

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES

IN THE MATTER OF GRIEVANCE ARBITRATION, BETWEEN:

CITY OF ALEXANDRIA, MINNESOTA,

EMPLOYER

-and-

ARBITRATOR'S AWARD
BMS Case No. 10-PA-1616
Discipline - Suspension

LAW ENFORCEMENT LABOR SERVICES,
INC.,

UNION.

ARBITRATOR:	Rolland C. Toenges
GRIEVANT:	Ryan Cook
DATE OF GRIEVANCE:	June 2, 2010
DATE OF ARBITRATOR NOTIFICATION:	August 11, 2010
DATE OF HEARING:	November 10, 2010
DATE POST HEARING BRIEFS RECEIVED:	December 10, 2010
DATE OF AWARD:	January 10, 2011

ADVOCATES

FOR THE EMPLOYER:

Thomas A. Jacobson
Assistant City Attorney

FOR THE UNION:

Isaac Kaufman, General Counsel
Law Enforcement Labor Services, Inc.

ISSUES

1. **Did the City of Alexandria violate the Collective Bargaining Agreement by questioning Officer Ryan Cook without advising him that he had a right to a Union Representative?**
2. **Did the City of Alexandria violate the Collective Bargaining Agreement by suspending Officer Ryan Cook for three (3) days without just cause.**
3. **If so, what is the appropriate remedy?**

WITNESSES

FOR THE EMPLOYER:

Sadie Witt, Dispatcher

Keith Melrose, Police Officer

Kevin Guenther, Police Sergeant

Scot Kent, Police Captain

Rick Wyffels, Police Chief

FOR THE UNION:

Aric Risbrudt, Flight Paramedic

Ryan Cook, Police Officer

JURISDICTION

The matter at issue is whether discipline administered to the Grievant was for just cause, and in accordance the terms and conditions of the Collective Bargaining Agreement between the Parties. The matter came on for hearing pursuant to the Grievance Procedure (Article 6) contained in said agreement. The relevant provisions of the Grievance Procedure are as follows:

“6.1 Definition of a Grievance: A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.”

“6.2 Union Representatives: The Employer will recognize representatives designated by the Union as the grievance representatives of the bargaining unit having the duties and responsibilities established by this Article. The Union will

notify the Employer in writing of the names of such Union Representatives and of their successors.”

“6.4, Step 4. A grievance unresolved in Step 3 and appealed to Step 4 will be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971 as amended. The selection of an arbitrator will be made in accordance with the “Rules Governing the Arbitration of Grievances” as established by the Bureau of Mediation Services.”

“6.5, A. The arbitrator will have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union and will have no authority to make a decision on an other issue not so submitted.”

“B. The arbitrator will be without power to make decisions contrary to or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The arbitrator’s decision will be submitted in writing within thirty (30) days following close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision will be binding on both the Employer and the Union and will be based solely on the arbitrator’s interpretation or application of the express terms of this contract and to the facts of the grievance presented.”

“C. The fees and expenses for the arbitrator’s services and proceedings will be borne equally by the Employer and the Union provided that each party will be responsible for compensating its own representatives and witnesses. If either party desires a verbatim record of the proceedings it may cause such a record to be made, providing it pays for the record. If both parties desire a verbatim record of the proceedings, the cost will be shared equally.”

The relevant provisions of the Collective Bargaining Agreement regarding discipline (Article 7) are as follows:

“7.1. The Employer will discipline employees for just cause only. Discipline will be in one of the following forms:

- A. Oral reprimand
- B. Written reprimand
- C. Suspension
- D. Demotion
- E. Discharge

7.2. Suspension, demotions, and discharges will be in written form. Written reprimands, notices of suspension, notices of demotion, and notices of discharge which are to become part of an Employee's personnel file shall be read and acknowledged by signature of the Employee. Employees and the Union shall receive a copy of such reprimand and/or notices. Discharges will be preceded by a five (5) day suspension without pay.

7.3. Employees shall be advised they have the right to a Union Representative before responding to any investigative inquiries that the employer reasonably believes will result in disciplinary action."

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The Arbitration hearing was conducted as provided by the terms and conditions of the Collective Bargaining Agreement (CBA) and the Public Employment Labor Relations Act (179A.01 – 179A.30). The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute.

Witnesses were sworn under oath and were subject to direct and cross-examination. The Parties submitted post-hearing briefs. Upon receipt of the briefs by the Arbitrator, the hearing was closed. There was no request for a verbatim record of the hearing.

The Parties stipulated to the issues in dispute and that the matter was properly before the Arbitrator for decision.

BACKGROUND

The City of Alexandria (Employer) has a population of approximately 12, 500 and is located in Douglas County. The population increases significantly during the spring, summer and fall when tourists visit the area. The City Police Department consists of some 25 staff, consisting of administration, Detectives, Patrol Officers, Animal Control and Secretaries.

Law Enforcement Labor Services, Inc. (Union) represents a bargaining unit consisting of all licensed essential employees (Police Officers) of the City of Alexandria Police Department. The Grievant is a member of the bargaining unit.

The Employer and Union are parties to a Collective Bargaining Agreement (CBA) in effect from January 1, 2010 through December 31, 2011. The CBA contains Articles covering grievances and discipline. The relevant provisions are contained in this Award under the section titled "Jurisdiction."

Ryan Cook (Grievant) has been employed by the City of Alexandria as a Police Officer for about three (3) years. The Grievant has a four-year degree in Criminal Justice. He has acquired his Post License and has had training in interrogation, sobriety and DWI testing at Alexandria Technical College. The Grievant has no known DWI violations on record.

The afternoon of April 27, 2010, the Grievant was off duty and played golf with a friend (Aric Risbrudt) at the Tipsinah Mound Golf Course near Elbow Lake, Minnesota. They left the golf course about 6:30 p.m. and the Grievant dropped his friend off at the Ashby, Minnesota fire station, where his friend attended a meeting from 7:00 to 9:00 p.m.

