

City of Mpls.

TIME REQUIRED TO
RENDER AWARD: 52 DAYS

IN THE MATTER OF THE ARBITRATION BETWEEN:

**Police Officers' Federation of Minneapolis,
Union,**

and

City of Minneapolis,

Employer.

**GRIEVANCE OF ROBERT KAPPERS
BMS Case No. 00-PA-12**

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ARBITRATOR:

William E. Martin

APPEARANCES:

For the Union: Ann E. Walther, Best & Flannagan

**For the Employer: Karen S. Herland, Assistant City Attorney,
City of Minneapolis**

This grievance arbitration was heard before Arbitrator William E. Martin at the City of Minneapolis Public Service Center, 250 South Fourth Street, Minneapolis, Minnesota, on November 8, 9, 10, and 22, 1999.

Testimony was offered on behalf of the Employer by Jennifer Rae Millman, Case Manager, People, Inc; Alan Rathbun, Minneapolis Patrol Officer; David Richard Clifford,

Minneapolis Patrol Officer; Laurie Janikowsky, Police Sergeant, Minneapolis Sex Crimes Unit; Ann Quinn-Robinson, Police Sergeant, Minneapolis Sex Crimes Unit; Douglas William Belton, Police Sergeant, Minneapolis Internal Affairs Unit; Anne Nurnberg, Cornerhouse Child Interview Specialist; L.M.; K.M. (L.M.'s mother); William Jones, Deputy Chief, Minneapolis Police Department, Douglas Heck PhD, Clinical Psychologist, MINCEP Epilepsy Care, Robert K. Olson, Chief, Minneapolis Police Department; and Tara Knutson, Minneapolis Public Housing Authority Property Manager.

The Union offered the testimony of Patrick Kiely, Senior Patrol Officer, Minneapolis Police Department; Richard Thomas Lieutenant, Minneapolis Police Department; and Robert A. Kappers, the Grievant.

The Employer submitted the sixty (60) exhibits listed on the attached list of Employer's exhibits. The Union submitted as Exhibits:

- Union Exhibit 1: Lease addendum for Resident Peace Officer Program
- Union Exhibit 2: Off-Duty Employment Application
- Union Exhibit 3: Performance Evaluations of Officer Kappers (32 pages)
- Union Exhibit 4: Commendation List of Officer Kappers
- Union Exhibit 5: Most Recent Commendation of Officer Kappers (March 18, 1999)

The parties argued the case in written submissions exchanged on December 10, 1999 and agreed that the time for the arbitration award herein should be January 15, 2000. That time was later extended by agreement of the parties to January 31, 2000.

Based upon the testimony, exhibits and argument received herein, I make the following decision and award.

DECISION AND AWARD

I INTRODUCTION

A. Nature of the Grievance.

Robert A. Kappers, a Police Officer with the Minneapolis Police Department was discharged on July 3, 1999 based upon an Internal Affairs investigation and panel recommendation. The decision to discharge Officer Kappers was based upon the departmental conclusion that he had engaged in sexual intercourse with a known vulnerable adult when she had come to his apartment seeking assistance in regard to an issue of tenant conduct in the building. Grievant's conduct was regarded by the panel that reviewed it as a violation of the Minneapolis Police Department Code of Conduct, Rule 5-102¹ that requires police officers to abide by the Minnesota Law Enforcement Code of Ethics, which states in part:

I will keep my private life unsullied as an example to all;...develop self restraint; and be constantly mindful of the welfare of others.

The panel evaluating the charges against Officer Kappers regarded the conduct in question to be "sufficiently egregious" to justify termination because of its relationship of the Department's mission of public trust and service. Also, the panel recommendation cited prior discipline of Officer Kappers for having sexual relations with a known prostitute as reinforcing the panel's recommendation to terminate.

After the discharge notice of July 3, 1999, the Police Officers' Federation of Minneapolis

¹The conduct for which Officer Kappers was discharged occurred off duty. Originally he was charged with an on duty violation of the On-Duty Code of Conduct Rule 5-105.3 for leaving his duty assignment without approval the morning after his sexual encounter to visit the woman in question. Since the panel recommended discharge for the sexual encounter itself, it made no recommendation regarding the on-duty rule violation charged in the internal affairs investigation.

filed this grievance on behalf of Officer Kappers alleging a violation of Article 4 of the Labor Agreement between the city and the federation which states at Section 4.1:

The City will discipline employees who have completed the required probationary period only for just cause.

There was no argument or claim by either party that the grievance was not properly filed and properly advanced to arbitration under the Labor Agreement.

B. Issue For Arbitration

Was there just cause for the Minneapolis Police Department to terminate the employment of Police Officer Robert Kappers?

