

**IN THE MATTER OF ARBITRATION BETWEEN**

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<b>LAW ENFORCEMENT LABOR</b>	)	
<b>SERVICES, INC.,</b>	)	
	)	<b>ARBITRATION</b>
<b>Union,</b>	)	<b>AWARD</b>
	)	
	)	
<b>and</b>	)	<b>COFFEY</b>
	)	<b>GRIEVANCES</b>
	)	
<b>CITY OF OAKDALE,</b>	)	
	)	
<b>Employer.</b>	)	
	)	<b>BMS CASE NOS. 06-PA-0924</b>
<hr/>	)	<b>06-PA-1174</b>

Arbitrator: Stephen F. Befort

Hearing Date: February 5, 2007

Date post-hearing briefs received: March 6, 2007

Date of decision: March 23, 2007

**APPEARANCES**

For the Union: Marylee Abrams

For the Employer: Pamela L. VanderWiel

**INTRODUCTION**

Law Enforcement Labor Services, Inc. (Union) is the exclusive representative of a unit of police officers employed by the City of Oakdale (Employer). The Union asserts two grievances on behalf of the grievant, Officer Sean Coffey. The Union first claims that the City violated the parties' collective bargaining agreement by failing to provide

the grievant an opportunity to have a Union representative present during a disciplinary investigation interview. The Union additionally claims that the Employer violated the parties' agreement by suspending Coffey for one day without just cause. The Employer denies the substance of both grievances. The parties agreed to consolidate these two grievances which proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

### **ISSUES**

1. Did the Employer violate Article 10.6 of the labor agreement?
2. Was the Employer's one-day suspension of Officer Sean Coffey for just cause? If not, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE 10: DISCIPLINE**

- 10.1 The EMPLOYER will discipline employees for just cause only. Discipline will be in one or more of the following forms:
    - a. Written reprimand;
    - b. Suspension;
    - c. Demotion; or
    - d. Discharge.
  - 10.2 Suspensions, demotions, and discharges will be in written form.
- \* \* \*
- 10.6 Employees will not be questioned concerning an investigation of disciplinary action unless the employee has been given an opportunity to have a UNION representative present at such questioning.

## **FACTUAL BACKGROUND**

Sean Coffey has worked for the Oakdale Police Department as a patrol officer since 1999. From January to June of 2006, the Employer assigned Officer Coffey to work as a school liaison officer at nearby Tartan High School. His duties in that position were to provide a security presence at the school and to work with students and staff in mediating potential problems.

On January 31, 2006, Tartan High School Principal John Bezek requested Officer Coffey's assistance with a situation that potentially involved inappropriate contact between a female Hmong student and her uncle. Dr. Bezek told Officer Coffey that a male student office worker had engaged in an internet conversation on MySpace with the female student and relayed the information to school administrators. Officer Coffey advised the principal that the Oakdale Police Department employed a Hmong officer who might be of assistance due to the potential for cultural misunderstandings. Dr. Bezek agreed it would be a good idea to enlist the officer's aid in interacting with the female student. Officer Coffey attempted to contact his supervisor, Sergeant Kevin Gorsuch, to discuss this strategy, but was unable to reach him.

Officer Coffey then called Sergeant Jack Kettler, the Hmong officer's supervisor, and asked if the officer could assist him in the investigation. Sergeant Kettler expressed concern that the female student might not feel open to discuss potentially criminal sexual conduct in front of an adult Hmong male. Sergeant Kettler told Officer Coffey that he could consult with the Hmong officer on cultural issues, but that under no circumstances should the Hmong officer participate in any interview of the female student.

After speaking with Sergeant Kettler, Officer Coffey asked the Hmong officer to meet him at the high school to assist in the investigation. When Officer Coffey described Sergeant Kettler's concerns, the officer disagreed with the notion that his presence would inhibit communications with the female student. The two officers agreed that they would both be present during discussions with the female student, but that the Hmong officer would leave if any problem arose.

Officer Coffey and the Hmong officer met with the female student that same day in Officer Coffey's office at the high school. Officer Coffey asked the student if she knew why they were talking with her. The student responded that she knew it was because of her posting on the web site, but stated that nothing had happened. Officer Coffey further explained that they were looking into the possible occurrence of criminal sexual contact. The female student responded that no activity of this type had occurred. According to Officer Coffey's testimony, the three individuals then had a broad discussion of cultural topics, after which the Hmong officer departed. Officer Coffey continued discussions with the student and asked her if she had anything else to report. The student answered in the negative. Officer Coffey testified at the hearing that he did not question the female student further about the alleged sexual contact while the Hmong officer was present.

Later that same day, Officer Coffey and Sergeant Kettler intersected at the police station squad room. Sergeant Kettler asked Officer Coffey how the interview had gone, and Officer Coffey replied that it had gone well. Officer Coffey stated that he had met with the student for a little over an hour, with the Hmong officer present for about 30

minutes of that time. Officer Coffey expressed his belief that no inappropriate sexual contact had occurred.

