

In the Matter of the Grievance Arbitration Between

Law Enforcement Labor Services, Inc., Union
Adam Boler, Grievant,

And

County of Sherburne, Employer

Before:

Arbitrator Harley M. Ogata

BMS Case No. 15-PA-0362

Date and Place of Hearing:

January 27, 2015
Sherburne County Government Center
Elk River, Minnesota

Date Briefs submitted:

February 20, 2105

Advocates:

For the Union:

Isaac Kaufman
Law Enforcement Labor Services, Inc.
327 York Avenue
St. Paul, Minnesota 55130

For the Employer:

Greg Wiley
Sheriff's Civil Division, Sherburne County
13880 Hwy 10
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This is a grievance arbitration between the above-named parties. The dispute involves the demotion of Adam Boler (grievant) from his position of Sergeant in the Transport/Court Security (TCS) division in the Sherburne County Sheriff's office. The union does not dispute the underlying facts of the precipitating event, but argues that the penalty imposed is too severe. The employer argues that the grievant was demoted for factors in addition to the precipitating event which, in total, justify a demotion. The parties agree that the dispute is properly before the arbitrator. For the reasons enumerated below, the arbitrator sustains the grievance in part and changes the discipline to a one day suspension.

Issue

Was there just cause for the discipline (demotion) imposed?

If not, what is the appropriate remedy?

Factual Background

The Sherburne County Sheriff's office has 290 employees and up to 40 supervisory employees. The grievant has been employed by the Sheriff's office for over 14 years. He was promoted to sergeant of the TCS unit on April 3, 2006. The grievant supervises 14 employees. The TCS unit takes care of moving prisoners between jails and medical facilities. It also provides security for the courthouse and government center.

On September 30, 2014, the grievant brought a prisoner into the booking area of the jail. While doing so, the grievant was wearing his holstered firearm, in clear violation of Department policy. Another officer noticed the violation and discreetly assisted the

grievant in leaving the area so that his weapons could be secured. There is no dispute between the parties that the grievant had a firearm in the booking area, that this violated Department policy, and that it should result in some form of discipline to the grievant.

On October 8, 2014, Chief Deputy Don Starry initiated a complaint report regarding the incident and assigned Captain Dan Andren to investigate the complaint. It took about a week for the issue to surface to upper management, as the grievant did not self-report the incident. Andren is the grievant's immediate supervisor. On October 9, 2014, Andren provided the grievant with a notice of the summary of the complaint, which solely involved the incident related to having the firearm in the booking area. The grievant met with Andren that day. During the interview, the grievant readily admitted his mistake and indicated that he knew it violated Department policy.

On October 13, 2014, Andren issued his report regarding the results of his investigation. At the end of his report, Andren recommended that the grievant be disciplined at minimum with a written reprimand and at maximum with a 1 day suspension. The recommended discipline related to the incident in question and did not mention any other factors.

On October 15, 2014, Starry sent the grievant a letter stating that there would be a Loudermill hearing on the matter on October 21, 2014. The notice stated that the "specific charges" concerned the violation of the policy prohibiting bringing the firearm into the jail. There is nothing in the record that would indicate that anything other than the firearm-in-the-booking-area violation was being considered for discipline at this particular moment in time. In fact, the notice given to the grievant focuses solely on the firearm-in-the-booking-area violation as the reason for the potential discipline.

Starry's memo dated October 21, 2014 in which he recounts the events of the Loudermill hearing, restates the posture of the grievant. The grievant is reported to have acknowledged the violation, indicates that he should be disciplined, but feels that the proposed demotion is too severe. His written statement reiterates Starry's account and they are consistent with each other.

In an undated document titled Discipline recommendation for Adam Boler, Starry recites, for the first time, the extended reasons proffered for the grievant's demotion. He cites three other weapons violations that occurred in the past, each of which resulted in disciplinary actions against the grievant. He also cites what he describes as poor staff relationships and leadership deficiencies. Starry relies upon incidents that he heard about from subordinates of the grievant to support his contentions. Finally, he points to the grievant's performance evaluations as further support for this contention. He concluded that the grievant had negative evaluations in the leadership/relationship arena every year from 2008 through 2014.