C. Contentions of The Parties

The City supported its termination of Officer Kappers with voluminous evidence that Officer Kappers had engaged in sexual intercourse with a person alleged by the City to be a vulnerable adult. The City argues that the alleged vulnerable adult [hereinafter L.M.] went to Officer Kappers's apartment during his off duty hours for advice and assistance about an issue with co-tenants. The City contends that because L.M. was a vulnerable adult, of limited mental and emotional capacities, that it was a violation of the Code of Ethics for Police Officers for Officer Kappers to have had sexual intercourse with this woman under these circumstances. In justifying the Police Department's decision to terminate Grievant, the City emphasized the lack of capacity of the woman involved, that Officer Kappers was aware of her limitations, and that in taking advantage of her vulnerability, Officer Kappers committed an ethical violation that was particularly egregious because of the interest of the Department in establishing trust of the police among all citizens. The contention is that an officer's taking advantage of a vulnerable adult, even

off-duty, “violates the public’s trust in a most serious way...” and justifies termination. The City also argued that prior discipline for Grievant’s having engaged in sex with a prostitute supports the Department’s decision to terminate for the ethical violation found by the Department here.

The Union contends that although Officer Kappers had sexual relations with L.M. that this did not provide grounds for the Department to discipline him. The Union argued not only that the City failed to prove just cause, but that the evidence actually shows there was no cause for discipline. First, the Union contends that the conduct here was off duty and that there was no nexus to the job justifying the Department as treating this as an employment issue. The Union supports its contention that there is no legitimate job connection by arguing that L.M. is not a vulnerable adult, that she consented to have sex, and that even if L.M. is a vulnerable adult Officer Kappers had no reason to know this. Further, the Union contends that no nexus between the job and the conduct in question results from the fact that Officer Kappers received his apartment as part of a program permitting police officers free residence in public housing. This argument is premised on the assertion that Grievant had no duties under this program. Ultimately, the Union argues that the Department decided to ignore the results of its criminal investigation and to make this an employment matter because of its embarrassment at the publication of the events herein. Further, the Union claims that this embarrassment does not constitute just cause where the conduct involved is lawful, off duty, private, consensual activity.

II FINDINGS OF FACT

Many of the facts herein were undisputed, but there was much argument about how the facts should be characterized. However, there are some factual disputes that must be resolved to

decide this case. For example, there was a fact dispute about whether intimidation was used by Officer Kappers to obtain sex from L.M. or whether the sex was agreed to by L.M. without coercion. As to this “dispute”, the evidence fails to support a claim that the sexual encounter here was “coerced” in any normal meaning of that word. Indeed, this conclusion is what caused the County Attorney to decline to file a complaint against Grievant. It also is disputed whether L.M. is a vulnerable adult. The evidence supports the claim that she is a vulnerable adult but it is important to be clear about the nature of her condition and its relationship to the events of this case.

This statement of facts sets forth the facts as I have found them from the evidence presented. Where I think it important, I do comment on my findings by discussing the evidence. I do not however comment on the evidence supporting those findings that were largely undisputed.

A. The Grievant’s Relationship with L. M. Prior to the Incident Giving Rise to his Termination.

Officer Kappers moved into his apartment in a Minneapolis Public Housing Authority building in July of 1998 (hereinafter the “2121” building). His residence in his MPHA apartment (Number 203) was rent free under the Housing Authority Resident Peace Officer Program. The purpose of the program is to make the buildings safer because of the visible police presence, but the police officers in the program have no actual security related duties arising from the program. Indeed, the Lease Addendum of the Resident Peace Officer Program states at paragraph 3: “Tenant shall have no employment relationship with MPHA and shall have no responsibilities of any type with MPHA except as specifically set forth in the lease and the lease addendum.” The only responsibilities set forth are to provide information to MPHA on criminal activity witnessed

and to be a member of the residents council. The lease addendum encourages, but does not require active participation in the resident council at the building. Officer Kappers was fully aware of the purposes of the program and he did participate actively in the resident council. In this capacity, he also volunteered for Project Lockout, a resident group that watched the entrance to the building until the evening security employee arrived.

As a participant in Project Lockout, Officer Kappers met L. M., who had been a building resident for over five years. L. M. also met and became friendly with Minneapolis Police Officer Lupe Herrera. Officer Herrera was then in a relationship with Officer Kappers and visited him frequently, sometimes staying in his apartment. While it is not clear how frequently Officer Kappers was in contact with L. M., he knew her well enough that he was concerned about her contact with his son. Indeed, in March of 1999, Officer Kappers had a conversation with Tara Knutson, the 2121 building manager in which he expressed concern about L. M. hugging his adult son who had been visiting Officer Kappers apartment. As of March 12, 1999, then, Officer Kappers and L. M. were acquaintances who knew each other as co-tenants and as persons involved with the 2121 building resident's security program. Also, L. M. was friendly with Officer Kappers' girlfriend Lupe Herrera, who was also a police officer.

