

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

TOWN OF SUTTON *

-and- *

SUTTON POLICE SEGEANTS AND
PATROLMEN'S ASSOCIATION, LOCAL 159 *

ARB-15-4457

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Joseph S. Fair, Esq. - Representing Town of Sutton

Susan F. Horwitz, Esq. - Representing Sutton Police Sergeants
and Patrolmen's Association, Local
159

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The Town had just cause for the eight-day suspension of Sergeant Kevin Richard dated March 2, 2015. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
April 12, 2016

INTRODUCTION

The Sutton Police Sergeants and Patrolmen's Association, Local 159 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a hearing at the Department's Boston office on November 16, 2015.

The parties filed briefs on February 3, 2016.

THE ISSUE

Was there just cause for the eight-day suspension of Sergeant Kevin Richard dated March 2, 2015? If not what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

ARTICLE 2 – MANAGEMENT RIGHTS (In Part)

2.1 Subject to this Agreement and applicable law, the Town reserves and retains its regular and customary rights in the exercise of its function of management and in the direction and supervision of the Town's business. This includes, but is not limited to the right to: ... suspend, demote, discipline, or discharge for just cause ... establish reasonable rules, regulations, job descriptions, policies and procedures ... except where any such rights are specifically modified or abridged by terms of this Agreement.
...

2.3 By way of example but not limitation, management retains the following rights: ...to suspend, demote, discharge or take other disciplinary action against employees for just cause, to require the cooperation of all employees in its internal security practices. ...

ARTICLE 4 GRIEVANCE (In Part)

4.1 All grievances shall be handled in accordance with the grievance procedure set forth herein. ...

Step 3: If the grievance shall not be resolved as a result of the written decision of the Town Administrator, then the Union or the Town may submit the grievance to arbitration by giving written notice to the other party, within twenty (20) days after receipt of the decision of the Town Administrator, stating its intention to arbitrate ...

4.2 The findings, decision, and award of the arbitrator shall be final and binding on the Town and the Union.

ARTICLE 8 DISCIPLINE (In Part)

8.1 Disciplinary action shall include on the following: Oral Reprimand, Written Reprimand, Suspension, Discharge, or Demotion in Rank. Suspension shall mean suspension from duty for a period as determined by the Chief not to exceed five (5) working days. Suspension imposed by the Town Administrator shall not exceed twenty-five (25) days. Disciplinary action may be taken only for just cause. ...

RELEVANT REGULATIONS**803 CMR 7.00 CRIMINAL JUSTICE INFORMATION SYSTEM (CJIS)****7.01: Purpose and Scope (In Part)**

(2) 803 CMR 7.00 sets forth the roles, responsibilities, and policies that apply to all agencies and individuals either directly accessing the Criminal Justice Information System (CJIS) or using data obtained from CJIS. ...

7.02: Definitions (In Part)

CJIS Authorized User: An employee within a criminal justice agency that is authorized to use CJIS in performance of the employees' official duties. ...

7.09: Prohibited Access to Criminal Justice Information Services (CJIS)

(1) CJIS shall not be accessed for any non-criminal justice purpose. The only non-criminal justice purpose for which a user may access CJIS is training. When using CJIS for training purposes, users shall use the test records provided by DCJIS. Users shall not run test

records or train with their own personal information or with the personal information of another real individual.

(2) CJIS shall only be accessed for authorized criminal justice purposes, including:

- (a) criminal investigations, including motor vehicle and driver's checks;
- (b) criminal justice employment;
- (c) arrests or custodial purposes; and
- (d) research conducted by the CJA.

FACTS

The Town of Sutton (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Kevin Richard (Sergeant Richard) has been a full-time police officer in the Town for seventeen years and was promoted to Sergeant in 2007.

In November 2013, Sergeant Richard began a romantic relationship with Ms. Smith (a pseudonym). Throughout their relationship, Ms. Smith has been engaged in divorce proceedings with her husband Mr. Smith (a pseudonym). The Smiths have two children, a son who is fourteen and a daughter who is nine. At all relevant times, the Smiths' daughter lived with Ms. Smith in Millbury. The Smiths' son initially lived with Ms. Smith, but in April 2014 he went to live with his father in Worcester, while continuing to attend school in Millbury.

Sergeant Richard and Mr. Smith worked together approximately fifteen years ago at the Worcester County Jail. In the intervening years, Mr. Smith has been convicted of federal drug charges, served jail time and was terminated from his employment with the Worcester Police Department.

