

FIREMEN AND POLICEMEN CIVIL
SERVICE ACT 78 BOARD

IN THE MATTER OF THE APPEAL
OF THOMAS L. MORRIS

Appeal from the action of the City of Troy appointing officer, Frank Gerstenecker, City Manager to discharge the Appellant, Thomas L. Morris, from employment with The City of Troy Police Department.

Date: May 3, 4, and 9, 1977.

Troy City Hall
500 West Big Beaver Road
Troy, Michigan 48064

Before: William Cole, Chairman
Gerald R. Thorley
Norman D. Michaelson,
Commissioners

Appellant, Thomas L. Morris, timely appeals his discharge from employment as a sergeant in The City of Troy Police Department.

Appellee, The City of Troy, in a letter dated March 10, 1977, signed by Frank Gerstenecker, the appointing officer of The City of Troy, sets forth therein the basis upon which the appointing officer decided to discharge the Appellant. Appellant thereafter exercised his rights under the grievance procedures of the collective bargaining agreement in effect between the Troy Command Officers Association and the City of Troy, this Board being the final step in said procedure.

Appellant requested a continuance of the initial hearing date, arguing a number of reasons for same, but principally that, due to the present pendency of a criminal charge or charges against Appellant, the continuation of this administrative hearing would effectively deny the Appellant his constitutional rights, specifically his Fifth Amendment privilege against self-incrimination. Cited by counsel for Appellant was the case of State of Michigan vs. Moceris, 47 Mich App 116 (1973), as authority for granting the continuance request. We believe that that case is distinguishable from the situation presented here, in that there will be different parties representing the City of Troy in this proceeding from those that will be prosecuting the criminal action, and there is no claim herein that the evidence to be utilized in this proceeding will be the same evidence utilized in the criminal proceeding. It is this Commission's opinion that the rationale and holding of the case of Sternberg v. State Bar of Michigan, 484 Mich 588 (1971), is analogous to the fact situation of this proceeding and based upon said decision, the request for continuance was therefore denied.

This Commission stated on the record of the hearing and for the purpose of this decision will now state again that the Appellant has in fact exercised his Fifth Amendment privilege not to testify in this hearing, and that no part of this decision is based upon the fact that the Appellant chose not to testify.

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Counsel for the Appellant and the City have raised other questions of law which this Commission feels should be ruled upon. Appellant argues that the doctrine of "just cause" should be applied by this Commission to the proofs submitted, rather than "cause" as set forth in Act 78 (1935 PA 788, Imd. Eff. May 24, 1935, as amended, MCLA 38.501, et seq.) and that the test of establishing said just cause by the City should be beyond a reasonable doubt. Appellant urges upon us the fact that the appeal to this Board is step four in the union contract grievance procedure and therefore the law applied by labor administration arbitration boards should be utilized in the decision of this appeal.

The City argues that this Commission is controlled by the statutory language of Act 78, its use of cause as interpreted by the State courts and the test to be applied to the proofs being whether or not by the submission of competent, material and substantial evidence, the City has shown proper cause for the action of its appointing officer.

After a considered review of the cases cited by counsel and their respective arguments, the Commission is of the opinion that the language of Act 78 as interpreted by the Courts of this State control the decision - making requirements of this Commission and therefore, the standard to be utilized in this hearing shall be that the City has the burden of proof to show cause that the decision to discharge the Appellant is supported by competent, material and substantial evidence. Montiy v. East Detroit Civil Service Board, 54 Mich App 510 (1974), Detroit v. General Foods Corporation, 39 Mich App 180 (1972).

The Commission has before it proofs concerning only two of the four allegations set forth in the City's letter of discharge. These proofs concern two guns, a 32 caliber, Smith & Wesson revolver, serial number 513350 and a 357 magnum, Dan-Wesson revolver, serial number 25168. The City alleges that with respect to each of these weapons, the Appellant violated a police department regulation, being General Order #4, as amended, was dishonest, neglected his duty and was guilty of misfeasance and non-feasance.

The Commission, after due consideration of the testimony and proofs presented, makes the following conclusions of fact. With respect to the 32 caliber Smith & Wesson (hereinafter called "Gun #1"), the testimony of Royal Oak Police Officer, Paul Bickford, indicated that the Appellant received and had in his possession a 32 caliber gun on November 3, 1974, taken from a John Oleskey, a felon, known to be such by Appellant. Further that the Appellant was working on a diamond case investigation for the City of Troy Police Department.

That the certified copies of the Michigan State Police records concerning guns disclosed that a request was made by the Troy Police Department on November 4, 1974, for information concerning a 32 caliber Smith & Wesson gun with serial number 513350, and indicating that the suspect involved was a J. J. Oleskey. (Exhibits 5 and 6).

That the records kept by the Troy Police Department disclosed that a second report concerning a 32 caliber Smith & Wesson gun with serial number 513350 was requested by the Troy Police Department of the Michigan State Police Crime Lab, again concerning the subject, John Joseph Oleskey. (Exhibit 10). This report is dated November 5, 1974.

In addition, witnesses, Donald R. Chambers, a detective sergeant with Michigan State Police Department and Jack Welch, an agent with the Alcohol Tobacco and Firearms Bureau, each testified that the Appellant had stated that Appellant had taken a gun from John Oleskey. The statement to Jack Welch was made sometime between November 3, 1974 and January 31, 1975.

The witness, Paul Bickford, stated that the Appellant sought the assistance of Paul Bickford and the Royal Oak Police on January 31, 1975, to act as cover for the Appellant while Appellant instituted the arrest of John Oleskey in the City of Troy. That Oleskey was transported to the Troy Police Station following the arrest.

It was further testified by the witness Paul Bickford that the Appellant and Paul Bickford on the same night, went directly to John Oleskey's residence in Sylvan Lake, Michigan, entered same, and observed a revolver lying on a table in the house. Bickford stated the weapon was a 357 magnum off-brand gun and that Appellant picked it up and called the City of Troy Police Department by telephone, asked for a lien check on the weapon, stating the name brand, caliber, and serial number of the weapon to the recipient of the call. Bickford stated that he and Appellant returned to the City of Troy Police Station and that Appellant had the gun taken at Oleskey's house in his possession when Appellant entered the Police Station.

That the certified copy of the Michigan State Police records concerning weapons disclosed that the lien check for the weapon described as 357 magnum Dan-Wesson being serial number 25168 (hereinafter called "Gun #2") was requested by the Troy Police Department on January 31, 1975. (Exhibit 7)

The testimony of witness, John Donovan, Captain of the Troy Police Department, indicated that a careful check of the records of the City of Troy Police Department disclosed that the report of the arrest of John Oleskey, being incident number 75-1887 (Exhibit 8) and the Michigan State Crime Lab gun receipt attached to an unrelated incident report (Exhibit 10) were the only records in the Department concerning John Oleskey. Donovan testified further that the property records of the City of Troy Police Department contain no recording in any form of either Gun #1 or Gun #2.

Witness, Donald R. Chambers, testified that he had obtained a search warrant for certain property believed to be located at the personal residence of Appellant. (Exhibit 1) The search warrant specifically listed the weapons, Gun #1 and Gun #2, as described above. The search warrant was executed on December 22, 1976, the Appellant voluntarily produced from under a bed, Gun #1 and Gun #2, and a certain Dealer Firearm Record Book from a shelf (Exhibit 4) containing the name of Appellant and certain handwritten entries.

A review of the Firearm Record Book discloses that Gun #1 and Gun #2 were listed and recorded as having been "personal" acquisitions. (quotes supplied)

Exhibit 15 and Exhibit 16 were each lists of the names of the City of Troy Police Officers, dated July 7, 1970 and June 17, 1975, respectively, each containing the name of Appellant with initials corresponding to his name located adjacent thereto. These lists were acknowledgment sheets indicating which officers had obtained and read General Order #4, dated November 19, 1963 (Exhibit 14), and General Order #4, as revised, dated June 12, 1975 (Exhibit 9). From this evidence and the testimony given during the hearing related to the duties of a City of Troy Police Officer, the Commission concludes that Appellant had knowledge of the existence of and requirements of General Order #4, both in its original and revised forms.

Based upon the foregoing, it is the considered conclusions of this Commission that the Appellant during all times pertinent to this matter was

acting in the capacity of a sworn police officer with the City of Troy. That the Appellant, while in said capacity, came into personal possession of Gun #1 and Gun #2. That Appellant had knowledge of the required procedures of a Troy Police Officer with respect to property taken into custody as set forth in General Order #4, as amended.

It has been urged upon this Commission that General Order #4 contains no time requirement for complying with its provisions. The testimony that the Commission has heard regarding the time element clearly supports a finding that the General Order #4 must be complied with in a reasonable time given the totality of the circumstances surrounding the acquisition of the property by the police officer and the type of property involved.

In this matter this issue produces no problem for the Commission because the guns in question were never introduced into the Troy Police records.

The records of the City of Troy Police Department evidence that Appellant at no time entered into the property or incident reports, the fact that either of the guns came into his personal possession in the course of his duties as a Troy Police Officer. Further, each of the weapons was found in the personal residence of the Appellant and each weapon was listed in the Gun register of Appellant under a category - personal. These facts lead this Commission to the conclusion that the Appellant intended to retain the weapons for his personal use, clearly a dishonest act.

That the above findings constitute a violation of the requirements of General Order #4, in its original form and as amended. That the failure to comply with said requirement is a neglect of the duty of the Appellant and constitutes misfeasance and non-feasance.

Appellant has received the highest discipline possible for the above acts - discharge. It has been argued to this Commission that this discipline is excessive in light of the facts above, this being the first such incident, and the fact that the Commission heard testimony from another police officer concerning his not being disciplined for the failure to enter property that came into his possession into the property records of the Police Department in a timely fashion.

The Commission is not persuaded by either argument. First, the facts concerning the other officer are significantly distinguishable from the facts of this case. Second, and most importantly, the converting of confiscated property that may be evidence of criminal conduct by a sworn police officer is a serious act that goes to the very core of responsibility and integrity of the law enforcement function.

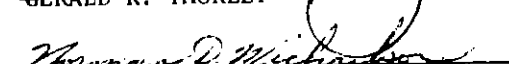
Therefore, the Commission concludes that the City has by competent, material and substantial evidence established cause as set forth in Act 78 for the decision to discharge the Appellant. The Commission further determines that the discharge of the Appellant is not excessive punishment, but is commensurate with the acts shown to have been committed by the Appellant.

Therefore, in accordance with this finding, the appeal of Thomas L. Morris, is denied.

Dated: May 16, 1977


WILLIAM COLE, Chairman


GERALD R. THORLEY


NORMAN D. MICHAELSON