B. The Occurrence Leading to Officer Kappers Termination

On March 6, 1999, Lupe Herrera drove L. M. to get a haircut. During the drive, L. M. complained to Officer Herrera about the allegedly disruptive and potentially illegal behavior of some co-tenants. Officer Herrera suggested that L. M. discuss the problem with Officer Kappers. That evening, at about 10:30 p.m., L. M. called Grievant and explained that she wished to speak with him about these other residents. Grievant told L. M. to come to his apartment. When

Grievant admitted L.M. to his apartment, he was wearing a T-shirt and long underwear. He had been drinking, but was not intoxicated. Prior to admitting L.M. to his apartment, he had been watching a pornographic videotape.

While the testimony of both L. M. and Grievant was somewhat unclear regarding the initial events that occurred after L. M. entered the apartment, it seems that after speaking briefly about her problems with the other residents, the conversation turned to sexual matters. According to Grievant, L.M. "came on" to him although both testified that L. M. said she was a virgin and that she had not been instructed about sex by her mother. It also was clear that Officer Kappers then showed L. M. a part of the pornographic video that he had been watching before she arrived and suggested it could be used for instructional purposes. At this point, they went into Grievant's bedroom and had sexual intercourse. While Grievant claimed that L.M. "came onto him." L. M. said later that they were having sex almost before she fully realized what was going on. On the question of credibility regarding how the sexual events were initiated, it is instructive that the Grievant admitted after questioning later that he had been watching pornography before L.M. arrived, that she had another reason for visiting him, and that she had told him she was sexually inexperienced.

The testimony of Officer Kappers and L. M. regarding the details of the sexual encounter are in conflict. According to Officer Kappers, L. M. was a willing participant. According to L. M., the experience was very painful, and she "froze" and was unable to prevent the sex from continuing. However, she also said that she told Officer Kappers to stop and tried to push him off. Grievant denied this. There were inconsistencies between L.M.'s testimony on this point and the prior statements she had made at various times. Some of the reasons for L. M.'s inconsistent

testimony will be illuminated in the section below describing her medical, emotional and mental problems and capacities. As stated above, her status as a vulnerable adult is at issue herein. One of the difficulties in the case is that the same vulnerabilities that are at issue may make some of L. M.'s testimony unreliable.

Given the conflicts in her testimony, and the difficulties posed by L. M.'s capacities, I conclude that Officer Kappers version of the sexual encounter is probably closer to the truth. His version requires the conclusion that from his perspective L.M. was a willing participant in the sexual encounter with Grievant in his apartment that night. This conclusion also was reached in the criminal investigation of L. M.'s charges of rape. But the conclusion that the sexual encounter was not rape (or that rape was not proved) does not negate the conclusion that Officer Kappers initiated the sex and that it was a painful experience for L.M. both physically and emotionally.

Following the sexual intercourse, Officer Kappers and L. M. got dressed. As she was leaving, Grievant told her not to tell anyone what had happened as it would get him into trouble with Officer Herrera. However, he sent her home with a pornographic videotape. She returned to her apartment, showered, and went to bed.

B. The Discovery, Reporting and Criminal Investigation of Officer Kapper's Sexual Encounter with L. M.

The next morning, at 9:30 a.m., L. M. was visited by a home health care nurse, Jennifer Milleman. Ms. Milleman was employed by People, Inc. a home health care company. Ms. Milleman, a registered nurse and case manager, was visiting L. M. to assess her needs for home health care following L. M.'s release from the hospital. L. M. (as is detailed below) suffers from epilepsy and has received home health care services for some time. Ms. Milliman's assessment

was to redetermine the need to reestablish these services.

During Ms. Milliman's visit, L. M. "matter-of-factly" stated that she had had intercourse the previous evening.² At that time a friend of L. M.'s, Glenn, had just left the apartment and Nurse Milliman assumed that Glenn was the man with whom L. M. had had sexual intercourse. Nurse Milliman said that they could finish the home health care assessment and then talk further about the sexual encounter. Nurse Milliman intended to discuss birth control, for example, when they returned to the topic. However, during the reassessment L. M. mentioned two or three times that she had been a virgin and had intended not to have sex until marriage. At about 10:10 a.m., Nurse Milliman noted, following a blood pressure check, that L. M.'s arm was jerking and determined that she was having a seizure. L. M. had three seizures at this time.

While L. M. was in seizure, Officer Kappers, in uniform, knocked at the door. When Nurse Milliman opened the door and asked what he wanted, Grievant said that L. M. had been having trouble with neighbors and that she could see him about it later at his apartment. When the door was closed, L. M. said that Officer Kappers was the man with whom she had had intercourse. Nurse Milliman verified with L. M. that the man with whom L.M. had sex had not been Glenn, and Nurse Milliman began to question L. M. more closely about what had occurred the prior evening.

In response to Nurse Milliman's questions, L. M. revealed that she had been having problems with neighbors, that Lupe Herrera had said that "Bob" would help, that she had gone to

²Again, I state my findings regarding L. M.'s status as a "vulnerable adult" below and thus do not repeat these facts here. Suffice it to say at this point that her condition is such that her reaction to the events of the night before must be evaluated in light of that condition, and not evaluated in the abstract or as they might be evaluated in the context of an average adult.

see him and that “before she knew it” her clothes were off and she was having sex. When asked by Nurse Milliman if she had consented, L. M. said that she had signed a blank piece of paper. The nurse then called L. M.’s mother who said charges should be brought against Officer Kappers. Nurse Milliman called 911.

