

IN RE ARBITRATION BETWEEN:

LAW ENFORCEMENT LABOR SERVICES, LELS,

and

CITY OF SHAKOPEE

DECISION AND AWARD OF ARBITRATOR

BMS Case No. 11-PA-0450

JEFFREY W. JACOBS

ARBITRATOR

7300 Metro Blvd. #300

Edina, MN 55439

Telephone 952-897-1707

E-mail: jjacobs@wilkersonhegna.com

June 23, 2011

IN RE ARBITRATION BETWEEN:

LELS,

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City of Shakopee

DECISION AND AWARD OF ARBITRATOR

Lisa Quick grievance

BMS Case # 11-PA-0450

APPEARANCES:

FOR THE UNION:

Brooke Bass, Attorney for the Union

Lisa Quick, grievant

Molly Moonen, Shakopee Police Officer

FOR THE EMPLOYER:

Cy Smythe, Labor Representative

Sgt. Lynn Lipinski, Shakopee PD

Sgt. Jason Arras, Shakopee PD

Chief Jeff Tate, Chief of Police

PRELIMINARY STATEMENT

The hearing was held May 16, 2011 at the City of Shakopee Police Department. The record was closed on May 16, 2011. The parties submitted Briefs dated June 13, 2011.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period of January 1, 2009 to December 31, 2009. The grievance procedure is contained at Article 7. The arbitrator was selected from a list maintained by the Bureau of Mediation Services. The parties agreed that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUE

Did the City have just cause to discipline the grievant? If not, what is the proper remedy?

RELEVANT CONTRACTUAL PROVISIONS

The parties cited several provisions of the labor agreement in relevant part as follows:

Article 9.5. Senior qualified employees shall be given shift assignment preference after eighteen (18) months of continuous full time employment.

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

- a) oral reprimand;

- b) written reprimand;
- c) suspension;
- d) demotion; or
- e) discharge

CITY'S POSITION

The City's position is that there was just cause to suspend the grievant for a specific incident which occurred on May 21, 2010 as well as the grievant's long history of disciplinary warnings and counseling to get her to do her job better. In support of this the City made the following contentions:

1. The City cited both a specific incident that led to the suspension herein as well as a longstanding history of counseling, coaching and various attempts to get the grievant to correct her behavior and actions. The City also noted that the grievant one of only a very few officers who as denied the right to select their shift under Article 9.5 cited above due to her not being qualified. The City asserted that the suspension here should be treated as a last chance for the grievant and that this should be a stark warning to her that she must conform her actions to the expectations of the department or she will be discharged.

2. The City pointed to the incident that gave rise to suspension in this matter and noted that the grievant was called to a report of a hit and run accident on May 21, 2010 at a local gas station. The grievant met with the alleged victim of this incident who described the vehicle that hit her as a "goofy looking work truck" but also gave the grievant an actual license plate number. There was also a hole in the side of the victim's car consistent with what she reported as the hit and run.

3. Instead of filling out the ICR report fully and completely, the grievant omitted the license plate number. As a result, the victim was having trouble dealing with their insurance company getting the damage repaired. The victim's husband then called the department inquiring about the lack of suspect information despite the fact that the pertinent information was provided to the grievant. This in turn caused an investigation by Sgt. Lipinski to determine the facts and whether there were violations of Department policy committed by the grievant in this incident.

4. The City contended that it undertook a thorough and fair investigation and that the grievant was interviewed and given an opportunity to explain what happened. Instead of taking the call seriously and completing required forms properly, the grievant characterized this whole incident as a “silly call.” This demonstrated a somewhat callous attitude toward the victim and caused her delay and undue angst in dealing with this situation. It also brought disrepute to the department and caused a member of the public to believe that the department did not take their call for service seriously. Further her failure almost caused the victim to have to pay the \$500.00 deductible since there was inadequate information on the ICR.