While his friend was attending the meeting, the Grievant went to the "Pub" in Ashby where he had dinner and consumed three 12-ounce beers, within about an hour and one half. The Grievant then drove to another bar, the Melby Outpost, Melby, Minnesota, where his friend later joined him. While at the Melby Outpost, the Grievant consumed four (4) additional alcoholic drinks three (3) mixed Jack-Coke drinks and a shot¹. Upon leaving the Melby Outpost, about 10.00 or 10:30 p. m., the Grievant had consumed seven (7) alcoholic drinks in a period of about three and one half (3 ½) hours.

¹ The number of drinks consumed by the Grievant is somewhat unclear. The Grievant acknowledges consuming three (3) Jack Cokes and a shot. The bar tender said that he served the Grievant four (4) Jack Cokes and and two shots.,

While at the Melby Outpost, the Grievant and his friend were joined by their co-worker and friend, witness Sadie Witt and friend Jada Wolf. The Grievant, his friend, Sadie Witt and Jada Wolf all left the Melby Outpost at the same time. The Grievant and his friend then drove to another bar ("Pit Stop") in Evansville, Minnesota, where the Grievant had another drink. The Grievant left the Pit Stop and drove to Raaper's Bar in Alexandria, arriving about 11:00 p.m. Upon leaving the Pit St the Grievant had consumed eight (8) drinks in a period of about four (4) hours.

When the Grievant left the Melby Outpost, Sadie Witt was concerned that the Grievant had too much to drink to be driving safely. She observed that the Grievant appeared quiet and tired, similar to the way she had previously observed him when she thought he was intoxicated. Witt had previously been with the Grievant at times when he was sober and times when he had been intoxicated.

The Grievant and his friend left the Melby Outpost with the Grievant in the driver position. Because of her concern, Sadie Witt called the Douglas County Law Enforcement Center and told the dispatcher she wanted to talk to a police officer

Sadie Witt's call was routed to Officer Keith Melrose, who was on call that night. Officer Melrose returned Witt's call and she explained her concern that she believed the Grievant had too much to drink to be safely driving and that she believed he was headed for a bar in Alexandria, known as "Raaper's."

Upon receiving this information from Witt, and because it involved another officer, Officer Melrose called Sergeant Keith Guenther and reported the situation to him. Officer Melrose and Sergeant Guenther were in separate squad cars and headed in the direction they believed the Grievant would be entering Alexandria, but soon found the Grievant's vehicle at Raaper's bar. Sergeant Guenther then positioned his squad car at a location where he believed the Grievant would pass by if leaving Raaper's. Sergeant Guenther felt this would give him an opportunity to observe Grievant's driving conduct to determine if there was a problem.

After waiting some time, Sergeant Guenther called the Grievant on his cell phone. Sergeant Guenther informed the Grievant he was at work and he had received a call from a citizen who believed he had too much to drink to be driving safely. The Grievant told Sergeant Guenther that he had *not* driven from Melby to Alexandria and that his friend had done the driving. At the time of the call, the Grievant was at the house of Jada Wolf who had picked he and his friend up from Raaper's.

Sergeant Guenther then called Sadie Witt to clarify who she had seen driving when the Grievant and his friend left the Melby Outpost. Sadie Witt confirmed that the Grievant was driving when he and his friend left the Melby Outpost.

Sergeant Guenther, believing that the Grievant may have been untruthful, reported the matter to his supervisor, Captain Scott Kent and prepared a written report titled "Allegation of Employee Misconduct. The matter was then brought to the attention of Police Chief Rick Wyffels, who ordered an investigation.

A written "Notification of Complaint Investigation" was prepared and presented to the Grievant on April 30, 2010 by Chief Wyffels. This notification informed the Grievant that he had the right to Union representation. Upon presenting the Notification to the Grievant, he made an impromptu statement to Wyffels, that he was driving upon leaving the Melby Outpost and had told Sergeant Guenther otherwise because he did not want to deal with the matter at that time.

Captain Kent met with the Grievant later that day and explained to the Grievant that they needed to set up a time to discuss the matter at issue. The Grievant then made an impromptu statement to Kent, similar to the one he had given earlier to Chief Wyffels.

An investigative meeting was held with the Grievant on May 4, 2010, with his attorney present. Prior to the meeting he was given a *Tennessee* warning. During the meeting,

the Grievant said that he had driven from the Melby Outpost to the Pit Stop in Evansville and to Raaper's in Alexandria.

Another investigative meeting was held with the Grievant on May 13, 2010. The Grievant was given notice that he could have his attorney present. However, the Grievant chose to proceed with the meeting without his attorney present. Another *Tennessee* warning was given and Captain Kent proceeded to interview the Grievant. The Grievant now remembered drinking one more drink (a shot) than he had previously reported, bringing the total to seven (7) drinks in a period of about three and one half (3 ½) hours.

Based on the investigative findings, Captain Kent concluded that the Grievant had violated two principles of the Alexandria Police Department on Conduct Unbecoming an Officer. One, that his conduct had caused a citizen to believe he was not fit to be safely driving and two, he had discredited himself by not being truthful about who was driving and the number of drinks he had consumed.

Captain Kent recommended to Chief Wyffels that the Grievant be given discipline. Chief Wyffels concurred and the Grievant was given a three (3) day suspension without pay.

The Grievant filed a grievance, under the terms and conditions of the CBA, claiming that the discipline was not for just cause and his right to Union representation had been violated. Thereafter, the grievance was processed through the CBA grievance procedure without resolution. Accordingly the matter comes before the instant arbitration proceeding for resolution.

EXHIBITS

JOINT EXHIBITS:

- Statement of Stipulated Issues.