Three police officers and two paramedics arrived at L.M.’s apartment and treated the situation as an allegation of rape. L. M. was taken to the hospital for a medical examination. Nurse Milliman left and called her supervisor to make a vulnerable adult incident report. After L. M. left the hospital later that day, she moved into her parents apartment in Eden Prairie.

The criminal charges against Officer Kappers were investigated by Sergeant Ann Quin-Robinson and Sergeant Laurie Janikowski of the Minneapolis Police Department sex crimes unit. They completed their investigation and submitted it to the Hennepin County Attorney’s Office on April 1, 1999. The investigation was thorough and included transcripts and summaries of statements from all persons having information about the incident. These statements are included in the record of the arbitration as exhibits and they are consistent with the testimony presented at the arbitration. In sum, they support the findings of fact herein.

On April 1, 1999 Carrie Lennon of the Office of Hennepin County Attorney issued a Complaint Denial based upon the above investigation. Submitted as Employer Exhibit 4 the denial is predicated upon two conclusions. First, the County Attorney concluded that “it is not clear” that L. M. “would meet the statutory definition of a vulnerable adult, although she notes that some people who know L. M. believe she is a vulnerable adult.”³ Further, the County

³I discuss the issue of L.M.’s vulnerabilities in detail below. It was not extensively argued in the context of the criminal charge whether a finding that L.M. is a statutory vulnerable adult would in and of itself provide a basis for a criminal charge. Since Officer Kappers was not a care

Attorney concluded that, in any case, Officer Kappers did not meet the statutory definition of a care giver merely because he was a tenant in his housing unit under the Peace Officer Residence Program.

Having concluded that no criminal charge under the vulnerable adult statute could succeed; the County Attorney applied “traditional sexual assault standards” to her review and concluded that it could not be proved that the sexual intercourse between Officer Kappers and L. M. was non-consensual, in part because the inconsistencies in L. M.’s statements impair her credibility. Above, I have reached the same conclusion. It was not shown at the arbitration that the acknowledged sexual acts here were non-consensual. Indeed, L. M.’s earliest statements regarding the sexual incident to Nurse Milliman contained no claim that the sex was non-consensual. Indeed, the eventual termination recommendation of the Internal Affairs Investigation panel did not rest primarily upon a determination that the sexual intercourse was non-consensual. Rather, the main basis of the discharge was that L. M., is a vulnerable adult, who had come to Officer Kappers for assistance, in part because he was a police officer. Thus, whether criminal or not, his actions were regarded as a serious breach of trust and ethics constituting misconduct justifying his discharge. Ultimately then, the analysis of whether there was just cause for termination must follow a consideration of L. M.’s capacities. In what sense, if any, is she a vulnerable adult?

C. L. M.’s Disabilities and Her Status as a Vulnerable Adult.

giver, I assume not. In any event, I do not regard the criminal issues and the issue for the arbitrator here as being identical. This is because the standard for the arbitrator, just cause, is different than the statutory standards of the vulnerable adult protective statutes and different than the standards of the “rape” statutes as well.

The evidence shows that L.M. is a twenty-nine (29) year old woman who is developmentally delayed as the result of organic brain disorders. While it was not clear exactly which causes are responsible for which problems, the evidence demonstrated that L.M. suffers from at least two separate problems. L.M. was born with epilepsy and some of her current problems relate to this condition. L.M. is prone to two different types of epileptic seizures. She has complex seizures during which she is incapacitated and unaware of what is going on around her. During complex seizures she visibly shakes and anyone seeing her in this condition would be aware of the seizure. L.M. also suffers from what are called simple, partial epileptic seizures. During these seizures she remains conscious, but suffers some loss of awareness. Finally, as a result of her multiple problems, L.M. also has a panic disorder which results in her “freezing up” during times of stress. However these panic attacks are not true epileptic seizures.

L.M.’s condition is complicated by brain damage that resulted from a near drowning incident during her childhood. At age twelve, she was found unconscious at the bottom of a swimming pool, perhaps because of an epileptic seizure. The brain damage suffered from this incident caused L.M.’s epilepsy to worsen to the point where her seizures cannot be completely controlled. She does take several medications each day and those medications have some effect on her awareness. As a result of the near-drowning incident, L.M. began experiencing learning difficulties that were not present before the incident. Now that she is twenty-nine years old, it is apparent that in addition to learning difficulties her brain problems have resulted in memory dysfunction, and a lack of ability to function well in social situations. Her manner of expression is child like and her emotional development appears to be somewhat stunted.

The effect of her condition upon L.M.’s functioning in the world has been dramatic. She

is unable to hold employment and is isolated socially. Since she is unable to support herself, she depends upon public assistance, living in public housing, occasionally with her parents, and receives public medical assistance. For example, she has had home nursing care throughout her adult life, discontinued during periods when her medical situation requires hospitalization.

