

Arbitration Award

In re
City of Lubbock, Texas
and
Individual Grievant

125 LA (BNA) 554
AAA Case No. 71-390-00053-08
July 29, 2008

Harold E. Moore, Arbitrator

Background

This case was scheduled to be heard on July 22, 23, and 24, 2008 in Lubbock, Texas. The Appellant filed this motion and brief in support of his motion to dismiss his indefinite suspension, claiming that the City violated mandatory provisions of Chapter 614 of the Texas Government Code on June 18, 2008. The City filed its response to the Appellant's motion on June 30, 2008. The parties submitted a Stipulation of Facts on July 8, 2008. A telephone hearing was conducted on July 8, 2008, wherein the parties were afforded full opportunity to be heard, examine and cross-examine witnesses bearing on the motion to dismiss.

In the interest of economy, the accommodation of the parties, and after study and review of the evidence and arguments presented by the parties, the arbitrator rendered a decision on July 9, 2008, granting the Appellant's motion to dismiss. With the parties' approval, the opinion, which is set forth below, for granting the motion, which is customary in labor and employment cases, is as follows.

Facts

On December 5, 2007, P___, Appellant, a Police Officer with the City of Lubbock, Texas, was served with a copy of a "Suspension Order and Statement of Charges" addressed to the City of Lubbock, Texas Civil Service Commission, advising them of the Appellant's indefinite suspension. (Memorandum, receipt of which acknowledged by the Appellant) In that document the Appellant was charged with violating various rules and special orders of the Police Department, which had as their nexus that he was working without permission while being on a job related medical leave. On December 6, 2007, the Appellant timely asserted his appeal rights under Chapter 143 of the Local Government Code and requested arbitration before a third-party hearing examiner. (Letter dated December 6, 2007 and acknowledged by the clerk of the Civil Service Commission)

A summary of the Stipulated Facts reflects:

1. The Appellant was given a Garrity Warning (*Garrity v. New Jersey*, 385 U.S. 493, 1967) on November 4, 2007. Among other items, the Garrity Warning stated that the Appellant was being asked questions relating to his job performance or fitness for office. As is the custom, the warning also stated that if the Appellant refused to answer the questions he would be subjected to departmental charges that could result in his dismissal from the Police Department. The warning also stated that the information or answers would not be used against the Appellant in any subsequent criminal proceedings. Attached to the Garrity Warning was a Special Order consisting of nineteen (19) numbered questions. The Appellant answered all nineteen questions in writing. The Appellant signed the Garrity Warning and the answers to the questions. The City representative retained the signed copies and gave the Appellant an unsigned copy of the questions and the answers.
2. The unsigned Garrity Warning, the proposed Suspension Order and the Statement of Charges and the Suspension Order and Statement of Charges were the only documents that the Appellant received before being indefinitely suspended.

Applicable Texas Law

Texas Government Code
Section 614.022

“To be considered by the head of a state agency or ... local law enforcement agency, the complaint must be:

- (1) in writing; and
- (2) signed by the person making the complaint.

Section 614.023

(a) A copy of a signed complaint against a law enforcement officer of this state ... shall be given to the officer ... within a reasonable time after the complaint is filed.

(b) Disciplinary action may not be taken against the officer ... unless a copy of the signed complaint is given to the officer... .”

Appellant's Arguments

The Appellant asserts that Chapter 143 of The Texas Local Government Code required that the City has the burden of proving its position by a preponderance of the evidence. There is no evidence that the City complied with Chapter 614 of The Texas Government Code, because the City is unable to produce any evidence that the Appellant ever received a written complaint signed by a complainant in this case. The Appellant claims that the indefinite suspension of the Appellant is defective because it fails to rise to the

required level of legal sufficiency as required by the Texas Local Government Code. The Appellant filed this motion to dismiss the indefinite suspension because the City violated the mandatory provisions of Chapter 614 of the Texas Government Code.

City's Arguments

The City does not dispute that the applicable case law, *Guthrey v. Taylor*, 112 S.W.3d 715 (Tex. App.-Houston [14th. Dist.] no pet.) holds that a proposed disciplinary action cannot suffice as a written complaint. Instead, the City asserts that the Garrity Warning issued to the Appellant on November 4, 2007 constituted compliance with Chapter 614 of the Texas Government Code. Further, the City argues that the complaint against the Appellant was internally generated and therefore if given to the Appellant by a supervisor is sufficient for compliance with Chapter 614 of the Texas Government Code. (*Fudge v. Hagar*, 621 S.W.2d 196 (Tex Civ. App.-Texarkana, 1981, writ re'd n.r.e.)

Discussion

Section 614.022 of the Texas Government Code (TGC) is specific, that is, "... the complaint must be (1) in writing, and (2) signed by the person making the complaint." Also, Section 614.023(b) states, "Disciplinary action may not be taken against the officer ... unless a copy of the signed complaint is given to the officer." Therefore, there are four basic elements of the two Sections of the TGC. There must be a complaint, it must be in writing, signed by the complainant and a signed copy of the complaint given to the officer. The City asserts that the Garrity Warning issued to the Appellant constitutes the complaint in this matter.

The Garrity Warning given to the Appellant is comprised of two parts. The First part is entitled "City of Lubbock, Lubbock Police Department Garrity Warning." The document has the customary language that the Appellant will be "asked questions specifically directed and narrowly related the performance of your official duties or fitness for office." Also in the first part of the document the Appellant is informed that he is required to answer the question or be subjected to dismissal, but that the information gained by the department may not be used against the Appellant in any subsequent criminal proceedings.

The Garrity Warning is customarily given to all Police Officers when a Police Department believes that an Officer might have information regarding personnel matters. Often it is given to Police Officers who are not the subject of a complaint.

The first part of the Garrity Warning given to the Appellant also contains a section entitled "You are under investigation for the following: Performing unauthorized off duty security work while on official injury leave. Willfully lying to a supervisor in the course of an investigation regarding unauthorized off duty work. Working at an establishment prohibited for off duty work under the Lubbock Police Department Policy and Procedures Manual." The Garrity Warning concludes, "If any of the allegations are found to be true

you may have violated one or more of the following:" followed by a list of twelve (12) rules.

The second part of the Garrity Warning given to the Appellant is entitled "Special Order". It is composed of nineteen (19) numbered questions, some of which contain two (2) questions for a total of twenty-seven (27) questions. Except for the introduction and concluding statements, each numbered item is followed by a question mark.

The unsigned Garrity Warning delivered to the Appellant does not constitute a complaint. It is conceivable that a Garrity Warning could also be a complaint. However, for a document to be considered as a complaint it must express some form of an accusation, protest or charge.

The first section of the Garrity Warning ordered the Appellant to answer questions and assured him that the answers to the questions would not be used against him in a criminal action.

The second part of the Garrity Warning presented to the Appellant is entitled "Special Order" and contains a list of twenty-seven (27) questions. The questions are specific and succinct whereby the Appellant was able to answer with a simple yes or no. None of the twenty-seven (27) questions are accusatory. They are simply questions.

Nothing in the Garrity Warning furnished to the Appellant accused or complains that the Appellant had violated any of the listed rules. For example, R3.05.005 states

"Prohibited.

Officers under the influence of alcohol or drugs will not carry firearms."

Nowhere will it be found in the document that the Appellant is accused or charged (emphasis added) with being under the influence of alcohol, drugs or that he was carrying a firearm. This observation could be said of all of the twelve (12) numbered rules.

The Garrity Warning furnished the Appellant merely states that the Appellant was "... under investigation for the ..." listed rule violations, and a "Special Order" that lists questions that the Appellant was required to answer under the penalty of possible termination, but there are no affirmative statements in the Garrity Warning that assert that the Appellant violated any of the listed rules. Nor are there any specific statements that the Appellant could explain or defend himself, which is customarily found in a complaint. The Garrity Warning furnished the Appellant is not a Complaint. Therefore, the Appellant's motion to dismiss the indefinite suspension must be granted because it is defective because it fails to rise to the required level of legal sufficiency.

The parties presented arguments regarding the legitimacy of typewriter signatures and the distinction between internal and external complaints. These issues need not be addressed because of the finding that there was no complaint as required by the TGC.

— Award —

To reiterate and affirm the decision dated July 9, 2008, a copy of the decision is hereby made a part of this decision, the Appellant's motion to dismiss the indefinite suspension for violation of the City of Lubbock mandatory provisions of Chapter 614 of the Texas Government Code is Granted. The Appellant shall be reinstated to the position of Police Officer and awarded full back pay and benefits.

Dicta

The State of Texas follows the doctrine of "Employment at Will." Which means an employee may be terminated for any reasons, good or bad, so long as the reason is not illegal. The Texas legislature has seen fit to provide special legislation addressing the disciplining and discharging of police officers. This is one of the few exceptions to the "Employment at Will" doctrine. The Texas legislation prescribes procedural and technical requirements that the City and the police officer must follow. To a casual observer procedural and technical requirements should not be used to stand in the way of substantive matters and place a burden on an employer or the employee in an "Employment at Will" state. However, the major focus of a Police Department is enforcing the State's Penal Code. In accomplishing this task Police Departments are accustomed to dealing with procedural and technical matters.

Appendix

In the interest of economy and the accommodation of the parties this decision will address the motion. The case is scheduled to be heard by the undersigned arbitrator on July 22, 23, and 24, 2008. On June 18, the arbitrator received the Appellant's Motion transmitted by the United States Postal Service by way of the American Arbitration Association. On June 30, 2008, the arbitrator received the City's response to Appellant's Motion. On July 8, 2008, a telephone conference was conducted whereby testimony was received pertaining to the motion. Also, on July 8, 2008, prior to the telephone conference, the arbitrator received from the parties a stipulation of facts, with an attachment, via facsimile pertaining to the motion.

After a study and review of the excellent and scholarly briefs, and oral arguments submitted by counsel, the Appellant's Motion to dismiss the indefinite suspension by the City of Lubbock of the mandatory provisions of Chapter 614 of the Texas Code is Granted. As agreed to by the parties, an Opinion explaining the reasons for this decision will be forthcoming.

Therefore, there is no need to proceed with the hearing of the merits of the case. The hearing scheduled for July 22, 23, and 24, 2008 is hereby cancelled. Because the City failed to give the Appellant a signed complaint as prescribed by Sections 614.022 and 614.023 of the Texas Government Code, the Appellant shall be reinstated to the position of Police Officer and awarded full back pay and benefits.