

THE MATTER OF ARBITRATION BETWEEN

COUNTY OF FARIBAULT,)
)
)
Employer,)
)
and) **DULAC TERMINATION**
) **GRIEVANCE**
)
LAW ENFORCEMENT LABOR)
SERVICES, INC.,)
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Union.)
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_____)

Arbitrator: Stephen F. Befort

Hearing Date: May 17-20, 2016
July 8, 2016

Post-hearing briefs received: September 2, 2016

Date of Decision: September 21, 2016

APPEARANCES

For the Union: Isaac Kaufman

For the County: Susan K. Hansen

INTRODUCTION

Law Enforcement Labor Services (Union), as exclusive representative, brings this grievance claiming that the County of Faribault (County) violated the parties' collective bargaining agreement by discharging Deputy Sheriff Shane Dulac without just cause. The County asserts that the discharge was warranted for two reasons: First, the County claims that the grievant encouraged other County employees to make a trade for controlled substance pills at a bar and then failed to contact the deputy on duty to take control of the pills. Second, the County contends that the

grievant engaged in misconduct by pointing a loaded weapon at four other deputies. The grievance 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) Was the termination of Deputy Sheriff Shane Duloc for just cause?
- 2) If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 10. DISCIPLINE

10.1 The Employer will discipline for just cause only.

FACTUAL BACKGROUND

The grievant, Shane Dulac, has been employed as a patrol deputy by the Faribault County Sheriff's Office since 1997. The only prior discipline on his active record is an unrelated written reprimand. Law Enforcement Labor Services, Inc. represents the Sheriff's deputies unit and has negotiated a collective bargaining agreement that limits the County's right to impose discipline except upon a showing of just cause.

The Derby Bar Incident

On the evening of Thursday, March 26, 2015, Dulac, who was off-duty, and two friends visited the Derby Bar in Guckeen, Minnesota for drinks. Also present at the bar were three employees of the Faribault-Martin County Human Services Department – Jen Nelson, Lindsay Greff, and Bethany Vetsch. Dulac and the three Human Services workers all were drinking alcohol. Dulac testified that he drank three beers while at the Derby Bar in addition to the two he

had consumed earlier at another establishment. Nelson testified that she consumed eight to ten beers while at the bar.

At about 10:30 p.m., a man by the name of Joe entered the bar. Dulac recognized him as a suspect in a recent boat theft investigation. Joe was acting oddly, fidgeting and repeatedly combing his long hair. He also had left his girlfriend and child outside in their car. After consuming one beer, Joe displayed two Vicodin tablets and offered to give them to anyone who would buy him a beer.

At this point the testimony of those present at the bar diverges. Nelson, Greff, and Vetsch testified that Dulac suggested that they should make the trade so that Dulac could arrest Joe. Dulac denies making such a request and testified that he only stated in response to a question that he could arrest Joe if the pills were obtained. At the arbitration hearing, Dulac testified that he did not mean that he himself would arrest Joe, but only that he could contact the on-duty deputy to effectuate an arrest.

Dulac then engaged Joe in conversation to see if he could obtain more information about possible drug dealing. Dulac asked whether Joe could obtain marijuana or methamphetamine, but Joe said that he could not. Dulac walked away from Joe and told Nelson that he did not intend to arrest Joe just for having two prescription pills.

Later that evening, Nelson showed Dulac two Vicodin pills and explained that she had obtained them from Joe in exchange for buying him a beer. Dulac testified that he was shocked that Nelson had actually made the trade and now possessed the pills. Dulac did not take custody of the pills, but instead told Nelson that she should contact Chief Deputy Scott Adams the next morning to report the exchange with Joe and to turn over the pills.

Nelson did call Adams the next morning, but he was not working that day. So, she left a voicemail message for Adams and retained the pills in her possession. Adams testified that he was not aware of Nelson's message until the following Monday, March 30. At that time, he assigned the matter to Detective Mark Purvis who, in turn, left a voicemail message for Nelson. Nelson, however, was working out of the county and did not connect with Purvis.

On Wednesday, April 1, Vetsch filed a child protection report concerning Joe's conduct at the Derby Bar. Her supervisors in the Human Services Department then called Vetsch in for questioning about the report. Vetsch became concerned that her job might be in jeopardy and reached out to Nelson and Greff. They contacted Dulac, and, upon learning that Nelson had not yet turned over the pills, he urged her to do so as soon as possible.

