

THE MATTER OF ARBITRATION BETWEEN

POLICE OFFICERS FEDERATION)
OF MINNEAPOLIS,)
)
 Union,)
)
and)
)
CITY OF MINNEAPOLIS,)
)
 Employer.)

KEEFE DEMOTION
GRIEVANCE

Arbitrator: Stephen F. Befort

Hearing Date: April 6, 2017

Post-hearing briefs received: April 21, 2017

Date of Decision: May 17, 2017

APPEARANCES

For the Union: Erik Bal

For the County: Mike Bloom

INTRODUCTION

Police Officers Federation of Minneapolis (Union), as exclusive representative, brings this grievance claiming that the City of Minneapolis (City or Employer) violated the parties' collective bargaining agreement by demoting former Lieutenant Michael Keefe without just cause. The City asserts that the demotion to the position of sergeant was warranted because the grievant violated several department policies, evidencing that Keefe does not possess the leadership skills necessary to serve as a lieutenant. 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 demotion of Michael Keefe for just cause?
- 2) If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 4

DISCIPLINE

Section 4.1 The City, through the Chief of the Minneapolis Police Department or his/her designee, will discipline employees who have completed the required probationary period only for just cause. . . .

FACTUAL BACKGROUND

The grievant, Michael Keefe, has been employed as a police officer by the City of Minneapolis since 1991. In 2007, the City promoted Keefe to the position of lieutenant. The instant grievance challenges the City's demotion of Keefe to sergeant in 2009.

Following his promotion to lieutenant in 2007, Keefe was assigned to serve as the commander of the Violent Offender Task Force (VOTF), a multi-jurisdictional unit charged with combating gang violence and drug-trafficking. The VOTF included the participation of the federal Bureau of Alcohol, Tobacco, and Firearms (ATF) and the Federal Bureau of Investigation (FBI) as partners.

Keefe's service time with VOTF was tumultuous. Among other matters, Keefe sought to remove other officers from the task force, engaged in behavior that led both the ATF and the FBI to ban Keefe from their facilities, and criticized Minneapolis Police Department (MPD) Chief Tim

Dolan in the media. Three of Keefe's fellow MPD officers claimed that Keefe made derogatory comments about minorities and homosexuals. For his part, Keefe contends that the three complaining officers expressed false or trumped up charges out of personal animosity.

Based on various events and complaints, the MPD undertook two Internal Affairs (IA) investigations. The first IA investigation, conducted in 2008, examined the following five allegations, namely that Keefe:

- 1) Violated MPD Policy 5-101 concerning truthfulness, by making false statements that he ordered the removal of Hudson Police Chief Andy Smith from the VOTF email list;
- 2) Violated MPD Policy 5-101 concerning truthfulness by making false statements about MPD Sergeant Mark Lenzen in a memo sent to Captain Mike Martin;
- 3) Violated MPD Policy 5-105.14 and .15 by using disrespectful and derogatory language regarding minorities and homosexuals;
- 4) Violated MPD Policy 6-115, Law Enforcement Agency Liaison, by virtue of being banned from ATF and FBI facilities; and
- 5) Violated MPD Policy 5-105.13, Professional Code of Conduct, by publicly criticizing the MPD in the media.

The internal affairs investigator sustained each of these allegations, and a reviewing disciplinary panel endorsed those findings. The panel recommended discharge as the appropriate sanction.

In 2009, the MPD initiated a second IA investigation into whether Keefe made false statements to the effect that certain MPD officers were about to be indicted for corruption. This investigator did not sustain the allegation with respect to truthfulness, but did so on the basis of a lack of discretion. The reviewing three-member disciplinary panel sustained the allegations on both counts and again recommended that the grievant be discharged.

The Employer ultimately decided to demote Keefe to the position of sergeant rather than to adopt the discharge recommendation. Former Assistant Chief Sharon Lubinski testified that she and Chief Tim Dolan determined that, while Keefe lacked the leadership skills to serve as a lieutenant, he did have a good track record as an officer and would likely perform adequately at a lower rank.

The Union filed a timely grievance challenging the Employer's demotion decision. Shortly thereafter, Keefe filed a lawsuit alleging that the City's action violated both federal and state law. The Union and the City agreed to put the grievance on hold pending the outcome of the litigation. Eventually, both federal and state courts dismissed Keefe's litigation claims.

POSITIONS OF THE PARTIES

Employer:

The City contends that it had just cause to discipline the grievant for multiple violations of MPD policies. These violations include untruthfulness, use of derogatory language, and an inability to work with interjurisdictional partners. The City maintains that these violations demonstrate that Keefe lacks the leadership qualities necessary for the lieutenant position.

Union:

The Union denies that Keefe engaged in the conduct alleged by the City and objects that the City relies on hearsay rather than direct testimony to support its allegations. Even if the City can establish that Keefe committed some of the alleged acts, the Union argues that a permanent demotion is too severe of a penalty. The Union also urges that Keefe's overall good work record should mitigate any disciplinary sanction.

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 City alleges that Keefe engaged in misconduct by violating four MPD policies. The policies in question concern:

- truthfulness;
- disrespectful and derogatory language;
- inability to work with law enforcement partners; and
- professional code of conduct.

Before discussing these four policies, the Union raises an evidentiary issue that warrants preliminary consideration.

1. Evidence and Credibility

The Union maintains that the Employer's allegations should be given little weight because they are based primarily on hearsay evidence, *i.e.*, witness statements and investigation reports, rather than on live testimony subject to cross-examination. While it is true that arbitrators are not bound by formal rules of evidence, and frequently admit hearsay "for what it is worth," many

arbitrators find such evidence not to be determinative when outweighed by credible live testimony. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 8-33 to 8-39 (7th ed. 2012).

This arbitrator has addressed this issue in two prior cases. In *City of Minneapolis and Int'l Ass'n of Firefighters Local 82*, 121 LA (BNA) 77 (Befort, 2005), the employer terminated a fire fighter for allegedly engaging in inappropriate sexual contact with a citizen client. The employer did not call the citizen as a witness at the arbitration hearing, but instead introduced her story through the second-hand oral testimony of a department supervisor. I sustained the grievance, finding that the hearsay evidence did not outweigh the fire fighter's credible sworn testimony to the contrary.

In *Steele County and Law Enforcement Labor Services*, BMS Case No. 07-PA-0220 (Arb. Befort, 2009), the employer primarily relied on the recorded statement of a co-worker in discharging a deputy sheriff for misconduct. The co-worker subsequently recanted his statement at the arbitration hearing. In that case, I found the recanted statement to be more credible than the live testimony and denied the grievance.

I believe that the present context is more similar to *Steele County* than to *City of Minneapolis*. Here, the City has presented voluminous evidence in the form of transcribed witness statements. These documents, while technically hearsay, provide detailed substantive information close in time to the events in question. The information in these documents was then synthesized and analyzed in two IA investigation reports and in the summary narrative testimony of Assistant Chief Lubinski. Three court decisions further enrich the arbitral record. While the Union makes a valid point in noting the lack of an opportunity to cross-examine the documentary sources, the City has presented a detailed and credible record that should not automatically be trumped by the grievant's live testimony.

2. The Alleged Policy Violations

a. Truthfulness

The City alleges that Keefe violated the MPD policy on truthfulness on three occasions. First, the City claims that Keefe was untruthful when he told the Chief of Police in a memo that he had ordered Sergeant Pat King to remove Hudson Police Chief Andy Smith's name from the VOTF email list. In an August 17, 2007 memo to Chief Dolan, Keefe wrote:

On August 9th I discovered Sgt. King had Chief Andy Smith of the Hudson WI Police Department on our unit e-mail list along with ATF Agent Alden Fry. I had both names removed from the list.

Keefe repeated this claim while giving a *Garrity* statement to Internal Affairs on August 30, 2007.

In actuality, however, Keefe's August 9 communication with Sergeant King authorized Smith's name to remain on the message list. Keefe's August 9 email message to Sergeant King stated:

Pat, A.J. Fry is on our VOTF message list . . .? Not good. I tried to remove him, but was denied. Please remove his name. I had to laugh when I saw Andy's name, he can stay.

This email message clearly contradicts the information communicated by Keefe to Chief Nolan and violates the MPD policy on truthfulness.

Second, the City alleges that Keefe made several knowingly untruthful statements regarding Sergeant Mark Lenzen in a memo submitted to Captain Martin on June 14, 2007 which led to the removal of Lenzen from VOTF. Keefe's memo alleged that Lenzen violated the chain of command, used foul language, and obstructed Keefe's orders. Lenzen denied the accuracy of these statements. At the arbitration hearing, Keefe testified that both Sergeant Wentz and Sergeant Snyder had reviewed and approved Keefe's memo before it was sent, but Wentz and Snyder each stated in investigatory statements that they had informed Keefe that some of the information in the

memo about Lenzen was not true. Accordingly, the evidence establishes that Keefe's comments in the June 14, 2007 memo violated the MPD policy on truthfulness.

Finally, the City contends that Keefe violated MPD policies on truthfulness and discretion by repeatedly stating that five law enforcement officers - three from the MPD and two from the FBI - were going to be indicted for corruption. Keefe generally made these allegations in conjunction with criticizing what he perceived as the mishandling of a VOTF investigation. Keefe also repeated these claims at each of his Loudermill hearings. In spite of these contentions, no indictments ever resulted, and the record is devoid of any tangible evidence that the five law enforcement officers were ever subject to any investigation.

It may well be, as the second IA investigator found, that Keefe sincerely believed that the five officers should have been indicted. But, I agree with the disciplinary panel that Keefe's repeated assertions about indictments were unfounded as a matter of fact and significantly damaging to MPD work relationships. Thus, the City has produced sufficient evidence to establish MPD policy violations for untruthfulness and improper use of discretion.

b. Disrespectful and Derogatory Language

The City alleges that Keefe used offensive and inappropriate language when referring to African Americans and homosexuals. Such conduct, if established, would run afoul of MPD Policy 5-105.14 and .15.

These allegations are premised on IA statements provided by Sergeants King, Snyder, and Wentz, none of whom testified at the arbitration hearing. For his part, Sergeant Keefe adamantly denied making such statements in his arbitration testimony.

Although hearsay statements may be probative when supported by other indicia of credibility, the three IA statements are not accompanied by any tangible evidentiary support. In

addition, personal animosity exists between Keefe and the other three sergeants. Under these circumstances, I conclude that the City has not submitted sufficient evidence to establish this alleged violation.

c. Inability to Work with Law Enforcement Partners

The City alleges that Keefe demonstrated an inability to maintain cooperative multi-jurisdictional partnerships by engaging in conduct that resulted in both the ATF and the FBI banning him from their facilities. Both agencies were extra-jurisdictional partners in VOTF.

In May 2007, VOTF was investigating the activities of the Tre Tre Crips gang in Faribault, Minnesota. According to Keefe, a federal wiretap overheard comments by gang members threatening to kill Faribault police officers who pulled them over for traffic stops. Keefe disclosed this information to Faribault law enforcement agencies despite the explicit instruction from ATF Agent Alden Fry not to disclose any information from the wiretap. Steven Bogdalek, ATF's VOTF supervisor, sent Keefe an email message on May 21, 2007 banning him from ATF office space and stating, "you are a detriment to this investigation, which was clearly exhibited by your poor judgment in making unauthorized disclosure about a federal investigation to agencies that did not have a need to know."

Another VOTF operation resulted in the arrest of Twin Cities gang leader Taylor Trump. During an interview following his arrest, Trump alleged that six MPD officers were on his payroll. Keefe believed that Trump's accusations were false, and he had a disagreement as to tactics with an FBI agent who was conducting a follow-up interview of Trump. The FBI agent eventually ended the interview, finding Keefe's participation to be disruptive. The FBI banned Keefe from its premises on February 29, 2008.

The fact that two federal agency partners banned Keefe from their facilities clearly damaged the desired inter-agency cooperation necessary for the VOTF operation. This series of events clearly establishes a violation of MPD 6-115.

d. Professional Code of Conduct

As a final allegation, the City claims that Keefe violated MPD Policy 5-105.13 by publicly criticizing the MPD and the Chief of Police in the media. In general, MPD contact with the media is undertaken by the department's public information officer. All other MPD employees are expected to avoid media contact absent departmental permission.

Despite this policy, Keefe has been quoted in numerous newspaper articles. Most significantly, Keefe was quoted in a Star Tribune article saying, "[Chief] Tim Dolan doesn't like me, and I don't like him." In that same article, Keefe is quoted saying, "the impression in the department is that friends of Dolan can operate with impunity." The City has established that this conduct violates MPD Policy 5-105.3.

B. The Appropriate Remedy

The remaining question is whether a demotion is an appropriate sanction under the circumstances of this case. The City claims that it is, citing to the serious nature of Keefe's various policy violations. More particularly, the City maintains that these violations evidence that Keefe lacks the leadership qualities to serve as a lieutenant.

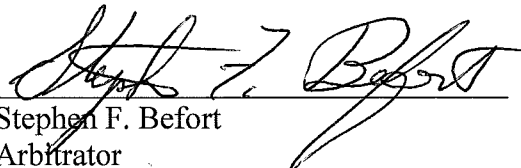
The Union advances two arguments in urging a lesser sanction. First, the Union argues that Keefe generally has received good performance reviews of his work as a police officer. Second, the Union contends that if the City's principal concern is Keefe's lack of managerial skills, that purported deficiency can be addressed through training as opposed to a permanent demotion.

I believe that the City has the better of this argument. While Keefe has many skills as a police officer, he also has a volatile demeanor. His emotional outbursts appear to cloud his judgment and cause friction in co-worker relationships. As the City's post-hearing brief asserts, "a lieutenant must be a team player, work corroboratively, and maintain a high level of trust with . . . law enforcement partners." Since Keefe has exhibited considerable difficulty in performing in these capacities, it is preferable that his future service with the MPD be in the role of a sergeant rather than a lieutenant.

AWARD

The grievance is denied.

Dated: May 17, 2017.



Stephen F. Befort
Arbitrator