

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

**DANIEL JOHNSON and
KAYLA SMALLEY,**

HF No. 8 G, 2003/04

Grievants,

DECISION

vs.

MEADE COUNTY,

Respondent.

This matter comes before the Department of Labor based on a grievance complaint filed by Daniel Craig Johnson (Johnson) and Kayla Smalley (Smalley) pursuant to SDCL 3-18-15.2. A hearing was held before the Division of Labor and Management on September 23, 2004, in Sturgis, South Dakota. Kevin W. Klapprodt represented Johnson and Smalley at the hearing. After the hearing, George E. Grassby represented Johnson and Smalley. Adam H. Altman represented Meade County (County). The sole issue presented was whether the County violated, misinterpreted or inequitably applied the negotiated agreement and/or personnel policies when the County fired Johnson and Smalley.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence:

1. Johnson was hired by the County in May 1991 as a Deputy Sheriff and was eventually promoted to Sergeant.
2. In addition to his regular duties as a Sergeant, Johnson was also responsible for the operation and supervision of the Sheriff's Reserve Program.
3. Throughout most of his employment with the County, Johnson was married, but he and his wife, Roxanne, separated in mid October 2003. Johnson was served with divorce papers in late October 2003.
4. During his twelve years of employment, Johnson had an exemplary employment record with the County.
5. Ron Merwin, the Meade County Sheriff, was Johnson's supervisor.
6. Johnson and Sheriff Merwin were very good friends. They socialized together, coached softball and basketball together and their families would go camping together. Roxanne was also good friends with Sheriff Merwin and his wife.
7. Smalley started working at the Sheriff's Office through a school-to-work program while she was in high school. Smalley completed her internship and then was hired by the County as a full-time Dispatcher in March 2000.
8. Laurie Greeley was the Dispatch Supervisor and Smalley's immediate supervisor. Sheriff Merwin was Greeley's direct supervisor.

9. Smalley became a Reserve Deputy in 2002. Johnson was Smalley's supervisor when she worked as a Reserve Deputy.
10. As a Dispatcher, Smalley would take calls for the Sheriff's Office, Sturgis Police Department, Sturgis Fire Department, South Dakota Highway Patrol and for other emergencies in the surrounding area. Smalley had a great deal of responsibility and interacted with the public on a frequent basis. Smalley was also involved with training other Dispatchers.
11. Smalley did not receive any complaints about her job performance. She had one performance evaluation, which indicated an adequate performance.
12. Johnson and Smalley were very close friends. Smalley was also good friends with Sheriff Merwin and other Deputies.
13. In addition to working with the Deputies, Smalley would "hang out" with the Deputies in various social situations. In other words, Smalley and the Deputies worked together and socialized together.
14. It was not uncommon for Deputies to stop over at Smalley's house while on-duty. For example, Smalley would bake cookies, call dispatch and "tell the guys to stop over." In addition, Johnson and other Deputies would stop over at Smalley's house for dinner or to visit while on-duty. No one was ever disciplined for stopping over at Smalley's house while on-duty because it was not a violation of any policy.
15. In July 2003, Johnson went camping with his family at Orman Dam, which is approximately twenty-nine miles from Sturgis. Johnson frequently camped in this area in the summer and Johnson maintained an open invitation for any of his co-workers to join him at the campsite.
16. Johnson and his father set up their campers next to each other. Another co-worker, Deputy Bob Lehrkamp, also set up his camper in close proximity to Johnson's campsite. There was even some discussion of Sheriff Merwin joining the group at the campsite, but he decided not go camping that weekend.
17. Johnson's wife had to leave the campsite sometime in the afternoon because she had to work in Sturgis that night.
18. Smalley was invited to join the group at the campsite. After Smalley finished up with a rummage sale in the afternoon, she packed her tent and bedding and drove to the campsite.
19. Smalley had every intention of sleeping in her tent, but it was too windy to set up her tent. Smalley did not want to leave the campsite because she and several others had consumed several alcoholic beverages.
20. Johnson's father offered Smalley a place to sleep in his camper, but she did not feel comfortable with that arrangement. Smalley stayed in Johnson's camper, along with Johnson, one of his daughters and two of her friends. No inappropriate conduct occurred.
21. Sheriff Merwin learned through a casual conversation with Deputy Lehrkamp that Smalley stayed in Johnson's camper.
22. Sheriff Merwin asked Chief Deputy Thomas Wilts to speak to Johnson about the circumstance surrounding the camping trip. Johnson explained to Chief Deputy Wilts the reasons why Smalley stayed in his camper, along with one of his daughters and two friends.

