illness or injury to that of the employee, the employee's spouse, the employee's parent(s).....

7.3(5) **NOTICE OF LEAVE.** To be eligible for sick leave with pay, an employee shall:

- (a) Report to their department head within one-half (1/2) hour after the start of the shift on the morning of the first working day of absence, except that where a relief employee is required, such report must be made one hour before the hour to report for work, including the reason for his or her absence.
- (b) In the case of non-emergency and preventative medical appointments it shall be the employee's responsibility to give at least 3 days notice.
- (c) Keep the department head informed of his or her condition. Supervisors may request a medical certificate for any amount of absence requested under this section if there is a reasonable suspicion of purpose or pattern of abuse. No classified employee shall be allowed to return to work until he or she complies with this subdivision.

- (d) Complete request for family and medical leave per Family and Medical Leave Act Policy as needed/ if applicable.

BACKGROUND

The City of West St. Paul, hereinafter referred to as the “EMPLOYER or CITY” is a political subdivision of the State of Minnesota and a public employer within the meaning of Minnesota Statutes. Police personnel of the City classified as “Police Officers” are represented, for purposes of collective bargaining, by the Law Enforcement Labor Services, Inc. and its Local No. 72, hereinafter referred to as the “UNION.” Kevin O’Neill, the Grievant in this matter, has been a licensed Police Officer since 1996. He was initially employed by the City in 1991 as a Community Service Officer and became a regular Patrol Officer in 1996. He was subsequently promoted to Investigator in 2005 and continued to serve in that position at the time of the instant hearing.

Grievant was issued a “Letter of Reprimand and Remedial Action” on December 4, 2003 by then Deputy Chief of Police Manila Shaver. This letter states, in relevant part:

It is alleged that on September 18, 2003 you failed to obtain the proper supervisory approval and make the required notification in leaving an assigned shift. In addition when you were asked later to provide an explanation for your absence, you were disrespectful and discourteous towards a superior ranked officer. These infractions are outlined in departmental polices 117 and 119..... An investigation was conducted into these allegations and it was subsequently determined that you violated the aforementioned departmental policies. As a result of your actions, this letter will constitute a written reprimand for these violations.

.....

Action: This constitutes an official letter of reprimand, which will be placed in your personnel file. In addition, the city is imposing a two-day suspension from duty without pay for unauthorized absence from duty and disrespect to a superior officer. Implementation of this suspension will be held in abeyance for a period to two years from this date, and will be dismissed if there are no same or similar offenses during that period. The 5.5 hours of unauthorized sick time you submitted for will be credited back to your sick time balance. Lastly, in order to meet your total annual working hours obligation, you have been scheduled to work a 1600-2130 traffic car shift on December 16.

Grievant refused to sign this letter but acknowledged, at the hearing, that he had received it. The Union challenged the Letter of Reprimand through a Step 3 Grievance submitted by Union Business Agent Terry Herberg to the City Manager on December 5, 2003. This grievance alleges that Grievant was disciplined without just cause in violation of Article X of the parties' labor agreement and requests that the discipline be withdrawn in remedy. Then City Manager Bob Larson denied the grievance, in writing, on December 16, 2003. The grievance was thereafter advanced to arbitration in accordance with the provisions of the labor agreement. However, due to vacancies in the offices of City Manager and Chief of Police, the matter was deferred by the parties until 2005 when the matter was finally set for arbitration. There being no contention that the grievance was untimely filed or processed through the contractual procedure, the Arbitrator finds that it is properly before him for final and binding determination.

CONTENTIONS OF THE PARTIES

The Employer takes the position that it properly disciplined Grievant for violating the City's Sick Leave Policy and department reporting procedures and for violation of Police Department Policies 117 and 119. The Employer argues that Grievant both left a

scheduled training session without giving notice to a supervisor and improperly claimed sick leave for this absence. In this connection the Employer maintains that Grievant also violated a calling-in sick procedure that had been communicated to all departmental personnel in October of 2002. The Employer further takes the position that Grievant compounded the above violations when he was disrespectful and engaged in inappropriate behavior toward a superior officer who later asked Grievant to provide an explanation for the above absence. The Employer therefore urges that the grievance be denied.

The Union takes the position that the discipline imposed by the City was excessive and that the internal investigation conducted by the Department was unwarranted under the circumstances. Indeed, the Union argues that, based on the unusual circumstances and facts, no discipline can be justified. It therefore contends that the grievance should be sustained.

