

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF THE
VOLUNTARY ARBITRATION
BETWEEN

Case: Glazer #3

CITY,

Employer,

and

Union.

ARBITRATION OPINION AND AWARD

(Excessive Discipline)

ISSUE

WAS THE TEN DAY SUSPENSION OF THE
GRIEVANT FOR JUST CAUSE, AND IF NOT,
WHAT SHOULD BE THE REMEDY?

The Grievant, a police officer, was given a 10 day suspension on July 18, 2005 for incidences occurring at Comerica Park and in the parking lot of McGee's Bar. The Department wrote:

MEMORANDUM

TO: The Grievant
FROM: Chief of Police
DATE: July 18, 2005
RE: Notification of Discipline for incident occurring on
April 24, 2004 at McGee's Bar.

As a result of the investigation conducted into an altercation that you
were involved in on May 4, 2005 at Comerica Park and then at
McGee's Bar, and the subsequent predetermination hearing held at

8:00 am on July 6, 2005, I find that you violated the
policies/procedures and Civil Service/Personnel Rules as described
in the "Pre-Determination Notice Letter" dated June 21, 2005.
Based on this information you are hereby suspended for a period of
ten (10) days starting Saturday, July 23, 2005. You will return to
work on Saturday, August 6, 2005. You gun, badge, and
Identification card will be surrendered and held by your shift
commanding officer during your suspension.

The charges are listed in a Pre-Determination Notice Letter from June
21, 2005, as follows:

PRE-ADETERMINATION NOTICE LETTER

To: The Grievant

From: The Chief

Date: June 21, 2005

Subject: Alleged Violation of Police Department Rules and Regulations, Policies/Procedures, Civil Service/Personnel Rules and Regulations, regarding the incident on May 4, 2005 in which you were involved in an altercation at Comerica Park and then continuing later at McGee's Bar. Statement of Charges: Potential Disciplinary Action; and Setting Date for a Pre-Determination Hearing to be held in the Chief's Conference Room on Wednesday, July 6, 2005 at 8:00 am.

The factual basis for the charges against you are contained in the June 21, 2005 memorandum of Inspector John and the June 15, 2005 memorandum of Lt. B which is attached hereto and made part hereof and as set forth below, may lead to your being disciplined, up to and including discharge. Specifically, they are as listed below:

Charges:

As a result of this incident that occurred on May 4, 2005 you violated the following:

1. Violation of Department Rules and Regulations; Section IV, Conduct; in that he did bring discredit to himself, the department, and the City, by his actions on 5-4-05. Specifically, Officer the Grievant acted in a drunk and disorderly manner in a public place (Comerica Park) and also was involved in a physical fight with Mike in the parking lot of McGee's Bar.
2. Violation of Department Rules and Regulations; Section IV, Integrity; in that he did not scrupulously avoid any conduct which might compromise the integrity of himself, his fellow officers, or the department. Specifically, he acted in a drunk and disorderly manner at Comerica Park, and also was involved in a physical fight with Mike in the parking lot of McGee's Bar.
3. Violation of Department Policy 3.2; Non-Deadly Force; Section H, numbers 1 and 2; in that he did not report his use of force as required, and did not report the fact the Mike was injured due to his use of force.
4. Civil Service Rule 7, Section 3, d; in that was guilty of conduct unbecoming an officer or employee of the City, either on or off duty, specifically that he acted in a drunk and disorderly manner at Comerica Park, and also engaged in a physical fight with Mike in the parking lot of McGee's Bar.

5. Civil Service Rule 7, Section 3, g; in that he was guilty of disgraceful conduct, whether that conduct occurred while on duty or off duty. Specifically, he acted in a drunk and disorderly manner at Comerica Park, and also engaged in a physical fight with Mike in the parking lot of McGee's Bar.

6. Civil Service Rule 7, Section 3, h; in that he was offensive in his conduct and language in public, and towards the public, while off duty. Specifically, he acted in a drunk and disorderly manner at Comerica Park and was asked to leave the stadium by Detroit Police Officers.. He also was engaged in a physical fight with Mike in the parking lot of McGee's Bar.

An arbitration hearing under the rules of the FMCS was held on February 8, 2006. Testifying

for the Employer were: Mike, Complainant; Gerald, Witness; Richard, Witness; the Detective Lieutenant, and the Chief of Police.

Testifying for the Union was the Grievant. Comprehensive post-hearing briefs were submitted by the parties.

BACKGROUND

During the morning of May 4, 2005 The Grievant went to McGee's, a bar owned by Mike. The Grievant was on his day off, although he had gone to court at the beginning of the morning.

