Arbitration Award

City of Quincy
and
Firefighters L-63 IAFF

126 LA (BNA) 534
FMCS Case No. 08/0421-02331-A
November 10, 2008, Decided
June, 2009, Reported

Matthew W. Finkin, Arbitrator*

The Issue

Was the Grievant discharged for just cause and, if not, what shall be remedy?

The Governing Instruments

Four governing instruments relate to this case. First is the collective bargaining agreement. It treats the imposition of discipline thusly:

Article XXVI
Discipline and Discharge

> 26.1 No employee covered by this Agreement shall be disciplined without just cause. Discipline in the Department shall be progressive and corrective, designed to improve behavior and not merely punish. When an employee is disciplined by a supervisor, other than the Fire Chief, that employee may appeal such discipline through the Department's chain of command and ultimately to the Fire Chief as provided by Department policy.
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> 26.3 When an employee is disciplined by the Board of Fire and Police Commissioners, that employee may choose to appeal that decision by grievance to arbitration or to the local Circuit Court as provided by law. It is understood by all parties that an employee's request for petition to Circuit Court shall be considered a waiver of the grievance/arbitration procedure and that a request for arbitration at this point shall be considered a waiver of that employee's right for Circuit Court review. However, the employee shall at all times retain the right to seek review of an arbitration decision pursuant to the Uniform Arbitration Act.

The Grievance Procedure, set out in Art. VI, provides in pertinent part:

> Step 3 Should the Union feel that the grievance was not satisfactorily settled at Step (2),

the grievance shall, within (10) calendar days, be presented to an arbitration committee consisting of one (1) member designated by the Union and one (1) member designated by the Mayor. These two (2) arbitrators so selected shall meet within ten (10) calendar days and settle the grievance. If the two (2) arbitrators cannot reach agreement on the dispute, the Union and the City shall jointly request the Federal Mediation and Conciliation Service to supply a panel of nine (9) arbitrators. Upon receipt of said panel, the City and the Union shall have the right to strike one (1) name at a time from the panel of arbitrators, with the order of striking as to the first grievance filed hereunder to be determined by coin toss; the order shall alternate thereafter on succeeding grievances. The remaining name shall be the arbitrator. The entire striking process shall be completed within ten (10) days of mutual receipt of the pane
l, weekends and holidays excluded.

The decision reached under arbitration shall be final and binding on both parties. The fee and expenses of third arbitrator and hearing room shall be divided equally between the Union and the City. Each party shall bear the expense of its own representatives and witnesses. All such hearings shall take place in the City of Quincy unless the parties mutually agree otherwise.

Second is the City's "Internet/E-mail Usage Policy" of November 1, 1999, as amended in 2001. The policy applies to all City of Quincy employees. The policy in chief provides in pertinent part:

Purpose: The purpose of this policy is to establish guidelines an restrictions on use by City employees of City owned or leased computers utilized for Internet access and messaging. * * *

Terms and conditions: * * *

2. Privileges/Discipline — The use of the City's Internet is a privilege, not a right, and inappropriate use will result in a cancellation of those privileges. The City of Quincy reserves the right to deny, revoke, or suspend access at any time. Violation of these policies may constitute cause for disciplinary action (in addition to loss of privileges) including suspension or discharge.

3. Unacceptable Use — You are responsible for your actions and activities involving the network. Some examples of unacceptable uses are:

* * *

m. Accessing, submitting, posting, publishing or displaying any defamatory, inaccurate, abusive, obscene, profane, sexually oriented, threatening, racially offensive, harassing, or illegal messages, pictures, or other material [emphasis added]; * * *

Privacy and Monitoring: Employees shall be aware that computer communications may be read by others for a variety of valid purposes. The nature of computer communications can lead one to forget or ignore the fact that it cannot be considered to be the private property of the sender or recipient, even though passwords or encryption codes are used

for security purposes. In light of this, messages of a confidential nature should not be sent using computer communications.

Employees should have no expectations of privacy in their use of equipment of their computer communications.

The City has the authority to inspect the contents of any equipment, files, calendars or computer communications of its employee. Messages may be accessed, reviewed, copied, deleted or disclosed.

The City may at any time monitor, retrieve or recreate any communications from City equipment. In addition, the City may monitor the employee's activities on computer devices which include the amount of time an employee is connected, and recipients and senders of messages, and locations which employees may have visited. Employees should expect that their activities on computer devices are regularly reviewed.

The addendum was added to deal with "unauthorized access and computer viruses." It provided in its entirety:

1. Acceptable Internet Use—Access to the City's Internet must be for the sole purpose of business related projects.

2. Acceptable E-mail Use—The City E-mail system may only be used for business related purposes. No personal e-mails may be sent or received through the City of Quincy's e-mail system.

3. Forwarding of non-business related e-mails to other city e-mail users is prohibited.

4. The term "business related" refers to those activities directly related to the user/employee's job and/or functions as a municipal employee and those matters directly related attendant to the lawful operations of the City of Quincy.

Third is the City's "Policy Regarding Sexual Harassment." The Policy defines sexual harassment thusly:

Any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when

a. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.

b. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

c. such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The prohibition is put in this way:

> Prohibited acts of sexual harassment can take a variety of forms ranging from subtle pressure for sexual activity or contact to physical contact. At times the offender may be unaware that his or her conduct is offensive or harassing to others. Examples of conduct which could be considered sexual harassment include:
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> a. persistent or repeated unwelcome flirting, pressure for dates, sexual comments or touching;
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> b. sexually suggestive jokes, gestures or sounds directed toward another or sexually oriented or degrading comments about another;
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> c. preferential treatment of an employee, or a promise of preferential treatment to any employee, in exchange for dates or sexual contact; or the denial or threat of denial of employment, benefits or advancement for refusal to consent to sexual advances;
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> d. the open display of sexually oriented pictures, posters, or other material offensive to others;
>
> e. retaliation against an individual for reporting or complaining about sexually harassing conduct.

Fourth are the Fire Department's rules and regulations governing the conduct of officers which provide in pertinent part:

> 3.00 Unbecoming Conduct
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> Firefighters shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the department. Conduct unbecoming a firefighter shall include that which tends to bring the department into disrepute or reflects discredit upon the firefighter as a member of the department, or that which tends to impair the operation or efficiency of the department or firefighter.
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> It is further defined as engaging in conduct on or off duty which adversely affects the morals or efficiency of the department; or in the alternative, engaging in conduct on or off duty which has a tendency to destroy public respect for the employee and/or the department and/or destroy confidence in the operation of the Municipal service.

The Facts

The basic facts are in all major respects undisputed. The Grievant was hired by the Quincy Fire Department on March 12, 2001, and at the time in question held the rank of Lieutenant.

The Director of Administrative Services for the City of Quincy, Mr. Kenneth Cantrell, testified that in September of 2007, an employee reported to him that two employees were spending a lot

of time together or communicating to one another by phone or e-mail. On October 9, 2007, he sent the names of two officers of the Fire Department and of two female employees to Jim Murphy of the Information Technology Department to conduct an investigation: the second officer and the second female employee's name were sent over because Cantrell had received a letter earlier alleging that they were having an affair and he "just wanted to clear the record while I was asking for the information."

Murphy began his investigation into the four employees on October 10, but a day or two later he added D__ because some of the messages to or from one of the female subjects came from or were addressed to him. These were selected out and given to the City's human resources department.

In investigating D__, Mr. Murphy discovered that several files attached to e-mail were password protected. Some of these were work-related. Of the 519 e-mails he was able to recover, he determined 499 to be personal, i.e., non-business related. In addition, one of D__'s files was programmed automatically to contain e-mails from M__, a woman employed by the City who was married to a subordinate of D__'s; it was double password protected. It took Mr. Murphy from a month to a month and a half or two months to be able to open these files. It should be noted that M__ was at the time employed in the IT department, Mr. Murphy's department, and was highly skilled in computer usage; she was, in effect, a systems analyst in charge of all computer needs for the Fire Department.

In addition, Mr. Murphy investigated the telephone traffic between D__ and M__. He found extensive traffic, so extensive as, in his opinion, to impair M__'s work in his office by virtue of the amount of time spent on those personal calls.

Mr. Murphy reported on the results of his investigation. D__ was suspended with pay and served with notice of interrogation which took place on November 1, 2007. The interrogation was conducted by Mr. James Spizzo, in the presence of Union representatives and Mr. O'Hara as well as Mr. Olson. D__ acknowledged the City's e-mail policy and the impropriety under it of transmitting "sexually suggestive" e-mails. He denied having physical contact with M__, but agreed that he'd set up a "secret password" to a computer file.

On November 15, 2007, the Chief of the Quincy Fire Department served a notice of "Formal Internal Affairs Investigation" on D__ accompanied by a set of thirteen questions requiring a written response. In his response, D__ denied maintaining "a romantic or sexual relationship" with M__ and denied having computer "folders" that are "password protected or otherwise secured against examination by the director of IT" or the Fire Chief. He went on at length, as he did in his testimony in this proceeding, to distinguish a pst file he'd set up as not "password protected" as he understands what that entailed under the City's policy. He went on to explain that he'd forgotten the password he'd chosen for it as he'd not used it for over a month.

Charges looking forward to his dismissal by the Board of Fire and Police Commissioners were served and sustained by that body. D__ was dismissed. This proceeding ensued.

In the instant hearing, Fire Chief Scott Walker testified to the duties of Lieutenants in the

Department: that they are responsible for supervision and coordination of personnel. After reviewing D__'s answers to the questionnaire submitted to him, in conjunction with his interrogation and the answers he gave in it, Chief Walker concluded that D__ had conducted "a romantic relationship" with the wife of a subordinate. Chief Walker also concluded that D__ had violated the City's e-mail policies and failed to cooperate in the investigation by failing to disclose the passwords to his pass-protected files. D__ consistently denied the existence of such a relationship; D__ characterized his e-mail exchanges with the subordinate's wife as "friendly banter."

Chief Walker opined that given the nature of the exchanges between D__ and the subordinate's wife, he, D__, would be incapable of functioning in a supervisory capacity vis-à-vis the woman's husband or the latter's friends in the Department. Moreover, Chief Walker testified that D__'s failure fully to cooperate in the investigation compromised his ability to perform in a manner the leadership position of Lieutenant requires.

The firefighter estranged husband of the woman in question testified that he had been a friend of D__ until late July, 2007, when D__'s attitude toward him changed. He asserted categorically that he could not work with D__ if D__ were reinstated; nor could shifts be assigned to assure that the two would never be placed in a working relationship. The Grievant confirmed that there could be situations when, if reinstated, he would be called on to supervise that firefighter.

The Grievant testified that he'd served in the Department for close to eight years and had a spotless disciplinary record. Neither fact is in dispute. Because of his knowledge of computers he was assigned by the Chief to work with the IT Department on various aspects of the Fire Department's computer system and usage. In that capacity, he'd gotten to work with his subordinate's wife: both were encountering marital difficulties at the time and, at the time of the hearing, both were in divorce proceedings. He testified that a bond was formed between them, but he insisted as he had in his earlier responses that there was no physical relationship between them.

He testified at one point that his exchanges were playful "chatting back and forth." "You know, when you sit at a computer and you are by yourself, you get to saying things that you wouldn't normally say in public. That was the ongoing joke and the content back and forth." But when pressed in cross examination by reference to specifically romantic and salacious parts of some of these exchanges, culminating in expressions of desire to be together and to hide that from their spouses, he testified that their relationship was "in the beginning stages," leading up to this colloquy:

> Q. [by Mr. Spizzo] And is it safe to characterize your denial of a physical or an emotional relationship through these e-mails in the time period they represent? Are you denying that, sir?
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> A. [by the Grievant] Yes, I am.
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> Q. Do you admit at least that you were building that relationship through those e-mails just like you, sorry, building that relationship through the e-mails?

A. It may have been in early stages of building something.

Q. There was an emotional bond developing all through these, correct?

A. That would be fair to say.

The Grievant further testified that he'd maintained four password protected computer files, three of which were for business purposes, one being union business. He did not believe that these violated City policy. The pst file [*editor: personal storage table*], which he called the LT file, was not as the City alleged and much of his testimony was devoted to computer usage in explaining his choice of terms and how the system he set up actually operated. His account was challenged by Mr. Murphy who reiterated that the Grievant had configured his system in such a way that messages from M__ were automatically dumped into a double password protected account. As the Grievant did not provide a password for it, Murphy had to run password-cracking software to access it. When Mr. Murphy realized that he could not access that account, however, instead of returning to the Grievant and pressing him for the password the Grievant had failed to remember, he and Mr. Olsen decided to run the cracking software. In the event, only eleven e-mails in the to pst file were from M__.

Analysis

The Grievant was discharged for his violation of the City's e-mail policy in the transmission of a volume of sexually oriented messages (and while on duty) to the wife of subordinate and for engaging in a "sexual or romantic" relationship with her, for creating password protected accounts; and for being unforthcoming in his response to a request for those passwords in compliance with the City's investigation. It is conceded that the Grievant did violate the City's policy regarding the transmission of these e-mails but, as in the companion case of O__, the Union contends that the City's contractual commitment to progressive discipline should have been observed. In addition, the Union strongly contests the allegation of a lack of cooperation, adverting to the Grievant's understanding of computer usage, and that he was candid when he provided only the passwords he'd remembered in response to the City's inquiry.

It suffices to say that if the Grievant's conduct vis-à-vis M__ was such misconduct as to give just cause to discharge the other grounds need not be reached. Accordingly, attention is directed to that course of conduct.

The Grievant consistently denied having a physical sexual relationship with M__ at the time in question and there is no evidence to contradict his testimony. The Arbitrator has reviewed the e-mail traffic placed on the record. The Grievant characterized these as "friendly banter," as "chatting back and forth." But they are a good deal more. As the Grievant testified when pressed, his relationship with M__ was "building" into something; that is, it was building into an intense romantic relationship through the medium of sexually charged electronic exchanges. In other words, a seduction. The Arbitrator accepts the Grievant's assertion that he'd not had sexual intercourse with M__. But that M__ was more than willing to be seduced, to indicate her amenability to the consummation of their relationship at some indefinite point in the future, only colors the character of what the Grievant was about.

It is a fundamental principle of workplace justice that an employee's private life is none of the employer's concern save in those instances where there is a demonstrable deleterious impact in the workplace. Such, indeed, is the substance of the Department's

Rule 3.0 excerpted at the outset of this award. On the one hand, the Grievant's conduct was in the workplace and in violation of City policy forbidding sexually oriented e-mail messages, but on the other, a public employer ordinarily should respect its employees' right of private intimate association and the e-mails concerned the Grievant's private romantic relationship. Thus the issue of actionable misconduct vis-à-vis M__ breaks down into three closely related components: (1) is the Grievant's right of intimate association with M__ subject to sanction; (2) if so, was the City obligated to adopt a rule or apply progressive discipline before it could dismiss him for building his relationship with her; and, (3) is the evidence of workplace impact compelling.

A. Right of Association

Even as public employers may be required to respect their employees' right of intimate association, it is generally acknowledged that they may take action adverse to employees for romantic involvement with the spouses of superiors or subordinates. See e.g., Mecure v. Van Buren Twp., 81 F.Supp.2d 814 (E.D. Mich. 2000), Caruso v. City of Cocoa, Fla., 260 F.Supp.2d 1191 (M.D. Fla. 2003). They may do so because of the impact of these relationships in the workplace. The same logic applies to this uniformed service "given the importance of teamwork," Caruso v. City of Cocoa, id. at 1209, in the conduct of the Fire Department's mission. In other words, the Grievant's right of intimate association is subject to sanction where there are demonstrably deleterious consequences in the workplace. See Rule 3.0, supra.

B. Notice

The Union argues that, "There is no rule in the City of Quincy against fraternization amongst employees." This is a powerful argument because one could scarcely be charged with an act of misconduct that one had no reason to believe was wrong at the time, especially where the conduct is an aspect of one's private life.

Thus in Monterey County, 117 LA (BNA) 897 (Levy, 2002), the Arbitrator recommended the reinstatement of a county employee discharged for having an extra-marital affair with a subordinate: "There is no evidence that this admitted relationship violated any established anti-fraternization policy of the Employer. The relationship occurred during non-working time and did not adversely affect Grievant's performance of his duties." Id. at 899-900. But, some conduct is so obviously wrong that any sentient employee would, or should, know it to be so even in the absence of a rule specifically prohibiting it; whence the more general provision commonly found in rules governing uniformed services proscribing "conduct becoming" the officer, as Rule 3.0 does here.

The Union makes much of the fact that the relationship between the Grievant and M__ was not physical, or not yet physical, and therefore not adulterous. However, the gravamen of the Grievant's conduct did not require physical consummation. Adulterous intercourse implicates the ancient wrong of physical trespass upon the property of the husband, i.e., on the body of the

wife, a theory long since discarded.

That we have come to see women today as independent of their husbands and not as their property speaks not at all to the deep sense of betrayal a spouse endures by learning that his or her spouse was the willing object of seduction, of the "building of a relationship" with another, by means of an extended course of clandestine, sexually-charged electronic exchanges. In this case, unlike Monterey County, supra, the conduct took place during working time, the Grievant's messages (and efforts to conceal them) evidence his understanding of the wrongfulness of what he was doing, and, critically, there is more than adequate evidence of the serious workplace impact of it.

C. Workplace Impact

Discipline or discharge of an employee due to his or her off-duty activities, or activities of a private nature cannot be imposed based on speculation about deleterious effects: it requires proof of actual adverse impact in the workplace. See, e.g., Dept. of Correctional Services, 114 LA 1533 (Simmelkjaer, Arb., 1997), setting aside the discharge of a corrections officer for displaying a Nazi flag on his front porch on the ground of the want of any evidence of adverse impact in the workplace. The Arbitrator stressed that not a single corrections officer in a unit of 350 came forward to assert that he or she would refuse to work with the Grievant.

In this case, the husband of the object of the Grievant's sexual exchanges and desires testified to his inability to work with the Grievant should he be reinstated. The record also evidences that, given the size of the Department, were the Grievant to be returned to duty it would be inevitable that at some point they would be called upon to work together in a supervisor-subordinate relationship.

The Union responds that, "If, indeed, subordinates could control the employment retention policy of the City by merely indicating that they cannot work with somebody because of a purported relationship other employees have with the subordinates' spouses, havoc would ensue." This claims too much. The relationship between the Grievant and Ms. Doe is well established on the record, it is not "purported."

In effect, given this fact, the Union is challenging the standard arbitrators (and the courts) apply in assessing an employer's ability to sanction an employee for private-life conduct, i.e., the test of deleterious workplace impact. It may well be anomalous that lawful private conduct may be subject to sanction on the basis of co-worker reaction, but such is the state of the law and, more important for present purposes, of Rule 3.0 and of the common law of the workplace absent contractual treatment to the contrary.

Award

The Grievance is denied.

* Selected by parties through procedures of the Federal Mediation and Conciliation Service