On Friday, April 3, Nelson met with Adams and turned over the pills. She also provided an account of the night at the Derby Bar including the allegation that Dulac had asked her to trade for the tablets. Later that day, County Sheriff Michael Gormley advised Dulac that was being placed on administrative leave pending an investigation into the Derby Bar incident.

The County Sheriff's Office contracted with Watonwan County to conduct a criminal investigation into the Derby Bar incident. The Watonwan County Attorney declined to pursue criminal charges, but the declination letter described Dulac's statement to the criminal investigator as "markedly self-serving" and not forthcoming.

Following the criminal investigation, Sheriff Gormley filed an internal affairs complaint against Dulac, and Detective Dave Hoffman of the Worthington Police Department undertook an internal affairs investigation of the Derby Bar matter. He issued a report finding that Dulac had engaged in conduct unbecoming an officer by enlisting the participation of the Human Service

employees in a plan to obtain controlled substance pills from a criminal suspect, and that Dulac had improperly handled evidence by failing to secure the pills obtained by Nelson.

Dulac testified that while the internal affairs investigation was pending, he was contacted by two individuals who had spoken with the owners of the Derby Bar. According to Dulac's testimony, these individuals told him that the bar owners had indicated that they had engaged in a conversation with Greff in which she purportedly admitted that Dulac had not encouraged any of the Human Service employees to obtain the Vicodin tablets. Investigator Hoffman interviewed the bar owners, but they denied having such a conversation.

Service Weapon Incidents

In May 2015, during a firearms qualification exercise, Deputy Chris Albers revealed to the range instructors – Deputy D.J. Bullerman and Blue Earth Police Chief Tom Fletcher – that two months earlier, Dulac had pointed his loaded service weapon at him while they were both in the Sheriff's office. According to Albers, the incident occurred from a distance of about four feet as Albers neared Dulac's cubicle on his way to the restroom.

Bullerman and Fletcher reported Alber's allegations to Chief Deputy Adams, who, in turn, notified Chief Gormley. Three other deputies subsequently came forward with additional allegations that Dulac also had pointed a loaded duty weapon at them. The timing and circumstances of these alleged incidents are as follows:

2007: Dulac points weapon at Mark Purvis, a newly hired deputy while in front of the old Sheriff's office.

2009: Dulac points weapon at Pat Campbell, another newly hired deputy, while at the old Sheriff's office.

2009: Dulac points weapon at Deputy Campbell, this time at the new Sheriff's office.

2012: Dulac points his weapon at Campbell a third time while they were sitting in their respective cubicles in the Sheriff's office.

2014: Dulac points his weapon at Deputy Brittney Gehrking at the Sheriff's office.

None of the deputies reported the incident at or near the time of occurrence. At the arbitration hearing, Dulac acknowledged the occurrence of three of these incidents. He testified that he could not remember the other three incidents, but he did not dispute that they might have occurred.

Once again, the County retained two outside investigators to look into these allegations. Dakota County Attorney James Backstrom decided not to file criminal charges relating to the gun-pointing incidents.

Wright County Lieutenant Annette Habisch-Peterson then undertook an internal affairs investigation. She concluded that Dulac had violated several County policies by pointing a loaded weapon at other deputies. She found that this conduct was unbecoming an officer and that it created a dangerous and hostile work environment.

During these investigations, several of the deputies who had been the target of Dulac's actions stated that they thought Dulac was just joking around and that they did not feel threatened by his actions. At the arbitration hearing, however, these deputies uniformly reported being fearful of Dulac and opposed his return to the workforce. In the Notice of Intent to Terminate Employment, dated September 28, 2015, Sheriff Gormley alleged that the gun-pointing incidents "made deputies and other officers uneasy and fearful to be around you."

The County terminated Deputy Dulac's employment effective October 12, 2015. The Union filed a grievance challenging that decision which proceeded to a five-day arbitration hearing beginning in May 2016. Following the first four days of hearing, the County again retained Lt.

Habisch-Peterson, this time to investigate claims made by Dulac at the hearing that Deputy D.J. Bullerman and former Deputy David Karge had previously pointed loaded weapons at him. Habisch-Peterson concluded that those allegations were unfounded. The arbitration hearing resumed and concluded on July 8, 2015.

