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Date: 6/2/03

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Subject: Teamsters v. City of Albany arbitration

Comments:

*JACK H. CALHOUN
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May 19, 2003

Michael J. Tedesco
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15050 SW 150th Court
Beaverton, OT 97007

James V.B. Delapoer
Long, Delapoer, Healy, McCann & Noonan, P.C.
102 West First Street
P.O. box 40
Albany, OR 97321-0014

RE: International Brotherhood of Teamsters Local 223, and City of Albany

Gentlemen:

Enclosed is my opinion and award in the matter referenced above. I have also enclosed my statement of fees and expenses.

If either party objects to this decision being submitted to arbitration reporting services for consideration for publication, please let me know, in writing, within 30 days.

Sincerely,


Jack H. Calhoun

JHC: pg
119-02 OR
Enclosure
cc: (with decision) Wendy Greenwald

Certified Mail No. 9199 8594

*JACK H. CALHOUN
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March 18, 2003

STATEMENT OF FEES AND EXPENSES
(IRS Employer No. 81-0458895)

BILL TO: International Brotherhood of Electrical Workers, Local 223
and
City of Albany

RE: Arbitration of Officer Gerald Morris grievance

HEARING DATE: March 7, 2003

FEES: 1.0 day travel (from Portland) and hearing, 3.0 days
review, research write @ \$750.00 per day \$3000.00

EXPENSES: Travel (Portland – Albany – Portland) 136 miles
@ \$.35 \$47.60
Meal \$6.00
Contracted Secretarial Services \$120.80

TOTAL \$3174.40

½ payable by teamsters, Local 223 \$1587.20

½ payable by City of Albany \$1587.20

119-02 OR

IN THE MATTER OF THE GRIEVANCE
ARBITRATION BETWEEN:

INTERNATIONAL BROTHERHOOD)
OF TEAMSTERS, LOCAL 223,)
 Union,)
 and)
CITY OF ALBANY,)
 Employer.)

OPINON
AND
AWARD

Jack H. Calhoun
Arbitrator

Hearing Held
March 7, 2003
Albany, Oregon

APPEARANCES

FOR THE UNION:

Michael J. Tedesco
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Beaverton, OR 97007

FOR THE EMPLOYER:

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Albany, OR 97321 -0014

I. BACKGROUND

Police Officer Gerald Morris was the subject of an internal affairs investigation by the Albany Police Department. As a result of that investigation, he was found to have violated certain general orders of the Department when he responded to a call regarding minors in possession of alcohol. A three-day suspension without pay was imposed on him.

II. ISSUES

The parties stipulated that the issues in dispute are: (1) Was the Grievant, Gerald Morris, disciplined for just cause according to Article 26 of the labor agreement? (2) If so, was the level of discipline appropriate?

III. FACTS

Officer Morris has been employed by the Albany Police Department for 15 years. On April 13, 2002, a call came in to the Police Department from the manager of a trailer court that there were 4 teenagers inside one of the motor homes drinking and that two females were outside within the last 30 minutes vomiting. The caller also said one of the females was only 10 years old. Later the caller advised that the two females were mother and daughter and they had gone home to another location in the trailer court.

Officers Morris and Hammersley were dispatched to the location and had the above information on their computer. They arrived at approximately the same time in their individual patrol cars. They went directly to the motor home where the drinking was reported to have been taking place. Morris looked through the window of the door of the motor home for a few seconds and saw a number of male juveniles inside, but they were not drinking. He did not see the owner of the motor home, William Powell. Morris

knocked on the door, which was then opened by one of the juveniles, Andy Brown. Morris then explained why he and Hammersley were there and asked permission to enter. Brown replied that he could come in. Morris did not ask Brown if he had authority to give consent for Morris to enter the premises. Officer Morris was concerned about date rape and a 10-year old girl drinking inside a motor home with 15-year old boys. He was concerned about her safety and juveniles drinking. Alcohol poisoning entered his mind.

As Morris stepped into the motor home, he saw Powell. Morris could smell alcohol and, based on Powell's physical appearance, slurred speech and red, watery eyes, decided Powell was drunk. In addition to Brown, there was one other juvenile in the motor home, Robert Southwick. Hammersley followed Morris into the motor home.

Officer Morris told Powell the reason they were there. Powell began looking from side to side saying, "I want you out of here." Andy Brown tried to calm Powell down saying, "It's O.K. we didn't do anything wrong." Brown then asked Morris if he wanted to see that there was not anyone else in the motor home. Morris indicated he did and followed Brown as Brown entered the bedroom. On the way to the bedroom Morris glanced in the bathroom and could see no one was in there. Morris stuck his head in the bedroom and concluded no one was there. Morris had Brown blow into his hand to check for alcohol. Morris concluded that Brown had not been drinking.

