Minneapolis, City of

IN THE MATTER OF ARBITRATION BETWEEN

JL Reynolds

City of Minneapolis
Police Department
Employer/City/Department

-and-

The Police Officers Federation
of Minneapolis
Union/Federation

GRIEVANCE ARBITRATION

DECISION AND AWARD

Re: Demotion of
Sergeant Bruce Kohn

BMS Case Number:
96-PA-1117

Date of Award:
August 26, 1996

Arbitrator: James L. Reynolds

Date and Place of Hearing: July 24-25, 1996
Offices of the Employer
Minneapolis, Minnesota

Date of Receipt of Post Hearing Briefs: August 16, 1996

APPEARANCES

FOR THE EMPLOYER: Mr. Scott A. Paulsen, Consultant
Goldberg, Swanson & Paulsen
100 Tallmadge Building
1219 Marquette Avenue
Minneapolis, Minnesota 55403

FOR THE UNION: Ms. Ann E. Walther, Attorney
Best & Flanagan
4000 First Bank Place
601 Second Avenue South
Minneapolis, Minnesota 55402-4331

ISSUE

Was the Grievant, Bruce Kohn, permanently demoted from his rank of Sergeant to that of Patrol Officer for just cause as required by Article 21 of the Collective Bargaining Agreement? If not, what shall the remedy be?

JURISDICTION

The issue in grievance was submitted to James L. Reynolds as sole arbitrator for a final and binding resolution under the terms set forth in Article 5 of the Agreement (Joint Exhibit One and Joint Exhibit Four) between the parties. The arbitrator was mutually selected by the parties in accordance with the procedures of the Bureau of Mediation Services of the Minnesota State Government. The parties stipulated at the hearing that the arbitrator had been properly called, and that the grievance had been processed through the required steps of the grievance procedure without resolution and was properly before the arbitrator.

The hearing was held at the Minneapolis City Hall commencing at 9:30 A.M. on July 24, 1996, and continuing at 9:00 A.M. on July 25, 1996. At the hearing the parties were provided full and complete opportunity to examine and cross examine witnesses, and to present their proofs. The parties provided the arbitrator with their final argument through post hearing briefs which were received by the agreed upon deadline. With the receipt of the post hearing briefs the record in this matter was closed. The issue is now ready for determination.

STATEMENT OF THE ISSUE

The issue in this case is whether or not the grievant was permanently demoted for just cause, and if not what shall the remedy be? The contract provision which bears on this grievance is found in Article 21 - DISCIPLINE. It reads in its entirety as follows:

ARTICLE 21
DISCIPLINE

Section 21.1. The City will discipline employees who have completed the required probationary period only for just cause. 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 21.2. 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 thorough procedure such as Civil Service, Veteran's Preference, or Fair Employment. Except as may be 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 form or manner is terminated.

FACTUAL BACKGROUND

Involved herein is a grievance which arose when the City permanently demoted the grievant from Sergeant to Patrol Officer for violation of Departmental rules and regulations. The demotion was effective on January 3, 1996. The Employer is the City of Minneapolis, a municipal corporation incorporated under the laws of the State of Minnesota. The Union is the exclusive representative for all certified employees in the classifications identified in Section 1.1 of the Labor Agreement. The employees represented by the Federation are all the sworn Officers of the City of Minneapolis Police Department with the exception of Chief, and three Deputy Chiefs. The parties have maintained a collective bargaining relationship for many years.

The Agreement (Joint Exhibit Four) between the parties was made effective on January 1, 1993 and continued in full force and effect through April 15, 1995. At the hearing the parties mutually stipulated that the collective bargaining agreement, Joint Exhibit Four, controls in this case, notwithstanding the fact that it had expired by the date the grievant was demoted.

