
ARBITRATION IN THE MATTER

Between

County of XXXX

and

The County Employees Union

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Grievant: Jim Cooper

Issue: One-day Suspension

Judy A. Gust, Arbitrator

PRELIMINARY STATEMENT

The hearing in this matter was held on July 15, 1999, at the County of XXXX, Employee Relations Division, Room 10, 2067 County Center Drive, Anytown, California. During the course of the hearing the parties presented evidence through exhibits and testimony of witnesses who were subject to cross-examination. The record of this case was closed November 3, 1999 following receipt by the arbitrator of the parties post-hearing briefs.

APPEARANCES & WITNESSES

For the Union

David M. Zoton Spokesperson and Counsel, County Employees Union
Jeff K. Smith. President, County Employees Union
Cindy Yoder Unit Representative, County Employees Union

For the County

Shirley Carlton Employee Relations Manager, County of XXXX
Henry Grant Captain, XXXX County Sheriff's Department
Kelly P. Krider Human Resources Manager, XXXX County Sheriff's
Department

BACKGROUND AND FACTS

Jim Cooper ("Cooper"), the grievant, is employed as a uniformed, non-sworn Correctional Services Technician ("CST") with the XXXX County Sheriff's Department. He has been employed in that position since 1983. Cooper's responsibilities include providing inmate services such as receiving and logging clothes, issuing clothing, supervising and showering inmates, meal delivery, mail distribution, cleaning and trash removal.

On February 10, 1997, Cooper was arrested by the California Highway Patrol for drunk driving and booked into the Riverside County Jail. On March 21, 1997, Cooper admitted in a Departmental interview that he was wrong for driving under the influence. A Notice of Pending Suspension was issued on June 5, 1997, and Cooper was notified of his one-day suspension¹ on January 9, 1998. The basis for the suspension was violation of Department Rules/Regulations: 31.01.0 (Standard of Conduct) and 31.06.0 (Obedience to Laws and Regulations).

The parties agreed that the matter was properly before the arbitrator for a final and binding decision.

ISSUE

The following issues were presented to the arbitrator: Was Jim Cooper suspended for reasonable cause? If not, to what remedy is the appellant entitled under the provisions of Article IX, Section 8 of the Memorandum of Understanding?

RELEVANT CONTRACT PROVISIONS

“Article VIII, Section 4. Suspension

- A. *No regular, limited-term or probationary employee shall be suspended except for reasonable cause.”*

POSITION OF THE UNION

The Union’s position is that the County’s discipline was unwarranted. The Union argues that Cooper is an excellent CST, as noted in Cooper’s yearly performance evaluation for the period 8/29/97 to 8/28/98. Further, the offense was a minor off-duty incident, unrelated to his employment, and it has no impact on any aspect of his job performance (Un. Br. pp. 1, 15).

The Union’s first argument is that discipline may not be imposed for off-duty conduct without a clear harmful connection to the employee’s job. It cites several references from How Arbitration Works (BNA; Fifth Edition, 1997) and Employee Lifestyle and Off-Duty Conduct Regulation (BNA; 1993) to support its argument. These references clearly note the nexus required between the off-duty behavior and the employment situation. According to Arbitrator Louis C. Kesselman, to justify a discharge for misconduct away from the workplace the behavior must harm the Company’s reputation or product, render the employee unable to perform his duties or appear at work, or lead to refusal, reluctance or inability of other employees to work with him (Un. Br. pp. 3). Further, the effect of the employee's outside behavior must be reasonably discernable and not mere speculation (Un. Br. pp. 4). Continuing its argument, the Union quotes from a General Motors-UAW decision by Ralph Seward, particularly noting:

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¹ The suspension date was January 15, 1998.

Only in exceptional cases, where the impact upon plant operations is shown to be clear, serious and direct, may Management intervene. And in each contested case Management must satisfy the Umpire of the reasonableness of its judgment—must show that the effect of the incident upon working relationships within the Plant was so immediate and so upsetting as to justify the abnormal extension of its disciplinary authority (Assoc. Br. pp. 5).

