

STATE OF CONNECTICUT
DEPARTMENT OF LABOR

STATE BOARD OF MEDIATION AND ARBITRATION

In the Matter of Arbitration
between

Case No. 2020-A-0067
Hearing Date: Jan. 13, 2020
Mar. 6, 2020, Mar. 9, 2020
Date of Award: June 25, 2024

City of Hartford
and
Hartford Police Union

Location of Hearing:
Department of Labor
Wethersfield, Connecticut

Panel: Nestor L. Diaz, Chair and Alternate Public Member
Michael C. Culhane, Management Member
Donald Sevas, Alternate Labor Member
(Raymond D. Shea, Permanent Labor Member)

Appearances:

For the City/Town:

John P. Shea, Esq.

For the Union:

Marshall T. Segar, Esq.

ISSUE

Did the City of Hartford's Police Department, the Employer or City herein, have just cause to suspend its employee, Sergeant Andrew Rodney, herein the Grievant, for thirty-five days because he allegedly engaged in sexual harassment of a female officer under his command. If not, what shall be the remedy?

STATEMENT OF THE CASE

The grievance was filed by Hartford Police Union, herein the Union, alleging that the City of Hartford through its Police Department, the Employer or City herein, violated the Collective Bargaining Agreement (CBA) existing between the Parties, when it suspended the Grievant for thirty-five (35) days without just cause. The Employer denied the grievance which the Union has appealed to the State Board of Mediation and Arbitration (SBMA) for a decision on the merits.

Relevant Contractual Provisions (partial only)

Article I, Section 1.5, Management Rights

Except as specifically abridged or modified by any provision of this Agreement, the City will continue to have, whether exercised or not, all of the rights, powers and authoritytake disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons

Article II, Section 2.2, Grievance Procedure

Grievances involving discharge, suspension, and demotion, following disposition by the Chief of Police, shall be processed beginning at the third (3rd) step.....No employee shall be suspended, discharged, demoted or disciplined except for just cause.

The Facts

At the time this hearing opened in early 2020, the Grievant had been employed by the City for fourteen (14) years as a police officer, the last six years as a Sergeant. Sometime in Spring of 2018, the Grievant was assigned to the Recruitment Division in which he reported to Lt. Paul West. The Grievant was the direct supervisor of female Officer Kelly Baerga.

On or about Saturday, May 26, 2018, the Grievant, along with Officer Baerga and Lt. West, attended a recruitment event held at a high school in Bridgeport. (Lt. West had been transferred out of the Recruitment Division a

couple of weeks earlier but went to the event at the specific request of Baerga who did not feel comfortable with the Grievant's past inappropriate sexual comments and because she felt that she was working in a sexually hostile work environment.) This event was opened to all state wide police departments that were in the process of hiring new police officer recruits. Approximately some 400 to 500 individuals showed up for the event which included physical agility testing such as running, push up, sit ups, etc. Some of the applicants were female and wore yoga type pants and gym stretch work out outfits for the physical agility try outs.

During this event, according to Baerga, the Grievant is alleged to have been observing many of the female candidates that were well endowed and making sexual comments to Lt. West as to their appearances and how he would handle them sexually. Baerga was behind Lt. West and so he could not see Baerga and was not aware that she could hear the Grievant's comments. Apparently, the Grievant was making these sexual comments and would look towards Baerga, who was in his line of sight. Officer Baerga was quite upset and felt insulted at the Grievant's conduct.

On or about May 28, 2018, Baerga met with Lt. West and expressed her disgust with the Grievant's conduct at the Bridgeport event and informed Lt. West that she had heard what the Grievant had said at the event in Bridgeport. Lt. West then went and verbally informed upper management about Baerga's complaint. Lt. West met with then Chief David Rosado, and Asst. Chief Rafael Medina. He was told to document the complaint in writing and was told that the Grievant would be removed from the Recruitment Division and that he was not to have any contact with Officer Baerga. Lt. West reported the incident in a memo dated May 30, 2018 to Asst. Chief Medina.

