

City of mpls.

In the Matter of Arbitration

City of Minneapolis
"Employer"
and
Police Officers Federation of
Minneapolis
"Union"

(BMS Case No. 96-PA-2193)
Suspension
Appledorn
Christensen

THE DECISION IS
29

Date of Hearing: November 13, 1996
Place of Hearing: Minneapolis City Hall, Minneapolis, MN
Date of Award: December 14, 1996
Arbitrator: Bernardine Bryant

Appearances

For the Employer: Scott Paulsen
Goldberg, Swanson & Paulsen
100 Tallmadge Bldg.
1219 Marquette Avenue
Minneapolis, MN 55403
Sgt. Carol Mulvihill, I. A. Investigator
Christopher Shaheen, Attorney
Gary Haynes, Inspector
Honorable Delila F. Pierce

For the Union: Ann Walther, Attorney
4000 First Bank Place
601 2nd Avenue S.
Minneapolis, MN 55402
Sherry Appledorn, Grievant
Erica Christensen, Grievant

Issue

Were the Grievants suspended for just cause? If not, what is the proper remedy?

Background

This case has been brought by the Police Officers Federation of Minneapolis (hereinafter Union) on behalf of Erica Christensen and Sherry Appledorn (hereinafter Grievants) who are employed by the City of Minneapolis (hereinafter Employer).

The dispute which gives rise to this arbitration stems from the Employer's suspension of both Grievants because of their violations of Minneapolis Police Department Rules and Regulations prior to and at a Rasmussen hearing in front of the Honorable Delilah Pierce on July 20, 1995.

The incident which precipitated their need to appear at a Rasmussen hearing was an arrest for a possible DWI that they made as police officers on February 26, 1995. The transcript of the court hearing (Employer Exhibit 1) indicates that on that evening the Grievants observed a truck "fishtailing" and heard the truck's tires squealing when the driver of the truck pulled away from a stop sign. The Grievants pursued the driver of the truck until he pulled into an alley. According to their court testimony, after the driver stopped the truck they observed him get out of the truck and stumble up against a car parked in the driveway and stumbled again and lost his balance and used the car to break his fall (T. 46). As they were talking to him they could smell the odor of alcohol on his

breath, his coordination and balance were poor, he had bloodshot eyes and he admitted he had been drinking (T. 48). They did a pat search and placed him under arrest without doing a field sobriety test. However, the Grievants testified that they did not conduct a field sobriety test because they didn't feel comfortable doing it nor is it a mandated policy (T. 66). At the time the Grievants made the DWI arrest, Grievant Christensen had served as a police officer for approximately three years and Grievant Appledorn had served as a police officer for approximately two years.

The City of Minneapolis contracted for legal services with the Dorsey & Whitney Law Firm. Mr. Chris Shaheen, an attorney with the firm since 1994, was assigned to this case. The morning of the Rasmussen hearing, Attorney Shaheen, met with both Grievants to review the case.

At the arbitration hearing, he testified that he met the Grievants in the basement level of the City Attorney's office but it took a while to "hook up" with them because of the way they were dressed. He said he did not recognize them at first because they were not in uniform nor neatly dressed. He described their attire as not even work day casual. He was concerned because of the impression this would have on the judge and subsequently the jury. He said he discussed their appearance with them and told them they should put on a uniform. He described the discussion as prolonged and uncomfortable. He said the Grievants got angry with him because he couldn't give them a specific time that they were to appear in court. He said he tried to explain to them that he could not give them any definite time since he had no control over court scheduling. In

particular, Grievant Christensen walked out of the pre-trial meeting he was having with them and threatened to not appear in court although she did eventually show for the hearing. He further testified that the Grievants were not good witnesses. He said they were sarcastic and disrespectful to not only him but the defense attorney, as well and they failed to show respect for the court.

