

CASE: LYONS #2

In the Matter of the Arbitration
Between:

UNION and EMPLOYER

(Grievant: Officer Michaels)

OPINION AND AWARD

BACKGROUND /FACTS

The Grievant was employed as a police officer with the County Sheriff's Department for approximately sixteen years. He was terminated on January 19, 2005 for violating five of the Department's standards of conduct. The basic issue presented in this case is whether he was terminated for just cause.

An Administrative Review and Determination Hearing was conducted on January 19, 2005. The officer was represented by the Union and he was found guilty of the following charges: 2.0 Violation of Rules, 5.10 Conduct, 5.105 Truthfulness, 5.110 Unsatisfactory Performances, 5.25 Conformance to Laws.

The Union filed the instant grievance (Joint Ex. 3a) which states:

The Union acting on behalf of Police Officer Michaels is at this time charging Sheriff Warrens with a violation of Article 9 - Discipline.

On January 19, 2005, an Administration Review and Determination Hearing was held and the department found the officer guilty on all charges and he was terminated.

The Union views this termination to be a violation of the officers' Due Process Rights and the "Just Cause" standard, contained in the Collective Bargaining Agreement.

Therefore, the Union demands arbitration and that arbitration be held within (90) calendar days from receipt of this grievance, as called for in the Collective Bargaining Agreement.

The arbitration hearing was held on May 24, 2005, post-hearing briefs were submitted by both parties and exchanged on June 29, 2005.

Essentially, the Grievant and a long time personal friend, allegedly participated in a scheme to defraud the American Express Credit Card Company (AMEX). PA, a high school classmate and personal friend of the Grievant, obtained a Michigan state driver's license in the Grievant's name by using the Grievant's personal identification. PA then made three purchases with the driver's license and Grievant's AMEX cards that raised the suspicion of AMEX investigators.

On June 14, 2003 PA charged, at Marshall Fields, \$198.21 of clothing on an AMEX credit card ending in the numbers 81001. He then went to Best Buy, and charged a laptop computer on the same credit card. Also on that same date PA went to Circuit City. He charged a large plasma TV on another AMEX credit card that ended in 64008. PA had refused free delivery and set up of the television. Instead he transported the TV to the Grievant's home in his pick up truck. He gave the Grievant the television, laptop computer, credit cards and driver's license.

On the following day, June 15, 2003, Grievant called AMEX to report that his credit card ending in 64008 was lost. On June 16, 2003 Grievant reported that his credit card ending in 81001 was likewise lost. American Express, as is their practice, requested that the Grievant complete an affidavit of fraud for each credit card.

On July 28, 2003, Grievant completed an affidavit of fraud for the credit card ending in 81001. He claimed to have last seen the card on June 13, 2003 and to have lost his wallet on June 16, 2003. He denied having knowledge of the purchases and denied allowing anyone to use his card. The total amount claimed as fraudulently charged was \$2,257.74. AMEX reimbursed the vendors for these purchases.

On August 21, 2003 the Grievant completed an affidavit of fraud for the credit card ending in 64008. He claimed he could not find his credit card and the last time he saw the card was on June 13, 2003. In the affidavit he denied having knowledge of the \$7,630.59 purchase of a plasma TV at Circuit City. He also denied allowing anyone to use his credit card.

American Express initiated its own investigation. In December, 2003, Special Agent MB, of AMEX Global Security was assigned because of the size of the disputed claim and the fact that the claims were filed on two AMEX accounts. During this investigation, Mr. MB found that the Grievant had reported losing his AMEX credit card in 2000 after a Rolex watch - value of \$5,639.20 - was charged on the card. The Grievant had denied responsibility for the watch purchase. American Express waived the charge and Grievant did not pay for the watch.

Mr. MB during his investigation spoke with the Circuit City operations manager who remembered this transaction well because she had spent over an hour assisting Mr. PA, who was posing as the Grievant. He used an AMEX card in the Grievant's name, and also produced a driver's license in the Grievant's name which contained Mr. PA's picture.

