

**SOUTH DAKOTA DEPARTMENT OF LABOR and REGULATION
DIVISION OF LABOR AND MANAGEMENT**

**GENERAL DRIVERS & HELPERS
UNION, LOCAL 120,**

HF No. 16G, 2011/12

Petitioner,

v.

DECISION

MOODY COUNTY, SOUTH DAKOTA,

Respondent.

The above-referenced matter is a Hearing upon a Grievance filed pursuant to SDCL 3-18-15.2. The Department of Labor and Regulation conducted a hearing on the matter in Flandreau, South Dakota on September 20, 2012. Petitioner, General Drivers & Helpers Union, Local 120 (Union) and Employee Peter Harper (Harper) appeared personally and through attorney of record appearing pro hac vice, Jay Smith of Smith & McElwain, and local counsel Onna Hauck with the firm Cutler & Donahoe. Attorney Paul Lewis represented Respondent Moody County, South Dakota (County). Upon consideration of the live testimony given at hearing, the evidence presented at hearing, and the parties' written submissions, Petitioner's grievance is denied.

Issue

Did County violate, misinterpret, or inequitably apply the Negotiated Agreement when local Union member, Peter Harper, was suspended and terminated from his employment with County?

Facts and Analysis

Peter Harper began his career as a sheriff's deputy with Moody County Sheriff's Department on April 7, 2009. Harper attended the state training academy in April 2010. There are two deputies for County as well as Sheriff Troy Wellman. Sheriff Wellman has worked for County since 1997. He has been Sheriff since 2007. During a typical shift, a deputy will receive 3 calls a day from local 911 radio dispatch. A deputy will also receive duty calls on his cell phone, about 2 per week.

Each deputy is assigned a car or vehicle in which they perform their duties. Harper was assigned a 2010 Ford Crown Victoria Police Interceptor. This vehicle was equipped with typical police equipment including an onboard camera and recording devices. There is a camera mounted in the car facing forward that is running at all times, but it is not able to be recorded unless the lights and sirens are activated. When the officer activates his lights and sirens, the recording devices starts to record the camera view in front of the vehicle, the sounds from inside the vehicle, as well as the speed, direction, and location of the vehicle. The 90 seconds previous to when lights and sirens are activated are also recorded.

On October 31, 2011, Harper was transporting prisoners from Flandreau to Sioux Falls and was driving the Sheriff's patrol vehicle. This transport was routine and non-emergency. A highway patrolman, who knows the Sheriff and his vehicle, was patrolling South Dakota Interstate 29. He clocked the Sheriff's vehicle traveling 85 miles per hour in a 75 mile per hour zone on South Dakota Interstate 29 at approximately 2:30 pm. The highway patrolman called the Sheriff's cellular phone and inquired why the Sheriff was in such a hurry. The Sheriff, knowing who was driving his vehicle, inquired and received details about how fast his car was being driven in a non-emergency situation.

Sheriff Wellman prepared a written reprimand for Harper. Sheriff had verbally addressed Harper's propensity to speed while on duty on a number of occasions. On an occasion just prior to October 31, 2011, Harper was reported driving approximately 69 miles per hour in a 25 mile an hour zone in the city of Flandreau. On November 8, 2011, Harper signed the reprimand indicating that he had received it. The reprimand stated, "If you should continue to improperly ignore your duty to abide by the law, I will have little choice but to apply additional disciplinary measure, including, but not limited to, termination." The reprimand was sent to the Union and put in Harper's personnel file.

The Sheriff's office has a Standard Operating Procedure Manual that all employees are expected to abide by. Harper knew of the SOP Manual and had read and understood the contents. Section 27 of the Manual details vehicle response conditions for deputies. "Cold" and "hot" responses to dispatch calls are detailed. The Conditions do not specify how fast a

deputy's vehicle may be driven during a hot or cold response, but it does state that, "no officer may, at any time, operate a police vehicle at the rate of speed that may cause the loss of control." It also states that emergency vehicles should, if possible, pass to the left of a vehicle.