The next argument is that because the incident was off-duty and unrelated to Cooper's employment, the County did not have reasonable cause to suspend Cooper. The incident occurred in another county, was an isolated occurrence that received no publicity and had no affect on Cooper's "credibility" or fitness for duty. The County suffered no harm to its operations or reputation as a result of the incident. It cites a decision with similar facts: two public employees who received a one-day suspension for intentionally exposing their buttocks to a woman outside a bar. In that case, the arbitrator overturned the one-day suspension noting: "[i]t cannot merely be assumed that particular conduct—even conduct so gross as to result in a criminal conviction—necessarily is related to job performance." The arbitrator went on to state, "Accordingly, the applicable standard to be applied in judging the conduct of employees in public service takes into the realistic account the fallible nature of the human condition which results, with substantial frequency, in conduct which is less than exemplary by commandment of both moral and legal codes. It recognizes, quite properly, that however much an employer may be wont to enforce such codes and condemn their transgression, he is entitled to do so only to the degree that there is a direct and demonstrable relationship between the illicit conduct and the performance of the employee's job or the job of others." (Un. Br. pp. 7-8). Several other cases were cited, again underscoring the standard for an employer's imposition of discipline for off-duty conduct: the affect on the employer's reputation or business interests, whether the conduct resulted in the refusal or reluctance by co-workers to work with the offending employee and the affect on the employer's ability to direct the workforce (Un. Br. pp. 9-10).

In support of its argument that the County lacked reasonable cause to suspend Cooper, it points out that there was no evidence introduced that Cooper's arrest brought any discredit upon the Department (Un. Br. pp. 2, 11). There was no publicity and no harm flowed from the occurrence. Further, there was no adverse effect on the Department operations nor was Cooper's job effectiveness compromised. As to Captain Grant's ("Grant") hearing testimony about the possible diminution of Cooper's credibility with inmates and staff, again the Union argues that the allegation is purely speculative with no evidence of any credibility-related issue at the time or within the twenty-eight months which have passed since the incident occurred in early February 1997 (Un. Br. pp. 12).

The Union next argues that a mere arrest without a conviction is not a proper basis for discipline. According to the Union, the County's action not only fails the reasonable cause test but also violates Labor Code §432.7 which provides in relevant part:

- (a) No employer, whether a public agency or private individual or corporation, shall . . . seek from any source whatsoever, or utilize, as a factor in determining any condition of employment, including hiring, promotion, [or]

termination ... any record of arrest or detention that did not result in conviction...

The suspension imposed upon Cooper falls within the scope of actions prohibited by Section 432.7. Further, such a suspension would impact other conditions of Cooper's employment including any future promotional opportunity for which Cooper becomes eligible (Un. Br. pp. 13).

In its final argument, the Union rebuts the Department's claim of past practice. The County's witness testified that the Sheriff's Department normally imposed a two-day suspension on peace officers and a one-day suspension on other Department employees for DUIs. The County only produced four instances of discipline imposed on Sheriff's Department employees following a DUI. Two of those examples occurred after Cooper was disciplined and are, therefore, irrelevant to determining past practice. Three of the four cases involved peace officers and each of the cases involved facts far more serious than the facts leading to Cooper's discipline. Accordingly, the Union argues that the Sheriff's Department has no discernible practice regarding discipline of employees for off-duty DUIs (Un. Br. pp. 14).

In summary, the Union posits that the County did not have reasonable cause to discipline Cooper for his off-duty conduct. It asks that the suspension not be sustained and that Cooper be made whole, including restoration of lost pay and benefits, and that any reference to the suspension removed from his personnel file (Un. Br. pp.15).

POSITION OF THE COUNTY

The County argues that because of the high degree of confidence and trust society places in persons employed in law enforcement agencies, the Department has set the highest standards of conduct for its employees. As a CST within the Sheriff's Department, Cooper is held to a higher standard of conduct more like that of law enforcement officers than employees of non-law enforcement agencies. His position is sensitive and it involves both inmate visitation and mail programs. These high standards of conduct apply to both the personal and professional lives of Department employees. They require that employees abide by the law and not bring discredit and disrepute upon the Department. Cooper violated these standards when he was arrested for drunk driving. The County also points out that prior to this incident, Cooper was arrested for spousal abuse and pled guilty to disturbing the peace. That incident resulted in a written reprimand and put him on notice that future misconduct involving failure to comply with the law or rules would result in more severe disciplinary action being imposed (Co. Br. pp. 4-5).