The grievant in this case was hired by the Minneapolis Police Department on January 7, 1985. At the time of his demotion the grievant was a Uniformed Patrol Sergeant assigned to the Third Precinct. In addition to his duties as a Uniformed Patrol Sergeant, the grievant was also the Supervisor of the Chemical Munitions Team at the time of the incident which gave rise to his demotion. The Chemical Munitions Team is a part of the Emergency Response Unit of the Department. Related to those duties the grievant was responsible for collecting items from the armory at the Third Precinct for use in a training exercise being planned for the Emergency Response Unit of the Department at Fort Dodge, Iowa. Those items were to be collected and made ready for loading onto the ERU vehicles on the evening of September 8, 1995 for transport to Fort Dodge on the morning of September 10. The record shows that the grievant entered the armory at the Third Precinct on four occasions the night of September 6 and the morning of September 7, 1995. The grievant testified that he did so to collect the items needed for the training exercise at Fort Dodge.

In the course of his career with the Minneapolis Police Department, the grievant had received no prior sustained disciplinary actions against

him. The record shows that he had received many letters of appreciation and had been awarded the Medal of Commendation and Department Award of Merit in 1993.

The grievant was demoted for violation of six rules and regulations of the Minneapolis Police Department. The portions of those rules and regulations which the grievant was charged with violating are as follows:

> 1-405 RESPONSIBILITY OF SUPERIOR OFFICERS
>
> To set an example for subordinates and insure that department rules, regulations and orders are followed.
>
> 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.
>
> 5-310 NOTIFICATION OF FIREARMS DISCHARGE
>
> Any officer who discharges a firearm, whether on or off duty, shall notify an immediate superior officer so soon as possible.
>
> 5-308 JUSTIFIABLE USE OF FIREARMS
>
> Officers are allowed to use their firearm only when deadly force is authorized by State Statute 609.066.
>
> 5-311 WRITTEN REPORT ON DISCHARGE OF FIREARMS
>
> All firearms discharges that require notification shall be reported in a written statement by the officer involved.
>
> 7-804 EXPLOSIVES, SUSPECTED EXPLOSIVE PACKAGES AND EXPLOSIONS
>
> An officer called to a location of any explosion or where an explosive or suspected explosive package or device, including a chemical bomb is found shall immediately notify the MECC. The Communication Center shall immediately notify the Bomb Squad.

Related to the violation of Department rules and regulations, the grievant was charged with violation of Civil Service Rule 11.03 - Cause for Disciplinary Action, Subdivision B, Misconduct, Sections B-18 and B-9. Those sections read as follows:

> B. Misconduct
>
> The following activities are examples of misconduct which may be cause for disciplinary action.
>
> * * * *
>
> 9. Violation of safety rules, laws, and regulations.
>
> * * * *
>
> 18. Violation of department rules, policies procedures or City ordinance.
>
> * * * *

The charges against the grievant arose out of an incident which occurred on the dog watch at the Third Precinct station at approximately 5:00 AM on the morning of September 7, 1995. At that time the grievant was the supervisor of the dog watch at the Third Precinct. He was outside the station when he was notified by a passerby in a vehicle that a suspicious looking item was in Lake Street near Minnehaha Avenue. The grievant approached the item and identified it as a military type trip flare. He visually examined the trip flare and determined that it was safe, with the spoon lever still in place.

At approximately 5:00 AM the grievant notified the MECC and requested the Bomb Squad to assist. The MECC promptly notified Officer Larson,

who had the watch for the Bomb Squad at the time. Officer Larson lives in Wisconsin, and was contacted by the MECC at his home there. Realizing that it would be some time before he could be on scene, Officer Larson notified Inspector Indrehus who is a Bomb Squad Technician, and lives closer to the scene. Officer Larson notified Inspector Indrehus at approximately 5:00 AM. Inspector Indrehus told Officer Larson that he would pick up the bomb truck and meet him at the scene. The record of this hearing shows that the grievant was not notified at that time of the plan which was agreed between Inspector Indrehus and Officer Larson.

At 5:08 AM the grievant requested an estimated time of arrival for the Bomb Squad from the MECC. They advised that Officer Larson was coming from Wisconsin, but did not indicate that Inspector Indrehus was picking up the Bomb Truck. From this information, the grievant concluded that it would be a while before the Bomb Squad arrived.

The flare was left in Lake street until at least 5:18 AM, at which time the grievant requested MECC to advise Officer Larson of the cell phone number in the grievant's squad. MECC replied that it was "too late now", meaning that Officer Larson was then enroute.

At 5:24 AM the grievant received a call on his cellular phone from Officer Larson advising that he was enroute from his home in Wisconsin. Officer Larson did not tell the grievant that anyone else was responding, i.e. Inspector Indrehus. The grievant then estimated that

it would take about an hour to an hour and a half for Officer Larson to arrive at the scene. Recognizing that rush hour was about to begin on Lake Street, the grievant determined that it would be necessary to move the trip flare out of the street. He picked up the flare with his hand, and placed his finger over the spoon. While holding the flare out the window of the squad with his left hand, he drove to an area behind a nearby Target store. He then pulled the pin and delivered the flare into a pile of dirt using an underhand throwing motion. The spoon came off, but the flare failed to detonate. In a continuing attempt to detonate the flare, the grievant then fired two rounds from the 12 gauge shotgun carried in his squad car into the flare. It did not detonate. The grievant's partner, Sergeant Klund, then tried his hand at detonating the flare by firing another round into it. It still did not detonate. The grievant then brought an ammunition can from his squad car, and placed the flare into it.

At 5:46 AM the grievant called Officer Larson by cell phone. The grievant told Officer Larson that he had moved the flare to a location behind the Target store, and attempted to deploy it without success by "popping" (i. e. shooting) at it. Officer Larson acknowledged that report, and advised that Inspector Indrehus was driving the Bomb Truck to the scene. That was the first time that the grievant was aware that anyone other than Officer Larson was responding.

At 5:48 AM the grievant called Inspector Indrehus by cell phone. Inspector Indrehus was at that time in the Bomb truck. The grievant advised him that the scene had moved to behind the Target store, and that he had "popped" or "capped" the device. "Popped" or "capped" referred to the attempts made to deploy the flare with shotgun fire. Inspector Indrehus stated that "was not good".

Shortly after Inspector Indrehus arrived, Officer Larson arrived. The flare was removed from the ammunition can, and successfully deployed by means of a "water cannon" shot. A small intense fire ensued for approximately 60 to 90 seconds. Some of the nearby weeds caught fire, but burned themselves out without any fire fighting efforts.

Inspector Indrehus directed the grievant to write a report and label it as "incendiary device". The grievant prepared such a report, but failed to mention that the discharge of a firearm had occurred. Department rules and regulations require notification of a superior officer and filing of a written report when a police officer discharges a firearm. At the hearing the grievant testified that he simply forgot to file the report, and that he recognizes that he should have done so. He further testified that, at the time, he did not think notification of a superior officer of the discharge was necessary because he was the supervisor on duty. He testified that he now recognizes that he should have notified his superior.

Later on the day of incident Inspector Indrehus reported the matter to Deputy Chief Hestness. He expressed concern about how it was handled by the grievant, and reported that he felt that several department rules and regulations had been violated, and that the grievant set a terrible example for the other officers who were present at the scene.

On September 8, 1995 an internal affairs complaint was issued which initiated an IAD investigation of the grievant in this matter. That investigation resulted in sustained charges that the grievant violated six department rules and regulations. After reviewing the IAD report the grievant's supervisor, Inspector Haynes, recommended on November 16, 1995 that the grievant serve a three day suspension. On November 26, 1995 the charges against the grievant were sustained by Deputy Chief Hestness. Chief of Police Robert K. Olson ordered that statements be taken from all Third Precinct officers on duty during the dog watch on the night of the incident, and that Deputy Chief Hestness conduct a Laudermille hearing prior to discipline being imposed. That additional investigation work was completed, and Deputy Chief Hestness submitted his report to Chief Olson on December 22, 1995. In his report Deputy Chief Hestness recommended that the Chief consider a reduction in rank for the grievant. Deputy Chief Hestness also reported to Chief Olson that the manner in which the flare came to be found on the city street was suspect. He noted that a number of white phosphorous military signal flares were stored in the armory, and were not inventoried. He further reported that the grievant had

access to the Third Precinct armory, and that he had been in the armory prior to the flare being found.