The Circuit City manager did become suspicious when PA refused free home delivery and set up of the TV. She warned him that it would void the warranty, however, PA transported the TV and turned it over to the Grievant. Apparently the

Grievant telephoned her in late July or August with questions about the sale. The Grievant told the manager that he had not made the purchase and had never been in the store. He also informed her that he was employed by the County Sheriffs Department. On February 23, 2004 Mr. MB had the manager review a photo spread. She identified a photo of PA who she believed was named Michaels -the Grievant.

Mr. MB then suspecting fraud, contacted Officer DD of the County Sheriffs Department. Officer DD then contacted the Secretary of State's office to obtain Grievant's driver's license information and the photographs on the November 2, 2002 and March 27, 2000 driver's licenses. They did not match the picture on the other driver's license that had been issued for Michaels. After further investigation, the Department learned that PA was the person whose picture appeared on the March 27, 2000 and the November 2, 2002 licenses. Finally, on August 29, 2004 PA was interviewed. He described how he and the Grievant carried out driver's license schemes and credit card fraud in the year 2000 and 2003. He also prepared a written statement which summarized their activities. (See pp. 44 and 45 of Joint Ex. 5 as well as the statement taken by Internal Affairs, pp. 46-69, Joint Ex. 5).

A criminal warrant was issued for PA and the Grievant, containing three counts: obtaining money under false pretenses, false certification obtaining a driver's license in 2000, and false certification obtaining a driver's license in 2002. PA ultimately was placed on probation. The Grievant, on the other hand, entered into a pre-trial diversion program through the County Prosecutor's Office on November 17, 2004. The program will be completed on November 16, 2005. Felony charges are pending against him until that time.

The Department charged the Grievant internally and determined that he violated five of its standards of conduct which have been referred to earlier. His employment was terminated effective January 20, 2005.

ISSUE

WHETHER THE GRIEVANT WAS TERMINATED FOR JUST CAUSE?

DISCUSSION

A fourth step hearing was held and the response was tendered by Labor Relations Analyst Obe on February 17, 2005 (Joint Ex. 3b). There is further discussion of the facts in this particular case set forth in that fourth step response which bears repeating. In the Background section Mr. Obey states:

In *Internal Affairs Case #2004-222*, the Sheriff's Office investigated a report that former Police Corporal Michaels committed credit card fraud on no less than two (2) separate occasions during calendar years 2000 and 2003. The Sheriff's investigation revealed that on June 14, 2003, an individual claiming to be Mr. Michaels made purchases using an American Express credit card [#3717-] in the cities of Taylor and Southgate totaling \$2,257.74. Additionally, on the same day in question, the same individual made purchases using an American Express credit card [#3728-] in the city of Harper Woods totaling \$7,630.59. On June 15, 2003, Mr. Michaels reported the theft of both American Express credit cards. On both, July 28, 2003 and August 21, 2003, Mr. Michaels filed *Affidavits of Fraud* with American Express indicating that he had not made the purchases cited above on June 14, 2003. Also, Mr. Michaels indicated that he had last seen the cards on June 13, 2003.

On December 23, 2003, Ms. T, the manager at the Circuit City store located in Harper Woods, recalled that an individual named Mr. Michaels made purchases in June of 2003 with an American Express credit card and a Michigan Driver's License. Ms. T confidently identified the individual from a photograph line-up. The individual identified by Ms. T matched the photo of the individual depicted on the fraudulent driver's licenses issued in the name of Mr. Michaels.

On June 2, 2004, the Sheriff's Office simultaneously executed lawful search warrants at the residences of Mr. Michaels and Mr. PA. Sheriff's officers

discovered a State of Michigan Certificate of License [#PD-4] for a Private Detective Agency, which had expired on May 22, 2004. Additionally, the officers found a business card for "Strong Investigations," which indicated that Mr. Michaels was a licensed, bonded private investigator. This card contained Mr. Michaels's home telephone number.

On July 9, 2004, District Judge Rogers signed the County Prosecutor's warrant recommendations for both Mr. Michaels and Mr. PA. The criminal charges on the warrants included: one (1) felony count of *False Pretenses-over \$1,000 but less than \$20,000* and two (2) felony counts of *Motor Vehicle Code-False Certification Impermissible Use of Personal Information*. All charges were punishable by up to five (45 years of prison.

During an interview with the Sheriff's officers on August 19, 2004, Mr. PA indicated that Mr. Michaels gave him three (3) pieces of personal identification and an American Express credit card. Mr. PA purchased a laptop computer and a plasma television with Mr. Michaels's credit card and a fraudulent driver's license. Thereafter, Mr. PA returned the credit card and identification to Mr. Michaels.

On September 7, 2004, Mr. PA pled guilty to the criminal charges and received a sentence of one (1) year probation. On November 9, 2004, Mr. Michaels applied for placement in a diversion program upon the recommendation of his attorney. On November 16, 2004, Mr. Michaels paid restitution to the American Express credit card company in the amount of \$7,763.76 via cashier's check [#4688061251]. On November 17, 2004, Circuit Judge Craig signed an order placing Mr. Michaels on diversion until November 16, 2005.

It should be noted for the record that on a prior occasion, Mr. Michaels reported the loss of his American Express credit card within days of a \$5,320.00 purchase from a jewelry store located in the City of Dearborn. This prior incident occurred in April of 2000.

In addition to the above factual scenario Mr. Obe includes in a footnote the following:

The Michigan Secretary of State informed the Sheriff's Office that Mr. Michaels had one (1) valid Michigan Driver's License with his photograph in addition to two (2) fraudulent Michigan Driver's Licenses depicting the photograph of another individual later identified as Mr. PA. All three (3) Driver's Licenses were sent to the address printed on the valid license, that being the residence of Mr. Michaels. Further investigation revealed that Mr. PA and Mr. Michaels were close associates who had grown up next door to each other and attended the same high school.

In his disposition at the fourth step, he stated:

The preponderance of the evidence of record established that Mr. Michaels and his close associate of many years [i.e., Mr. PA] actively engaged in credit card fraud against the American Express credit card company. Mr. Michaels's misconduct violated the laws of the State of Michigan, as evidenced by his arrest and the criminal charges not to mention his application for and placement in the diversion program and his payment of restitution to American Express. Consequently, Mr. Michaels violated the *Standards of Conduct* enumerated above. Based on the totality of the facts and circumstances of this matter including, the severity of the illegal misconduct perpetrated by Mr. Michaels's vis-a-vis his former job classification [i.e., police corporal], the Sheriff issued a reasonable level of discipline on this occasion. Therefore, based on the appropriateness of the Sheriff's determination and the absence of any contractual violation, the Union's grievance #2005-007 is appropriately denied, thereby sustaining the termination of Mr. Michaels.

As noted, both parties submitted extensive and helpful written argument in support of their positions. The Union basically alleges that the officer's due process rights, and the just cause standard were violated. The County denies a violation of the Grievant's due process rights. It urges that the Grievant participated in the Administrative Review Hearing, had Union representation, and the opportunity to present evidence counter to the information discovered by the American Express investigator, as well as the Internal Affairs investigator of the Sheriff's Department. There was no contrary evidence presented. The Employer presented five witnesses: an investigator from the Secretary of State, an Internal Affairs investigator, a special agent from the American Express, Assistant Prosecuting Attorney as well as the opinion of Commander K and Undersheriff C. There is no evidence in this record to suggest that the due process rights of the Grievant were violated. Actually that concept, due process, is included in a review of the just cause standard. He was accorded an opportunity upon the issuance of the charges to respond and present evidence in his own defense. He used the grievance procedure within the collective bargaining agreement and ultimately the arbitration process. The evidence does not support a violation of due process in this case.

Further, the Union alleges a violation of the just cause standard set forth in the collective bargaining agreement. The contract provides in Section 9.08 of Article 9 that "All disciplinary action shall be for just cause".