In December 2013, Sergeant Richard was advised by Ms. Smith that Mr. Smith was actively using and selling cocaine and frequently operating a vehicle under the influence of drugs, sometimes with his children in the car. Ms. Smith also informed Sergeant Richard that Mr. Smith had a brother that lived in Sutton who he frequently visited. As part of a custody arrangement between the Smiths, drop off and pick up of the children would take place in the parking lot of the Millbury Police Department. At one of these exchanges in December 2013, Ms. Smith reported that Mr. Smith was waving a bloody napkin and acting erratically, information that Sergeant Richard took to mean that Mr. Smith was actively using and under the influence of cocaine.

On December 4, 2013, the day after the incident at the Millbury Police Department, Sergeant Richard accessed the Department's Criminal Justice Information System (CJIS) to check the status of Mr. Smith's driver's license, to find out the make, model and plate number of Mr. Smith's vehicle, and to see if Mr. Smith had any outstanding warrants against him. Sergeant Richard learned that Mr. Smith's license was active and that he had no outstanding warrants. Sergeant Richard took no further action at that time and did not report any of the information about Mr. Smith to any member of the Sutton Police Department.

In May 2014, Ms. Smith informed Sergeant Richard that Mr. Smith was several months behind on his court ordered child support payments. Sergeant Richard again ran Mr. Smith through the CJIS and used the system to check the status of Mr. Smith's driver's license, the make, model, and plate number of his vehicle, and to see if there were any outstanding warrants against Mr. Smith.

In August 2014, Mr. Smith complained to Chief Dennis Towle (Chief Towle) that Sergeant Richard had been in contact with the Smith children in violation of a probate court order issued to Ms. Smith and Mr. Smith. Under the order, which Sergeant Richard was not a party to, Mr. and Ms. Smith were prohibited from allowing their significant others to be in the presence of either Smith child. Despite his knowledge of the probate court order, Sergeant Richard was in the presence of one or more of the Smith children on at least two occasions in violation of the order. Upon receipt of this complaint, Chief Towle initiated a disciplinary investigation. On September 15, 2014, Sergeant Richard, the Union and the Town reached a resolution of the disciplinary matter under which Sergeant Richard accepted a three-day suspension for conduct unbecoming an officer.

In October 2014, Mr. Smith again contacted Chief Towle to file a complaint against Sergeant Richard. Mr. Smith advised the Chief that someone had sent an anonymous email to his son's school advising the Millbury Public Schools that Mr. Smith's son was not living in Millbury, but was instead living in Worcester with his father while attending the Millbury schools. Mr. Smith stated that Sergeant Richard sent the email and was targeting him in retaliation for his prior complaint about the violation of the probate court order. Mr. Smith stated that he was fearful of driving in Sutton due to the actions of Sergeant Richard.

In response to the complaint, Chief Towle met with Sergeant Richard. In that meeting, Sergeant Richard admitted sending the anonymous email as a "Concerned Citizen". Chief Towle asked Sergeant Richard if he had ever encountered or seen Mr. Smith in Sutton. Sergeant Richard answered that he had

not encountered Mr. Smith in Sutton, but that he had run his name through CJIS a few months back. In light of this information, Chief Towle requested an audit report from the Department of Criminal Justice Information Services (DCJIS) to determine the number and types of CJIS searches that had been performed by Sutton Police Officers between September 1, 2013 and November 18, 2014 regarding Mr. Smith.

The DCJIS reported confirmed that Sergeant Richard had run Mr. Smith through the CJIS on two occasions, once on December 4, 2013, and a second time on May 27, 2014. The report indicated that Sergeant Richard searched whether Mr. Smith had an active license, the make, model and plate number of his vehicle, and whether Mr. Smith had any outstanding warrants. No other Sutton police officer had initiated a check on Mr. Smith. In light of this report, Chief Towle ordered Sergeant Richard to submit in writing the reasons that he had searched Mr. Smith in the CJIS. Sergeant Richard responded in an email by stating that:

1. Smith is a known criminal.
2. Smith is using/selling illegal drugs and frequently operates his vehicle "oui drugs".
3. Smith has family ties to the Town of Sutton and frequently visits the area.
4. Smith is behind on Court Ordered Child Support which eventually results in license suspension.