Discussion

The parties to this dispute agree on the facts and violation of the precipitating event. The grievant bringing a firearm into the booking area of the jail violated policy. They also appear to agree that this violation alone should result in discipline, up to and including a one-day suspension. Where they diverge is whether other factors should be considered as well, including the grievant's past performance issues, leadership/relational issues and past discipline. The employer's position is that when

considering all of the above factors, a one day suspension is not an adequate response and that the grievant needed to be removed as a supervisor within the department.

Past Discipline

The arbitrator finds that the grievant's past discipline carries very little weight as a factor in increasing the discipline here. The employer cites three past weapons related charges as its support. As an initial matter, the first two disciplines cited occurred prior to the grievant being promoted to sergeant over two other well qualified applicants. The grievant had been given a written reprimand and a five-day suspension for these weapons related violations. Those disciplines, while serious, were apparently not enough to prevent his being promoted to the sergeant position in question in the first place and should not now be used retroactively against him.

Second, the other disciplines are distinguishable because they involved conduct that cannot be described as inadvertent. The first (written reprimand) involved pointing his gun at a motorist during a traffic stop. The second (five day suspension) involved throwing his gun on the back seat of a car while making an arrest. The third (one day suspension) involved reckless use of a taser. This last discipline occurred after he was a sergeant and involved sophomoric behavior in the workplace and appeared to be conduct unbecoming of any employee. The current discipline, while involving a weapon, related to conduct which was admittedly inadvertent and not intentional.

Leadership/relational issues and past performance evaluations

The employer cites a number of alleged statements made by subordinates about the grievant's leadership qualities as a further basis for advancing the discipline to a demotion. As an initial matter, the arbitrator agrees with the union that these allegations

were brought to the hearing mainly by the hearsay testimony of the sheriff and chief deputy and lacked sufficient evidentiary weight as a result. The grievant has no ability to contest the efficacy of the statements or otherwise challenge them without having the declarants appear at the hearing.

Having said that, it is clear from the record that the grievant is aware that his relational issues are a concern to management. He had been rated as needing improvement in this area in three of the past six years. It does appear from the record that the grievant has attempted to better himself in this area and those efforts are noted in the evaluations. Indeed, one of the union's own witnesses testified that while he personally wanted to see the grievant returned as his supervisor, he believed it would not be good for the office as a whole for him to be brought back "because of things that have happened."

After listening to the testimony and observing matters at the hearing, the arbitrator concludes that the relational issues, both with subordinates and others at the center, are the real, underlying basis for the grievant's demotion.

Most telling is the testimony of the Sheriff himself. He very clearly testified that he is the one who "gets the feedback" from people, and the feedback is that "people don't want Adam." He said that his "word should be good for something" here. The arbitrator disagrees with the imposition of a demotion here not because he does not believe the sheriff in this regard, but because arbitral just cause principles require more fair warning to the grievant about the consequences of failure to correct than what occurred here. The record is devoid of any such warning and it's not surprising that the grievant was so surprised by the result of the investigation.

First, during the process of the investigation, based on the record in front of the arbitrator, it is clear that the grievant had no understanding that his performance issues and relationship issues would be used as part of the investigation. Until the moment he met with the Sheriff, this had never been mentioned as an issue. By that time, the decision to demote had already been effectively made and the grievant was not prepared to defend those issues. The Sheriff imposed the discipline and the grievant immediately started the grievance process. This caused the grievant to feel betrayed by the administration. It could look like the administration was using the performance issues to justify their actions. On the contrary, the evidence shows that the performance issues were the real underlying issues that prompted the demotion and not vice versa.

