The Almanac
MENLO PARK • ATHERTON • PORTOLA VALLEY • WOODSIDE
Online

The unfiring of a Menlo Park police officer

How police officer Jeffrey Vasquez got his job back, and why shrouding binding arbitration in secrecy serves neither the public nor law enforcement

by Sandy Brundage
Almanac Staff

June 4, 2013

Questions linger months after the Almanac **broke the story** about the arrest, firing and reinstatement of veteran Menlo Park police officer Jeffrey Vasquez: How, exactly, does a police officer keep his job after being caught naked with a prostitute in a Sunnyvale motel room? How does he not only get reinstated after his firing, but awarded $188,000 in back pay, despite reportedly admitting that wasn't the first time he'd solicited a hooker for sex?

A commentary written by the police union lawyer who represented Officer Vasquez throughout the binding arbitration that led to his reinstatement finally gives the public some possible answers.

Attorney Sean D. Howell, with Mastagni, Holstedt, Amick, Miller & Johnson, didn't detail the 2011 motel incident in **his commentary**, but said the Menlo Park police department violated his client's rights during the internal affairs investigation and the subsequent disciplinary hearing, called a Skelly hearing.

"They shouldn't have fired him in the first place. I pointed out the violations at the Skelly hearing; I told them up front," Mr. Howell told the Almanac after his article was published by the Peace Officers Research Association of California.

Former police commander Lacey Burt, now retired, supervised the internal affairs investigation and said the police department's attorney confirmed it was handled properly. "We take these investigations very seriously, and take great strides to make sure that we do not violate anyone's rights," she said. "We stand by the case."

The law prohibits the city from commenting on personnel discipline.

Mr. Howell said his commentary was a response to media coverage of the Vasquez matter triggered by an overheard conversation between City Manager Alex McIntyre and his predecessor, Glen Rojas, at a Menlo Park bar.

The attorney asserted that arbitrator James Margolin found several errors in how the Menlo Park police department conducted its review of Officer Vasquez, including:

* That then-chief Bryan Roberts and Cmdr. Burt improperly participated in a Skelly hearing after actively directing the investigation.

* That the lead investigator secretly recorded two witness interviews and disclosed confidential personnel information to one witness.

Also, according to Mr. Howell, the arbitrator decided that Officer Vasquez committed no crime.

"He didn't get off on a technicality. He didn't commit a crime. On the merits itself, he was exonerated," said Mr.

Howell.

Both the Sunnyvale police department and Santa Clara County District Attorney's Office thought the officer had broken the law, and charged him with misdemeanor solicitation. Officer Vasquez pleaded not guilty. The case was later dismissed in court after the prosecution's time **ran out** while the investigating officer was on emergency family leave.

Mr. Howell's commentary alleges that the Sunnyvale police officer investigating the prostitution case testified during the arbitration that he wasn't planning to complete a crime report, but that his supervisor ordered him to do so nearly two weeks after the bust at the request of Chief Roberts.

Police reports show, however, that the investigating officer conducted follow-up interviews with the prostitute within a week of the incident. Chief Roberts did contact the department at some point, but the investigation was ongoing regardless, Sunnyvale police told the Almanac.

The city of Menlo Park eventually fired Officer Vasquez, who then appealed through binding arbitration.

The arbitrator issued his ruling on Aug. 30, 2012. According to Mr. Howell, he decided the Menlo Park police department violated Officer Vasquez's rights and failed to prove the misconduct by a "clear and convincing" standard, as well as by a "preponderance of evidence." He ordered the officer reinstated with back pay.

That decision is final under the terms of binding arbitration.

Mr. Margolin declined to comment on the case, on whether the commentary accurately reflected his findings, and on his background as an arbitrator.

The attorney who represented Menlo Park -- Cynthia O'Neill of Liebert Cassidy Whitmore -- also declined to comment.

