2004

Salt Lake City Corp. v. Salt Lake City Civil Service Commission : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

Salt Lake City Corp.,	:	
	:	
Petitioner,	:	
	:	
v.	:	Appeal No. 20040515-CA
	:	
Salt Lake City Civil Service Commission	:	
	:	
	:	
Respondent.	:	
	:	

REPLY BRIEF OF PETITIONER

Martha S. Stonebrook, #5149
Salt Lake City Attorney's Office
451 South State Street, Suite 505A
Salt Lake City, UT 84111
Attorney for Petitioner Salt Lake City Corp.

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Salt Lake City Attorney's Office
451 So. State St., #505A
Salt Lake City, UT 84111
Attorney for Petitioner Salt Lake City Corp.

PARTIES TO PROCEEDING BEFORE CIVIL SERVICE COMMISSION

Drew Measels
c/o Todd Shaughnessy
15 West So. Temple, #1200
Salt Lake City, UT 84101
attorney for Drew Measels who was the petitioner before the Civil Service Commission

Salt Lake City Corp.
the respondent before the Civil Service Commission

Salt Lake City Civil Service Commission
c/o Secretary Pattie Terzo
451 So.State St., #115
Salt Lake City, UT 84111
the agency below (named as respondent herein pursuant to Utah Rule of Appellate Procedure 14(a))

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ARGUMENT

The City has appealed the decision of the Civil Service Commission ("the Commission") on the grounds that it failed to properly apply the analysis established in the case of *Kelly v. Salt Lake City Civil Service Commission*, 2000 UT App 235. Specifically, the Commission failed to analyze the question of whether the charges warrant the sanction imposed by breaking that inquiry down into two sub-parts: First, is the sanction proportionate and, second, is the sanction consistent with previous sanctions imposed by the department pursuant to its own policies. *Kelly*, 2000 UT App at ¶ 21. Because it failed to apply the appropriate test to aid it in its examination of the Chief's disciplinary decision, the Commission took away the Chief's discretion to impose progressive discipline and choose the appropriate punishment based upon the facts and circumstances of each case.

Although the respondent, Officer Measels, acknowledges that the two-part Kelly inquiry is apt, he contends that the Commission properly considered both sub-questions before rendering its decision. With respect to the first inquiry, Officer Measels asserts that the Commission adequately considered the issue of the proportionality of the sanction simply because the Commission had before it "the whole record" when it evaluated the proportionality of the sanction. (Aplee Br. at 13). This huge generality is unpersuasive because it relies solely on an assumption that the Commission did, in fact, consider the record. Despite Officer Measels' conjecture that the Commission reviewed the full record, there is no ready evidence that it did.

A review of the Commission's findings (R. 30-35) makes this clear. The record shows that, in addition to the violation for which he received the 30 hour suspension, Officer Measels had three prior sustained violations. (R. 37, Ex. 3, pp. 172-173). Yet, the Commission notes only one prior violation for inconsiderate contact. It makes no mention of the sustained violation of the abuse of police authority. Chief Dinse testified that the incident leading to those violations was "substantial." (R. 36 at p. 14). If the Commission was looking at the full record, as Officer Measels assumes it did, the Commission would have addressed both violations rather than mentioning only the violation of the inconsiderate contact policy. Officer Measels also had received a written reprimand for violating department policy requiring thoroughness and accuracy of reports. There is nothing in the Commission's decision to suggest that the Commission considered this violation either. The Commission made no findings concerning whether or not Officer Measels' entire disciplinary history. The fact that the Commission referred only to the one violation of the Inconsiderate Contacts policy does not indicate whether or not the Commission considered the rest of Officer Measels' disciplinary history or whether it failed to consider that history because it did not understand or apply the dictates of review established in *Kelly*.

Although the chief fully explained the reasons he imposed the 30 hour suspension, the Commission made no mention of any of those reasons. The Chief testified that Officer Measels had not "gotten the message" (R. 36, p. 142) regarding how he should conduct himself. The Chief found it significant that Officer Measels did not accept responsibility for his actions or seem to understand that he had done anything wrong. (R.

36, pp. 142-143). Thus, the Chief, after weighing all the facts and circumstances concluded that another written reprimand was not appropriate and imposed discipline that was still within the range of sanctions imposed on others.