On January 3, 1996 Chief Olson issued a notice to the grievant which sustained the findings of violation of six department rules and regulations, and imposed a permanent reduction in rank from the grievant's position as sergeant to the rank of patrol officer effectively immediately. The Federation filed a timely grievance which was heard in arbitration on July 24, 1996.

DISCUSSION OF THE ISSUE AND POSITION OF THE PARTIES

Position of the City

The City argues that the grievant was demoted for just cause, and the grievance should be denied in its entirety. In support of this position the City provides the following arguments.

1. The grievant violated fundamental Departmental policy and endangered himself and his coworkers.

2. These violations cannot be trivialized as the Federation suggests. The Department operates on rules and rank. The rules are orders, not suggestions or guidelines for officers to follow at their convenience.

3. Pure luck prevented the grievant and others from being seriously injured during this incident. The grievant, Inspector Indrehus and Sergeant Larson could have received serious burns had the flare deployed. Such injuries would have exposed the City to potentially large legal liability.

4. The record in this case dismisses the suggestion that the grievant was acting in good faith. After moving the flare to a location behind the Target store, the grievant had no reason whatsoever to attempt to deploy it. He was attempting to provide a show for himself and the other officers present.

5. The grievant attempted to cover up his discharge of the shotgun by picking up the shell casings, placing the flare in the ammunition can, and failing to tell Inspector Indrehus and Sergeant Larson when they arrived that he had fired the shotgun at the flare.

6. The grievant continued to hide the shotgun episode by failing to advise a senior officer of his use of the firearm as required by policy. He further "forgot" to mention the use of the shotgun in the report he filed several days later. Such omissions are in clear violation of policy and state statute.

7. The grievant did not act in good faith, and after the Department learned of his actions his only option was to put a good faith spin on his actions.

8. The decision of the Chief to permanently demote the grievant should be upheld. While the grievant has a good work record, he repeatedly violated rules in handling this situation and reporting it. Good judgment was nonexistent. He completely abandoned his duties as a Sergeant during the incident. His credibility and trust as a supervisor have been severely compromised as a result of this incident and will not be remedied by a short term demotion as argued by the Federation.

9. Civil Service rules do not limit the demotion to 180 days as argued by the Federation.

10. The decision by Chief Olson to permanently demote the grievant was not discriminatory, capricious or motivated by non-job-related concerns. Other officers have been demoted for failing to meet the duties and responsibilities of their rank.

11. The arbitrator should not substitute his judgment for that of management in a case where there is good and objective reason for the disciplinary action taken. The Chief made a reasoned decision based on undisputed violation of Department rules that the grievant should no longer assume the duties and responsibilities of a Sergeant. It must be the Department's decision to determine when the grievant may again assume those duties and responsibilities.

Position of the Federation

The Federation concedes that the grievant technically violated the six rules and regulations that he is charged with violating. While there is just cause for discipline, the severity of a permanent demotion far outweighs the action needed to correct the grievant's behavior. The permanent demotion should be set aside in favor of a lesser penalty. In support of this position the Federation offers the following argument.

> 1. The City lacks just cause for a permanent demotion of the grievant. The disciplinary policy of the City is that discipline shall be progressive and corrective rather than punitive. The Civil Service Rules provide that permanent demotion is appropriate only where an employee has problems in performing in the position of higher rank, and not for general misconduct.
>
> 2. The City based the severity of discipline upon misrepresentations and unsubstantiated allegations. The incident was not a very dangerous situation. City witnesses testified that the flare is an illuminator and not an explosive device. It contains magnesium and not white phosphorus as reported by Inspector Indrehus and Deputy Chief Hestness. At the scene Inspector Indrehus approached the flare without using protective clothing or devices. It is apparent that he recognized that it was a flare and not a dangerous explosive device.
>
> 3. The City inappropriately relied upon Deputy Chief Hestness' allegations that the grievant stole the flare from the Third Precinct armory. There are no facts to support such a charge, and the grievant was not charged with violation of any Department policy against stealing property or lying in an IAD investigation. Notwithstanding the absence of such charges, Deputy Chief Hestness reported his suspicions to Chief Olson prior to the Chief making his determination of the level of discipline to apply.