23. Chief Deputy Wilts indicated that Sheriff Merwin was not aware that Johnson's child and friends also stayed in the camper. Chief Deputy Wilts informed Johnson that "a friendship with a co worker is fine[.] He could not act in a manner that could be considered conduct unbecoming."
24. Johnson disagreed that Chief Deputy Wilts mentioned anything about conduct unbecoming during the casual conversation.
25. There was nothing "correctional" about the nature of the conversation and nothing more was made of this conversation or about the camping trip.
26. In August 2003, Johnson and Smalley were each going to the Central State Fair in Rapid City. They decided to ride to the Fair together and planned to meet some family and friends, including other Deputies from the office.
27. For whatever reason, Johnson and Smalley could not find any other Deputies in the German Tent, so the two socialized with Smalley's aunt and uncle. At all times, Johnson and Smalley conducted themselves in an appropriate and normal fashion, the same as would be expected by any other Fair attendees.
28. In early October 2003, Roxanne approached Sheriff Merwin at a basketball game and asked Sheriff Merwin about Johnson and Smalley's relationship. She then asked Sheriff Merwin to speak to Johnson.
29. On October 6, 2003, Sheriff Merwin had a short informal "meeting" with Johnson while he was off-duty. This "meeting" took place on the front step at Johnson's house. Sheriff Merwin told Johnson that "if there is something going on, it had better stop." Sheriff Merwin did not give Johnson any other directive. Sheriff Merwin did not discuss any consequences with Johnson.
30. Johnson credibly testified this was the only directive he received from Sheriff Merwin during this "meeting."
31. Johnson was not worried about his conduct after this conversation because he and Smalley were not having an affair.
32. At some point during this time frame, it was brought to Smalley's attention that she left a trainee alone in the dispatch area. Smalley did so because Johnson asked her to assist with the urinalysis of two females who were brought in by the Highway Patrol on drug charges. This is a part of her job duties. Smalley was in Johnson's office for a brief period of time. When she completed her tasks, Smalley returned to the dispatch area. Smalley explained the circumstances to Greeley and Smalley was told she handled the situation correctly. Nothing more was made of this incident.
33. At a lunch some time after this incident, Sheriff Merwin informed Johnson that when he was in the dispatch area to "keep it short and professional."
34. No evidence was presented to demonstrate that Johnson did not follow this directive.
35. In November 2003, Johnson and Smalley traveled to Montana together to visit some mutual friends. Johnson just wanted to get out of town for a few days and visit with some friends. Smalley had several days off in a row and decided to travel with Johnson to see their mutual friends.
36. Johnson and Smalley shared a hotel room, but both credibly testified, they traveled together as friends and "nothing happened."
37. At the end of the trip, Smalley became sick. She was scheduled to work on Monday at 9:00 p.m. Smalley called dispatch at 11:30 a.m. that day and talked

- to Greeley. Smalley informed Greeley that she had been in Montana over the weekend and was sick and would not be able to work that night.
38. That same day, November 17, 2003, Sheriff Merwin learned that Johnson and Smalley traveled to Montana together. Sheriff Merwin considered this “direct insubordination” because he told Johnson to “keep it professional.”
 39. The next day, November 18, 2003, Sheriff Merwin called Johnson and Smalley into his office for a meeting. Chief Deputy Wilts was also present. Sheriff Merwin informed Johnson and Smalley that “perception is reality” and that he had no choice but to terminate their employment.
 40. Sheriff Merwin fired Johnson and Smalley for “conduct unbecoming” and “insubordination.”
 41. According to Sheriff Merwin, the conduct unbecoming and insubordination charges stem from the perception that Johnson and Smalley were involved in an inappropriate relationship outside the scope and course of their employment.
 42. Prior to Smalley’s termination, neither Sheriff Merwin nor Greeley ever addressed any concerns with Smalley about the appearance of an inappropriate relationship with Johnson.
 43. At no time did Sheriff Merwin receive any complaints from the public, other than from Roxanne, concerning the appearance of an affair between Johnson and Smalley.
 44. Sheriff Merwin never told either Johnson or Smalley to “stay away from each other” while off-duty. Johnson credibly testified the directives he received from Sheriff Merwin were to “keep it professional” at work and that “if there is something going on, it had better stop.”
 45. Johnson and Smalley were not fired for job-related performance issues. They were fired due to the “perception of an inappropriate relationship.”
 46. At the hearing, Sheriff Merwin admitted that he did not fire Smalley for insubordination because she never received any directive concerning her behavior.
 47. Johnson and Smalley were not having an affair while working for the County. There was no credible evidence presented to demonstrate that these two were anything other than good friends during their employment at the County.
 48. Johnson currently works as a Security Officer at the Rushmore Mall.
 49. After Smalley was terminated, she worked at a daycare for one year. She is currently a substitute teacher for the school district.
 50. Johnson and Smalley began a romantic relationship after they were terminated. At the time of the hearing, Johnson and Smalley were engaged to be married.
 51. Johnson and Smalley were credible witnesses. This is based on consistent testimony and the opportunity to observe their demeanor at the hearing.
 52. Other facts will be developed as necessary.

