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IN THE COURT OF APPEALS OF IOWA

DENNIS R. VIET,

Plaintiff-Appellant,

vs.

CIVIL SERVICE COMMISSION OF THE CITY OF MASON CITY, IOWA,

Defendant-Appellee.

Filed January 30, 1981

0-372
2-64893

Appeal Cerro Gordo District Court - Ralph McCartney, Judge.

Plaintiff police officer appeals from the district court order affirming defendant commission's imposition of ten day disciplinary suspension. - AFFIRMED.

Neil A. Barrick, of Conley, Conley & Crawford, Des Moines, for plaintiff-appellant.

B. Michael Dunn, Mason City, for defendant- appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff, Dennis Viet, appeals from the district court order affirming defendant commission's imposition of ten day disciplinary suspension. We affirm.

Our review of this matter is de novo. §400.27, The Code 1979; Iowa R. App. P. 4.

Viet, a police officer, was off-duty one night and had consumed three beers in various bars when he observed a person he knew to be a juvenile in a bar in an apparently intoxicated condition. He attempted to place the juvenile under arrest, without seeking assistance from other police officers who could have been found in the police station a block away. His action resulted in a altercation with the juvenile and his three companions which ended only when other police officers arrived.

Viet's superior officer gave him a ten day suspension without pay for misconduct which was affirmed by the mayor, defendant commission, and the district court. The charges specified that plaintiff had, while off-duty, attempted to perform official duties after consuming alcoholic beverages without requesting the assistance of nearby on-duty officers.

The trial court did not find that plaintiff was intoxicated but held that under the circumstances he should have sought the assistance of on-duty officers to make the arrest since no emergency existed.

Viet alleges the evidence presented by the city was not sufficient to prove the charges against him. The commission's burden in this matter was to provide competent evidence to show their action was not arbitrary, but based on a finding of misconduct as charged. §400.18, The Code 1979; Anderson v. Civil Service Commission, 277 Iowa 1164, 1167, 290 N.W. 493, (1940).

Viet asserts his actions did not rise to the level of misconduct, but were at most mere errors of judgment. We find the evidence supports the prior rulings. Viet was charged with misconduct in the following specifications: 1) while off-duty, attempted to perform official duties after consuming alcoholic beverages; 2) while off-duty, attempted to perform official duties upon a premises serving alcoholic beverages without requesting nearby assistance of on-duty officers.

Due process requires that Viet was sufficiently aware his actions constituted a violation of required conduct. The Police Department Rules and Regulations include the following:

> "Intoxicants-On-Duty. No officer in uniform shall drink any alcoholic beverage while on duty. No officer in plain clothes shall drink any alcoholic beverage while on duty, except when necessary in the performance of his duty."
>
> "Intoxicants-Reporting For Duty. No officer who has the odor of, or is under the influence of, alcoholic beverages shall report for duty under any circumstances unless he has first given this information to, and has been ordered to report by, a superior officer."
>
> "Intoxicants-In Uniform. No officer off duty and in uniform, or in any part of uniform dress, shall drink any alcoholic beverage in public view or in any place accessible to the public."

Under General Rules of Procedure and Conduct appears the following:

> "Don't drink intoxicating liquor on duty. Not even a glass of beer, and don't drink before you report for duty. A small amount of liquor consumed several hours before coming on duty can be detected on your breath. The natural result is a complaint by a citizen that the officer is drunk."

Police officers, of necessity, must maintain an image of integrity, good judgment and dependability. Millsap v. Cedar Rapids Civil Service Commission, 249 N.W. 2d 679, 686 (Iowa 1977). The above rules evidence a deep concern about public perception and the damaging effect of any association with intoxicating beverages upon the image presented. In addition to preserving that image, the rules seek to prevent official police action from an officer whose judgment might be impaired from intoxicants unless such action is necessary and ordered by a superior. While Viet did not technically violate the specific rules, the combination of his off-duty imbibing and self-initiated assumption of official action does not comply with conduct becoming an officer. Furthermore, no evidence of an emergency situation was offered to justify Viet's voluntary efforts to arrest the juvenile. Fellow officers testified their reaction in a situation like this would have been to seek on-duty assistance. The altercation that did ensue might well have resulted from the juvenile's negative response to an off-duty policeman who is drinking and asserting authority. That cause and effect is precisely what the departmental rules are designed to prevent.

While we appreciate Viet's dedication to law enforcement and realize this may be a bitter lesson, we find the commission's decision was sufficiently supported by the evidence.

AFFIRMED.