In addition to home health care, L.M. has been treated by Douglas Heck, Ph.D., a clinical psychologist with MINCEP Epilepsy Care. Dr. Heck has seen L.M. occasionally since 1994, and regularly (every two or three weeks) recently. He testified that L.M. suffers from all of the above problems including the epileptic and non-epileptic seizures, panic attacks, social isolation, psychosocial difficulties, mild retardation and below average intelligence from brain damage resulting from her near drowning experience. He characterized her problems as including developmental delay, memory impairment, and coping difficulties ranging from moderate to severe.⁴

In discussing whether L.M.'s multiple problems make her a vulnerable adult, Dr. Heck was clear that he was not stating an opinion about the statutory definition of that term. Rather he was considering her condition in terms of her ability or capacity to care for herself and to deal normally with life situations on a day-to-day basis. First, Dr. Heck was clear that L. M. is capable of consenting to engage in sex. He said that she is capable of comprehending what is going on and of deciding what she wants to do in such a situation. However, Dr. Heck also clearly viewed L.M. as being vulnerable in such situations. He testified that she would not fully understand risks and consequences due to her developmental delay and that she could easily be taken advantage of. For example, he told of an earlier situation where L.M. was persuaded to

⁴While he did not testify at the hearing, L.M.. Also has regularly seen a psychiatrist, Dr. William Brower, since 1990.

permit a group of relative strangers stay in her apartment for a week during which she was unable to get them to leave. Dr. Heck also testified that L.M.'s emotional deficit makes it difficult for her to handle relationships so that she had not had sexual relationships during her adult years. Finally, Dr. Heck testified that L.M.'s susceptibility to manipulation would be exacerbated when she is under stress. At mild levels of stress she becomes even more dependant than she normally is and at extreme levels she is incapacitated suffering non-epileptic seizures, freezing up, and becoming uncertain about what is occurring.

Dr. Heck's testimony regarding L.M.'s vulnerabilities resulting from her multiple mental and emotional problems was confirmed in several ways. Nurse Milliman regarded L.M. as a vulnerable adult describing her as behaving emotionally at the level of a thirteen year old. The 2121 building manager, Tara Knutson, who has social work experience regarded L.M. as a vulnerable adult, and assumed that her problems and behaviors were so obvious that everyone living in the building was aware of them.

D. The Internal Affairs Investigation and the Termination of Grievant.

In addition to the criminal investigation, this matter was referred to the Internal Affairs Division of the Minneapolis Police Department. Grievant had been suspended with pay pending the results of the criminal and internal affairs investigations. Sergeant Douglas Belton had access to the criminal investigation file, and he conducted his own investigation. Grievant was informed of the charge that his conduct violated the Minnesota Law Enforcement Code of Ethics, and interviewed. Also, L.M. was referred to Cornerhouse for an interview by a professional interviewer who specializes in cases involving sexually abused children and vulnerable adults, Anne Nurnberg. Ms. Nurnberg testified at the arbitration, and a tape of her interview with L.M.

was submitted in evidence. It was Ms. Nurnberg's opinion that L.M. is a vulnerable adult and that she had been sexually abused by Grievant. Sergeant Belton completed his investigation, summarizing all of the evidence, and submitted his findings to a three person panel chaired by Deputy Chief William Jones. The panel sustained the charge against Grievant and held a disciplinary hearing on June 17, 1999. Following this hearing at which Officer Kappers was represented by the Federation, the panel determined that Grievant had violated Rule 5-102 of the Minnesota Law Enforcement Code of Ethics. Deputy Chief Jones recommended to Chief Olson that Grievant be terminated. That recommendation was accepted and the discharge of Officer Kappers was finalized on July 3, 1999.

The stated reasons for the panel decision, the Deputy Chief's recommendation, and the Chief's final action were that L.M. had come to Grievant in part because he was a police officer, that she is a vulnerable adult, and that Grievant knew of L.M.'s mental and emotional disabilities and problems. Also, the Grievant was aware of the fact that L.M. was consulting him about a problem she was having with co-tenants. The rationale for the decision to terminate was stated in Deputy Chief Jones letter as follows:

Police officers are routinely placed into contact with citizens who are at a disadvantage and could be victimized by an officer's authority and position. The panel feels that Officer Kapper's actions violate the public's trust in the most serious way, and that he cannot be trusted to act appropriately in sensitive matters that are part of a police officer's routine duties.

The panel indicated that it believed discharge was appropriate here regardless of Officer Kapper's prior record of discipline (a two week suspension for sustained charges of having had sexual relations with a prostitute) but indicated also that it regarded the prior incident as confirming that the Grievant has "a tendency of placing himself in inappropriate sexual situations with persons who, for varying reasons, may be deemed vulnerable or victimized..."

III DISCUSSION

A. The Just Cause Standard

The CBA, Section 4.1, sets forth the familiar "just cause" standard by which the discipline of an employee, (here the discharge of Grievant) must be evaluated. While the contract does not define "just cause", the parties have not argued any novel standard in this case. Generally, just cause excludes arbitrary or unreasonable discipline. Put affirmatively, the Employer has just cause if it selects a reasonable or proportionate penalty to discipline an employee who has committed an actual offense against duties owed to the employer and relevant to the performance of the employee's job. Since the burden of proof to demonstrate just cause is on the employer, it must have shown that the Grievant committed the offense for which the discipline was given; that the offense merits discipline within the framework of the reciprocal duties of the particular work setting and job; and that the penalty selected bears a reasonable relationship to the nature and severity of the offense proven. The essence of just cause is fairness of treatment under the particular circumstances given the real employer interests at stake in the case. See generally, Elkouri & Elkouri, How Arbitration Works, 5th Ed., p. 884-944 (BNA, 1997)

In this case, there is one feature of the situation that requires a specialized application of the just cause standard. Officer Kappers was discharged for off duty conduct. I agree with the

Union that in such a case the Arbitrator must take care to insure that the employer has not impermissibly based discipline upon judgments solely relating to the perceived morality of the employee. Typically in arbitrations the need to insure that the discipline is truly regarded as an employment matter, not a purely moral matter, is served by applying a special test to off duty conduct. This test in off duty cases requires a showing by the employer of a special or meaningful nexus between the conduct in question and some legitimate Employer interest, in order to sustain the discipline. In its Brief at page 12, the Union stated this principle as follows:

The overriding principle in the public sector is that discipline for off duty conduct is appropriate only when such misconduct has a demonstrable adverse effect on the employer's business or the overall employment relationship... [A]n employer's power to discipline is restricted [in off duty cases] even where misconduct results in substantial embarrassment to the employer. Hill & Sinicropi, Management Rights, 209-210 (BNA Books, 1986).

B. Evaluation of Grievant's Conduct Under the Just Cause Standard and the Nexus Test for Off-Duty Conduct.

The Union has characterized this case as one involving sexual conduct between consenting adults which does not have a sufficient nexus to Grievant's employment as a police officer to provide a proper basis for discipline. This characterization is predicated on the Union's claims that there was no proof that L.M.'s participation was not consensual, that L.M. is not a vulnerable adult under Minnesota statutes, and that Grievant did not know she was a vulnerable adult in any

case. As my above stated findings show, I agree with the Union that L.M.'s participation in the sexual encounter was not proven to have been coerced. L.M.'s psychologist testified that she was capable of consenting, and the evidence does not show that her participation was not consensual in a conventional sense. While she testified that she said no and pushed Grievant away at some point, and while she testified that she was intimidated by Grievant's moving his gunbelt near her, the inconsistencies in L.M.'s testimony from interview to interview impact her credibility sufficiently that, like the County Attorney, I cannot conclude that the sexual encounter here was nonconsensual.

Of course, the issue of consent, and L.M.'s credibility, is complicated by her medical condition, by the possibility that she had a seizure of some kind at the time of the sexual encounter, by her panic disorder that causes her to freeze under stress, and by her emotional and mental deficits resulting from brain damage from her child hood near drowning experience. While L.M.'s mental and emotional disabilities and deficits impact upon her credibility in terms of her initial rape allegations, they also form the basis of the City's arguments premised upon the contention that she is a vulnerable adult. Also, the obviousness of her condition undercuts Grievant's claim that he did not know L.M. was a vulnerable adult prior to the sexual encounter.

The facts as set forth above require the conclusion that L.M. is a vulnerable adult in many ways, and that her condition is obvious to anyone who meets her. She is constantly medicated for her epilepsy. She has suffered brain damage which results in below average intelligence and, more importantly here, in arrested emotional development. Her home care nurse testified that she acts as if she were in her early teens. Her parents testify that in many ways she has not developed emotionally since the age of 12 when she suffered brain damage from her near drowning accident.

As a result, she is unemployable, has in-home nursing care, and is treated by a psychiatrist and a psychologist for a variety of problems including stress disorders.

All of her care givers regard L.M. as vulnerable in some sense, although they were reluctant to render a legal conclusion under the statutory definition of vulnerable adult. While the result here does not necessarily turn on the application of the legal standard set out in the vulnerable adult statute, an examination of that standard is instructive. The statute defines a vulnerable adult (in relevant part) as a person over 18 years old who:

(3) receives services from a home care provider...;
or (4) regardless of residence or whether any type of service is received, possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction: (i) that impairs the individual's ability to provide adequately for the individual's own care without assistance...; and (ii) because of the dysfunction or infirmity and the need for assistance, the individual has an impaired ability to protect the individual from maltreatment.

Minn. Stat. § 609.232, subd. 11.

