

IN THE MATTER OF A GRIEVANCE ARBITRATION BETWEEN

City of Winona

EMPLOYER

and

BMS Case No. 15PA0314

Law Enforcement Labor Services, Inc.

UNION or "LELS"

ARBITRATOR: Richard J. Dunn

DATE AND PLACE OF HEARING: March 4 and 5, 2015, Winona City Hall

DATE AND RECEIPT OF POST-HEARING BRIEFS: March 30, 2015

DATE OF AWARD: April 17, 2015

ADVOCATES

For the Union:

Mr. Isaac Kaufman, Attorney and General Counsel
Law Enforcement Labor Services, Inc.
327 York Avenue
St. Paul, MN 55130-4039

For the Employer:

Mr. Brandon M. Fitzsimmons, Attorney
Flaherty and Hood, P.A.
525 Park Street, Suite 470
St. Paul, MN 55103

JURISDICTION

The parties to this arbitration are the City of Winona or "Employer" and Law Enforcement Labor Services, Inc, "Union" or "LELS", who represents the Police Officers employed by the City of Winona Police Department. LELS represents the grievant related to his discharge from employment with the City. The parties are signatories to a labor agreement between the City of Winona and Law Enforcement Labor Services, Inc. (Local No. 75) representing Police Officers for the period of January 1, 2014 through December 31, 2014. Article 35 of the Agreement specifies the grievance procedure and provides for arbitration. Article 34 provides for discipline by the Employer for cause only. (LELS Exhibit One, p. 15-17) (Employer Exhibit 11, p. 15-17)

On August 1, 2014 the Grievant, who was a twelve year veteran of the Winona Police Department, was discharged by the City after an incident on November 27, 2012, and after the Grievant was charged with DWI on December 20, 2012 based on the results of a blood draw on the date of the incident. The incident occurred during an off day for the Grievant.

His driver's license was revoked for one year, effective January 6, 2013. The Grievant pled guilty to one count of Fourth Degree DWI, a misdemeanor, on June 27, 2014, after a series of legal proceedings. The City Manager, who has the authority to determine the level of discipline of employees, discharged the Grievant because his driving privileges had been restricted and were not valid for City employment purposes for 60 consecutive days. The City cited this and other misconduct as not in compliance with its policy and practice. The discharge letter was sent to the Grievant on August 11, 2014 by the City Manager, Ms. Judith R. Bodway, copying Mr. Kevin Hinrichs, LELS Business Agent and the City of Winona Merit Board.

LELS began a grievance on August 7, 2014, pursued Step 2 on August 12, 2014, pursued Step 3 on September 16, 2014 and wrote to Commissioner Tilsen of the Bureau of Mediation Services on November 3, 2014 to take the case to arbitration. The City Police Chief, Mr. Paul R. Bostrack, wrote to Mr. Hinrichs on September 12, 2014 denying the grievance for lack of merit. The City Manager wrote to Mr. Hinrichs on October 31, 2014 denying the grievance. LELS General Counsel Isaac Kaufman, the Grievant's legal counsel, wrote to the undersigned on December 3, 2014 advising of his selection to serve as the neutral arbitrator concerning three grievances. (Employer Exhibit 47) He wrote again on February 17, 2015 advising that two of three grievances were withdrawn, and one grievance remained for arbitration., which was scheduled for a March 4, 2015 hearing.

The Union claims that the termination was without just cause and therefore violated the terms of the labor agreement, and asked that the grievance be sustained and the Grievant reinstated to his Police Office position.

The undersigned Arbitrator conducted the hearing on March 4 and 5, 2015 in Winona City Hall. Both parties agreed that the case was properly before Arbitrator Richard J. Dunn, and that there were no procedural issues. They also agreed that this is a final and binding arbitration decision. The designated representative of both parties received a full and fair hearing, witnesses were sworn and cross-examined, and exhibits were received by the Arbitrator and entered into the record. Each representative filed a post-hearing brief on March 30, 2015.

Two additional matters were agreed upon at the hearing by both parties. First, the name of the Grievant is to be redacted in this decision narrative at the request of the Grievant. Second, it was agreed to have the record remain open until or about April 7, 2015 when LELS may submit evidence of the restoration of the Grievant's driving license.

APPEARANCES

For the Employer

Paul R. Bostrack, Chief of Police
Judith R. Bodway, City Manager
Thomas John Williams, Deputy Chief of Police
Eric Engrav, Sergeant
Myrna Olson, Human Resources Coordinator
Eric Mueller, Patrol Officer
Deb Beckman, Benefits Coordinator

For the LELS

The Grievant
Kevin Hinrichs, Business Agent, LELS, Inc.
Earl Gray, Defense Attorney
Ed Wooden, Patrol Officer
Thad Pool, Sergeant

I. ISSUE STATEMENT

The issue for arbitration in this case is two-fold. First, did the City of Winona discharge the Grievant for cause in violation of the Collective Bargaining Agreement under Section 34.1? And if the City did not discharge the Grievant for cause, what is the appropriate remedy?

II. RELEVANT LABOR AGREEMENT PROVISIONS

The following are relevant contractual provisions of the Labor Agreement between the City of Winona and Law Enforcement Labor Services, Inc (Local No. 75) for the 2014 year.

ARTICLE 6 - RIGHTS, PRIVILEGES AND WORKING CONDITIONS

All written rights, privileges, and working conditions, other than those protected under ARTICLE 7 - Employer Rights, enjoyed by the employees at the present time which are not included in this Agreement shall remain in full force and effect, unchanged in any manner, during the term of this Agreement unless changed by mutual consent of the Employer and the Union, or such rights and/or privileges are altered by virtue of State or Federal legislation. If such rights and/or privileges are altered by enactment of State or Federal legislation, such changes shall supersede applicable provisions of this Agreement.

ARTICLE 34 - DISCIPLINE

Section 34.1. The Employer will discipline for cause only. Discipline will be in one or more of the following forms:

- a. Oral reprimand
- b. Written reprimand
- c. Suspension
- d. Demotion, or
- e. Discharge

Section 34.3. Written reprimands, notices of suspension, 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. The employee will receive a copy of such reprimand and/or notices. Written reprimands will be purged from the employee's personnel file and be of no effect two (2) years after the date (on) which the employee acknowledged the reprimand.

III. RELEVANT MINNESOTA STATUTES

The following are relevant Minnesota statutes

169A.20 DRIVING WHILE IMPAIRED. (City Exhibit 3 at 0421-0422)

Subdivision 1. Driving while impaired crime; motor vehicle. It is a crime for any person to drive, operate, or be in physical control of any motor vehicle, as defined in section 169A.03 subdivision 15, except for motorboats in operation and off-road recreational vehicles, within this state or any boundary water of this state when:

(1) the person is under the influence of alcohol;

(5) the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more:

169A.27 FOURTH-DEGREE DRIVING WHILE IMPAIRED. (Employer Exhibit 3 at 0423)

Subdivision 1. Degree Described. A person who violates section 169A.20 subdivision 1, 1a, 1b, or 1c (driving while impaired crime), is guilty of fourth-degree driving while impaired.

Subdivision 2. Criminal penalty. Fourth degree driving while impaired is a misdemeanor.