Mike offered The Grievant the opportunity to go to the Tiger game that night with a ticket that he had been given. Mike said that he returned to the bar at 5:00 or 5:30, and that he observed that the Grievant had been there all day. Mike said that he had a couple of drinks and that at 6:30 he, the Grievant, and another man left for the game. Mike stated that the Grievant was not drunk, but was slightly buzzed.

At the ball game, Mike said that he had a couple of beers. According to Mike, the Grievant was yelling at Boston fans, became upset with them, and jumped over a fence separating their seats from the Tiger Den, to confront the Boston fans.

According to Mike, the police or security escorted the Grievant out of the park. Mike said that the Grievant was upset and that he identified himself as a police officer. The Detroit officers responded that if he was a police officer, he needed to leave. Mike said that the Grievant didn't want to leave, but that he was escorted out of the park.

After the Grievant left the park, Mike stated that his group also left to meet up with him. He said that he argued with The Grievant in their truck, and that he told him that he had been embarrassed by his actions. Mike said that he and the Grievant shouted at each other.

When they returned to the bar, Mike testified that the two occupants in the front of the vehicle left to return to the bar, and that he and the Grievant stayed. At that point, Mike said that The Grievant hit him. Mike added that this occurred after they had left the vehicle. Mike stated that the Grievant hit him a second time, while he was down on one knee.

The bar owner said that next he went to his office in the bar. He said that he was bleeding profusely over his forehead and mouth. He further said that he suffered a chipped tooth and a cut lip.

The next day Mike contacted the police. Pictures were taken that corroborated Mike's injuries.

Mike said that he had two or three beers before the game at his bar along with a couple of shots of alcohol. He states that he was slightly buzzed. Mike further said that he had beer at the ball park.

Mike is certain that the Grievant went over a restraining rail at the ballpark. He agrees that he and the Grievant argued in the truck, and that the Grievant told him that it wasn't his fault. Mike does not think he was as intoxicated as the Grievant.

Gerald has season tickets to the Tiger games and invited Mike, who was allowed to invite the Grievant. He arrived at the bar at 5:30, and stated that he observed the Grievant to be intoxicated.

At the ballpark, Gerald said that the Grievant was arguing with Boston fans, and that he tried to jump the rail to the Tiger Den, where they were located. Eventually, Gerald said that a police officer came up to them and told them that they better take care of their friend because he was intoxicated. Gerald did not see the Grievant escorted out the park.

Gerald said that the police came back and told the group that the Grievant was outside of the park, and that they then left to meet him. Gerald testified that the Grievant was intoxicated.

Gerald then drove back to the bar. He said that Mike and The Grievant argued; however, he didn't observe a fight. When they arrived at the bar, he said that he went inside. When Mike followed shortly thereafter, Gerald said that he observed blood on him.

Gerald testified that he had two beers at the ballpark. He indicated that the Grievant jumped the rail to the Tiger Den and that the Grievant used profanity against the Boston fans. Gerald also said that he observed blood in the truck, and on both seats in the back.

Rick was also invited to the game by Gerald. He said that when he observed Mike and The Grievant at the bar before the game, he felt that both of them were intoxicated. He said that the Grievant continued to drink after he arrived. At the game, Rick said that the Grievant was in and out of his seat.

Rick testified that he saw the Grievant getting into an argument with Boston fans after jumping a rail, and that the Grievant was removed by security and Detroit Police Officers. Rick said that he had two beers at the park.

The Chief testified that he suspended the Grievant for 10 days because he discredited the Department by his actions at the ballpark by being drunk and disorderly. He further felt that the Grievant engaged in misconduct by engaging in a fight. Finally, the chief indicated that the Grievant committed a violation by failing to report a use of force. The chief testified that the discipline that he issued was consistent with prior cases.

The Grievant testified that Mike was intoxicated on the day in question. The Grievant denies drinking any beer at the stadium. He said that he left his seat to talk to some girls.

The Grievant said that some Boston fans argued with him, and that a Detroit police officer came into the area. The Grievant said that he jumped the rail to talk to the officer, and identified himself as a police officer. The Grievant said that he agreed to leave the park with the officer.

According to The Grievant, Mike was upset with him because they had to leave the game early. The Grievant said that he apologized, but that Mike called him a "big pussy". He said that Mike was drunk.

While in the parking lot of the bar, The Grievant said that Mike shoved him and again called him a "big pussy". When they got out of the truck, the Grievant stated that Mike charged him like a bull, and that he hit him a couple of times.

The Grievant said that he drank a couple of rounds before he left for the ballpark. He added that he showed his police I.D. to the Detroit officer at the ballpark. The Grievant denies scuffling with the Detroit Police Department, but rather says that he voluntarily left. The Grievant states that Mike assaulted him in the parking lot.

The Grievant said that he didn't report any force, because he didn't think he had to because he wasn't on duty.

PERTINENT CONTRACT PROVISIONS AND RULES

ARTICLE XXVIII MANAGEMENT RIGHTS

28.1 ...

D. The City has the right to hire, select and direct the workforce and to assign, promote and transfer employees. The City has the right to determine the duties and work assignments of employees and to discipline and discharge for just cause employees covered by this Agreement. The City has the right to lay off personnel in order to improve departmental efficiency or due to a lack of work or funds.

SECTION IV - GENERAL RULES

...

Conduct: An Officer must, at all times, whether on or off duty, conduct themselves in a manner which does not discredit to himself, the Department or the City.

Integrity: An Officer must scrupulously avoid any conduct which might compromise the integrity of himself or his fellow Officers of the Department.

H. REPORTING USE OF FORCE

1. All use of force will be reported via the standard incident report. A full description of the circumstances, lawful basis and the force used shall be included in the report.
2. If a subject is injured as a result of the use of force this shall also be carefully and completely recorded in the incident report. This shall be reported no matter how slight the injury may be. If the subject was injured by anyone or in any manner not caused by police, these injuries and cause (if known) shall also be carefully and completely recorded. Photographs will be taken of the injury regardless of the source cause.

Section 3. The following shall be considered just cause for removal, discharge or reduction in classified service, although removal, discharge or reduction may be made for other causes. That the employee:

...

- (d) Has been guilty of any conduct unbecoming an officer or employee of the City, either on or off duty; or
- (g) Has been guilty of insubordination or, of disgraceful conduct; whether such conduct occurred while on duty or off duty; or
- (h) Is offensive in his conduct or language in public or towards the public, city officers, or employees either on or off duty.

POSITION OF THE EMPLOYER

The City argues that the evidence supports the charges against the Grievant. It is emphasized that the independent witnesses, testified that both Mike and The Grievant were drunk, and that The Grievant was escorted from the ballpark.

The Employer notes that the Grievant did not dispute that he was drunk at Comerica Park. Further, it is maintained that the Grievant was out of control in the truck, and that he assaulted Mike, causing chipped teeth, and cuts to his mouth and forehead, which produced blood.

The Employer also argues that the Grievant failed in his obligation as a police officer to report the use of force.

The City contends that the Grievant's off-duty conduct was actionable, and that he brought discredit to the Department through his actions at Comerica Park and in the parking lot of the bar. The City cites various court of appeals decisions in support of its position.

The Employer asserts that it has been consistent in its disciplinary penalties for off-duty misconduct. It further maintains that because the penalty in this case was not arbitrary and capricious, it should not be disturbed by the arbitrator.

POSITION OF THE UNION

Initially, it is argued that there is no nexus between the events at the ballpark and the Grievant's role as a police officer. The Union notes that the Detroit officers weren't called as witnesses, and that no police report was made by the Detroit Police Department. Arbitration cases are cited wherein discipline was prevented when the Grievant's actions were unrelated to his job. The Union maintains that the Grievant's private life should be protected.

The Union further contends that the Grievant was deprived of notice that he was required to report the use of force in an off duty fight.

Disparate treatment is also alleged relative to earlier cases involving off-duty misconduct.

DISCUSSION

There are three essential charges against the Grievant:

1. He discredited and compromised the integrity of the Department by his drunk and disorderly conduct at Comerica Park.
2. He discredited the Department and compromised its integrity by engaging in a fight in the parking lot of McGee's Bar.
3. He did not report his use of force against Mike in violation of the Use of Force Policy.

Regarding the third charge, I agree with the Union that the Grievant lacked notice that he would be required to make a use of force report for an off-duty fight. Paragraph 2 of the Use of Force Policy states, "If a subject is injured as the result of the use of force this shall also be carefully and completely recorded in the incident report."

The policy's use of the word "subject" would reasonably lead an officer to understand that he would have to make a report only when he was involved in a police incident where there was a "subject". Mike was not a subject when he was in a fight with the Grievant. Therefore, the Grievant lacked notice that the policy would apply to him in this instance, and therefore there was not just cause for this particular charge against him.

Regarding the Comerica Park charge, the Grievant was clearly drunk and disorderly. The evidence supports that he was intoxicated and that he created a disturbance. He was escorted out of the park by the Detroit Police Department after jumping a fence into an area that he didn't belong. The evidence does show that the Grievant was both intoxicated and disorderly.

In the parking lot, it was established that the Grievant engaged in a fight with Mike, where Mike was injured. I do not find that the Grievant was the aggressor or that he acted in self defense. The evidence supports that two highly intoxicated men engaged in a fight and that is the extent of the established proofs.

WAS THERE A NEXUS BETWEEN THE GRIEVANT'S BEHAVIOR AND HIS EMPLOYMENT AS A POLICE OFFICER?

The Grievant's drunk and disorderly conduct at Comerica Park and his fight were sufficient to establish actionable off-duty misconduct. However, there must be a nexus between the off-duty conduct and the Grievant's employment as a police officer. The standards found in the Common Law of the Workplace (St. Antoine Editor, National Academy of Arbitrators, 2005, p. 180181) state:

6.6 Discipline for Off-Duty Conduct

(1) The requirement of nexus. An employer may discipline an employee for off-duty conduct if there is some demonstrable and harmful connection, or "nexus" between the conduct and the employer's legitimate business interests.

(2) The employer may show the required nexus in several ways:

(a) Conduct involving harm or threats to the supervisors, coworkers, customers, or others with an actual or potential business relationship with the employer;

(b) Conduct that could seriously damage an employer's public image;

(c) Conduct that reasonably makes it difficult or impossible for supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer to deal with the employee; or

(d) Public attacks by the employee on the employer, supervisors or the employer's product.

Elkouri and Elkouri in *How Arbitration Works* (BNA 6th Ed, pp. 1326-1328) note that, "The public nature of the off-duty conduct can be particularly critical in police officers' cases." The authors state that arbitrators have upheld suspensions for police officers who engaged in improper off-duty intoxication. The authors state:

The public perception of the officer has been discussed in cases involving off-duty drinking by officers. One arbitrator stated that a municipality had not shown that an officer had brought discredit or embarrassment on himself or the police department when he was found in a bar drinking while off duty and in civilian clothing, and that therefore discharge was inappropriate. The same arbitrator reached the conclusion that a suspension was justified where the municipality established that the Grievant 'created the perception that he was intoxicated...in public.'

The Grievant was not ticketed at Comerica Park; neither was an incident report apparently made. However, he did identify himself as a police officer to the Detroit police officer, who removed him for his drunk and disorderly conduct.

The Employer's city borders Detroit and it is not inconceivable that Detroit and the Employer's officers will have a working relationship. The Grievant's action could have discredited the employer's Police Department in the eyes of the Detroit Police Department. Is this the most serious offense in the world? Clearly, no. However, there is a sufficient nexus for there to be some degree of discipline.

The fight with Mike also provides a nexus. Mike is a local business owner. The Grievant, as a police officer, might have to make arrests at his establishment or engage in investigations of Mike himself for liquor violations. Therefore, the Grievant's fight with Mike potentially compromises his work as a police officer. The Grievant, as a police officer, should have made every effort to avoid a fight with Mike, a city business owner. Because The Grievant did not avoid a fight, a nexus was established.

WAS THERE DISPARATE TREATMENT?

Just cause requires that penalties be meted out in an evenhanded manner. A prior officer received a seven day suspension for recklessly discharging his firearm after becoming angry with his girlfriend. This resulted in a criminal conviction. That case, where there was a criminal conviction, was clearly more serious than the Grievant's, yet the Grievant received a higher suspension. This represents disparate treatment.

Further, there was a prior case where an officer called in sick and instead went to the Windsor Casino, where he got into a fight. He was wearing a city police T-shirt. After he returned from Windsor, he had a fight with his family which required the police to be called. The officer also had a prior three day suspension, which the Grievant did not. After a settlement, the officer was given a five day suspension, with an additional five days held in abeyance for one year.

This would again represent disparate treatment, insofar as the prior officer's actions were at least as serious as the Grievant's, yet he received only five days.

WHAT SHOULD BE THE PENALTY?

No two cases are exactly the same, but there should not be a wide disparity in treatment. The Grievant was treated more severely than the officer in the reckless firearm case and the officer in the Windsor Casino case. The record would suggest that the Grievant's actions were certainly no worse than those of the officer in the Windsor Casino case. Accordingly, the penalty in this case should be reduced to a five day suspension, with five days held in abeyance until one year after the initial suspension, or July 18, 2006.

AWARD

For the foregoing reasons, the penalty shall be modified to a five day suspension, with five days held in abeyance until July 18, 2006, when they will be dismissed if the Grievant has engaged in no further incidences of similar misconduct. Neither party having fully prevailed, the expenses of arbitration shall be shared. After July 18, 2006, if there are no further incidences, the Grievant shall be made whole for five days of his initial ten day suspension.

Mark J. Glazer
Arbitrator

May 26, 2006