On February 26, 2015, a disciplinary hearing was held by the Town Administrator who, after hearing all of the evidence, found that Sergeant Richard's actions constituted an improper use of the CJIS and a serious misuse of his position with the Town of Sutton in violation of 803 CMR 7.09 and Department policy 1.21. Sergeant Richard was suspended for eight days. The Union filed a

grievance over the suspension that was denied at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

The CJIS checks performed by Sergeant Richard were for personal reasons and not for a legitimate police purpose.

Under Department Policy and Procedure 1.21, the Department's computers and communication systems are to be used for department business only. All Department computer transactions must be conducted in accordance with NCIC and CJIS guidelines, and all users must be certified in such use. As set forth in DCJIS regulation, 803 CMR 7.09(1), CJIS shall not be accessed for any non-criminal justice purpose. Further, the regulation states that CJIS shall only be used for authorized criminal justice purposes including:

- (a) criminal investigations, including motor vehicle and driver's checks;
- (b) criminal justice employment;
- (c) arrests or custodial purposes; and
- (d) research conducted by the CJA.

There is no dispute that Sergeant Richard accessed the Department's CJIS system on December 4, 2013 and May 27, 2014 to perform checks on Mr. Smith. Although Sergeant Richard testified that he only ran checks on those dates to determine if Mr. Smith's driver's license was suspended, the audit report that was provided to the Department by DCJIS clearly reflects that this was not the only type of check that Sergeant Richard had performed. Sergeant Richard also ran a search for outstanding warrants against Mr. Smith and the make, model and plate number of his vehicle.

The central issue in this case is whether Sergeant Richard ran the checks at issue for a legitimate police purpose, or whether he ran them for his own personal reasons. When examined as a whole, the steps Sergeant Richard did and did not take in this matter are wholly inconsistent with what one would expect to see from an experienced police officer whose primary focus was a legitimate police objective and instead, they paint a portrait of an individual who is looking for information for his own personal reasons.

In defending his actions, Sergeant Richard pointed to several pieces of information regarding Mr. Smith. He asserted that Mr. Smith was known to be a criminal and that he had been provided information by Ms. Smith about Mr. Smith's alleged persistent sale and use of drugs and frequent operation of his vehicle under the influence of drugs, sometimes with his children present. Sergeant Richard also relied on the fact that Mr. Smith had a brother who lived in Sutton and that Mr. Smith was in arrears on his child support payments. Sergeant Richard professed to both the Arbitrator and the Chief that he did not run the checks for personal reasons and that the only reason he would run Mr. Smith through the system was for a police purpose.

Sergeant Richard's explanation that he ran the checks on the days in question, because it would give him a reason to stop Mr. Smith if he encountered him in Sutton in the future, rings hollow. While the checks certainly would reflect whether or not Mr. Smith has an active license at the time that the checks were run, they would not reflect whether Mr. Smith's license status had changed

between the time a given check was run and whenever Sergeant Richard encountered him later.

The fact that Sergeant Richard concedes that the checks were not in any way related to a traffic stop, ongoing investigation or other event that transpired within the Town of Sutton or during the course of Sergeant Richard's duty also points to a personal motivation for the checks. At no time, did Sergeant Richard encounter Mr. Smith in Sutton. Also Sergeant Richard is not a detective, so he would not have been conducting an investigation into Mr. Smith, nor should he have been given, his relationship with Ms. Smith. Although Sergeant Richard testified that he had in the past performed CJIS checks on individuals without having encountered them in Sutton, the unspecified instances that he cited were all limited to 2003/2004 and 2007, when he was assigned to the Blackstone Valley Drug Task Force. Sergeant Richard did not identify a single instance when he ran a CJIS check on someone whom he had not encountered in Sutton during the eight years that followed his exit from the task force in 2007. The only occasions where he did so were the two occasions involving Mr. Smith that are at issue here.

Sergeant Richard's explanation for his actions and inactions are completely inconsistent and fly in the face of what is expected of an officer truly performing a legitimate criminal justice function. If Sergeant Richard had credible information that a convicted felon was actively selling and using drugs, frequently operating his vehicle under the influence of drugs, sometimes with children in the car, and has family living in Sutton that he periodically visits, he would have passed that information along to other members of the Department. Instead, Sergeant Richard

kept the information to himself, which demonstrated that the real reason he ran the checks was personal in nature with no legitimate criminal justice purpose at its root. Additionally, Sergeant Richard made no attempt to file a report with the Department of Children and Families (DCF) pursuant to G.L. c. 119, Section 51A, even though as a police officer he is mandated by law to report suspected child abuse to that agency.