Although Officer Measels' previous misconduct was serious, the Commission, with the singular focus on the consistency factor, ignored Officer Measels' prior violations of the abuse of police authority policy and the report policy. Apparently, the Commission only considered as a valid variable the one prior sustained violation of the Inconsiderate Contacts policy, a policy closely related to the Personal Contacts policy at issue in this case. In *Kelly*, this Court recognized that a link between instances of misconduct is not necessarily required when weighing the full record. *Kelly*, 2000 UT App 235 at ¶27. Therefore, the Commission should have looked at Officer Measels' whole prior disciplinary history, not just the one prior incident of related conduct.

The Commission's sole focus in reaching a conclusion on the second question was whether or not the 30 hour suspension without pay was consistent with discipline imposed on others who violated the Personal Contacts policy or the related Inconsiderate Contacts policy. The Commission's rigid reliance on the consistency of discipline as the determinative factor as to whether or not the Chief abused his discretion is not supported by the law. As stated by this Court in *Kelly*, the "consistency element simply requires the Department to abide by its own policies, as outlined in *Lucas v, Murray City Civ. Service Commission*, 949 P. 2d 746, 761 (Utah App. 1997), and as recognized in the Department's own regulations." *Kelly*, 2000 UT App 235 at ¶ 28. The *Kelly* Court

pointed to Salt Lake Police Department policy 3-11-02-00 (now D38-02-00.00) which states:

> Positive corrective action should be considered before the imposition of sanctions. The following factors should be considered when determining the degree of disciplinary action needed:
> . . .
> 5. Consistency of discipline.[1]

Kelly, 2000 UT App 235 at ¶ 28. Thus, inconsistency in Officer Measels' discipline when compared to the discipline imposed on others for similar conduct is but one factor in determining if the Chief abused his permitted discretion. *Id.* Despite Officer Measels' assumption that the Commission's review was more thorough than its decision reflects, the only evidence in the Commission's decision indicates that for the Commission, the consistency of discipline was the only factor that was considered.

The Commission's staunch position that no discipline can be imposed except that which was previously imposed for similar conduct raises that consideration to an inviolate rule. The City believes that position incorrectly presents the state of the law. Like most employers, the City uses progressive discipline whenever possible. Progressive discipline is a well-accepted policy (*See Lucas v. Murray City Civil Service*

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[1] That Salt Lake City police department policy has been renumbered as D38-02-00.00. In addition to consistency of discipline, the other factors include: (1) Nature of the violation and the circumstances in which it occurred; (2) the impact the behavior has on the Department; (3) mitigating circumstances; (4) length of service and work record; (5) consistency of discipline; (6) extent to which disciplinary action may play a rehabilitative role; (7) attitude and conduct of the employee throughout the investigation and personnel interview; (8) adequacy of Department training needs or practices and Department policies and procedures.

Commission, 949 P. 2d 746, 761-62 (Utah App.1997)) which by its very nature considers the cumulative nature of offenses, whether or not related. The use of progressive discipline is committed to the Chief's discretion, based upon the severity of the offense. *Lucas,* 949 P. 2d at 762. In this case, the Chief clearly concluded that the severity of the instant matter, especially when coupled with Officer Measels' prior misconduct, justified the imposition of progressive discipline in the form of a 30 hour suspension without pay. The Commission, focusing only on the consistency element, failed to recognize the importance of progressive discipline and the discretion of the Chief to weigh all the circumstances and determine the appropriate discipline.

The Commission's ruling appears to argue against the very concept of progressive discipline. Given the Commission's position, no officer could ever receive more than a written reprimand for a first or second violation of the Personal Contacts policy unless such a violation included the use of profanity and physical violence. (R. 33). If profanity or violence was part of the misconduct, then, according to the Commission's decision, a suspension within the range of 20 to 50 hours would be appropriate (R. 32-33).

Applying this reasoning, had Officer Measels used profanity with Mr. Hansen after stopping him in "retaliation for the oinking noise Mr. Hansen made" (R. 31) and while detaining him "far too long" in a stop that could "constitute police harassment" (R. 31), the Commission would have found that his 30 hour suspension was "within the 20 to 50 hour range" (R. 32-33) and, as such, would have been within the Chief's discretion. Such reasoning strips the Chief of his discretion to impose discipline based on the totality of the circumstances, as allowed under *Kelly*, and, instead, forces a formulaic response to

discipline. Surely an officer who "took police action in retaliation for an oinking sound," who conducted a stop that constitutes "police harassment" and who engaged in "deplorable," "unprofessional conduct" can be disciplined by the Chief of Police within the 20 to 50 hour range for a violation of the Personal Contacts policy despite the fact that the officer did not use profanity. Any other conclusion ignores the Chief's ability to impose progressive discipline and nullifies the Chief's discretion to manage his police force and impose discipline based upon the full record in each case.

A review of Officer Measels' conduct demonstrated unwillingness to appropriately deal with the public. No employee should be granted the right to repeatedly display material errors in judgment that affect his employer and the public because the Chief is without the discretion to weigh the officer's conduct and determine whether another written reprimand or suspension "within the 20 to 50 hour range" should be administered in order to deter future misconduct. Nowhere is the concept of progressive discipline and the Chief's discretion to address police misconduct more applicable than in the area of law enforcement where public safety and public expectations demand more. The "severity of the offense will determine the steps required for progressive discipline." *Lucas v. Murray City Civil Service Commission*, 949 P.2d 746, 762 (Utah App. 1997). The Commission's decision fails, not only on legal grounds, but on public policy grounds as well.

The Commission's formulaic approach that fails to give due consideration to the gravity of the misconduct, the history of the officer, and the full record in each case sends the wrong message to the public and police officers alike. Chiefs of Police must have the

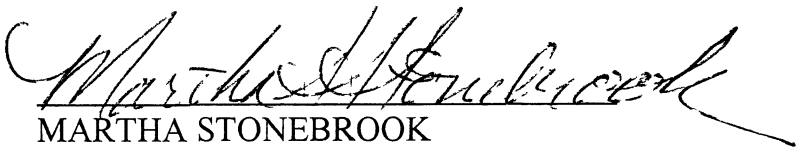
discretion to impose discipline given the circumstances attendant to the misconduct rather than be handcuffed to potentially irrelevant or ineffective precedent. While conduct that is similar in time, content and consequences should be treated substantially similar, experience tells us that those situations are uncommon. For instance, there are countless ways to violate the Personal Contacts policy. However, police officers, their conduct, their motivations and justifications and the impact of such conduct all vary from case to case, even when they all have violated the same police policy. Police Chiefs must be given broad discretion and deference in measuring the nature of officer misconduct and its impact upon the Department's public safety mission. The law recognizing this discretion is clear and well established. *Lucas*, 949 P.2d at 761 (Discipline is within the sound discretion of the Chief. We hold that the use of progressive discipline is committed to the Chief's discretion based on the Chief's determination of the severity of the offense.); *In re Discharge of Jones v. Tooele County*, 720 P. 2d 1356, 1363 (Utah 1986) (The sheriff must manage and direct his deputies and is in the best position to know whether their actions merit discipline.). The test that was adopted in *Kelly* allows the Chief to demonstrate a "fair and rational basis" for any inconsistency of discipline while maintaining the necessary flexibility to impose discipline based upon an officer's entire record. The Chief acted within the discretion vested in him by established precedent and, by failing to make findings that would indicate that the Commission properly evaluated the matter, as established by *Kelly* and other precedent, the Commission acted "outside the law" and substituted its own discretion for that of the Chief. Thus, it was the Commission that abused its discretion, not the Chief of Police.

By failing to acknowledge any of the Chief's reasons for imposing the discipline he did, the Commission ignored the *Kelly* test, instead demanding rigid conformity with other discipline regardless of the circumstances.

CONCLUSION

Because the Commission failed to properly apply the law when it addressed the question, do the charges warrant the sanction imposed, the Commission abused its discretion by stepping outside the legal boundaries set forth in *Kelly*. This Court should overturn the Commission's ruling and affirm the Chief's 30 hours suspension as discipline for Officer Drew Measels.

DATED this 14th day of December, 2004.



MARTHA STONEBROOK
Senior City Attorney
Attorney for Petitioner

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on the 14th day of December, 2004, she caused two (2) true and correct copies of the foregoing REPLY BRIEF OF PETITIONER to be hand-delivered to:

Salt Lake City Civil Service Commission
c/o Secretary Pattie Terzo
451 South State Street, Room 115
Salt Lake City, Utah 84111
Respondent

and the undersigned further certifies that on the 14th day of December, 2004, she caused a two (2) true and correct copies of the foregoing REPLY BRIEF OF PETITIONER to be mailed, first class postage prepaid, to:

Todd M. Shaughnessy
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101
Attorney for Drew Measels who was
the petitioner before the Civil Service Commission

Sandra Stanger
SANDRA STANGER