4. The City, through its witness Deputy Chief Hestness, claimed that it was "suspect" for the grievant to not obtain the name of the passerby who reported the flare in the street. To suggest that an officer should wait in responding to a situation to first gather information about the informant is absurd. No evidence was offered by the City to rebut the grievant's testimony that under the circumstances, proceeding to the scene rather than wasting time interrogating the citizen was common practice.

5. The grievant was required by his duties as an ERU supervisor to be in the Third Precinct armory the morning of September 7. The fact that Deputy Chief Hestness did not mention to Chief Olson that the grievant had a legitimate reason to be in the armory rises to the level of intentional concealment of material facts. The credibility of Deputy Chief Hestness is, therefore, suspect.

6. There is no evidence that the flare came from the ERU armory. The Bomb Squad has recovered trip flares on other occasions, which shows that such devices are available in public.

7. The permanent demotion violates City rules and policy. City policy provides that discipline is to be progressive and corrective rather than punitive. It was stipulated that the grievant had no prior discipline. The imposition of a permanent demotion for a first time offense, particularly on an employee with an impeccable record, is violative of City policy. The Chief, himself, characterized the demotion of the grievant as "pure punishment". The City violated its policy which provides that discipline cannot be punitive.

8. The Discipline of the grievant was not for substandard performance. The Civil Service rules provide that permanent demotions are appropriate for substandard performance, rather than misconduct. The grievant is charged with acts of misconduct, accordingly, a permanent demotion is not appropriate.

9. Absolutely no evidence was presented by the City to show that the grievant could not perform the duties of a sergeant. In fact, the opposite was true. His performance evaluations were excellent, including the one covering the period of this incident. Several witnesses testified that the grievant was an excellent employee and supervisor. The Chief, himself, testified that the grievant could test again for the position of sergeant again, admitting that permanent demotion was not appropriate.

10. The permanent demotion is unreasonable in light of the relative damage to the City and grievant. The City has not suffered at all from this incident. There were no citizens involved, no publicity, and no injuries. There was no loss of money to the City and no loss of reputation. There is no potential of a lawsuit from a citizen or an employee as a result of the grievant's actions. Conversely, the grievant has suffered greatly both in monetary terms and by reputation.

11. Two other permanent demotion cases in the Department have been reduced by arbitrators to fixed term demotions. Those cases involved conduct of sergeants which was more egregious than the conduct of the grievant in the instant case. In the instant case the public was not involved, there were no injuries, no publicity, and no harm whatsoever. If permanent demotion is too severe in those prior cases, it is clearly too severe here.

ANALYSIS OF THE EVIDENCE

In a disciplinary case the arbitrator must determine if the employer has presented sufficient proof of two issues. The first is the employer's burden to show that the grievant actually committed the misconduct of which he/she stands accused. The second is whether or not the level of discipline was justified when consideration is given to all the facts of the case including the prior record of the grievant.

In this case, the City and the Federation concur that the grievant did indeed violate the six rules and regulations he is charged with violating. Accordingly, the Employer's burden to show that the grievant committed the acts he is accused of has been met. The remaining question in this case is whether or not the penalty of a permanent demotion is too severe. The City, of course, claims that

the penalty is appropriate, the Union claims that just cause for the permanent demotion is not present.

In determining the appropriateness of a disciplinary sanction imposed it is well settled that an arbitrator will give consideration to the past record of the grievant, the severity of the infractions committed by the grievant, the consistency of penalties applied in similar cases, and the extent the behavior of the grievant would be remedied by a lesser sanction.

A positive record of a grievant can mitigate the evidence against him, while a record blemished with many sustained prior disciplinary actions will promote a more severe penalty. In this case the grievant has a very good record. His recent performance evaluations have been uniformly superior. He has received many letters of appreciation, and has been decorated with the Medal of Commendation and Award of Merit. Some of his former subordinates appeared at the hearing and testified that they found him to be a good supervisor, and that they would trust his judgment. No previous disciplinary actions have been taken against the grievant. It is clear that this incident is in sharp contrast with his established good record. His record should serve to mitigate the sanction imposed. The City claims that it has already considered his record in determining that the grievant should be permanently demoted rather than terminated. A permanent demotion is a very severe disciplinary sanction. It is clearly of greater weight

than a ten day suspension, for example. It carries with it a significant financial loss for the grievant over the balance of his career. Additionally, and equally important, it compels the grievant to carry a permanent stigma. In view of the severity of the permanent demotion, it does not appear that the City gave adequate consideration to the past record of the grievant.

The City is correct that the rule infractions charged to the grievant are very serious. The rules violated go to the essence of leadership and credibility of a supervisor. It is noted in the record, however, that the grievant immediately recognized the foolishness of how he handled the incident, and promptly mentioned to the officers under his command that they should let the Bomb Squad move a suspect item in any similar situation in the future. It is important to note that he made these comments before any charges were brought against him.

As to the grievant's failure to file a report that he had discharged a firearm, I find his explanation that he forgot to be unimpressive. He was a Sergeant in the Department, and is expected to know the rules in regard to discharge of firearms by a police officer. It is noted, however, that no evidence was offered to show that the grievant failed to report the discharge of the shotgun in attempt to cover up the incident. While the City made such a charge, no evidence was presented to sustain it. To the contrary, the grievant's testimony that he told Inspector Indrehus and Officer Larson in the course of cellular telephone conversations with them that he had "capped" or "popped"

the flare was not refuted. If the grievant had intended to cover up his actions, he would not have made such a statement to Inspector Indrehus and Officer Larson.

The isolated incident involved in this case, while serious, does not show a pattern of behavior which would compel a finding that the grievant is permanently unsuited for supervisory duty. Such a finding would require a pattern of misconduct or substandard performance. No such pattern is found in the record of the grievant in this case. Accordingly, a permanent demotion out of supervisory rank is not justified on the basis of the record of the grievant.

It is noted that the City suffered no monetary loss as a result of the incident. The incident did not involve the public to any significant degree, and no publicity ensued. The reputation of the City was not damaged. What was at risk was a breakdown in effective police practices. It is unlikely, however, that any permanent damage was done to police protocols as a result of this incident. The scales of justice show that the penalty of a permanent demotion is too severe for any damage done to the City.

In other permanent demotion cases in the Department which have been arbitrated, the permanent demotions have not been upheld by the arbitrators. While arbitrators are not obliged to observe any precedence

which may have been created from similar cases in the past, it is common for previous cases to provide strong guidance in deciding any subsequent case. Consistency in sanction is very desirable in establishing a code which the parties can use to judge their future actions. Without such consistency, order in the justice applied to the workplace is lost.

The two permanent demotion cases which were heard by arbitrators in the past were overturned to demotions for a fixed period of time. The facts as adduced from a careful review of the record in this case compels a similar finding.

During the hearing in this case the arbitrator had an opportunity to observe the demeanor of the grievant. He indicated that he had learned his lesson from this incident. A lessor penalty would not dilute the remedy of changed behavior which the grievant appeared prepared to demonstrate if given the opportunity.

AWARD

Based on the evidence and testimony entered at the hearing, it is hereby determined and ordered that the grievance is sustained in part and denied in part. The permanent demotion issued to the grievant is reduced to a demotion from Sergeant to patrol officer for a period of one year. Accordingly, the grievant is to be restored to the rank of Sergeant in the Minneapolis Department effective January 3, 1997, and assigned at the discretion of the Administration.

James L. Reynolds
Arbitrator

Dated: 8/26/96

awd16.96