

**IN THE COURT OF APPEALS OF IOWA**

No. 8-792 / 08-0408  
Filed January 22, 2009

**CITY OF DUBUQUE,**  
Petitioner-Appellant,

**vs.**

**THE CIVIL SERVICE COMMISSION OF  
THE CITY OF DUBUQUE,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

The City of Dubuque appeals a district court ruling affirming the suspension of a police officer contending that termination of the officer is warranted. **AFFIRMED.**

Barry Lindahl, Dubuque, for appellant.

Andrea Hoeschen and Scott Soldon of Previant, Goldberg, Uelmen, Gratz, Miller & Brueggerman, S.C., Milwaukee, WI, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Potterfield, JJ.

**VAITHESWARAN, J.**

The City of Dubuque appeals a district court ruling affirming the suspension of a police officer. The city contends the court should have terminated the officer.

***I. Background Facts and Proceedings***

The facts are essentially undisputed. Officer Kurt Rosenthal started working for the Dubuque Police Department in 2002. For five years, he performed his job duties satisfactorily and acquired no disciplinary record. In 2007, that changed.

Rosenthal went out with fellow officers and became heavily intoxicated. The conversation turned to a female officer on the force. One of the officers in the group contacted the dispatch center to get her phone number. He passed the number to Rosenthal, who called the female officer twice. The second time, Rosenthal left her a sexually explicit message. He had no romantic relationship with the female officer. The same evening, Rosenthal drove around town while intoxicated.

Following an investigation, the police chief of Dubuque terminated Rosenthal. See Iowa Code § 400.19 (2007) (stating a chief of police has the power to suspend, demote, or discharge a subordinate for misconduct). Rosenthal challenged the termination. While he conceded the pertinent facts, he urged that the sanction was too onerous. The Dubuque Civil Service Commission agreed and reduced the punishment to a thirty-day suspension without pay. See Iowa Code § 400.27 (stating the civil service commission has

jurisdiction to determine the rights of civil service employees and may affirm, modify, or reverse the decision of the police chief).

The city filed an appeal with the district court. After conducting a de novo trial, the district court affirmed the decision of the commission. The city appealed that decision as well.

## **II. Analysis**

There is no question that Rosenthal's actions constituted misconduct. See *Sieg v. Civil Serv. Comm'n*, 342 N.W.2d 824, 829 (Iowa 1984) (finding misconduct where officer made profane, derogatory, and intimidating remarks to a fellow officer, thereby violating rules requiring courtesy and civility between officers); *City of Fort Dodge v. Civil Serv. Comm'n*, 562 N.W.2d 438, 440 (Iowa Ct. App. 1997) ("The term 'misconduct' has no fixed meaning, but is broad enough to include relatively minor or innocuous behavior as well as flagrant and injurious breaches of decorum."). The only question is whether the misconduct warranted termination or suspension. Our review of this issue is de novo. *Dolan v. Civil Serv. Comm'n*, 634 N.W.2d 657, 662 (Iowa 2001).

In arguing for termination, the City of Dubuque asks us to focus on the nature of the misconduct. We agree this is a significant consideration. *Johnson v. Civil Serv. Comm'n*, 352 N.W.2d 252, 258 (Iowa 1984) (citing nature of officer's offense and characterizing it as "abhorrent"). As noted, Rosenthal admittedly drove while intoxicated and sexually harassed an officer, all within the span of a few hours. The district court characterized this misconduct as "egregious." We fully concur with this assessment.

Our analysis does not end here because the appropriate sanction also turns on (1) an officer's prior disciplinary record, (2) an officer's subsequent mitigating actions, and (3) the effect of the officer's misconduct on the public. *Civil Serv. Comm'n v. Johnson*, 653 N.W.2d 533, 538 (Iowa 2002) (stating an officer's prior disciplinary record may be considered "in determining whether the cumulative effect of an officer's misconduct is sufficient to warrant discharge"); *Dolan*, 634 N.W.2d at 665 ("We have previously found evidence discovered subsequent to a chief's decision sufficient to mitigate the alleged misconduct."); *Johnson*, 352 N.W.2d at 258 (stating "protection of the public and furthering the general good must be our paramount concern").

Rosenthal was not disciplined in the five years preceding this incident. In fact, his personnel file is replete with letters of commendation from his superiors and notes of appreciation from members of the public. The absence of a disciplinary history militates in favor of suspension rather than termination. See *Dolan*, 634 N.W.2d at 664 ("[W]e consider Dolan's prior punished acts of misconduct as well as this current incident."); *Sieg*, 342 N.W.2d at 830 (stating evidence revealed "a consistent pattern of indifference to departmental rules and established procedures"). *But see Johnson*, 352 N.W.2d at 258 (concluding termination of officer based on use of excessive force was justified even though incident was the officer's first offense).