POSITIONS OF THE PARTIES

Employer:

The County contends that it had just cause to discharge the grievant for two incidents of misconduct. First, the County maintains that Dulac acted inappropriately by encouraging non-law enforcement County employees to obtain controlled substance pills at a bar and by not taking action to take custody of the pills as evidence. Second, the County asserts that Dulac pointed a loaded weapon at four deputies on a total of six occasions, creating an environment of discomfort and fear among his co-workers. The County claims that discharge is an appropriate remedy for this behavior in that the behavior constituted serious misconduct and interferes with the grievant's ability to function effectively as a member of the County's law enforcement team.

Union:

The Union maintains that the County did not have just cause to support its discharge decision. The Union argues that Dulac did not encourage the Human Service employees to obtain the pills, but that this was a story concocted by those employees to protect their jobs. The Union also maintains that Dulac acted reasonably by instructing Nelson to contact Chief Deputy Adams about the pills on the day following the Derby Bar incident. The fact that the pills were not transferred for a week was the fault of Nelson, not Dulac. In terms of the gun-pointing incidents, Dulac acknowledges that this was inappropriate behavior. The Union argues that the penalty of

discharge is too harsh of a sanction, however, because of the lack of progressive discipline and the fact that Dulac has expressed remorse for his behavior.

DISCUSSION AND OPINION

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 that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, 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* 15-23 (7th ed. 2012).

A. The Alleged Misconduct

The County alleges that Deputy Dulac engaged in misconduct with respect to both the Derby Bar incident and the gun-pointing incidents. Each is discussed below.

The Derby Bar Incident

The County claims that Dulac's conduct relating to this incident entailed two distinct types of misconduct. First, the County contends that Dulac encouraged three non-law enforcement County employees to engage in an unlawful barter for a controlled substance. The County maintains that this behavior constituted conduct unbecoming an officer. Second, the County asserts that Dulac improperly handled evidence of criminal behavior by failing to secure the Vicodin pills after Nelson made the trade with Joe.

The Unlawful Barter

It is undisputed that Nelson bought Joe a beer in trade for two Vicodin tablets at the Derby Bar during the evening of March 26, 2015. Vicodin is a controlled substance which may be

lawfully possessed only if prescribed by a health care provider. Apparently, neither Joe nor Nelson had such a prescription.

The three Human Service Department workers claim that Dulac encouraged them to make the trade with Joe to obtain the Vicodin tablets so that Joe could be arrested. Investigator Hoffman found this claim to be credible and concluded that Dulac, by encouraging this unlawful trade, engaged in conduct unbecoming an officer.

I do not believe that this allegation is clearly established for several reasons. First, Dulac has consistently denied that he ever encouraged this trade, although he does acknowledge that he told the Human Service employees that “if he shows you something, I can arrest him.” Second, the record contains evidence, albeit hearsay evidence, that Greff admitted to the owners of the Derby Bar that the three employees had fabricated the allegation against Dulac in order to protect their jobs. Finally, it is plausible that the three employees mistakenly interpreted Dulac’s “if he shows you something, I can arrest him” comment as a request to affirmatively undertake the transaction with Joe. The fact that Nelson had been drinking heavily could have contributed to a possible misunderstanding. In the end, while Dulac exercised poor judgment by playing undercover detective while off-duty in a bar, it is not clear that he directly engineered the unlawful barter.

Improper Handling of Evidence

The County’s second claim flowing from the Derby Bar incident is that Dulac failed to secure the pills as evidence of criminal behavior after Nelson told him that she had made the trade. According to the County, the failure to secure the evidence in a timely manner precluded the possibility of obtaining a search warrant for the purpose of determining Joe’s possible involvement in a broader scope of unlawful behavior.

The County maintains that Dulac failed to pursue several viable options for securing the pills. The best option would have been for Dulac to summon the deputy on-duty to come to the bar and take custody of the evidence. Another alternative would have been for Dulac himself to take custody of the pills and then review the matter with one of his supervisors in the morning. At a minimum, the County argues, Dulac should have monitored the situation more closely to ensure that Nelson transferred possession of the pills on Friday, March 27.

The Union contends that permitting Nelson to keep the pills overnight would have achieved the desired results if she had succeeded in delivering the pills on March 27 as planned. The fact that the anticipated transfer did not occur until a week later, the Union argues, is the result of Nelson's negligence rather than that of Dulac.

While it is true that the communication breakdowns involving Nelson, Adams, and Purvis contributed to the delay, these problems would never have come into play if Dulac had exercised one of the three preferable options described above. Given these circumstances, the County has adequately established this allegation of misconduct.