Subsequently, he expressed his concerns about what happened in a memo dated October 9, 1995 to Henry Martinez, Minneapolis Deputy City Attorney. He wrote... "their underlying conduct in the case was questionable. While I do not know what the Department's standard policy is, I have not encountered other officers who simply refuse to conduct field sobriety tests. While there are circumstances in which such tests are inappropriate, it seems to me that most any DWI arrest by these Officers is vulnerable to a probable cause challenge if they refuse to ever make additional inquiry into whether the driver is inebriated. Second, their attitude towards me was very uncooperative and unprofessional. Third, their attitude towards the court and the judicial process was unprofessional and disrespectful. This made it very difficult, if not impossible, for me to do my job effectively"... (Employer Exhibit 1 p.31-32).

Deputy City Attorney Martinez followed up with a memo to Chief of Police Robert Olson. Soon thereafter, an investigation into the Grievants conduct commenced. Sgt. Carol Jean Mulvihill of the Internal Affairs Unit was assigned by Lieutenant Skarma to conduct the internal investigation. Sgt. Mulvihill notified both Grievants on November 20, 1995 that "you are being investigated on allegations of your

unprofessional, disrespectful, and uncooperative conduct on July 20, 1995 when appearing for/and in court.

You are alleged to be in violation of the following:

- 1) MPD R/R 3-104 Dress Code
- 2) MPD R/R 5-103 Use of Discretion
- 3) MPD R/R 5-104 Professional Code of Conduct #11
- 4) MPD R/R 5-106 Procedural Code of Conduct #5
- 5) MPD R/R 6-101 Relationships With Other Agencies
- 6) Civil Service Rule 11.03 B-10 Discourtesy to public or fellow employees
- 7) Civil Service Rule 11.03 B-18 Violation of department rules, policies, procedures or City ordinances.

Mulvihill testified at the Arbitration hearing that she interviewed Attorney Shaheen and Judge Pierce and she reviewed the transcript of the Rasmussen hearing. She said she also talked over the investigation with her Supervisor and because of the credibility of Attorney Shaheen and Judge Pierce and the court record of the hearing it was determined there was no need to take statements from the Grievants. Therefore, she wrote up a supplemental summary of the investigation and made recommendations of findings as follows:

I recommend that OFFICERS APPLIEDORN and CHRISTENSEN violated **MPD R/R 3-104 Dress Code, Non Uniformed Personnel and Court Attire**, which states, *all employees reporting for work or court are to be clean and neat in appearance. When an officer is not in uniform, appropriate business attire shall be worn*, be found **SUSTAINED**. It is apparent by the observations and comments of the prosecuting attorney, his colleagues and the Judge that the officers were not in uniform or dressed in business attire as described in the MPD Manuals.

I recommend that OFFICERS APPLIEDORN and CHRISTENSEN violated **MPD R/R 5-103 Use of Discretion**, which reads in part, *the police profession is one*

*which requires officers to use considerable judgment and discretion in the performance of their daily duties, be found **SUSTAINED**.*

I recommend that OFFICERS APPLIEDORN and CHRISTENSEN violated **MPD R/R 5-104 Professional Code of Conduct #11**, which reads in part, *employees shall treat all fellow employees with respect*, be found **SUSTAINED**.

I recommend that OFFICERS APPLIEDORN and CHRISTENSEN violated **MPD R/R 6-101 Relationships With Other Agencies**, which reads in part, *it is the policy of this department to establish and maintain liaisons and relationships with criminal agencies and coordinating councils*, be found **SUSTAINED**.

Upon reading the court transcript, referring to page 24 lines 21-25, and page 25, line 1, I recommend OFFICER APPLIEDORN violated **MPD R/R 5-106 Procedural Code of Conduct #5**, which reads in part, *employees shall not willfully misrepresent any matter, sign any false statement or report, or commit perjury before any court, grand jury or judicial hearing*, be found **SUSTAINED**.

While it appears OFFICER CHRISTENSEN'S testimony was not credible (refer to pages 76-78), I recommend that **MPD R/R 5-106 Procedure Code of Conduct #5** be found **NOT SUSTAINED**.

