

BEFORE ARBITRATOR ROSS RUNKEL

In the Matter of the Arbitration ) G\_\_\_\_\_ Discipline  
 )  
Between )  
 )  
TOWN OF LAKEVIEW )  
 )  
And ) ARBITRATOR'S OPINION  
 ) AND AWARD  
 )  
TEAMSTERS LOCAL UNION )  
NO. 223 ) July 25, 2001

HEARING: July 18, 2001  
Lakeview, Oregon

HEARING CLOSED: July 18, 2001

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## INTRODUCTION

This matter came before me as arbitrator selected by the Parties to resolve a dispute arising under their collective bargaining agreement. A hearing was held on July 18, 2001 in Lakeview, Oregon. The Parties presented witnesses, testimony, and arguments. The following individuals testified: Eddie Now, Oregon State Police Senior Trooper, Fish and Wildlife Enforcement Officer; Dave Schutt, Lake County District Attorney; Arlene Clark, Mayor, Town of Lakeview; Dennis Ross, Chief of Police, Town of Lakeview; Wayne Botta, Business Representative, Teamsters Local Union No. 223; G\_\_\_\_\_, the Grievant. The Parties introduced 16 exhibits. All exhibits were received into evidence except No. 16 because it was prepared after the Town made its discipline decision and could not have been considered in making the decision. The hearing closed on July 18, 2001.

## OPINION AND AWARD

### 1. ISSUE

The Parties stipulated to the following issue:

Was the discipline taken for just cause under Article 14 of the labor agreement? If not, what is the appropriate remedy?

### 2. CONTRACT

The labor agreement (Exhibit No. 11) contained the following relevant provision:

## ARTICLE 14 - DISCIPLINE AND DISCHARGE

14.1 Discipline. No regular employee shall be disciplined, suspended without pay, demoted, or discharged except for just cause. All disciplinary action imposed upon a regular employee except oral reprimands may be protested as a grievance through the regular grievance procedure.

### 3. STANDARDS OF CONDUCT

The Lakeview Police Department Policy/Procedure Manual (Exhibit No. 5) contained the following relevant provisions:

#### III. DUTIES

##### A. Affirmatively Promoting a Positive Public Image

Officers shall conduct themselves both on and off duty in a manner that does not damage or have the probable expectations, in the mind of a reasonable and prudent person, of damaging or bringing the department's public image, integrity or reputation into discredit or disrepute.

##### D. Knowing, Observing, and Obeying All Directives, Rules, Policies, Procedures, Practices and Traditions.

Officers shall display an affirmative, consistent effort to observe and and comply with the mission, oath of office, code of ethics, directives, rules, policies, procedures, practices and traditions established for the effective, efficient, and safe operation of the Lakeview Police Department. This standard applies to policies, procedures, and practices that are written as well as those established by past patterns or practices.

##### G. Violation of Rules.

Officers shall not, by commission nor by omission, act in any manner which constitutes a violation of any of the rules, regulations, directives, mission or orders of the department.

##### H. Unbecoming Conduct.

Officers, at all times, shall conduct themselves in such a manner as reflects favorably on the Department. Conduct unbecoming includes any act or conduct which brings discredit upon the member, or the department or impairs the effective operations or efficiency of the department.

IV FF. Controversial Conduct.

As used in this section, controversial conduct shall be defined as that conduct which may damage the reputation of the department or bring it or the officer into disrepute.

1. Officers shall not engage in controversial conduct or behavior (committed on or off duty) that brings about public criticism and causes department personnel to spend an atypical amount of time and management cost to investigate or respond to the criticism.

4. FACTS

The Grievant has been employed as a sworn police officer in the Town's police department since August 1977. He served as a patrol officer until June 1999 at which time he was promoted to the rank of sergeant. On April 25, 2001 the Town imposed the following discipline: suspension without pay for 90 days commencing April 30, 2001 and, after the suspension, permanent demotion from sergeant to patrolman. The Union filed a grievance, and this arbitration was conducted to resolve the dispute between the parties.

The discipline was imposed primarily due to events that took place on September 24, 2000. Two witnesses testified about the September 24 events: the Grievant and Oregon State Patrol Senior Trooper Eddie Now. Although there were several variations in the details of their versions of events, there is a core of relevant facts that stand out clearly. To the extent that the two versions of events

are different from each other, the differences are not significant to the resolution of this case.

September 24 was the last day of bow season, that period of time during which it is lawful to hunt deer with a bow, but not lawful to hunt with a rifle. The Grievant worked his regular shift until 4:00 p.m., and then he and his teenage son set off in the Grievant's pickup. They had two rifles with them, and first engaged in some target practice, shooting at cans. Then the Grievant drove his pickup and parked it near a gate on a ranch about ten miles from Lakewood. There were some deer nearby, and the Grievant, from inside the pickup, fired his rifle twice at one of the deer.

Unknown to the Grievant, Trooper Now was engaged in bow hunting about 200 yards away. Trooper Now had observed the pickup drive up to the gate, and was looking in its direction when he heard the two gunshots. While Trooper Now was walking toward the pickup he observed the Grievant's son come from behind the pickup carrying a rifle. As Now approached, the Grievant got out of the pickup. The Grievant was embarrassed, and that was obvious to Trooper Now. Now asked the Grievant if he had heard any shots, and the Grievant responded, "What shots?" Now interpreted that as the Grievant saying in substance that he had not heard any shots. Now said, "You know what I'm talking about." The Grievant responded, "What do you want me to say now, Ed?"

According to Now, he again asked the Grievant about hearing shots, and got another answer which Now interpreted as the Grievant saying he heard no shots. According to the Grievant, Trooper Now asked the son whether he heard any

shots and the son said "no." Trooper Now testified that he did not ask the son any questions. The two witnesses also disagreed as to whether Trooper Now asked whether the Grievant or his son had shot at a deer. Trooper Now testified that he asked that question and the Grievant denied it. The Grievant testified that Trooper Now did not ask that question.

The Grievant did tell Trooper Now that he was about to go bow hunting. The Grievant's bow had been in a bow case in the back of the pickup, and when the Grievant took the bow out and began to get it ready, Trooper Now asked to see the Grievant's bow tag. The Grievant did not have a tag with him because he had left his wallet and tag at home. When Trooper Now said it was illegal to hunt without a bow tag in his possession, the Grievant said, "Fine, we'll just go home."

Trooper Now picked up a .223 shell casing from the pickup's floorboard and retained it as evidence. Then he spent some time looking for a dead or wounded deer.

That evening, Trooper Now telephoned the Lakeview dispatcher and said he needed to talk to Chief Ross about witnessing one of his officers in a game violation. Shortly thereafter, Now and Ross discussed the matter by telephone. Trooper Now also stopped at the police station and asked two police officers about the types of rifles issued by the Lakeview Police Department.

On September 29 Trooper Now issued two citations to the Grievant alleging aiding in a wildlife violation and bow hunting without a bow tag in possession.

On October 27 the Town Council placed the Grievant on paid administrative leave. During December the Lake County Circuit Court dismissed the bow

hunting charge and found the Grievant guilty of aiding in a wildlife violation. During January the Town conducted its own investigation of the matter, using the services of an independent private investigator. The investigation was concluded in late February 2001.

During the period beginning shortly after the September 24 incident and running at least up to the date the Town announced its discipline decision, the local newspapers carried a number of articles devoted to the incident, the citations, the court case, Town Council meetings, and related matters. There also were many rumors and jokes circulating.

On April 25 the Town Council voted to impose the discipline of 90 days suspension without pay plus a demotion from sergeant to patrolman. The Union filed a grievance and this arbitration followed in due course.

## 5. POSITIONS OF THE PARTIES

### A. Position of the Union.

The Union's position is that there is not just cause for the severe discipline imposed by the Town. "Just cause" requires that there be a proper relationship between the act and the consequences. The game violation was a violation and not a crime, and was a minor act. The Town must bear some responsibility for the adverse publicity because it stretched out longer than necessary; the Town could have avoided the delay of two months waiting for the court case and could have shortened the gap between December and late February.

Demotion is a disfavored form of discipline because it rarely works and it must be related to the incident. A suspension of 90 days is too long. The combination of demotion plus 90 days suspension is unreasonable.

B. Position of the Town.

The Town's position is that the discipline was for just cause and should be upheld. The level of discipline fits the severity of the offense. The Grievant committed a game violation and then was evasive and less than candid. He violated the police department policies, his oath of office, and the code of ethics for police officers. His acts caused credibility problems for himself and for the Town.

6. DISCUSSION

The standard for judging this case is "just cause," the phrase contained in the labor agreement between the Town and the Union. Although the term "just cause" can potentially involve a number of issues, in this case it boils down to whether the discipline imposed by the Town is proportionate to the Grievant's misconduct. This is sometimes stated as "whether the punishment fits the crime" or "whether there is a proper relationship between the act and the consequences."

When applying the above standard, it is necessary to look first at what the misconduct was, and then examine the discipline.

The Parties obviously have different views as to what the Grievant's misconduct was. I disagree with the Union's characterization of the misconduct as a minor act. The Grievant admitted that he fired his rifle two times in an attempt to kill a deer out of season. He was cited for, and the court found him guilty of, Aiding in a Wildlife Violation. This was a violation rather than a crime, and to that extent it was minor.

Although the Grievant was virtually caught in the act of shooting at a deer, his conduct in dealing with Trooper Now changed the nature of the situation. When asked about hearing shots, he said, "What shots?" The Grievant has attempted to sweep this away by saying he merely answered a question with a question, and by saying he never denied that he shot at a deer. Coming from a person who has just fired his rifle, "What shots?" is not merely answering a question with a question. Any reasonable observer would interpret that as a statement that he did not hear any shots and did not know about any shots. It is, in effect, a statement that he did not know anything about the shots that he himself had just fired. He was evasive. He was not candid.

The testimony of the Grievant and Trooper Now differed as to whether Trooper Now ever directly asked whether the Grievant or his son shot at a deer. Even if that question was not asked, the Grievant's "What shots?" response to the other question would lead a reasonable observer to believe that the Grievant was denying that either of them shot at a deer.

The Grievant has attempted to justify his statements to Trooper Now on the ground that he had a constitutional right not to incriminate himself. Surely that

basic proposition is true, and the Grievant's constitutional right does not go away simply because he is a police officer. However, the right granted by the constitution is the right to be silent, the right to refuse to answer questions asked by a police officer. The Grievant did not exercise his right to be silent and to refuse to answer questions. He did respond to the questions, and did so in a manner that was misleading and evasive. The constitution does not grant anyone the right to answer a police investigator's questions in an evasive and misleading manner.

The Grievant's conduct on September 24 led to a series of newspaper articles, rumors, and jokes. All of this caused an impairment of the public's perception of the Grievant, the police department, and the Town.

The Grievant violated the Lakeview Police Department Policy/Procedure Manual both by committing a game violation and by his evasiveness and lack of candor while interacting with Trooper Now. These acts fit clearly within Part III A because they did damage the department's public image, integrity, and reputation. The events of September 24 were destined to become public knowledge either because the Oregon State Police would conduct an investigation, the Town would conduct an investigation, or the matter would come before the court. The events did become public knowledge, resulting in damage to the department's public image, integrity, and reputation.

The Grievant's acts also violated Part III H in that his acts and conduct brought discredit upon himself and the department.

Although the events took place while the Grievant was off duty, there was a clear and direct connection between his off duty misconduct and the performance of his job, plus a clear and direct connection between the misconduct and the efficiency of the police department. The matters became well known in the community both because the information was spread by word of mouth and because there were many newspaper articles about it. The District Attorney made it clear that he was concerned about bringing cases in which the Grievant would be a witness because of the expectation that defense lawyers will introduce negative evidence as to the Grievant's reputation for truthfulness, and he made that known to the Council and Mayor. The result was a serious impairment of the Grievant's and the department's abilities to perform police services.

It is not necessary to explore whether the Grievant's acts also were violations of Parts III D, III G, and IV FF, or whether he violated his oath of office or violated the Criminal Justice Code of Ethics. His misconduct clearly violates the Manual provisions mentioned in earlier paragraphs.

From the above, I conclude that the Town had just cause to impose some discipline on the Grievant. The question then becomes whether the Town had just cause to impose the level of discipline it imposed.

The discipline imposed in this case was a combination of demotion from sergeant to patrolman plus a suspension without pay for 90 days. In deciding whether the discipline is proportionate to the misconduct, it is not an arbitrator's role to simply step in and exercise his own judgment as to what discipline he

would have imposed if he had been the employer. An arbitrator's job is not to substitute his own judgment for the Town's judgment. The arbitrator's job is to consider the seriousness of the misconduct and the level of discipline to determine whether it is consistent with principles of "just cause" that have been built up in countless arbitration decisions over many decades.

The Union's position is that the Grievant did nothing to bring these matters to the attention of the press and the public, that Trooper Now contributed by his telephone call to the dispatcher and his interview of the two officers, and that the Town contributed by delaying an investigation.

Trooper Now telephoned the dispatcher for the purpose of bringing the matter to the attention of Chief Ross. When he talked to the dispatcher he explained that he wanted to discuss a matter involving an officer's violation of the game laws. Although the Union might prefer that Trooper Now not mention the actual purpose of the call, and merely say that the matter was urgent, my opinion is that it was proper for Now to state the reason for the call so that Chief Ross could make his own determination as to whether it was urgent. Trooper Now's interview of the two police officers was part of his initial investigation. Thus, the call and the interviews were a natural outgrowth of the situation the Grievant created.

The Union argues that the Town must take some responsibility for the adverse publicity because the period of time between September 24 and the late-February 2001 completion of the Town's investigation was unreasonably long could have been shorter had the Town done things differently. The initial delay

was between September 24 and the completion of the court case. The Town did not conduct its own investigation during that time in the hope that a court trial would reveal most of the necessary details, and to avoid reaching a conclusion contradictory to the court's. In hindsight, no additional facts were brought out in court because the Grievant did not testify. However, the Town's plan was a reasonable one. The Town had the option of moving forward independently of what the court was doing, but it was not unreasonable to wait about two months under these circumstances.

The delay from the December court decision until late February also was reasonable. There were new Council Members who took office on January 1 and had to be brought up to date. The Town had to go through a hiring process to procure the services of an investigator. The first investigator worked two weeks and then quit, so the Town had to start over with a second investigator.

Even if the period of time had been shortened, it is quite speculative as to how much, if any, that would have reduced the amount of publicity\*\*\*\*\*

I find that the demotion was appropriate in this case. As the Union argued, demotion is a disfavored form of discipline. There are several reasons for this. It typically has a large financial impact because the level of pay is reduced for an indefinite period of time. Second, demotion often has no logical connection to the misconduct involved in a particular case. Third, as the Union argues, it often does not work.

In this case the Chief of Police testified that the sergeant position is immediately under the Chief position, and that the sergeant supervises all other

members of the department. He testified that the sergeant mentors other officers and reserves, schedules shifts and vacations, and performs other supervisory tasks. It is clear that the Chief has lost confidence in the Grievant as a sergeant (although this may be in part for reasons unrelated to this case). There was uncontradicted evidence that there has been a loss of morale among other officers due to the Grievant's misconduct and the resulting damage to his and the department's reputations. It is difficult to perceive how the Grievant can, without the passage of a long period of time, serve as a mentor to other officers, command their respect as a supervisor, and command the Chief's confidence as a second-in-command. I therefore find that demotion to patrolman was fully justified by the facts of this case.

My first approach to the 90 days suspension without pay is to recognize that it does not stand alone. The suspension is in addition to the demotion. My second approach is to compare the length of time to the patterns and practices in other police departments as to which I have direct knowledge or have read about. A suspension of 30 days is considered to be a long suspension, and it is extremely rare to see suspensions for longer than 30 days even for extremely serious misconduct. Probably the primary reason for this is that discipline is usually designed to be corrective, its purpose being to demonstrate to the employee that the misconduct must stop. The message should be clearly delivered with a 30 day suspension, so more than that is often considered to be unnecessarily punitive.

In light of the fact that the Grievant will be permanently demoted, and that a 30 day suspension is considered to be a long suspension even when standing alone, I find that there was not just cause for more than a 30 day suspension.

## 7. CONCLUSION

There was just cause for a permanent demotion from sergeant to patrolman plus a suspension without pay for 30 days.

## 8. AWARD

The discipline is reduced to a permanent demotion from sergeant to patrolman plus a suspension without pay for 30 days. The Town shall make the Grievant whole for all back pay and other benefits lost as a result of any suspension beyond the period of 30 days. In accordance with the stipulation of the Parties, I retain jurisdiction for 60 to resolve any dispute as to the administration of the award.

Dated: July 25, 2001

Respectfully submitted,

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Ross Runkel