Service Weapon Incidents

The County also alleges that Deputy Dulac engaged in misconduct by pointing his loaded service weapon at four other deputies on a total of six occasions. For his part, Dulac testified that he only remembers three of the incidents, but that he does not deny that the other incidents actually occurred.

Sheriff Gormley's internal affairs complaint summarized the alleged policy violations flowing from this conduct as follows:

Conduct unbecoming an officer. Deputy Dulac's actions of pointing a loaded gun at someone without cause or reason.

Creating a dangerous and hostile work environment. Dulac's actions of pointing a gun at another deputy without cause have made deputies and other officers uneasy and fearful to be around him.

Violation of Policy 608 – Use of Equipment. Dulac violated the Use of Equipment Policy by pointing his gun at a fellow employee and not following safety standards and training taught annually.

Violation of Policy 801 – Employee Conduct and Work Rules. Dulac violated this policy by inflicting unwelcome harassment by pointing his gun at fellow employees, hazing type behaviors as well as violating the safety rules.

Lt. Habisch-Peterson sustained each of these allegations in her investigative report.

Since the occurrence of these incidents is not disputed, the County has adequately established the existence of this misconduct.

B. The Appropriate Remedy

The remaining question is whether discharge is an appropriate sanction under the circumstances of this case. Here again, it is helpful to consider the areas of misconduct one at a time.

The Derby Bar Incident

The first sustained area of misconduct concerns Deputy Dulac's improper handling of the Vicodin pills as evidence of possible criminal behavior. The failure of Dulac to secure custody of the pills had the eventual impact of foreclosing the possibility of obtaining a search warrant. While that misstep warrants discipline, it is not so substantial by itself to justify an immediate discharge. The possession and barter of the pills is not a high level criminal offense. Dulac has no prior discipline for similar behavior. And, there is nothing in the record to suggest that a sanction short of discharge would not serve to correct his behavior. Accordingly, if this was the only misconduct at issue, I would not sustain the discharge penalty.

Service Weapon Incidents

The gun-pointing incidents are another matter. The County argues that this is extremely serious misconduct. I agree. Pointing a loaded weapon without a law enforcement reason at another person is extremely dangerous. A slip, stumble, or jostle could result in the accidental discharge of the weapon and a horrific result. Pointing a weapon at a fellow deputy, moreover, engenders fear and damages the trust necessary for productive teamwork. Not surprisingly, the County annually trains deputies never to point a weapon at anyone unless necessary for law enforcement purposes.

The Union does not deny that gun-pointing is a serious matter and that Dulac erred in engaging in this conduct. The Union, however, asserts several arguments in favor of a lesser sanction.

The Incidents Were Not Threatening in Nature

The Union contends that Dulac did not intend to harm or threaten anyone by these incidents and engaged in them with a playful or joking manner. The Union points out that during the criminal investigation, Albers, Purvis, and Campbell each told the investigator that they did not feel fearful or threatened by Dulac's behavior. During the internal affairs investigation, Gehrking stated that she thought that Dulac was just "joking around." Dulac's counselor, Dave Andros, described Dulac's conduct as "playful but stupid."

At the arbitration hearing, however, the levity disappeared. Albers and Campbell testified that they no longer trust Dulac and would resign if he returned to work. Purvis testified that he would not feel safe around Dulac if he returned as a deputy. Gehrking testified that she would be "terrified" if Dulac were back on duty. Whether this testimony is objectively accurate or, as the

Union suggests, the result of “coaching,” it is clear that the other County deputies do not currently look favorably on Dulac’s behavior.

Moreover, pointing a loaded weapon at a co-worker is unacceptable behavior even if not intended as threatening. A lack of ill will does not insulate this type of serious and dangerous misconduct from an otherwise appropriate remedial sanction.

The Lack of Progressive Discipline

The Union argues that the County did not employ progressive discipline to correct Dulac’s behavior. In general, progressive discipline is favored as a means of putting an employee on notice of unacceptable behavior and to afford the employee an opportunity to cease that behavior.

DISCIPLINE AND DISCHARGE IN THE WORKPLACE 65 (Norman Brand & Melissa H. Biren, eds., 2nd ed. 2008). Here, the lack of progressive discipline reflects the fact that no deputies reported or complained of any of the gun-pointing incidents. As a result, department supervisors never put Dulac on notice that any additional incidents would not be tolerated.