DISCUSSION, OPINION AND AWARD

There is little, if any, dispute concerning the facts surrounding this dispute. Grievant was assigned to attend a training session outside the City of West St. Paul on September 18, 2003. According to the time records submitted by the Employer, Grievant worked an overtime school assignment from 6-8 p.m. on September 17 and appeared for the September 18 scheduled training at 8:00 a.m. However, at the training he indicated to a fellow officer that he was tired and left the training session at the lunch break. Grievant did not return. Grievant testified that although he had intended to return and complete the training after lunch, he changed his mind after visiting his father who was ill. He stayed

with his father for a short period of time and then went home and slept. It is uncontested that Grievant never informed a superior officer that he was leaving the training nor did he call in later that day to inform anyone that he would not be returning to the training session. He did report and work his scheduled shifts on September 19 and 20, 2003. Shortly after reporting to work on the evening of September 20, Grievant sent the following e-mail to Deputy Chief Shaver at 9:38 p.m.:

On Thursday 09-18-03 I was scheduled for School (EDP). The previous night I slept approximately two hours. I have a hard time readjusting my sleep schedule after working the shift that I do. I was going to call in sick but thought I should try to attend class. I was able to make it to class but by noon I was "out of it." I was very tired. When I left for lunch I visited my Father who lives in Eagan.¹ He has had some recent health issues again and was having some anxiety problems. He asked me to stay with him until my mother arrived back home. I went home around 2 p.m. and went back to bed and slept until 9 p.m. I am asking to use sick time for the second half of the class. It does not matter about post credits. I have plenty.

It would appear from the record that the above e-mail was motivated by a brief discussion between Grievant and Sergeant Tom Fangel that had occurred earlier that day at 7:00 a.m. when Fangel was coming on duty and Grievant was going off. According to a memorandum that Fangel sent to Shaver on September 21:

On Thursday, 09-18-03 several officers were scheduled to attend a class, "Patrol Officers Dealing with the Emotionally Disturbed." The class was scheduled from 0800 -1700 hrs. at the Eagen Center.

The instructor gave the class a lunch break at 1130 hrs. When we returned from lunch at 1230 hrs, I noticed Officer O'Neill was not present. He neglected to return for the remainder of the scheduled class.

¹ Grievant's father lived in Eagan near where the training was being conducted.

On 09-20-03 at 0700 hrs, I asked Officer O'Neill why he did not return after lunch. He replied, "I was tired." According to the schedule book O'Neill was off the night before the training. He was not scheduled to work the night of the training date.

I explained to O'Neill he could not just leave a scheduled training without approval. He said, "I am 45 years old and I can do what I want." "I will just take it as sick." He did not get approval to take it as sick time. He "stormed" out of the building saying, "Do what you got to do."

I am requesting this be reviewed and [that] O'Neill receive disciplinary action for his unexcused absence.

Both Grievant and Fangel testified at the hearing concerning this brief conversation. Grievant indicated that the encounter was brief; that he indicated he would "take care of" his early departure from the training session; and that while he had had several "spirited" discussions with Fangel in the past, he did not intend to be discourteous to the Sergeant. Fangel testified that Grievant never approached him at the September 18 training to indicate that he was leaving or that he would not be returning, nor did he notify Fangel later that day. When Fangel later questioned Grievant's failure to return to the training session, Fangel characterized Grievant's response as unsatisfactory. It can be readily inferred from Fangel's testimony that he was more upset over Grievant's September 20th response and the attitude that it conveyed than over the fact that Grievant had left a training session early without notifying a superior officer on September 18th. It is clear from Fangel's testimony that but for what he deemed to be a "confrontation" with Grievant on September 20, 2006 coupled with Grievant's unwillingness to provide a full explanation of the circumstances, no discipline would have been requested. Further, it must also be inferred that Grievant's belated request for sick leave to Shaver on the evening of September 20 was motivated primarily by his discussion with Fangel and less

by any perception that he had violated policy and procedure in connection with his early departure from training on September 18.

A careful reading of the Employer's sick leave policy supports such an interpretation. There can be little doubt that Grievant could reasonably have requested sick leave under 7.3(4) of the City's Sick Leave policy either because he was very tired and having difficulty concentrating or because he needed to care for his Father. If Grievant's contention that he had only two hours sleep the night prior to the training is credited, it would not be unreasonable to conclude that he was experiencing sleep deprivation on September 18. Whether or not he was sleep deprived, there can be no doubt that, based on his testimony, he was legitimately concerned about his Father's health. This would appear to be a "defensible deviation" within the meaning of departmental policy, *supra*. As required, this deviation was followed up by an explanation in writing from Grievant to Shaver.

Unfortunately, section 7.3(5) of the Sick Leave policy does not directly address Grievant's circumstances on September 18. Part (a) of the policy is clearly inapplicable since Grievant started, and "worked" half of the "shift." The policy is silent with respect to notice to supervision (if any) required of individuals who leave work during their shift for personal illness or to care for the illness of another. Part (b) is likewise inapplicable to Grievant because this section clearly covers only medical appointments. While part (c) does require the employee to "keep the department head informed," there is no time limit on providing this information; it cannot be denied that Grievant returned to work on his next scheduled shift; and that he did notify the department head on his second day back at work. The City here argues that Shaver clarified the sick leave policy through a memo

on October 21, 2002 which states the “General Rule: When calling in sick, you need to speak to a supervisor, advising that you will be out sick.” While this language does not specifically address Grievant’s situation on September 18 either, a reasonable person could only conclude from this memo that if an employee is not at work by reason of sickness, he/she is expected to notify someone in authority. Grievant clearly failed to comply with the spirit of this policy on September 18 and only belatedly complied after being challenged by Fangel. However, he did ultimately comply with the policy and it can be readily inferred from the record that no discipline would have been forthcoming absent Grievant’s interaction with Fangel on September 20, 2003. The Arbitrator is therefore forced to conclude that Grievant’s failure to strictly comply with the Employer’s sick leave policy in connection with the September 18 incident was insufficient, in and of itself, to justify discipline, even in the eyes of the Employer. Accordingly, the Employer’s determination that Grievant violated Department Policy 117 must be rejected. There is no evidence that Grievant consistently failed to observe policy or that he habitually challenged this or other policies. On the contrary, it is essentially uncontested that Grievant is, and has been, an exemplary officer.

We are left therefore with the incident of September 20 and the question of whether or not Grievant’s conduct toward Fangel can be deemed discourteous, disrespectful or insubordinate within the meaning of Department Policy 119. This is a particularly difficult question given the admittedly contentious nature of the prior working relationship between Grievant and Fangel. At the very most it would appear that the matter is one of discourtesy rather than disrespect or insubordination. Such a finding is supported by the testimony of Chief Shaver who admittedly considered, but ultimately

rejected, more serious discipline. What actually occurred between Grievant and Fangel is known only to them. Both were quite circumspect in their testimony, apparently attempting to downplay the seriousness of the event. What is abundantly clear is that Grievant made little effort to inform Fangel concerning the circumstances or reasons for his failure to return to training. Fangel, as a superior officer, had the right, indeed the duty, to inquire about these circumstances particularly since he had personally observed Grievant's absence. When Grievant was short and likely rude to Fangel, the Sergeant had little alternative but to report these circumstances to his superior once Grievant terminated the conversation and thereby rejected Fangel's attempt to informally resolve the matter. It was this course of conduct by Fangel that ultimately lead to the disciplinary action contested by the instant grievance.

One of the principle tenets of workplace discipline is that Employer's have the right to discipline employees to maintain respect for supervision. The Arbitrator must find that this principle is applicable here. Shaver had little alternative but to support Fangel and the chain of command by taking at least minimal disciplinary action. This is so even though Fangel may have precipitated the confrontation with Grievant. Although it is clear that Grievant's transgression was relatively minor, and it is certainly possible that Grievant did not perceive his conduct on September 20, 2003 to be discourteous or rude, the Arbitrator finds that the preponderance of the evidence favors the Employer based on the slightly more credible testimony of Fangel.

The Arbitrator has made a thorough review and analysis of the entire record in this matter and has carefully read and considered the arguments set forth by the parties in their respective post hearing written arguments. Based on his review he has identified

what he believes to be the critical issues in this dispute and discussed them above. He has also determined that certain other matters raised in these proceedings were immaterial, irrelevant or side issues at the very most and therefore has not afforded them any significant treatment, if at all, for example: the tragic and untimely death of Grievant's Father; Grievant's outstanding Performance Appraisals, Commendations and other evidence of outstanding performance; Grievant's subsequent promotion in rank; whether or not Fangel ever saw Grievant's time card reflecting sick leave; whether or not Officer Muellner was interviewed during the investigation; whether or not an internal investigation was an appropriate response by management; whether or not Grievant had sufficient post credits; whether or not Grievant refused to sign the letter or reprimand; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties' labor agreement the evidence is sufficient to show that Grievant was discourteous to a superior officer in connection with the above noted September 20, 2003 incident, but not sufficient to prove that Grievant clearly violated City or departmental sick leave policy in connection with his request for sick leave for a portion of September 18, 2003. This is so even though the City, within its legitimate discretion, denied the sick leave request. Accordingly, the grievance must be sustained, in part, and denied, in part. An award will therefore issue, as follows:

AWARD

THE EMPLOYER HAD JUST CAUSE TO DISCIPLINE GRIEVANT THROUGH A WRITTEN LETTER OF REPRIMAND FOR HIS CONDUCT ON SEPTEMBER 20, 2003. THE EMPLOYER DID NOT HAVE JUST CAUSE TO DISCIPLINE GRIEVANT IN CONNECTION WITH THE ABOVE CITED EVENTS OF SEPTEMBER 18, 2003.

REMEDY

ALL REFERENCE TO THE STAYED TWO DAY SUSPENSION SHALL BE EXPUNGED FROM GRIEVANT'S RECORD.

JOHN REMINGTON, ARBITRATOR

April 8, 2006

St. Paul, Minnesota