When Officer Morris turned from the doorway of the bedroom to go back toward the exit door he saw Powell and Officer Hammersley having a heated discussion. Morris took two steps in the narrow passageway and Powell immediately confronted him face to face. Powell began flailing his hands and became extremely angry wanting Morris to leave. Morris could see kitchen knives close to his shoulder and feared Powell might try

to get one if he, Morris, stepped back. Powell would not let Morris get by him. Morris told Powell they were leaving and asked Powell to sit down. Powell would not move. At that point Morris put his hands on Powell's shoulders and pushed him back. Powell fell onto a bench.

Officers Morris and Hammersley left the motor home without getting the names of the occupants of the motor home because Morris had determined that the complaint about minors in possession of alcohol was unfounded and because he did not want to further agitate Powell. Both officers then went to the home of the 10-year old girl, Britney Canfield, and her mother, Carla Canfield, who was drunk, and further concluded that the complaint was unfounded.

William Powell filed a complaint with the City. An internal affairs investigation was initiated by Captain Shinholster. Sergeant Carter performed the actual investigation. Carter interviewed Powell, Southwick, Morris, and Hammersley. He also had the report that Corporal Dorland wrote after interviewing Powell. Carter did not interview Andy Brown until after the internal affairs investigation was over. He did not interview Tim Brown, Andy's 17-year old brother, who was standing outside the motor home during the visit of Officers Morris and Hammersley on the evening in question. He did not interview Carla and Britney Canfield. Based on his investigation and Officer Morris' past performance problems, which resulted in remedial training and a written reprimand for taking inappropriate actions involving the use of force, Sergeant Carter recommended a two-day suspension without pay for Morris. After conducting a pre-disciplinary hearing on July 25, 2002, at which Officer Morris and his representative attended and made statements, Captain Shinholster imposed a three-day suspension on Morris.

Captain Shinholster based his imposition of the suspension on his findings and conclusion that (1) Morris entered Powell's motor home without permission or legal authority; (2) he misapplied the community caretaking law; (3) he did not conduct a thorough investigation because he did not go to the home of the mother and daughter first; (4) he pushed Powell down causing him pain and injury; and (5) he was too quick to use force.

According to Andy Brown, Officer Morris did not wait for his permission before he entered the motor home. Tim Brown said Andy did give Morris permission to enter. During the internal affairs investigation, Robert Southwick said he opened the door and Morris entered without permission. William Powell said he opened the door and Morris entered uninvited.

There had been drinking going on in the motor home before Officers Morris and Hammersley arrived. Powell had bought beer for the juveniles and he gave Britney a shot of whiskey.

Andy Brown had been staying with Powell for a few days before April 13th. Powell himself is a disabled alcoholic who suffers from Alzheimer's disease. He is constantly drunk and cannot be believed. He lied several times in his statement during the internal affairs investigation.

IV. SUMMARY OF EMPLOYER'S POSITION

The Employer contends that Officer Morris entered Mr. Powell's home without legal authority and the discipline imposed upon him was appropriate. His entry cannot be justified on the basis of a search warrant, lawful consent, or the community caretaker statute. His entry was in violation of Mr. Powell's rights under the Oregon Constitution.

The Police Department had a right and a duty to discipline him so that he and other officers will learn that such conduct is not permissible. The level of discipline was appropriate, given that he had similar instances when he acted too quickly without consideration of a citizen's rights.

An officer can only enter a home if the officer has a lawfully issued warrant, consent from a person authorized to give consent, or under exigent circumstances. There is no dispute that there was not a search warrant. Officer Morris testified he entered Powell's home based on consent by the young man who opened the door when he knocked. Morris did not make any inquiry about the young man's authority to give consent for him to enter. His subsequent search of the bedroom was also based on the consent of the same youth. He did so despite the fact that Mr. Powell was by then ordering him out of his home. Officer Morris did not inquire about the authority of the minor child and there were no objective facts upon which he could have concluded that the minor had actual authority to consent to the search, especially given that the owner and person apparently in charge, Mr. Powell, almost immediately ordered him out. The law in Oregon is clear, an officer cannot search a home without a warrant in reliance on the consent of a third party without first inquiring and ascertaining whether that third party actually has authority to consent.

Nothing in Officer Morris's pre-disciplinary interviews, his police report, or his testimony at the arbitration hearing, demonstrates that community caretaking was on his mind during the evening in question. Instead, community caretaking is offered as a legal excuse for an entry based on an unlawful reliance on a child's consent. Essentially, the Union argues that Officer Morris's conduct was accidentally correct.

Officer Morris testified that his entry was based on consent, not community caretaking concerns. This testimony, in and of itself, should remove community caretaking as a justification for the entry because Morris was not making the entry decision based on those concerns. Exigent circumstances could never justify a warrantless entry when, at the time of entry, the exigent circumstances were not even considered by him.

Even if Officer Morris had been thinking about authority to enter based upon the community caretaker law, there was no objectively reasonable basis for believing it was necessary to enter to prevent serious harm to persons or property, to render aid, or to locate missing persons. At most, with the benefit of hindsight, all he could come up with was good faith, subjective justifications. He could say that sometimes alcohol consumption by juveniles accompanies date rape, alcohol poisoning, or other safety concerns. Entry into Powell's home, however, could not be justified based on what he actually saw or heard prior to entry.

V. SUMMARY OF UNION'S POSITION

The Union contends that the Employer's failure to conduct a complete investigation in this case is dispositive. Fundamental due process requires that an adequate and fair investigation be conducted and without a complete investigation there could be no fair investigation. Captain Shinholster admitted that all the available witnesses were not questioned by Sergeant Carter and that a complete investigation should have been done. Not only should the two Brown children have been interviewed, but also the criminal records of the individuals who were interviewed should have been checked.

The Union also contends the Employer had the burden to prove by clear and convincing evidence that Officer Morris improperly searched the Powell motor home. To meet that burden, the Employer offered the results of its internal affairs investigation, which was incomplete, undermining its credibility. The evidence suggesting Morris did not have permission to enter the motor home consisted of the unsworn testimony of two incredible witnesses and one police officer who stated she believed Morris had permission to enter, but could not be sure. The Employer offered no reason for its failure to call the other witnesses and subject them to cross-examination. Instead it relied on the secondhand unsworn statements of an alcoholic and a juvenile. Hearsay testimony is essential to the Employer's allegation that Morris entered the motor home without permission. The only non-hearsay evidence directly contradicts the hearsay evidence, which should not be accorded any weight.

Even if Officer Morris entered the motor home without Powell's permission, the circumstances did not require either consent or a warrant. Exigent circumstances required that Morris search the premises to find any children who might have been in danger. The Employer's claim that Morris lacked an objectively reasonable belief that such danger existed is inconsistent with well-established legal principles.

Police officers are allowed to conduct warrantless searches in connection with community caretaking functions under ORS 133.033. The relevant question at issue in this case is whether Officer Morris had an objectively reasonable belief that his search was necessary to prevent serious harm to any person or to render aid to injured or ill persons.

An officer can make a warrantless search, if, under the circumstances, he reasonably believes it is necessary. It is not necessary that an actual emergency exist. An officer's experience in similar situations provides context regarding the appropriateness of the search. That Morris found no children at risk in the motor home is irrelevant here. His experience in recognizing intoxicated people, and of situations likely to arise out of minors who have been drinking are relevant to provide proper context.

There were sufficient facts to establish that Morris, in assessing the scene, had an objective reasonable belief that other children might be hidden in unseen parts of the motor home. The computer report showed there were minors drinking in the motor home, two of whom, including a 10-year old girl were outside vomiting. Morris saw several minors through the window. When the door was opened he could see an intoxicated Powell. He could see that parts of the motor home were hidden from view and to see them, he would have to enter the motor home. He knew, based on experience and training, that alcohol poses a serious health danger to children. He also knew that when young men and women are together consuming alcohol, there is an increased risk of sexual assault.

In light of the totality of the circumstances, even if Officer Morris erred, he did so in good faith and in an effort to protect citizens. Such mistake does not warrant a three-day suspension.

OPINION

This is not a discharge case. While a higher quantum of proof than a preponderance of the evidence may be appropriate in cases that end in the termination of an employee's job and often in the employee's career, it is not the proper standard here.

Whether it be called a mere preponderance of the evidence or simply persuading the arbitrator that the disciplinary action the Employer took was premised on reasonable, just and sufficient cause, that is the standard that will be followed here in deciding this disciplinary case.

A fair investigation by an employer into employee behavior that is suspected to be in violation of employer rules is an element of industrial due process to which the employee is entitled, especially in discharge cases. *Teamsters Local 878 v Coca Cola Bottling Co.*, 613 F.2d 716, cert. denied 446 U.S. 988. The investigation conducted by the Employer in the instant case, while clearly not a model of thoroughness, was adequate. It was not substantially tainted. To be complete, the investigator should have interviewed all the persons present on the evening in question. Even so, Officers Morris and Hammersley were interviewed and the decision to impose discipline was based on their own testimony, specifically that of Officer Morris. Morris was not prejudiced by the Employer's failure to interview the two Brown juveniles before reaching a decision. Not only was Officer Morris given a sufficient opportunity to make his case in an interview with Sergeant Carter, he was provided with a pre-disciplinary hearing before Captain Shinholster, at which he and his representative had the opportunity to give explanations, point out mitigating circumstances, or furnish other relevant information. The investigation was impartial and a sufficient amount of proof was adduced by the Employer to establish that Officer Morris was guilty before the discipline was imposed.

In connection with its argument that the Employer's investigation was inadequate, the Union also argues that the evidence the Employer offered regarding Powell and Southwick's statements should be given no weight because it is hearsay and it is essential

to the Employer's argument that Morris entered the motor home without permission. Suffice it to say, no weight has been given here to the written statements made by Powell and Southwick. The testimony of the two Brown teenagers has been discredited to the extent they gave testimony that conflicted with that of Officers Morris and Hammersley.

The substantive focus of this dispute is on whether the community caretaker function set forth in Oregon law can justify the entry of Officer Morris into the Powell home. The entry cannot be justified based on a warrant because none was issued, nor was it in dispute. The entry cannot be justified by consent from a person authorized to give consent because the consent given to Officer Morris came from a 15-year old teenager who was a visitor at the Powell home. In *State v. Will*, 131 Or. App. 498, 885, P.2d 715 (1994) the Oregon Court of Appeals held:

Before police can enter or search without a warrant in reliance on third party consent, they must inquire and ascertain whether the consenting party has common authority.

The evidence shows that Officer Morris asked for, and received permission from Andy Brown to enter the motor home. He did not inquire about the authority of Brown to give consent, however, he simply stepped inside and was ordered out moments later by Powell, who Morris had by then decided was in charge of the premises.

Without consent to enter, the only way an officer can legally enter is with a warrant or under exigent circumstances. Those circumstances have been codified in Oregon under ORS 133.033, which states:

Peace officer; community caretaking functions. (1) Except as otherwise expressly prohibited by law, any peace officer of this state, as defined in ORS 133.055, is authorized to perform community caretaking functions. (2) as used in this section, "community caretaking functions" means any lawful acts that are inherent in the duty of the peace officer to serve and protect the public. "Community caretaking functions" includes, but is not limited to:

(a) The right to enter or remain upon the premises of another if it reasonable appears to be necessary to:

- (A) Prevent serious harm to any person or property;
- (B) Render aid to injured or ill persons; or
- (C) Locate missing persons. ***

The relevant question at issue is whether Officer Morris had an objectively reasonable belief that his entry and search were necessary to prevent serious harm to any person or the property or render aid to injured or ill persons. In *State v. Christensen*, 181 Or. App. 345, 45 P.3d 511, (2002) the court held:

A police officer's authority under ORS 133.033(2) (a) to enter a residence to carry out a community caretaking function arises under circumstances in which "it reasonably appears necessary" to do so for one of the reasons listed in the statute. As the state agrees, although the statute does not require an actual emergency, the need to enter a house must be based on an officer's objectively reasonable perceptions. The subjective beliefs of the officers are not, therefore, dispositive.

The facts in the instant case compel the conclusion that Officer Morris did not have objectively reasonable beliefs that the entry and search were necessary to carry out one of the statutory purposes. All he had was a computer report showing minors drinking in a motor home, two females, one 10 years of age, vomiting who had already gone home and his brief observation of juveniles in the motor home who were not drinking or doing anything wrong. He could not base his entry into the motor home on what he actually saw or heard previously. He had seen nothing and heard nothing that demanded unusual or immediate action. There were no emergency-like circumstances present.

The key fact in this case, according to Professor Paris, who gave expert testimony at the hearing, is that Morris did not see Powell until he was inside the motor home; therefore, he did not know Powell was intoxicated before he entered. He did not see him through the window. He did not see him until he stepped inside, after Brown backed up, after Morris crossed the threshold. Paris was of the opinion that what the officer saw

before entering was critical to the outcome of the case. Morris did not see the inebriated Powell until he was in Powell's home. No exigent circumstance concerning the safety of minors existed until he saw the drunk who was in charge of the premises.

Although Officer Morris knew from his training and experience that alcohol poses a serious health danger to children and that when youngsters of both sexes consume alcohol together there is a risk of sexual misconduct, he had no objective facts to believe kids were in jeopardy or misbehaving when he looked into the motor home's window. There was nothing he could see that created an objective reasonable belief he needed to enter to prevent serious harm to anyone.

The Employer had just cause to discipline Gerald Morris. The level of discipline imposed was appropriate given his record.

AWARD

The grievance is denied.

Dated this 19th day of May, 2003.


Jack H. Calhoun

119-02OR