L.M. had a home care nurse assigned to her. She was incapable of sustaining employment. She had difficulty with relationships, even casual relationships in her building. As of the age of 29, L.M. had not had a sexual relationship prior to her encounter with Grievant. In the language of the statute, L.M. was obviously and noticeably suffering from a mental or emotional

dysfunction and this dysfunction demonstrably diminished her capacity to cope without assistance and to protect herself against imposition. For example, her psychologist testified that she had been imposed upon by a group of persons who moved into her apartment and refused to move out for a week.

While the details of L.M.'s existence were largely unknown to Officer Kappers, her condition was not. He had contacts with her in the building. L.M. became friendly in a dependent way with his girlfriend. He had discussed L.M. with the building manager who was aware of L.M.'s deficiencies and vulnerabilities. Indeed, the manager Tara Knutson, believed from her contact with L.M. that L.M. was a vulnerable adult. Indeed, virtually every person who came into contact with L.M. recognized that she is emotionally dysfunctional, in a way that they concluded makes her vulnerable.

The conclusion that L.M. is vulnerable due to major and multiple dysfunctions is more obvious when placed in the context of this case. The case involves not a simple life transaction, but the complex dynamics of human sexuality. Because of her condition, resulting in an emotional deficit and a childlike demeanor, L.M. was sexually naive. She stated to Grievant that she was a virgin and that she had not been given instructions on sexual matters. While she did appear later to be upset about the fact that no birth control was used, at the time she said nothing. While she seemed matter of fact about the encounter shortly thereafter, she was soon greatly upset about it. The Union argues that this was because L.M. was a willing participant, and only reacted negatively later because of Nurse Milliman's reaction and L.M.'s fear that her parents would disapprove. There may be some truth to the Union's observations, but L.M.'s reactions also are consistent with confusion and inappropriate response and understanding due to her mental and

emotional dysfunction. I conclude that the Employer did prove that L.M. is vulnerable due to her mental and emotional dysfunctions.⁵

Further, the obviousness of L.M.'s dysfunctions, obvious to her nurse, to the building manager, to the police officers who investigated the case, and to the Arbitrator from L.M.'s testimony, requires the conclusion that Grievant must have been aware that she is dysfunctional even if he was unaware of the exact details.

Because L.M. is a vulnerable adult, and her condition is open and obvious to those who spend even a short time with her, I conclude that there was just cause for Grievant's termination. L.M.'s obvious vulnerability, along with the other circumstances of this case provide the necessary connection between the off duty conduct here and the Employer's legitimate interests, which satisfies the nexus test set out above. L.M. was aware that Grievant was a police officer. Indeed he was a tenant in the building because he had been given a free apartment under the special public housing program to increase security in the building. This fact alone would not convert all of Grievant's off duty conduct to employment matters, but it is a factor here because it explains in part why L.M. came to Grievant's apartment that night. She had been having problems with certain tenants who she thought were using illegal drugs. She asked Police Officer Lupe Herrera about the situation and Herrera told L.M. to see Grievant. Thus when L.M. called that night it was for help with a police related issue. And she called Officer Kappers in part because he was a police officer at the suggestion of another police officer and he was aware of this.

⁵This conclusion is not the same as a legal conclusion under the vulnerable adult statute. Rather it is a conclusion about the reality of L.M.'s situation as it relates to the context of this case: that is, the context of the sexual encounter that took place between L.M. and Grievant.

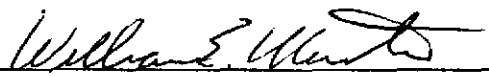
Given all of the above, it was not only a violation of the Minnesota Law Enforcement Code of Ethics for Grievant to use this occasion to have sexual intercourse with L.M., but it was a breach of the trust which Officer Kappers owed to L.M. as an individual, and a breach of the trust that the police department is vitally and legitimately interested in establishing with the public. This breach, involving a vulnerable adult, was reasonably regarded by the Employer as being sufficiently serious to justify termination.⁶ Special care has been taken and should be taken to avoid the abuses which can result from the juxtaposition of police power and the variety of vulnerabilities that police officers encounter both on and off duty in connection with their status as police officers.

IV CONCLUSION AND AWARD

Based upon the above Findings and Discussion, I conclude that there was just cause for the Employer to terminate Grievant. Grievant engaged in conduct that, though it was off duty, was connected to his employment and was sufficiently important in relation to the Employer's legitimate interests to justify the decision to terminate employment.

Therefore, the grievance herein is hereby denied.

Dated: January 31, 2000



William E. Martin
Arbitrator

⁶While the evidence showed that Officer Kappers had been a very good police officer in other respects, receiving several commendations, it also showed prior discipline for misconduct involving sex with a prostitute. I agree with the Employer that this prior misconduct is relevant here without taking the unnecessary step of speculating what the result might have been if this prior related disciplinary action were not a part of this case.