5. The City also asserted that the grievant is a senior officer and knows what proper procedure is and can in fact comply if she chose to do so but that here she decided to essentially treat this call as a petty matter.

6. The City further asserted that the level of discipline was appropriate here given the chronic nature of the grievant's history. The City noted, as above that the grievant was one of a small handful of officers who was denied the right to select her shift because she was not “qualified” within the meaning of Article 9.5. The city noted that in law enforcement circles, this is a significant incident and noted that officers work long and hard to gain sufficient skill and seniority to be able to select a shift of their preference. When such a benefit is denied, it speaks volumes about that officer's ability and attitude toward performing their duties.

7. In addition, the City pointed to multiple instances where the grievant has been warned, coached, counseled, given training and assisted in every way the department knows, to improve her performance. Despite those efforts these low level measures have not worked so a disciplinary suspension is necessary to “get her attention” and emphasize the consequences of her failure to perform to expectations and to correct her somewhat cavalier attitude toward her job at times.

8. The May 21, 2010 incident was one such example and the City asserted that the Chief felt it necessary to impose a 7 day suspension, as opposed to something less severe, to make it clear to the grievant that she is getting perilously close to further discipline, even termination, unless her performance and attitude toward her job improves. The City pointed to multiple training sessions and other coachings she has received yet asserted that she decides when she wants to do a good job and when not to. See Tab D of the City's exhibit book.

9. The City noted that the grievant acknowledged during the hearing that Sgt. Lipinsky's investigative report was accurate in all material respects and that she may not have performed all of her duty obligations with regard to the May 21, 2010 incident.

10. The City further noted that the Union stated in its opening statement that there would be evidence of disparate treatment yet there was not a single shred of such evidence adduced at the hearing. The City maintained that there was no disparate treatment here and that it treated the grievant as it would have any other officer who had failed to perform as she did during the May 21, 2010 incident herein. The City witnesses described their frustration with the grievant over time and indicated that the main issue is that she can be a good officer but that she decides when she will put forth appropriate effort when to perform her duties and when not to.

11. The City further countered the Union's claim that there was not "just cause" for discipline here and noted that the grievant indicated that there were no errors or omissions in Sgt. Lipinski's report. Further, the Union raised the issue that there were no videos of the alleged hit and run but later acknowledged that the area covered by the video camera at the store would not have covered the area where the accident happened anyway. Further, the City noted that there were significant holes in the alleged perpetrator's story that the grievant should have checked out and been aware of during her investigation of the accident. She simply chose to treat this as a "silly call" and effectively "blew it off" as insignificant.

12. The City pointed repeatedly to the long history of problems with the grievant's performance and noted all of the efforts made to get her to understand the consequences of not performing her job, not following up on information and the need to be thorough and to treat each call for service seriously. Despite that she continues to demonstrate a propensity to treat some as serious and others as merely annoyances and that this cannot continue. The city characterized this as a "last chance" for the grievant and noted that any further violation of policy or other directives of the department could lead to her termination.

The City seeks an award denying the grievance in its entirety.

UNION'S POSITION

The Union took the position that there was not just cause for the discipline in this matter. In support of this position the Union made the following contentions:

1. The grievant is a 15-year veteran of the Shakopee Police Department and takes her job very seriously. The Union pointed to a number of commendation letters and other positive comments from both public members as well as the department itself for her fine work as a police officer. See Union Exhibit 12. These go back to 1997 and continue right up to and beyond the May 21, 2001 incident that is the subject of this matter.

2. The Union acknowledged that she has three other minor instances of discipline on her record but asserted that these are unrelated to the type of allegation at issue in this matter and are now several years old. These were not grieved because she agreed that she violated Department policy and that the discipline was appropriate. Thus contrary to the assertions by the City, the grievant is both contrite and very willing and able to correct her workplace actions and is hardly the sort of incorrigible officer the City's representative made her out to be.

