

IN THE MATTER OF APPEAL PROCEEDINGS
HEARING EXAMINER NORMAN BENNETT

LIEUTEANT WAYNE DEMOSS)
Appellant)
-and-) Appeal: Promotional Bypass
CITY OF AUSTIN, TX)
City)
)

APPEARANCES:

For the Appellant: Tom Stribling
CLEAT Attorney

For the City: Michael Cronig
Assistant City Attorney

OPINION

Chief of Police Art Acevedo of the Austin Police Department (Department) issued Lieutenant Wayne Demoss (Appellant) a Memo of Promotional Bypass (Memo), dated June 11, 2009. Section 143.038 of the Texas Local Government Code (Code) provides: "Unless the department head has a valid reason for not appointing the person, the department head shall appoint the eligible promotional candidate having the highest grade on the eligibility list." The Appellant had the highest grade on the eligibility list when he was bypassed for two Commander vacancies.

The Memo charges the following as a valid reason for the promotional bypass:

(1) The Appellant asked a prostitute what she charged with the intent to engage her services during a visit to a brothel in Panama.

(2) The Appellant paid a prostitute he met at a convenience store for sex on several occasions during the trip to Panama.

(3) The Appellant displayed a cavalier attitude regarding the prostitution allegations during his Internal Affairs interview. Specifically, he noted during the interview that prostitution was legal in Panama and that he wasn't aware Internal Affairs reached 3000 miles away.

(4) The Appellant failed to avail himself of the opportunity to develop management skills offered by Chief Acevedo at the end of the 2/4/09 meeting after there was an indication that the Appellant would be bypassed.

(5) The Appellant failed to follow the Department's Significant Incident Notification (SIN) regarding the arrest of the U.T Baseball coach for DWI, despite knowing that the arrest would generate extensive national media interest. The Appellant received a written reprimand for that violation.

(6) The Appellant did not know who City Manager Ott was when he introduced himself to the Appellant at a funeral of former APD Police Captain Louie White, a pioneering African American member of the Department. A few minutes later, the Appellant jokingly informed Chief Acevedo that he met the City Manager and thought it was humorous that he did not know who the City Manager was. The Appellant's interaction with the City Manager was an embarrassment to the Department.

The Department has bypassed candidates on an Eligibility List before this case, but those cases also involved cases where the employee had been disciplined. A disqualifier under the Career Development Plan is, "1. Sustained Internal Affairs resulting in more than a three day suspension in the last year." That disqualified is

not applicable in this case. Therefore, the issue for resolution is whether the Department had a valid reason for bypassing the Appellant for two Commander vacancies? If so, what shall be the remedy?

Factual Background

The Appellant was a Lieutenant with the Department and had about twenty-three years of service when this case arose. In December 2007, the Appellant visited Panama in order to take a Spanish emersion course. During that time, he visited a brothel where asked a prostitute what she charged. In his testimony, the Appellant denied having sex with a prostitute at the brothel, but stated went there because he as "curious." The Appellant also met a woman at a Panama convenience store with whom he had sexual relations several times over the course of about a week.

Around Christmas of 2007, the Appellant told Lt. Marceline Gonzales about his trip to Panama. During that conversation, the Appellant told Lt. Marceline Gonzales about his visit to the brothel in Panama and that he had asked about the price of a prostitute during that visit. He further told Lt. Gonzales that had sexual relations with the woman he met at a convenience store because it was easier than going to a house of prostitution.

On April 17, 2008, Civil Service administered the Commander Written Exam. On June 25, 2008, Lt. Gonzales, who was below the Appellant on the Commander Eligibility List, filed a complaint against the Appellant. This complaint reported that the Appellant had told him he had visited a brothel in Panama and asked a prostitute what she charged there. It also reported that the Appellant had told him about having sexual relations with a woman he met at a convenience store in Panama.

Chief Acevedo testified it "looked odd" that Lt. Gonzales would have filed the complaint against the Appellant because of the

competition for Commander positions. On that point, the Appellant testified that he was involved in this case because an individual he believed to be a friend sought an advantage in the promotional process.

On June 18, 2008, Internal Affairs interviewed the Appellant regarding the Gonzales complaint. During that interview, the Appellant stated that he went to the brothel because he was "curious" but that he did not have sex with a prostitute there. He also denied having paid to have sex the woman he met in the convenience store. Finally, the Appellant noted that prostitution was legal in Panama. He further stated that Panama was 3,000 miles away and that he didn't realize Internal Affairs had such a long reach. At the hearing, the Appellant stated that he made this statement because he had become irritated during the interview.