169A.52 TEST REFUSAL, OR FAILURE: LICENSE REVOCATION (Employer Exhibit 3 at 0415)

Subdivision 4. Test failure; license revocation. (a) Upon certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the person submitted to a test and the test results indicate an alcohol concentration of 0.08 or more or the presence of a controlled substance listed in Schedule I or II or its metabolite, other than marijuana or tetrahydrocannabinols, the commissioner shall revoke the person's license or permit to drive, or nonresident operating privilege:

(1) for a period of 90 days, or, if the test results indicate an alcohol concentration of twice the legal limit or more, not less than one year;

IV. RELEVANT CITY POLICY PROVISIONS

The City Drug and Alcohol Policy includes the following relevant provisions: (Employer Exhibit 3)

1.0 Drug and Alcohol Use

The policy of the City is to promote a drug-free environment. The City's goal is to establish and maintain a healthy and efficient workforce free from the effects of drug and alcohol abuse in compliance with the requirements of the federal Drug-Free Workplace Act and applicable state law.

Employees are required to report to work on time and in appropriate mental and physical condition for work. No employee shall be under the influence of any drug or alcohol while the employee is working or while the employee is on the City's premises or operating the City's vehicle, machinery or equipment, except to the extent authorized by a valid medical prescription. Depending on the circumstances and the employee's job, off duty drug or alcohol abuse may subject the employee to discipline.

Violations of this policy will result in disciplinary action, up to and including termination, and may have legal consequences.

The City Employee Handbook includes the following relevant provisions: (City Exhibit 1 at 0552-0553)

You are not only part of the City's organization, to those members of the public with whom you will come in contact, *you are the City of Winona*. You make an impression each time you contact a member of the public, whether it is on or off the job.

The City Administrative Procedure, Number 107-5 (Loss of Driving Privileges) states:

1.0 Policy:

Many of the City of Winona job descriptions require that the employee possess a Class A or B driver's license, commonly called a "Commercial Drivers License". Other titles require possession of a Class C license which is the regular driver's license (State of Minnesota or equivalent out of state license).

Those licenses may sometimes be suspended, revoked, or canceled because of the employee's conviction or guilty pleas to various driving offenses. As a result, an employee in such a situation can no longer lawfully drive while employed by the City of Winona and does not meet the minimum qualifications of the job.

3.0 Guidelines: (Employer Exhibit 19)

In the interest of preserving, for a limited time, an employee's job when the employee has a driver's license of any type suspended, revoked, or canceled, and to establish uniformity in addressing such a situation, all City employees, with the possible exception of those employees with a bona fide medical condition which may be grounds for an exemption, will be subject to the following:

1. If an employee loses driving privileges and possession of a license is a requirement of the employee's job, the responsibility for regaining the license is the employee's, not the City's.
2. The employee must, at the employee's expense and on personal time, settle the issue by utilizing a private attorney or union business representative as may be needed to resolve the issue with the District Court or Department of Public Safety.
3. Management, upon being made aware of the loss of an employee's license, shall send the employee a letter advising the employee that the employee will be put on leave without pay status for sixty (60) calendar days. The employee's job is not lost, but no pay will be drawn until the loss of a driver's license issue is settled within the 60 calendar day period of time. The employee's union will also be advised. Vacation and/or compensatory time may be used during this 60 calendar day period.
4. If the employee's driving privilege are restored within 60 calendar days, the employee may return to work with full pay effective the date of return to work.
5. If the employee cannot resolve the license problem, then termination proceedings will be commenced at the expiration of the 60 calendar day time period.
6. Extensions shall be granted only in exceptional circumstances at the discretion of the City Manager.
7. In order to possibly continue City employment, it is permissible for an employee to explore a voluntary reduction. No employee shall continue in his or her present or reduced title if minimum qualifications include the holding of any driver's license are not met.

The City Administrative Procedure, Number 107-7 Driver's License Policy states: (Employer Exhibit 26)

1.0 POLICY

....

It is the policy of the City that every employee who operates a City vehicle at any time for any reason, or who operates some other vehicle for use on City business or for transportation to or from employee training, must have a current driver's license.

....

3.0 Guidelines

1. No employee may operate any City vehicle for any purpose without a valid and current driver's license.

2. No employee may operate any vehicle, even the employee's own vehicle, while engaging in the business of the City or to travel to employee training events, without a valid current driver's license.

....

5. Any employee who might be assigned to operate a City vehicle for any purpose, or who will likely operate any vehicle on City business or to travel to employee training, must inform the City in writing if the employee for any reason no longer possesses a valid driver's license for City employment purposes, including if the license has been suspended, revoked, or canceled because of the employee's conviction or guilty pleas to various driving offenses.

....

7. It is the responsibility of the employee to refuse to drive and to advise the City of the lack of current driving privileges if the employee is asked to drive but lacks a current valid driver's license for City employment purposes.

8. Any employee who operates any motor vehicle in violation of this policy, or who refuses to provide requested information consistent with this policy, is subject to discipline up to and including termination.

V. DISCIPLINE

The following are relevant provisions of the City Employee Handbook related to discipline and disciplinary procedure:

City employees are expected to maintain the highest level of performance. In the case that an employee's job performance or behavior falls below acceptable standards, discipline, including termination, may result.

DISCIPLINARY PROCEDURES

Probationary employees and employees who serve "at-will" may be removed from their position at the discretion of the City. The following definition of "just cause" shall apply to all other positions, including those positions covered by a collective bargaining agreement, for which there may be discipline only in the event of "just cause".

Just Cause:

Just cause is intended to be and is a broad term that encompasses any legitimate basis to conclude that correction, including discipline is appropriate. It includes, but is not limited to, conduct which falls below expected standards of performance or integrity for the position, as established by the City and the department; the failure to meet any of the City's policy objectives or the fulfillment of the standards expressed in departmental rules, regulations, guidelines or acceptable practices, and the failure to abide by the express or implied directives of supervisors. It includes any conduct, performance, or issue of integrity which, if repeated regularly, would tend to impact negatively the quality of the City's services, the health, safety, morale and well-being of other employees or members of the public, or would tend to cast the City in a negative public light.

Without intending to provide an exhaustive list of particular behavior that constitutes just cause for discipline, employees should be aware that the following types of misconduct are examples of situations giving rise to "just cause" for discipline:

- failure to meet professional standards commonly applied to the position or role;
-
- violations of City or departmental policies or rules;
- misuse or unauthorized possession or handling of intoxicants...that may be dangerous to the health and safety of the employee or to others;
-
- disregard or neglect of the employee's duties and obligations to the employee's position; and
- engaging in any other conduct or action that is adverse to the interest of the City or the public

The level of discipline to be applied in any situation rests in the discretion of the City Manager. In some cases, the serious nature of the infraction may warrant termination on a first offense. In other cases, discipline will be administered in progressive steps depending again on the seriousness of the infraction, the employee's past disciplinary

record, the employee's service record with the City, and any aggravating or mitigating circumstances. Guided by these principles, misconduct may result in non-discipline, such as corrective counseling, verbal warnings, or written reprimand. Where discipline is appropriate, discipline may include suspension without pay, demotion, or dismissal from employment. Although a first minor offense might warrant only employee counseling or a verbal warning, repeated offenses will be understood as a disregard for prior correction, warnings, and discipline, and will result in a higher level of discipline.

VI. FACTS AND BACKGROUND

At about 3:45 p.m. on November 27, 2012 the Grievant, a Patrol Officer employee since February 28, 2000, was off duty on vacation when he drove to City Hall in downtown Winona after he was called by Sergeant Eric Engrav for him to provide a voluntary health insurance benefit form to the Human Resources Benefits Coordinator. (Testimony of the Grievant, Testimony of Deputy Chief Williams) This form was overdue for the Grievant to complete for him and his family to obtain health benefit coverage. Deputy Chief Tom Williams directed Sergeant Eric Engrav to instruct the Grievant to complete a renewal form for his flexible spending account. (LELS brief, p. 7) Sergeant Engrav phoned the Grievant and indicated he had less than a half hour to submit a form for flex spending by a 4:00 p.m. deadline that day. Although intoxicated, he testified that his memory was not affected, and he drove his own car about one mile to City Hall. He parked his car behind Deputy Police Chief Tom Williams' City squad car and entered City Hall to complete the form with Benefits Coordinator Deb Beckman. (Id.) The Grievant testified that he had asked to deliver the form the next day, but was told by Sergeant Engrav he could not, causing the Grievant to have concern about losing health insurance coverage for himself, his wife and four children.

After leaving City Hall the Grievant noticed that Deputy Chief Williams and Sergeant Engrave were parked in a vehicle across the street. He joined Williams inside Williams' squad car at Williams' request. Deputy Williams observed that the Grievant, who is a recovering alcoholic, seemed to be under the influence of alcohol, whereupon he admitted drinking alcohol. Williams directed that a preliminary breath test should be administered, and the Grievant did so on himself while en route to the Winona Community Memorial Hospital to take an alcohol blood test. The PBT test result indicated his blood alcohol content ("BAC") was 0.26. (Employer Exhibit 3, at 0488)

Deputy Williams consulted with Chief Bostrack by phone after reviewing the PBT reading, and then informed the Grievant that there would be a criminal charge of driving while intoxicated. Williams decided there was a potential criminal act by the Grievant as a City employee, and promptly contacted the Winona County Deputy Sheriff's Office so as to avoid a possible conflict involving a City employee. The Deputy Sheriff asked that the Grievant take a blood sample so as to determine whether he was driving while impaired, which would be in violation of the Minnesota statute. The blood test result indicated an ethyl alcohol concentration of 0.22 grams per 100 milliliters of blood as reported by the Minnesota Department of Public Safety, Bureau of Criminal Apprehension, Forensic Science Laboratory for the test collection on December 27, 2012. (Employer Exhibit 3, at 0481)

The Minnesota Implied Consent Law required that the Grievant's driver's license be revoked for not less than one year as a result of the BAC with alcohol concentration greater than 0.16. The

Grievant's drivers license was revoked in a mailing on December 12, 2012 by the Minnesota Department of Public Safety effective January 6, 2013. (LELS Exhibit 16)

On November 28, 2012 Police Chief Bostrack placed the Grievant on non-disciplinary administrative leave with pay and benefits. This resulted from the Grievant's November 27, 2012 driving to City Hall under the influence of alcohol which the Chief believed compromised the safety, security and operations of the City and public. (Employer Exhibit 14) The directive stated in part that the Grievant was prohibited from entering or being on City property, and that the terms of the leave were to remain in place "until you are otherwise notified by the City", stating also that the violation of those terms could result in "additional immediate disciplinary action against you, up to and including discharge." (LELS brief, p. 9, Employer Exhibit One, at 0556)

About December 6, 2012, the Grievant was readmitted to Community Memorial Hospital with multiple organ failure. He remained hospitalized for about two weeks. (LELS Brief, p 9.)

On December 19, 2012 the Grievant was admitted to Hazelden Betty Ford in Center City, Minnesota for treatment of alcohol and/or drug addiction. (LELS Brief, p 9.) The Grievant obtained this treatment on his own initiative. He had previously in or about September 2011 attended an alcoholism treatment program in La Crosse, Wisconsin, but had relapsed and begun consuming alcohol again, and was suffering from acute pancreatitis and multiple organ-related disorders related to alcoholism. He completed the Hazelden program and was discharged after 28 days on January 16, 2013. A March 11, 2015 letter and Summary Discharge attachment from

Tracey Hogan of the Hazelden Betty Ford Foundation was made part of the record of this arbitration after the hearing. The letter and attachment described the treatment of services, including the biomedical and emotional/behavioral/cognitive conditions, certain risks, and complications in the case.

The Grievant testified at the hearing that since leaving Hazelden he had not consumed alcohol for two years and three months.

On December 20, 2012 the Grievant was charged in Winona County District Court with 3rd Degree Driving While Impaired, pursuant to the Minnesota Statutes cited above. 169A.20 subd. 1(1) and 3rd Degree DWI- Operate Motor Vehicle - Alcohol Concentration of 0.08 within two hours, Minnesota Statutes 169A.20 subd 1 (5). This was based on the results of the November 27, 2012 blood draw. His driver's license was revoked for one year beginning January 6, 2013 (LELS Exhibit 16)

On January 25, 2013 the Grievant handed the City Human Resources Coordinator a form from Minnesota Department of Public Safety requesting that the City sign an exemption for ignition Interlock. (Employer Exhibit 17) The City Manager denied this by letter on January 30, 2013. (Employer Exhibit 17) On June 3, 2014 the Grievant again requested this exemption for Ignition Interlock, and the City Manager again denied this request on June 17, 2014. (Employer Exhibit 33)

Criminal proceedings took approximately 18 months to complete, during which the Grievant's driver license revocation was stayed for about 13 months, and he was allowed to return to work in the Police Department. He performed a variety of police duties, including investigation of crimes and interaction with the public at large in Winona, but not including driving any vehicle. The chronology of this implied consent proceeding is highlighted as follows: (as summarized in the LELS Brief, p. 11)

- On February 5, 2013, Attorney Earl Gray filed a petition for judicial review of the revocation of the Grievant's driver's license. The Court stayed the balance of the revocation, and the Grievant's driving privileges were restored.
- Following the U.S. Supreme Court's decision in *Missouri v. McNeely* on April 17, 2013, Mr. Gray, on or about May 20, 2013 filed a motion to suppress those results, believing that the Grievant's blood draw would be inadmissible. On July 12, 2013 the motion was heard.
- On August 30, 2013, the court judge stayed the Grievant's criminal proceeding pending the Minnesota Supreme Court's ruling in *State v. Brooks*, which would address Minnesota's implied consent law in light of *McNeely*.
- On October 23, 2013, the Minnesota Supreme Court issued its decision in *Brooks*, holding that the implied consent statute does not violate the Fourth Amendment.
- On November 5, 2013, the court denied Mr. Gray's motion to suppress, but invited him to re-open the record on the issue of consent to present additional facts or arguments. The court also sustained the State's revocation of the Grievant's driver's license.
- On November 13, 2013, Mr. Gray filed a second motion to suppress based on the totality of the circumstances. On November 30, the court again stayed the balance of the Grievant's driver's license revocation, and his driving privileges were restored.
- The second motion to suppress was heard on March 14, 2014. On May 6, 2014 the court denied the motion.

During this criminal proceeding and delay, the Grievant was first placed on administrative leave without pay after his license revocation. Then when the court stayed the balance of the

revocation period, he was placed on paid administrative leave, then returned to work. When the first motion to suppress was denied, the revocation of his driver's license went back into effect and he was again on unpaid leave status. When the second motion to suppress and the revocation were stayed, he was again directed to return to work. After the second motion to suppress was denied, the revocation of the license was sustained. Thus the Grievant worked for approximately 13 out of the 18 months during this criminal proceeding. (LELS Brief, p. 12.)

During this period of on again, off again work, the Grievant reported to Sergeant Chris Nelson and worked regular shifts performing a variety of duties not involving driving. The Sergeant reported that the Grievant "has been doing awesome work for me" (LELS Brief, p. 13.)