The hearing process

A Skelly hearing takes place once a supervisor notifies a public employee of the intended discipline and the justification. Not a formal hearing with witnesses or cross examinations, according to labor attorneys, it's a chance for the employee to respond with mitigating information or explanations.

Afterward, should the discipline be levied, the employee may appeal. In Menlo Park, where the police union's contract allows binding arbitration, the case goes before a third party. The union and city first try to agree on an arbitrator. If they can't, the state supplies a list of five names, and both sides take turns eliminating names until one remains; that person then serves as arbitrator. Most arbitrators are attorneys with years of experience working on both the employer and the employee side.

"It's the first opportunity the police officer has to present evidence, call witnesses, and cross-examine the city's witnesses," Mr. Howell said. "The city has the burden, on a preponderance standard, to show just cause for the discipline that was imposed."

To avoid due process violations, Mr. Howell said, the internal affairs investigator should present a report after conducting an autonomous fact-finding investigation instead of taking direction about how to proceed from the chief or his administrators, who eventually conduct the Skelly hearing.

But labor attorneys with decades of experience representing public agencies during arbitration questioned that interpretation of case law, saying that as long as the supervising officer maintains an open mind, that person may be involved with both the investigation and the Skelly hearing.

"In smaller departments, you can't go out and necessarily get a neutral person. It's not practical, and not legally required," said Arthur Hartinger, an attorney with Meyers & Nave who specializes in representing public employers. "I do not think it is improper for a chief to have some oversight in an internal affairs investigation, where the internal affairs officer at some juncture says, 'Am I done? What else should I do?'"

According to Mr. Hartinger, based only on the information in Mr. Howell's article, the arbitrator may have taken an overly broad view of the Skelly process, rather than assessing whether the hearing met the requirement of having a reasonably disinterested party evaluate the situation and the officer's response.

"There are a lot of good arbitrators and there are a lot of weak arbitrators. The arbitrator can be legally and factually wrong and it's still binding," Mr. Hartinger said.

No data

At least 16 jurisdictions in California rely on binding arbitration in police disciplinary cases. The lack of a centralized database of arbitration decisions, or even statistics on how many cases are upheld, turns evaluating the effectiveness of the system -- or individual arbitrators -- into a monumental challenge.

The Almanac obtained 17 redacted decisions in police misconduct cases involving San Jose, Stockton, Richmond, Alameda, Sierra Madre, Oroville, Merced County and Oakland. Out of 17 cases, arbitrators reinstated the officers nine times, and reduced a suspension once -- a reversal rate of about 59 percent. They upheld terminations in the remaining seven cases.

"That's the kind of data that we would love to have," Mr. Hartinger acknowledged. "We've been trying to get at that for years."

The state doesn't require arbitrators to publish their decisions, and due to confidentiality laws, both parties must give permission should an arbitrator choose to release a case ruling.

"It's very non-transparent," Mr. Hartinger said. "If you call up and say, 'Can I get your resume and a sample decision,' and you're with city management, you get a decision that supported management. There's always been a concern that they're cherry-picking their decisions."

California could require arbitrators to list their last 10 decisions, similar to a rule used in federal cases, he said. Another alternative is dispensing with binding arbitration, typically negotiated as part of union contracts, in favor of a civilian review board. In the wake of the Vasquez case, Menlo Park council members told the Almanac they were considering the value of binding arbitration as they entered into negotiations with the police union this spring.

Labor attorney Monna Radulovich of Wiley Price & Radulovich noted that the process, while not perfect, does offer advantages to public agencies -- arbitration tends to be faster and less expensive than pursuing a case through the courts, and the arbitrators usually know employment law, unlike judges who may handle mostly criminal or personal injury cases.

"The person who's deciding the case is a human being, the same as with a judge or a jury. So it's not foolproof," Ms. Radulovich said.

Attorneys compare experiences with specific arbitrators, according to Ms. Radulovich, so the process isn't entirely blind. "The attorneys will research the backgrounds of the arbitrators on the list and try to pick one who knows the law, and will consider the case carefully and fairly."

