

BEFORE THE PUBLIC SAFETY CIVIL SERVICE COMMISSION
OF THE CITY OF SEATTLE

In the matter of the Appeal of)
CHARLES E. PILLON) FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER)
_____)

I. INTRODUCTION

This matter came before the Public Safety Civil Service Commission ("Commission") in the appeal of Charles E. Pillon ("Appellant") from his discharge by the City of Seattle Police Department ("Department").

1.1 Appearances.

1.1.1 Appellant. The Appellant was represented by Quentin Steinberg, Steinberg and Steinberg.

1.1.2 Department. The Department was represented by Douglas N. Jewett, City Attorney, and Randy Gainer, Assistant City Attorney.

1.1.3 Commission. Maura O'Neill, Chair; Arthur Joyner and Daniel J. Oliver, Commissioners; Dallas Shockley, Secretary and Chief Examiner.

1.1.4 Witnesses. Witnesses for the Police Department were: Sgt. Ronald Wilson, Raymond F. Schork of the Seattle Police Pension Board, Asst. Chief Noreen Skagen, Chief Patrick Fitzsimons, Detective Shaun O'Kinsella, Capt. Michael Germann, Dr. H. B. Edwards, Capt. John Pirak, Maj. A. W. Terry, Asst. Chief David Grayson, Sr. Deputy Ricardo Martinez of King County Prosecuting Attorney's Office, Capt. Elton George, Detective Timothy Perry, Maj. Mike Brasfield, Asst. Chief William Kramer, and Asst. Chief Roy Skagen; witnesses for the Appellant were: the Appellant, Lt. Mary Stowe, Detective Charles Scheuffle, Capt. Donald Marquart, Capt. Romero Yumul, Ellen McBride (neighborhood leader), Officer Mike Carney, Dennis Law of the Beacon Hill/South District Journal, Chief Patrick Fitzsimons, Lt. Donald Vert (ret.), Officer Leland Gayles, Officer Richard Carr, and Detective Gregory Seth.

1.2 Proceedings.

By notice dated February 23, 1988, Sergeant Charles Pillon was discharged from his employment with the Department. The Commission received notice of discharge the same date. Sgt. Pillon timely filed his appeal on February 25, 1988.

Hearings were held on March 21, 22, 23, 28, 29, 31 and April 4, 1988. Post hearing briefs were filed with the Commission on June 7, 1988.

1.3 Summary of Positions.

1.3.1 Appellant. Sergeant Pillon contends that he was denied due process in two administrative hearings conducted by the Department. He further contends that he was treated discriminatorily and unfairly by the Department. Sgt. Pillon asserts that he was discharged as a result of his exercise of rights protected by the First Amendment to the United States Constitution, and that his discharge violates public policy and his contract of employment with the Department.

1.3.2 Department. The Department asserts that the Chief of Police, Patrick Fitzsimons ("Chief"), acted in good faith in discharging the Appellant for his unexcused absence from duty and failure to obey an order transferring him to the Department Communication Division and that the Appellant's conduct constituted cause for the discipline imposed. The Department argues that there was no basis for excusing the Appellant's refusal. Even should the Commission consider the basis for the transfer order, the Department urges that the Appellant has been afforded due process and fair treatment, and was not singled out by the Department for treatment as a result of the Appellant's exercise of protected rights.

1.4 Commission. This case presents the question, "When may a police employee disobey the orders of the Police Department?" Having considered the extensive hearing record in this matter, including the credibility of the witnesses and exhibits presented to us, and the argument of the parties, we enter the following.

II. FINDINGS OF FACT

2.1 Department. The Department is organized into four Bureaus. The Patrol Division and the Communication Division are included in the Operations Bureau and Field Support Bureau respectively. There are four precinct stations: North, South, East and West.

Ranks within the Department include assistant chief, major, captain, lieutenant, sergeant and officer.

2.2 Seattle Police Officers Guild. The City of Seattle ("City") recognizes the Seattle Police Officers Guild ("Guild") as the exclusive bargaining representative of all sworn police officers of the Department, up to and including the rank of sergeant. The City and Guild are parties to a collective bargaining agreement ("Agreement") governing the wages, hours and working conditions of represented police officers, including Sgt. Pillon. The current Agreement is effective through August 31, 1989.

2.3 Commission. The Commission derives its authority from Article XVI of the City Charter, and Chapter 4.08 Seattle Municipal Code.

2.4 Appellant. Sgt. Pillon was first employed by the Department on June 8, 1964. He was promoted to the rank of sergeant on October 14, 1970. On May 12, 1986, he was assigned to serve on a special unit within the Patrol Division working out of the South Precinct. The unit was called the Anti-Crime Team ("ACT"), and was charged with the mission "to suppress street crimes occurring in the South Precinct specifically burglary, larceny, fencing of stolen property, and the trafficking of narcotics in exchange for stolen property or cash."

2.5 Public Comment. ACT operations were subject to both praise and criticism in City government, the community and in the media. Praise was based on the perceived "get-tough" attitude on criminal behavior, particularly drug and drug-related crimes. ACT was seen by some as an aggressive and positive effort to address criminal conduct in the south end of the City. Criticism was based on asserted failures by ACT to conform to law and Department policy, particularly the due process rights of the accused and the community. ACT operations were criticized for shortcuts, and inadequate documentation that resulted in the inability to prosecute criminal cases through trial. Sergeant Pillon became a central figure in the debate about ACT. He spoke openly to the media of his support for ACT, and he criticized the Department's efforts to assure that ACT operated in conformance with law and policy.

2.6 The Arrest.

2.6.1 On August 10, 1986, Sgt. Pillon arrested and booked a suspect into King County Jail (the "arrest"). The arrest resulted in a Departmental investigation conducted by the Internal Investigation Section (IIS) of the Department and a recommendation for discipline. There was sufficient reason for the IIS to conduct an investigation. The Appellant waived his right to a disciplinary hearing to review the recommendation as guaranteed by the Agreement and the Manual of Rules and Procedures ("Manual") of the Department.

2.6.2 A disciplinary hearing panel ("first panel") was convened by the Chief, despite the waiver, under the Chief's authority "if such a review is desired (by the Chief) before finalizing a disciplinary action." The panel included a representative chosen by Sgt. Pillon. Section 1.09.040 of the Seattle Police Department Procedures Manual provides the accused officer the right to remove any Panel member for just cause. It states, "Personal animosity or previous disciplinary action against the accused by a prospective panelist shall be just cause for exclusion from the Panel." Sgt. Pillon did not challenge any prospective members for just cause but did exercise his right to one peremptory challenge.

2.6.3 The Agreement requires that the accused officer be apprised of the general or specific laws, rules, regulations or procedures he/she is alleged to have violated and the general nature of the acts which constitutes the basis for the complaint. Furthermore, the Agreement states, "Nothing in this provision shall function to limit the scope of the investigation..."

2.6.4 The Agreement instructs the DHP to render one of four findings following its investigation and deliberation: a) further investigation with specific recommendation; b) dismissal of the charge; c) finding a charge not sustained; d) finding a charge sustained and listing their recommendations.

2.6.5 Somehow, during the referral process, from IIS to the DHP the charge was amended slightly. The charge investigated by IIS was the Misuse of Authority - no probable cause to arrest the suspect on a fugitive charge. When it was referred to the DHP the charge became Misuse of Authority - no probable cause to arrest the suspect on fugitive or any other charge. The DHP members testified that the addition of the phrase "or any other charge" constrained them to render a finding of "not sustained."

2.6.6 The first panel further unanimously recommended that the Chief transfer Sgt. Pillon to a "non-line" unit. The recommendation was based on the panel's consideration of Sgt. Pillon's quality of work, attitude about rule compliance, and the potential for his adverse influence on inexperienced officers. This panel unanimously deplored the quality of Sgt. Pillon's actions. They found that he submitted an ill-prepared case with insufficient data for effective follow-up. They stated that there was absolutely nothing forwarded in the case report at the time to substantiate the basis for the arrest, suspicion of fugitive, and that there were no statements of probable cause, no warrants, no follow-up reports, no suggestions for alternative charges, no memos, not even an explanatory phone call -- leaving the assigned detective with no option other than to release the suspect. Similar administrative recommendations for transfer or reassignment are not uncommon in the disciplinary hearing process of the Department. It is on this point that the Commissioners disagreed. The majority believes that it is neither uncommon nor improper for a disciplinary hearing panel to put forward a recommendation to the Chief, in addition to making one of the four required findings. The recommendation by the panel was a result of the evidence the panel received during the disciplinary hearing including the testimony by Sgt. Pillon. Sgt. Pillon did not have a right to a second disciplinary hearing regarding the recommendation of the first panel. Even if it was improper for the panel to have made a recommendation beyond it's finding of not sustained, the Chief conducted an additional investigation, and had recommendations from the chain of command. It was well within his authority to order the transfer.

The findings and recommendations of the disciplinary hearing panel are advisory to the Chief, as is the IIS investigation and as well as the recommendations of those in the chain of the command.(1)

The Chief has the authority to make a different finding and impose any administrative or disciplinary actions he determines is appropriate.(2)

2.6.7 Following the receipt of the first panel's recommendation on February 6, 1987, the Chief conducted further investigation. Sgt. Pillon and his counsel were fully apprised of the Chief's investigation, and given full opportunity to consider the information gathered in the investigation of Sgt. Pillon's performance, and to respond to the Chief.(3) The Chief considered all the information available to him, and on March 6, 1987, ordered Sgt. Pillon transferred to the Communication Division.

2.6.8 The conduct of the first panel and the determination of the Chief to transfer Sgt. Pillon did not violate any rights under the Agreement, civil service, or any other law or regulation applicable to him. Sgt. Pillon was given a complete hearing before the panel. Although with a finding of not sustained, that panel recommended Sgt. Pillon's transfer.

(1)The majority strongly disagrees with the minority that the Chief is bound by the results of the DHP. As indicated, the DHP is one of two sets of recommendations made to the Chief. This does not in any way render meaningless a significant and essential portion of the disciplinary procedures negotiated in the Agreement, as asserted by the minority.

(2)The majority disagrees with the minority that the Chief "would normally be constrained to impose no higher punishment than that recommended by the panel." This has no basis in either tradition, Departmental policy, the Agreement, or law. The Chief is free to make his decision regarding the appropriate level of discipline.

(3)The Chief was not required to conduct his own investigation but afforded Sgt. Pillon ample opportunity to bring forward any additional information and to meet and discuss the situation. The majority does not agree that "the officer, called into the Chief's office, is placed in an inherently more coercive atmosphere than that of the DHP." Meeting with Sgt. Pillon indicated to the majority that the Chief was making every effort to allow the officer to discuss the issue, and raise additional evidence for the Chief to consider (which the Chief did). Sgt. Pillon was afforded more procedural safeguards than he was entitled to legally.

The Chief duly considered that recommendation, as well as all information that Pillon chose to submit to the Chief. Based upon that review, the Chief made his decision to transfer Sgt. Pillon.(4)

2.6.9 Sgt. Pillon did not appeal the transfer order. An appeal to the Department Employee Relations Panel was available to him. Such an appeal would not have been futile or meaningless. Because the Appellant failed to exhaust available administrative remedies, for purposes of this decision we need not decide whether a subsequent appeal from a decision of an Employee Relations Panel is to this Commission or to arbitration under the Agreement.

2.7 Transfer to Communication Division.

2.7.1 The Chief transferred Sgt. Pillon to a radio dispatch sergeant position in the Communication Division. The assignment of Sgt. Pillon to the Communication Division did not result in a loss of position, rank, salary, benefits, or otherwise effect the status of his employment with the Department.

2.7.2 Sgt. Pillon reported for work on March 6, 1987, the effective date of the transfer order. He immediately commenced to use accumulated vacation benefits to be absent from work. From March 6, 1987 to May 13, 1987, he worked six days. Those six days were spent in training sessions. On May 15, 1987, Sgt. Pillon placed himself on disability leave. The Seattle Police Pension Board denied, on October 27, 1987, Appellant's disability application. Sgt. Pillon used the balance of vacation days, took additional sick leave, and on December 16, 1987 advised the Communication Division that he was not coming back to work, and would have to be marked AWOL (Absent Without Leave) until he was fired. He further advised Department administration that he was refusing to report to the Communication Division assignment.

2.7.3 Sgt. Pillon was advised by the Department that employment termination would be recommended if he did not report for duty as ordered. He again notified the Department that he would not report for work. Following a recommendation for discharge, a disciplinary hearing panel ("second panel") was formed. Sgt. Pillon sought to have the second panel summon the Chief to testify. In his offer of proof to the second panel, he argued that the Chief's testimony would establish the invalidity

(4)While it is not the role of the Commission to substitute their judgement for the Chief's with regard to administrative transfers within the Department, the majority does not agree with the minority that the transfer to the Communications Division "does nothing to remedy the problem." The evidence and testimony in the Commission's hearing indicate just the opposite.

of the transfer order. The second panel denied the request to have the Chief testify. We do not find that the conduct of the second panel has harmed Sgt. Pillon. He had the opportunity through his own testimony to establish and argue his theory of the case. A disciplinary panel's determination constitutes a recommendation to, and is not binding on the Chief. Sgt. Pillon had further opportunity to meet with the Chief following the second panel's recommendation. Further, Sgt. Pillon had every opportunity to submit his case to this Commission. To the extent that it was error for the second panel to refuse Sgt. Pillon's request for Chief's testimony, the error was harmless and without impact on the proceedings.

2.7.4 Sgt. Pillon's assertion that he had the right to disobey the transfer order for health reasons is not supported by the record in this case. In the public safety sector, government employees are regularly ordered into situations in which personal health and safety are placed in risk. There may be a situation in which the order of a police or fire department may be disregarded, but this case surely does not present facts sufficient to require our definition of standards governing the exception to the "obey now, grieve later" rule. The evidence in this case does not demonstrate actual, or objective fear of, health or safety hazards from the assignment to the Communication Division.

2.8 Validity of Transfer Order.

2.8.1 In Section 2.6, above, we determined that Sgt. Pillon failed to challenge the transfer order. This failure to exhaust available remedies should preclude our review of the transfer order. Our review would then be limited to the specific case of Sgt. Pillon's disregard of the transfer order and unexcused absence. To rule otherwise would jeopardize the fundamental concepts of discipline necessary to the quasi-military organization of the Department. The rule of "obey now, grieve later" is no more important than in such an organization. Department employees may not disregard orders on the basis of a claimed invalidity in the order. Nevertheless, for the purposes of this case, we have considered Sgt. Pillon's evidence in support of his challenge to the validity of the transfer order.

2.8.2 The evidence does not support Sgt. Pillon's position that the assignment to the Communication Division was unfair or otherwise exercised in bad faith by the Chief. The Department had a legitimate basis for investigating "the arrest," and Sgt. Pillon's handling of the arrest. That discipline was not recommended or imposed, does not preclude the Chief from taking action which he deems to be in the best interest of the Department.

2.8.3 Sgt. Pillon's public and private speech activities relating to ACT or the Department were not a substantial or motivating factor in the Chief's determination to transfer or discharge him. Even were we to find that Sgt. Pillon's protected speech constituted a substantial or motivating

factor in the transfer or termination decision, his unauthorized leave or failure to respond to duty (insubordination) constitutes adequate, independent grounds for his discharge. See discussion in Sections 2.6.5 and 2.8.1, above. The discharge decision would have been the same even in the absence of any protected conduct.

2.8.4 Sgt. Pillon was provided with all available information and with opportunity to meet with the Chief at every stage of the proceedings that are the subject of this action. At no point were procedural rights guaranteed by the Agreement or by this Commission denied to him. And, as discussed above, Sgt. Pillon's unexcused absence constitutes adequate, independent grounds for discharge, notwithstanding any procedural defects in the Department's proceedings.

2.9 Good Faith.

The Chief acted in good faith in discharging Sgt. Pillon for his unexcused absence and failure to report to the Communication Division.

III. CONCLUSIONS OF LAW

3.1 Charles E. Pillon is a civil service employee with the rank of police sergeant. The Commission has jurisdiction over the subject matter of and the parties to this action.

3.2 The notice of discharge and appeal to this Commission, have been brought by the respective parties in a timely fashion.

3.3 Pursuant to City Charter, Ordinance (SMC 4.08.100), and Agreement, the tenure of every person holding civil service employment shall be only during good behavior and acceptable performance. Sgt. Pillon may be removed or discharged only for cause. There is no need to consider other employment contract theories or public policy exceptions to the employment-at-will doctrine. Sgt. Pillon may be discharged only for cause. This Commission has jurisdiction to determine the Appellant's discharge was in good faith, for cause, and not otherwise prohibited by law or public policy.

3.4 The decision of the Chief to discharge Sgt. Pillon was not made for political, religious, speech, or other reasons that contravene the Appellant's rights. The decision of the Chief was made in good faith.

3.5 Based on the independent determination of the Commission, there was good cause for the imposition of discipline against Sgt. Pillon.

3.6 Based on the independent determination of the Commission, there was good cause for discharge of Sgt. Pillon.

IV. ORDER

4.1 The order of discharge in this matter is affirmed.

4.2 Any appeal from this decision shall be taken in the manner prescribed by law.

DATED this 20th day of July, 1988.


Maura O'Neill, Chair


Daniel J. Oliver, Commissioner

(see separate opinion)
Arthur Joyner, Commissioner