Next the County cites several court decisions that recognize that certain professions impose responsibilities and limitations on freedom of action which do not exist in other professions; namely, public officials such as judges, policemen and school teachers. Although Cooper is not a sworn officer, the County argues that his position in the Department warrants that his conduct likewise be above reproach, for discredit on him is discredit upon the Department, its employees and law enforcement in general (Co. Br. pp. 5-6). Of particular note, the County offers the reasoning in a Polk County case [Polk County Iowa and American

Federation of State, County and Municipal Employees, Local 1868, 80 Lab. Arb. 639 (1983) (Arbitrator Stanford C. Madden)] to support its position. That decision quotes extensively from other decisions and primarily focuses on the ability of the employer to administer discipline for off-duty conduct where a high degree of responsibility and trust is imposed on the employee. In part, the decision reflects the appropriateness of discipline for off-duty conduct where the misconduct can have a detrimental effect on the employer's reputation or product, or where the conduct leads to a refusal, reluctance or inability of others to work with the employee (Co. Br. pp. 6-8). In summary, the County argues that Cooper's discipline was incrementally appropriate to his misconduct and consistent with the principles of progressive and corrective discipline (Co. Br. pp. 9).

Another argument offered by the County is that Cooper's misconduct is of the sort to bring harm to public service. It again cites several court decisions involving public employees which both permit higher standards of good conduct and impose a consideration of actual or potential harm to the public as standards for determining whether the employer's action is supported by reasonable cause (Co. Br. pp. 9). The County asserts that the difference between a sworn employee and an unsworn employee may be of little consequence in the eyes of the public. To allow a CST's violation of the law and Department rules and regulations to go uncorrected would begin an incremental decline in the standards set by the Department for all employees. It urges rejection of Cooper's requested remedy to overturn the suspension (Co. Br. pp. 10).

In its last argument, the County argues that where there is reasonable cause to impose discipline, an arbitrator should not substitute his judgment for the judgment of management made in good faith. It cites both court decisions and Elkouri and Elkouri, How Arbitration Works (5th Ed.) to support its argument. In this case, where the Department is applying a fair and reasoned disciplinary suspension while putting him on clear and unequivocal notice of what is expected of him, it is unreasonable that the conduct should be deemed acceptable and, as such, ignored (Co. Br. pp. 10-11).

In conclusion, the County asks that the grievance be denied (Co. Br. pp. 12).

DISCUSSION

As in all disciplinary cases, there are two issues to consider: 1) Was there reasonable cause to impose the discipline and, if so, 2) was the type of discipline imposed appropriate to the offense.

In this case the basis for the discipline was off-duty misconduct by a uniformed but non-sworn employee of the Sheriff's Department. There is no dispute that Cooper was *arrested* for drunk driving. Although no evidence was introduced as to a conviction on this charge, Cooper's un rebutted admission of his wrongdoing during the Departmental investigation is sufficient to establish that he violated Department Rules/Regulations 31.01.0 (Standard of Conduct) and 31.06.0 (Obedience to Laws and Regulations). However, reasonable cause also requires that consideration be given to the employee's past work record and that any discipline imposed be

timely. In this case, Grant testified that Cooper's past work record was not a key element in making his recommendation; rather, that the imposition of a one-day suspension was consistent with other discipline issued for similar infractions. Grant also denied that he considered Cooper's 1995 letter of reprimand for an unrelated incident when making his recommendation. Although the County argues that the suspension was incrementally appropriate and consistent with the principles of progressive and corrective discipline, Grant's testimony is contradictory to this argument.

The next issue is whether a nexus was established between the off-duty misconduct and Cooper's job. The standard for finding a connection between one's job and the off-duty conduct is somewhat different between private and public employment. Public employees are usually held to a higher standard of conduct than employees in the private sector. Additionally, there are types of public service which are held to an even higher standard than that of most public employees such as judges, police officers and teachers to name a few. In this case, the Sheriff's Department has recognized that higher standard and promulgated rules and regulations consistent with that standard. Cooper was aware of the Department's rules and his un rebutted admission that he was driving under the influence constitutes a violation of those rules. Even though Cooper is not a sworn officer, no discredit or public attention to his arrest was shown, and he was not impeded in his ability to perform his duties as a result of the arrest. However, Cooper's position within the Sheriff's Department requires that he adhere to Departmental rules. Rule 31.06.0 requires that all members, not only sworn officers, observe and obey all laws and ordinances. Cooper's admission that he violated one of the Department's rules does constitute reasonable cause for some type of discipline.

The Union also argues that the use of Cooper's arrest without a conviction violates the Labor Code §432.7. Although there was no evidence of a conviction, a finding on that issue is outside the jurisdiction of this arbitration. In this case, Cooper's admission of wrongdoing following the arrest is the critical factor in determining whether or not cause existed to impose discipline. Cooper admitted driving under the influence which, whether convicted or not, violates the Department's rule that requires all members of the Department to observe all laws and ordinances.

Consideration now must be given to the appropriateness of the discipline. The County argues that where there is reasonable cause to impose discipline, that discipline should not be disturbed. In many instances that is the case. However, arbitrators differ in their view of this assertion, particularly where some of the elements in determining just or reasonable cause and its concomitant discipline have been disregarded. The facts of this case support a review of the level of discipline imposed.

In the instant matter, some of the criteria for determining the appropriate level of discipline were either ignored or given little weight. First, Grant testified that he did not give much consideration to Cooper's past work record and denied considering Cooper's 1995 discipline when recommending a one-day suspension. Further, the discipline was not recommended until June 1997 and not imposed until January 1998. Both of those factors suggest that the conduct was not so serious that a simple warning would not have sufficed to curtail any

future unacceptable off-duty behavior of this nature. The County's argument that previous discipline alerted Cooper to the progressive nature of future consequences also falls short in that the prior discipline was for a completely different violation. In deciding the level of appropriate discipline, a good work record can mitigate an offense while a poor work record can aggravate it. In this instance, Cooper had an approximate 14-year work record of satisfactory to above-satisfactory ratings. Only one prior reprimand was evidenced for a separate incident in May 1993, again for an unrelated off-duty situation.

Grant also testified that his recommendation for a one-day suspension was based on practice. Consequently, one must look to the evidence presented for such a practice. In order for practice to be compelling, the practice must be unequivocal, clearly enunciated, applied over a period of time and accepted by both parties. Based upon the evidence introduced, the other situations where discipline was imposed for DUI arrests all occurred after Cooper's arrest on February 10, 1997. Three of the four cases involved sworn peace officers that, according to Grant are held to an even higher standard of conduct than non-sworn employees. Cooper was not a sworn peace officer. Additionally, his infraction and the surrounding circumstances were less serious than the other situations resulting in discipline. Thus, one can only conclude that there was no existing practice, as Grant testified, of a one-day suspension for non-sworn employees and two-day suspension for sworn employees at the time that Cooper was given his Notice of Pending Suspension on June 6, 1997 (Co. Ex. 1).

However, to completely ignore Cooper's violation of the Department's rules 31.01.0 and 31.06.0 would interfere with the Department's ability to maintain order and discipline. Further, it would send an incorrect message to other employees and the public. Thus, in consideration of the off-duty nature of the offense, the fact that no harm or discredit to the Department was shown, no impediment to Cooper's performance was shown, Cooper had a satisfactory to above-satisfactory work history and there was no evidence of any subsequent infractions for more than two years after the incident, the appropriate level of discipline is found to be a Letter of Reprimand.

AWARD

Based upon the foregoing, the grievance is sustained in part. The suspension shall be reduced to a written reprimand dated January 9, 1998 and the Grievant shall be made whole for lost wages and benefits resulting from the suspension.

Judy A. Gust, Arbitrator
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December 11, 1999