Furthermore, there is a specific provision in the SOP that states, "Officers must realize that even in an emergency if they use neither the audible nor the visual emergency signals then they are no longer eligible to exercise the privileges accorded them by SDCL 32-31 and the officer is therefore bound by the rules that govern all other traffic." That rule means that if an officer is not operating his lights and siren, he must abide by the traffic rules, including speed limits. Harper testified that the unwritten rule of the police and sheriff's departments is that with lights and sirens operating, an officer is allowed to drive up to 20 miles per hour over the posted speed limits.

On March 15, 2012, Harper received a cell phone call from an off-duty police officer informing him that he observed a driver in a car traveling South on Interstate 29 in Moody County, smoking what looked like a marijuana pipe. Harper was the only sheriff's deputy on duty so he left the station in his vehicle to intercept the southbound vehicle. Interstate 29 is 9 miles West of Flandreau on Highway 32. Harper drove out of town at a very high rate of speed. A county resident noticed Harper driving west at a very high rate of speed without his lights and sirens activated. The resident telephoned Sheriff Wellman and reported Harper's behavior.

Sheriff Wellman reviewed Harper's vehicle recording on March 20. The recording was transferred to a digital format and presented as evidence at the hearing. According to the digital recording, Harper activated his lights and sirens on 18:35:52. The most previous 90 seconds indicated that Harper was driving at speeds of 97 mph to 113 mph in a 65 mph zone. Harper was driving 113 mph when he finally activated his lights and sirens. The video shows Harper driving West on Highway 32. At 18:37:47, 2 minutes after activating lights and sirens, Harper approached the Interstate off ramp going 103 mph. At 18:35:25, Harper passed a car on I-29 going 115 mph in a 75 mph zone. At 18:42:15, Harper was observed passing a car on the right side, going 106 mph. At 18:45:48, Harper drove out of Moody

County and into Minnehaha County going 101 mph. At one point, Harper approached a vehicle in the passing lane. The car in the passing lane was passing a car in the driving lane. Harper's speed forced the passing car to speed up to pass the car in the driving lane. Sheriff Wellman testified that he believed Harper's driving and excessive speed was a danger to the other drivers on the highways.

At I-29 mile marker 95, about 20 miles south of the Flandreau exit, Harper stopped the suspect's vehicle in Minnehaha County. Minnehaha County is outside of Harper's general jurisdiction, unless in active pursuit of a criminal suspect. The suspect was driving at the posted speed limit of 75 mph. A Highway Patrolman was the second vehicle on the scene. Moody County dispatch had notified the State Dispatch which in turn notified Minnehaha County and the Highway Patrol. The driver and the passenger of the car had two ounces of marijuana on their person and there were two pounds of pot in the trunk of the vehicle.

On March 21, Sheriff Wellman reviewed another patrol vehicle recording of Harper's from March 18, 2012. While Wellman was looking for the March 15 incident, he happened upon the March 18 incident. While the camera recorded Harper traveling 80 mph in a 55 zone with no lights, sirens, or emergency, Harper responded to a dispatch call about a silver BMW that was involved in a hit and run accident. The BMW was traveling towards Flandreau from the west on Highway 32 East. Harper was South of Flandreau on Highway 34 North when he received the call. The digital recording shows Harper driving 77 mph in a 55 mph zone at 9:42:09 without lights and sirens. After he received the call, Harper approached the City of Flandreau and was within the city limits, with lights and sirens driving 95 mph in a 35 posted speed limit zone. Harper consistently drove about 60 mph through the city, crossing from lane to lane with lights and sirens, at one point straddling the center line of the highway through town. Harper turned onto Highway 32 West and accelerated to 74 mph in a 35 mph zone. At this point, Harper knew that the suspect was driving towards Flandreau towards Harper. Harper was driving 101 mph in a 65 zone when he had to stop, turn around on the highway and execute the stop of the BMW outside the city limits. The BMW was driving within the posted speed limit.

