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Darryl J. Lee, Editor — Kirton McConkie

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EMPLOYEE MISCONDUCT

How a police officer hanged himself with a bracelet

by Brinton M. Wilkins

Police officers have a tough job. They have to deal with people at their worst, and they always need to be wary of potential threats and dangers. Because of this stress and given the unique authority they possess, it's understandable that some officers may occasionally cross the line. But just because something is understandable doesn't make it right. A municipal police officer from Orem learned that lesson the hard way, and it cost him his job. Read on to see how even municipal laws can play an important role in making sure employees toe the line.

Excessive force

By October 29, 2009, the Orem City Police Department (OCPD) had terminated Dennis Nelson's employment. He had served as a police officer in the OCPD for approximately 14 years. His termination stemmed from events that occurred on September 18, 2009.

On that day, Nelson had been asked to transport an arrestee—referred to as Mr. Fox—to jail. After arriving at the jail, Nelson removed Fox's handcuffs and began a preliminary search, which two video cameras recorded.

Nelson asked Fox to remove a string bracelet he was wearing. Fox removed the bracelet but dropped it on the ground. Nelson asked him to pick it up, but he refused, saying "It's all yours" while clapping his hands in front of his body. Nelson then grabbed him and pushed him toward a nearby door. Fox grabbed at the door frame, at which point Nelson pushed him into it.

Nelson then forced Fox onto his stomach on the ground. He first knelt on Fox's back and then straddled him and twisted his arm behind his back and pulled it up to the back of his head.

Fox sustained a cut above his right eye. When he asked for medical help, Nelson told him to "shut up" before calling for medical assistance. With Fox still on his stomach, Nelson began an expletive-filled discussion with him.

During the conversation, Fox objected to being treated "like a rat," after which Nelson twisted his arm more severely. Nelson later admitted that his actions at this point were intended to inflict pain and be a punishment. At about this time, he knelt on Fox's back, placing most, if not all, of his weight on his right knee. Nelson weighed about 280 pounds; Fox weighed about 155. Fox grunted and curled up in apparent pain.

Throughout the incident, Nelson continued to use foul language, calling Fox a "piece of s____" and telling him to "shut [his] f_____ mouth." In total, he kept Fox on the ground for nearly four minutes. At no time did Fox fight or resist.

Near the end of the encounter, Fox was breathing heavily and didn't respond when Nelson asked if he was having a hard time breathing. At that point, Nelson moved him into a sitting position, keeping both of his arms behind his back in a control hold until someone else arrived with handcuffs.

Department reviews incident

Lieutenant Giles of the OCPD reviewed the incident. After meeting with Nelson, speaking with Fox, and viewing the video, Giles determined that Nelson's use of force violated the OCPD's policies and that he had used force as an inappropriate punishment.

Giles reported to Captain Connor, who conducted his own review. Connor agreed with Giles and issued a notice of intent to terminate Nelson's employment. Nelson appealed that decision to Mike Larsen, Orem's director of public safety. Larsen met with Nelson and his lawyer, but ultimately upheld the termination, issuing his decision on October 29, 2009.

Not ready to give in, Nelson appealed that decision to the Orem City Employee Appeals Board, at which time he argued that the OCPD's decision to terminate him was inconsistent with its treatment of other officers. Specifically, he pointed to its treatment of Officer

Kirton McConkie is a member of the *Employers Counsel Network*



Scott Healy. In July 2000, the department had merely suspended Healy for two weeks without pay after he pushed two juveniles into walls, on separate occasions, and threatened to kill one of them.

Despite Nelson's arguments, the board upheld his termination. According to the board, there were sufficient facts to show that he had used excessive force justifying termination. Furthermore, the board found his termination was consistent with the OCPD's prior actions. The appeals board found that there was no inconsistent treatment because, unlike Nelson, Healy hadn't inflicted any pain or injury, had quickly recognized his mistakes and de-escalated the situations, had reacted in an angry response to rude juveniles, and had no intent to inflict pain or punishment.

Nelson again appealed, this time to the Utah Court of Appeals, which upheld the board's decision. In a last attempt to overturn his termination, he appealed that decision to the Utah Supreme Court.

Neither arbitrary nor capricious

Under Utah law, municipal employees may be able to appeal termination decisions to a final municipal appeals board. Municipal law determines what the complaining employee has to prove to win his appeal.

Under Orem's municipal code, to succeed on appeal, Nelson had to show that the Orem appeals board acted arbitrarily, capriciously, or in an otherwise illegal

manner in upholding the OCPD's actions. Nelson argued to the Utah Supreme Court that the board's decision was arbitrary and capricious because it permitted the OCPD to engage in inconsistent disciplinary actions. The Utah Supreme Court disagreed.

Rather, the court noted that there were sufficient differences justifying the OCPD's different treatment of Nelson and Healy. Thus, the department's actions were reasonable and justifiable, and the board hadn't acted arbitrarily or capriciously in upholding its decision. In the end, the Utah Supreme Court upheld the board's decision that Nelson's admitted desire to inflict pain and punishment and his failure to de-escalate the situation, along with the nature of the triggering event, justified his termination. *Nelson v. City of Orem*, 2013 UT 53.

Lessons learned

Often, employment issues seem to center on federal laws such as Title VII of the Civil Rights Act of 1964 or the Family and Medical Leave Act (FMLA). But even municipal laws can play a role in the employment landscape. The Utah Supreme Court's decision hinged on its interpretation of the Orem city code provision requiring Nelson to prove the appeals board acted arbitrarily or capriciously. Although this case involved a municipal employee with special appeal rights not available to most employees, the decision still stands as a general warning that employers need to be aware of all applicable laws. ♣