Gary Haynes, at the time the Commander of the Third Precinct and currently Captain of Homicide reviewed Sgt. Mulvihill's investigative report. He concurred with Mulvihill's recommendation and issued a three day suspension (30 hours) for each Grievant because both had received a prior disciplinary action (City Exhibits 2-3). He testified at the arbitration hearing, that there was no reason to not believe the Judge's and Attorney Shaheen's statements nor disagree with the investigative report. But he did state on cross examination that someone should have taken statements from the Grievants during the investigative process.

On January 3, 1996 the Grievants were notified by letter that they each were suspended for three days (30 hours) without pay for violating the following policies:

MPD - R/R - 3-104 Dress Code

MPD - R/R - 5-103 Use of Discretion

MPD - R/R - 5-104 Professional Code of Conduct #11

MPD - R/R - 6-101 Relationships to other Agencies

The other allegation MPD R/R 5-106 Procedural Code of Conduct #5 was not sustained (Employer Exhibit 1) for Grievant Christensen.

Grievances were filed on January 12, 1996 (Joint Exhibit 2-3) and are now timely and properly in arbitration.

Pertinent Contract Language & Work Rules

Article 3 - Management Rights

The Federation recognizes the right of the City to operate and manage its affairs in all respects in accordance with applicable law and regulations of appropriate authorities. All rights and authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City.

Article 4 - Discipline

Section 4.1. The City will discipline employees who have completed the required probationary period only for just cause. The unit of measurement for any suspensions which may be assessed shall be in hours. Investigations into an employee's conduct which do not result in the imposition of discipline shall not be entered into the employee's official personnel file.

Section 4.2. A suspension, written reprimand, demotion or discharge of an employee who has completed the required probationary period may be appealed through the grievance procedure as contained in Article 5 of this Agreement. In the alternative, where applicable, an employee may seek redress through a procedure such as Civil Service, Veteran's Preference, or Fair Employment. Except as may provided by Minnesota law, once a written grievance or an appeal has been properly filed or submitted by the employee or the Federation on the employee's behalf through the grievance procedure of this Agreement or another available procedure, the employee's right to pursue redress in an alternative forum or manner is terminated.

Section 4.3. Employee shall receive copies of and be permitted to respond to all letters of commendation or complaints that are entered and retained in the official personnel file. Upon the written request of employees, the contents of their official personnel file shall be disclosed to them, their Federation Representative, and/or their legal counsel.

Article 5 - Grievance & Arbitration

Sec. 5.1 - General Provisions

- A. This grievance and arbitration procedure has been established to resolve specific disputes which may arise between the Parties concerning, and limited to, the interpretation or application of the provisions of this Agreement.

Sec. 5.3 - Arbitration Procedure. If a grievance has not been resolved by the foregoing procedure and the Federation has served its notice of intent to arbitrate in accordance with Section 5.2 (Step 3), above, the Parties shall proceed as follows:

- C. The Arbitrator shall have no authority to amend, modify, nullify, ignore, add to or subtract from the provisions of this Agreement. He shall be limited to only the specific written grievance submitted to him by the City and the Federation and shall have no authority to make a decision on any other issue not so submitted to him. His decision shall be based solely upon his interpretation of the meaning or application of the express terms of this Agreement and the facts of the grievance presented. The decision of the Arbitrator shall be final and binding.

Minneapolis Police Department Rules

R/R 3-104 Dress Code - Non-Uniformed Personnel and Court Attire which states in part: All employees reporting for work or court are to be clean and neat in appearance. When an officer is not in uniform, appropriate business attire shall be worn. (04/04/91) (12/20/94) An exception to this is undercover or other unique duty requiring clothing suitable to the particular assignment. (05/01/89) Sworn employees assigned to administrative and investigative positions may wear the following:

Men:

Suit, or sport coat with:
- dress shirt and tie or
- turtleneck shirt

Women:

Dress, Suite, or blazer with:
- blouse
- turtleneck shirt

- a sweater may be worn with above
- dress slacks
- dress shoes

- a sweater may be worn with above
- dress slacks (no stretch or stirrup pants) or skirt
- dress shoes

R/R 5 - 103 Use of Discretion

The police profession is one which requires officers to use considerable judgment and discretion in the performance of their daily duties. Officers have a large body of knowledge from Department policies and procedures, training, their own professional policy experience and the experiences of their fellow officers to guide them in exercising proper judgment and discretion in situations not specifically addressed by Department rules and regulations. In addition, officers must always adhere to the following principles in the course of their employment with the Minneapolis Police Department:

Police Action - Legally Justified. Officers must act within the limits of their authority as defined by law and judicial interpretation, thereby ensuring that the constitutional rights of individuals and the public are protected.

Equality of Enforcement. Officers shall provide fair and impartial law enforcement to all citizens.

Loyalty. Officers shall be faithful to their oath of office, strive to uphold the principles of professional police services, and advance the mission of the Department.

R/R 5-104 - Professional Code of Conduct:

11. Employees shall treat all fellow employees with respect. They shall be courteous and civil at all times with one another. When on duty in the presence of other employees or the public, officers should be referred to by rank.

R/R 5-106 - Procedural Code of Conduct

5. Employees shall not willfully misrepresent any matter, sign any false statement or report, or commit perjury before any court, grand jury or judicial hearing.

R/R 6-101 - Relationships to Other Agencies

Establishing and maintaining channels of communication between law enforcement agencies and other criminal justice agencies is essential to cooperating and planning with agencies with differing mandates. (04/01/93)

It is the policy of this department not establish and maintain liaisons and relationships with criminal justice agencies and coordinating councils. (04/01/93)

Civil Service Rule 11:03-B- Misconduct -

the following activities are examples of misconduct which may be cause for disciplinary action:

- 10. Discourtesy to public or fellow employees.
- 18. Violation of department rules, policies, procedures or city ordinance.

Position of the Employer

The Employer contends that it had just cause to suspend the Grievants for three days (30 hours) without pay. An important duty of a police officer is court appearances and that includes conducting oneself professionally and looking professional in

appearance. On July 20, 1995 neither Grievant appeared for court duty in a uniform or business attire as per the police code of conduct. Further, both officers gave the prosecuting attorney a hard time, did not cooperate before or during the court hearing and in general displayed a disrespect for the court. Judge Delilah Pierce made mention of her concerns regarding the officers conduct in her Opinion and Attorney Shaheen followed up with his concerns in a memo to Deputy City Attorney Martinez. It is highly unusual for both a judge and prosecuting attorney to make mention of concerns regarding police officer conduct in court. There is no reason for either Judge Pierce or Attorney Shaheen to embellish or give false statements about what occurred in court. The Employer argues that the suspension is a reasonable and justifiable level of discipline. The Employer contends that even if it failed to provide the Grievants with the opportunity to make a statement during the investigatory process, any such procedural defect did not cause any prejudice to the Grievants.

Position of the Union

The Union contends that there was not just cause to suspend the Grievants. It maintains that the style of dress of the Grievants was not inappropriate because the hearing was before a judge and not a jury. Further, the two Grievants admitted they willfully did not show for a prior court hearing which gave rise to a previous discipline. The fact that they were truthful in admitting to their previous violation which resulted in discipline is proof they are truthful in this case, as well. The Union asserts that the Grievants did not intentionally state misrepresentations of fact nor did they knowingly

violate any policies or willfully show disrespect for the court. The Union asserts that the Judge had a predisposition against the Grievants and there is no basis for the charges against both Grievants.

Discussion and Opinion

The persuasive evidence established that the Employer provided sufficient proof to support the disciplinary suspensions. The Employer's case established that the Grievants violated the dress code, R/R 3-104; showed a lack of judgment and discretion in upholding the principle of professional police service, R/R 5-103; failed to uphold the professional code of conduct, R/R 5-104 #11; and failed to maintain relationships with other agencies of justice, R/R 6-101.