On July 3, 2008, the Commander Assessment Center took place. On July 9, 2008, Civil Service posted the Commander Final Eligibility List, which was to expire on January 2, 2010. On the Final Eligibility List, the Appellant had a score ahead of the scores of Lieutenant Raul Munguia, Lieutenant Stephen Baker, Lieutenant Gonzales and Lieutenant Patrick Ockeltree.

On July 15, 2008, Internal Affairs issued its Investigative Summary regarding the Panama incident. The chain of command determined that the charges in that case were "unfounded." Specifically, it determined that the misconduct in question did not occur. The case was forwarded to Chief Acevedo for his review. Whether Chief Acevedo read the file or was briefed on the matter, he did not overturn the findings and recommendation of the chain of command.

On December 18, 2008, a new Commander position was created due to consolidation of the Public Safety and Emergency Management with the APD. The deadline for filling the vacancy created by the

consolidation of the Public Safety and Emergency Management with the APD was April 17, 2009.

A funeral was held for APD Police Captain Louie White, a pioneering African American member of the Department, sometime during this period. At the funeral, City Manager Ott was greeting and introducing himself to officers in a formation line, including the Appellant. According to Chief Acevedo, when City Manager Ott introduced himself to the Appellant, the Appellant asked him who he was. The Appellant then said something about not being used to seeing Black people in high management positions. According to the versions of Chief Acevedo and Assistant Chief Patti Robinson, the Appellant was joking about not knowing who the City Manager was.

The Appellant's version of the incident is that City Manager was shaking hands and thanking officers as was he moved down the formation line. When City Manager Ott shook the Appellant's hand, the City Manager said, "I'm Marc Ott." The Appellant replied, "Oh, how are you doing." According to the Appellant, he knew the name, but not the face. In his testimony, the Appellant denied making any statement regarding not seeing Black people in positions of power.

On January 17, 2009, the Appellant was working the night shift as a Watch Commander. During that shift, the Appellant received a telephone call, informing that Adams Sector Officers had arrested the U.T. Baseball coach for DWI. Commander Donald Baker also received the same information and called the Appellant. Commander Baker informed the Appellant had he had left a voice message on the Assistant Chief Robinson's cell phone. The Appellant sent an electronic page to Commander Jim O'Leary, informing of the incident. Commander O'Leary and the Appellant also spoke by telephone. The Grievant, however, did not send a SIN, as required by the Department's SIN Protocol.

On February 4, 2009, the Appellant met with Chief Acevedo, Assistant Chief David Carter and Assistant Chief Sam Holt. In that

meeting, Chief Acevedo asked the Appellant about the Panama, Coach and City Manager incidents. After those discussions, Chief Acevedo indicated that he leaning toward bypassing the Appellant for the 12/18/08 Commander vacancy. According to the Appellant, he told Chief Acevedo that he "would go along with whatever Chief Acevedo wanted to do."

Chief Acevedo then asked the Appellant about whether he had any deficiencies, and the Appellant mentioned program management. Chief Acevedo offered the Appellant the opportunity to be transferred to a lieutenant position to help his development, but the Appellant never followed up on that offer. According to Chief Acevedo, the Appellant stated that he would be leaving at the end of the year or within a year. Finally, Chief Acevedo testified that the Appellant stated that he did want to be promoted and wanted his name removed from the eligibility list.

The Appellant testified that issue regarding the removal of his name from the eligibility list arose later when Chief Holt called him after the meeting. According to the Appellant, Chief Holt told him during the telephone conversation that Chief Acevedo was going to bypass him. Chief Holt then informed the Appellant that he needed to write a memo stating that he agreed to be bypassed. The Appellant testified that he thought at that time that the bypass was only going to be for one vacancy.

On February 5, 2009, the Appellant submitted a Memo to Chief Acevedo, which reads as follows:

This Memorandum is my written request that I be removed from the current Promotional List for the rank of Commander. I do not wish to be considered that promotion at this time.

Also on same date, the Department issued the Appellant a written reprimand for the Coach incident.

The Appellant testified that Civil Service contacted him about two days after the 2/5/09 Memo from Chief Acevedo. According to the Appellant, Civil Service told him that Chief Acevedo had been planning to bypass him for months. Civil Service further informed the Appellant that in order for Chief Acevedo to take his name off the Eligibility List, he would have to write a memo to Civil Service with that request and then go to the next Civil Service Board meeting and tell them that. At that point, the Appellant decided that he would only agree to being bypassed once.

On February 28, 2009, Commander James O'Leary retired from the Department. On March 22, 2009, Commander Rickey Hinkle retired from the Department. On March 27, 2009, Chief Acevedo wrote a memo to the Civil Service Director concerning the promotional bypass of the Appellant and the permanent removal of the Appellant from the Commander Eligibility List. This memo required the signature of the Appellant. On March 28, 2009, Commander Larry Oliver retired from the Department.

On March 30, 2009, the Appellant signed the 3/27/09 memo from Chief Acevedo, agreeing to be bypassed for the 12/18/08 vacancy. The Appellant, however, added a paragraph, rescinding his 2/5/09 Memo and requesting that he be reinstated to the current Eligibility List and that he be considered for future Commander vacancies. On April 5, Lieutenant Raul Munguia was promoted to the 12/19/08 Commander vacancy.

On April 6, 2009, the Appellant submitted a formal memorandum to Chief Acevedo, rescinding his 2/5/09 request to be removed from the Eligibility List and requesting that he be considered for the next Commander vacancy. On June 11, 2009, Chief Acevedo, Assistant Chief Carter and Assistant Chief Robinson met with the Appellant. During that meeting, Chief Acevedo informed the Appellant that he was being bypassed two more times for Commander vacancies for the same reason he

had been bypassed before. On the same date, Chief Acevedo filed a bypass memorandum with the Civil Service Commission.

On June 15, 2009, the Appellant filed an appeal of the double bypass. On June 18, 2009, the City Council abolished three Commander Positions at the request of the Department. Also on that date, Chief Acevedo promoted Lt. Baker, Lt. Gonzales and Lt. Ockletree to the three Commander vacancies and immediately demoted them because three Commander positions had been eliminated at the request of the Department. Since that time, all three of these individuals had been promoted back to Commander positions.

Discussion

A. The Panama Allegations

One of the charges in the Memo is that the Appellant went to a brothel and asked a prostitute what she charged with the intent to engage her services. In that regard, Chief Acevedo testified, "I believe he (the Appellant) solicited a prostitute in Panama." "I believe he (the Appellant) was there (the brothel) to engage in prostitution," Chief Acevedo further testified. During closing statements, both parties agreed that the City must prove the charges by such evidence as to permit a finding that they are true.

The Appellant testified that he went to Panama to take a Spanish emersion course. At the school, there were people from all over the world, and the Appellant met a Canadian. As the Canadian and the Appellant were sitting in a casino drinking beer, the Canadian asked if the Appellant wanted to "check out the ladies," and the Appellant agreed. As the Appellant and the Canadian were leaving in a car, the Appellant asked where they were going. The Canadian answered that they were going to a brothel. The Appellant first said "no," but then

agreed to go check out the place. According to the Appellant, he agreed to do so because he was "curious."

The Appellant asked a prostitute in the brothel how much she charged. The prostitute answered, "\$100.00 an hour." The Appellant offered the following explanation for that exchange to Internal Affairs (IA): "Now, there's a lot of things I want to do, but nothing I want to do for \$100 an hour." The Appellant declined the offer from the prostitute and left the brothel. The Appellant also told Internal Affairs that he would not have been interested even if the price had been less.

The City argues that the Appellant intended to engage the services of a prostitute but did not do so because the price was not right. In support of this argument, it cites the Appellant's telling Internal Affairs that he had "heard they (the prostitutes) were good." In further support, the City notes that the Appellant told IA prostitution was legal in Panama and he did not realize IA reached as far as Panama in that it was 3000 miles away.

These points raise reasonable suspicions. In this view, however, they are not enough on which to find that the Appellant intended to engage the services of a prostitute had the price been right. Therefore, it appears the chain of command got it right when they found this charge to be "unfounded." "Unfounded" means that the chain of command finds that an alleged misconduct did not occur. It is also noted that Chief Acevedo did not overrule the recommendation of the chain of command. The Appellant was not disciplined for this alleged misconduct. This charge in the Memo is not sustained.

The Appellant met a female at a convenience store on the trip to Panama. He then moved into an apartment, which rented by the day. The female visited the Appellant several time over the course of week at the apartment, and they had sexual relations. The Appellant denied that the woman lived with him in the apartment. "She did not

live in the apartment. She had her own apartment, and she worked," the Appellant testified. In his interview with Internal Affairs, the Appellant denied this woman was a prostitute. Internal Affairs, however, did not ask the Appellant for the name of this woman.

Chief Acevedo asked the Appellant during the 2/4/09 meeting, over a year after the incident occurred, for the name and a photo of the woman. According to Chief Acevedo, the Appellant replied that he did not have a name or photo of the woman. Chief Acevedo testified, "When he (the Appellant) says this woman was not a prostitute, I don't believe him." According to the Appellant, he provided Chief Acevedo with the first name of the woman but could not recall her last name over a year later. The Appellant further testified that he did not have a photo of the woman. In his testimony, Chief Acevedo stated that he found the Appellant's version to be "hard to believe."

It is this opinion that the chain of command was also right when they found the charge that the Appellant engaged the services of a prostitute he met in a convenience store "unfounded." The reason is that the evidence is not sufficient to establish this woman was a prostitute. It is again noted that Chief Acevedo did not overrule the recommendation of the chain of command. It is also noted that the Appellant was not disciplined for this alleged misconduct. This charge in the Memo is also not sustained.

B. The City Manager Allegation

The Appellant attended a funeral for former APD Police Captain Louie White, a well-respected, African American member of the Department. This was a high media event, with every TV station in town there. At this event, officers were lined up in a formation line. City Manger Ott was going down the line greeting and thanking officers in the formation. The events that transpired during this

incident are in dispute. Assistant Chief Robinson, Chief Acevedo and the Appellant provided their accounts of the incident at the hearing.

Assistant Chief Robinson testified that she was in the vicinity when City Manager Ott was greeting officers in the formation line. According to her testimony, she saw the Appellant laughing and asked him what was going on. The Appellant then said City Manager Ott shook his hand and stated, "I'm Marc Ott." The Appellant responded by asking, "Who are you?" The Appellant next said something like, "I don't get out much and don't see many Black people in management positions." Assistant Chief Robinson instructed the Appellant to "tell the Chief before anyone else does."

Chief Acevedo testified that he saw the Appellant walking at the funeral and that the Appellant may have flagged him down. According to Chief Acevedo, the Appellant told him that City Manager Ott had said, "I'm Marc Ott" as he greeted the Appellant in the line. The Appellant responded, "Who are you?" The Appellant then stated, "I'm not used to seeing Black people in management positions." At the hearing, Chief Acevedo equated the Appellant's not knowing the name of the City Manager to someone not knowing the name of the President. From Chief Acevedo's perspective, this incident was an embarrassment to the Department.

The Appellant, for his version, testified that City Manager Ott was going down the line, thanking officers and shaking their hands. When City Manager Ott approached the Appellant, he shook his hand and said, "I'm Marc Ott." The Appellant responded, "Oh, how are you doing?" "I knew the name, but didn't have a face to put with the name," the Appellant testified. The Appellant denied having made a statement about working nights and not getting out enough to see Black people in power.

The parties stipulated City Manager Ott would testify to the following if called to testify as a witness: (1) That he did not

consider the incident to be an embarrassment to the Department; (2) That he did not report the incident, directly or via a third party, to anyone within the Department; (3) That he does not have independent recall of the incident; and (4) That he does not believe that this incident is a valid reason for not promoting the Appellant to the position of Commander.

Chief Acevedo testified that this incident reflected on the Appellant's judgment. While the Appellant could have handled this situation better, there is no evidence that the Appellant was disciplined or even counseled for this incident. Apparently, the first time this incident became an issue was in the 2/4/09 bypass meeting. Under the circumstances, it is evident that this incident cannot serve as a significant reason for the two bypasses.

C. The Coach Allegation

The arrest of the U.T. Baseball coach for DWI constitutes a Level 1.6 incident under the Department's Significant Incident Notification Protocol (Protocol). The Protocol defines a Level 1.6 incident as, "Incident that will garner intense media attention greater than normal POI releases." The Protocol requires the Watch Commander to make page, phone and email notification to specified individuals in upper-level management.

The Appellant notified Commander O'Leary of the incident by page and a phone call. He also spoke with Commander Baker by telephone about the incident. During that telephone conversation, Commander Baker informed the Appellant that he had notified Assistant Chief Robinson of the incident via voice message. The Appellant did not notify Assistant Chief Robinson because he believed she had already been notified. Assistant Chief Robinson acknowledged on cross examination that Commanders O'Leary and Baker left her voice messages regarding the incident.

The Appellant, however, did send the emails notifying of the incident required by the Protocol. The Grievant testified that he had been written up because of the incident. Duty Commander O'Leary also did not comply with the Protocol by making notifications required by the Protocol. There is no evidence that Commander O'Leary was written up or even counseled about the incident. In closing statements, the City conceded that this incident does not provide significant support for the two bypasses. Accordingly, this incident cannot serve as significant support for the two bypasses.

D. The Training Issue

Chief Acevedo asked the Appellant during the 2/4/09 meeting whether he was deficient in any area. The Appellant replied that he was deficient in program management. Chief Acevedo then offered to transfer the Appellant to a difference lieutenant position so that he could address that deficiency. However, the Appellant never followed up on that offer. To Chief Acevedo, this lack of follow-up reflects a lack of interest in being prepared to be a Commander. Chief Acevedo also testified that the Appellant's work as a night-shift Watch Commander did not afford the Appellant with a sufficient opportunity to develop for a Commander position in the area of community relations.

The Appellant testified that this issue arose after Chief Acevedo advised of the intent to bypass during the 2/4/09 meeting. According to the Appellant, it was at this point that Chief Acevedo asked if he had a deficiency. The Appellant answered that he had a deficiency in program management. Chief Acevedo then said: "We've done you a disservice. When we reorganize, we will put you in a position (to address the deficiency)." According to the Appellant, Chief Acevedo added: "We will take care of you. You trust me, don't you?"

The evidence reflects that no other candidate for promotion to Commander was ever asked about a deficiency for the position or ever

required to address a deficiency to be eligible for such promotion. The evidence further shows that candidates for promotion to Commander were never told that any particular work experience as a lieutenant was necessary to qualify for a promotion to Commander. In fact, Lt. Raul Munguia was promoted to a Commander position after serving as a lieutenant only on the night shift. It thus appears the Appellant was held to standards not communicated to candidates during the qualifying process and not applied to any other candidate. Under these circumstances, this reason cannot serve as a substantial basis for the bypass.

E. Other Issues

Chief Acevedo testified that he was concerned about the attitude the Appellant displayed in the Internal Affairs interview regarding the Panama incidents. In that regard, Chief Acevedo noted that the Appellant told Internal Affairs that prostitution was legal in Panama and that he didn't realize Internal Affairs had a reach of 3000 miles. To Chief Acevedo, these remarks demonstrate an attempt by the Appellant to justify his misconduct. The Appellant testified that he made these statements because he had become irritated at that point in the interview. "I was wrong. It was an error," the Appellant testified.

Chief Acevedo was also concerned that the Appellant told him during the 2/4/09 meeting that he was going to resign or leave the Department by the end of the year. During his testimony, the Appellant did not deny making a statement like that. Chief Acevedo was also concerned that the Appellant said in the 2/3/09 meeting that he did not want to be promoted and wanted his name removed from the eligibility list. On these points, the Appellant testified that he understood that he was only being bypass once and, consequently, did not challenge that bypass. According to the Appellant, however, he changed his mind about being removed from the eligibility list after being fully apprised of his right to do so.

These are the issues of most concern in this case. The attitude displayed by the Appellant in the Internal Affairs meeting was wrong, as the Appellant admitted in his testimony. Further, even though he had a legal right to do so, the Appellant rescinded the representation to Chief Acevedo that he wanted his name removed from the eligibility. The question, however, is whether these issues are adequate to serve as a basis for the bypasses. In this opinion, they do not.

E. Conclusion

There was a discussion before closing statements about whether the standard of review is abuse of discretion. On this point, the parties agreed there would be an abuse of discretion if the evidence does not support findings that the charges are true. In this regard, the evidence in the record does not permit findings that the most serious charges, the Panama charges, are true.

It is also this opinion that a qualification not communicated during the process and not applied to other candidates should not disqualify for promotion. Moreover, when the parties discussed the issues right before closing statements, the City acknowledged that the Coach incidents does not provide significant support for the two bypasses. Further, when another commander engages in the same reporting violation in the same incident and not written up, how the reporting violation provides significant support for the two bypasses is not apparent. Finally, it is this opinion that the other issues do not provide a sufficient basis for the two bypasses in and of themselves. Therefore, the Appeal must be granted.

AWARD

The Appeal is granted. The Appellant shall be promoted to a Commander position and be made whole. Jurisdiction is retained in the event a dispute arises as to this remedy.

DATED, this the _____ day of December, 2009.

Norman Bennett
Hearing Examiner