EMPLOYER EXHIBITS:

- E-1. E-mail dated 4/28/2010 - Guenther to Kent, phone call regarding Cook.
- E-2. Narrative Report by Guenther, dated 4/29/2001, RE: Cook.
- E-3. Allegation of Misconduct, dated 4/29/2010, RE: Cook
- E-4. Notification of Complaint Investigation, dated 4/30/2010, RE: Cook.
- E-5. Personal Notes of Chief Wyffels, dated 4/30/2010, RE :Cook.
- E-6. Tennessen warning issued to Cook, dated 5/4/2010.
- E-7. Tennessen warning #2 issued to Cook, dated May 13, 2010.
- E-8. Summary Report of Cook matter by Kent, undated.
- E-9. Allegation of Misconduct Related to #APD Admin File 2010-001, dated 5/25/2010.
- E-10. Employee Disciplinary Notice, dated 5/27/2010.
- E-11. Third step grievance, dated 6/2/2010.
- E-12. Acknowledgement of receipt of third step grievance, dated May 8, 2010
- E-13. Denial of third step grievance, dated June 18, 2010.
- E-14. Collective Bargaining Agreement, 1/1/2010 through 12/31/2011.
- E-15. Policy on Conduct Unbecoming a Peace Officer, dated 7/2003.
- E-16. Resolution appointing the Grievant a Police Officer, dated 12/10/2007.²
- E-17. Quarterly Review of the Grievant's performance, dated 2/9/2009

² The matter referred to in this document concerning time reporting was issued after discipline was administered in the instant case and therefore, is not relevant to the discipline at issue in instant matter.

- E-18. Performance Evaluation of Grievant, dated 11/27/2009
- E-19. Commendations and complaints regarding the Grievant.³
- E-20. Transcript of conversation between Captain Kent and Grievant regarding setting up a meeting and advising the Grievant to arrange for representation, undated.
- E-21. Transcript of investigatory interview by Captain Kent with Grievant and his attorney, undated.
- E-22. Transcript of investigatory interview by Captain Kent with the Grievant, dated 5/13/2010.
- E-23. Transcript of investigatory interview by Captain Kent with Aric Risbrudt, undated.

UNION EXHIBITS:

- U-1. Collective Bargaining Agreement, 1/1/2010 to 12/31/2011.
- U-2. Policy on Conduct Unbecoming a Peace Officer, dated July 2003.
- U-3. E-mail extending commendation to Grievant for an arrest on 1/17/2010.
- U-4. E-mail extending a commendation to Grievant for job well done, 1/27/2010.
- U-5. Quarterly Review of Grievant, dated 2/9/2009.
- U-6. Thank you to Grievant and others for their assistance in a drowning on 5/2/2010.
- U-7. Note of recognition for a job well done to Grievant and others in conducting a search warrant on 8/21/2010.⁴

³ Some of the documents pertain to incidents that occurred after the discipline was administered in the instant case and are not relevant to the discipline at issue in the instant matter.

⁴ The search warrant event post-dates the time the Grievant was disciplined and therefore is not relevant to the question of whether the discipline was for just cause at the time the discipline was administered.

- U-8. Allegation of Employee Misconduct, dated 4/27/2010.
- U-9. Notification of Complaint Investigation, dated 4/30/2010.
- U-10. Narrative Report regarding alleged misconduct, dated 4/29/2010.
- U-11. Transcript of Investigatory Interview with Grievant and His Attorney, undated.
- U-12. Transcript of second Investigatory Interview with Grievant, dated 5/13/2010.
- U-13. Transcript of Investigatory Interview with Aric Risbrudt, undated.
- U-14. Summary Report of Allegations against Grievant, undated.
- U-15. Notification of Complaint Results Involving Grievant, dated 5/25/2010.
- U-16. Employee Disciplinary Notice to Grievant, dated 5/27/2010.
- U-17. Grievance Documents, dated 6/2/2010, 6/18/2010 & 6/22/2010.

POSITIONS OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Employer did not violate the CBA during any interactions with the Grievant.
- In order to find a violation of the CBA provision that, “Employees shall be advised they have the right to a Union Representative before responding to any investigative inquiries that the Employer reasonably believes will result in disciplinary action,” the Arbitrator must first find whether the Employer ever conducted any “investigative inquiries “ that it reasonably believed would “result in disciplinary action.”
- There were five (5) times that the Employer had contact with the Grievant regarding the April 27, 2010 incident:

- The first was the night of April 27, when Sergeant. Guenther called him to inform in of a complaint that he was DUI.
- The second was on April 30, when Chief Wyffels verbally and in writing informed the Grievant of an investigation and his right to have Union representation.
- The third was later on April 30, when Captain Kent met with the Grievant for the sole purpose of scheduling a formal interview, at which the Union representative could be present.
- The fourth was on May 4, when the Grievant was interviewed by Captain Kent with the Grievant's attorney, Isaac Kaufman present.
- The fifth and final was on May 13, when Captain Kent conducted a second interview with the Grievant and he waived his right to have his attorney present.

For the purpose of the Grievant's argument, that the Employer failed to advise him of his right to union representation, only the initial conversation with Sergeant Guenther is at issue.

- It is undisputed that before any of the other discussions took place, the Grievant was clearly and unambiguously advised of his right to representation. This notice was not only in writing, but it was discussed with the Grievant at the beginning of his April 30 meetings with Chief Wyffels and Captain Kent and at the beginning of the interviews with Captain Kent on May 11 and May 13.
- The call from Sergeant Guenther on the night of April 27-28, was the only instance where the Grievant was not advised of his right to Union representation. Consequently, the threshold issue becomes whether Sergeant Guenther's call was an "investigative inquiry," that required the Grievant be advised of his right to Union representation. Clearly, it was not.
- Sergeant Guenther's call was not an investigative inquiry because it was not even an *inquiry*. In order for someone to make an inquiry, they must inquire, that is they must ask questions.⁵
- The undisputed testimony from both the Grievant and Sergeant Guenther is that Sergeant Guenther never asked the Grievant a single question. Sergeant Guenther called the Grievant and told him about the complaint APD had received.

⁵ Cited was *Oxford universal dictionary (1955)* definition of the word "inquire" and The Merriam Webster on-line dictionary definition of the word "inquire."