In that memo, Lt. West reported that on May 26, 2018, he observed and heard the Grievant making sexually explicit comments about some of the females at the event. Some of the women that attracted the Grievant he said that they were "thick and healthy bodied". The Grievant would also scan the list maintained for record keeping and appeared to store the names and phone numbers on his cell phone of some these females and was saying that he would be in contact with those women. After noticing a woman that he found voluptuous, the Grievant exclaimed, "Man, she's thick" and described how he would handle her sexually. The Grievant then gestured and looked to Baerga and said, "Too bad she doesn't want no dick". Lt. West claimed that he tried to discreetly redirect the Grievant

because of all the people in the area but that the Grievant laughed and said, “She want tit, not dick”. Lt. West stated that he tried to provide caution and that he shunned the conversation and that he was unaware that Baerga had heard these comments until she informed him on Monday, May 28, 2018. Lt. West also reported in the memo that the Grievant bragged about his proficiency in sexual threesomes. Lt. West asked the Grievant if he wasn’t married and that he replied “so what, it’s fun.” Lt. West replied that marriage was sanctified and the Grievant replied, “If he’s fucking my wife, and I’m fucking his wife, so what”. And the Grievant added, “If I’m with two women, and the woman satisfies my wife and she falls asleep, what am I to going do with this” as he motioned to his crotch as if he had an erect penis. He added that he was not going to wait until morning to be satisfied. The Grievant then grabbed his inner thigh to illustrate the size, length and girth of his penis. Lt. West stated in the memo that Baerga had heard and observed the Grievant’s actions and believed that she was the intended audience.

About May 29, 2018, the Grievant was told to come to a meeting with Asst. Chief Medina, present also was Deputy Chief Dustin Rendock. The Grievant was informed that a complaint of sexual harassment had been made against him and that he was being transferred out of the Recruitment Division immediately and he was not to have any contact with Baerga. (The Grievant was transferred to the Patrol Division.)

Immediately, after coming out of Asst. Chief Medina’s office, the Grievant went straight to Baerga’s cubicle which was nearby and confronted her about the complaint. He ordered Baerga to go outside of the Chief’s Complex. They went outside the Complex and the Grievant started yelling at Baerga saying “Kelly, you know me” and “I did not mean what I said” and “You could have talked to me”. There were some eye-witnesses in the area that saw the Grievant yelling at Baerga. Amongst them: First Sgt. Llappes, who said “smile would ya” as she passed by them; Lt. Leonard who was waiting for his daughter to come out of the restroom; Detective Leopold Clarke who was just getting out of the elevator asked “is everything ok?”. Baerga told the Grievant that she had nothing to say to him and went back to her desk, got her things and left for home.

On May 30, 2018, Chief David Rosado sent Lt. Brandon O’Brien, Commander, Internal Affairs Division (IAD), a request to conduct an IAD investigation into the allegation that the Grievant had engaged in sexual harassment while on duty on May 26, 2018. Lt. O’Brien conducted an exhaustive

investigation into the allegation of the Grievant's alleged sexual harassment of Baerga. He interviewed the City's top Police Department officials as well as the Grievant, Lt. West and others that were involved with or were aware of the situation. The only individual that he was not able to interview for his investigation was Baerga who avoided all his numerous attempts to have her come for an interview to explain in detail her allegation against the Grievant. Lt. O'Brien testified at the hearing that Management did not wish to order Baerga to present herself for an interview because of the sensitive nature of her complaint

On June 1, 2018, Baerga reported to work early. The Grievant who was not supposed to be there was present and approached her and said that he was sorry. The Grievant quickly left the area when he heard someone else in the area. Later that day, Baerga and Lt. West met with Asst. Chief Medina. Baerga told Medina that she did not feel safe around the Grievant and that he had already approached her twice. Medina replied that the Grievant was told not to have any contact with Baerga.

On June 4, 2018, Baerga agreed to meet with Chereese Chery, Director to Human Resources. Present was also Jeanine Fair who apparently works in that department. Chery asked Baerga if she wanted to read the complaint that Lt. West had made on the sexual harassment allegation she had made against the Grievant. Baerga declined the offer and then she replied to some questions that Chery asked about the allegations. Chery said that she would look into the matter and would speak with the Grievant and would inform her as to the disposition of the case and Chery's recommendation to the Police Department.

On September 28, 2018, Chery issued her Investigation Report addressed to Asst. Chief Medina. Her recommendation was that Lt. West and the Grievant must attend sexual harassment prevention training. She did not recommend any type of suspension or more serious disciplinary action be issued.