It is reasonable to conclude that the Police Department relied on the corroboration of the statements of Judge Pierce and Attorney Shaheen during the internal investigation and assumed that neither one of them would have any reason to embellish or give false statements to the internal investigator. The judicial system is called on to maintain high standards of judicial conduct and must uphold the reputation for truth and veracity. Consequently, judges are called upon to avoid all situations which so much as suggest that their rulings are tempered by favoritism or self interest.

Both Grievants were notified that there would be an internal investigation and were notified as to what the charges against them were as per the letter they each received from Sgt. Mulvihill. At the conclusion of the internal investigation, they were each given written reasons for the discipline and an opportunity to grieve the discipline, including

the right to arbitration. The Labor Agreement, Article 4 Discipline, Sec. 4.3 states that employees shall receive copies of and be permitted to respond to all letters of complaints that are entered and retained in the official personnel file. Article 4, Sec. 4.2 provides for an appeal through the grievance procedure, Civil Service, Veteran's Preference or Fair Employment where applicable.

The Grievants sought redress through the grievance procedure to pursue a remedy for the disciplinary action. The Grievance Procedure, Article 5, provides for the parties to meet to discuss the elements of the grievance and resolve the issue, if possible. The grievance process allows for an opportunity for the Grievant to present her side of the story and challenge the Employer's decision. While the Employer did not take statements from either Grievant during the internal investigation, certain elements of due process were observed.

The following persuasive evidence indicates that the Employer's actions were taken because both Grievants behavior had proven significantly detrimental to the image of the police department and in violation of police department rules and regulations.

1. The Grievants have as part of their job responsibility as police officers, a responsibility to testify in court. Two of the Employer witnesses, Judge Pierce and Attorney Shaheen both credibly testified at the arbitration hearing that the Grievants were inappropriately dressed for court.

Of particular concern to a police department is the public image and the responsibility for presenting a professional image and appearance. Other arbitrators have

permitted discipline or discharge "where it was shown that appearance was detrimental to image" (In Elkouri & Elkouri p. 718; 55 LA 663-666; 55 LA 1020-1024; 37 LA 130).

Attorney Shaheen testified that while he doesn't remember exactly what the Grievants were wearing, he remembers that they were not in uniform and not neatly dressed. His best recollection is that they had on casual slacks and T-shirts. He was very concerned about their appearance and the fact that this might interfere with the impression this would have on the judge and jury. He stated that the discussion regarding their dress attire was prolonged and doubted that there was enough time remaining for them to change clothes prior to the start of the Rasmussen hearing.

Judge Pierce testified that the Grievants were dressed in pants, shirts and had on fanny packs. She stated that initially she thought they were witnesses for the defense instead of police officers because of the way they were dressed.

Both Grievants testified that they were wearing slacks and some type of knit summer top. Grievant Christensen testified that they were dressed this way for comfort and that no one had ever told them before that this style of dress was inappropriate for court.

It is clear that from all the testimony, including both Grievants, that they were not dressed as per R/R 3-104. Appropriate business attire is listed as a dress, suit or blazer with a blouse, turtleneck shirt, dress slacks or skirt and dress shoes. Department R/R 3-104 clearly states that employees reporting for work or court should be clean and neat in appearance and when not in uniform appropriate business attire shall be worn.

The fact that both Judge Pierce and Attorney Shaheen were concerned about the professional appearance and the image that both Grievants conveyed to the court because of their dress attire is further persuasive evidence that the Grievants were dressed inappropriately for a court appearance and in violation of R/R 3-104.

2. The general perception of Judge Pierce and Attorney Shaheen was that both Grievants displayed an arrogant attitude and showed a general lack of judgement and credibility in carrying out their role as police officers and as witnesses in court.