3. The Union noted that the grievant is a military veteran and is not only female but also slightly older than the majority of her co-workers. As such, she does not participate in the out of work activities others do and is often mistakenly characterized as aloof or “curt” or even something of an outsider by other officers. She does not “live to work” but rather comes to work, does her job and then leaves her job at work and does not mix home life with work life. She should not however be penalized for this.

4. The Union took issue with the City’s characterization of the grievant as unwilling to conform her behavior and argued that she has always taken the directives and suggestions of her superiors seriously and has tried diligently to apply those lessons to her job. The Union pointed to the goals and objectives in her latest evaluation and pointed to her comments about them as demonstrating her commitment to doing a good job. She wants to “be more aware of my co-workers perception of my attitude and improve it,” further to be notified in a timely manner about my behavior so it can be corrected,” “to be notified as I did not get any such feedback until an evaluation,” and finally, “I want to do better and improve.” The Union pointed to these statements as indicative of the grievant’s desire to be a better officer and to improve her performance and her relationships with her co-workers.

5. The Union asserted that the grievant followed proper procedure with respect to the incident of May 21, 2010. The grievant contended that when the call came in, which was nearly 8 hours after the original incident, Officer Moonen and Sgt. Forberg were present. The Union contended that Sgt. Forberg told the grievant that she would need only do an ICR for this incident. The Union further asserted that the grievant took the appropriate information from the victim of the crash and wrote a report. The Union further noted that the victim was a very poor historian and was able to give only the barest details about the vehicle that allegedly hit her and was frankly disjointed at best in describing the whole incident. Despite this the grievant took the best information she could despite the sparse information she was provided by the victim.

6. The Union further noted that the grievant was not disciplined for her “attitude’ during the investigative report with the victim even though the victim’s husband raised concerns about that. The Union noted that even though the grievant wrote down the plate number in her notebook, it was incorrectly transcribed and used a “Y” rather than a “V” in the letters on that plate number. The Union asserted that the grievant was given so little information and was given it so late in the process that there was little she could do to track down the driver of the other vehicle and that she should not be disciplined because the victim did such a terrible job describing the truck that backed into her.

7. The grievant asserted that she inspected the hole in the victim’s car but determined that it was too low to the ground to have been caused by a hitch of a pick up truck despite the fact that the victim told her it was a “goofy” sort of truck. She used her experience and training and deduced that something was amiss with the entire story and reacted accordingly.

8. The Union argued most vehemently that there is nothing in the disciplinary letter about a last chance and is not a true last chance letter as the city insisted. Accordingly, the Union asserted that the City should be held to an extremely high burden of proof given the City’s position that this is the “last straw” even though that was not communicated to the grievant during the disciplinary process.

9. The Union asserted that there has been disparate treatment here, likely caused by the fact that the grievant is “not one of the boys” and does not participate in the out of work activities engaged in by other officers. The Department has a history of meting out far lesser discipline to other officers and asserted that to start with a 7 day suspension is simply far too harsh for the relatively minor infraction present here.

10. The Union noted that the actual policies allegedly violated were Performance of Duty, 26.1.1.A.2, Submitting Inaccurate Reports, 26.1.1.A.8.d and Accident Reporting and Investigation 63.1.1.A.2. The Union noted that another officer also found to have violated 26.1.1.A.2 and 26.1.1.A.8.d was given a written reprimand only. See Union exhibit 10.

11. The Union argued that other officers who violated those same policies were given a written reprimand and on only one other instance was there a 60 day suspension with a last chance agreement but that was for a far more serious matter involving a felony level sexual assault case where the consequences were far more serious than a minor fender bender hit and run accident with no injuries and very minor damage to a vehicle. The grievant has no other discipline for failure to comply with either 26.1.1.A.2 or 26.1.1.A.8.d and as such should be treated as having no other discipline involving those policies and be given a far lesser degree of discipline.