In this same vein the burden of proof is upon the Employer to prove the charges brought against an employee (Section 9.17). The Arbitrator is, of course, to make a determination of guilt based only upon the evidence presented (Section 9.18). The burden of proof is set forth in Section 9.21. It requires the Department to substantiate the charges and the standard of proof set forth is a preponderance of the evidence.

The evidence consists of the testimony of the witnesses presented on behalf of the Employer and the Exhibits (14 Joint, and 6 Employer including the diversion agreement and the driver's license certification information from the Secretary of State, photo line up, and the image retrieval history of the Grievant and his friend, Mr. PA.

The Union suggests that the case is substantially based on circumstantial evidence. Although there is an amount of circumstantial evidence, there is much direct evidence, as well as the statements of the co-defendant. The Grievant used the diversion process to avoid criminal prosecution. These factors, taken together, overwhelmingly support the charges as proffered by the County in the termination of the Grievant. As we know, just cause requires an inquiry into whether or not the alleged charges are established by the evidence. Circumstantial evidence is submitted. Sometimes circumstantial evidence is the best evidence that can, without doubt, point to the guilt of a member when he or she has been charged with a violation of the rules. There is also direct evidence through statements of witnesses and investigators that coupled with the circumstantial evidence clearly establish the burden set forth in the collective bargaining agreement and a violation of each of the Department's rules as alleged. With regard to the specific rules Grievant violated Rule 2.0 with his obvious

failure to report his and PA's illegal activity. Likewise, he is alleged to have violated four other Standards of Conduct.

Standard 5.10 holds officers accountable for unprofessional conduct on duty and off duty. The Grievant and another party planned and conducted a scheme to defraud a credit card company and the Michigan Secretary of State, for his personal gain.

Standard 5.105, Truthfulness, was violated when the Grievant denied that he participated in the schemes to obtain fraudulent driver's licenses and to defraud the American Express Company.

Standard 5.110 requires officers to conform to work standards established for the officer's rank, grade and position. Obviously, it is a failure to meet this standard and a violation of this rule if a grievant has committed a crime and entered into fraudulent schemes such as set forth in this case.

Standard 5.25, Conformance to Laws, requires officers to obey the laws of the United States and State of Michigan. An indictment, arrest, criminal charges, complaint, or warrant can be the cause for disciplinary action up to and including termination. The standard clearly sets forth that termination of employment will be sought for an officer who is involved in a "settlement plea of any of the following". Standard 5.25.1 includes any felony. This is the case at hand. Clearly there is an obvious violation. The Grievant was arrested and charged with three felonies. Therefore, based on the totality of the evidence submitted in this case, it is the opinion of the Arbitrator that the charges have been established against the Grievant.

The next consideration of the so-called just cause standard is whether or not the penalty (termination) is appropriate in this case. The Arbitrator has the responsibility to review the facts in evidence and "in the event of a finding of guilty of the charges may review the discharge or suspension to determine if it is unreasonable under all of the



circumstances". See Section 9.19. This is a sad case. The Grievant was a sixteen year employee of the Department. His termination is based on clear evidence that he, on two separate occasions, committed fraud and obtained goods under false pretenses for his personal gain. Undersheriff C testified that he is not fit to serve as a police officer. The Grievant has submitted no evidence of mitigation except his long seniority and the argument that he has been accepted into the Diversion Program to avoid the fact of conviction upon completion. Mitigation must be of equal weight to the violations committed. There is no mitigation to negate the hard facts that the Grievant committed a crime. He intentionally obtained goods under false pretenses, participated in a scheme to defraud the Secretary of State and the American Express Card Company, submitted false affidavits, and lied to investigators, and ultimately was charged with a crime. Unfortunately, even though the Grievant has long service there are no real mitigating factors that can be considered to modify the penalty assessed by the Sheriff's Department.

The punishment, termination, is appropriate based on the facts of this case.

AWARD

The discipline is sustained. The penalty of termination was appropriate. Therefore, the grievance is denied.

Respectfully submitted,



John Lyons, Arbitrator

Dated: July 15, 2005