

BEFORE THE NEUTRAL ARBITRATOR, RICHARD M. HUMPHREYS

In the Matter of

The City of Fairbanks, Alaska

And

The Public Safety Employees Union. AFSCME Local 803.
Fairbanks Police Department Chapter

Grievance: Douglas Whorton: Demotion

OPINION AND AWARD OF THE ARBITRATOR

APPEARANCES:

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Award issued at Seattle, Washington on June 17, 2009.

Statement of the Case.

This matter came on for hearing on March 22 and 23rd 2009 in the City of Fairbanks, Alaska. It was convened by mutual agreement at the Regency Hotel in the City of Fairbanks to consider disciplinary action taken by the Police Department of the City of Fairbanks, (hereinafter, the "City"). On March 7,

2008 the City demoted Douglas Whorton, (hereinafter, "Grievant") from Lieutenant to Senior Top step Patrol Officer.¹ Pursuant to the terms and conditions of the Collective Bargaining Agreement² (hereinafter "Agreement") the Public Safety Employees Union, (hereinafter the "Union") filed a grievance challenging the demotion.³ The parties were unable to resolve this grievance under Article 8, Section 5 of the Agreement. As a result, the Union demanded that the matter be submitted to final and binding arbitration. The undersigned was selected to act as the neutral arbitrator. This Opinion and Award is submitted pursuant to the terms and condition of the Agreement.

Statement of the Facts.

This matter arose from an internal police department dispute over a vacant position within the Police Department Command Staff. The Police Department of the City of Fairbanks has a Command Staff that consists of a Chief of Police, a Deputy Chief of Police and 4 Lieutenants who are Shift or Watch Commanders. One of these Lieutenants was the Head of the Investigations Unit. Grievant was a Lieutenant in the Patrol Division. In March of 2007, the Lieutenant in charge of Investigations announced his retirement thereby creating a vacancy. The vacancy in investigations generated 3 potential candidates including the grievant. Another candidate was Lieutenant Dan Wellborn, Head of the Patrol Division.

Welborn expressed satisfaction with his Patrol position and reluctance to move to Investigations. During the selection process, that reluctance was gradually overcome by the Police Chief and the Deputy Police Chief. In the end, Welborn decided to accept the position. Welborn assumed command of the Investigative Unit. The grievant assumed command of the Traffic Safety Program and became coordinator of fleet management. The remaining candidate was appointed second in command to the Deputy Chief for accreditation management issues and inventory and supply.⁴

The method and legitimacy of the selection is not at issue in this case. However, the grievant had a different perspective on the selection process. It was the desire of the grievant to be selected to command the Investigative⁵ Unit. Grievant was aware of Welborn's initial reluctance. During conversations and email exchanges, grievant offered to support Welborn should he desire to resist what grievant saw as an attempt to "draft" Welborn into the position. Grievant assured Welborn that he was prepared to join with him in filing a grievance to protest what to the grievant seemed more like compulsion of Welborn than a willing candidacy by Welborn in the selection process.

Ultimately, and to the disappointment of grievant, Welborn accepted the position in Investigations. As it became evident to the grievant that Welborn would accept the position, feelings between the two officers began to harden. City Exhibit 5 is an exchange of emails between them. It captures Welborn's initial reluctance for the position; the grievant's ire with Welborn's lack of will to resist the selection and the tension between the two officers. In the aftermath of that selection, grievant held a breakfast meeting at a local restaurant, The Cookie Jar, with the newly elected Mayor of the City of Fairbanks. The meeting took place on January 31, 2008.⁶ After hearing what the grievant had to say at that meeting, the Mayor expressed alarm to the Chief of Police that she had heard allegations of nepotism, favoritism, corruption and the creation of a hostile work environment within the Police Department. Prior to raising these allegations with the Police Chief, the Mayor contracted with an outside fact finder to conduct an investigation into the allegations. The Mayor regarded this matter as an employee complaint against the Deputy Chief of Police, Dan Johnson. On February 5, 2008, the fact finder

¹ See City Exhibit 19.

² See Joint Exhibit 1

³ See City Exhibit 1.

⁴ See City Exhibit 4.

⁵ See Interview of Grievant, City Exhibit 16 Pp 6-13.

⁶ See City Exhibit 6.

commenced his interviews of relevant Fairbanks Police Department employees, including the grievant. Those interviews surfaced allegations from the grievant charging departmental nepotism, burdensome work assignments and unfair work evaluations.⁷

On February 6, 2008, the Mayor notified Deputy Police Chief Johnson that she was ordering a formal internal investigation into allegations that he had threatened grievant with retaliation for asserting the right to file a grievance and had subjected "employees" to a hostile work environment. This internal investigation culminated on February 28, 2008 with a recommendation from the Chief of Police to the Mayor. The recommendation was that the grievant be demoted to Patrol Officer.⁸ Based on that recommendation, the Mayor convened a Pre-Disciplinary hearing for the grievant on March 6, 2008. The grievant attended along with union representation. Several consequences developed as a result of the Pre-Disciplinary hearing.

