

IN THE MATTER OF ARBITRATION BETWEEN

NEW ENGLAND POLICE BENEVOLENT ASSOCIATION
COUNTY CORRECTIONAL OFFICERS ASSOCIATION LOCAL 575

AND

NORFOLK COUNTY SHERIFF'S DEPARTMENT

(Stephen Ohlson)

Grievance No. 18-005

ARBITRATION DECISION AND AWARD

Introduction:

The County Correctional Officers Association-NEPBA Local 575("Union") and the Norfolk County Sheriff's Office ("Department" or "Sheriff's Office") are parties to a Collective Bargaining Agreement ("Agreement"). Under the Agreement, grievances not resolved during the grievance procedure may be submitted to arbitration under the rules of the American Arbitration Association. The parties presented their case in Arbitration before Gary D. Altman, Esq., on April 19, 2019. The parties had the opportunity to examine and cross-examine witnesses and to submit documentary evidence. The parties submitted written briefs after the conclusion of the testimony.

Issue:

The parties agreed that the issue to be decided is as follows:

Was there just cause for the discharge of the grievant, Officer Stephen Ohlson? If not, what shall the remedy be?

Facts

The grievant, Stephen Ohlson, has worked as a Correction Officer for the Norfolk County Sheriff's Office for five years. Until the present matter, Officer Ohlson had received no prior discipline during his employment with the Department. In November of 2017 Officer Ohlson was placed on administrative leave pending investigation into allegations made by another Correctional Officer. On October 27, 2018 the Sheriff's Office discharged Officer Ohlson, and a grievance was filed challenging the discharge. The events leading up to Officer Ohlson's discharge and whether his discharge was for just cause will now be considered.

On November 28, 2017 former Correction Officer Sarah Medeiros filed a complaint with the Department's Sexual Harassment Officer. Officer Medeiros alleged that in 2015, she was drugged and sexually assaulted by co-workers in a hotel. This event occurred outside of working hours. Officer Medeiros further alleged that there was a video of the sexual assault, and that it was being shown to other correction officers in the workplace. Officer Medeiros alleged that Officer Ohlson was one of the three Officers who were present during the alleged assault at the hotel. Immediately after the allegations were made, the Department placed Officer Ohlson and two other officers on paid administrative leave¹. Officer Medeiros sought and the

¹ The Union grieved placing Officer Ohlson on unpaid leave, but this matter was put in abeyance pending the investigation.

Department also granted her request to be placed on administrative leave.

The Department notified the Norfolk County District Attorney's office to determine whether criminal prosecution was warranted.² The Department also hired Attorney Denise Murphy, an outside investigator, to conduct an internal investigation into the allegations. Attorney Murphy interviewed thirty employees of the Department including the officers who were allegedly present at the hotel during the assault. The investigation took over sixteen months to complete. On February 23, 2018 Attorney Murphy interviewed Officer Ohlson. Attorney Murphy asked Officer Ohlson whether he took, saw or showed a videotape of Officer Medeiros engaged in sexual activity. Officer Ohlson denied that he took, saw, or showed anyone a video of Officer Medeiros engaged in sexual activity.

On March 15, 2018 Attorney Murphy interviewed Officer Martin Parlon and asked him whether he had seen any video of Officer Medeiros engaging in sexual activity. In his answer to Attorney Murphy, Officer Parlon said that he had not seen any video. Later that day Officer Parlon called Attorney Murphy and changed his statement; he then told Attorney Murphy that Officer Ohlson had shown him the video of Officer Medeiros. On March 29, 2018, Officer Parlon followed up by submitting a written report indicating that he had seen a video of Officer Medeiros having sex with another officer, and that:

I was shown a short video while on transportation. This video was shown to me by Steve Ohlson at some time during my shift approximately three years ago.

² The District Attorney's office declined to initiate any criminal charges.