ISSUE

WHETHER THE COUNTY VIOLATED, MISINTERPRETED OR INEQUITABLY APPLIED THE NEGOTIATED AGREEMENT AND/OR PERSONNEL POLICIES WHEN THE COUNTY FIRED JOHNSON AND SMALLEY?

SDCL 3-18-15.2 provides for an appeal to the Department of Labor when a public employee's grievance remains unresolved. SDCL 3-18-1.1 defines a grievance as:

[A] complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

The burden of proof is on Johnson and Smalley as they are the party alleging the violation. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991).

Article XXVI (Disciplinary Action), Section 1 of the negotiated agreement provides:

The County agrees not to discipline any employee without good and just cause. Disciplinary action will generally take, but not limited to, one of the following forms:

- (a) Oral reprimand
- (b) Written reprimand
- (c) Probation not to exceed thirty (30) days without loss of pay
- (d) Suspension without pay, not to exceed thirty (30) days
- (e) Demotion
- (f) Dismissal

Section 2.16 of the Meade County Employee Handbook pertains to "OFF-DUTY CONDUCT AND EMPLOYMENT." This section states:

Generally, the County regards the off-duty activities of employees to be his/her own personal matter rather than that of the organization. However, there are certain types of behavior that can cause concern for the County and will not be tolerated. Employees who engage in, or are associated with illegal or immoral conduct, the nature that adversely affects the County, or his/her own ability or credibility to carry out his/her employment responsibilities, may be subject to disciplinary action including termination.

The South Dakota Supreme Court previously stated, "[m]unicipal employees, whether in the performance of their jobs or in their off-duty behavior, are constantly under the ever watchful eyes of the public." Kleinsasser v. City of Rapid City, 440 N.W.2d 734 (S.D. 1989). "The very nature of [immoral or indecent] conduct has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." Id.

The County must abide by the terms of the negotiated agreement. See Wessington Springs Educ. Ass'n v. Wessington Sch. Dist. No. 36-2, 467 N.W.2d 101, 104 (S.D. 1991). "Disputes over the meaning of terms in [a negotiated agreement] are resolved under the general principles of contract law." Gettysburg Sch. Dist. 53-1 v. Larson, 2001 SD 91, ¶ 11. Terms in a contract are to be given "their plain and ordinary meaning." Harms v. Northland Ford Dealers, 1999 SD 143, ¶ 12 (citation omitted). "When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subject that it is expected to cover, 'there is no need to go beyond the four corners of the contract.'" Wessington Springs, 467 N.W.2d at 104 (citation omitted). "The only circumstances in which we may go beyond the actual language of the collective-bargaining agreement are where the agreement is ambiguous or fails to address a subject that it is expected to address." Id.

According to the negotiated agreement, the County may not discipline an employee without good and just cause. Sheriff Merwin fired Johnson and Smalley for conduct unbecoming and insubordination. Neither conduct unbecoming nor insubordination was defined by the negotiated agreement.

Conduct unbecoming an officer is not defined in any South Dakota statute. However, the South Dakota Supreme Court has defined this term. See Green v. City of Sioux Falls, 2000 SD 33. The Court stated, "[i]n its prevailing usage, conduct unbecoming an officer imports a dual significance. Not only must the behavior be a serious breach of law, morality, or decorum, exposing the offender to personal discredit, but also it must tend to bring dishonor or disrepute on the offender's professional or organization. Id. ¶ 13 (citations omitted). "Law enforcement organizations must eliminate behavior reasonably thought to impede proper performance of duties. Id.