On February 13, 2019, Lt. O'Brien issued a written order to the Grievant that he was not to discuss this matter with anyone involved and that he was not to have any contact with Baerga. On February 14, 2019, Baerga filed a sexual harassment complaint with the Connecticut Commission on Human Rights and Opportunities (CHRO) alleging that the City and the Police Department had and were engaging in sexual harassment and creating a hostile work environment based on her sex, sexual orientation and because of her Hispanic/Latino heritage. During CHRO's investigation of her complaint, Baerga submitted a sworn affidavit (dated

Feb. 14, 2019) which the City later submitted as her evidence in the instant arbitration hearing.

On March 27, 2019, Lt. O'Brien issued his report addressed to then Police Chief Rosado. The Grievant was informed of the findings of the investigation by letter dated April 5, 2019, and advised that he was entitled to a departmental hearing on this matter and that he had a right to select as a hearing officer one of the following individuals: Deputy Chief Long, Deputy Chief Watson or Captain Rousseau. The Grievant was also advised of the potential disciplinary penalties for each violation should they be sustained. The Grievant selected as his hearing officer, Deputy Chief Sonya Watson.

Deputy Chief Watson held the hearing on July 16, 2019 in which the Grievant was represented by the Union and its counsel. She issued her findings and submitted her report to Interim Police Chief Jason Thody on September 6, 2019. The Grievant was found to have violated the department's Code of Conduct for the following infractions:

Article IV, Section 4.01- Using rude, insulting or offensive language, or other behavior by a supervisory officer towards an employee of a lower rank.

Article VI, Section 6.07- Intentional absence from duty assignment without authorized permission.

Article VI, Section 6.09- Intentional and willful failure to comply with lawful orders, directive, or regulations, oral or written (3 counts).

Deputy Chief Watson recommended that the Grievant should receive a three (3) day suspension for the infraction of Article IV, Section 4.01 for using rude, insulting or offensive language, or other behavior by a supervisory officer towards an employee of a lower rank and retraining in General Order 1.05, Harassment and Discrimination. She also recommended that the Grievant receive a two (2) day suspension for the infraction of Article VI, Section 6.09 for failure to comply with his written lawful directive to not discuss the ongoing investigation. Deputy Chief Watson found that there was insufficient evidence to support a violation of Article VI, Section 6.07.

On September 19, 2019, Interim Chief of Police Thody issued his decision on this matter. He agreed with Chief Watson that there was insufficient evidence to support a violation of Article VI, Section 6.07. However, Chief Thody decided to issue the Grievant a much harsher disciplinary action for the other infractions.

Chief Thody concluded that sufficient evidence had been presented to sustain the violation of Article IV, Section 4.01 and that he was imposing a five (5) day suspension for that infraction. Chief Thody also decided that based on the preponderance of the evidence presented that each of the three (3) Article VI, Section 6.09 infractions were sustained and imposed a five (5) day suspension on the first violation. Under the progressive discipline system utilized by the department, the penalty for the second charge calls for a six (6) to ten (10) day suspension, and therefore he was imposing a ten (10) day suspension. For the third infraction, based on progressive discipline the penalty recommended is for a fifteen (15) day to thirty (30) day suspension and that he would impose a fifteen (15) day suspension on the Grievant, for a total of a thirty-five (35) day suspension. Consequently, the Grievant would be suspended without pay from September 29, 2019 to November 3, 2019.

Subsequently, the Grievant filed a grievance through the Union which the Union has appealed to this Board. We held hearings starting on January 13, 2020. Another two hearings were held on March 6th and 9th 2020. Shortly thereafter the COVID 19 pandemic hit which resulted in numerous delays and extensions until the present time. (During this long delay we lost our good friend and very able labor arbitrator, Raymond D. Shea, and we all pray that he rest in peace. Donald Sevas was appointed to replace Raymond D. Shea.)

As in the situation with Lt. O'Brien's IAD investigation, Baerga failed and refused to avail herself of her right to testify at the arbitration hearing as to the sexual harassment she had alleged in this matter. Baerga even failed to comply with a subpoena that the City issued her. The Parties agreed that her testimony was very important and crucial to the outcome of this arbitration. However, because of the sensitive nature of this case in which she would have had to testify in front of a group of men, the Parties acquiesced and decided to go forward and conclude this hearing without her in person testimony.