12. The Union asserted most strenuously that coaching is not discipline and should not be used in the progressive disciplinary scheme. Further, the City used evidence it acquired after the discipline in this matter, i.e. the other instances of coaching. More importantly, the grievant was placed on a performance improvement plan in February 2011 and successfully completed that. Thus she is certainly capable of improving her performance without discipline and should be given that chance; certainly prior to a “last chance” step.

13. Finally, the Union asserted that the investigation was lacking in several ways. The City never got the 911 call or the radio traffic reports for this incident, which could have shown whether the grievant got the correct plate number for this vehicle and whether it came back matching the description of the vehicle given to her by the victim. Second, the City never went to the City of Savage, where the incident was actually first reported, to determine what they were given and what information they had. Finally, the City never checked to see if there was a video of this incident to determine what actually happened, even after there was a dispute about which vehicle was the hit and run vehicle. The Union argued that if the City wished to hold the grievant to the same standards of investigating a possible crime it should be held to that same standard and asserted it was severely lacking here.

The Union seeks a ruling that the City did not have just cause for the discipline imposed herein and an award making grievant whole for all back pay and accrued contractual benefits.

MEMORANDUM AND DISCUSSION

The grievant is a 15-year veteran of the Shakopee Police Department. It was clear from the evidence that she is well aware of Department policies and procedures for investigating, documenting and reporting a hit and run accident. As will be discussed more below, she has been given numerous trainings, coachings and counselings regarding the need to be complete and thorough in such matters, even where they may seem trivial to the officer. They may not be so trivial to a member of the public and may, as in the instance of the May 21, 2010 incident, have economic consequences for the public.

A review of the grievant's overall record reveals a mixed bag. There were certainly a great many commendations in her file, See Union Exhibit 12, which showed good work as a police officer. There were a number of commendations and positive comments about her work going back to at least 1997 and continuing even after the May 21, 2010 incident. These were taken into account here but as will be discussed below were counterbalanced by the other evidence in the case.

On the other hand, there was also considerable evidence of a more than occasional lapse in her adherence to good practice and procedure and a large body of evidence that she has been coached and counseled, given training and even a performance improvement plan to get the grievant to adhere to policy. The City's witnesses gave credible testimony in this regard and indicated that they have met with the grievant numerous times about her work performance issues and have indicated to her both informally and formally through evaluations and coaching sessions of the need to treat each case seriously and to follow procedure. This evidence was considered mostly for the degree of discipline

The Union asserted that much of the evidence regarding the coaching and counseling the Department has given the grievant was "after-acquired" and should not have been used to determine either just cause for the discipline or the degree of discipline. This was something of a two part analysis.

First, the Union's after acquired evidence argument was of little evidentiary value here since her coaching and counseling sessions were already in her record and would have certainly been known to the employer prior to the discipline being issued. The after acquired evidence rule applies to evidence that the employer is unaware of prior to the imposition of discipline but learns of later and the attempts to use to bolster and argument for just cause. Here that simply is not the case.

Second, there was the question of the degree of discipline and how the amount of coaching the grievant has received factored into that. There is some merit to the Union's claim that coaching is not discipline. That is generally true; it is not and should not be used to establish placement on a progressive disciplinary ladder for example. It does show notice though of the rules and the need to adhere to them. It can also provide evidence of the efforts made to get an employee to adhere to policy and efforts to train and assist them in that regard. Here that evidence clearly mitigated in the City's favor as the evidence showed considerable efforts by the Chief and others within the department to get the grievant to do her best all the time – and not only when it suited her to do so.

More to the point, the grievant does have prior discipline on her record and the fact that it did not pertain to “these” rules, i.e. 26.1.1.A.2, Submitting Inaccurate Reports, 26.1.1.A.8.d and Accident Reporting and Investigation 63.1.1.A.2, is not persuasive here. Progressive discipline does not depend on whether there was a violation of the same rule all the time. Otherwise an employee could violate multiple rules without further progression up the ladder so to speak and could go quite a long time without getting past the oral or written reprimand stage. Without some very specific language in the CBA or the policy limiting progressive discipline in that way, the general rule of progressive discipline or the general notion that discipline should be corrective will to be applied in that way.

