

1
2
3
4
5 **CITY OF SEATTLE**
6 **PUBLIC SAFETY CIVIL SERVICE COMMISSION**

7 IN RE THE APPEAL OF:

8 ERIC WERNER

9 Appellant,

10 vs.

11 SEATTLE POLICE DEPARTMENT,
12 CITY OF SEATTLE

13 Respondent/Employer.

No. 09-006

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

14
15 **I. INTRODUCTION**

16 The Commission heard this matter pursuant to a Notice of Appeal filed by Officer Eric
17 Werner appealing his termination by the Seattle Police Department (Department). Interim Chief
18 John Diaz made the termination decision.

19 The Commission held a full evidentiary hearing on October 5 and 6, 2009, before
20 Commissioners Joel Nark, Herb Johnson, and Terry Carroll, with Commissioner Nark acting as
21 Presiding Officer. The parties submitted briefs on October 28, 2009. Each submitted a
22 supplemental brief in early November. The Commission's record was closed on November 13,
23 2009. The Commission has jurisdiction over this matter pursuant to Article XVI, Section 3 of

1 the Seattle City Charter and Chapter 4.08 of the Seattle Municipal Code. The Commission may
2 affirm, reverse, or modify the department's decision. SMC 4.08.100.

3 The Commission analyzes the charge in light of the factors to determine whether the
4 Department had just cause to impose the disciplinary action. After considering the evidence in
5 this case, including testimony, documentary evidence, and arguments of the parties and their
6 representatives, the Commission entered Findings of Fact, Conclusions of Law and Order, as
7 provided in SMC 4.08.100.¹

8 **II. FINDINGS OF FACT**

9 1. Appellant was hired as a patrol Officer in the Department in November 2000.

10 2. Prior to his termination, Officer Werner had no disciplinary record.

11 3. In June 2008, the Department received information from Snohomish County
12 Sheriff's Office ("SCSO") that, during Officer Werner's application process to become a deputy
13 sheriff with SCSO, Officer Werner admitted that he had previously lied during an internal
14 investigation conducted by SPD.

15 4. SCSO also reported that during his nine year career, Officer Werner only once
16 improperly disclosed evidence and once made a false reimbursement for police boots. It was
17 later found that Officer Werner was entitled to reimbursement for the boots. Resp. Ex. 1, SPD
18 220-21, 224-26.

19 5. On July 4, 2008, Officer Werner made a report to SPD's Office of Public
20 Accountability's Investigative Section (OPA) about these same statements. He characterizes his
21 statements as misstatements rather than lies.

22 6. OPA initiated an administrative investigation. OPA Lieutenant Mark Kuehn

23 ¹ Unless noted otherwise, individual findings of fact and conclusions of law are unanimously adopted by the Commission.

1 reviewed documents that had been compiled by SCSO. Resp. Ex. 1, SPD 224-227; Tr. I 56.
2 OPA then conducted its own independent investigation over several months, interviewing key
3 witnesses and gathering additional documentation. This included interview with Appellant,
4 SCSO Det. Malkow, SCSO Lt. Brand, and Lake Stevens Sgt. Julie Jamison. Resp. Ex. 1.

5 7. In or around December 2008, the investigation was forwarded to the Chief of
6 Police for his consideration. OPA recommended that the Chief sustain a single specification of
7 misconduct: lying during a 2007 internal investigation regarding Werner's use of force. Other
8 incidents involving Werner's repeated lack of veracity were provided as background
9 information, relevant to the determination of whether Werner purposefully lied during the 2007
10 investigation. Resp. Ex. 1, SPD 236-45.

11 8. After the file was reviewed, Werner was notified of a proposed disciplinary action
12 sustaining the allegation and recommending his termination. Resp. Ex. 5.

13 9. An initial pre-disciplinary (Loudermill) meeting was held on or around December
14 22, 2008. Resp. Ex. 5. Then-Chief Kerlikowske and current-Interim Chief Diaz were both
15 present. Officer Werner was represented by Seattle Police Department Guild President Rich
16 O'Neill. Also present were members of Officer Werner's chain of command and the
17 Department's Legal Advisor. Officer Werner's sergeant, Sgt. Zerr, attended in support of Werner
18 and communicated the support of many in Officer Werner's squad.

19 10. Guild President O'Neill supported the Department's right to discipline Werner,
20 but asked that discipline less than termination be imposed. He testified that discipline is only
21 appropriate when it is for the specification outlined on the Disciplinary Action Report (DAR).
22 Werner's DAR is limited to a single specification: lying in an OPA investigation.

23 11. Guild President O'Neill also stated that there was an outpouring of support for

1 Officer Werner as an outstanding officer. (App. Ex. 4).

2 12. The Department was asked to permit Werner to be evaluated by a psychologist to
3 determine if any psychological factors may have contributed to Werner's actions. Tr. I, 235. The
4 Department agreed to the request and did not make any discipline determination pending that
5 evaluation.

6 13. Werner was evaluated by Dr. Bill Ekemo in January 2008. In February 2008, Dr.
7 Ekemo submitted his findings to the Department. (Resp. Ex. 7) Dr. Ekemo found that Werner
8 exhibited a "consistent pattern of dishonesty" and that Werner's testimony to OPA constituted a
9 "knowing omission" and not a memory issue.

10 14. After reviewing Dr. Ekemo's report, Chief Diaz scheduled a second Loudermill
11 meeting for March 19, 2009.

12 15. Based on his review of the relevant materials and the information presented at the
13 two Loudermill meetings, Chief Diaz issued a decision sustaining the specification of
14 misconduct on May 18, 2009. As reflected in the DAR: "you acknowledged that you had been
15 untruthful in a prior administrative interview with the Seattle Police Department in OPA-IS case
16 No. 07-0465. This administrative investigation concerned a complaint of unnecessary
17 force...During the OPA-IS interview you denied striking the complainant, which you
18 subsequently acknowledged more than once during the screening process in Snohomish County
19 to be false." Resp. Ex. 4.

20 16. Based on these findings, Chief Diaz terminated Officer Werner's employment. *Id.*

21 17. On May 18, 2009, Officer Werner received notification of his termination. He
22 filed a timely appeal.
23

III. CONCLUSIONS OF LAW

Standard of Review

18. The Commission unanimously concludes that the Department has the burden of showing by a preponderance of evidence that the discipline was “in good faith for cause.”

19. Appellant Werner argues that the 2008 Collective Bargaining Agreement (CBA) alters the standard of proof. He asserts that the 2008 CBA requires the Department to prove his dishonesty by clear and convincing evidence. The Commission disagrees that this case requires a heightened standard of proof.

20. The Commission has repeatedly held that it lacks authority to enforce the provisions of the CBA. *Charles v. SPD*, PSCSC No. 05-008; *Powers v. SPD*, 05-010 ¶¶19-20, 25); *Arata v. SPD*, PSCSC Case 08-007, Order Granting SPD’s Motion to Dismiss (Commission is not as a matter of law the appropriate forum to litigate contract issues). Likewise, the Commission does not have authority to construe ambiguity in a CBA. *See Mahoney v. SPD*, PSCSC Case No. 09-001, Amended Findings of Fact, Conclusions of Law, and Order (August 26, 2009).

21. Instead, the Commission’s scope of its review is limited to the issues established in the City Charter, the PSCSC ordinance and the PSCSC rules. The standard of review is found in SMC 4.08.100 and Commission Rule 6.21. The Department has the burden of showing by a preponderance of evidence that the discipline was “in good faith for cause.” The Commission has the authority to affirm, reverse, or modify the decision of the employing department pursuant to SMC 4.08.100.A.

22. The Commission has utilized several factors in analyzing whether the Department has met its burden. The factors are not exclusive - nor are they elements that each must be

1 proven. As the Commission has repeatedly said in prior decisions, the factors are just that -
2 factors it considers in its analysis.

3 23. The factors include whether: (1) the employee had notice that his or her conduct
4 would result in disciplinary consequences; (2) the rule was reasonable; (3) the employer
5 investigated to determine whether the rule was in fact violated; (4) the investigation was fair; (5)
6 the employer's decision-maker had substantial evidence that the employee violated the rule as
7 charged; (6) the employer applies its rules even-handedly; and (7) the discipline administered
8 was fair in relation to the nature of the offense and imposed with regard to the employee's past
9 work record.²

10 **The Dishonesty Charge – Lying in the OPA Investigation**

11 24. A unanimous Commission concludes that, by preponderance of the evidence, the
12 dishonesty charge was issued "in good faith for cause."

13 25. Notice of a Reasonable Rule. The Commission unanimously concludes that the
14 Department may discipline employees for dishonesty. The SPD manual states that dishonesty is
15 prohibited and therefore put officers on notice that dishonesty may result in discipline.³ A rule
16 against dishonesty is also reasonable. The credibility of the Department depends upon the
17 honesty of individual officers, particularly in an OPA investigation.

18 26. Fairness of Investigation. The Commission further unanimously concludes the
19 investigation was fair and adequate. The Department completed an OPA investigation that
20 included key witness interviews, held two Loudermill meetings, and a physiological evaluation

21
22 ² See PSCSC #09-001 B.T. Robert Mahoney v. SFD; #07-005 Marcia Kinder v. SFD; PSCSC #06-006 Richard
Roberson v. SPD; and PSCSC # 07-007 Felton J. Miles III v. SPD

23 ³ As stated above, the Commission does not have authority to construe ambiguity in a CBA and therefore does not
address any possible differences between the CBA and SPD manual.

1 of Officer Werner. The investigation, meetings, and evaluations provided Interim Chief Diaz
2 substantial and credible evidence that Officer Werner had been dishonest during an OPA
3 interview.

4 **Reasonableness of the Discipline**

5 27. The Commission majority believes that termination was the inappropriate form of
6 punishment given the facts and circumstances of this case.

7 28. SMC 4.08.100 gives the Commission the power to “modify the order of removal,
8 suspension, demotion, or discharge by directing a suspension, without pay, for up to thirty (30)
9 days, and subsequent restoration to duty, or demotion in classification, grade or pay.”

10 29. Even-Handedness of the Rule. The Commission majority is concerned about the
11 even-handedness in which the Department is applying its rules. There is evidence that employees
12 in past cases involving dishonesty either received no suspension of duties or only temporary
13 suspension of duties. Examples of more lenient punishment include an officer who fired shots at
14 a stolen car and then misrepresented the facts was not suspended for the incident; an officer who
15 did not notify authorities of the discharge of his service weapon, and only reported the incident
16 when he learned that local police were investigating received was not suspended but instead
17 received a disciplinary transfer with no loss of pay; an off-duty officer was involved in an
18 encounter when her handgun was accidentally discharged, she initially denied it before reporting
19 it to her chain of command and was given only 15 days suspension; and an officer, who denied
20 using any force but was contradicted by three witnesses, received a one-day suspension for
21 excessive force in a case where dishonesty was an issue. To date, no other employee has been
22 terminated based on dishonesty. The Commission majority concludes the evidence does not
23 support that the Department even-handedly applied its rules.

30. The Commission is not holding that dishonesty can never be the sole grounds for termination.

31. Fairness in Relation to Offence. The Commission majority believes the punishment given to Officer Werner is unfair in relation to the offense and his record.

32. On one hand, honesty in the OPA process “goes to the heart of [an officer’s] work as a police officer. Lying in the context of a court proceeding, an [OPA] proceeding, is really the most serious kind of lie, if you will, by an officer.” Tr. I, 125. There is no question that officers have a duty to act with the upmost honesty both generally, and in the conduction of OPA investigations.

33. On the other hand, Officer Werner had an unblemished record prior to this charge of dishonesty. In the course of the investigation, many fellow officers commended Officer Werner as a good and honest police Officer. Terminating Officer Werner would effectively end his entire police officer career based on a single act. Had he admitted the truth during the original investigation into this single act, he likely would have received no discipline at all.

34. Although dishonesty in this case is troubling and dishonesty may well be a cause for termination, termination is not the appropriate discipline for Officer Werner given the facts and circumstances in this specific case. A 30-day suspension of duties without pay, which is the maximum penalty the Commission can impose short of termination, is more appropriate when considering the nature of the offense and Officer Werner's previously unblemished record.

IV. DECISION

1. The Commission unanimously concludes that the Department acted in good faith for cause in concluding Officer Werner acted dishonestly in answering certain questions during the OPA investigation.

2. The Commission majority also concludes that disciplining Officer Werner with termination instead of a 30-day suspension of duties without pay would be unfair and excessive in light of the circumstances.

V. ORDER

1. The Commission affirms the charge of dishonesty

2. The Commission amends the Department's disciplinary action from termination to a 30-day suspension of duties without pay.

Dated this 21st day of January, 2010.

PUBLIC SAFETY CIVIL SERVICE COMMISSION OF THE CITY OF SEATTLE

/s/ Joel Nark	1/21/10
---------------	---------

_____ Commissioner Joel Nark	_____ Date
---------------------------------	---------------

/s/ Herbert V. Johnson	1/21/10
------------------------	---------

_____ Commissioner Herbert V. Johnson	_____ Date
--	---------------

PARTIAL DISSENT

I dissent from that part of the above decision that seeks to change the Police Chief's decision to terminate this employee. The law requires that the Chief make a decision "in good faith for cause." There is no serious issue raised in the majority opinion that the Chief did other than what he was required to do. The members of this Commission are not Chiefs of Police. In my opinion, both common sense and the law require that we give some deference to the Chief's

1 decision. He/She carries the burden of managing the Police Department under the City Charter
2 and the issue before us is not what we as individuals might do, but, rather, whether our thorough
3 review demonstrates that the Chief acted “in good faith for cause.” Again, to reiterate, nothing
4 in the majority view demonstrates otherwise. Although my colleagues are sincerely motivated,
5 the opinion as to discipline appears based principally on sympathy for an officer with an
6 apparent good record.

7 Turning to the specifics of this case, my colleagues note that the discipline here may be
8 inconsistent with prior cases. The fact is there are no similar cases where an allegation of
9 dishonesty was sustained. Specifically, those cases cited by the majority in paragraph 29, supra,
10 do not involve any sustained findings of dishonesty. Nor do any of those cases involve anything
11 close to the 30 days suspension that my colleagues believe is appropriate here. Further, the 2008
12 Collective Bargaining Agreement (which the parties agree governs this case) mandates that there
13 is a presumption of termination where an allegation of dishonesty is sustained. Likewise, the
14 thoroughness and fairness of the investigation in this case by the Office of Professional
15 Accountability (OPA) is not questioned and, by any measure, is extraordinarily thorough.

16 It must be remembered that this officer lied when asked several times in the course of an
17 interview by OPA, after being warned of the consequences of not answering questions truthfully,
18 as to whether he struck a citizen. Also, the matter would never have been discovered without
19 two events: First, his statement prior to an impending lie detector test when he applied to the
20 Snohomish County Sheriff’s Office; and, second, that same Sheriff’s office reporting the matter
21 to SPD. Subsequently, during the course of the SPD/OPA investigation he developed a rather
22 convoluted version of some type of temporary memory lapse that the Commission found not
23 credible. As noted in paragraph 13, supra, the Commission’s view was supported by a

1 psychiatrist, who examined Officer Werner at his own request, and found a ‘consistent pattern of
2 dishonesty’ and that Officer Werner’s testimony to OPA constituted a ‘knowing admission’ and
3 not a memory lapse.

4 None of this is intended to suggest that this has been an easy decision. I am well aware
5 of the impact of termination from employment for a police officer. Police officers are critically
6 important to the community and their work is entitled to the highest respect from citizens. Part
7 of that foundation of trust, though, must be premised on the assumption that they will tell the
8 truth – especially in a circumstance where the striking of a citizen is involved. Note, further, that
9 in paragraph 25, supra, my colleagues agree that “....the credibility of the Department depends
10 upon the honesty of individual officers, particularly in an OPA investigation”.

11 In sum, then, the evidence is undeniable that the Chief carefully weighed the evidence
12 and his options in this matter and acted ‘in good faith for cause’. We should not only sustain his
13 opinion on the facts of the dishonesty here but the discipline as well. The integrity of the
14 discipline system demands that result in my view.

15
16 /s/ Terry Carroll

1/21/10

17 _____
Commissioner Terry Carroll

18 _____
Date