On March 20, 2012, Sheriff Wellman put Harper on a 6-day suspension due to Harper putting the public and himself in danger on March 15. Harper refused to sign the suspension. After reviewing the tapes again, and reconsidering what he had seen regarding the March 18 incident, Sheriff Wellman made the decision to discharge Harper for jeopardizing the safety of the motoring public, and the inability to follow protocols, rules, and warnings given by the Sheriff. County discharged Harper on March 26, 2012.

SDCL 32-31-4 gives emergency vehicles operated by law enforcement officers the flexibility to drive faster than the posted speed limit when responding to an emergency situation or while in the pursuit of a law violator if they have lights and sirens. However, SDCL 32-31-5 specifies that the provisions of SDCL 32-31 “shall not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.” According to Sheriff Wellman, who has been in law enforcement for over 15 years, Harper was driving recklessly and disregarding the safety of the other drivers on the road.

The Union on behalf of Harper grieved the suspension and dismissal to the County. On April 6, 2012, the County Commission prepared a letter upholding and affirming Sheriff Wellman’s decisions. The County Commission reviewed the digital video evidence and remarked in the letter, “it appears to be by sheer luck that no motorist was struck as you maneuvered your patrol vehicle in and out of traffic. Finally, while the County acknowledges that your patrol work resulted in an arrest for marijuana possession, the arrest cannot justify the danger posed to the public in your pursuit of that arrest.”

The Union appealed the discharge to the Department of Labor pursuant to SDCL 3-18-1.1 and 3-18-15.2.

The South Dakota Supreme Court has set the standard by which the Department looks at a formally grieved discharge. The Court stated:

“The standard for determining whether misconduct rises to the level which justifies discharging an employee is lower than that which determines whether an employee’s misconduct will deprive him of unemployment compensation.” *Kleinsasser v. City of Rapid City*, 440 NW2d 734, 737 (SD 1989). (citation omitted). According to SDCL 9-14-15, a civil service employee such as Miller “may be removed only pursuant to the provisions of the ordinance.” Thus, the issue is whether the admitted misconduct of Miller was sufficient to be considered just cause for termination under the ordinance.

City of Sioux Falls v. Miller, 1996 SD 132, 555 NW2d 368. Similarly, pursuant to the Negotiated Agreement, Harper may be dismissed for just cause. The provision requires at least a three-day suspension prior to dismissal, a written statement by the County of the reason for dismissal, and there must be at least one warning prior to either a suspension or a dismissal. The Agreement also says, “It is understood that there are offenses of extreme seriousness for which an employee may be discharged without a warning letter.”

All requirements for suspension or dismissal listed in the Negotiated Agreement were followed by Sheriff Wellman prior to the suspension and discharge of Harper. Harper had a written warning in his file from October when these two incidents happened in March. The warning was there prior to the suspension. The 6-day suspension occurred prior to the dismissal.

In a special concurrence in the *Kleinsasser* case, Justice Henderson wrote, “[SDCL 3-18-1.1] defines a grievance proceeding and expresses the function of the Department. In essence, a complaint filed by a public employee is reviewed to determine if there is a violation of an existing agreement, policy, rule or regulation.” *Kleinsasser* at 739 (also cited by the majority in *Cox v. Sioux Falls Sch. Dist.*, 514 NW2d 868, 872 (SD 1994). The County thoroughly reviewed Harper’s discharge and determined no violation of the agreement occurred.

The evidence shows that County did not violate, misinterpret, or inequitably apply the Negotiated Agreement when Peter Harper was disciplined for his conduct on March 15 and 18, 2012. County’s decision to discharge Harper was for “just cause” and was appropriate and justified based upon the evidence presented by County. The discharge was allowed under the Negotiated Agreement.

County shall submit Proposed Findings of Fact and Conclusions of Law and an Order, consistent with this Decision, within 20 days from the date of receipt of this Decision. Union will then have 10 days to make written objections and submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to waiver of Findings of Fact and Conclusions of Law and if they do so, the County will submit such Stipulation, along with an Order in accordance with this Decision.

Done this 27th day of December, 2012 in Pierre, South Dakota.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald
Administrative Law Judge