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Nonmedical Employee Performance Deficiencies
Part Two – Incompetency as a Commanding Officer

Contents

This three-part series examines the case law relating to the discipline of employees for *nonmedical* performance problems. The articles do **not** analyze adverse employment action taken against persons who have an illness, injury or disability that impedes their ability to perform satisfactorily or those who suffer from chronic drug or alcohol abuse.

Part One focused on traffic enforcement deficiencies that were proved by comparative statistics. This part addresses inefficiency or incompetency as a commanding officer. Part Three, which concludes this series, will examine negligent performance in three areas: loss of evidence or property, firearms handling negligence and vehicular negligence.

❖ Standard of proof

What standard of proof is necessary to impose an involuntary demotion? Employers often state that the purpose of the reduction in rank is not to punish the employee, but only to return him or her to a position that the employee performed in a satisfactory manner.

While management may characterize a performance demotion as non-disciplinary, the employee and the union will argue that there is a loss of prestige (or humiliation), a reduction in pay, lost fringe benefits, and lower retirement pay.

One arbitrator, in a thoughtful opinion, forcefully stated that when an employer demotes an employee for performance problems, management must present sufficient evidence to demonstrate that demotion was appropriate and the burden of proof "may not be lighter than demonstrating just cause" for discipline. He wrote, that to justify a demotion for employee performance or rule violations requires an employer to prove six things: [1]

1. The employee was ***provided the necessary training or instruction*** to perform the position from which he was demoted;
2. The employee was given a ***reasonable opportunity to master the position*** from which he or she was demoted;
3. The performance or rule violations are sufficient to ***demonstrate the incapacity*** of the employee to perform the position from which he or she was demoted;
4. The employee was ***given a reasonable opportunity to self-correct*** his or her alleged inadequate performance prior to demotion;
5. There is a reasonable expectation that ***the employee can successfully perform the position to which they are demoted***; and
6. Given the other alternatives, ***demotion is reasonable alternative.***

In addressing the six requirements, arbitrator William L. Corbett [2] then addressed the issue of how they differ from criteria for establishing "just cause" in a discipline case. His response was:

1. Once it is determined that management's motive was not disciplinary, the purpose and context of the employer action is different. The focus of the employer action is not for the purpose of causing the employee to self-correct or punishing for failing to adequately perform.

2. Management should be acting to redeem the employee, rather than allow the inadequate performance to become the basis for discharge.

3. The employee should be given an opportunity to have his or her performance problems addressed by disciplinary action, including potential termination, or accept the demotion.

4. If the employee is a member of a collective bargaining unit, the agreement's *just cause standard* is not applicable in assessing the appropriateness of the employer's action. [3]

In the end, it matters little whether a performance demotion is characterized as non-disciplinary, quasi-disciplinary or disciplinary. The result is that the employee retains his or her employment, but at a lower rank, at a reduced pay grade, and often, with lesser fringe benefits (such as a take-home vehicle).

Performance demotions further assume that:

1. The employee did not intentionally underperform in the command or supervisory rank.
2. The employee is capable of satisfactorily fulfilling job expectations at a lower rank.

The remainder of this article discusses performance failures in two contexts. The first is where a serious performance failure warrants a reduction in rank. The second is where there are a series of minor errors or deficiencies that expose a pattern of unsatisfactory performance. Both are illustrated with poignant cases.

❖ Single instance of serious performance failure

In Santa Fe, the trendy and sometimes eccentric high-altitude capital of New Mexico, a police lieutenant commanded the graveyard shift. At 11 p.m. officers were notified that a seven-year old boy had been missing since 5 p.m.

Although one officer searched for the child for nearly seven hours, the lieutenant never asked him about the case, provided no additional resources, and did not notify an on-call detective, as required by the SFPD's regulations. The youth was never found.

Two captains recommended that the lieutenant be demoted to sergeant and attend the first line supervisor training program. He challenged the demotion, beginning with an administrative hearing and ending five years later in the state's Supreme Court. The justices noted:

> "[The appellant] was demoted because he failed to adequately supervise or respond in any way to a case involving a missing seven year-old who was never found and because he failed to notify an on-duty detective commander about it.
>
> "The hearing officer found that [the appellant] never issued a bulletin; never personally looked for [the child] during the entire graveyard shift, even though he was available; never called for assistance or utilized the officers under his command in searching for the child; and never notified anyone in his chain of command about the missing child, so that his supervisors learned about it only from a 'Hot Sheet,' even though he was adequately informed by his subordinates and was responsible for knowing the significant and material facts.
>
> "The hearing officer further found that, as the commander in charge, [he] failed to give sufficient attention to the case. He failed to react decisively, quickly, and appropriately in supervising and employing the resources available to him to conduct an investigation and search, in calling in additional resources if necessary, and in following Department policy, while exercising sound judgment and common sense. The evidence supports these findings."

Unanimously sustaining the demotion, they wrote:

> "These facts demonstrated to the City that [he] lacked the experience, skill, and knowledge to be a watch commander and that he demonstrated poor judgment in handling a missing child report during the first critical hours of the case."

Looking, alternatively, as to whether a demotion was appropriate from a disciplinary perspective, the justices added:

> "Based on our whole record review, we agree that there was sufficient evidence to support a deviation from the progressive discipline policy and thus to support demotion and additional training."

The justices then noted that the City chose not to terminate the lieutenant, "because there were no aggravating circumstances, and his employment record justified retention."

Citing a Texas decision, they defined the role of reviewing courts:

> "The propriety of a disciplinary measure meted out by an agency is a matter of internal administration with which a court should not interfere absent a clear abuse of authority."

Whether the four New Mexico Supreme Court Justices, had they sat as first instance arbiters, would have imposed a greater or lesser penalty is not germane. There clearly was no administrative abuse to justify judicial intervention. Archuleta v. Santa Fe Police Dept., #28,630, 137 N.M. 161, 2005 NMSC 6, 108 P.3d 1019 (2005).

❖ **Multiple instances of assorted performance failures**

A Major in the City of St. Louis Metropolitan Police Dept. [4] was accused of inefficiency or incompetency. His immediate superior recommended that the Major should voluntarily step down to Captain. The Chief [5] also told him that the job might be too big for him.

After he declined a demotion, he was suspended as the city's North Area Commander. There were multiple counts of specifications. The civilian Police Board found him guilty of general inefficiency and dismissed him.

He appealed. The state's Supreme Court summarized the charges:

> 1. Despite instructions received, he failed to take effective measures to bring about more effective patrol and police activity in his area.
>
> 2. He failed to establish and maintain an adequate and effective line inspection system, in spite of orders so to do, with the result that line inspections in his area were ineffective to detect improper performance of duty by personnel under his supervision.
>
> 3. He made no effective suggestions or recommendations of changes which would improve performance.
>
> 4. He expressed satisfaction with the performance of all personnel, and he failed to recommend changes in personnel who were inefficient.
>
> 5. He demonstrated an unwillingness or inability to carry out the duties of his rank and command.

Testimony was taken over a 23-day period and arguments heard on another day. The transcript consisted of approximately 2,200 typewritten pages and there were 150 exhibits. The Police Board made **36** findings of fact.

The Board found, as a basis for its order of dismissal, that the Major had "failed to bring about and maintain an effective line inspection system, that operational deficiencies in his command continued without improvement, and that [he], as a result, displayed an inability to effectively command the North Area."

On appeal, the Justices noted, with concern:

> "These charges do not amount to any specification of intentional wrongdoing or corruption in office relating to Major McCallister. This officer stands here today admitted by all to have had a long and honorable record of service to the Department and the people of the City of St. Louis."

However, the Police Board had adopted a policy of field inspections and accountability. The Justices wrote:

> "The determination of policy was the prerogative of the Police Board. It was [the] appellant's duty to carry out that policy. He had no right to do otherwise on the basis that he disagreed with the policy established. He had the unmistakable duty to carry out that policy and the orders given in connection therewith. ...
>
> "Even if [he performed] the rest of his work in a satisfactory manner, his command position made it essential that he carry out the inspection program according to directions, and his failure to do so would make him inefficient as the commanding officer of the North Area. It would provide a basis for removing him from that position."

However, his incompetence as a Major was not grounds for removal as a career police officer. The Justices wrote:

> "We hold that the decision of the Police Board to dismiss appellant from the Police Force was not authorized or justified. The most that the Board could do upon a finding of guilty of the charge upon which appellant was tried would have been to remove him from his assignment as Major in charge of the North Area and

> reassign him to some other position on the police force and [to] reduce him to such rank as the Board should decide upon, based upon the evidence received."

The Justices noted that the question was whether his removal was supported by substantial and competent evidence, based on the whole record. It was not.

Subsequently, the Police Board demoted the appellant to Captain. McCallister v. Priest, #52686, 422 S.W.2d 650, 1968 Mo. Lexis 1077.

❖ Summary

1. Arbitrator William Corbett set forth six requirements to justify a demotion in rank because of managerial incompetency or command inefficiency. See p. 202, above. Although this is not a widely cited "landmark" arbitral decision, it is (in the editor's opinion) a well-reasoned and highly persuasive award.

2. A few people are over-promoted, sometimes just to remove them from a work unit.

3. Supervisors and managers must possess ministerial skills beyond those needed for the successful performance of the people they command or supervise.

4. A failure to perform well as a manager or supervisor is not grounds to remove a person as an employee, if he or she can competently fulfill the duties of a subordinate.

5. Demotions have an adverse psychological affect on workers. A disgruntled employee can demoralize the work force. Behavioral professionals, such as police psychologists, should be consulted on how to successfully demote and re-empower employees. [6]

Notes:

1. *Philotechnics and Laborers Local 155*, 118 LA (BNA) 1725 (Corbett, 2003). The award was copyrighted by BNA.

2. William L. Corbett is a law professor at the University of Montana.

3. Endnote 11 in *Philotechnic.*

4. Coincidentally, the author's father was at one time, a corporal under the command of the appellant, when the latter was captain of the city's 11th district.

5. Chief Curtis Brostron later became the president of the IACP. He pioneered the use of staff civilian consultants to promote field efficiencies in St. Louis.

6. Readers can consult members of the IACP's Police Psychological Services Section.

Reference:

Demystifying Demotion: A look at the psychological and economic consequences on the demotee, by Paula and Kerry Carson, 50 (6) Business Horizons (*Elsevier*) 455-466 (Nov-Dec. 2007). Abstract.

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- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as "legal advice." Lawyers often disagree as to the meaning of a case or its application to a set of facts.