We turn to Rosenthal's subsequent conduct that he claims should be considered in mitigation of his actions. See *Dolan*, 634 N.W.2d at 664 (stating court would consider "extenuating circumstances mitigating the misconduct"). On the day after the incident, Rosenthal called the female officer a third time and

left a message apologizing for his phone calls the night before. The following month, he enrolled in an alcohol rehabilitation program. While he discontinued his involvement when his health insurance was terminated, he reenrolled and completed the program after regaining coverage.

We agree with Rosenthal that his immediate apology is a mitigating circumstance. That apology reflects an understanding of the severity of his misconduct and reflects remorse for that misconduct. We are less convinced that Rosenthal's enrollment in the alcohol rehabilitation program should be viewed in the same light. Although he ultimately completed the program, he did not abide by the evaluator's recommendations of abstinence and attendance at Alcoholics Anonymous meetings. For this reason, we place minimal weight on his alcohol rehabilitation efforts. *See id.* at 665 (stating "the evidence offered by Dolan to show he no longer consumes alcohol does not impact the issue of misconduct").

We are left with the effect of Rosenthal's actions on the public. *See Johnson*, 352 N.W.2d at 258. Rosenthal placed members of the community at risk by driving while intoxicated. His actions, in turn, affected the prestige of the police department. *Dolan*, 634 N.W.2d at 664 ("Dolan's misconduct likely damaged the Davenport Fire Department's prestige and breached the public's trust in his leadership abilities."); *City of Fort Dodge*, 562 N.W.2d at 440 ("The image presented by police personnel to the general public is vitally important to the police mission."). For example, Rosenthal admitted that his prior mentoring

of school children as a D.A.R.E. officer<sup>1</sup> was probably jeopardized. In his words, “a lot of [the kids] have probably read or parents told them what I had done. It kind of wasted the time I spent with them probably somewhat.” Additionally, the police chief testified that Rosenthal’s conduct opened the department up to charges of hypocrisy. Finally, the female officer who received the profane phone call testified that she felt offended and degraded by it, raising doubts about Rosenthal’s “respect for his fellow human beings.” See *Sieg*, 342 N.W.2d at 829.

Notwithstanding this evidence concerning the effect of the misconduct on the public, the totality of the record suggests the misconduct was an isolated incident. *Id.* at 830 (“If the profane outburst directed at Woods was an isolated incident, we would be inclined to agree with the trial court’s conclusion that termination was not warranted.”). Rosenthal had no prior disciplinary record and immediately expressed remorse for his conduct. These factors support the district court’s decision to suspend rather than terminate Rosenthal.

In reaching this conclusion, we have declined to consider Rosenthal’s duly admitted evidence of disciplinary action taken against other officers for various infractions. While this evidence may be relevant, we conclude its relevance is marginal at best and, for that reason, is entitled to no weight. See *Johnson*, 352 N.W.2d at 255 (“[W]hen an officer’s misconduct poses a serious threat to the safety of the public, evidence of disparate treatment is not determinative.”); *City*

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<sup>1</sup> D.A.R.E. stands for Drug Abuse Resistance Education, a nationwide program in which police officers lead a series of classroom lectures teaching elementary and secondary school students the importance of living substance- and violence-free lives. D.A.R.E., <http://www.dare.com> (last visited Dec. 16, 2008).

*of Des Moines v. Civil Serv. Comm'n*, 513 N.W.2d 746, 749–50 (Iowa 1994) (noting evidence of disparate treatment “bore some relevance to the inquiry”).

Having taken into account all of the relevant considerations, we affirm the district court’s suspension of Officer Rosenthal.

**AFFIRMED.**

Vaitheswaran, J. and Potterfield, J. concur. Sackett, C.J. dissents.

**SACKETT, C.J.** (dissenting)

I respectfully dissent. I would reverse the district court.

This is a difficult case. A Dubuque police officer acted very inappropriately, possibly exposing the city to civil litigation, and drove while intoxicated, putting the public at risk. He apologized and otherwise has a good record. The police chief terminated his employment. The Dubuque Civil Service Commission reviewed the case and found there should only be a thirty-day suspension without pay. The district court, after finding the officer's misconduct "egregious," affirmed the commission. The majority has affirmed the district court. The city contends here that the police chief's decision to terminate the officer should stand. I must agree. The officer's conduct is such that the police chief was clearly justified in firing him. In my de novo review, I believe this fact is entitled to more weight than the officer's apology and prior record.