The City's Position

The City's position is that the Grievant's disciplinary action was issued for just cause because of the uncontroverted evidence that he engaged in the conduct for which he was charged. The Grievant admitted at the hearing of his making comments that support a violation of Article IV, Section 4.01 and those comments are also supported by the sworn affidavit that Baerga gave to CHRO. He also admitted approaching Baerga twice after being ordered by Chief Medina not to

have any contact with Baerga. He also agreed that he made a statement to the news media about the matter after receiving a written order from Lt. O'Brien not speak about the incident except to the Union or his legal advisors.

With respect to the issue of the penalty as being too harsh as proclaimed by the Union, the City argues that the penalty as handed down by Chief Thody was reasonable in light of the seriousness of the comments admittedly made by the Grievant and the progressive nature of the department's disciplinary procedure which calls for a number of penalty days for each infraction. The Grievant admittedly made comments concerning a subordinate's physical appearance, referring to her as "thick" and her perceived sexual orientation suggesting she likes "tit not dick". He also referenced sexual threesomes, comments that were heard by Baerga. Notably, the Grievant engaged in making these gross, disgusting and foul comments just a few months after attending sexual harassment prevention training. Therefore, it is the City's position that the thirty-five (35) suspension issued to the Grievant was for just cause.

The Union's Position

The Union's position is that the disciplinary penalty issued to the Grievant is too harsh and severe in view of the fact that Baerga failed and refused to testify as to her accusations and that she dodged a subpoena and numerous attempts to have her testify in person. While the Union appreciates Baerga's refusal to testify about alleged sexual comments, in front of a group consisting mostly of men (except for the female court reporter), there is no reason why Lt. West was not asked or subpoenaed to testify in this matter since he initiated the investigation when he filed the sexual harassment charge.

The Union maintains that the City's case against the Grievant is based in most part on hearsay evidence since the only person to testify as to the events is the Grievant. The witnesses (Baerga and West) who could have testified and complete a full record failed to testify. An accused individual is entitled to confront his/her accuser as well as the witnesses and to cross-examine the veracity of their testimony. In this case, the Grievant has been denied that right, yet the City has based its harsh discipline on evidence that the Grievant has not been able to assail nor to have its credibility assessed by the Panel. Disciplinary action is supposed to be corrective in nature to help an employee mend his/her behavior. To promulgate a thirty-five (35) day suspension on a police officer who has never been suspended based solely on an affidavit given by Baerga to the CHRO without her in person

testimony or that of Lt. West is not corrective discipline but punishment. The Panel should be very cognizant of the failure of the City not to have Baerga, or at least Lt. West, testify and that it should not give her affidavit much “probative value” since their testimony was crucial and they could have testified but did not.

The Union also noted that Cherese Chery, as part of her Human Resources investigation, actually met with and interviewed Baerga about her charges and the City did not call on her to testify. If Baerga was too upset to subject herself to examination and cross-examination, the City had two witnesses (Chery and West) that could have testified and made for a more complete record.

The Union also noted the vast departure of the penalty issued to the Grievant by Chief Thody when compared to the recommendations of Deputy Chief Sonya Watson and Human Resources Director, Cherese Chery. Watson held a hearing in which the Grievant was present and testified as to the charges against him. (Notably Lt. West did not testify at this hearing as well.) She recommended that the Grievant should receive a three (3) day suspension for using rude, insulting or offensive language, or other behavior by supervisory officer towards an employee of a lower rank. She also recommended that he be suspended for two (2) days for his failure to comply with a written order not to discuss the ongoing investigation. Chery met with Baerga and got first- hand information as to what the Grievant was alleged to have said in Baerga’s presence. Chery recommended only that the Grievant and Lt. West must attend sexual harassment prevention training.

Chief Thody, who does not have to follow Deputy Chief Watson’s recommendations nor Chery’s, increased the five (5) day suspension to thirty-five days, based on the same alleged evidence. The Union questions, why does this same evidence merit such an increase in the number days of suspension. And it submits that it is political. In this regard, the Union notes that the Baerga was at the time a representative for the LGBTQ community and that her allegations had been reported in the media, including television broadcasts about the allegations. The City had to show that it did not condone the Grievant’s comments and behavior and thus the discipline had to be severe. Therefore, it is the Union’s position that the City did not have just cause to discipline the Grievant with such a harsh discipline and that the grievance be sustained or at the very least, the suspension should be reduced.