The employer has the right to set a reasonable standard for its employees and to set an even higher standard for its supervisors. Regarding the overall record, the employer further asserts that the:

written and unwritten record of Boler's performance is considered, whether that be in coaching, performance reviews, disciplinary records or supervisors' feedback of subordinate employees, and the feedback of other individuals with whom Boler had contact with as a Sergeant, it is clear that Administration unanimously considers Boler' 'rollercoaster' performance to be unfit for an officer in the Sergeant's supervisory role.

Employer brief at p 18. The arbitrator finds that, even if true, there is not enough evidence in the record to support a demotion. When it addressed these issues, the administration failed to give adequate to the grievant of the potential consequences of a failure to cure his noted deficiencies.

Generally, with performance issues, this arbitrator requires that an employee be put on notice of the deficiencies noted by the employer, be provided with some assistance and guidance in overcoming those deficiencies, and be placed on clear notice that if the deficiencies are not corrected, further and more severe discipline will result. Any initial discipline imposed for performance issues should normally be designed to provoke improved performance and not be punitive in nature.

Here, the employer made some attempts to put the grievant on notice that his performance in the area of relationships with subordinates needed improvement. This was first noted in the record in his 2009 performance evaluation where the employer noted that he is sometimes “hyper-vigilant which sometimes causes friction with those he supervises or has contact with.” That evaluation indicated that this area needed improvement.

In 2010, his evaluation indicated that he meets standards in this area and it is noted that he made “noted improvement” here and is “making a sincere effort to be more relaxed and cooperative with those he has daily interaction with.”

In 2011, the grievant again is told that he needs improvement in this area. The notes indicate the he “is well intended, but sometimes has a tendency to be harsh or abrasive in his tone when speaking with subordinate staff. The majority of the time there is noticed improvement, but sometimes has a tendency to regress.”

In 2012, he again meets standards in this area. The notes indicate that he “works hard to better communicate with those he supervises and those he has daily interactions with. Sometimes has a tendency to be abrupt in his communication, but overall there has been noticed improvement since the previous evaluation period.”

In 2013, he again meets standards in this area. The notes indicate that he “works hard to better communicate with those he supervises and those he has daily interactions with. Sometimes still has a tendency to be abrupt in his communication, but overall seems to maintain a professional demeanor in his interactions with others.”

In 2014, the grievant is listed as needs improvement in the relationships area as well as in leadership and supervision. Under relationships, it is noted that he “generally does a good job fostering and maintaining good working relationships with members outside of the department or outside of the division, but sometimes comes across as being impatient or condescending towards those he supervises. More improvement is needed regarding relationships and verbal communications with subordinate employees.” Under leadership and supervision, it is noted that he:

continues to be well organized and consistently goes above and beyond what is expected of him as a first line supervisor, however, more attention is still needed in the area of leading rather than managing. The perception or concerns of favoritism, being excessively critical, and having a condescending demeanor need to be resolved.

Cite?

The evaluation is dated August 13, 2014, which is on or near the time that Starry testified that he received the staff complaints cited in his investigative report and recommendation to the Sheriff. This arbitrator would expect that if these issues were significant enough to cause a demotion, they not only should have been brought to the grievant’s attention (which they apparently were), but that the grievant should have been placed on notice that unless he successfully addressed them, it could result in discipline, up to and including demotion. This failure is the fundamental reason why this arbitrator will not uphold the demotion.

Having said all this, the grievant now must understand that the employer is serious about demanding that he address the issues concerning his relational style. The grievant should now be well aware that if these issues are not adequately addressed, it will result in his demotion at some future date. He has shown that he is capable of improving in this area and needs to be vigilant in continuing to improve and address what the employer expects of him or suffer the consequences. He must respect the fact that the employer has the right to set the expectations for his position.

Decision

Based on the foregoing discussion, the arbitrator sustains the grievance in part and reduces the discipline from a demotion to a one-day suspension for the proven offense of bringing a firearm into the booking area of the jail in violation of clear departmental policy.

Dated: March 8, 2015

A handwritten signature in black ink, appearing to read "Harley M. Ogata". The signature is stylized and cursive, with a long horizontal stroke extending to the right.

Harley M. Ogata

Arbitrator