Overall, the arbitration process provides a good mechanism for resolving disputes outside of court, she said. One way to perhaps improve the system would be to expand the grounds for overturning arbitration decisions, although that could lead to more expensive litigation and burden the court system.

Hidden flaws

Confidentiality laws shield personnel information from public awareness. The laws safeguard private and public employees, but public safety officers receive more rigorous protections.

Some cities, like Menlo Park, refuse to disclose information that could legally be released; the Almanac has been unable to obtain even the number of local cases or names of the arbitrators. Other jurisdictions don't take such a hard line.

The city of San Jose, for instance, releases annual reports on employee disciplinary actions, and, if the discipline was appealed, the final outcome.

Among the terminations overturned in arbitration: A police officer fired in 2011 for driving under the influence and failing to secure weapons; an officer fired in 2010 for conducting inadequate investigations; two officers fired in 2010 for not properly investigating vehicle accidents. In the last case, arbitration reduced the discipline to 11-

month suspensions.

An arbitrator did uphold the firing of a police officer in 2011 for driving under the influence, failing to book a controlled substance and spending on-duty time not related to police function.

Confidentiality, in these cases, cuts both ways.

"The officer never gets to make a statement or to rebut what information anybody (releases) until the hearing before the arbitrator," Mr. Howell said. "The city is going to characterize the facts in a negative light, so if I read it, I go 'why is this guy a cop?' But then you get into the nuts and bolts of it and you can see all the facts and determine the employer has mischaracterized the actions of the officer."

He said police departments bear some responsibility for employee conduct related to performance issues. For example, if an officer gets fired for conducting inadequate investigations, it is possible the department may have failed to train the employee properly, depending on the case. "If I have inadequate skills for a position that my employer hired me for, and my department failed to train me properly, am I responsible? Partially. But they need to provide additional training. Then, if I blow it, it's on me."

Professor Mark Iris at Northwestern University has published studies of binding arbitration in jurisdictions that disclose some data. The topic caught his attention during his service as the executive director of the Chicago Police Board years ago, when a news story broke about a Minnesota police officer reinstated by an arbitrator after pleading guilty to a misdemeanor related to exposing himself and fondling his 14-year-old babysitter.

Typically only the most inflammatory cases reach public awareness, he noted in a 1998 study, but "these cases are exceptional, not because the police chiefs' decisions were overturned, but because the arbitrators' decisions became publicly known and attracted wide attention."

In Chicago, arbitrators cut police officer suspensions, on average, by half, according to his review. The same proved true in Houston. "If a police chief wins half the time, they're doing really well," he said, and added that some cities, such as Philadelphia or Cincinnati, would be thrilled to win even 50 percent of their cases.

"I'd like to put a bright spin on this, that justice triumphs in the end, but the reality is, it does not," Mr. Iris said.

SIDEBAR
One city's five-year history of disciplinary actions

Menlo Park refused to release its employee disciplinary-action data, but the city of San Jose maintains a public database on its website of employee disciplinary actions. As in Menlo Park, arbitration in police cases is binding.

City of San Jose statistics
2013 (Jan. - March): Five city employee disciplinary cases total. Two police officers suspended; neither appealed.

2012: 32 cases total. Nine police officers disciplined; two appealed to binding arbitration. Outcome pending.

2011: 41 cases total. Six police officers; four appeals. Two dismissals overturned, and one dismissal upheld. One case settled for resignation instead of termination.

2010: 51 cases total. Ten police officers; six appeals. Three dismissals overturned in arbitration. Two cases settled for suspension instead of termination.

2009: 65 cases total. Eighteen police officers; five appeals, three to civil service commission instead of arbitration. One case settled for suspension instead of termination. No reversals.

2008: 55 cases total. Seventeen police officers; three appeals -- two to a civil service commission, which reduced hours of suspension, and one to arbitration, which reduced suspension to counseling.