Of the thirty Officers interviewed, only Officer Parlon stated that Officer Ohlson had shown him the video. Robert Harnais is the General Counsel for the Department. Mr. Harnais testified that in an unrelated matter Officer Parlon had been found to have cheated on a promotional exam, and also provided false information when he filed a workers' compensation claim. Officer Parlon did not testify in this proceeding. Mr. Harnais further stated that the District Attorney office did not pursue criminal charges. Mr. Harnais also testified that the State Police conducted the investigation for the District Attorney's office, and never found any video of the any sexual activity as alleged by Officer Medeiros, and that they reviewed Officer Ohlson's phone and found no such video on his phone.

On October 15, 2018 the Department discharged Officer Ohlson finding him to be untruthful during the February 23, 2018 investigatory interview, when he claimed that he had not taken, seen or show anyone a video of Officer Medeiros engaging in sexual activity. In addition, the Department's discharge letter indicated that Officer Ohlson had shown Officer Parlon the video, and that such action violated the Department's sexual harassment policy.

Positions of the Parties

Summary of the Department's Arguments

The Department maintains that there was just cause for the discharge of the grievant, Stephen Ohlson. The Department contends that the allegations against Officer Ohlson are very serious; he was accused of lying during a Departmental investigation, and violating the Department's sexual harassment policies. The Department states that Officer Ohlson told the investigator that he did not take, show, or see any video that showed Officer Medeiros

engaging in sexual activities. The Department states that Officer Parlon, however, offered a contradictory statement in which he claimed that Officer Ohlson did, in fact, show him a video of Officer Medeiros having sex with other officers.

The Department states that Officer Ohlson, as a result of his lies during an official investigation, forfeited his employment with the County. The Department asserts that Officer Ohlson lost the confidence of his superiors and could no longer be trusted to perform his duties for the Department. Moreover, the Department contends that Officer Parlon's statement that Officer Ohlson showed this video to him at work, violated the Department's sexual harassment policy. The Department states that in the operation of correctional facility, Officer Ohlson's conduct undermines the operation of the Department and therefor there was just cause for the discharge of Officer Ohlson from his position with the Department.

Summary of the Union's Arguments

The Union contends that there was not just cause to discharge the grievant, Stephen Ohlson, from his position as a Correction Officer with the Norfolk County Sheriff's Office. The Union contends that the Department has the burden of proof to show that the employee is engaged in misconduct, and that the penalty is appropriate for the wrongdoing. The Union argues that in the present case, the Department has not provided by any standard of proof that Officer Ohlson engaged in any misconduct.

The Union states that Officer Medeiros made very serious accusations against officers of the Department, including Officer Ohlson. The Union states that although the charges were very serious, the Employer still must

produce evidence that the alleged wrongdoing occurred. The Union states that in the present case, the Norfolk County District Attorney's office did not initiate any criminal charges in this matter. Moreover, the Union states that the State Police, who conducted the investigation for the District Attorney's Office, never found any video, and never saw any such video on Officer Ohlson's phone. Further the Union states that the Department never found such video of the alleged encounter.

The Union further states that thirty officers were interviewed and none of them indicated that they saw any video of Officer Medeiros having sex with any Norfolk County Correctional Officers. The Union states that only one officer, of the thirty officers interviewed, claimed that three years prior to the investigation, Officer Ohlson showed him a video of Officer Medeiros having sex with another officer.

The Union states that there is a serious question as to the veracity of such an accusation. First, the Officer who made the claim initially stated under oath that he did not see any such video, then he changed his mind and later stated said that Officer Ohlson showed him a video. The Union further maintains that the Officer who made the claim had previous discipline with respect to work related incidents in which he was less than truthful. Finally, the Union states that this Officer did not testify in this proceeding, and his credibility and memory of the event could not be challenged. The Union thus argues that there is no legitimate reason to accept the statement of this Officer that Officer Ohlson, did in fact show him a video of Officer Medeiros engaged in sexual activity.

The Union maintains that based on the lack of any evidence, it cannot be found that Officer Ohlson was untruthful during the investigation, or that he ever showed any employee a video of Officer Medeiros having sex with any officer. The Union concludes that as there is no credible evidence or testimony that Officer Ohlson did anything wrong, the grievance must be sustained, and Officer Ohlson must be reinstated and be made whole for lost wages and benefits.

Discussion

It is well established in arbitration proceedings that the Employer has the burden to prove that the grievant was guilty of the wrongdoing for which he has been charged and the discipline is appropriate for the infraction. Mr. Ohlson was discharged for his failure to be honest in a Department investigation, and for violating the Department's sexual harassment policies.

Certainly an allegation that a correction officer was untruthful during an investigation or showed a video of an officer having sex with another officer would provide the Administration with a legitimate basis to initiate an investigation. Officer Ohlson maintained that he did not take, see or show the video, and that he was truthful in the investigation. It was the statement of Officer Parlon that served as the basis for Officer Ohlson's discharge. Specifically, Officer Parlon told the investigator that Officer Ohlson showed him the video while at work, and the Department then concluded that Officer Ohlson lied during the investigation.

Despite the seriousness of the allegations there must be proof that the reasons for the discharge did, in fact, occur. The matter was referred to the Norfolk District

Attorney's Office, and the State Police investigated the allegations. The State Police never uncovered any video, and the District Attorney's office did not bring any charges against any Norfolk County Correctional Officer. While the decision not to pursue charges is not determinative of whether there was just cause for discipline, the fact that the District Attorney did not pursue the matter, and the fact that the State Police did not find any evidence or the existence of any video, casts doubt as to any allegation that Officer Ohlson engaged in the misconduct for which he was charged.

It was Officer Parlon who made the allegations that Officer Ohlson was untruthful in this investigation. Specifically, Officer Parlon claimed that Officer Ohlson showed him the video. Officer Parlon, however, was the only one of thirty officers who were questioned who claimed that he had seen the video. Even this allegation is subject to doubt. Specifically, Officer Parlon initially told the investigator that he had not seen any video, then changed his mind and implicated Officer Ohlson. No explanations or reasons were offered as to why Officer Parlon changed his account of what had occurred. Moreover, the record shows that, in the past, Officer Parlon has had issues with his veracity. Specifically, Officer Parlon was found to have been untruthful in a workers compensation claim, and found to have cheated in a promotional exam. Thus, based on the totality of events there are legitimate doubts whether to credit Officer Parlon's second version that Officer Ohlson, did, in fact, show him a video.

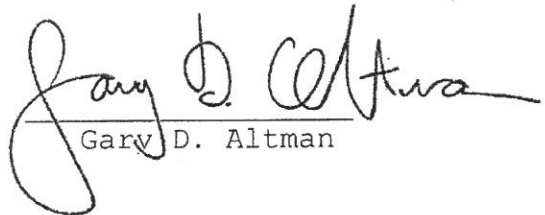
Even more significant is the fact that Officer Parlon did not testify in this proceeding. Thus, there was no testimony from Officer Parlon as to what he witnessed or

observed. In this matter, without Officer Parlon's testimony, the record will be lacking a direct first hand account of what transpired on the day in question. More importantly, the grievant was denied the opportunity to challenge the source of the allegations against him and he did not have the ability to inquire into the credibility of his accuser, to question the reasons why Officer Parlon changed his mind, or to question the accuracy of the Officer Parlon's allegations. Therefore, Mr. Parlon's hearsay accusation that Officer Ohlson showed him a video, cannot serve as the basis to discipline the grievant. See generally, Hill and Sincropi, Evidence in Arbitration, 2nd Ed, BNA Books. See also. Bamberger's 59 LA 879, 880 (Glushien 1972). In sum, the accusations made by Officer Parlon against Officer Ohlson are not conclusive evidence of any wrongdoing or misconduct that would warrant the imposition of any discipline on Officer Ohlson.

Conclusion and Award

For the reasons set forth above, there was not just cause for the imposition of any discipline on Officer Stephen Ohlson. Officer Ohlson must be reinstated and made whole for lost pay and benefits from the date of his termination until the date he is reinstated to his position with the Department.

June 25, 2019
Brookline, Massachusetts


Gary D. Altman