On July 2, 2014 the Grievant ple

d guilty in Winona District Court to an amended charge of Fourth Degree Driving While Impaired, which is a misdemeanor violation of Minnesota Statutes 169A.20 1 (1) . (LELS Exhibit 25) The plea was accepted by the Court that day. The revocation of the Grievant's drivers license is schedule to be lifted on April 7, 2015. (LELS Brief, p. 11)

On July 23, 2014 Police Chief Bostrack initiated an investigation and complaint alleging that the Grievant engaged in misconduct and violated City policies related to the November 27, 2012 conduct. The Chief wrote that the allegation was supported by sufficient evidence. He submitted his report to the City Manager on July 28, 2014. (Employer Exhibit 3, at 0411 to 0419)

City Manager Bodway wrote to the Grievant on July 30, 2014 notifying him of the City's intent to discharge him, presenting the basis for this action and giving him an opportunity to respond. (Employer Exhibit 4, at 0542 to 0557)

On August 11, 2014, Ms. Bodway sent another letter to the Grievant indicating the Grievant had not responded to her, and she was making a final decision to discharge him for the reasons stated in the July 30, 2014 letter. The City discharged the Grievant on August 11, 2014, citing that his driver's license was revoked or not valid for employment purposes for a substantial period from his November 27, 2012 incident to the date of discharge. (Employer Exhibit2, at 0701-0701) Because these driving privileges were restricted for 60 consecutive days, the City determined he was not complying with its policy and practice. The City would have needed to accommodate him by allowing an employment exemption for driving for employment purposes involving an accommodative Interlock Ignition Device.

Thereafter on August 12, 2014 the LELS Business Agent Kevin Hinrichs submitted a Step 2 grievance in accordance with Articles 34 and 35 of the Labor Agreement, notifying the Police Chief that the City's action violated the Agreement, specifically but not limited to Article 34 which provides for the employer to discipline for cause only. (LELS Exhibit 13) The letter sought the Grievant's reinstatement and reimbursement for lost wages and benefits, and that all documentation of this discipline be removed from any and all of his employment files, and any other remedy necessary to make the Grievant whole. Police Chief Bostrack denied the grievance on September 12, 2014 in a letter to Business Agent Hinrichs, claiming the City had just cause to discharge the Grievant. (Id.)

Business Agent Hinrichs wrote on September 16, 2014 a letter to the City Manager Bodway submitting a step 3 grievance in accordance with the Labor Agreement, repeating the claim of lack of just cause for the discharge. (Id.) The City Manager denied this grievance in a letter to Mr. Hinrichs on October 31, 2014. (Id.) Mr. Hinrichs responded by November 3, 2014 letter to Commissioner Tilsen requesting a list of arbitrators for an arbitration proceeding in the case. (Id.)

Again, LELS General Counsel Isaac Kaufman wrote to the undersigned on February 17, 2015 advising that the Union had elected to withdraw two of the grievances, namely BMS Case # 13PA0882 and Case # 14PA0715 while proceeding with the current grievance case. (LELS Exhibit 13) A hearing was set for March 4, 2015 with the concurrence of City attorney Brandon Fitzsimmons.

Subsequent to the arbitration hearing, LELS submitted for the record a March 12, 2015 letter to the undersigned as documentation of the Grievant's treatment at and discharge from the Hazelden Betty For Foundastion. This included the Discharge Summary from Hazelden. On April 10, 2015 General Counsel Kaufman again wrote to the undersigned to have LELS Exhibit 34 included in the record and given due consideration. This Exhibit is the document removing the "Y restriction" from the Grievant's driving privileges by the Department of Public Safety, thereby reinstating the Grievant's unrestricted driving privileges. Also on April 15, 2015 the attorney for the City, Brandon Fistszsimmons, e-mailed the undersigned maintaining its objection to the evidence regarding the removal of the "Y" restriction.

VII. POSITIONS OF THE PARTIES

Employer Arguments

The City argues that the Grievant's drivers license was revoked and not valid for employment purposes for 60 consecutive days as of the date of discharge, August 11, 2014, contrary to City policy and practice. The City denied the Grievant's request for the employment exemption to drive a City car because: 1) the City was not required to approve this; (2) any such accommodations for the Grievant would be the result of his own misconduct; (3) the City would then need to spend time and effort verifying that the Grievant was only operating City-owned vehicles for the normal course and scope of employment duties; (4) the Grievant would not be able to fulfill his Patrol Officer duties in all official City activities where he may need to drive a non-City owned vehicle; (5) his driving "would have been a threat to himself, City employees, third parties, and the public; expose the City to unnecessary financial and legal liability and harm the reputation of the City and its ability to provide law enforcement services to the community"; (6) the vehicle and liability insurance rates might increase for the City if the Grievant drove a City-owned auto, based on his misconduct; (7) other employees may be reluctant to work with the Grievant in their official activities if he drove a City-owned vehicle.

(Employer Exhibit One at 0546)

The City listed the following consequences that City management thought could be adverse impacts of such misconduct: (Employer Brief, p. 17-18)

1. The reputation of the police department and its ability to perform law enforcement functions, such as DWI laws, is impaired.

2. City management has lost trust in the Grievant's ability to perform law enforcement functions that include driving.
3. The Grievant's driving a City-owned vehicle would be a threat to the safety of himself, City employees, third parties and the public and expose the City to unnecessary financial and legal liability.
4. Other City employees who obtained knowledge of the Grievant's relevant misconduct through sources other than the City would be reluctant to work with him in official City activities in which he drives a City-owned vehicle.
5. The City has expended significant time, effort and expense monitoring, reviewing documents, considering legal and practical solutions and taking actions related to the Grievant's November 27, 2012 conduct and civil, criminal and employment consequences of it.
6. The calls for service per patrol officer have increased substantially.
7. An employee had to move from one regular shift to another regular shift resulting in an employee having to change vacation and personal plans.
8. When an officer has been out on unexpected leave, last minute changes to other officers' schedules were compounded, disrupting plans for days off and sleep schedules of these officers.
9. Department overtime expenses have increased to provide adequate shift coverage.
10. Officers assigned to the same patrol unit as the Grievant experienced limited dates and total number of days being available to use paid time off compared to the other core patrol units.
11. The City has not been able to provide an officer for non-priority activities in which a resident has requested an officer for, e.g. a public appearance or extra patrol.
12. Another officer's assignment has been delayed and the duties of the new assignment have been greatly impacted as a result.
13. All of these impacts have been compounded since other patrol officers were taking extended leaves of absence.
14. As a result of the foregoing, the sufficiency and efficiency of operation of the City Police Department is jeopardized and employee morale is negatively impacted.

15. The Grievant's continued employment with the City and failure to be able to perform all the essential functions of his position will continue and compound these adverse impacts.

The City argues that the Police Chief conducted a fair and thorough investigation of this incident, and that he and the City Manager gave the Grievant an opportunity to respond to the complaint as well as to the letter of intent to discharge him. (Id. p.33)

The case is made that LELS did not dispute or challenge the City policy where if the employee cannot resolve the license problem, then termination proceedings will commence at the expiration of the 60 calendar day time period. (Id, p. 21)

The City cites that there were other employees required to have a driver's license who have lost the license and resigned or were discharged at the decision of City management. (Id. p. 21)

The job of Patrol Officer requires a driver's license as specified in the job description, according to the City Brief. While the Grievant was placed on intermittent administrative leave returning to work when he had a valid unrestricted driver's license, the City did so because the criminal proceeding was in process, his driver's license status had been pending and indeterminate for an extended period of time, and the City had certain tasks that the Grievant could undertake, argues the City. This was not the case at the time of discharge. He was placed on leave without pay when his driver's license was revoked or not valid for his employment responsibilities.

The City claims it has never accommodated an employee with cars equipped with an Interlock Ignition Device, and that doing so would undermine City policy of placing employees on leave

or discharged after losing driving privilege for at least 60 consecutive calendar days. Further the City states that loss of a license precludes the performance of an essential job function of a Patrol Officer.

The Grievant drank heavily in connection with the November 27, 2012 incident, and had impaired attention skills, concentration, decision-making ability, coordination, vision, tracking ability, reaction time and muscular coordination and driving related skills, according to the City. His blood alcohol content was 0.22 to 0.26, or around three times the legal BAC limit to drive. (Employer Exhibit 3 at 0481) Despite this level of alcohol, the Grievant drove during a school and business day, crossing train tracks which bifurcate the City, where stoplights and stop signs and school buses were present.

Additionally the City lists the workplace impacts of the Grievant's conduct, including: reputational harm to the City law enforcement to enforce laws such as DWI; questions by law enforcement officers as to whether the Grievant will remain sober while on duty, or be able to drive; loss of trust by City Management in the Grievant's ability to do his job, especially when drinking would be a "threat in driving"; the City's time, effort and expense associated with regard to the Grievant's conduct, and the civil, criminal and employment consequences of his conduct; impacts on operation of the Police Department from the standpoint of staffing, service, shift assignments, time off, overtime expenses and related performance; the compound adverse impact of the Grievant's failure to be able to perform all essential functions. (Employer Brief., p 27)

The City rejects any impact on the case of the Minnesota Drug and Alcohol Testing in the Workplace Act ("MDATWA"), and argues that this reference was raised for the first time in the arbitration hearing, not during the investigation interview of the Grievant, and not giving him an opportunity to respond to the City's intent to discharge. (Id., p. 28) It is further suggested that the Arbitrator has no authority to make determination of the legality of an employer's decision, and that the Labor Agreement does not authorize consideration of statutory interpretation and court-defined standards. Furthermore "upholding the Union's position that MDATWA precludes discharges violates the provision of the Labor Agreement requiring the arbitrator to interpret and apply the agreement as written and to not ignore or nullify it." (Id , p. 29.) The City concludes that "the arbitrator, therefore, has no authority to award the Union's position that the Labor Agreement provision simply requiring cause to discharge should be amended, modified, and added to by requiring that all discharges must also comply with MDATWA." (Id. p. 29)

The attorney for the City goes on to make the case that even if MDATWA were considered, it does not apply for the following reasons. First, with regard to the alcohol testing and use of services of a testing laboratory that meets certain criteria, the PBT and Blood Test were administered to determine probable cause criminally that the Grievant was driving while impaired, and not to determine if he engaged in employment misconduct. Secondly, the Grievant was off duty for the City when the incident occurred, and he was not an "employee" at that time. Thirdly, the City does not take a PBT or a Blood Test in the circumstances it did for its employment drug and alcohol testing. Fourthly, the City had no intent to administer these tests for employment purposes when this was done. Fifth, the City discharged the Grievant for "extensive reasons other than the results of that test and the Blood Test was irrefutably for law

enforcement purposes - not employment purposes - as exemplified by the City referring the testing to another law enforcement agency for criminal purposes", the test being requested by the Sherriff's Department, andthe "compliance with the criminal procedure for testing and the test being litigated as part of the criminal proceeding against the Grievant". (Id. p. 30-31)

Further the City cites that their claim is of a violation against the City policy on Drug and Alcohol Use, and not Drug and Alcohol Testing. (Id., p 31) The City points out that the legislative intent of MDATWA was clarified by the title of the statute and its description, which characterizes it as regulating the administration of drug testing in the workplace.

The City describes the Grievant's misconduct as violating state DWI laws, the Department code of ethics and standards of conduct, the City's policies regarding loss of driving privileges, maintaining a license to drive, not influenced by alcohol while on City premises, upholding the City reputation, maintaining standards of performance or integrity, and not negatively impacting the quality of City services, the health, safety, morale and well-being of other employees or the public or casting the City in a negative light. (Id., p. 32)

The City brief describes previous discipline of the Grievant, including: 1) an oral reprimand; two suspensions without pay for using profanity with the public; missing a court appearance; and improper use of a Taser which caused a complaint. The City notes that the Grievant used substantial sick leave time for suspicious reasons.

In testimony, co-worker Eric Mueller commented that the Grievant "did not always use the best judgment as a police officer, had a pattern of taking off of work, and appeared to have a problem with alcohol". (Testimony of Patrol Officer Eric Mueller)

The City also maintained its objection to the document sent on April 10, 2015 by the LELS General Counsel, saying that the post-discharge license status is "irrelevant and more prejudicial than probative". This e-mail indicated that "should this evidence be admitted, the City maintains its request that it be admitted only for the limited purpose of determining what the appropriate remedy is, if any, should the arbitrator find that the City did not have cause to discharge the Grievant though the City asserts the evidence clearly shows it did have cause to discharge him, i.e., it should not be admitted to determine whether the City had cause to discharge the Grievant." (e-mail of April 15, 2015 from Attorney Brandon M. Fitzsimmons)

The City represents that it correctly discharged the Grievant for cause, and requests that the grievance be denied in its entirety. (Employer Brief, p. 34)

LELS Arguments

The LELS first points out that MDATWA authorizes an employee to undergo testing if the employer has a reasonable suspicion the employee is under the influence of drugs or alcohol. (LELS Brief, p. 14) The legislation also specifies that an employer may not discharge an employee for a first positive test unless the employee has first been given the opportunity to have counseling or rehabilitation, in situations where the employee has refused to participate or to successfully complete the program. The Union cites the Minnesota Court of Appeals statement,

namely "The legislative intent of the statute is to prevent discharge based solely on drug (or alcohol) test results without first offering counseling. (Id, p. 15.)

The Union refutes the City argument that the Arbitrator does not have authority to interpret MDATWA in this just cause case, noting that the City drug and alcohol policy largely incorporates MDATWA provisions. (Id.) Secondly, language in the Labor Agreement is cited as recognizing the effect of statutes to supersede provisions of the Agreement. And the Union cites another arbitration case, namely *City of St. Cloud and Law Enforcement Labor Services, Inc.*, BMS Case #14-PA-1069 and claims this is arbitral precedent for applying MDATWA to a disciplinary arbitration case. The point is made that the legislative intent is for employers to deal with drug and alcohol use foremost through treatment rather than discipline. (Id. p, 16)

While acknowledging that the Grievant was under the influence of alcohol in the workplace, and that Deputy Chief Williams had reasonable suspicion to initiate testing, the Union notes that this was the first testing procedure on the Grievant in 12 years, which triggered limitations on discipline and discharge by virtue of MDATWA and City policy. Because the City did not offer counseling or rehabilitation, the termination is claimed to be a violation of statute and policy. The Grievant completed treatment and maintains sobriety, which serves the legislative intent embodied in the statute. (Id.)

The Union makes the case that Williams testified that he began the alcohol testing on November 27, 2012 in a City vehicle for both employment and law enforcement purposes, thereby contradicting the City's position regarding MDATWA's applicability. There was disputed

testimony as to whether Williams actually told the Grievant that he would not be arrested. But when Williams saw the high blood alcohol concentration results of the PBT screening, he notified the Winona County Deputy Sheriff who administered drawing a blood sample. (Id., p. 17) This suggests, claims the Union, that a decision was made to change the procedure to a criminal/implied consent investigation. This all is contrary to MDATWA in that an employee cannot be terminated for a first positive test result unless refusing to undertake counseling or rehabilitation.

The point is also discussed in the Union Brief that the Grievant subsequently enrolled in the Hazelden Betty Ford Treatment program but was not offered this by the City. The Grievant did not notify the City of this enrollment because of his interpretation of the November 28, 2012 notice to mean that he would face immediate disciplinary action including possible discharge if he used his e-mail account or discussed this matter with anyone, which the Grievant interpreted to mean "Don't call us, we'll call you". (Testimony of the Grievant) (Employer Exhibit 14) The Union notes that the Winona Community Memorial hospital staff contacted the City Director of Benefits regarding insurance coverage for the Hazelden program, the Grievant told his supervisors and co-workers after completing the program, and therefore his rights under MDATWA are enforceable because of sufficient notice. (LELS Brief, p. 18)

The Union also argues that even if MDATWA does not apply, the City lacks just cause to terminate the Grievant. The first offense, and the conviction for a single count of misdemeanor DWI "does not rise to the level of termination", (Id., p.19) The City disregarded progressive discipline, the record of the Grievant's service and mitigating factors, according to the Union.

It is also claimed that several cases have established arbitral precedent to not support the City's contention that a temporary loss of driving privileges is sufficient reason to terminate a police officer. One case involved termination of a police officer whose driving privileges were restored prior to the time of the hearing of a Veteran's Preference panel which reinstated the officer. *City of Belle Plaine and Richard Olsen - Veteran* Another case involved a police officer in a charge of 4th Degree DWI for which the grievant received a 320 hour unpaid suspension, which the Arbitrator reduced to 100 days because of the grievant's full record of service and because of mitigating factors where the reduced penalty might serve to correct the behavior rather than simply punish. *Police Officers' Federation of Minneapolis and City of Minneapolis*.

The Union challenges the City's contention that employees and supervisors have lost trust in the Grievant's ability to do police work. The Chief's investigative report did not cite any individuals, nor did the notice. While Office Mueller questioned the Grievant's maturity and judgment, Sergeant Thad Pool and Officer Ed Wooden testified that they had not lost trust in the Grievant and would work with him without reluctance. (Testimony of Eric Mueller, Thad Pool and Ed Wooden) Therefore the Union makes the case that the City has not sufficiently proven the City Manager's allegations regarding adverse impacts of the Grievant's conduct.

Furthermore the Grievant's record of 13 months of assigned work in the Department during his criminal proceedings is cited as evidence of effective performance of police duties, particularly as cited by Sergeant Nelson's March 27, 2014 positive e-mail. It is not plausible, contends the Union, for the Department to have assigned the Grievant during this period of time to the kinds

of duties he completed if he had lost the trust of his co-workers, supervisors and the general public. Adverse media coverage relative to the case did not prevent the Department from assigning him numerous policing duties, including interaction with the public, under the supervision of the Sergeant in charge of the Criminal Investigations Division.

The City has not offered evidence to support the allegations related to staffing, as previously enumerated here in the City's argument section, and the Union cites this lack of evidence of an overall negative impact on the efficient functioning of the department. (LELS Brief, p. 25) Even if the City had such evidence, the Union notes that the City would be unable to prove that the Grievant was responsible for these shortfalls. Even today staffing is an issue on the shift on which the Grievant had been assigned.

As to the long criminal proceeding, the Union argues that this was undeniably long and complicated during 18 months, but that this cannot be relied upon as a reason for his termination. Much of the delay was due to multiple motions connected to the U.S. Supreme Court ruling in *McNeely T. Gray* and the Minnesota Supreme Court's decision in *Brooks*, which decision could impact the Minnesota implied consent law as to its constitutionality. The Union states that "At no time did Mr. Gray or the Grievant deliberately delay the criminal proceeding or cause any prejudice to the City." Therefore the City Manager should not have stated in the Notice of Intent to Discharge that the City had spent too much time, effort and expense in the case, according to the Union. (Id, p. 25-26)

As to the disciplinary history of the Grievant, the Union cites that previous incidents involved unrelated conduct issues and "should be given little weight". (Id., p. 26) His most recent performance evaluation indicates that he met the standards of performance in all areas. (LELS Exhibit 2) Yet the Union notes that the City Manager gave no consideration to his 12 years of services or the favorable aspects of his work record.

The Union also notes the Grievant has remained sober since November 27, 2012, having completed the Hazelden Betty Ford treatment program sought at his own initiative. This should be a mitigating factor in determining the level of discipline. (LELS Brief, p. 27)

The Union charges there has been disparate treatment in the discipline of officers, particularly citing Sergeant Gary Hoepfner's case which resulted in minor discipline and no discharge after a misdemeanor guilty plea like the Grievant's conviction. And the City has hired other officers with DWI convictions in their record, which is known to the City management, according to the Union. (Id.)

For these reasons, the Grievant's termination was without just cause and violated the terms of the Labor Agreement, requiring that he be reinstated to his Police Officer position, according to the Union. (Id., p. 28)

VIII. DISCUSSION AND OPINION

A key issue that is raised in this case is whether the alcohol testing on November 27, 2012 was associated with drug and alcohol use in connection with employment, or whether the testing was

undertaken because it was associated with a probable criminal offense. There are two relevant sections of the City of Winona Drug and Alcohol Policy, namely the Drug and Alcohol Use section, and a separate section entitled Drug and Alcohol Testing. Drug and alcohol testing is commonly used in government and industrial employment both for applicants for employment, and for testing of active employees.

The November 27, 2012 testing procedure followed a pattern more typical of testing to determine the *level* of alcohol use and whether there was probable cause for charging the Grievant for driving under the influence of alcohol, rather than employment testing for drug and alcohol use. Deputy Chief Williams had determined that the Grievant had been drinking, the Grievant admitted to the Deputy that he had been drinking alcohol to the point of intoxication, and the preliminary breath test result indicated a blood alcohol content of 0.26. This level of intoxication caused Deputy Chief Williams to write in his supplementary report:

"Upon arrival at the (hospital), the Grievant provided a PBT sample which indicated his BAC at 0.26. I told the Grievant that I felt based on his extreme level of intoxication that *this had now moved to a criminal* matter and that he would be processed as a DWI." (Employer Exhibit 3, at 0469)

In his testimony at the hearing Deputy Williams testified that the alcohol testing was both for employment purposes and law enforcement purposes. (Testimony of Deputy Chief Williams, LELS Brief, p. 17) While acknowledging this contradiction, the Arbitrator gives greater weight to Williams' written supplementary report documentation prepared on November 28, 2012, which is a day after the incident in contrast to the March 4, 2015 hearing testimony.

An unusual procedure occurred when Deputy Chief Williams and Sergeant Engrav attempted to use the Sergeant's PBT device to administer the test. When the device was inoperable while

driving to the hospital, the Grievant administered a PBT on himself (Employer Brief, p. 8) This is hardly the standard procedure for employment drug and alcohol testing in the workplace to have an employee incumbent administer the test. Also the Grievant was on a vacation day at the time of the testing, and not on duty at the time of the incident and testing. He had been asked to come to the office that day to deliver a flex-benefits form. Testing was agreed to voluntarily by the Grievant. (Testimony of the Grievant) It was the driving while probably impaired that led to the testing.

Also not typical, the Winona County Sherriff was called to the Hospital by Deputy Chief Williams, and it was actually personnel from this other law enforcement agency, Deputy Sheriff Darrin Brand, who requested that the Grievant take a blood sample test to determine impairment. Would the Winona County Sheriff normally do drug and alcohol employment testing for the City employees?

The test registered a concentration of 0.22 grams per milliliters of blood, which then led to criminal charges in Winona County District Court on December 20, 2012. This led to the Grievant's revocation of driving privileges for a substantial period of time from November 27, 2012 through August 11, 2014, which is the date of the Grievant's discharge from employment.

The undersigned concludes from these facts and circumstances that the alcohol test was for law enforcement purposes. Therefore, the Minnesota Drug and Alcohol Testing in the Workplace Act ("MDATWA"), Minn. Stat. 181.950-.957 is not directly applicable in this case because the PBT

and Blood Test were administered by law enforcement agencies to determine probable cause for a criminal violation of DWI, and not to determine if the Grievant was engaged in employment misconduct in the regular workplace. In this case, testing was referred to another law enforcement agency for criminal purposes and eventually for criminal proceedings. As discussed above, the testing circumstances and procedure in this case were not typical for employment alcohol testing in the workplace. Discharge actions were for a variety of reasons related to lack of a valid driver's license, the incumbent's inability to perform all duties and function of a Patrol Officer, and failure to comply with workplace standards. These violations were independent of the results of the test.

With regard to the argument that MDATWA provides that an employee cannot be terminated for a first positive test result unless he refused to participate in a rehabilitation program such as Hazelden Betty Ford, sufficient notice is required to be given about enrollment in rehabilitation. At best there were indirect and incomplete communications between the Grievant and the City prior to his enrollment at Hazelden. There were no direct communications between the Grievant and the City management regarding this enrollment. The Grievant requested Winona Community Memorial Hospital staff to contact City Benefits Director Deb Beckman regarding insurance coverage. It would have been possible for the Grievant to communicate directly with the City management by letter, for example, as to his intent to enroll at Hazelden. Or he could have asked Hazelden staff to assist in keeping the City management aware of his treatment and enrollment in this rehabilitation program. Such steps would have raised the possibility of sufficient notice by the Grievant.

To the Grievant's credit, he completed the rehabilitation program at Center City.

The case was subsequently litigated in criminal proceedings. Eventually, on July 2, 2014 the Grievant pled guilty to an amended charge of Fourth Degree Driving While Impaired, and this misdemeanor plea was accepted by the Court. (LELS Exhibit 25)

The Grievant had a history of discipline in the Police Department. He had received a one day suspension for neglect of duty for missing a court appearance. He had been suspended in 2010 for three days without pay for conduct unbecoming of an officer and improper use of a Taser while on duty at the community hospital. (Employer Exhibits 8 and 9) Additionally he had a record of using substantial sick leave. (Employer Exhibit 7) These previous misconduct matters are given due weight in arriving at a decision and award.

The City required that a Patrol Officer have a valid driver's license as stated in the job description and the City Administrative Procedure. (Employer Exhibit 4, Employer Exhibit 19, City Administrative Procedure, Number 107-5) The Grievant did not have an unrestricted license for several periods of time during his criminal proceedings through the Court, although during some of the time, his driver's license was valid and unrestricted; it was only during these latter periods of unrestricted drivers license that he was allowed to return to work under the status of intermittent leave. The City policy stated that if the employee cannot resolve the license problem, then termination proceedings will be commenced at the expiration of the 60 calendar day time period. It is commonly a requirement in police work for officers to have a

valid, current driver's license, and lack of a drivers license precludes the performance of essential duties, as many arbitrators have decided.

Another aspect of the policy guidelines stated that the responsibility for regaining the license is the employee's, not the City's. The Grievant was unable to obtain an unrestricted drivers license until April 9, 2015 when the "Y restriction", which refers to the ignition interlock requirement, was removed from the Grievant's driver's license. The City could not wait indefinitely with uncertainty for the reinstatement of this drivers license both for practical policing reasons to enforce the laws, and because prolonged waiting would undermine the City enforcement of the policies noted above. The Grievant was discharged from employment with the Police Department on August 11, 2014, because the Grievant was unable to fulfill all the duties and functions of a Patrol Officer.

The LELS did not challenge any of these policy matters.

There was adverse publicity about this November 27, 2012 incident and subsequent legal proceedings. (Employer Exhibit 3 at 0403-0515) City management believed the Grievant's misconduct compromised the public's trust and discredited the Department. (Testimony of the City Manager and the Chief of Police)

The City Manager and Police Chief testified to the problems associated with the case, and they lost confidence in the Grievant's ability to perform law enforcement functions, particularly those related to safe driving. The Arbitrator gives particular weight to safety issues, staffing issues and

the impact on other officers in the Department where their schedules were impacted for a considerable period of time. The Arbitrator does not agree with the City's workplace impact of "expending significant time, effort and expense monitoring, reviewing documents, considering legal and practical solutions etc." as a good reason for termination.

As to the commonly used set of "just cause" guidelines or criteria for applying the facts of a case, seven questions are typically stated in the form of the following, where a "no" response to any one question typically signifies that "just cause" did not exist: (The Seven Tests of Just Cause, *Enterprise Wire Co. and Enterprise Independent Union*, 46 LA 359, Daugherty 1966)

1. Did the organization give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

As a veteran police officer trained and responsible for enforcing the law, the Grievant should have known the legal and employment consequences of driving under the influence of alcohol. The Winona Police Department General Duty Manual, the City Drug and Alcohol Use Policy and the City Employee Handbook all were available to the Grievant. The City Employee Handbook and the Drug and Alcohol Use Policy described the probable disciplinary consequences of this kind of misconduct, including possible termination.

2. Was the organization's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the organization's business and (b) the performance the organization might properly expect of the employee?

The Police Department General Duty Manual and the City Employee Handbook described policies and practices important to the orderly, efficient and safe operation of the Department. The Manual sections on the Law Enforcement Code of Ethics and the Standards of Conduct described the performance the Department would properly expect of the Police Officer. (Employer Exhibit 3 at 0416-0417) The Police Officer job description delineated the essential functions of the job, qualification requirements, various skills, abilities and physical demands, as well as the work environment. (Employer Exhibit 5)

It should be noted that the Police Department discontinued individual performance evaluations several years ago, for reasons that were not adequately explained by the Police Chief at the arbitration hearing. The Grievant's last performance evaluation was completed in November 2009, and the Grievant met all expectations according to that document. (LELS Exhibit 2)

3. Did the organization, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

The City Police Chief conducted an investigation of the November 27, 2012 incident and wrote a case report dated July 28, 2014 which he subsequently referred to the Rochester, Minnesota City Attorney's Office. The Chief found misconduct and specific violations of Minnesota statutes related to alcohol and driving, as well as Police Department General Duty Manual sections on the Law Enforcement Code of Ethics

and Standards of Conduct, and the City Drug and Alcohol Use Policy. (LELS Exhibit 10) This was followed by the City Manager's letter of July 30, 2014 to the Grievant giving notice of the intent to discharge, and August 11, 2014 letter communicating discipline and discharging the Grievant. The investigation and reasons for discharge given by the City Manager reported on the evidence of violations of rules and statutes.

4. Was the organization's investigation conducted fairly and objectively?

The investigation relied upon numerous inputs from internal police personnel, the Minnesota Department of Public Safety Bureau of Criminal Apprehension, Forensic Science Laboratory and Winona County Sheriff's personnel who were involved in the case.

The Grievant was invited to be interviewed by the Chief of Police and the City Manager, but because the interview was voluntary and not a compelled statement under *Garrity*, and upon the advice of counsel, the Grievant decided not to attend an investigatory interview. (LELS Exhibit 9)

The investigation was fair and objective.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

For his investigative report, the Police Chief obtained evidence relative to the November 27, 2012 incident from the Minnesota Department of Public Safety Bureau of Criminal

Apprehension, Forensic Science Laboratory, the Winona County Deputy Sheriff, Deputy Chief Williams, Sergeant Jay Rasmussen, Sergeant Eric Engrav, and Deputy Sheriff Darrin Brand from the Winona County Sheriff's Office.. The Grievant declined the Chief's request to be interviewed upon advice of counsel. The evidence was that the Grievant's blood alcohol content was 0.26 from the preliminary breath test, and from a blood sample the alcohol concentration was 0.22, considerably above the legal limit. This was evidence that the employee was guilty as charged. This resulted in his loss of a valid driver's license, which was a requirement for City employment purposes.

6. Has the organization applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

During the previous 20 years all City employees who were required to have a current valid driver's license and who had lost their driving privileges for more than 60 consecutive days were either discharged or resigned from employment. (Employer Exhibit 10) A previous arbitration in 1999 also sustained a discharge of an employee who lost driving privileges.

Furthermore the City has never granted an employment exemption to an employee to drive cars using an Interlock Ignition Device as an accommodation. (Employer Brief, p. 23)

There was no evidence that the City committed disparate treatment in this case. Although the Hoepfner case was cited, and was a serious offense committed by Sergeant Hoepfner, his misdemeanor incident involved very different facts and

circumstances that related to disorderly conduct, not a DWI or inability to perform police work. The City proffered no evidence with regard to loss of a driver's license in the Hoepfner case. (LELS Brief, p. 28)

The City has applied its rules, policies, orders, and discipline evenhandedly and without discrimination.

7. Was the degree of discipline administered by the organization in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the organization?

The discharge disciplinary action was a result of the Grievant not able to perform his job duties as a Patrol Officer because of loss of his driver's license after a DWI. The initial charges and the eventual plea to a misdemeanor were very serious for a law enforcement officer who is responsible for enforcement of DWI and related statutes. It is critical that law enforcement personnel be able to fully perform their responsibilities. It is key to an effectively functioning democracy governed by the rule of law.

The discharge discipline was greater for this incident than previous reprimands, suspensions and other warnings for misconduct. The discipline was reasonably related to the proven offense, and the Grievant's previous employment record with the City.

Based on these responses, the disciplinary action meets the criteria set under the Seven Tests of Just Cause.

The concept of "just cause" is also addressed in the City of Winona Employee Handbook. The Employee Handbook describes "just cause" as it applies to positions other than those held by probationary employees, but including positions covered by a collective bargaining agreement, for which there may be discipline only in the event of "just cause". (Employer Exhibit 3 at 0408)

"Just cause is intended to be and is a broad term that encompasses any legitimate basis to conclude that correction, including discipline, is appropriate. It includes, but is not limited to, conduct which falls below expected standards of performance or integrity for the position, as established by the City and the department; the failure to meet any of the City's policy objectives or the fulfillment of the standards expressed in departmental rules, regulations, guidelines or acceptable practices, and the failure to abide by the express or implied directives of supervisors. It includes any conduct, performance, or issue of integrity which, if repeated regularly, would tend to impact negatively the quality of the City's services, the health, safety, morale and well-being of other employees or members of the public, or would tend to cast the City in a negative public light."

With regard to disciplinary procedures, the City Employee Handbook describes both "just cause" and the level of discipline to be applied. The Handbook states: (Id. at 0418)

"The level of discipline to be applied in any situation rests in the discretion of the City Manager. In some cases, the serious nature of the infraction may warrant termination on a first offense. In other cases, discipline will be administered in progressive steps depending again on the seriousness of the infraction, the employee's past disciplinary record, the employee's service record with the City, and any aggravating or mitigating circumstances. Guided by these principles, misconduct may result in non-discipline, such as corrective counseling, verbal warnings, written warnings, or written reprimand. Where discipline is appropriate, discipline may include suspension without pay, demotion, or dismissal from employment. Although a first minor offense might warrant only employee counseling or a verbal warning, repeated offenses will be understood as a disregard for prior correction, warnings, and discipline, and will result in a higher level of discipline."

This discharge discipline is one of numerous past disciplinary actions taken by the City relative to the Grievant. The DWI is a more serious offense and should result in a higher level of discipline, as employees have been notified in this statement of disciplinary procedures. With regard to the DWI and abuse of alcohol, there was failure by the Grievant to meet professional standards applied to the position, violations of City and Departmental policies, and misuse of intoxicants that can be dangerous to the health and safety of the employee and others. There was a valid concern for the safety of the Grievant, other employees and the public.

There was testimony about the Grievant's longstanding problems with alcohol. (LELS Brief, p. 6) These problems with alcohol had jeopardized the Grievant's health to the point that upon relapse, in November 2012, he suffered acute illnesses, serious health risks and health episodes caused by his alcohol abuse. (Hazelden Betty Ford Discharge Summary, p. 1) Numerous other biomedical conditions and complications are reported by the Grievant's treatment professionals, including risk factors that the undersigned has weighed in the formulation of a decision. (Id. p. 3) This is reported in the Hazelden Discharge Summary dated January 16, 2013.¹

In this case, the lack of a continuing valid driver's license due to a Police Officer convicted of a misdemeanor for driving under the influence of alcohol, his failure to comply with Departmental standards and regulations, and his abuse of alcohol which interfered with his performance of job duties warrant termination for "just cause".

¹ The Union asked in a letter dated March 12, 2015 from LELS General Counsel Isaac Kaufman to the Arbitrator that this Discharge Summary from Hazelden Betty Ford Foundation be included in the record and given due consideration in formulating the arbitration award. In the interest of protecting the Grievant's health privacy, this decision will not go further into biomedical conditions and behavioral health issues described in the Hazelden Discharge Summary report.

To his credit, the Grievant testified that since leaving Hazelden he has not consumed alcohol for over two years, maintains sobriety, and has participated in a structured outpatient program as well as Alcoholics Anonymous meetings.

In conclusion, the City demonstrated with credible evidence that the Grievant violated numerous Department policies, pled guilty to a misdemeanor in Winona District Court, and could not perform essential functions of Police Officer without a valid unrestricted driver's license required for employment purposes.

IX. AWARD

For the reasons discussed above, the grievance is denied, and the City's discipline of the Grievant is for "just cause".

Because the Grievant effectively performed limited duties during his unusual intermittent leave, and because he has a recent record of sobriety but also has a history of serious illness associated with his condition, the sick leave earned while he was employed should be paid to him in a lump sum as part of the award.

The City is also directed to write a letter to the Grievant within five (5) work days of this decision to offer and describe its employee assistance services provided by the Sand Creek Group behavioral health professionals. If such services are accepted by the Grievant, they are to be available and supported by the City to the Grievant for 65 work days from this order, and

should be rendered at locations suitable for counseling and employee assistance in or around the City of Winona.

For the limited purpose of overseeing enforcement of the ordered Award, the undersigned shall retain jurisdiction over this case.

Issued and Ordered on the 17th day of April, 2015

Richard J. Dunn, Labor Arbitrator