All Judges concur, except Donielson, J. and Johnson, JJ., who dissent.

DONIELSON, J. (dissenting)

I dissent from the majority's conclusion that the record presents evidence sufficient to support a finding of misconduct under section 400.18, The Code 1979. I believe the majority has insufficiently presented the facts and incorrectly cited the applicable law. The trial judge found that suspension was warranted for misconduct and conduct unbecoming an officer. In my view, neither the facts nor the departmental regulations support this ultimate conclusion.

Officer Viet attended educational classes in the evening of the night in question. He was neither on duty nor scheduled for duty that evening. After his classes, he made the rounds of several liquor-serving establishments between the hours of 11:00 and 1:30 a.m. He indicated that he had two bottles of beer and one glass of beer between the time his classes ended and the fracas occurred, which was sometime after 1:00 a.m. The last place Officer Viet stopped that night was the Stagecoach Lounge, where he observed a juvenile with whom he was acquainted and whom he believed to be on probation. When Viet approached the juvenile, he was sitting with his head on the table and had to be aroused. Viet then identified himself as a police officer and asked the juvenile to accompany him, whereupon the juvenile, who was staggering in the opposite direction, became obstinate and obstreperous. Viet led the juvenile to the door and arrested him for public intoxication. Since the police station was only a half-block away, Viet intended to take the juvenile to the station and to contact his parents concerning his intoxication. However, when Viet attempted to lead the juvenile away, a male and two females in the company of the juvenile tried physically to resist his removal from the bar. A fight then ensued, during which Viet was assaulted, sustaining injuries to his back and groin and causing him to be hospitalized for four days.

I fail to see how it can be established, on the basis of these facts, that Officer Viet was guilty of either misconduct or conduct unbecoming an officer. Police department regulations provide that being off-duty does not relieve an officer from responsibility to take police action where appropriate; in dealing with the situation presented by the intoxicated juvenile, Officer Viet was merely attempting to comply with this regulation. Several officers testified that faced with this situation, they would have called an on-duty officer to attend to the juvenile, and perhaps this may have been the more appropriate procedure. However, at the time Viet first approached the juvenile, there was no indication of serious trouble or disturbance; in fact, the

record indicates that much of the altercation came about after the on-duty officer arrived at the scene. Furthermore, at least one officer testified that he would have proceeded under the circumstances exactly as Viet did. That this may not have been the most appropriate response to the situation does not mean that Officer Viet's actions amounted to misconduct. On the contrary, the fact that police officers disagreed as to how they would have handled the situation vividly illustrates that this case involves a question of judgment and not a question of misconduct. Nor in my estimation does this amount to conduct unbecoming an officer. It is well established that the primary responsibility of a police officer is to enforce the law and that in so doing, the officer must present an image of personal integrity and respect for the law in order to have the respect and cooperation of the public. Millsap v. Cedar Rapids Civil Service Commission, 249 N.W.2d 679, 686 (Iowa 1977) (quoting 16 McQuillin, Municipal Corporations § 45.16, at 621-22 (3rd ed. 1973) (emphasis added)). I fail to see that Officer Viet did anything inconsistent with an undivided allegiance to his public duty. For me, the term "misconduct" connotes intentional wrongdoing and the phrase "conduct unbecoming an officer" reflects this connotation. I find neither present in this case.

Nor do I find that Viet can be said to have broken any of the regulations of the police department. The majority refers to three such regulations regarding intoxicants on duty, intoxicants reporting for duty, and intoxicants in uniform, none of which are applicable to the instant case since Viet was neither on duty, reporting for duty, nor in uniform. Furthermore, I question the majority's emphasis on Viet's "off-duty imbibing." There is no evidence to refute his testimony that he had three beers; as a matter of fact, all the evidence indicates that he did not appear to be under the influence of alcohol. A blood test taken shortly after the incident and at his request revealed that Viet's blood alcohol level was less than one-third the amount necessary to justify an arrest for operating a motor vehicle while intoxicated. There was not the slightest bit of evidence to suggest that Viet acted obnoxiously or offensively or that he was unfit to report for his next tour of duty.

In short, Viet's self-initiated action is totally in accord with the responsibilities of an officer as defined by department regulations and to conclude, as the majority does, that this was misconduct or conduct unbecoming an officer is neither reasonable nor fair. I would instead characterize the instant case as one involving a judgment call and am extremely hesitant to impose a permanent and serious blemish on Viet's record

solely because he may have made an honest error in judgment. To do so would miscontrue the law in this area and I therefore believe the case should be reversed.

Johnson, J. joins in this dissent.