The Union also raised the argument that the grievant was actively trying to improve her performance and indicated in her recent goals a clear desire to improve her performance. This evidence was reviewed in some detail as well and cuts in both directions. First, the grievant claimed that she did not get adequate feedback when there were allegations of violations of policy. On this record there was no persuasive evidence that she did not get the feedback as she claimed. The evidence here was that in fact she was getting feedback in various ways and from various supervisory people about her need to improve.

There was also the allegation that the grievant was trying to improve performance and that she so indicated on the goals in a recent evaluation. On the one hand her words demonstrate intent to improve her performance and her attitude. On the other, her response to the goals while admirable does show that there have been problems with regard to her work attitude and with adherence to department policy and further shows that she has indeed been counseled repeatedly about her sometimes cavalier attitude toward her work and of the need to correct that. Thus on this record her responses show both a commitment to getting better but also a clear need to. This, coupled with the clear showing by the City that her actions relative to the May 21, 2010 incident did violate policy and were deficient in several ways, supports the City's claim that another mere "slap on the wrist" would be insufficient to impress upon the grievant the need to correct her adherence to policy. It is against this backdrop that the events of May 21, 2010 occurred.

Turning to the events of May 21, 2010, the evidence showed that late in the afternoon of May 21, 2010 the Shakopee Police Department received a call about a possible hit and run incident that had occurred at 7:15 that morning at a local convenience store and gas station. The grievant was dispatched to meet with the victim of this incident and investigate the crime. There was some evidence that when this call came in there were other officers around and that Sgt. Forsberg said something to the effect that since there was an 8 hour gap between when the incident happened and when the call came into the Department the grievant would only have to write an ICR report about it.

While that may have been true, there was no evidence that he told the grievant to treat this incident as a mere annoyance or that she should fail to follow proper procedure in investigating it, writing it up or documenting it or that she should be cavalier about how she approached this incident or the seriousness with which it should be considered.

The grievant met with the victim of this incident and the evidence showed that the victim's description of the vehicle left much to be desired. She was obviously a very poor historian, could remember few details about the truck other than it was a truck and that it was "goofy looking," whatever that meant. She did however, significantly, provide a license plate number to the grievant and the grievant apparently wrote this down in her notebook but failed to write it on the report.

This caused the victim's insurance company to question the report and created problems in getting the insurance company to pay the claim. The victim's husband contacted the Department a few days later and complained not only about the lack of information on the report but also about the grievant's demeanor and attitude during the investigatory interview with his wife. This in turn caused an investigation by Sgt. Lipinski.

Her report was reviewed in detail as well and reveals several violations of policy by the grievant. Sgt. Lipinski determined after a review of relevant documents and interviewing the grievant, that the grievant was given adequate information with which to conduct a further investigation but failed to do so even though she had enough information. The ICR report was inadequate and the grievant failed to provide adequate service to the victim's of the hit and run. A review of her statements shows some evidence that the grievant felt this was a minor call, silly and perhaps not worthy of her time even though there were clear allegations that a crime involving property damage had occurred and that a member of the public was quite concerned about it.

Significantly, the grievant acknowledged at the hearing that the investigative report of Sgt. Lipinski was accurate and that she found no errors or omissions in it. On this record there was no question that the grievant failed to follow department policy as outlined by Sgt. Lipinski in her report on this incident.

As noted in passing above, there was some dispute over which car hit which one during this incident and the alleged perpetrator later asserted that his vehicle had been hit by the victim, not the other way around. The parties argued about whether there should have been a review of the video from the gas station and whether that would have shown anything anyway since the cameras point at the pumps and not at the area where the crash occurred. The Union asserted that the City never made any effort to review the tape but on this record that is immaterial. While it might have been important in order to prosecute the crime the simple fact here is that the grievant made no effort to determine what the video showed either nor did she follow up on the license plate that she had been given to determine the facts of the incident.

On this record the evidence clearly showed that there was just cause for discipline. The evidence showed that the grievant failed to follow procedure as Sgt. Lipinski's investigative report showed. The question is now whether the degree of discipline was appropriate.

The Union argued that in other instances other officers have been given only a written reprimand for similar violations of policy. See Union Exhibit 10. There was no evidence as to the underlying circumstances of those other incidents. More importantly, there was no evidence as to what their records were or whether those other officers who received reprimands were given the type of coaching and counseling or had the same history of work related problems as the grievant. Without such evidence a claim of disparate treatment is difficult if not impossible to establish. Moreover, it was clear that the grievant has been disciplined for other violations of policy in the past. She was issued a formal oral reprimand stemming from an accident with the squad car on May 17, 2007. This was not grieved.

She further received a 3-day suspension on January 22, 2009 for actions with a car and for failure to complete a daily log. This was also not grieved either. She was given a written reprimand on June 15 2010 for her conduct on an unrelated matter but which also occurred on that same day as the hit and run incident, May 21, 2010. This was not grieved and was not considered in rendering this decision since the discipline itself was issued after the date in question. Likewise, none of the incidents listed in Employer Exhibit D that occurred after May 21, 2010 were considered as they too occurred after the incident in question. To this extent, that would be considered after acquired evidence and are not to be considered in determining just cause for discipline or the appropriate degree of discipline in such a matter.¹

There were also a number of other times where she was sent home for actions which frankly could well have resulted in discipline and while these were not formal “disciplines” the message was clear – the grievant was on thin ice and needed to improve her performance and her attitude and demeanor or face further disciplinary action. The Chief testified persuasively that he would not have given a 7-day suspension if the only matter on the record had been the May 21, 2010 incident, even with all of the failures in policy found in that incident. It was because of the grievant’s overall record, including her prior discipline that he felt it was necessary to give something more severe to the grievant here. On this record, the City established that there was not only just cause for discipline but also for the degree of discipline that was meted out here.

One final issue remains pertaining to whether this discipline should be treated as a “last chance” for the grievant with the consequence that if there are any further violations of policy of any kind such will result in the grievant’s termination. Clearly, the letter given to the grievant is not a Last Chance Agreement, or LCA as they are sometimes referred to, per se.

¹ It should be noted that there is no formal requirement in the CBA of progressive discipline taking any particular form. In other words, it is not required that the first step always be an oral reprimand followed by a written reprimand and then by a short suspension and so forth. Here even though there was an oral reprimand then a 3-day suspension and then a written reprimand this merely shows that the City was adjusting the level of discipline to the facts of each incident rather than following some pre-ordained disciplinary ladder without regard to the facts of each incident. On this record, these facts did not undercut the City’s position here.

The letter dated July 21, 2010 is by no means an “agreement” between the City and Union as to future discipline nor does it reflect any agreement that the normal just cause analysis would be dispensed with for further violations. A true LCA takes the just cause analysis out of the calculation of whether to impose discipline and calls for a certain result if there is a proven offense. While the disciplinary letter here, Employer Exhibit 1, references possible further discipline for “same and or similar actions in the future” up to and including discharge, such language in disciplinary letters of this nature is not uncommon. It does not reflect any lessening of the just cause standard nor of any deviation from the requirement in future cases that all of the requirements for discipline in the CBA be followed. Thus, while the City terms this as her “last chance,” just cause will be required if the City imposes discipline in the future. That too must await future facts and further analysis of all the elements of just cause when and if such a case arises.

AWARD

The grievance is DENIED.

Dated: June 23, 2011

Jeffrey W. Jacobs, arbitrator

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