Officer Coffey filed a report summarizing his investigation with respect to the female student. Captain Michael Grill reviewed the report, discussed the matter with Sergeant Kettler, and concluded that it lacked sufficient detail such as how the incident arose, the parties' names, and any information concerning the uncle. Captain Grill instructed Sergeant Kettler to request a supplemental report, and Sergeant Kettler did so in an e-mail message sent to Officer Coffey on February 5, 2006

Meanwhile, on February 1, Captain Grill met with the Hmong officer to discuss the investigation and to ask him to submit a supplemental report. According to Officer Coffey's testimony, it was his belief that Captain Grill told the Hmong officer not to discuss the matter with Officer Coffey. The Hmong officer subsequently submitted a supplemental report which provided the following additional detail concerning what transpired during the January 31 meeting with the female student:

[She] stated that one of her uncle who has been staying at her resident wrote her a letter asking her to go out with him. [She] stated the uncle no longer stay at her residence and confirmed that there was no sexual activity between her and her uncle. Although [she] stated that there was no sexual activity, she did state that her uncle touched her on the forearm and that sometimes he brushed up against her as walked past her. [She] also stated she had told her parents about the situation and they had already planned to talk to the uncle regarding the behaviors.

On February 6, Officer Coffey stopped by Captain Grill's office and asked to talk. According to Officer Coffey's testimony, he asked Captain Grill whether he was familiar with Sergeant Kettler's e-mail message and the underlying investigation. Captain Grill responded in the negative. The two officers proceeded to discuss the matter, and Officer Coffey expressed concern because he and Sergeant Kettler had experienced problems in

the past. Officer Coffey testified that Captain Grill asked him three questions during the conversation: 1) “Did Sergeant Kettler order you not to have [the Hmong officer] in the interview?;” 2) “Why didn’t you call Sergeant Gorsuch?;” 3) Did you try his cell phone?”

Captain Grill’s testimony concerning this conversation differs in two respects. First, Captain Grill testified that he only denied having reviewed Sergeant Kettler’s e-mail message, but not that he was without knowledge of the investigatory incident. Second, Captain Grill testified that he only asked the latter two questions alleged by Officer Coffey.

On February 14, 2006, Sergeant Kettler filed a formal letter of complaint against Officer Coffey. Captain Grill commenced an investigation and took Officer Coffey’s formal statement on March 20, 2006. Two weeks later, Captain Grill submitted a Complaint and Investigative Summary to Police Chief William Sullivan alleging three counts of misconduct against Officer Coffey: 1) insubordination for failure to follow Sergeant Kettler’s order not to have the Hmong officer present during the female student’s interview; 2) failure to follow the chain of command by contacting his direct supervisor with questions regarding the conduct of the investigation; and 3) failure to file complete initial and supplemental investigative reports.

Police Chief Sullivan, after reviewing the investigative file, sustained all three counts. Chief Sullivan imposed a one-day suspension for the insubordination count and issued a non-disciplinary corrective action notice with respect to the other two counts.

The Union filed two grievances relating to this matter. The initial grievance claims that the Employer violated the parties’ agreement by questioning Officer Coffey with respect to a disciplinary matter without affording him the opportunity to have a

Union representative present. The second grievance goes to the merits of the discipline and asserts that the Employer disciplined Officer Coffey without just cause. The grievances proceeded through the steps of the contract grievance procedure and were consolidated for purposes of arbitration.

## **POSITIONS OF THE PARTIES**

### **Employer's Position:**

The Employer contends that both grievances are without merit. The Employer first alleges that the conversation that took place between Officer Coffey and Captain Grill on February 6, 2006 was not an investigatory interview subject to Section 10.6 of the parties' contract because Captain Grill neither instigated the conversation nor systematically questioned Officer Coffey with respect to the merits of the underlying investigation. The Employer also argues that it had just cause to discipline Officer Coffey for insubordination because of the latter's inclusion of the Hmong officer in the investigatory interview in spite of Sergeant Kettler's direct order to the contrary. Finally, the Employer argues that a one-day suspension is an appropriate sanction for Officer Coffey's transgression.

### **Union Position:**

The Union claims that the Employer violated Section 10.6 of the contract by not providing Officer Coffey the opportunity for Union representation when Captain Grill questioned the grievant with respect to events that eventually led to the imposition of discipline. The Union also argues that the Employer did not have just cause to suspend Officer Coffey for insubordination. The Union maintains that Officer Coffey did not disobey Sergeant Kettler's directive because the Hmong officer was present only for a

preliminary pre-interview conversation with the female student and did not participate in the actual interview subsequently conducted by Officer Coffey without assistance.

## **DISCUSSION AND OPINION**

### **A. The Section 10.6 Claim**

The Union asserts that Captain Grill's meeting with Officer Coffey on February 6, 2006 violated Section 10.6 of the parties' collective bargaining agreement. Section 10.6 provides that "Employees will not be questioned concerning an investigation of disciplinary action unless the employee has been given an opportunity to have a UNION representative present at such questioning."