Employer's Exhibits

*Police Officers Federation of Minneapolis (Officer Robert A. Kappers) &
City of Minneapolis, Police Department
BMS No. 00-PA-12
Arbitrator William Martin*

Exhibits from Minneapolis Police Department Internal Affairs Unit Case #99-09

1. Table of Contents, Complaint & Supplement [Chronology of Investigation]
2. Summary by **Sgt. Douglas Belton** (Internal Affairs Unit)
3. Relieved of duty letter to Officer Robert Kappers – March 18, 1999
4. Complaint Denial – Hennepin County Attorney's Office, April 1, 1999
5. **Lisa Messano** statement – April 2, 1999
6. **James Messano** statement – April 2, 1999
7. **Officer Alan Rathbun** statement – April 2, 1999
8. **Officer Allen Williams** statement – April 2, 1999
9. **Sgt. Mark Cassman** statement – April 5, 1999
10. **Jennifer Milliman** statement – April 7, 1999 & notes dated March 17, 1999
11. Vulnerable Adult Maltreatment Report – March 17, 1999 & Letter from Hennepin County Adult Services Department – April 9, 1999
12. **Officer David Clifford** statement – April 8, 1999
13. **Tara Knutson** statement – April 21, 1999
14. Letters from Tara Knutson to Lisa Messano – March 3, 1999
15. Case notes to file of Lisa Messano filed by Tara Knutson – March 2 & 3, 1999
16. Memo to file of Lisa Messano – March 5, 1999
17. Notification Letter to Officer Robert Kappers – April 9, 1999
18. **Officer Robert Kappers** statement and Garrity/Tennessen warning – April 20 & 22, 1999
19. Cornerhouse Interview Synopsis by **Anne Nuernberg** – May 27, 1999
20. Video Tape of Cornerhouse interview, May 26, 1999
21. Memo from Sgt. Marcy Kuester to Sgt. Douglas Belton – May 28, 1999
22. Resident Peace Officer Program Plan – Minneapolis Public Housing Authority
23. Notice of Disciplinary Hearing sent to Robert Kappers - June 9, 1999
24. Transcript of Disciplinary Hearing – June 17, 1999
25. Discipline Worksheet – June 17, 1999
26. Letter from Deputy Chief William Jones to Chief Robert Olson – June 30, 1999
27. Discharge Notice – July 3, 1999

Minneapolis Police Criminal Case # MP-99-077039

28. Case Report
29. Property Inventory Report
30. Report of **Officer Alan Rathbun** (3rd Precinct), March 17, 1999 – Supplement 1

31. Report of **Officer David Clifford** (3rd Precinct), March 17, 1999 – Supplement 2 & 4
32. Report of **Officer Allen Williams** (3rd Precinct), March 17, 1999 – Supplement 5
33. Report of **Sgt. Rod Timmerman** (Identification Division), March 17, 1999 – Supplement 6 & pictures taken of Kappers apartment, #203 2121 Minnehaha
34. Taped Statement of **Jennifer Milliman**, March 18, 1999 – Supplement 7
35. Taped Statement of **Lisa Messano**, March 17, 1999 – Supplement 8
36. Taped Statement of **Glen Countryman**, March 18, 1999 – Supplement 9
37. Supplement of **Sgt. Ann Quinn-Robinson** (Sex Crimes), March 18, 1999 – Supplement 10
38. Supplement of **Sgt. Laurie Janikowski** (Sex Crimes), March 19, 1999 – Supplement 11
39. Supplement of **Sgt. Laurie Janikowski** (Sex Crimes), **Robert Kappers** interview, March 17, 1999 – Supplement 12
40. Taped Statement of **Robert Kappers**, March 17, 1999
41. Supplement of **Sgt. Laurie Janikowski** (Sex Crimes), **Glen Countryman** interview, March 18, 1999 – Supplement 13
42. Taped Statement of **Dr. William Brauer**, March 23, 1999 – Supplement 14
43. Taped Statement of **Dr. Douglas Heck**, March 23, 1999 – Supplement 15
44. Taped Statement of **Officer Lupe Herrera**, March 23, 1999 – Supplement 16
45. Supplement of **Sgt. Ann Quinn-Robinson** (Sex Crimes), March 23, 1999 – Supplement 17
46. Taped Statement of **Tara Knutson**, March 25, 1999 – Supplement 18
47. Taped Statement of **Evelyn Larue**, April 2, 1999 – Supplement 19
48. Supplement of **Sgt. Laurie Janikowski**, April 17, 1999 – Supplement 20
49. Sexual Assault Exam Report, March 17, 1999

Other

50. Grievance – July 5, 1999
51. Newspaper article from StarTribune – July 8, 1999
52. Certification to position of police officer, September 24, 1987
53. Newspaper articles – September 1993
54. Internal Affairs File 93-41: Summary
55. Recommendation for 15-day Suspension, September 1994 & Letters to Robert Kappers from former Police Chief John Laux
56. Minn. Stat. §§ 609.232 - .2335 (1998) (crimes against vulnerable adults)

Applicable MPD, Civil Service Rules, Labor Agreement, and Discipline Manual

57. MPD Rule 5-102 (Code of Ethics)
58. MPD Discipline Process Manual
59. Civil Service Rule 11
60. Labor Agreement