In Green, the Court relied upon "the time-honored" definition of conduct unbecoming to create a two-part test. Id. ¶ 15. The Court held:

The misconduct although it need not be a crime, must be a serious breach of law, morality, or decorum, exposing the offender to personal discredit, and it must tend to bring dishonor or disrepute on the offender's profession or organization. . . . This formulation discourages extreme discipline for entirely private misbehavior unrelated to job performance.

Id. (internal citations omitted). Therefore, it must be shown that Johnson and Smalley's alleged "misconduct" was a serious breach of morality exposing them to personal discredit and it must bring dishonor or disrepute to the County, and in particular, the Sheriff's Office.

Sheriff Merwin determined Johnson and Smalley's behavior constituted conduct unbecoming because of the perception of an inappropriate relationship. Sheriff Merwin relied upon the various incidents previously mentioned to determine that a violation occurred with regard to immoral conduct.

Johnson and Smalley were friends and associated themselves in such manner. There is no rule or policy that prevents co-workers from conducting an off-duty friendship. There was no inappropriate conduct or action between these two employees. It is true that Johnson and Smalley held positions of authority and must act appropriately. But, maintaining an off-duty friendship does not rise to the level of immoral conduct that would compromise their positions with the County. At no time did

either Johnson or Smalley engage in any inappropriate behavior while on-duty or off-duty.

Johnson and Smalley spent time together with other deputies, friends or family members present. They did not display affection toward each other. There was no evidence of an inappropriate relationship. There was no serious breach of morality that exposed either of them to personal discredit. Their friendship did not bring dishonor or disrepute to the Sheriff's Office. Neither Johnson's nor Smalley's behavior constituted conduct unbecoming. The County did not have good and just cause for firing Johnson and Smalley for conduct unbecoming.

Insubordination is not defined by the negotiated agreement. The South Dakota Supreme Court has defined insubordination as "not submitting to authority; disobedient." Schroeder v. Department of Social Services, 1996 SD 34, ¶ 10 (citations omitted). At the hearing, Sheriff Merwin agreed that he could not fire Smalley for insubordination because no directive was ever given to Smalley concerning her interaction with Johnson while on or off-duty. The County did not have good and just cause to terminate Smalley for insubordination.

Sheriff Merwin's directive to Johnson was "if there is something going on, it had better stop." Johnson was also directed to maintain a professional relationship with Smalley. Johnson followed Sheriff Merwin's direct orders. At all times, Johnson maintained a professional relationship with Smalley, both on and off-duty. Johnson conducted himself in an appropriate professional manner while on-duty. Johnson submitted to Sheriff Merwin's authority and was not disobedient. Johnson was not insubordinate. Therefore, the County did not have good and just cause to terminate Johnson for insubordination.

The County violated and misinterpreted the negotiated agreement because it did not fire either Johnson or Smalley for good and just cause. Johnson and Smalley's actions did not rise to level of conduct unbecoming or insubordination. The evidence demonstrated Johnson and Smalley's termination was based on nothing more than suspicion and speculation. Johnson and Smalley conducted themselves only in a professional manner on and off-duty. The record was devoid of any evidence that the friendship maintained between Johnson and Smalley impacted their job performance in any way. Sheriff Merwin's decision to terminate Johnson and Smalley was a harsh result when there is no rule or regulation that prevents co-workers from maintaining an off-duty friendship.

Despite the County's persistent accusation that Johnson and Smalley were involved in a romantic relationship, the record was devoid of any such evidence. The evidence demonstrated that Johnson and Smalley were good friends and did not become romantically involved until after their termination. The record was also devoid of any evidence that the friendship between Johnson and Smalley detrimentally impacted their job performance. Because the County fired both Johnson and Smalley without good and just cause, Johnson and Smalley's request for relief is granted. Johnson and Smalley are entitled to reinstatement to their previous positions, back pay, and prejudgment interest.

Johnson and Smalley shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. The County shall have ten days from the date of receipt of Johnson and Smalley's proposed Findings and

Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Johnson and Smalley shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 23rd day of June, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge