

111-96 TRANSFER - GRIEVANCE

DECISION OF ADVISORY ARBITRATOR

In re COUNTY OF NASSAU, NEW YORK and POLICE BENEVOLENT ASSOCIATION OF THE
COUNTY OF NASSAU, INC., contract administration procedures.

I, PHILIP HARRIS, having been duly appointed to hear and decide the matter
in dispute and having duly heard the proofs and allegations of the Parties,
hereby render the following decision:

The grievance of Police Officer Timothy P.
McCaffery should be denied.

AFFIRMATION

STATE OF NEW YORK)
)
COUNTY OF NASSAU)

ss.:

I, Philip Harris, do hereby affirm upon my oath as Arbitrator that I am the
individual described in and who executed this instrument, which is my
award.

Philip Harris
Philip Harris, Ph.D.
Hewlett, New York
January 5, 1998

AppearancesFor the County

Eileen M. Vogel, Esq., Assistant to the Director, Office of Labor Relations; Robert Bishop, Assistant Chief, Police Department; Philip Minicozzi, Assistant Director, Office of Labor Relations; Christopher Paradise, Labor Relations Assistant; and Thomas Skelly, Inspector, Police Department.

For the Association

Harry Greenberg, Esq., Law Offices of Solomon Richman Greenberg P.C.; John Flower, Trustee; John L. Grebe, Delegate; Wayne Hartman, Trustee; Timothy P. McCaffery, Police Officer and Grievant; James McHale, Lieutenant, Police Department; Allen Unterweiser, 2nd Vice President; and James B. Ward, Sergeant, Police Department.

Issues

Did Nassau County violate Section 6.0 et. seq. of the collective bargaining agreement when it transferred Police Officer Timothy McCaffery from the 1st. to the 2nd Precinct on August 8, 1996? If so, what shall the remedy be?

Facts

On May 26, 1996 Police Officers McCaffery and his partner Donald Carney heard on their patrol car radio that another patrol car had been ordered to an arrest scene. The two Officers knew there was only one person in the responding car and therefore offered to respond too but were directed not to. Fearing for the safety of the lone person, they responded anyway. They told their supervisor Sergeant Ward their reason and he

then told them to remain at the scene. An investigation followed. On August 8, 1996 Officer McCaffery was transferred to another precinct. Both Officers were disciplined on October 26, 1996 eight hours loss of pay. Mr. McCaffery did not challenge it because doing so meant a full trial would be held, and if found guilty there he would have lost points on a forthcoming Sergeant's exam.

The Association claims that the transfer of Officer McCaffery was in retaliation for the May 26, 1996 incident: reporting to the scene when told not to (his partner was not transferred). The County states this is not the case, but rather an exercise of its Reserved Rights.

Contract Provisions

3.0 The County - Reserved Rights.

Except as limited by this agreement the County reserves the right to determine the standards of service to be offered by its various agencies; to set the standards of selection for employment; to direct its employees; to regulate work schedules; to take disciplinary action; to relieve its employees from duty because of lack of work or for other legitimate reasons; to maintain the efficiency of governmental operations; to determine the methods, means and personnel by which governmental operations are to be conducted; to determine the content of job classification; to take all necessary actions to carry out its mission in emergencies; and to exercise complete control and discretion over its organization and the technology of performing its work.

6.0 Disciplinary Procedures

6.3-6 An employee, against whom a report of disciplinary action is to be made, will have an opportunity to verbally express himself/herself before the Disciplinary Review Board upon application to and approval of such Board within two (2) working days after he/she has been advised of the nature of the violation by his/her Commanding Officer. An employee who avails himself/herself of such opportunity may be

accompanied by a representative of the Association. The Association representative may confer with and advise the employee before and after the hearing before the Disciplinary Review Board, but shall not participate in the hearing in any way, except as an observer.

6.3-8 Retaliation for Exercising Rights - No Police Officer shall be discharged, disciplined, demoted or denied promotion, transfer or reassignment, or otherwise be discriminated against in regard to his/her employment; or be threatened with any such treatment by reason of his exercise of the rights granted by these procedures.

Association Position

1. The Grievant (and his partner) responded though told not to, and once there told to remain (Association Brief page 4, hereafter A 4).
2. They did not want overtime, wanted to come in to explain, and were told to write a letter about the events (A 4).
3. In the station house, a Lieutenant Jaskot told Officers McCaffery and Carney they should not have gone to the arrest scene (A 5).
4. The investigation was ending in July '96, and the transfer was prior to the filing of disciplinary charges and not part of the disciplinary disposition (A 5).
5. The transfer avoided disciplinary review and denied the Grievant contractual protection (A 6).
6. Mr. McCaffery was charged with failing to obey an order, a serious charge, but the penalty was less severe than expected (A 6).
7. The arrest scene is a high crime area, and it is common for officers to respond without being so ordered (A 7).
8. Inspector Skelly was unhappy with Mr. McCaffery, but twenty incidents reflect that he is not a marginal performer (A 9 - 11).
9. Officer McCaffery was transferred for disciplinary reasons and was not part of the disciplinary process of disposition in violation of the

Agreement (A 12).

10. Inspector Skelly decided in July to effect the transfer (A 13).

11. Sections 6.1 and 6.3-8 were violated. The Grievant should be made whole.

County Position

1. The details of the May 26, 1996 incident are irrelevant to the case (County Brief page 27, hereafter C 2).

2. Officers McCaffery and Carney chose to discuss the matter with their superiors and without an Association Representative present (C 2).

3. Mr. McCaffery accepted the eight hour pay loss. He chose not to exercise his rights under the Disciplinary Procedures (C 2).

4. The case is a contract grievance arbitration not a disciplinary review arbitration (C 3).

5. There is not retaliation if the protected rights were not exercised (C 3).

6. The transfer was done prior to the Grievant choosing not to exercise his rights, and could be for any reason other than retaliation (C 4).

7. There was no interrogation that would give rise to representation rights of Section 6.2 (C 4, 5).

8. The Association seeks to review the disciplinary procedure in the contract grievance format. The grievance should be denied (C 6).

Opinion

A close and frequent reading of Section 6.3-8 leads the Arbitrator to the conclusion that the preponderance of evidence favors the County. The deliberations included rereadings of the Association's thorough and

weighty Post Hearing Brief which makes a substantial case for what may have been the intentions of certain Police Department officials. However, there are stark realities that militate for a denial of the grievance. Police Officer McCaffery was transferred on August 8, 1996. He was disciplined on October 26, 1996 and elected not to challenge it under the Disciplinary Procedures of the collective bargaining agreement. Section 6.3-8 addresses retaliation "by reason of his exercise of the rights granted by these procedures." Officer McCaffery never exercised his contractual rights, so a strict reading of Section 6.3-8 precludes retaliation by the Police Department in the instant matter. This is not to say that the Association is incorrect in its own assessment of the case, that the Police Department had a hidden agenda in transferring the Grievant. Anything is possible. But given the choice between the possibility of retaliation as espoused by the Association, and the fact Officer McCaffery never exercised his rights under Section 6.3-8 thereby closing the door on retaliation claims, the Arbitrator's finding necessarily is for the latter. This reasoning is augmented by the broad Reserved Rights, Section 3, that Nassau County has in managing the Police Department. Retaliation is the only reason brought to the Arbitrator's attention that limits the County's rights, and retaliation claims are foreclosed herein. The contract was not violated.

Award

The grievance of Police Officer Timothy P. McCaffery should be denied.