First, by writing dated March 7, 2008; the Mayor accepted the recommendation for demotion.⁹ Second, based on what she heard from grievant at the hearing; she concluded that he was untruthful to her regarding the circumstances of their breakfast meeting. Her decision to accept the demotion recommendation was based, in part, on the findings of Chief Hoffman as reported to her,¹⁰ and in part on her belief that grievant had been untruthful to her in the Pre-Disciplinary meeting of March 6, 2008. The decision to demote the grievant was grieved by the Union on March 10, 2008.¹¹ In that grievance, the Union alleged that the decision to demote was a violation of Article 8, Section 14 of the agreement which provides that:

"No member shall be disciplined, demoted, or discharged except for just cause."

The March 6, Pre-Disciplinary hearing also triggered a second internal investigation. This investigation focused on whether the grievant was truthful to the Mayor at the Pre-Disciplinary hearing.¹² The investigation commenced on March 25, 2008¹³ and concluded on April 18, 2008 with findings that led the Police Department and the Mayor to conclude that the grievant, along with a fellow officer, had colluded to have the Mayor initiate a call to the grievant, and that despite assertions by the grievant to the contrary at the Pre-Disciplinary hearing, he had been expecting a telephone call from the Mayor.¹⁴ On May 5, 2008, these findings were the subject of a second grievance by the Union alleging excessive discipline, retaliation and defamation.¹⁵ In this grievance, the Union alleged the following:

"...In review, the City unjustly demoted Lieutenant Whorton on March 10, 2008. Lieutenant Whorton was, allegedly demoted for disloyalty. The demotion was excessive and unjust discipline. That disciplined is challenged in a separate grievance, G-F08-01 under the provisions of Article 8, Section 14 of the Collective Bargaining Agreement [CBA] that specifically state: "No member shall be disciplined, demoted or discharged except for just cause". The PSEA brings the instant Grievance under the same authority stated above"

The Union communicated its fear to the Mayor that the City was "contemplating" further discipline based on the second internal investigation finding of untruthfulness. On June 9,

⁷ See City Exhibit 14

⁸ See City Exhibit 17

⁹ See City Exhibit 19

¹⁰ See City Exhibit 17.

¹¹ See Association Exhibit No. 3

¹² See City Exhibit 22

¹³ See City Exhibit 25.

¹⁴ See City Exhibit 25

¹⁵ See City Exhibit 26.

2008, the Mayor responded to the grievance and notified the Union that she did not contemplate further discipline beyond the demotion of the grievant¹⁶. The two grievances proceeded to this arbitration in the same posture.

ISSUE:

Did "Just Cause", exist pursuant to Article 8, Section 14, for the demotion of the Grievant from Lieutenant to Patrol Officer? If not, what shall the remedy be?

RELEVANT COLLECTIVE BARGAINING AGREEMENT AND POLICY PROVISIONS

The Agreement

Article 6. Management Rights

The City under this Agreement has and will retain the right to represent and manage the City and the City's property and to direct its working forces, including the right to hire, to set staffing levels, to promote and demote, to reclassify, and to discipline or discharge any personnel in its employ for good and just cause in the interest of the City, provided it does not conflict with the provisions of this Agreement. Nothing in this Agreement is intended to, or is to be construed in any way, to interfere with the recognized prerogative of the City to manage and control its business.

Article 17 Disciplinary Action

Section 1. Whenever employee performance, attitude, work habits or personal conduct at any time falls to a level unsatisfactory to his/her supervisor, the supervisor shall inform the employee promptly and specifically of such lapses and give counsel and guidance. A letter or departmental form of counseling, as distinguished from a letter of reprimand, shall not be considered disciplinary action and shall not be subject to the grievance procedure, nor shall it be placed in the employee's personnel file. If appropriate and justified, a reasonable period of time for improvement may be allowed before initiating disciplinary action. In some instances a specific incident may justify severe disciplinary action in and of itself; however the action to be taken depends on the seriousness of the incident and the records contained in the employee's personnel file.

Section 2. In situations where an oral or written counseling/warning has not resulted in the expected improvement, or where a more severe initial action is warranted, a written reprimand will be sent to the member, or a copy shall be placed in the members personnel file and a copy will be sent to PSEA.

Section 3. An employee may be suspended without pay and/or demoted by his/her department head with approval of the City Mayor, designee, for reasons of misconduct, negligence, inefficiency, insubordination, disloyalty, unauthorized absence, or other justifiable reason when alternative personnel actions are not appropriate. Employees shall be furnished in advance a written notice at least twenty-four 9240 hours prior to the effective date containing the nature of the proposed action. Said employee shall be advised that he/she is

¹⁶ See Association Exhibit 4.

entitled to have a PSEA Staff representative present at any meeting where disciplinary actions are contemplated or possible. If a member is suspended for a period of days, rather than a term of consecutive hours, the term of "day" shall be deemed to mean that member is suspended for the full twenty-four hours of such day.

Fairbanks Police Department Code of Conduct

VI. Truthfulness

Upon the order of the Department Head, his designee or any superior officer, members shall truthfully answer all questions specifically directed and narrowly related to the scope of employment and/ or operations of the department which may be asked of them.

Fairbanks Police Department Law Enforcement Code of Ethics.

As a Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional Rights of all persons to liberty, equality and justice,

I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life. I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, animosities, or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or violence, and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of law enforcement. I will constantly strive to achieve these objectives and ideals, dedicating myself to my chose (sic) profession as a law enforcement officer.

Discussion and Analysis.

Article 6 of the Agreement gives to the City the right to demote employees. That right is not without constraints. Under Article 6, the right to demote cannot be exercised in a manner that conflicts with the provisions of the collective bargaining agreement. Article 8, Section 14 of the Agreement circumscribes the authority to demote by requiring the existence of just cause as the condition precedent to the exercise of the right to demote. Finally, Article 17, Section 1 requires that in serious offenses, the record of the employee be considered prior to a decision on discipline. There is no doubt that the action taken by the City against the grievant constituted discipline. The parties to this controversy have delegated their inherent power under the Agreement to this neutral to determine whether just cause existed for this demotion. The inquiry will focus on the existence of record evidence that proves or disproves that grievant was disloyal to the Police Department and untruthful to the Mayor. If so, just cause exists.

The demotion in this case was based primarily on accusations leveled by the Chief of Police that the grievant had been disloyal to the Department. These accusations surfaced as a result of a review of the findings of the outside investigator who first probed the allegations made by the grievant to the Mayor at their breakfast meeting. The Chief of Police incorporated into his internal investigation a finding by the outside investigator that the allegations were

unfounded. The demotion was also based in part on the belief of the Mayor that the grievant had been untruthful when he asserted to her that he had not expected a telephone call from her. That assertion was alleged to have been made to the Mayor by the grievant during the course of the March 6, 2008 Pre-Disciplinary or "Loudermill" hearing. A Loudermill hearing is a Pre-Termination process intended to act as a brake on the action of the employer. When an accusation surfaces that an employee has committed an offense which is punishable with discipline, the employee has the opportunity, prior to discipline being imposed, to express his or her version of the events, and the Employer can step back and reflect prior to the imposition of discipline.

The Burden and Quantum of Proof

The task of determining whether just cause exists for the demotion of the grievant in this case must be grounded in certain proof standards. Having taken the action to demote, the City must prove the existence of just cause by clear and convincing evidence. Stated another way, the arbitrator must be convinced of the existence of evidence that the grievant was disloyal to the Police Department and untruthful and that those proven acts warranted the penalty of demotion.

The Standard of Review of a Decision of Management.

Limitations also exist on the function of the arbitrator as he or she reviews evidence to determine the existence of just cause. The City made the decision to demote. The arbitrator did not. The arbitrator may have applied a different penalty or no penalty. The fact that the arbitrator may have applied a different penalty is of no relevance. As a general proposition, the arbitrator should not substitute his judgment for that of the City on the question of the penalty and its propriety.

An exception to that proposition does exist. An arbitrator may substitute his judgment where he or

she finds that the penalty of demotion was imposed in a manner that was unreasonable, capricious or arbitrary. While the arbitrator must defer in the first instance to the managerial right of the City to decide the penalty, the grievance procedure at Article 8 of the Agreement, and indeed general considerations of fairness, compel the arbitrator not be a "potted plant" and to, without hesitation, overturn this decision to demote should he determine that it was taken in an arbitrary manner.

The Allegations.

The allegations made by the City against the grievant raise several issues that turn on the evidentiary record in this case along with the relevant provisions of the Agreement and policies of the City. The City makes two allegations. The first is that when the Grievant met with the Mayor on January 31, 2008 at the Cookie Jar Restaurant, he acted outside the chain of command within the Police Department and in doing so was disloyal to the Chief of Police and his leadership team. In his capacity as a lieutenant, grievant was a member of that leadership team. The Chief of Police reports directly to the Mayor. All disciplinary decisions announced by the Chief of Police, including this decision to demote, must be ratified by the Mayor.

The second accusation is that the grievant was untruthful to the Mayor in the course of a Loudermill predisciplinary meeting on March 7, 2008. The purpose of that meeting was to consider facts relating to the alleged disloyalty and to give the grievant the opportunity to express his version of the events prior to taking a decision to discipline. At this meeting, and in response to a question put to him by the Mayor, the grievant stated that he had not expected a call from the Mayor. According the testimony of the Mayor, she was "stunned" at this statement and regarded it as an untruth told to her by a city police official. The arbitrator