The foregoing clearly demonstrates that Sergeant Richard's behavior, actions and inactions in this matter do not correspond with what an officer would have actually done if his objectives were related to a legitimate police function. Instead, they reflect the actions of an individual who was romantically involved with a woman who was in the middle of an acrimonious divorce and custody proceeding and who was trying to uncover information that might prove useful to the woman in those proceedings.

The eight-day suspension was justified given the serious nature of the misconduct.

In suspending Sergeant Richard for eight days, the Town Administrator considered the seriousness of the offense along with the fact that there were two separate instances of improper access of the CJIS and misuse of position involved. Based on this, the Town Administrator suspended Sergeant Richard for four days for each offense, totaling eight days. There is ample evidence in the record to support the Town Administrator's decision in this regard.

The Department's policy on the use of the Department's computer terminals and the DCJIS regulations on accessing CJIS make it very clear that officers are prohibited from accessing the system for anything other than official police

business. In addition, Sergeant Richard's actions constituted a misuse of his position with the Town. The State Ethics Commission has consistently held that Section 23(b)(2) prohibits public employees from using official resources for private purposes. Sergeant Richard's actions were not minor transgressions. Sergeant Richard holds a position that entails a high degree of public trust, and his misconduct constitutes a serious violation of that public trust. Violations such as this undermine the public's perception of the integrity and effectiveness of the Town's Police Department. Finally, Sergeant Richard's actions were months apart and demonstrate that this was not a momentary lapse in reason but instead were conscious choices to use his position for personal purposes. Based on the weight of all of the record evidence, the Town has amply demonstrated that just cause existed for the eight-day suspension that was issued in this matter and asks that the Arbitrator deny the Union's grievance.

THE UNION

The collective bargaining agreement between the Town and the Union provides that the Town must have just cause to suspend or otherwise discipline a bargaining unit employee. Here, there was not just cause for any discipline of Sergeant Richard.

On the two occasions that Sergeant Richard conducted the CJIS license checks on Mr. Smith, he did so for criminal justice purposes. In accordance with the Town's policies and procedures, Sergeant Richard had completed CJIS training and passed the online certification examination. Sergeant Richard has a user account and password, and on both instances that he did a CJIS check on

Mr. Smith, he used the user account and password assigned to him by the department. Sergeant Richard in no way hid the fact that he was conducting these CJIS checks on Mr. Smith.

Sergeant Richard testified that the reason he conducted the CJIS license checks on Mr. Smith was because he knew Mr. Smith to be a known criminal who had in fact been convicted of drug crimes and served time in prison. Therefore when Ms. Smith told Sergeant Richard that Mr. Smith was using and selling cocaine again, that he was driving his vehicle under the influence of cocaine with children in the vehicle, and that Mr. Smith visited his brother, who lived in Sutton, Sergeant Richard felt duty bound to follow up on this information.

The CJIS is in place to enhance public safety, improve interagency communications, promote officer safety and support quality justice and law enforcement decision-making. This is exactly what Sergeant Richard was doing when he conducted the CJIS checks on Mr. Smith.

Although the Town has claimed that Sergeant Richard conducted the CJIS checks in violation of 803 CMR 7.09, his actions were in no way a violation of Section 7.09. Sergeant Richard conducted the CJIS checks for a criminal justice purpose to inquire whether an established criminal, who he knew was continuing to engage in criminal conduct and who was driving in Sutton, had an active driver's license.

The Chief and the Town have chosen to conclude that, because Sergeant Richard became aware of the allegations of criminal conduct from his girlfriend, his CJIS checks are necessarily personal rather than for criminal justice purposes.

However, since the information provided by Ms. Smith clearly involved matters of serious criminal conduct, there is no basis for claiming that the CJIS access was not for a criminal justice purpose, and for disciplining Sergeant Richard for his accessing the CJIS system to inquire about Mr. Smith's driver's license in December 2013 and May 2014.

Finally, it is improper for the Town to impose an additional eight-day suspension against Sergeant Richard, because Sergeant Richard had already accepted a three-day suspension in September 2014, which was after the CJIS checks in December 2013 and May 2014. As Sergeant Richard testified, the reason he accepted the three-day suspension in September 2014 was to get these matters behind him. It is wrong for the Town to claim or imply that, at the time Sergeant Richard conducted the CJIS license checks, he was on notice that the Chief was concerned that his relationship with Ms. Smith was impacting his responsibilities as a police officer. The CJIS checks had been conducted before the issue was raised concerning the probate order which led to the three-day suspension. Therefore, it is wrong to punish Sergeant Richard for prior conduct after he accepted the three-day suspension concerning the probate order.

For all the above reasons, the Arbitrator should find that there was no just cause for the eight-day suspension of Sergeant Richard. Sergeant Richard should be made whole for all losses, and his record should be cleared of all documents concerning this dispute.

OPINION

The issue before me is: Was there just cause for the eight-day suspension of Sergeant Kevin Richard dated March 2, 2015? If not what shall be the remedy?

For the reasons stated below, the Town has just cause for the eight-day suspension of Sergeant Richard and the grievance is denied.

It is undisputed that Sergeant Richard used the CJIS on two occasions to run checks on Mr. Smith, his girlfriend's estranged husband. The only issue to be decided is whether Sergeant Richard did so for a legitimate criminal justice purpose as argued by the Union, or for his own personal reasons, unrelated to his role as a sergeant in the Sutton Police Department.

When questioned by the Chief after Mr. Smith's second complaint, Sergeant Richard conceded that at no time did he ever witness Mr. Smith in Sutton. Sergeant Richard stated that his first CJIS check on Mr. Smith was in response to Ms. Smith sharing information about Mr. Smith's actions during a child custody swap. The second CJIS check that Sergeant Richard ran was in response to information he obtained from Ms. Smith that Mr. Smith was several months behind on his child support. Sergeant Richard testified that in each instance, he only ran the check to confirm that Mr. Smith held a valid driver's license. This claim, however, is unsupported by the internal audit done by DCJIS, which shows that on each occasion, not only did Sergeant Richard check for a valid driver's license, but also inquired about the make, model and plate number of Mr. Smith's car, and any outstanding warrants against Mr. Smith. Sergeant Richard's denial of the extent of the searches is not credible.

Sergeant Richard's actions or lack thereof upon receiving the information about Mr. Smith's alleged transgressions also seriously call into question his claim of a legitimate criminal justice purpose for his searches. If Sergeant Richard was truly as concerned about Mr. Smith's actions as he claims, it is inconceivable that the only action he would take, after receiving information about the possible operation of a motor vehicle under the influence of drugs with children in the car, is to run a simple driver's license check. Common sense dictates that the information be shared with other members of the Police Department, and that a report be filed with DCF to prevent any further potential harmful conduct towards the Smith children. Instead, Sergeant Richard told no one about the information he received. He did not alert any other members of his department to be on the lookout for Mr. Smith in Sutton and made no effort to ensure that the Smith children were protected in the future from Mr. Smith's alleged dangerous behavior. These are not the actions of a police officer using the CJIS for a legitimate criminal justice purpose, rather these are the actions of a police officer using resources at his disposal for personal reasons in violation of both Town policy and state regulations. The Town possessed the requisite just cause to suspend Sergeant Richard for his improper use of the CJIS on the two occasions in question.

Length of Suspension

The Union also challenges the length of the suspension claiming that there is no basis for an eight-day suspension. I disagree. Sergeant Richard previously received a three-day suspension for failing to adhere to a probate court order that

he not be in contact with the Smith children. The Union and the Town came to an agreement on the length of this suspension. This agreement, however, does not absolve Sergeant Richard for his improper use of the CJIS. It is irrelevant that the searches in question occurred prior to the agreement on the three-day suspension. The information about Sergeant Richard's improper use of the CJIS did not come to light until many months later during Mr. Smith's second complaint against Sergeant Richard. The agreement reached with the Town concerned Sergeant Richard's role in the probate court order violation. The fact that Mr. Smith was the individual searched during the improper use of the CJIS does not make the Town's discipline any less legitimate.

The testimony at the hearing was that after considering Sergeant Richard's disciplinary history of a three-day suspension, the Town decided to suspend Sergeant Richard for four days for each improper use of CJIS. The Town's decision to find each improper use of CJIS to be a separate and distinct violation is within its discretion. The violations were months apart, and the Town's conclusion that they showed a conscious effort by Sergeant Richard to use the CJIS for personal gain, as opposed to a momentary lapse of judgement, is supported by the record.

Having found just cause for discipline, I now find that the Town's decision to suspend Sergeant Richard for four days for each improper use of the CJIS, for a total of an eight-day suspension, to also be for just cause. As such the grievance is denied.

AWARD

The Town had just cause for the eight-day suspension of Sergeant Kevin Richard dated March 2, 2015. The grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
April 12, 2016