- Without being asked a question, the Grievant lied and told Sergeant that he had not driven from Melby to Alexandria, deceptively telling Sergeant Guenther that Aric Risbrudt had been the driver.
- Simply put, when the Grievant volunteered this information to Sergeant Guenther, there had been no question posed to him; therefore, at that point there was no “investigative inquiry” to obligate Sergeant Guenther to advise him of a right to Union representation.
- Other arbitration awards support this conclusion. Sergeant Guenther’s call to the Grievant was no different than the interactions between employees and supervisors in these cases.⁶
- Sergeant Guenther asked no questions and simply notified the Grievant of information he had obtained. The Grievant’s comments were voluntary and unsolicited, were untrue and were not improperly gained.
- If the Grievant argues that Sergeant Guenther’s call to him was an investigative inquiry, because he felt compelled to talk to his supervisor, this argument should be rejected. There is no evidence in the record to support this argument.
- Sergeant’s call to the Grievant was on his personal cell phone. The Grievant could have ignored the call and he could have remained silent when Sergeant Guenther reported Witt’s complaint to him.
- That the Grievant was compelled to talk to Sergeant Guenther is also refuted by the Grievant’s own testimony. Not only did the Grievant admit to lying to Sergeant Guenther, but he also admitted that when he did, he knew it was wrong to do so. In other words, he knowingly deceived Sergeant Guenther.
- If the Grievant had the presence of mind to know he was doing something wrong when he talked to Sergeant Guenther, he certainly had his wits about him enough to recognize that he was not being coerced to say a thing.
- If the Grievant’s argument were to be accepted, then every conversation between every supervisor and employee would trigger the CBA Article 7.3. This is because depending on how the conversation goes and/or upon information that is later discovered, every such conversation could lead to disciplinary action.⁷

⁶ Cases cited were: BMS Case No. 10-PA-0319, FMCS Case No. 080226-53889-3 and BMS Case No. 09-RA-0636

⁷ Cited is *AAA Equipment Service Co. v. NLRB*, 598 F. 2d, 1142, 1146 (8th Cir. 1979).

- Sergeant Guenther did not have a serious concern about the Grievant's honesty, until *after* he talked to the Grievant and then called Ms. Witt. It was at the point that he talked to Ms. Witt that Sergeant Guenther had the facts to form a belief that the Grievant had lied to him and a point where Sergeant Guenther had a reason to believe that disciplinary action might follow.
- Thus, any latent threat that the Grievant may have felt when called by Sergeant Guenther did not trigger his right to be advised of his right to Union representation.
- In summary, Sergeant Guenther was not required to advise the Grievant of his right to Union Representation when informing him of Witt's complaint because it was not an investigative inquiry. The Grievant was undeniably advised of his right of Union Representation prior to the actual investigative interviews on May 11 and May 13.
- The Employer had just cause to suspend the Grievant for three days. It is undisputed that the Grievant lied to Sergeant Guenther.
- It should go without saying that dishonesty by a police officer cannot be tolerated.⁸ This principle is embodied in the City's Policy on Conduct Unbecoming an Officer.
- The Policy begins with the statement that "Law enforcement effectiveness depends on community respect and confidence. Conduct which detracts from this respect and confidence is detrimental to the public interest and should be prohibited."
- Principle Two of this policy states, "Peace officers shall refrain from any conduct in an official or *social capacity* that detract from the public's faith and integrity of the criminal justice system." [Emphasis Added]
- Rule 1.3 of Principle Two mandates that "Peace officers shall truthfully, completely and impartially report, testify and present evidence, including exculpatory evidence, in all matters of an official nature."
- Principle Four prohibits officer from exhibiting conduct on or off duty, which "discredits themselves or their department or otherwise impairs their ability or that of other officers or the department to provide law enforcement services to the community."

⁸ Cited is BMS Case No. 09-PA-0748 and BMS Case No. 09-PA-0588.

- The rationale for Principle Four stresses that “A peace officer’s ability to perform his or her duties is dependent upon the respect and confidence communities have for the officer and law enforcement officers in general. Peace officer(s) must conduct themselves in a manner consistent with the integrity and trustworthiness expected of them by the public.”
- By lying to Sergeant Guenther, the Grievant violated these Principles. Lying to Sergeant Guenther detracted from the trust and confidence his supervisors had in him. The Grievant’s deception seriously detracts from his credibility as a witness in any matters about which he may be called to testify.
- By way of comparison, terminations of dishonest police officers were upheld in other cases, which recognized that being deceitful could, in and of itself, be cause for termination.⁹
- Given that termination would have been a fair alternative, the Employer’s decision to merely suspend the Grievant for three days was entirely reasonable.
- The Arbitrator should reject the Grievant’s grievance and uphold the Employer’s three-day suspension of him for lying to his direct supervisor.

THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:

- When Sergeant Guenther called the Grievant on the night of April 27 to inform him of Ms. Witt’s allegation, he reasonably expected that the Grievant would respond. It was also reasonable to expect that the response given by the Grievant could result in disciplinary action - and as in fact it later did. Therefore engaging the Grievant in this way without advising him that he had the right to a Union representative, the Employer plainly violated Section 7.3 of the CBA.
- Section 7.3 of the CBA is broader than the so-called “*Weingarten* rule” The *Weingarten* rule is not automatic – the right to Union representation attaches only if the employee requests it.
- By contrast, Section 7.3 of the CBA places the burden on the Employer to advise the employee of his/her right to Union representation when an inquiry is reasonably likely to result in discipline. The Employer clearly failed to comply with this requirement.

⁹ Cited is the cases cited in footnote #8 and *Thorsen v. Civil Service Commission of the City of St. Paul*, 242 N.W. 2d 603, 606 (1976).

- At least one Labor Relations Board has determined that when an interview is conducted in violation of *Weingarten*, disciplinary action must be reversed unless the employer establishes that it would have reached the same decision without relying on the information gathered from that interview.¹⁰
- For the forgoing reasons, the discipline based on a charge of untruthfulness must be reversed.
- In the instant case, the Employer based its suspension of the Grievant entirely on off-duty conduct. The right to privacy provides protections for law enforcement officers, provided there is no demonstrable negative effect caused by the off-duty activities on the officer's job.
- Courts have reversed discipline for off-duty activities where the justification was 'nebulous and ill-defined.'¹¹
- It is well established that in order to discipline an employee for off-duty conduct, there must be a "nexus" between the conduct and the employer's business interests.¹²
- In the instant case, the Employer based its suspension entirely on off-duty conduct. The only way the Employer could possibly demonstrate the required nexus would be to show that the Grievant's conduct seriously damaged the Employer's public image. Based on the facts in the record, the Employer cannot make this showing.
- While public intoxication by an off-duty officer may have a negative effect on that image, in this case there is no evidence of actual intoxication. Other than Ms. Witt, no one interviewed during the investigation perceived the Grievant to be intoxicated.
- Ms. Witt has no training or experience in recognizing signs of intoxication. In short, the Employer cannot meet its burden of demonstrating that Ms. Witt's perception of the Grievant's conduct could "seriously damage" the Employer's image. There is no nexus.