The Union argues that the Employer already had initiated an investigation into Officer Coffey's interview of the female student by the time of the February 6 meeting. The Union points out that Captain Grill had discussed the facts of the interview incident with both Sergeant Kettler and the Hmong officer prior to the February 6. The Union further contends that Captain Grill asked Officer Coffey the following three questions during the meeting: 1) "Did Sergeant Kettler order you not to have [the Hmong officer] in the interview?;" 2) "Why didn't you call Sergeant Gorsuch?;" 3) "Did you try his cell phone?" The Employer subsequently disciplined Officer Coffey as a result of the events surrounding the interview of the female student. The Union, in short, maintains that Captain Grill questioned Officer Coffey as part of an "investigation concerning disciplinary action" on February 6 without providing Officer Coffey an opportunity to have a Union representative present.

The Union's argument falls short of the mark in several respects. First, the notion of a disciplinary interview necessarily contemplates a mandatory meeting called by an

employer. In this instance, however, Officer Coffey not only initiated the meeting but also set the meeting's agenda. The fact that Captain Grill permitted the conversation to continue does not automatically transform the discussion into a disciplinary hearing.

Second, the Employer had not yet commenced a discipline-related investigation into the interview incident. While Captain Grill had requested supplemental reports of the incident from Officer Coffey and the Hmong officer to ascertain what had transpired, no formal disciplinary complaint had been filed as of February 6. Although there may be circumstances that reveal that a de facto investigation was in progress even in the absence of an announced formal investigation, those circumstances do not appear to be present in this instance.

Finally, Captain Grill's questions during the February 6 meeting were not in the nature of an investigatory interrogation aimed at determining culpability. The only question arguably relating to the discipline ultimately imposed concerned Officer Coffey's contention that Captain Grill asked, "Did Sergeant Kettler order you not to have [the Hmong officer] in the interview?" While Captain Grill denies asking this statement, even under Officer Coffey's version of events, this question was asked only in response to a series of preliminary questions posed by Officer Coffey. Moreover, since neither side disputes the fact that Sergeant Kettler did issue such an order, no prejudice could have resulted to Officer Coffey by reason of that particular question even if it was asked.

## **B. The Insubordination Claim**

### **1. The Analytical Framework**

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary

decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof to establish that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established by a preponderance of the evidence, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 948 (6<sup>th</sup> ed. 2003).

## **2. The Alleged Misconduct**

The Employer's contention with respect to the alleged insubordination claim is a straightforward one. The Employer maintains that Sergeant Kettler gave a direct order to Officer Coffey that the Hmong officer was not to participate in the interview of the female student. Officer Coffey disobeyed that order by permitting the Hmong officer to be present for approximately thirty minutes of the interview.

The Union does not dispute Sergeant Kettler's order, but points out that Principal Bezek also desired to use the Hmong officer as a cultural resource during the investigation. According to the Union, Officer Coffey balanced these concerns by asking the Hmong officer to be present for an initial conversation about cultural issues with the Hmong student. Officer Coffey testified that his interview of the female student, during which he elicited factual information in response to questions, did not occur until after the Hmong officer had departed the interview room. As such, the Union contends that the Hmong officer did not "participate" in the interview, but was present only for an initial non-interview "conversation."

The Union makes too fine of a distinction in attempting to characterize the initial portion of the discussion with the female student as a "conversation" rather than an

“interview.” The essence of an interview is the elicitation of facts through the process of interrogation. In this instance, Officer Coffey acknowledged asking the female student if she knew why they had asked her to meet with them and whether anything illegal had happened. These were precisely the types of questions that Sergeant Kettler had earlier explained the female student might be reticent to discuss in front of a male clan member. Moreover, it is clear from the Hmong officer’s supplemental report that the discussion that took place while he was present was not confined to general cultural matters. His report, instead, contained a detailed description of what the female student had stated about her relationship with her uncle. This detail clearly evidences that the Hmong officer had been present during an interview rather than a mere cultural discussion.

During the hearing, the Union elicited a number of comments concerning the positive contributions that the Hmong officer had made to the discussion with the female student and to the investigation as a whole. That may or may not be true, but it is beside the point. Sergeant Kettler gave Officer Coffey a direct order that the Hmong officer was not to participate in the interview of the female student. If Officer Coffey disagreed with that order, his recourse was to revisit the matter with Sergeant Kettler or another supervisor. But disobeying the order was not an acceptable option for a member of a paramilitary police force.

In conclusion, Officer Coffey engaged in insubordination when he decided to have the Hmong officer present during the interview of the female student. The Employer, accordingly, has carried its burden of establishing that the grievant engaged in the misconduct for which discipline was imposed.

### **3. The Appropriate Remedy**

The purpose of discipline short of discharge is to correct employee behavior. The sanction should be of adequate severity to convince the employee that a change in conduct is necessary, but not so severe as to be disproportionately punitive. DISCIPLINE AND DISCHARGE IN ARBITRATION 57 (Norman Brand, ed. 1998). The Employer's imposition of a one-day suspension satisfies that formula in this instance. Officer Coffey's transgression was of a serious nature and warrants more than a mere warning or reprimand. On the other hand, a one-day suspension is a relatively minor sanction and recognizes Officer Coffey's good work record and the fact that he acted in this context with good intentions.

### **AWARD**

The grievance is denied.

Dated: March 23, 2007

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Stephen F. Befort  
Arbitrator