In Washington County and Law Enforcement Labor Services, BMS Case No. 05-PA-599 (Befort, 2005), I heard and decided another case in which a deputy sheriff was terminated for the inappropriate pointing of his service weapon. I reduced that termination to a 30-day suspension based upon the following logic:

In a nutshell, this case comes down to this: Deputy Lindholm engaged in an excessive amount of gun horseplay pranks. Department supervisors were aware of the situation, but took no corrective action. This failure of supervision effectively condoned the grievant’s conduct and did not facilitate a correction in behavior. Yet, Lindholm, by virtue of training and experience, should have known that such conduct was inappropriate. Under these circumstances, a significant penalty short of discharge is appropriate.

The Union argues that a similar outcome should follow in this case so as to provide Dulac an opportunity to correct his behavior.

There is, however, a significant distinction in the two cases. In the Washington County matter, there was evidence that department supervisors knew of the grievant's behavior yet took no action to halt or correct it. No similar evidence has been presented in this case. The record evidence clearly establishes that Faribault County supervisors were not aware of any of the gun-pointing incidents until Albers made his revelation in May 2015. At that point, Sheriff Gormley took immediate action by making an internal affairs complaint and launching an investigation. Faribault County supervisors clearly did not condone Dulac's actions.

In addition, it is well established that warnings and a pattern of increasing discipline are not required in instances of severe misconduct. An employee is presumed to know without warning or lesser discipline that severe misconduct is not permissible. DISCIPLINE AND DISCHARGE IN THE WORKPLACE 80 (Norman Brand & Melissa H. Biren, eds., 2nd ed. 2008). Thus, an employer need not use progressive discipline when an employee commits serious misconduct such as theft or violence. The same is true with respect to a law enforcement officer who points a loaded weapon at a co-worker.

In short, the lack of progressive discipline does not provide a viable defense in this instance.

A Climate of Gun Play

The Union suggests that a climate of gun play exists within the Faribault County Sheriff's Office. At the arbitration hearing, Dulac testified that he himself has experienced having two other deputies pointing their weapons at him. Dulac testified that David Karge, who left the County's employ in 1997, had pointed his weapon at Dulac on three separate occasions. Dulac also testified that D.J. Bullerman pointed his weapon at Dulac approximately five or six years ago.

Following this testimony and before the resumption of the hearing on July 8, 2016, the County asked Lt. Habisch-Peterson to investigate these claims. After interviewing all of the

relevant participants, she concluded that Dulac's claims were unfounded. Both Karge and Bullerman testified on rebuttal and denied ever pointing a gun at Dulac.

In contrast to Dulac's testimony, the County elicited testimony from six witnesses who each testified that they had never observed any deputy other than Dulac point a weapon at another employee. Lt. Habisch-Peterson testified that she asked all eight County's deputies during the investigation whether they had ever observed any deputy other than Dulac point a weapon at a co-worker. Each deputy answered in the negative.

Based on the record as a whole, I do not believe that a climate of gun play exists at the Faribault County Sheriff's Office.

Remorse

Dulac testified at the hearing that he recognizes that pointing guns at other deputies is wrong, and he takes full responsibility for his actions. He also testified that he has made significant changes in his personal life, including to quit drinking, change churches, and undergo counseling. The Union, accordingly, contends that Dulac is unlikely to repeat his gun-pointing behavior if reinstated.

The County argues that Dulac's remorse is too little and too late. The County maintains that his repeated service weapon violations belie any enlightenment in behavior.

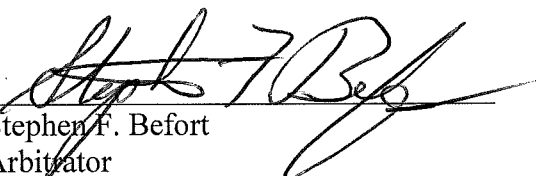
I believe that Deputy Dulac's remorse is genuine. But, I also believe that his past conduct has resulted in an environment in which the rest of the department has lost all trust in his rehabilitation. Under those circumstances, I do not think that even genuine remorse is sufficient to repair the relationship between Deputy Dulac and the Faribault County Sheriff's Office.

I find that the County has carried its burden to show that discharge is an appropriate remedy in this case.

AWARD

The grievance is denied.

Dated: September 21, 2015.


Stephen F. Befort
Arbitrator