Analysis and Conclusions

The Panel has considered all the evidence submitted in this matter and has concluded that there is sufficient evidence to support disciplinary action against the Grievant, however, we find that the City did not have just cause to issue the Grievant a thirty-five day suspension. We recognize that an accused person is entitled to confront his/her accuser and to have that individual's testimony be examined and cross-examined. In this case, Baerga failed and refused to make herself available to this Panel to consider the veracity of her allegations and testimony. We understand the sensitivity of the allegations she made but steps could have been taken (such as sequestration) to minimize her discomfort and distress to have to testify in front of a group of men. She did not make any suggestions or requirements for this Panel to consider in order to get her testimony and the Grievant is entitled to confront his accuser.

We also find it troublesome that the City did not require that Lt. West make himself available to testify in this proceeding, after all he is the individual who initiated the investigation and had first-hand knowledge of the comments made by the Grievant. The City made some reference to his being ill during some of the hearing dates held in this case, however, we did not hear it said that he was ill during the whole four plus years that this case has been around. We also note that Lt. West did not testify at the hearing before Deputy Chief Sonya Watson. Clearly, his testimony was important and it looks to this Panel that he got a pass from both the City and the Union. The Union had a right to subpoena Lt. West but for some reason it put the onus on the City to present Lt. West. When the City failed to call him to testify, the Union should have presented Lt. West with a subpoena to testify. The testimony of Lt. West was crucial in another respect. The Grievant made certain assertions at the hearing that Lt. West was an active participant in the discussion of sexual threesomes but that assertion was not rebutted or explained because Lt. West did not testify. Could that be a reason why Lt. West did not admonish the Grievant at the recruiting event? Was he complicit in that gross sexual discussion? We don't know because he did not testify and we don't know if he received any discipline for his lack of supervision over the Grievant when he was making his sexually explicit remarks.

Another person who met with Baerga and got a first-hand declaration as to what the Grievant said at the recruitment event was Chereese Chery, Human Resources Director. She wasn't called to testify by the City or the Union. The two

most critical witnesses in this case did not testify and yet the City expects this Panel to uphold a thirty-five day suspension which we find is excessive.

We note that Cherese Chery, who is female, met with Baerga personally and heard her evidence and that she only recommended that the Grievant and Lt. West be sent to sexual harassment prevention training, no written warnings or suspensions. Similarly, Deputy Chief Watson, also female, recommended that the Grievant be issued a five day suspension. Acting Chief Thody, increased that five day suspension to thirty-five days, he claimed pursuant to progressive discipline. We agree with the Union that Chief Thody was under pressure to act boldly because of the media sensation caused by the allegations raised by Baerga and that is why he had to make an example of the Grievant and show that the Police Department does not tolerate sexual harassment of any sort. Further, the Panel noted that Chief Rosado acted swiftly when informed of the Grievant's gross sexual comments in the presence of a female lower ranked officer. Chief Rosado, solely on the basis of Lt. West's report, removed the Grievant from a coveted position as a recruitment official and sent him back out to the patrol division. This is evidence that the Police Department's upper management does not tolerate sexual harassment and that a less severe suspension was appropriate.

Accordingly, based on the above discussion the Panel has concluded unanimously, that there was insufficient evidence of just cause to issue the Grievant a thirty-five day (35) suspension. However, we have also determined that there is evidence to support lesser discipline and hereby unanimously have concluded that a ten (10) day suspension is warranted and order that the Grievant's thirty-five day suspension be reduced to a ten (10) day suspension and that he be made whole for lost wages and benefits consistent with this award.

AWARD

The thirty-five (35) suspension is reduced to a ten (10) day suspension.

CONNECTICUT STATE BOARD OF MEDIATION AND ARBITRATION

By: /s/ Nestor L. Diaz
Panel Chair & Alternate Public Member

By: /s/ Michael C. Culhane Sr.
Michael C. Culhane Sr., Management Member

By: /s/ Donald Sevas
Donald Sevas, Alternate Labor Member