

IN THE MATTER OF THE ARBITRATION BETWEEN

Minnesota Teamsters Public & Law Enforcement
Employees' Union
Grievant,

and

City of Rogers,

Employer.

OPINION AND AWARD

Grievance of Teamsters, Local 320
(Ryan Franzen Suspension and
Discharge)

BMS Case No. 06-PA-0938

ARBITRATOR:

Janice K. Frankman,
Attorney at Law

DATE OF AWARD:

November 8, 2006

HEARING SITE:

Rogers Community Room
21201 Memorial Drive
Rogers MN 55374

HEARING DATES:

July 26 and 27, 2006

RECORD CLOSED:

August 21, 2006

REPRESENTING THE UNION:

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JURISDICTION

The hearing in this matter was held on July 26 and 27, 2006. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of the Minnesota State Bureau of Mediation Services. The parties submitted contract issues to arbitration. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. Post-hearing Briefs were received from the parties on August 21, 2006, when the record closed and the matter was taken under advisement. At the close of the hearing, the parties waived their CBA provision requiring issuance of an award 30 days from the close of the record.

ISSUE

The parties do not agree with regard to the statement of the two issues in this case. They set them out in their closing briefs as follows:

City:

Whether the Grievant could be suspended without pay pending discharge?

Whether the Grievant's admitted misconduct constitutes just cause for his dismissal from the force?

Union

Did the City act outside of the contract when it placed the Grievant on unpaid administrative leave?

Did the City possess just cause to terminate the Grievant?

The Arbitrator believes the following accurately states the issues:

Whether the City acted in accord with the parties' collective bargaining agreement in placing the Grievant on unpaid administrative leave and, if so, whether it had just cause for its action? If not, what is the appropriate remedy?

Whether the City had just cause to discharge Ryan Franzen from his position on the City of Rogers Police Department and, if not, what remedy is appropriate?

BACKGROUND AND SUMMARY OF THE EVIDENCE

Ryan Franzen (“Grievant” “Officer Franzen”) became employed by the City of Rogers Police Department in June, 1999. He has nine years’ experience as a peace officer in Minnesota. At the time of his discharge in January, 2006, he was Union Steward and the most senior officer on the Rogers police force. He was involved in the organization of the police unit in Rogers. He had received favorable performance evaluations, is respected by his colleagues and had not received any discipline. On October 6, 2005, he was placed on paid administrative leave pending investigation of an incident in Princeton, Minnesota on September 20, 2005. The paid leave was converted to suspension without pay on November 18, 2005. On November 30, 2005, the Chief of Police recommended discharge of the Grievant. After City Council meetings in December and January, he was discharged from his position. Grievances were filed by the Union on November 21, 2005, and January 25, 2006.

The Incident

Officer Franzen worked the night of September 19 and 20, 2005. He was returning to his home in Princeton, at about 6:30 a.m. on Highway 169 when an individual sped up behind him, tailgating then darting around his vehicle and speeding off, continuing to dart in and out of traffic cutting drivers off and causing people to brake and slow. The individual, Johnathon Havisto, was driving a White Ford Ranger, and Officer Franzen was driving a blue Chevrolet extended cab. Officer Franzen had seen the same vehicle speeding and driving recklessly a week earlier. He sped up, when he could, to pursue Mr. Havisto but dropped back when his speeds reached 95 MPH and he could not catch up with him. Officer Franzen followed Mr. Havisto off Highway 169 at the Highway 95 ramp. He pulled up to the right of Mr. Havisto at a stop sign and motioned to him to roll down his window. He showed his badge and when Mr. Havisto “gave him a look”, “an attitude” and did not roll down his window, Officer Franzen showed his gun by holding it raised toward the passenger side of his own vehicle and told Mr. Havisto to “lower (his) fucking window”. Mr. Havisto responded by briefly putting his hands up then reaching over the seat to roll down the passenger side window. Officer Franzen called him a “dumb ass” or “asshole” and admonished him for his driving, advising him that he needed to slow down or he was going to kill someone. Officer Franzen told Mr. Havisto that he had seen him on the highway the week before and that next time, he would see to it that he was ticketed for his driving. He suggested that Mr. Havisto get up earlier to avoid speeding and driving recklessly to get to work on time. The incident occurred over a less than 2 minute time span. Mr. Havisto reported to Princeton Police Officer Eric Minks that he had been afraid and uncomfortable and did not want to stay there so he turned left onto Highway 95 and drove to his work. Officer Franzen had no intent of arresting Mr. Havisto. He was “pissed off” with him and wanted to give him a warning. He did not think the Princeton PD would want to get involved with a speeding violation.

Mr. Havisto called the Princeton Police Department to report the incident at about 7:45 a.m. the same day at the encouragement of his co-workers. Officer Minks of the

Princeton PD took the call and at about noon, he went to Officer Franzen's home and stood in the door and spoke with him. The visit was unannounced and Officer Franzen had just gotten out of bed. He believed that he was talking with officer Minks "officer to officer". He told him that he had shown his badge and his gun, that he was upset with Mr. Havisto's driving and that he did not call the Princeton PD because he did not believe anyone would want to get involved. He expressed regret at the manner in which he handled the matter.

Officer Minks did not take any notes of his conversation with Officer Franzen. He returned to Officer Franzen's home on September 29, after taking a taped statement from Mr. Havisto the day before. Mr. Havisto had reported that Officer Franzen had pointed a gun at him. Officer Minks told Officer Franzen that a criminal investigation had been started. He told him that he would like him to come into the station for a taped statement. They talked about the matter for about nine minutes all of which was recorded on video/audio equipment in Officer Mink's vehicle. The audio was turned off for the last three minutes of their conversation. At hearing, neither of the Officers could remember what they had said during those three minutes. Officer Minks prepared an Investigation Report sometime after September 29, which reported his conversations with Mr. Havisto and Officer Franzen and the taped statement taken from Mr. Havisto on September 28. Officer Franzen had phoned Officer Minks the afternoon of September 29, to tell him that he had been advised by Union representation not to provide a taped statement.

Officer Franzen reported the incident to Rogers Chief of Police Keith Oldfather a day or two after it occurred. He called the Chief and then met with him with Union Business Agent Greg Burnes. Their meeting lasted ten to fifteen minutes. The Chief did not take notes. He told Officer Franzen that he wanted to see the police report on the incident. On October 6, the Chief notified Officer Franzen that he was suspended from his duties with pay pending investigation of the incident. He reported the basis for his action as follows:

* * *

. it is alleged that you, while off duty and angry at the alleged improper driving conduct of a citizen, drove at speeds up to 95 miles per hour to catch up to him and you then accosted this driver, displayed your badge and service firearm in a manner the complainant states was threatening to him and cursed him. The alleged conduct, if true, violates several criminal statutes and provisions of the department's General Orders. As a result of this incident, the Mille Lacs County Attormey is presently considering whether to bring felony charges.

* * *

City Exhibit 1

Investigation; Criminal Complaint; Discipline

Mille Lacs County entered a Criminal Complaint against Officer Franzen on October 10, 2005, charging him with violation of Minn. Stat. §§ 609.222, Subd. 1 and 609.66, Subd. 1 (1) for assault in the second degree – dangerous weapon and dangerous weapons – public zone. Officer Franzen was not interviewed by anyone from the City after his meeting with the Chief late in September, before he was suspended with pay. He was not asked for any of the detail of the incident. On November 18, 2005, Chief Oldfather placed Officer Franzen on Unpaid Administrative Leave. He and Officer Franzen signed a document captioned “Unpaid Administrative Leave” in which the Chief advised Officer Franzen that he was changing his employment status after consulting with the League of Cities legal counsel. He advised him that his benefits would continue at no cost to him except for dental coverage. On November 30, 2005, the Chief recommended to the City Council that Officer Franzen be discharged from his position. After meetings on December 19, 2005 and January 17, 2006, the City Council terminated Officer Franzen’s employment. There is no evidence or testimony in this record with regard to the City Council proceedings. A Grievance was filed challenging the discharge on January 25, 2006.

Chief Oldfather’s seven page Recommendation of Discipline For Officer Ryan Franzen includes a narrative in which the City Council is alerted to the September 20, incident and informed that Officer Franzen was on unpaid administrative leave, and that the only difference in the “stories” of the incident provided by Officer Franzen and Mr. Havisto was that Officer Franzen said that he had “showed” not pointed his gun at Mr. Havisto. The Chief advised the Council that a criminal complaint had been filed against Officer Franzen charging him with a felony and a misdemeanor. He advised that guilt or innocence would be determined in court and that he had concluded after review and investigation that “there are some very glaring violations of department rules and regulations.” He cited to various portions of the referenced rules and regulations, raised issues for the City Council to consider followed by his conclusions and recommendation to terminate Officer Franzen’s employment. The following are Chief Oldfather’s conclusions:

Point One: **Conduct Unbecoming**

Officer Franzen displayed a lack of judgment that brought discredit not only upon himself but the entire Police Department of the City of Rogers. Officers have the right to the use of discretion but not to the extent that was used in this incident. Officer Franzen used profanity toward a citizen.

Point Two: **Rules of Conduct**

Under this rule, Officer Franzen, by pulling his service weapon from its holster and intentionally showing it to another while off duty and for no logical reason is guilty of mishandling his weapon in a careless and imprudent manner.

Point Three: **Use of Force**

Officer used more force than was reasonable under these circumstances while he was not performing his official duties under the color of the law. A speeding violation, unless there are extenuating circumstances, does not warrant the drawing of one's firearm.

NOTE: Officer Franzen is the departments (sic) certified USE OF FORCE and FIREARMS INSTRUCTOR.

Point Four: **Exceed One's Authority**

Officer Franzen knowingly exceeded his authority in the enforcement of the law. Officer Franzen knew he had no authority, other than a normal civilian, while off duty and out of his city of jurisdiction to enforce a petty misdemeanor traffic offense. He could have and should have notified the appropriate police authority of his observations so that they could have intervened. Officer Franzen stopped this motorist, apparently, just to angrily confront him without any bona fide attempt at law enforcement.

Point Five: **Conformance To Law**

Officer Franzen did knowingly disobey State Laws namely he engaged in speeding and careless driving himself as he admits he drove 95 miles per hour to accost Harvisto (sic). Franzen admits pulling his service weapon although he does not claim that there was any threat to him or others or any reason to do so. He has been charged with felony assault and reckless handling of a weapon.

City Exhibit 4

Disposition of Criminal Case

On July 24, 2006, two days before commencement of this hearing, two misdemeanor guilty pleas were accepted by Mille Lacs County Judge Steven P. Ruble, and Officer Franzen was sentenced. The felony Assault charge was reduced to Disorderly Conduct. In sworn testimony to provide the factual basis for the pleas, Officer Franzen admitted to speeding up to approach Mr. Havisto, to using profane language, and to displaying his gun. He agreed that his behavior "could reasonably have aroused alarm, or resentment in (Mr. Havisto)". The two counts were merged for sentencing and convictions were entered on both. Officer Franzen was ordered to pay a \$1000 fine which was suspended except for \$500., and to serve 90 days in jail which was suspended except for 10 days which he chose to satisfy with 80 days of community service. He was directed to an anger management evaluation and to comply with all recommendations following the evaluation. He was evaluated within the next two days and released without a need for follow-up. See, Joint Exhibit 4.

Additional Evidence and Testimony

Mr. Havisto's driver's license had been revoked at the time of this hearing as a result of a DWI charge. He did not deny a litany of driving charges and tickets beginning in 1997, to which Union counsel referred on cross examination.

A case involving Chief Oldfather, serving as an undercover plainclothes police officer for the City of Minneapolis, is the subject of an unpublished Court of Appeals Opinion, affirming a District Court order denying the City's Motion for Summary Judgment. Mellgren vs City of Minneapolis et al., Docket C3-98-1405 (Minn Ct App 1999) Officer Oldfather and the City had been sued in a case which arose from a traffic incident. Mr. Mellgren alleged assault, false imprisonment, improper training of police officers and defamation as a result of Oldfather's alleged conduct. The Court of Appeals upheld the lower court's denial of the City's Motion based upon official immunity "(b)ecause the city failed to meet its burden to demonstrate that its officer's discretionary actions were legally reasonable." The Court of Appeals detailed the facts of the case for purposes of the immunity issue, as follows:

. . . . The encounter began at about ten o'clock in the morning as Mellgren drove his car east on Grant Street in Minneapolis. When he came to the intersection of Grant Street and Park Avenue, he saw a car coming the wrong way down Park Avenue Frontage Road. The car was an unmarked, undercover police car driven by a plainclothes police officer, Keith Oldfather. . . .

As Mellgren turned left onto Park, the turning position of his car blocked Oldfather's car for approximately 20 seconds. Mellgren yelled, 'One way! One way street! You're going the wrong way!' and gestured at Oldfather. At the same time, Oldfather yelled at Mellgren and banged his fist on the steering wheel.

Instead of continuing west on Grant, Oldfather turned north onto Park and followed Mellgren. . . . Frightened by being followed, Mellgren ran into the DieCraft office. Oldfather burst through the door behind him, angry and agitated. According to Mellgren and his witnesses, Oldfather said, 'You come outside with me, I want to talk to you.' DieCraft's owner told Mellgren to stay inside. At that point Oldfather said he was a police officer and demanded Mellgren come outside. DieCraft's owner asked Oldfather for identification, and Oldfather said, 'I've got a gun, I'll show you my gun,' and then added, 'Well, I can show you my badge.' The owner thought Oldfather was 'out of control' because he was red in the face and yelling at Mellgren 'like he was going to beat him up.'

The confrontation ended with the arrival of a uniformed police backup, apparently called by Oldfather to verify his status. Oldfather issued

Mellgren a citation for impeding traffic by his turning from Grant onto Park. Mellgren and Oldfather dispute whether Mellgren was under arrest during the citation process.

Union Exhibit 1 at pages 2 and 3.

There is no evidence or testimony with regard to the final disposition of the case in the lower court.

POSITION OF THE CITY

The City argues just cause for suspending without pay and then discharging the Grievant pursuant to the parties' Collective Bargaining Agreement. It argues that his admissions support its actions and interviewing him was unnecessary. It seeks a finding that the Grievant pointed his gun at Mr. Havisto and violated his Constitutional rights. It asserts that he, in effect, placed him under arrest by his actions. The City argues that the Grievant has violated its policies and rules as well as state law by the use of force and by his actions while off-duty and outside of his jurisdiction. It argues that he had the same rights as a private citizen to make an arrest immediately turning the offender over to the police in the jurisdiction where the offense was witnessed.

The City argues that the Grievant has breached trust and public confidence by his actions and that he is, therefore, unable to perform his duties as a police officer. It argues that he poses a risk to the public through his conduct and additionally to the City as a risk for potential liability if he were retained.

The City argues that neither Mr. Havisto's driving record nor the case involving Chief Oldfather when he was a Minneapolis Police Officer is relevant here. It urges the Arbitrator to focus only on Officer Franzen's conduct and admissions in deciding this case and seeks an Award which denies both Grievances.

POSITION OF THE UNION

The Union seeks reinstatement of Ryan Franzen to his position with backpay and without loss of seniority or benefits. It argues that the City failed to follow the terms of the CBA when it converted paid administrative leave to "suspension without pay" prompting the filing of the first of two grievances. It argues that the City did not have just cause for converting paid administrative leave to a suspension without pay. It argues that there were no new developments in the matter to justify discipline. It asserts that the City failed to investigate the matter properly when it did not interview the Grievant. It argues that disciplinary action was taken against the Grievant based heavily upon the statement of Mr. Havisto. It argues that the suspension should be returned to continuous administrative leave with pay resulting in repayment to the Grievant of loss of pay for the period November 18, 2005, to his discharge in January, 2006.

The Union further argues that the City did not have just cause to discharge the Grievant from his position. It argues that his conduct and the resultant disposition of his case in Mille Lacs County do not render him unable to properly perform his duties, and that he is a tenured police officer who has not received earlier discipline and has received positive performance evaluations. The Union points to disposition on July 24, 2006, of the criminal case filed against him on October 10, 2005. Guilty pleas to two misdemeanor offenses were accepted by the Court which support the statements the Grievant consistently made beginning on the date of the incident, that he did not threaten Mr. Havisto with his gun and that he admittedly used profanity and conducted himself inappropriately when he warned him about his careless driving. The Union argues that both grievances should be sustained reinstating the Grievant and making him whole for losses in pay and benefits and without loss of seniority.

OPINION AND FINDINGS

The record in this matter is a challenging one to review. Two Grievances were filed and significant argument has been made with regard to the City's improper handling of this case. It has been noted that the case has arisen under the parties' first Collective Bargaining Agreement. The Grievant has suggested he believes there is some significance in the fact that he was involved in organizing the police unit in Rogers which resisted organization and that he was Union Steward when he was suspended with pay then placed on unpaid administrative leave and finally discharged. Procedure which was followed is not consistent with the CBA and is unconventional with regard to labor practices. Nonetheless, it is the facts of the case which support this Award which returns Officer Franzen to his position and to make him whole for any loss he incurred as a result of his being placed on unpaid administrative leave on November 18, 2005, and discharged in January, 2006.

This award reflects conclusions that the City, although its Notice refers to suspension, intended to place Officer Franzen on paid administrative leave on October 6, 2005, a discretionary action not expressly grievable under the CBA; that later placement on administrative leave without pay in November, 2005, was tantamount to suspension without pay, appropriately grieved as discipline under the CBA; that the City's discretionary action, pending investigation and following the filing of criminal charges was appropriate and appropriately stands; and that the suspension without pay as well as the City Council discharge of Officer Franzen were imposed without cause. It is appropriate to elaborate on each aspect of the case as well as to provide illumination with regard to the ultimate decision to return Officer Franzen to his position.

The record made at hearing over two days requires inference for understanding. It does not, however, require inappropriate speculation to reach conclusions and the ultimate decision. The record is limited with regard to process detail. There is limited evidence of due process leading to Officer Franzen's discharge. He testified to a ten minute conversation, at his request, with his Chief days after the incident on September

20, 2005, and to his conversations with Princeton Police Officer Minks on September 20 and 29, 2005, at his home. There is no evidence of internal investigation of the incident beyond the Chief's contact with Princeton and Mille Lacs County with regard to its handling of the matter. Officer Franzen was placed on uncontested leave with pay and benefits in early October which was converted to unpaid administrative leave in mid-November, more than one month after criminal charges were filed against him. There is no evidence that he was provided with a Notice of Discharge or with the Chief's seven page Recommendation for Discipline provided to the City Council on November 30, 2005. He apparently attended the City Council meetings in December, 2005 and January, 2006, referred to by the Chief in his testimony as "hearings". However, there is no report or evidence of the basis for the City Council's decision.

The hearing record permits a conclusion that the basis for the discharge largely, if not exclusively, rested upon the criminal charges brought in Mille Lacs County notwithstanding the Chief's statement in his notice that the Court would determine guilt or innocence. Nonetheless, there has been no suggestion that this is not a serious matter or one that should be decided in a summary manner based upon procedural error. Nor has there been a suggestion that the detail of the case and the issues raised in the Chief's Recommendation provided to the City Council should not be carefully considered. To be clear, the City Council's decision was premature in any event. Even if Officer Franzen had later been convicted of the crimes as charged, discharge effective in late January, 2006, is unsupported. It should be unnecessary in this case to point to or discuss a presumption of innocence in criminal cases. As important here is a conclusion that without the criminal charges, the other rule and policy violations cited by the Chief do not provide just cause for discharge.

The facts of this case together with the Grievant's tenure as a peace officer, work performance and disciplinary records and demeanor through the pendency of the case support a conclusion that only significantly reduced, if any discipline, was warranted. There has been no explanation as to why disposition of the criminal case took nine and one half months. This Award recognizes the propriety of paid administrative leave pending disposition of the court case. The decision to suspend Officer Franzen without pay came late and without just cause. The Chief's reference to a changed court date and to having received counsel from the League of Cities does not support his action. While unusual, it appears that the only practical and supportable action for the City Council to have taken before July 24, 2006, would have been to exact lesser discipline pending disposition of the criminal matter. The Arbitrator declines, however, to impose lesser discipline at this time. The record made during the pendency of this matter is significant, and there has been no request for expungement of personnel records maintained by the City. In addition, Officer Franzen's criminal record is public.

This case arose from an incident of less than two minutes duration. Officer Franzen has been consistent in his reporting of it beginning a few hours after it occurred and continuing through his testimony at hearing. A video and audio tape of his second conversation with Officer Minks at his home, nine days after the incident, is part of the hearing record. It was helpful and convincing to hear Officer Franzen's description, a bit

more than a week after it occurred and before charges had been filed, of his encounter with Mr. Havisto. He reported a sequence of events that was credible and supports a conclusion that he erred in judgment and almost immediately recognized and regretted his error. He recognized that he had been aggravated by experiencing Mr. Havisto's "driving like a maniac" two times in two weeks and that he "should have let it pass" the second time the same as he did the first. He, in essence, self-corrected his conduct.

The City has argued that the only difference in their accounting of the incident is that Mr. Franzen claimed to have "shown" his gun as opposed to pointing it at Mr. Havisto as Mr. Havisto had reported to Officer Minks. Its argument fails to account for certain detail of the incident and the respective demeanor of the two men. Officer Franzen's description of Mr. Havisto's driving at high speed, tailgating him so that he could not see Havisto's headlights and reckless weaving in and out of traffic two weeks in a row permits understanding of his reaction. He told Officer Minks that he would not have caught up with Mr. Havisto if he had not exited Highway 169 at Highway 95. His description of Havisto's "attitude" was entirely credible and was supported by Mr. Havisto's demeanor at the hearing. Mr. Havisto's testimony did not lend credibility to his statement that Officer Franzen had pointed his gun at him through the window of his vehicle or to a conclusion that the exchange between them constituted an arrest. At most, his encounter with Officer Franzen gave him pause and upset him. There is no credible evidence that he was restricted from leaving. His driving record, including recent revocation of his license, lends further credence to Officer Franzen's description of extreme and inappropriate driving conduct. Off-duty, out of uniform and in his own vehicle outside of his jurisdiction, Officer Franzen was only permitted, not required, to take action as a private citizen having witnessed and experienced Mr. Havisto's reckless conduct. Unfortunately and improperly he momentarily usurped Princeton PD authority, a mistake it is doubtful he will repeat.

Officer Franzen's pleas, received by the Court, support his consistent, adamant and credible statement that he did not point his gun at Mr. Havisto and that he otherwise acted inappropriately. Moreover, Mr. Havisto's attitude at hearing and statement that it is a good thing that he did not have a gun that day illuminates the environment in which Officer Franzen acted. Just as his Chief has, on at least one occasion, apparently acted with lapsed good judgment leading to litigation against him and his employer, so Officer Franzen erred momentarily resulting in this case. There is no credible support for denying him the opportunity to continue in his position.

AWARD

The two Grievances are sustained. The Grievant's personnel record maintained by the City of Rogers shall reflect that he was placed on administrative leave with pay and benefits pending investigation and final disposition of criminal charges brought against him as a result of an incident which occurred on September 20, 2005, while he was off-duty and driving outside of his jurisdiction. The Grievant shall be reinstated to

his position with the City of Rogers Police Department and shall be made whole for any loss which he incurred as a result of being suspended without pay and discharged without just cause.

Dated: November 8, 2006

Janice K. Frankman, Attorney at Law
Arbitrator