IN THE MATTER OF THE ARBITRATION BETWEEN

The City of Waite Park, "Employer" or "City" And International Brotherhood of Teamsters, Local 320 "Union"	Type of Case: Disciplinary Case BMS Case: No. 14PA0655 Date notified of selection as neutral Arbitrator: April 04, 2016 Date of Hearing: September 12, 2016 and October 05, 2016 Place of Hearing: Waite Park City Hall Record Closed: October 28, 2016 Date Decision Awarded: November 26, 2016

I. APPEARANCES:

For the Employer:

Brandon M. Fitzsimmons, Shareholder Attorney Flaherty & Hood, P.A.

For the Union:

Martin H. R. Norder, Attorney at Law Kelly & Lemmons, P.A.

II. JURISDICTION:

Pursuant to relevant provisions in the parties' Labor Agreement ("Labor Agreement") and procedures of the Minnesota Bureau of Mediation Services this matter was heard on September 12, 2016 and October 05, 2016 at Waite Park City Hall in Waite Park, Minnesota. Arbitrator Harry S. Crump was selected to serve as grievance arbitrator pursuant to the procedures of the Minnesota Bureau of Mediation Services and the parties' Labor Agreement ("Labor

Agreement"). Both parties were afforded a full and fair opportunity to present their evidence pertaining to this matter. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs that were duly received on or before October 28, 2016, which closed the record, and the matter was taken under advisement.

III. BACKGROUND

Teamsters Local 320 (hereafter the "Union") filed a grievance on behalf of Officer Brent Nyhammer (hereafter "Officer Nyhammer") on November 1, 2013, alleging that his discipline of a 10 day suspension was without just cause pursuant to Article 10 of the Collective Bargaining Agreement (hereafter "CBA") between the Union and the City of Waite Park (hereafter the "City").

IV. ISSUES

The following are issues for this arbitration:

1. Is the purported grievance arbitrable?
2. Was there just cause for the ten day suspension without pay of Officer Nyhammer?
3. If not, what is the appropriate remedy?

V RELEVANT CONTRACT PROVISIONS

Article 10: Discipline

Section 10.1: The Employer will discipline employees for just cause only. Discipline will be in the form of:

A. Oral reprimand
B. Written reprimand
C. Suspension
D. Reduction
E. Discharge

Section 10.8: Grievances relating to this Article may be initiated by the Union in Step 3 or the grievance procedure under Article VIII.

Article 8: Employee Rights – Grievance Procedure

Facts Leading up to Investigation

On August 21, 2013, Officer Nyhammer submitted a request for vacation to Las Vegas on October 2, 2013. On September 13, 2013, Officer Nyhammer electronically accepted a notification from Lisa Laudenbach, Administrative Assistant for the City, notifying Officer Nyhammer that he was scheduled to testify in the case of State v. Sikkila at 9:00 AM on Tuesday, October 1, 2013. On Friday, September 27, 2013, at approximately 10:11 AM, Assistant County Attorney Meriel Lester emailed Officer Nyhammer and Sgt. Pat Grossback asking them for their availability to discuss the jury trial set for October 1. *See* Union Exhibit 7. Both Officer Nyhammer and Sgt. Grossback were on duty on that day. At the hearing, Officer Nyhammer stated that he got Ms. Lester's cell phone number from Sgt. Grossback and at approximately 7:42 PM, Officer Nyhammer contacted her informing her that he had just received her email and that he would be out of town for the jury trial beginning on October 1. *See* Union Exhibit 6. Officer Nyhammer informed Ms. Lester that he had not checked his calendar the last few days and also stated that he did not know how it got missed. *Id*. Officer Nyhammer asked Ms. Lester to give him a call back and provided her with two phone numbers. *Id*.

At the hearing, Officer Nyhammer testified that he never received a call back from Ms. Lester. Ms. Lester also testified that she did not call back Officer Nyhammer because she interpreted the voicemail as that he would not be available for trial. Ms. Lester further testified that she was able to get a continuance of the jury trial and that the case did go to trial and the defendant was found not guilty. Officer Nyhammer did testify at this trial and Ms. Lester testified at the hearing that she could not say for sure why the jury found the defendant not guilty.

On Saturday, September 28, 2013, Sgt. Grossback emailed Chief David Bentrud regarding the email he and Officer Nyhammer received from Ms. Lester. *See* Union Exhibit 9. Sgt. Grossback informed Chief Bentrud that Officer Nyhammer told him that he would be out of town on October 1. *Id*. Sgt. Grossback stated that he then gave

Officer Nyhammer a phone number to contact Ms. Lester regarding his unavailability. Sgt. Grossback also stated that he found it hard to believe that Officer Nyhammer was not notified and that he believed there could be an honesty issue. *Id.*

On Monday, September 30, 2013, Chief Bentrud contacted Ms. Lester. Ms. Lester stated that she was upset that she had to reschedule the trial on such short notice and that it brought professional embarrassment to her. Ms. Lester also played the voicemail that she received from Officer Nyhammer on September 27. On Tuesday, October 1, 2013, Chief Bentrud spoke to Ms. Laudenbach regarding the court notification process. Ms. Laudenbach informed Chief Bentrud that when she receives a court notification email from the County Attorney, she prints a copy of the court notice and places it in the officer's mailbox, writes the court case on the white board court calendar in the hallway of the police department, and sends an email notice to the officer who can then either accept or decline the notification. Ms. Laudenbach told Chief Bentrud that Officer Nyhammer accepted the court notification for the October 1 jury trial of State v. Sikkala on September 13.

On Thursday, October 3, 2013, Chief Bentrud signed a Complaint of Misconduct Form against Officer Nyhammer. *See* Union Exhibit 10. The Complaint ordered Officer Nyhammer to appear at an investigatory interview on October 9, 2013. Chief Bentrud gave Officer Nyhammer a copy of the Complaint on October 3. Officer Nyhammer told Chief Bentrud that it was his mistake regarding the court notification but Chief Bentrud told Officer Nyhammer that he would have to wait until the interview to discuss the matter with him.

Prior to the investigatory interview, Chief Bentrud again contacted Ms. Lester on October 7, 2013. Ms. Lester told Chief Bentrud that the defendant in this case was involved with the Stearns County Domestic Abuse Court which is reserved for the more serious abusers. Ms. Lester stated that she had requested a speedy trial in this matter and that this made her look bad in the eyes of the judge and defense attorney because she had to ask for the continuance at the last minute.

On October 9, 2013, Chief Bentrud conducted an internal interview with Officer Nyhammer with the Union Steward Arlan Schermerhorn also present. *See* Union Exhibit 12. Officer Nyhammer acknowledged that he had been notified about the October 1 jury

trial date prior to September 27. *Id*. at p. 2. Officer Nyhammer also admitted to Chief Bentrud that he screwed up. *Id*. at p. 3. Officer Nyhammer stated that he also told Sgt. Grossback that he screwed up on September 27. *Id*.

During the interview, Chief Bentrud played the recording of the call from Officer Nyhammer to Ms. Lester. Officer Nyhammer stated that he was trying to tell Ms. Lester that he screwed up in not checking his court calendar because it had been a couple hectic last weeks. *Id*. at p. 6. Officer Nyhammer also admitted that he may have used a bad choice of words in telling Ms. Lester that he screwed up. *Id*. at p. 7. Officer Nyhammer stated that a better choice of words would have been "I guess I don't know how I missed it" or "I don't know how it got missed by me." *Id*. at p. 7. Chief Bentrud then asked Officer Nyhammer how he thought Ms. Lester interpreted his voicemail and Officer Nyhammer stated that he had no idea how she interpreted it. *Id*. at p. 8. Officer Nyhammer again admitted that he misspoke and that he should have said that he was sorry that he screwed up. *Id*. at p. 11. Officer Nyhammer also questioned why Ms. Lester did not try and contact him after receiving the voicemail and Chief Bentrud responded that "she interpreted your voice message like I did, that you weren't notified and we've established that your were." *Id*. at p. 13.

After the interview, Officer Schermerhorn spoke with Chief Bentrud about the incident. Officer Schermerhorn stated that he could not believe what he had heard from Officer Nyhammer on the voice message and that he believed he lied. He also stated that Officer Nyhammer was lying.

On October 10, 2013, Chief Bentrud reviewed Officer Nyhammer's personnel file and discovered that Officer Nyhammer had been previously suspended for one day in 2004. However, it was later determined that this one day suspension was reduced to a letter of reprimand. *See* Union Exhibit 17. All of Officer Nyhammer's performance reviews have been acceptable and he has five letters of commendation and numerous thank you letters from citizens. *See* Union Evaluations and Awards Binder.

On October 14, 2013, Chief Bentrud spoke with Sgt. Grossback about his conversation with Officer Nyhammer on September 27. Sgt. Grossback stated that he did not recall Officer Nyhammer acknowledging that he made a mistake or accepting responsibility. Chief Bentrud did not take any notes or record this conversation.

On October 25, 2013, Chief Bentrud issued a Notice of Intent to Suspend without Pay for 10 days to Officer Nyhammer. *See* Union Exhibit 13. Chief Bentrud concluded that Officer Nyhammer's actions violated the following policies: Waite Park Police Department Policies and Procedures, Number 316 (Professional Conduct of Officers); Waite Park Police Department Policies and Procedures, Number 900.10: Duty; Waite Park Police Department Policies and Procedures, Number 900.17: Integrity; and Waite Park Police Department Policies and Procedures, Number 900.35: Truthfulness. *Id*. Chief Bentrud also stated that he had reviewed Officer Nyhammer's personnel file and discovered that he had been suspended for one day in 2004.

On October 30, 2013, Officer Nyhammer and Officer Schermerhorn met with Chief Bentrud to discuss the Intent to Suspend. Officer Nyhammer again stated that he screwed up and admitted that he used a bad choice of words. Chief Bentrud did not take any notes or record this conversation. On October 31, 2013, Chief Bentrud issued a Notice of Suspension without Pay for 10 days to Officer Nyhammer. *See* Union Exhibit 14. In the Notice, Chief Bentrud acknowledged that the one day suspension of Officer Nyhammer from 2004 was reduced to a written reprimand.

Grievance

On November 1, 2013, Business Agent Terry Neuberger filed a Grievance Application on behalf of Officer Nyhammer alleging that he was disciplined without just cause. *See* Union Exhibit 19. On November 4, 2013, City Administrator Shaunna Johnson wrote a letter to Mr. Neuberger stating that she was not the designated representative at Step 1 of the grievance and that a city employee must present a grievance to the Chief of Police. *See* Union Exhibit 20. On November 6, 2013, Mr. Neuberger sent a letter to Chief Bentrud stating that the Union was initiating a grievance on behalf of Officer Nyhammer at Step 1. *See* Union Exhibit 21. On November 22, 2013, Chief Bentrud responded to Mr. Neuberger's letter from November 6 by stating that until a City employee presents a grievance and discusses it with him, the City will deem alleged grievance by the Union as premature and invalid. *See* Union Exhibit 22.

On December 2, 2013, Mr. Neuberger sent a letter to Ms. Johnson informing her that the Union is appealing the grievance to Step 2. *See* Union Exhibit 23. Mr.

Neuberger further stated that the Union is the exclusive representative pursuant to the CBA and that it can sign grievances on behalf of its members. *Id*. On December 6, 2013, Ms. Johnson responded to Mr. Neuberger's letter stating that the grievance was premature and invalid. *See* Union Exhibit 24. On December 20, 2013, Ms. Johnson sent a letter to Mr. Neuberger denying the grievance on the grounds that it (1) was not a valid grievance and (2) the grievance wholly lacks merit. *See* Union Exhibit 26. On December 27, 2013, Mr. Neuberger informed Ms. Johnson that the Union would be appealing the grievance to arbitration. *See* Union Exhibit 27.

Both Mr. Neuberger and Ms. Johnson testified at the hearing. Ms. Johnson testified that it had been the City's interpretation and past practice that any grievance initiated at Step 1 must be signed by a City employee and given to the Chief of Police and discussed in person. Ms. Johnson stated that this is why the City believed this grievance not to be valid. Mr. Neuberger testified that the Union is the exclusive representative of the employees and that it can initiate grievances on their behalf. Mr. Neuberger also testified that pursuant to the CBA, the Union could have just started the grievance at Step 3 (Arbitration) but that he was trying to work with the City to come to a resolution short of arbitration.

VI. LEGAL STANDARD

There are two "proof" issues in discipline cases – the first involves proof of wrongdoing; the second, assuming guilt of wrongdoing is established, concerns the question of whether the punishment assessed by management should be upheld or modified. Elkouri, *How Arbitration Works*, 7th Ed., at 15-23 (hereafter "*Elkouri*"). If the employer meets its first burden, the burden of proof is then on the employer to prove by preponderance of the evidence that the level of discipline was warranted. *Id*. at 15-25.

The CBA protects job security by limiting the employer's power to discipline – specifically, Article 10.1 states that "The Employer will discipline for just cause only." Although just cause is not a precise concept, two principles central to the just cause analysis are employed by "all arbitrators" – due process and progressive discipline. Norman Brand, *Discipline and Discharge in Arbitration*, at 30 (2nd ed. 2008) (hereafter "*Discipline and Discharge*").

It is "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." *Elkouri,* at 15-40 (quoting *Capital Airlines,* 25 LA 13, 16 (Stowe, 1955). Discipline is considered excessive if it is "out of step with the principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored." *Id.* at 15-43. Arbitrators often modify disciplinary penalties imposed by management when there are mitigating circumstances that lead the arbitrator to conclude that the penalty is too severe or that the employer lacks, or has failed to follow, progressive discipline. *Id*. Moreover, arbitrators are "likely to set aside or reduce penalties when the employee had not previously been reprimanded and warned that his or her conduct would trigger the discipline." *Id.*

VII. UNION ARGUMENT

The Employer has failed to meet its burden of proof that the discipline of Officer Nyhammer – a 15 year employee as a police officer at the time of the discipline with an excellent service record – was warranted. The evidence in the record reveals that Officer Nyhammer admitted that he made a mistake and tried to correct it; the investigation was not thorough and objective; the employer inconsistently applied discipline; Officer Nyhammer's exemplary work record was ignored; and there was no attempt at progressive discipline. Officer Nyhammer's discipline was therefore excessive and the grievance should be sustained and Officer Nyhammer made whole.

VIII. THE GRIEVANCE IS ARBITRABLE

A general presumption exists that "favors arbitration over dismissal of grievances on technical grounds." *Elkouri,* at 5-11. The purpose of an agreement to require that a grievance be signed or otherwise presented by the aggrieved employee is to aid the employer in evaluating and responding to the grievance. *Id*. at 5-17. Where this purpose is otherwise achieved, an arbitrator might feel less strictly bound by the employee signature requirement. *See Republic Steel Corp*., 11 LA 691, 694-95 (McCoy, 1948).

Arbitrators have viewed the provision for employee signatures to initiate the grievance process as a mere formality and have indicated a strong inclination to find in favor of the union's right to initiate grievances. *Elkouri,* at 5-18. *See also Industrial*

Gasket & Packing Co., 45 LA 847, 848-49 (Coffey, 1965) (omission of employee signature was not a defect as to substance and signature by a union representative will suffice); *BP Oil*, 73 LA 347, 349 (Berkowitz, 1979); *Brush Beryllium Co.*, 55 LA 709, 714 (Dworkin, 1970); *Ohio Power Co.*, 45 LA 1039, 1044 (Leach, 1965); *Sinclair Ref. Co.*, 42 LA 376, 384 (Willingham, 1964); *Great W. Sugar Co.*, 40 LA 652, 658 (Seligson, 1963) (under public policy there is a presumption of union right to initiate grievances). The presumption of arbitrability of a grievance may override the absence of a grievant's signature on the grievance form if the form is signed by a union representative. *Id*. *See also Bloom Twp. High. Sch. Dist.*, 119 LA 321 (Bierig, 2003) (grievance challenging employee's suspension was arbitrable, even though collective bargaining agreement stated that "only an employee may grieve; the local does not have the ability to grieve," and employee did not sign any formal grievance, but had authorized union to pursue grievance).

In this case, the Union, as the exclusive representative of the employee, properly filed a grievance with the City. Business Agent Terry Neuberger filed and signed a grievance application on November 1, 2013, on behalf of Officer Nyhammer pursuant to Article 8 of the CBA. Mr. Neuberger also sent a letter to Chief Bentrud pursuant to Step 1 informing him of the Union initiating the grievance. Mr. Neuberger continued to properly follow the grievance procedure all the way up to Step 3 appealing the grievance to arbitration.

Ms. Johnson testified that it had been the City's interpretation and past practice that any grievance initiated at Step 1 must be signed by a City employee and given to the Chief of Police and discussed in person. Ms. Johnson stated that this is why the City believed this grievance not to be valid. This argument should not be accepted as justifying the City's contention that the grievance is not valid. As other arbitrators have held and public policy supports, the provision for employee signatures to initiate the grievance process is a mere formality and there is a strong inclination to find in favor of the union's right to initiate grievances. In this case, there was no surprise to the City of who was the employee grieving the discipline. Chief Bentrud knew that Officer Nyhammer may be filing a grievance of his suspension. The City suffered no prejudice by Mr. Neuberger, the exclusive representative of Officer Nyhammer, filing the

grievance application on his behalf. The City's attempt to interpret the grievance as not valid based on past practice should be rejected. For these reasons, the grievance in this matter is arbitrable.

IX. THE FACTS RELIED UPON IN THE INVESTIGATION DO NOT JUSTIFY THE LEVEL OF DISCIPLINE IMPOSED.

The facts relied upon by the City to suspend Officer Nyhammer 10 days do not justify this level of discipline. During his investigative interview, Officer Nyhammer admitted that he screwed up by not informing Ms. Lester until September 27 that he would not be available to testify at the trial on October 1. In fact, Officer Nyhammer admitted his mistake even prior to the interview when Chief Bentrud gave him the Complaint of Misconduct Form. Also during the interview, Officer Nyhammer stated that he was trying to tell Ms. Lester in his phone call to her that he screwed up in not checking his court calendar because it had been a couple hectic last weeks. Officer Nyhammer also admitted that he may have used a bad choice of words in telling Ms. Lester that he screwed up. Officer Nyhammer stated that a better choice of words would have been "I guess I don't know how I missed it" or "I don't know how it got missed by me." Chief Bentrud then asked Officer Nyhammer how he thought Ms. Lester interpreted his voicemail and Officer Nyhammer stated that he had no idea how she interpreted it. Officer Nyhammer again admitted that he misspoke and that he should have said that he was sorry that he screwed up.

At the hearing, Chief Bentrud testified that the level of discipline was justified because Officer Nyhammer lied in his voicemail to Ms. Lester and in his investigatory interview. The basis for this lie was that Officer Nyhammer did not specifically say he did not know how the notice got missed "by me." Chief Bentrud also testified that the disciplined was based on the potential for what could happen which was a verdict of not guilty. However, as Ms. Lester testified, it is difficult to determine why juries find defendants not guilty and that it cannot be based solely on Officer Nyhammer's testimony.

Based on these facts, the discipline imposed on Officer Nyhammer was excessive. Mitigating circumstances, including Officer Nyhammer's admission of "screwing up" and his exemplary service record, were ignored by the City. Chief

Bentrud based his discipline of Officer Nyhammer's omission of two words, "by me," and how his words were interpreted by Ms. Lester. This omission of words cannot be determined to be an intentional misrepresentation by Officer Nyhammer. These facts are far from preponderance of the evidence that Officer Nyhammer, a 15 year veteran with only a written reprimand on his record, engaged in wrongdoing sufficient to warrant the ten day discipline imposed. Therefore, the grievance should be sustained.

X. THE INVESTIGATION WAS NOT THOROUGH AND OBJECTIVE.

An employer must conduct a careful and unbiased investigation of the charge that leads to the conclusion that "sufficiently sound reasons exist to discipline the employee." *Discipline and Discharge* at 42. When an investigation is found to be less than thorough, arbitrators have concluded that the just case standard has not been met. *Id.* Arbitrators "frequently look beneath the surface of an investigation to determine whether the employer made its decision at an earlier stage and then just went through the motions of conducting investigatory interviews and fact finding." *Id.* at 40. Investigators should encourage free flowing narratives by the interviewee, favor open ended questions, and minimize interruptions. Investigators should not assume that the involved officer has something to hide until proven otherwise.

In this case, Chief Bentrud both filed the Complaint of Misconduct Form and conducted the investigatory interview with Officer Nyhammer. Prior to the interview, Officer Nyhammer admitted his mistakes to Chief Bentrud. Officer Nyhammer also admitted that he screwed up early in the interview. However, instead of ending the interview once he had Officer Nyhammer admit his mistake, Chief Bentrud continued the interview to try and see if he could get any other incriminating statements from Officer Nyhammer that could be used against him in imposing any discipline.

XI. EMPLOYER INCONSISTENTLY APPLIED DISCIPLINE.

Arbitrators recognize that proper discipline requires consistency in rule enforcement. *Discipline and Discharge,* at 96. Consistency requires that rules be enforced evenhandedly. *Id.* It also requires that the penalty imposed for the rule violation be consistent with penalties imposed for similar offenses. *Id.* Arbitrators find

just cause lacking where the evidence shows the employer has been inconsistent in its enforcement of rules. *Id*. at 97.

In this case, the Union introduced a written reprimand for Sgt. Thomas Jensen imposed by Chief Bentrud in 2010. *See* Union Exhibit 18. In this incident, Sgt. Jensen directed a subordinate officer to indicate in her police report that a victim in a domestic assault case was uncooperative during the investigation. *Id*. This was determined to be an untruthful statement and Chief Bentrud imposed a written reprimand against Sgt. Jensen. *Id*. At the hearing, Chief Bentrud testified that he was concerned about Sgt. Jensen's credibility because he made an untruthful statement to both the Chief and to a fellow officer. Chief Bentrud also testified that the situation with Sgt. Jensen was different than the situation with Officer Nyhammer because Officer Nyhammer made an untruthful statement to a county attorney.

The cases with Sgt. Jensen and Officer Nyhammer bear a striking resemblance to each other. Both cases deal with domestic assault, one of the most important and dangerous cases that are pursued by law enforcement and prosecutors. In Sgt. Jensen's case, his untruthful statement led to a defendant not being arrested for domestic assault. In Officer Nyhammer's case, his admitted poor choice of words led to Ms. Lester having to request a continuance for the trial on short notice. However, Sgt. Jensen only received a written reprimand while Officer Nyhammer received a 10 day suspension. For these reasons, the Employer inconsistently applied discipline in this case.

XII. OFFICER NYHAMMER'S EXEMPLARY, DISCIPLINE-FREE WORK RECORD WAS IGNORED.

For over 50 years, arbitrators have considered an employee's long, good past record as a "major factor" to reduce discipline.[1] *Elkouri*, at 15-63. In fact, studies have

[1] *See e.g., Foods & Commercial Workers Local 7 v. King Soopers, Inc.*, 222 F.3d 1223 (10th Cir. 2000); *Silverstream Nursing Home*, 2000 WL 1481892 (DiLauro, 2000); *Oldmans Township Bd. of Educ.*, 2000 WL 1481889 (DiLauro, 2000); *USS, Div. of USX Corp.*, 1999 WL 1074563 (Petersen, 1999); *City of Southfield*, 1999 WL 908627 (McDonald, 1999); *Elkhart County, Ind., Gov't*, 112 LA 936 (Cohen, 1999); *Weyerhaeuser Paper Co.*, 1999 WL 555867 (Eisenmenger, 1999); *Wayne State Univ.*,

111 LA 986 (Brodsky, 1998); *Western Res.*, 1998 WL 1110785 (O'Grady, 1998); *USS*, shown that prior work record is the most frequently cited mitigating factor considered by arbitrators in discipline arbitrations. *See* Jennings, Sheffield, & Walter, *The Arbitration Discharge Cases: A Fourth Year Perspective*, 38 Lab. L.J. 33, 41 (1987). *Elkouri* describes long service with an employer as a "*definite* factor in favor of the employee whose discharge is reviewed through arbitration." *Elkouri*, at 15-68 (emphasis added).

As previously discussed, Officer Nyhammer has an exemplary service record which includes five letters of commendation and numerous thank you letters from citizens. *See* Union Evaluations and Awards Binder. The only discipline in Officer Nyhammer's record is a written reprimand from 2004. Chief Bentrud stated in his Notice

Div. of USX Corp., 111 LA 52 (Neyland, 1998); *Mason & Hanger Corp.*, 109 LA 957 (Jennings, 1998); *Penn Traffic*, 1998 WL 1041392 (Imundo, Jr., 1998); *Smurfit Recycling Co.*, 103 LA 243 (Richmman, 1994); *Canteen Corp.*, 99 LA 649 654-55 (Allen, Jr., 1992); *Ball-Incon Glass Packaging Corp.*, 98 LA 1, 4-5 (Volz, 1991); *Ohio Dep't of Youth Servs.*, 97 LA 734, 738 (Bittel, 1991); *Rohm & Haas Tex.*, 92 LA 850, 856 (Allen, Jr., 1989); *S.E. Rykoff & Co.*, 90 LA 233, 235 (Angelo, 1987); *Weyerhauser Co.*, 88 LA 270 (Kapsch, 1987); *Consolidation Coal Co.*, 85 LA 506, 511 (Hoh, 1985); *Victory Mkts*, 84 LA 354, 357 (Sabghir, 1985); *Potomac Elec. Power Co.*, 83 LA 449, 453 (Kaplan, 1984); *Fisher Foods*, 82 LA 505, 512 (Abrams, 1984); *Southwest Detroit Hosp.*, 82 LA 491, 492 (Ellmann, 1984); *City of Burlington, Iowa*, 82 LA 21, 24 (Kubie, 1984); *Pfizer, Inc.*, 79 LA 1225, 1236 (Newmark, 1982); *Stylemaster, Inc.*, 79 LA 76, 78-79 (Winton, 1982); *Pinkerton's of Fla.*, 78 LA 956, 961 (Goodman, 1982); *Commonwealth of Pa.*, 73 LA 556, 561 (Gerhart, 1979); *Ryder Truck Rental*, 72 LA 824, 828 (Cohen, 1979); *Sunweld Fitting Co.*, 72 LA 544, 558 (Hawkins, 1979); *Kast Metals Corp.*, 70 LA 278,
284 (Roberts, 1978); *City of Boulder, Colo.*, 69 LA 1173, 1178 (Yarowsky, 1977); *Shenango, Inc.*, 67 LA 869, 869-70 (Cahn, 1976); *Charleston Naval Shipyard*, 54 LA 145.151 (Kesselman, 1971); *Ingersoll-Rand Co.*, 50 LA 487 (Scheiber, 1968); *LockheedCalifornia Co.*, 47 LA 937, 940 (Levin, 1966); *Marathon Rubber Prods. Co.*, 46 LA 297, 302 (Lee, 1966); *Clinton Engines Corp.*, 35 LA 428, 430 (Young, 1960); *Pan Am. World Airways Sys.*, 33 LA 257, 259 (Seitz, 1959); *Reed Roller Bit Co.*, 29 LA 604, 608 (Hebert, 1957); *Pratt & Whitney Co.*, 28 LA 668, 672 (Dunlop, 1957); *Ironrite, Inc.*, 28 LA 394, 398 (Haughton, 1956; *Niagara Frontier Transit Sys.*, 26 LA 575, 577 (Thompson, 1957).
of Suspension without Pay, and testified at the hearing, that he took into account Officer Nyhammer's personnel file when determining the correct level of discipline. Chief Bentrud also noted that he at first mistakenly believed that Officer Nyhammer's 2004

discipline was a one day suspension instead of a written reprimand. Chief Bentrud stated that this mistake was not considered in making his final determination of discipline.

In reviewing the facts of this case, it is clear that at best minimal consideration of Officer Nyhammer's past work was considered by Chief Bentrud. This is a significant mitigating factor that was ignored by Chief Bentrud in determining the level of discipline to impose on Officer Nyhammer.

XIII. EMPLOYER MADE NO ATTEMPT AT PROGRESSIVE DISCIPLINE.

The employer must show that "a reasonable attempt was made toward rehabilitation through the use of progressive discipline." *Discipline and Discharge*, at 110. The purpose of progressive discipline is to put employees on notice of improper behavior in order to give them a chance to correct their behavior. *Id.* at 65-66. Progressive discipline is therefore mutually beneficial because it gives the employee a chance to correct his/her behavior and allows the employer to keep a trained employee. *See id.* at 66. Discipline is considered excessive if it is "out of step with the principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored." *Elkouri*, at 15-43.

In this case, the only prior discipline in Officer Nyhammer's record was a written reprimand from 2004. Additionally, the mitigating factors, including Officer Nyhammer's admission of screwing up and his exemplary service record, were ignored. There was no attempt at progressive discipline, such as a coaching session, made by the Employer as a result of the violations determined by Chief Bentrud.

In the case of an exemplary police officer such as Officer Nyhammer, the quantum leap to a 10 day suspension undercuts the concept of progressive discipline. The discipline in this case was clearly out of step with the principles of progressive discipline, was punitive, and the Employer ignored mitigating circumstances. Accordingly, Officer Nyhammer's discipline was excessive and the grievance should be sustained.

XIV. THE EMPLOYER ARGUMENT

A. The purported grievance is not procedurally arbitrable.

The Labor Agreement requires grievances to "be resolved in conformance" with the procedure provided in it.[1] The procedure was not complied with.

1. No valid grievance was initiated at Step 1.

The Labor Agreement states:

> **STEP 1.** *An employee* claiming a violation concerning the interpretation or application of this Agreement shall, within fifteen (15) calendar days after such alleged violation has occurred, present such grievance to the Chief of Police as designated by the Employer. The Chief of Police will discuss and give an answer to such Step I grievance within fifteen (15) calendar days after receipt. A grievance not resolved in Step 1 and appealed to Step 2 shall be placed in writing and shall set forth the nature of the grievance, the facts on which it is based, the provision or provisions of the Agreement allegedly violated, the remedy requested, and shall be appealed to Step 2 within fifteen (15) calendar days after the Chief of Police's final answer to Step 1. Any grievance not appealed in writing to Step 2 by the Union within fifteen (15) calendar days shall be considered waived.

A grievance was not initiated at Step 1 as no "employee" presented or discussed with the Chief of Police any grievance in this matter.[2] The City stated in a response letter to the Union's correspondence of November 1, 2013 in which it attempted to initiate a grievance that these requirements needed to be met otherwise "the City will deem any attempts by the employee or Teamsters, Local No. 320 (Union) to proceed further with the alleged grievance as premature and invalid."[3]

The Union is not authorized to initiate grievances at Step 1 because Step 1 provides that an "employee" exclusively must present the grievance at this step. The word "employee" is clearly defined in the Labor Agreement as: "a member of the exclusively recognized bargaining unit."[4] In contrast, Steps 2 and 3 establish that the "Union" presents the grievance at this step.[5] This difference in describing the appropriate individual or entity to present a grievance at these steps must have meaning.[6] In addition, the provision in the grievance procedure establishing the recognition of Union representatives only establishes that the Union will be "the grievance

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[1] (City Exh. 14 at 3053).
[2] (City Exh. 3 at 0018).
[3] (City Exhs. 43; 44; 46).
[4] (City Exh. 14 at 3051).
[5] (City Exh. 14 at 3053-3054).
[6] *See* Frank Elkouri & Edna Elkouri, *How Arbitration Works* 9-35 (Alan Miles Ruben, ed., 7th ed. 2012) (stating that in interpreting contracts, "the inclination is to choose the interpretation that would give effect to all provisions").

representatives of "the bargaining unit having the duties and responsibilities established by this Article."[7] This provision establishes that the Union is authorized as the grievance representative only of the collective "bargaining unit" – not an "employee." This means that the Union is only the grievance representative when the "Union" is authorized to do something, e.g. appeal grievances to Steps 2 and 3, but not initiate grievances at Step 1. Finally, the parties have no practice of authorizing the Union to initiate grievances at Step 1.[8]

The Union's assertion that the Union failed to comply with these requirements because the Chief did not set up a meeting to discuss this is misleading as the Chief of Police requested that Brent Nyhammer meet with him.[9] Brent Nyhammer did not contact the Chief of Police to schedule a meeting with him; nonetheless discuss it with him or sign the grievance correspondence.[10]

In addition, Brent Nyhammer was notified of his suspension without pay on October 31, 2013.[11] The grievance procedure was not complied with by November 15, 2013 -15 calendar days after the alleged violation.

The purported grievance is waived.

Finally, 8.6 of the Labor Agreement states: "If a grievance is not presented within the time limits set forth above, it shall be considered 'waived.'"[12] Because no grievance was timely initiated, the purported grievance related to Brent Nyhammer's suspension is waived.

Step 2 of the grievance procedure was not complied with**.**

The grievance procedure requires that:

> A grievance not resolved in Step 1 and appealed to Step 2 shall be placed in writing and shall set forth the nature of the grievance, the facts on which it is based, the provision or provisions of the Agreement allegedly violated, the remedy requested, and shall be appealed to Step 2 within fifteen (15) calendar days after the Chief of Police's final answer to Step 1. Any grievance not appealed in writing to Step 2 by the Union within fifteen (15) calendar days shall be considered waived.
>
> STEP 2. If appealed, the written grievance shall be presented by the Union and discussed with the Step 2 representative, the City Administrator. The City

[7] (City Exh. 14 at 3053).
[8] (Testimony of Shaunna Johnson).
[9] (City Exh. 46).
[10] (City Exh. 46).
[11] (City Exh. 2).
[12] (City Exh. 14 at 3054).

> Administrator shall give the Union the Employer's Step 2 answer in writing within fifteen (15) calendar days after receipt of such Step 2 grievance. A grievance not resolved in Step 2 may be appealed to Step 3 within fifteen (15) calendar days following the City Administrator's final answer in Step 2. Any grievance not appealed in writing to Step 3 by the Union within fifteen (15) calendar days shall be considered waived.[13]

The Union's purported appeal to Step 2 is premature because no valid grievance was initiated at Step 1. 10.8 of the Labor Agreement provides the Union discretion to initiate a grievance related to discipline at Step 3.[14] But, the Union chose to attempt to initiate the grievance at Step 1 by providing the initial grievance document to the City Administrator and Chief of Police.[15] Therefore, the requirements of Step 1 were required to be complied with.

Further, the Union did not discuss with City Administrator Johnson in person any grievance even if the grievance were validly at Step 2.[16] The City and Union have a binding past practice in processing grievances at Steps 1 and 2 that the discussions required by those steps be in person and discussing these matters in person is more conducive to an open discussion and reaching she requested that Union contact her to schedule a time to meet and discuss the matter in their above-correspondence with her in person.[17] On December 11, 2013, Union called City Administrator Johnson to discuss the above-correspondence. City Administrator Johnson stated to Union that Union must discuss this matter with her in person.[18] On December 11, 2013, City Administrator Johnson stated to Union in an email that the City emphasized again that even if Union have validly appealed a grievance at Step 1 to Step 2, this step requires that a grievance must be discussed with City Administrator Johnson and that the City requested again that Union schedule a time to discuss this matter with City Administrator Johnson in person.[19] Union failed to meet with City Administrator Johnson in person to discuss this matter.

For the foregoing reasons, the purported grievance is not grievable or arbitrable and waived.

<u>The purported grievance is barred by laches.</u>

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[13](City Exh. 14 at 3053-3054).
[14](City Exh. 14 at 3056).
[15](City Exhs. 43; 47). (Union Exh. 21).
[16](City Exh. 3).
[17](City Exh. 48).
[18](City Exh. 49).
[19](City Exh. 49).

The equitable doctrine of laches provides that: "when one sits on one's rights for too long, that person's claim should be estopped because it would be inequitable to require the defendant to fight the suit."[20]

Here, the Union has unreasonably delayed bringing this arbitration. In addition to the untimeliness of the grievance under the labor contract, the Union has delayed pursuit of the grievance by not requesting to schedule the arbitration hearing, i.e., on April 9, 2016, until nearly 29 months after attempting to initiate the grievance, i.e., on November 1, 2013, and 23 months after selecting the arbitrator, i.e., May 30, 2014.[21]

Union purports that these delays are due to a data issue, but it the Union waited 10 months from the City's final response to the data requested, i.e., October 29, 2014, and initiating a lawsuit related to it, i.e., July 20, 2015.[22]

The Union's delay in pursing the grievance has resulted in confusion related to *Giglio* disclosure of Brent Nyhammer's underlying discipline and witness memory.

The foregoing demonstrates that the Union has unreasonably delayed in bringing this arbitration to the detriment of the City. Therefore, the arbitration should be denied.

XV. The City had just cause to suspend Brent Nyhammer without pay.

The Labor Agreement provides that:

> 10.1 The Employer will discipline employees for just cause only. Discipline will be in the form of:
>
> A. Oral reprimand;
> B. Written reprimand;
> C. Suspension;
> D. Reduction
> E. Discharge.[23]

A generally accepted approach to determining whether there is just cause to discipline an employee involves a two-step inquiry: (1) whether the employer has submitted sufficient proof

[20] *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999).
[21] (Exhs. 43, 58 at 0697, and 64 at 2855-2856)
[22] (City Exh. 59).
[23] (City Exh. 14 at 3055).

of the employee's wrongdoing that warranted discipline; and (2) if the employee's wrongdoing is proved, whether the discipline imposed is appropriate in light of all the relevant circumstances.[24]

Brent Nyhammer engaged in serious misconduct. Brent Nyhammer lied to the prosecutor by indicating he did not receive notice of the jury trial.

Brent Nyhammer indicated to Assistant County Attorney Lester in a voice mail recording he left for her that he did not receive notice of the scheduled October 2, 2016 jury trial as a reason he could not testify at the Felony Domestic Assault trial even though he clearly received notice weeks before the Felony Domestic Assault trial by stating:

> I *just realized* that this court case on Tuesday is the same day I will be out of town. I am going to be in Las Vegas, so I will not be able to be here for this court case. Ah, *I don't know how it got, ah, through the, the, how it didn't get picked up* or whatever. . . . Sorry, *I don't know how it got missed*.[25]

Support that these statements were lies follows.

Brent Nyhammer clearly received notice of the jury trial.

Brent Nyhammer was clearly notified in September 13, 2013 of the Stearns County Attorney Office's request that he testify at the Felony Domestic Assault trial on October 2, 2013 through an electronic invite to appear that he accepted, a hard copy notice placed in his mailbox that Brent Nyhammer admitted in his formal statement that he received, his electronic calendar, and the police department "white board" calendar.[26]

Brent Nyhammer admits he lied in his voice mail to Assistant County Attorney Lester about receiving notice of the jury trial which he had a motive to do.

A portion of the formal statement related to Brent Nyhammer's voice mail to Assistant County Attorney Lester of September 27, 2013 is as follows:

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24 *See* Frank Elkouri & Edna Elkouri, *How Arbitration Works* 15-23-15-24 (Alan Miles Ruben, ed., 7th ed. 2012). *See also* Laura J. Cooper, Mario F. Bognanno, & Stephen F. Befort, *How and Why Labor Arbitrators Decide Discipline and Suspension without pay Cases: An Empirical Examination*, Arbitration, Proceedings of the Sixtieth Annual Meeting, National Academy of Arbitrators, 2007, at 6, 29, 31, 33; Minnesota Legal Studies Research Paper No. 08-12. Available at SSRN: http://ssrn.com/abstract=1107508 (finding that in 2,055 discipline and suspension without pay arbitration awards involving Minnesota public and private sector bargaining units issued between 1982 and 2005 that 91.44% of the arbitrators did not rely on "The Seven Tests of Just Cause," first articulated in *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966) (stating:

[25](City Exh. 5).

[26](City Exhs. 4 at 0304-0306, 0309; 6 at 0348; 22; 23; 27; 29; 34; 69). (Grosssback and Laudenbach Test.)

DB: And so when you say I don't know how it got missed, was that a true statement?

BN: I don't know how it got missed by me, yes.

DB: What would ..

BN: That's what..

DB: What would have been a true statement?

BN: I guess I don't know how I missed it.[27]

Brent Nyhammer had a motive to lie about receiving notice of the jury trial because he gave a last minute notice to Assistant County Lester that he was not available to testify. Brent Nyhammer indicated in his formal statement that he misspoke in his voice mail for Lester. But, he was clear in a statement to Chief Bentrud on October 25, 2013 after he was provided with the intent to suspend letter that he made that assertion because the Union told him to state that.[28]

In this voice mail he spoke with intermittent hesitation and a "nervous" laugh indicating he was not being truthful.[29]

Individuals that listened to the voice mail stated Brent Nyhammer indicated that he did not receive notice of the jury trial before September 27, 2013.

Assistant County Attorney Lester submitted an email to Sergeant Grossback, dated September 27, 2013, indicating that she received a voicemail from Brent Nyhammer in which "he claims he never got notice of this Felony Domestic Assault trial and he will be in Vegas Tuesday".[30] Before the jury trial, Assistant County Lester disclosed to the defense counsel and judge what she knew of Brent Nyhammer's conduct related to the voice mail which it appeared he lied under *Giglio*.[31]

Officer Schermerhorn listened to the voice mail left by Brent Nyhammer for Assistant County Lester. Officer Schermerhorn approached Chief Bentrud after the internal investigation interview on October 9, 2013 without Brent Nyhammer being present and made unsolicited comments to Chief Bentrud, which are summarized as follows: (1) that he could not believe

[27] (City Exh. 6 at 0353).
[28] (Exh. 4 at 0316).
[29] (Johnson Test.).
[30] (City Exh. 25).
[31] (Lester Test.).

what he heard from Brent Nyhammer i.e. the voice message; and (2) he believed that Brent Nyhammer "lied."[32]

Chief Bentrud determined following his extensive investigation into this matter that Brent Nyhammer lied in indicating that he did not receive notice of the jury trial when he actually received notice of it.[33] City Administrator Johnson affirmed Chief Bentrud's determination after she listened to the voice mail and reviewed his investigation.[34]

Brent Nyhammer lied to the Chief of Police during his formal statement.

Brent Nyhammer stated during his interview for the internal investigation into this matter as follows:

> DB: Okay. And after you read that email [i.e., the email from Assistant County Lester to Brent Nyhammer of September 27, 2013 asking Brent Nyhammer about his availability to discuss testimony at the jury trial on October 2, 2013], ah, after you opened it, what did you do?
>
> BN: I read it, went in and told Pat I screwed up because I hadn't, ah, paid attention to that. .
>
> DB: Okay. So you're saying you screwed up or you said I screwed up?
>
> BN: Yes.
>
> DB: Your words.[35]

But, Brent Nyhammer did not state anything to that effect to his supervisor. This is supported by Sergeant Grossback's unequivocal statement to Chief Bentrud on October 9, 2016 and during testimony at the hearing that Brent Nyhammer did not state anything indicating to Sergeant Grossback that he "screwed up."[36] Arbitrators have extensively held that when a grievant and supervisor's version of events differ, the supervisor must be believed because the "employee has a vested interest in protecting his job, whereas the supervisor has nothing to gain or lose."[37]

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[32] (City Exh. 4 at 0308).
[33] (City Exh. 4 at 0312).
[34] (Johnson Test.).
[35] (Exh. 6 at 0349).
[36] (City Exh. 4 at 0308). (Grossback Test.).
[37] *Discipline and Discharge in Arbitration* 447 (Norman Brand and Melissa H. Biren eds., 2nd ed. 2008).

In addition, Union Steward Schermerhorn stated to Chief Bentrud that Brent Nyhammer was untruthful in his formal statement because Brent Nyhammer believed it was the best course of action because of a culture of mistrust in the police department.[38]

Finally, Brent Nyhammer had a motive to lie about stating this because he knew that by making this statement he would have been taking responsibility for his mistake in lying to the prosecutor thereby mitigating adverse action that Chief Bentrud would take against him for not being available for Felony Domestic Assault trial.

County Attorney Lester about his unavailability to testify at the jury trial.

It was the practice of WPD officers that they notify Administrative Assistant Lisa Laudenbach, who is the primary contact with the County Attorney's Office for scheduling officers for testimony, of their vacations so that she can give the attorney's office a heads up.[39] Brent Nyhammer did not do this. It is also the practice of WPD officers that if they receive notice of a Felony Domestic Assault trial to testify and there is a conflict, they should contact the county attorney immediately to make arrangements.[40] Brent Nyhammer did not do this.

Brent Nyhammer was clearly notified in September 13, 2013 of the Stearns County Attorney Office's request that he testify at the Felony Domestic Assault trial on October 2, 2013 through an electronic invite to appear that he accepted, a hard copy notice placed in his mailbox that Brent Nyhammer admitted in his formal statement that he received, his electronic calendar, and the police department "white board" calendar.[41] He had booked his flight and requested vacation time off for a trip to Las Vegas on that date before this notice came.[42] Brent Nyhammer worked about 11 days and 110 hours from September 13, 2013 – the date he was notified of the Felony Domestic Assault trial – and September 27, 2013 – the date he received the email from Assistant County Attorney Lester.[43] This was more than sufficient time for Brent Nyhammer to notify Assistant County Attorney Lester of his unavailability for Felony Domestic Assault trial.

Assistant County Attorney Lester testified that in prosecuting hundreds of cases, she could not recall a law enforcement officer providing such a last minute notice of unavailability for a Felony Domestic Assault trial and that if a law enforcement officer has a conflict with a

[38](Exh. 4 at 0317).
[39](Testimony of David Bentrud, Patrick Grossback, and Lisa Laudenbach)
[40](Bentrud, Grossback, Laudenbach, and Lester Test.)
[41](City Exhs. 4 at 0304-0306, 0309; 6 at 0348; 22; 23; 27; 29; 34; 69). (Grosssback and Laudenbach Test.)
[42](Brent Nyhammer Test.)
[43](City Exh. 20).

court appearance date, they contact her sufficiently in advance of the Felony Domestic Assault trial or shortly after her follow-up with them before Felony Domestic Assault trial so that she can try to continue or reschedule the testimony.[44]

Suspension was appropriate.

Labor arbitrators consistently uphold suspensions and even discharges of law enforcement officers that make dishonest statements for such statements alone, especially based more recently on the *Brady-Giglio* standards.[45] For example, this Arbitrator upheld a four-day suspension without pay for a law enforcement officer that made false statements in a grievance document communicated by her solely to her employer, e.g., not to a prosecutor. This Arbitrator found the officer's conduct violated policies similar to the subject matter of policies in this matter, e.g., "Conduct Unbecoming an Officer," "Integrity," "Attention to Duty," and "Principle Governing Conduct of Sworn Officers."[46]

In addition, Arbitrator Miller upheld discharge of a law enforcement officer for, in part, making untruthful statements to an investigator – not a prosecutor - during an internal affairs investigation reasoning as follows:

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[44](Lester Test.).

45 *See, e.g., City of Chaska and Law Enforcement Labor Services, Inc.*, BMS Case No. 15-PA-0855, at 82 (Arb. R.J. Miller) (2016), available at http://mn.gov/admin/images/20160219-Chaska.pdf# (upheld discharge, in part, based on untruthful statements law enforcement officer made to external investigator during internal affairs investigation);
City of Blaine and Law Enforcement Labor Services, Inc., BMS Case Nos. 13-PA-0148 & 13-PA-0581, at 45 (Arb. Crump) (2014), available at http://www.mn.gov/admin/images/20140421-Blaine.pdf# (upheld 4-day suspension without pay for law enforcement officer who made a false statement to the employer in grievance document, which decision was affirmed by court of appeals); *City of St. Paul and St. Paul Police Federation*, BMS Case No. 13PA0880, at 9-14 (Arb. Kircher) (2013), available at http://mn.gov/admin/images/20131111-St-Paul.pdf (upheld discharge of law enforcement officer who made untruthful statements to his supervisor, criminal investigators and internal affairs investigator); *Carver County and Minnesota Public Employees Association*, BMS Case No. BMS Case No. 12-PA-0401, at 18 (Arb. Abelsen) (2012), available at http://www.mn.gov/admin/images/20121116-Carver.pdf# (upheld discharge of law enforcement officer in which officer made "untruthful, or less than forthright statements" during an internal investigation of him); *City of Alexandria and Law Enforcement Labor Services, Inc.*, BMS Case No. 10-PA-1616, at 29-30 (Arb. Toenges) (2011), available at http://mn.gov/bms/documents/BMS/54258-Arbitration%20Awards.pdf (upheld 5-day suspension without pay for law enforcement officer's untruthful statement to his supervisor on a phone call); *Roseau County and Law Enforcement Labor Services, Inc.*, BMS Case No. 09-PA-0588, at 94 (Arb. Yaeger) (2009), available at http://mn.gov/bms/documents/BMS/53974-Arbitration%20Awards.pdf (upheld discharge of law enforcement officer in which preponderance of the evidence substantiated that the officer made dishonest statements to a prosecuting attorney about an incident he responded to); *Steele County and Law Enforcement Labor Services, Inc.*, BMS Case No. 09-PA-0748, at 17-18 (Arb. McGilligan) (2009), available at http://mn.gov/admin/images/20160219-Chaska.pdf# (upheld termination of law enforcement officer based on untruthful testimony officer made during two arbitration hearings involving discipline of other officers and to external investigator during internal affairs investigation)

[46]*City of Blaine and Law Enforcement Labor Services, Inc.*, BMS Case Nos. 13-PA-0148 & 13-PA-0581, at 46-47 (Arb. Crump) (2014)

> The Grievant also provided untruthful answers during his Garrity interview in violation of CPD General Orders. If a Police Officer is not honest and truthful in his dealings, the integrity and honesty of the Officer will forever be called into question. The untruthfulness of a Police Officer is so egregious that it is destructive to a continuing employment relationship. In fact, the Grievant is Giglio-impaired and after testifying that virtually every member of the Police Department command staff lied at the arbitration hearing, there is simply no way the Grievant can ever return to the CPD.[47]

In this case, Brent Nyhammer failed to notify a prosecutor that he would be unable to testify at a jury trial until the business day before the Felony Domestic Assault trial even though he knew weeks before that he would not be able to testify. Brent Nyhammer indicated to the prosecutor that he did not receive notice of the Felony Domestic Assault trial as a reason he could not testify at the Felony Domestic Assault trial even though he clearly received notice weeks before the Felony Domestic Assault trial. Brent Nyhammer stated during his interview for the internal investigation into this matter that he told his supervisor related to this matter that he "screwed up." He did not state anything to that effect to his supervisor. This misconduct clearly supports a suspension without pay, at a minimum, based on the recent arbitral precedent.

The Union may argue that discipline other than suspension should be issued against Brent Nyhammer. But, that contradicts Union Steward Schermerhorn's statement to Chief Bentrud repeated on October 25, October 29, and October 30, 2013 that the Union was expecting a suspension against Brent Nyhammer albeit not 10 days.[48] The Union may base this argument on the discipline the City issued against Thomas Jensen in 2010.[49] But, that discipline cannot be considered in this matter because it was removed from Jensen's personnel file under 10.4 of the Labor Agreement stating: "Written reprimands shall be removed from an employee's personnel file after four (4) years if not part of a continuing record."[50] But, even if it is considered, it is irrelevant to determine appropriate discipline in this matter because the circumstances of that

[47] *City of Chaska and Law Enforcement Labor Services, Inc.*, BMS Case No. 15-PA-0855, at 82 (Arb. R.J. Miller (2016)
[48] (Exh. 4 at 0316-0317).
[49] (Union Exh. 18).
[50] (City Exh. 14 at 3056).

discipline compared to Brent Nyhammer's are substantially different. Examples of the circumstances not present with Jensen, but are present with Brent Nyhammer, are as follows: (1) Jensen did not make a dishonest statement to a prosecutor; (2) Jensen did not fail to sufficiently notify the prosecutor of his testimony availability; (3) Jensen's dishonest statements were not recorded by a third party nonetheless a prosecutor, and, therefore, his statement is not part of a third party's record; (4) Jensen's statements did not adversely impact the underlying criminal matter; and (5) Jensen did not disclose the allegation of dishonesty against him to a judge, defense counsel, or jury.

Brent Nyhammer's misconduct violated: (1) clear standards involving integrity, truthfulness and attention to detail included in Waite Park Police Department Policies that are imperative for law enforcement officers and (2) directives from the prosecutor and the Chief of Police.

This misconduct adversely impacted the underlying criminal proceedings; the reputation of the department was adversely impacted, especially due to the nature of this case; Brent Nyhammer is substantially impaired in performing his law enforcement functions, especially testifying on evidence he obtains in criminal matters; and the City questions Office Brent Nyhammer's honesty, integrity and credibility.

In addition, in the months preceding the suspension, Brent Nyhammer struggled with the quality of investigations, especially in domestic situations, such as this incident.[51]

Based on this, the Chief of Police testified he wanted to have Brent Nyhammer discharged, but he suspended Brent Nyhammer without pay instead based on his length of service and lack of discipline and to give him a chance to remedy his misconduct.[52] The foregoing support that a 10-day suspension without pay is wholly appropriate.

XVI. ANALYSIS AND DISCUSSION.

Issue 1. Is the purported grievance arbitrable?

[51] (Exh. 55 at 0630).

It's this Arbitrator Finding that this grievance is arbitrable based upon the following reasons.

A general presumption exists that "favors arbitration over dismissal of grievances on technical grounds." Arbitrators have viewed the provision for employee signatures to initiate the grievance process as a mere formality and have indicated a strong inclination to find in favor of the union's right to initiate grievances. Omission of employee signature was not a defect as to substance and signature by a union representative will suffice. The presumption of arbitrability of a grievance may override the absence of a grievant's signature on the grievance form if the form is signed by a union representative. Grievance challenging employee's suspension was arbitrable, even though collective bargaining agreement stated that "only an employee may grieve; the local does not have the ability to grieve," and employee did not sign any formal grievance, but had authorized union to pursue grievance.

In this case, the Union, as the exclusive representative of the employee, properly filed a grievance with the City. Business Agent Terry Neuberger filed and signed a grievance application on November 1, 2013, on behalf of Officer Nyhammer pursuant to Article 8 of the CBA. Mr. Neuberger also sent a letter to Chief Bentrud pursuant to Step 1 informing him of the Union initiating the grievance. Mr. Neuberger continued to properly follow the grievance procedure all the way up to Step 3 appealing the grievance to arbitration.

It's this Arbitrator Finding that the City's interpretation that the grievance is not valid based on past practice is rejected. In this case, there was no surprise to the City of who was the employee grieving the discipline. Chief Bentrud knew that Officer Nyhammer may be filing a grievance of his suspension. The City suffered no prejudice by Mr. Neuberger, the exclusive representative of Officer Nyhammer, filing the grievance application on his behalf.

For the above reasoning this Arbitrator Finding that no Waiver resulted because of the City's past practices, which delayed the process, and the City's final response to the data request of the union, and the union never explicitly withdrew the disciplinary grievance.

Issue 2. Did the City of Waite Park suspend Brent Nyhammer for just cause under 10.1 of the Labor Agreement?.

It is this Arbitrator Finding that the City of Waite Park suspended Brent Nyhammer for just cause under 10.1 of the Labor Agreement for the following reasons:

(1) Brent Nyhammer indicated to Assistant County Attorney Lester in a voice mail recording he left for her that he did not receive notice of the scheduled October 2, 2016 jury trial as a reason he could not testify at the Felony Domestic Assault trial even though he clearly received notice weeks before the Felony Domestic Assault trial by stating:

> I *just realized* that this court case on Tuesday is the same day I will be out of town. I am going to be in Las Vegas, so I will not be able to be here for this court case. Ah, *I don't know how it got, ah, through the, the, how it didn't get picked up* or whatever. . . . Sorry, *I don't know how it got missed*;[53]

(2) Brent Nyhammer was clearly notified in September 13, 2013 of the Stearns County Attorney Office's request that he testify at the Felony Domestic Assault trial on October 2, 2013 through an electronic invite to appear that he accepted, a hard copy notice placed in his mailbox that Brent Nyhammer admitted in his formal statement that he received, his electronic calendar, and the police department "white board" calendar;[54]

(3) Brent Nyhammer lied to the Chief of Police during his formal statement.

Brent Nyhammer stated during his interview for the internal investigation into this matter as follows:

> Okay. And after you read that email [i.e., the email from Assistant County Lester to Brent Nyhammer of September 27, 2013 asking Brent Nyhammer about his availability to discuss testimony at the jury trial on October 2, 2013], ah, after you opened it, what did you do?
>
> DB:
>
> I read it, went in and told Pat I screwed up because I hadn't, ah, paid attention to that.
>
> Okay. So you're saying you screwed up or you said I screwed up?
>
> BN:
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> Yes.
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> DB:
>
> Your words.[55]
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> BN:
>
> DB:

[54](City Exhs. 4 at 0304-0306, 0309; 6 at 0348; 22; 23; 27; 29; 34; 69). (Grosssback and Laudenbach Test.)

[55](Exh. 6 at 0349).

But, Brent Nyhammer did not state anything to that effect to his supervisor. This is supported by Sergeant Grossback's unequivocal statement to Chief Bentrud on October 9, 2016 and during testimony at the hearing that Brent Nyhammer did not state anything indicating to Sergeant Grossback that he "screwed up."[56] Arbitrators have extensively held that when a grievant and supervisor's version of events differ, the supervisor must be believed because the "employee has a vested interest in protecting his job, whereas the supervisor has nothing to gain or lose."[57]

(4).Brent Nyhammer's misconduct violated: (1) clear standards involving integrity, truthfulness and attention to detail included in Waite Park Police Department Policies that are imperative for law enforcement officers and (2) directives from the prosecutor and the Chief of Police.

This misconduct adversely impacted the underlying criminal proceedings; the reputation of the department was adversely impacted, especially due to the nature of this case; Brent Nyhammer is substantially impaired in performing his law enforcement functions, especially testifying on evidence he obtains in criminal matters; and the City questions Office Brent Nyhammer's honesty, integrity and credibility.

Issue 3. If not, what is the appropriate remedy?

In this case, Chief Bentrud both filed the Complaint of Misconduct Form and conducted the investigatory interview with Officer Nyhammer. Prior to the interview, Officer Nyhammer admitted his mistakes to Chief Bentrud. Officer Nyhammer also admitted that he screwed up early in the interview. However, instead of ending the interview once he had Officer Nyhammer admit his mistake, Chief Bentrud continued the interview to try and see if he could get any other incriminating statements from Officer Nyhammer that could be used against him in imposing any discipline.

Based on these facts, Chief Bentrud's investigation was not thorough and objective. In looking at it beneath the surface, it becomes clear that Chief Bentrud had made his decision at an earlier stage and then just went through the motions while

[56](City Exh. 4 at 0308). (Grossback Test.).

[57]*Discipline and Discharge in Arbitration* 447 (Norman Brand and Melissa H. Biren eds., 2nd ed. 2008).

conducting the investigatory interviews and fact finding. Chief Bentrud knew that Ms. Lester was upset over what had occurred and he needed to show her that Officer Nyhammer would be sufficiently punished even though Officer Nyhammer admitted his mistake and did not try to make excuses for what had occurred. For these reasons, the investigation was not objective and unbiased and it cannot lead to the conclusion that sufficiently sound reasons exist to discipline Officer Nyhammer.

For over 50 years, arbitrators have considered an employee's long, good pass record as a " major factor" to reduce discipline. In fact, studies have shown that prior work record is the most frequently cited mitigating factor considered by arbitrators in discipline arbitrations.

As previously discussed, Officer Nyhammer, has an exemplary service record which include five letters of commendation and numerous thank you letters from citizens. The only discipline it Officer's Nyhammers record was a one day suspension 2004.

In reviewing the facts of this case, it is clear that at best minimal consideration of Officer Nyhammer's past work was considered by Chief Bentrud. This is a significant mitigating factor that was ignored by Chief Bentrud in determining the level of this discipline to impose on Officer Nyhammer.

The Employer made no attempt at progressive discipline. The employer must show that "a reasonable attempt was made towards rehabilitation through the use of progressive discipline." The purpose of progressive discipline is to put employees on notice of improper behavior in order to give them a chance to correct their behavior. Progressive discipline is therefore mutually beneficial because it gives the employee a chance to correct his/her behavior and allow the employer to keep a train employee. Discipline is considered excessive if it is "out of step with the principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored. There was no attempt at progressive discipline, such as a coaching session, made by the Employer as a result of the violations determined by Chief Bentrud.

It's this Arbitrator Finding that in the case of an exemplary police officer such as Officer Nyhammer the quantum leap to a 10 day suspension undercuts the concept of progressive discipline. The discipline in this case was clearly out of step with the

principles of progressive discipline, was punitive, and the Employer ignored mitigating circumstances. Accordingly, Officer Nyhammer's discipline was excessive, and therefore, Officer Nyhammer's suspension should be reduce to three days suspension and that Officer Nyhammer is made whole through reimbursement of salary, benefits, and seniority for the balance of the period of time for the 10 days suspension.

XVII. CONCLUSION

1. The Union has established upon preponderance of the evidence that the grievance is Arbitrable.
2. The Employer has established upon preponderance of the evidence that the Employer had just cause to suspend the Grievant, however, for three days without pay;
3. The Union has established upon preponderance of the evidence that an appropriate remedy for the Grievant's suspension be reduce to three days suspension and that Grievent is made whole through reimbursement of salary, benefits, and seniority for the seven days period of time reduction in his suspension.

XVIII. AWARD

After study of the testimony and evidence produced at the hearing, on arguments of the parties (as opposed hearing written briefs), on the evidence in support of their respective positions, and on the basis of the above discussion, summary of the testimony, analysis and conclusions, the Arbitrator makes the following award:

1. The Employer is awarded Just Cause to suspend the Grievant for three days without pay;

2 The Union grievance is awarded appropriate remedy for the Grievant suspension to be reduced to three days suspension and that the grievant is

made whole through reimbursement of salary, benefits, and seniority for the seven days reduction period of time in his suspension.

3 The Union is awarded the grievance for its Arbitrable.

Harry S. Crump

By: Arbitrator Harry S. Crump

Date: November 26

Note: I shall retain jurisdiction in this matter for a period of twenty-one (21) calendar days from the issuance of this Decision to address any questions or problems related thereto.