Attorney Shaheen testified that the Grievants failed to cooperate with him as witnesses for the prosecution. The Grievants were argumentative and at some point during the preliminary court discussion, Grievant Christensen walked away and threatened to not appear in court. He was concerned that she would not appear as a witness. He described their behavior as being sarcastic, uncooperative, and argumentative. He said they slouched in their seat while testifying as witnesses and were disrespectful to him and the defense attorney by the way they responded to questioning from both him and the defense attorney while on the witness stand.

Judge Pierce's testimony at the arbitration hearing, corroborated that of Attorney Shaheen's. She, too, described both Grievants as being disrespectful to the court, argumentative, and hostile in behavior. She was concerned about the hostility they both exhibited throughout their testimony and their general demeanor. She stated that she was concerned about their body language and the way they slouched in their chair while

testifying. She further stated that when you combine the inappropriate dress attire along with their attitude, it made for a very bad impression for the court.

The persuasive evidence and testimony favors the Employer. Employment as a police officer requires an officer to adhere to certain standards of conduct. The Employer has a right to expect police officers to model respectful behavior. Although both Grievants denied being disrespectful or sarcastic except for perhaps being "short with the defense attorney", the testimony of Judge Pierce and Attorney Shaheen is more plausible and credible.

In assessing the credibility of the testimony of all the witnesses, I included the following factors: 1) character and reputation of the witnesses 2) relative experience of witnesses 3) opportunity of the witnesses to observe 4) self serving character of the testimony 5) interest or bias of the witnesses 6) inconsistency and internal contradictions.

The consistent testimony of the Employer witnesses and the factors used in assessing credibility favors Judge Pierce and Attorney Shaheen as being far more credible than both Grievants. Judge Pierce and Attorney Shaheen had nothing to gain and much more to lose by not being honest. And, to suggest that either one was not truthful or had a predisposition against both Grievants makes no sense. Clearly, there was more incentive for the Grievants to deny the charges.

Judge Pierce, a twenty three year veteran of the bench, stood to gain nothing by testifying to the inappropriate conduct that she observed by both Grievants. It is understood that judges must maintain, as part of their judicial code, a high standard of

judicial performance with particular emphasis upon being scrupulously fair and impartial, and they are called on to maintain high standards of conduct. Likewise, Attorney Shaheen had nothing to gain by not being honest in his interactions with his clients and the police department.

Further, Judge Pierce found the Grievants to be less than credible as witnesses during the Rasmussen Hearing and made mention of her problems with their credibility in the court record (Employer Exhibit 1 p. 112).

In addition, at the arbitration hearing, there were responses to questions that suggested a lack of credibility. Of particular note was when Mr. Paulsen asked Grievant Appledorn whether she wore a fanny pack to the Rasmussen hearing, (as per Judge Pierce's testimony regarding their attire). She replied, "NO, IT WAS A GUN" but, on redirect by Ms. Walther, Grievant Appledorn stated, "YES IT WAS A FANNY PACK, but a gun was in it. I am aware of others who wore guns in fanny packs."

One would logically expect that if indeed the Grievant was testifying truthfully she would have responded to the question by Mr. Paulsen with a YES to the simple question. The fact that she said it was a gun and only upon redirect by her attorney responded that yes it was a fanny pack with a gun in it, raises suspicions of an employee who changes her answer in order to satisfy the question of the inquisitor. This type of response to questioning raises a significant credibility issue with the Grievant's testimony, as well.

While the testimony of Judge Pierce and Attorney Shaheen would have been found more credible than both Grievants testimony even without the example of a less than

forthright and direct response to the fanny pack question, this example further demonstrates that the more compelling evidence clearly supports the Employer's actions to discipline the Grievants for violations of police Rules and Regulations as cited. The evidence and testimony demonstrates that both Grievants failed to show respect to fellow employees and failed to maintain good relationships with other agencies, including the courts.

It is reasonable for the Employer, in this case, to enforce rules. And, the purpose of progressive discipline, in this case, is to encourage the Grievants to reform their conduct.

DECISION

Based on the foregoing findings and conclusions, the grievances are hereby denied.

12/14/96

Date

Bernardine Bryant

Bernardine Bryant, Arbitrator