¹⁰ Cited is *Monroe County*, 34 PPER Sec. 55 (Pa LRB ALJ 2003)

¹¹ Cited is *The Rights of Law Enforcement Officers*, 6th ed. (2009), p.283

¹² Cited is *The Common Law of the Workplace, The Views of Arbitrators*, 2d ed. National Academy of Arbitrators, Theodore St. Antoine, Editor (2005), Sec. 6.6(1)

- The record does not support the conclusion that the Grievant's untruthful statement to Sergeant Guenther significantly damaged his relationship with his supervisors and co-workers. Indeed, Officer Melrose testified that he "can still trust" the Grievant.
- Chief Wyffels suggestion that a nexus may exist because under *Giglio* the Employer may be required to disclose the Grievant's untruthful statement to defense counsel.¹³ This is incorrect.
- The U.S. Supreme Court has held that "material" exculpatory evidence under the *Brady/Giglio* doctrine is information that, if disclosed to the defense attorney, would have a "reasonable probability of providing a different result in the trial or sentencing."¹⁴
- The Union is unaware of any case law extending this doctrine to off-duty statements like the one made by the Grievant to Sergeant Guenther. There is no evidence that this statement has had or will have a demonstrable negative impact on the Grievant's job. There is no nexus and no basis for discipline for this off-duty conduct.
- The Employer cannot meet its burden of showing that the Grievant's suspension satisfied all seven of the elements of just cause articulated in *Enterprise Wire*.¹⁵
- The investigation was unfair and incomplete. Due process, an integral part of just cause, requires employers to treat employee fairly during the disciplinary process.¹⁶ An employer must provide employees facing discipline precise information about the charges they face. An advanced notice is essential because "an employee must be given an adequate opportunity to present his/her side of the case, " before being disciplined.¹⁷
- In this case, the charges against the Grievant's conduct on the night of April 27, 2010 were a moving target. The Allegation of Employee Misconduct given to the Grievant by Chief Wyffels alleged that he drove his vehicle while intoxicated. Not

¹³ Cited is *Giglio v. United States*, 405 U.S. 150 (1972).

¹⁴ Cited is *United States v. Bagley*, 473 U.S. 667 (1995).

¹⁵ Cited is *Enterprise Wire Co. and Enterprise Independent Union*, 46 LA 359 (1966) (Daughtery, Arb.) Also cited, Koven & Smith, *Just Cause: The Seven Tests*, 2d ed. (1992)

¹⁶ Cited is *Discipline and Discharge in Arbitration*, Normand Brand, Editor (1998). p. 35.

¹⁷ Cited is *Elkouri & Elkouri, How Arbitration Works*, 6th ed. Alan Miles Ruben, Editor (2003), p.967.

until after Captain Kent completed his investigation that this charge was dropped for lack of evidence.

- In place of the aforementioned charge, the Employer initiated and sustained a charge that the Grievant violated City policy on the basis that he was “*perceived*” to be intoxicated. Based on due process principles, the changing nature of charges, and denial of adequate opportunity to present his side of the case, there was a clear violation of the Grievant’s due process rights.
- Captain Kent neglected to consider Ms. Witt’s mood or her consumption of alcohol, as relevant factors, in assessing her perception of the Grievant’s behavior. At the hearing, Ms. Witt acknowledged that she was in a foul mood, had one or two drinks at the Melby Outpost and these may have affected her perception of the Grievant. In this respect, Captain Kent’s investigation was incomplete.
- When the Grievant left the Melby Outpost, neither Mr. Risbrudt nor Ms. Wolf nor the bartender believed that the Grievant was intoxicated, nor did Ms. Witt tell the Grievant that she believed he had too much to drink to be driving.
- If Mr. Risbrudt believed the Grievant was intoxicated, he would have taken steps to prevent him from driving. The Grievant himself did not believe that he was intoxicated, or that his blood alcohol level was above the legal limit to drive.
- Ms. Witt cannot specify what, if anything, about the Grievant’s behavior made her think that he might be intoxicated, other than that he “looked tired” and was quieter than usual.
- The Grievant adds that his eyes were bloodshot because of allergies that had acted up after he was outside playing golf earlier in the day.
- Ms. Witt acknowledges that the Grievant was not stumbling or slurring his words at the Melby Outpost. Ms. Witt has no experience or expertise in recognizing signs of intoxication. Ms. Witt admits that she was in a bad mood on the night in question, and this may have affected her perception of other’s behavior. Ms. Witt admitted she had one or two drinks at the Outpost, and this too may have affected her perception.
- After stopping in Evansville, where they each had another drink, neither Mr. Risbrudt nor the Grievant believed that the Grievant was intoxicated or should not be driving.
- However, after having more drinks at Raaper’s Bar in Alexandria, the Grievant and Mr. Risbrudt believed they could possibly be intoxicated and arranged to be

picked up rather than continue to drive. They went to the home of the friend, who picked them up and where they planned to spend the night.

- The Employer acknowledges that the Grievant exercised good judgment by calling for a ride from Raaper's instead of driving home.
- After arriving at the friends house, the Grievant received a call on his cell phone from Sergeant Guenther telling him that an allegation had been received that the Grievant had been driving earlier that night while intoxicated. While Sergeant Guenther did not ask the Grievant a question, Guenther acknowledged that he expected the Grievant would respond to the allegation.
- Sergeant Guenther acknowledged it would have been a criminal offense if the Grievant acknowledged that he had been driving drunk that could result in discipline.
- Sergeant did not give the Grievant a *Garrity* advisory, not did he tell the Grievant that he had the right to a Union representative.
- The Grievant was caught off guard, frightened and possibly intoxicated. He told Sergeant Guenther that Mr. Risbrudt had driven from Melby to Evansville and then to Alexandria and that the Grievant had been a passenger, which was untrue.
- In interviewing Ms. Witt, Captain Kent did not inquire or consider whether her mood or her consumption of alcohol at the Melby Outpost may have affected her perception of events.
- Captain Kent concluded that the issue of the Grievant driving while intoxicated couldn't be determined. However, Kent sustained a charge of Conduct Unbecoming an Officer base solely on the Grievant giving Ms. Witt the impression that he was intoxicated when he drove away from the Melby Outpost, a charge that was not set forth in Sergeant Guenther's complaint or the investigation notice given to the Grievant.
- The Employer has insufficient proof to sustain its charges against the Grievant. Accusations of improper or excessive drinking are very serious and can potentially cause significant damage to an employee's reputation.
- "As a rule, arbitrators require an employer to produce *substantial evidence* when it charges an employee with use of drugs or alcohol."¹⁸ The person making the allegation, Ms. Witt, has no experience or training in recognizing signs of

¹⁸ Cited is *Discipline and Discharge in Arbitration*. P. 189 (emphasis added)

intoxication. At the arbitration hearing, Ms. Witt was unable to specify why she thought the Grievant was intoxicated when they left the Melby Outpost.

- Moreover, neither Mr. Risbrudt, nor Ms. Wolf, nor the bartender at the Outpost, nor the Grievant himself perceived him to be intoxicated. In sum, there is no substantial evidence that the Grievant was intoxicated.
- Similarly, the Employer cannot prove that the Grievant's conduct at the Melby Outpost violated the specific policy provisions set forth in Captain Kent's investigative report, Principles Two and Four of the City's Policy on Conduct Unbecoming an Officer.
- There is no evidence that the Grievant's conduct at the Melby Outpost detracted in any way from the public's faith in the Employer's law enforcement system. Ms. Witt was the only person interviewed that perceived the Grievant to be intoxicated and even she cannot explain how or why she formed that opinion.
- Neither is there any evidence that the Grievant's conduct has impaired his or any other officer's ability to provide law enforcement services.
- In his testimony, Chief Wyffels made several inaccurate and troubling statements regarding his assessment of the evidence against the Grievant. First, Chief Wyffels testified that the bartender at the Melby Outpost had perceived the Grievant to be intoxicated. Chief Wyffels retracted his testimony when it was pointed out, that in Captain Kent's investigative report, the opposite was true.
- In his testimony, Chief Wyffels testified that he was not convinced that the Grievant had not driven from Raaper's to Ms. Wolf's house. This was despite the unrebutted sworn testimony of both the Grievant and Ms. Wolf, that Ms. Wolf had picked them up and driven them back to her house. Moreover, the Grievant was never charged with driving while intoxicated after he left Raaper's.
- For the above reasons, it is apparent that Chief Wyffel's decision to discipline the Grievant was influenced by a misreading of the evidence in the record and by unproven suspicions regarding the Grievant's conduct.
- Even if the Arbitrator sustains the charge, that the Grievant was untruthful, the Union submits that a three-day unpaid suspension is an overly severe and inappropriate punishment for this conduct.
- The Employer is obligated to follow the principle of progressive discipline.¹⁹ This principle was not followed here. Prior to April 27, 2010, the Grievant had

¹⁹ Cites is *Discipline and Discharge in Arbitration*, p.34.

not been the subject of any prior investigation or discipline while in the employ of the Employer.

- The Grievant has no DWI charges on his record. He has never consumed alcohol or been under the influence of alcohol while on duty.
- In February 2009, the Grievant received a statewide award of Outstanding Rookie of the Year in connection with his substantial number of arrests for driving while intoxicated (DWI).
- On his November 2009 performance evaluation, Sergeant Guenther rated the Grievant's job performance as average or above average in all areas, including judgment, interaction with management, safety practices and proper behavior/cooperation. Of particular note was the Grievant's initiative in the area of traffic stops and DWI enforcement.
- On January 27, 2010, Chief Wyffels congratulated the Grievant for a felony arrest and issued a Certificate of Commendation to be placed in his file. Also on January 27, 2010, Chief Wyffels commended the Grievant for the professionalism that he exhibited in responding to a disturbed student at the local middle school.
- The Grievant has received extensive training in recognizing signs of intoxication, which he utilizes on a regular basis, at traffic stops and other interactions with the public. While off duty, this training also assists him in assessing his own degree of impairment.
- The Grievant was recognized repeatedly for his initiative and skills in the area of DWI enforcement. All the evidence in the record suggests that the Grievant's off duty conversation with Sergeant Guenther was an isolated incident of poor judgment, which the Grievant quickly recognized and admitted to Captain Kent and Chief Wyffels at his earliest opportunity.
- The Employer violated the CBA by questioning the Grievant without advising him of his right to a Union representative and by suspending him for three-days without just cause.
- A three-day suspension is not justified under these circumstances. The suspension should be reversed and removed from the Grievant's personnel file and the Grievant be made whole.

DISCUSSION

The basic issues before the Arbitrator area as follows:

- Did the conversation between Sergeant Guenther and the Grievant on April 27, 2010 constitute a violation of Article 7, 7.3 of the CBA?²⁰
- Did the Grievant's conduct at the Melby Outpost, as observed and reported by Sadie Witt or at any other time during the evening of April 27, 2010, including the conversation with Sergeant Guenther, constitute "Conduct Unbecoming an Peace Officer" in violation of Principles Two and/or Four of City Policy?
- Was the investigation into the Greivant's behavior on April 27, 2010, reasonably conducted in accordance with due process principles?
- Does just cause exist for discipline of the Grievant, and if so, does it reasonably fit the offense(s)? If not, what should the remedy be?

Was there a violation of Article 7, Discipline, 7.3?

7.3 provides that "Employees shall be advised they have the right to a Union Representative before responding to any investigative inquiries that the Employer reasonably believes will result in disciplinary action." [Emphasis Added]

The Union argues correctly that this language clearly places the burden on the Employer to advise an employee of his/her right to Union representation, before responding to an investigatory inquiry from the Employer where the Employer reasonably believes it will result in disciplinary action.

A fair interpretation of this language is that it applies when the employer is, in fact, conducting an investigative inquiry. An impromptu comment or utterance from an

²⁰ This conversation may have extended into early April 28, as it took place late on the evening of April 27, 2010.

employee, prior to the point where an investigative inquiry is to begin, would appear to be outside the jurisdiction of 7.3.

An example is the Grievant's impromptu admission that he had not told Sergeant Guenther the truth, when Chief Wyffels presented him with the "Allegation of Employee Misconduct" and informed him that Captain Kent would be in contact with him. Chief Wyffels did not ask the Grievant any questions or intend to do so. Chief Wyffels intent was to put the Grievant on notice of the allegation, to let him know Captain Kent would be contacting him with regard to it, and to let him know that he may have a Union representative present during any investigatory interview process.

Another example of the Grievant's impromptu admission was when Captain Kent contacted him to schedule an investigative interview. Again the Grievant made an impromptu admission of being untruthful when no inquiry regarding the allegation had been made. Captain Kent was merely trying to arrange a mutually agreeable date to conduct the investigative interview.

The night of April 24, 2010, Sergeant Guenther had been informed, by Officer Melrose, of a complaint that the Grievant had been seen leaving the Melby Outpost after having had too many drinks to be driving safely. Shortly thereafter, Sergeant Guenther observed the Grievant's vehicle at Raaper's Bar.

Sergeant Guenther then treated the complaint as he would any other similar complaint and positioned his squad car a short distance away on the route he expected the Grievant to take home. Sergeant Guenther believed from this point he would be able to observe the Grievant's driving by and take any appropriate action.

Sergeant Guenther waited for some time, but the Grievant had not passed by where he was waiting in his squad car. Being the Grievant's supervisor, Sergeant Guenther obtained the Grievant's cell phone number and called the Grievant to find out what was going on. Sergeant Guenther found out that the Grievant was now at the home of a

friend and planned to stay there for the night. The Grievant assured Sergeant Guenther that his vehicle would stay in Raaper's parking lot for the night.

Sergeant Guenther informed the Grievant that there had been a complaint that Grievant was driving after consuming too many drinks to be driving safely. The Grievant then made an impromptu statement to Sergeant Guenther that Aric Risbrudt was driving, a statement that he later admitted was not true.

The Union argues that Sergeant Guenther's call was in effect an investigative inquiry, subject to the provisions of 7.3, because the Grievant was notified of a complaint and, even though Sergeant Guenther did not ask him a question, Sergeant Guenther expected a response.

It is debatable what kind of response could be expected in this situation, but a Logical response might have been that he was not feeling up to discussing the matter at that time and would do so later.²¹ He had already assured Sergeant Guenther that he would not be doing any more driving that night.

It is important to note that at the time Sergeant Guenther called the Grievant, there was no basis to charge him with driving under the influence (DUI). To do so would have required that the Grievant be stopped while in control of his vehicle and found to be over the legal blood alcohol limit.

Even if the Grievant had acknowledged to Sergeant Guenther that he may had been driving after consuming a number of drinks, there was no basis to charge him with DUI.

²¹ The Grievant testified that the reason he gave for making the untrue statement to Sergeant Guenther was that, even though he knew it was wrong, he didn't want to make it [allegation] an issue.

This raises the question of why did the Grievant lie to Sergeant Guenther other than to cover up the fact that he, himself, believed that the allegation was true.

The record shows the instant concern about the Grievant driving after too many drinks is not the first occasion where this concern has arisen. Sergeant Guenther testified on both direct and under cross-examination, that “there have been previous complaints about the Grievant driving drunk.”

The Arbitrator finds that the telephone conversation between Sergeant Guenther and the Grievant, on the night of April 27, 2010, did not constitute a condition under which the provisions of Article 7, 7.3 apply. The main purpose of Sergeant Guenther’s call was to determine where the Grievant was and whether it could be expected that he would continue driving that night.

That Sergeant Guenther mentioned the complaint is understandable to explain why he would be calling the Grievant while off duty at that hour. Under these circumstances, it is reasonable that Sergeant Guenther would expect a response from the Grievant as to whether he would be doing any additional driving that night, to which the Grievant responded that he would not.

The Grievant’s impromptu statement, that he was not driving when they traveled from Melby to Alexandria, was not in response to a question from Sergeant Guenther. Sergeant Guenther, at that point in time, was not in a position to know that whether the Grievant’s statement was untrue. Only after Sergeant Guenther talked directly to Sadie Witt, and she said that she saw the Grievant driving, did Sergeant Guenther have reason to conclude that the Grievant may have been untruthful. Hence, Sergeant Guenther passed on what he had learned to Chief Wyffels and it was decided that an investigative inquiry was needed to establish the truth of the matter.

Did the Grievant's conduct violate the City's Policy on Conduct Unbecoming a Peace Officer, Principles Two and Four?

Principle Two provides that, Peace officers shall refrain from any conduct in an official or social capacity that detracts from the public's faith in the integrity of the criminal justice system." The relevant item in Principle Two is 1.3:

"1.3 Peace officers shall truthfully, completely and impartially report, testify and present evidence, including exculpatory evidence, in all matters of an official nature." [Emphasis Added]

Principle Four provides that "Peace officers shall not, whether on or off duty, exhibit and [any] conduct which discredits themselves or their department or otherwise impairs their ability or that of other officers or the department to provide law enforcement services to the community." [Emphasis Added]

"Rationale. A peace officers ability to perform his or her duties is dependent upon the respect and confidence communities have for the office and law enforcement officer is general. Peace officer must conduct themselves in a manner consistent with the integrity and trustworthiness expected of them by the public."

Although the Grievant has no DUI convictions on his record, the hearing record shows concern about the Grievant driving after consuming alcohol, and not only in the instant case. Sadie Witt testified that she knows the Grievant as a friend and a co-worker. Ms. Witt testified that she had been with the Grievant before when he drank and had seen him sober and after drinking. Ms. Witt testified that on the evening of April 27, 2010, she believed the Grievant was impaired when he drove away from the Melby Outpost in his vehicle and reported it to Dispatch because she was concerned for the Grievant's safety.

Ms. Witt testified, "I didn't intend to make a formal complaint, just wanted to protect a friend." Officer Melrose testified that Ms. Witt said she didn't want to see another officer have an accident like one that had happened earlier. Officer Melrose testified on cross-examination that Ms. Witt mentioned that another Officer had recently died in a snowmobile accident, where drinking was considered a factor, and didn't want to lose another officer.

Later, when Sergeant Guenther contacted Ms. Witt to clarify her complaint, Ms. Witt commented that she believed the Grievant was drunk when he left the Melby Outpost and stated, "the Grievant does this too often and I am concerned somebody was going to be hurt." When Ms. Witt testified, that when she learned from Sergeant Guenther that the Grievant had denied driving, "It made me feel this was not right and I was disappointed." Sergeant Guenther's testified on both direct and on cross-examination that, "I have had previous complaints about [the Grievant] driving drunk."

The Union discredits Ms. Witt's testimony because she was in a bad mood, doesn't have any training in assessing impairment due to alcohol consumption and had one or two drinks herself. Ms. Witt testified that she was not in a good mood when she arrived at the Melby Outpost and had interaction with Aric Risbrudt, but not much with the Grievant. Ms. Witt testified that she is not romantically involved with the Grievant. The Grievant testified that; "I had limited contact with Ms. Witt at Melby's - Witt didn't have anything to say to me."

Although Ms. Witt acknowledged having one or two drinks, it was considerably less than the seven consumed by the Grievant and the three consumed by Mr. Risbrudt. It is axiomatic that if Ms. Witt had any impairment, it would be minimal compared to that of the Grievant. Further, the fact that the Grievant has had training in alcohol impairment would not likely be of benefit in assessing his own condition, if the seven drinks he had consumed affected his reasoning.

The Union argues that neither the Grievant, nor Mr. Risbrudt, nor Ms. Wolf, nor the bartender thought the Grievant was intoxicated. As noted earlier, it would be reasonable to believe that the Grievant, having consumed at least seven drinks within a three and one half (3 ½) period, might be impaired in his ability to assess his own state of sobriety. Likewise, it may also be reasonable to believe that Mr. Risbrudt, having consumed three drinks in the past hour, might experience some impairment in judging the Grievant's sobriety.

Ms. Witt testified that the Grievant and Mr. Risbrudt got into an argument when approaching the Grievant's vehicle, but didn't explain what was in dispute. Ms. Wolf was a girl friend of Mr. Risbrudt. Ms. Wolf's ability to assess the Grievant's sobriety is unknown. The bartender's objectiveness could be under question. For the bartender to acknowledge serving a person who may be intoxicated drinks, could subject the bartender to illegal activity under Minn. Stat. 340A.801.

In summary, although there is no proof that the Grievant was intoxicated when he drove his vehicle from Melby to Evansville to Alexandria, there is sufficient evidence that he had consumed a considerable number of drinks. Further, The record shows, via the testimony of Ms. Witt and Sergeant Guenther, that the instant matter is not an isolated incident. It cannot be ignored that this conduct by the Grievant creates a potential distraction from his role as a peace officer, that the public must trust to objectively enforce DUI and other laws.

It is an established fact that the Grievant's statement to Sergeant Guenther, denying driving from Melby to Evansville to Alexandria on the date at issue, was untruthful. It is this untruthfulness that constitutes the major basis for the Employer's disciplinary action.

Sergeant Guenther testified that the Grievant lying to him caused him to ask himself, "Why is the Grievant lying to me? . . . "This bothered me more than if someone else lied to me – I work with him everyday, I am his supervisor."

Not only does this untruthfulness create a problem of creditability between the Grievant, his supervisors and other officer, it has a bearing on the Grievant's creditability as a witness in court cases where he may be a witness. It presents an opportunity for the defense to expose the Grievant's record of being untruthful to his superiors before the court, which can have the effect of diminishing his creditability as a witness for the prosecution.

Chief Wyffels testified that this concern made it difficult to determine whether a suspension or discharge was the best alternative. Undoubtedly, it was the Grievant's good work record that mitigated Chief Wyffel's decision to suspend rather than discharge.

The Grievant testified that he had a conversation with Sergeant Peterson before filing the grievance. Sergeant Peterson cautioned him that, if he went through with the grievance[establishing a public record of him being untruthful] there could be problems with his testimony in court under *Gigilo*.

The Union argues that the Employer's investigation was unfair and inaccurate. Although it might be argued that the investigation could have been performed in a more perfect way, the Arbitrator finds that it was done in a manner that complies with generally accepted principles of due process.

Lastly, the Union argues that, based on the Grievant's good record, a five-day suspension is excessive and the Employer is obligated to follow the principle of progressive discipline. The CBA, Article 7, 7.1 does not require that discipline be administered in a progressive manner, only that the level of discipline be supported by just cause.

FINDINGS

The telephone conversation between Sergeant Guenther and the Grievant on the night of April 27, 2010, wherein the Grievant made an impromptu statement to Sergeant Guenther that was untruthful, does not constitute a violation of Article 7, 7.3 of the Collective Bargaining Agreement. Sergeant Guenther had posed no question to the Grievant. Further, at the time, it was not reasonable for Sergeant Guenther to conclude

that the Grievant's impromptu statement was untrue, and to reasonably believe it would result in disciplinary action.

The Grievant's conduct was in violation of City Policy on Conduct Unbecoming a Peace Officer and accordingly the five (5) day suspension given the Grievant was for just cause in accordance with Article 7, 7.1 of the Collective Bargaining Agreement.

There is sufficient nexus between the Grievant's off duty conduct, where he has been perceived as driving when impaired, and his untruthfulness, to question the effect on his effectiveness as a Peace Officer, particularly in enforcing DUI laws and serving as a witness in the prosecution of offenders.

AWARD

The grievance is denied.

The five-day suspension administered to the Grievant was for just cause, in accordance with the terms and conditions of the Collective Bargaining Agreement.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 10th day of January 2011 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR