

IN THE MATTER OF ARBITRATION BETWEEN

Minnesota Teamsters Public & Law Enforcement
Employees Union, Local 320,
Union,

and

City of Corcoran, Minnesota,
Employer.

OPINION AND AWARD

Officer S. W. Discipline Grievance

BMS Case No. 08-PA-0614

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

August 20, 2008

HEARING SITE:

Corcoran, Minnesota

HEARING DATE:

June 17, 2008

RECORD CLOSED:

July 8, 2008

REPRESENTING THE UNION:

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JURISDICTION

The hearing in this matter was conducted on June 17, 2008. The undersigned was selected to serve as arbitrator pursuant to the parties' collective bargaining agreement ("Agreement") and the procedures of the Minnesota Bureau of Mediation Services. The parties submitted a discipline grievance to arbitration. Although an arbitrability issue was advanced by the Employer concerning one portion of the grievance, no other procedural issues were raised. The Agreement provision calling for award issuance within thirty days after close of the record was waived. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties post-hearing briefs were received via email on July 8, 2008, which closed the record, and the matter was taken under advisement.

ISSUES

The parties did not present a jointly agreed statement of the issues. It was apparent at the outset that the two parties saw the dispute from significantly different points of view. The Union proposed the following issue statement:

Did the Employer have just cause to discipline the Grievant by suspending him and removing him from the positions/assignments of Field Training officer, Defensive Tactics Instructor, Range Officer, and Department Training Officer?

The Employer submitted two separate issues:

1. Whether the Arbitrator lacks jurisdiction regarding the inherent managerial right of the Chief of Police to remove [Grievant] from range instructor, defensive tactics instructor and field training officer because the removal is not discipline under Article 9.1 A-E and to the extent the removal does not involve the "interpretation or application of the express terms" of the collective bargaining agreement (Article 6.5(Arbitrator's Authority))?

2. Whether the City of Corcoran had “just cause” to suspend [Grievant] for four (4) hours without pay?

Given the differing perspectives, the parties authorized the arbitrator to frame the issue statement after hearing the evidence and arguments. Accordingly, the following is found to fairly state the issues in dispute:

1. Did the Employer violate the agreement when it disciplined the Grievant by suspending him for four hours without pay?
2. Did the Employer violate the agreement when it removed Grievant from service as Field Training Officer, Defensive Tactics Instructor, Range Officer, and Department Training Officer?
3. What is the proper remedy if either or both of the foregoing substantive issues are answered in the affirmative?

BACKGROUND AND SUMMARY OF THE EVIDENCE

The instant dispute arose out of Grievant’s handling of a DWI arrest on the evening of September 13, 2007. At the time of the incident, Grievant had more than ten years of service with the Corcoran Police Department. The evidence shows that he had been disciplined twice before, one of which was a three-day suspension for his own DWI in October of 2006.

Because of the criticality of the evidentiary details in the instant record, much of the background of the dispute will be developed by using excerpts from actual documents in the evidentiary record together with a brief introduction of the overall circumstances.

Just before 10:30 p.m. (2230 hours) on the evening in question, the suspect and her male friend were having sex when the male began to experience an asthma attack. The suspect put on a

short night shirt and slippers and drove the male friend to his place of residence to obtain his inhaler. The suspect was stopped by Grievant when she drove around a "Road Closed" sign. She was eventually arrested for DWI after a preliminary breath test ("PBT" or "p.b.t.") revealed her to have an alcohol concentration in excess of the legal limit. Grievant wrote up his report of the incident. Upon review of the report by a corporal, the matter was brought to the attention of the Chief of Police, who directed Grievant to amend his report. The report was amended. Nonetheless, the City Attorney for the Employer declined to prosecute the case based on the contents of the report. This led to the hiring of an outside private investigator to conduct an internal affairs investigation. The results of the investigation caused the Chief of Police to impose discipline. Grievant was also removed from further service in several assignments that brought him extra pay and prestige in the law enforcement community. The Employer's action was timely challenged via the applicable grievance process and was advanced to arbitration.

The following text presents the narrative portion of Grievant's amended police report. The amendments that were added to the original report are shown double-underlined. Certain words and other information have been substituted to protect identities and privacy information.

* * *

On 09/13/2007 at approximately 2223 hours, I, Officer [Grievant] of the Corcoran Police Department was on duty when I was sitting at the "Road Closed" barricades of County Road 19 and County Road 50. I was facing westbound on County Road 50 at the barricades when I saw a vehicle driving south on County Road 19. I saw the car then go east on County Road 50 toward me. I watched the car go over the area that was being worked on, and heard the car "bottom out" a couple of times. As the car went around the barricades where I was sitting, I activated my emergency lights. The car continued eastbound on County Road 50. I turned around and caught up to the vehicle approximately one mile east of where I had been sitting. This is where we stopped.

When I approached the car (with Minnesota registration #####) I saw two occupants in the car, the driver appeared to be a female, later identified as [Driver]([her birth date]). I asked her if she knew why she was being stopped, and she said "yeah, probably because I was driving fast." I told her she had also driven around a road closed barricade. She said "I didn't know how bad the intersection was."

[Driver] did not have her drivers license or proof of insurance with her. She told me she did not because she and her passenger were having sex when he started to have an asthma attack, so she just threw on a night shirt and some slippers and jumped in

the car. She said she didn't even put any underwear or anything on. I told her that I would follow them to her passengers house so that he could take care of his issue, and asked her if she had been drinking because I smelled alcohol coming from her breath. She said that she had been drinking, but it had been quite a while. Her passenger's residence was approximately one mile from the stop location so I felt that it was close enough to follow them to the house so that he could get his inhaler to take care of his asthma attack. We went to [passenger's address] where [Driver's] passenger was staying. He went inside, and I asked [Driver] if she would be willing to give a breath sample into a p.b.t. She said that she would, but she had just sprayed binaca in her mouth. I asked her why she did that, and she said that she had just gotten done smoking a cigarette. When I approached the car in the driveway, she had just lit up a cigarette. I told her to put out the cigarette and asked her to have a seat in the back seat of my squad car, which she did. I observed [Driver] for approximately ten minutes before giving her the p.b.t. test so that all of the binaca would be out of her mouth. When [Driver] gave a breath sample into the p.b.t., the result was a fail with a reading of .114. I told [Driver] that she was under arrest for driving under the influence of alcohol.

I closed the door to my squad and asked the passenger of the car if he was feeling better. He said that he was since he had gotten his inhaler. I asked him if it was alright to leave [Driver's] car in his landlords driveway. He said that it was fine, but he needed to go get his truck. I told him that he would have to make other arrangements to get his truck. He told me that she was just trying to do a good thing. [Driver] was transported by this officer to the Corcoran Police Department and read the Implied Consent advisory at approximately 2303 hours. It was completed at approximately 2305 hours with [Driver] consenting to take a breath test and not wishing to consult with an attorney.

At approximately 2315 hours the intoxilyzer 5000 test was started. It was completed at approximately 2321 hours with a reported value of .10. [Driver] was given a copy of the test results, and also her copy of her temporary drivers license.

No field sobriety tests were given to [Driver] because of the exigent circumstances of the clothing she was wearing, including the footwear, and because of the temperature of the evening. [Driver] was very uncomfortable with only wearing a night shirt with nothing underneath. There was a wind that made [Driver] have to hold her night shirt down so that it would not blow up because of the wind.

[Driver] was transported to her residence by this officer.

* * *

The corporal who reviewed the report had several concerns about the matter as reported. He started to write an email to Grievant that pointed out the concerns and directed that it be amended. The corporal decided instead to bring the matter to the attention of the Chief of Police. On Friday,

September 21, 2007, the Chief wrote an email to Grievant as follows:

* * *

[Grievant] I reviewed your DWI report 07003783 and it is unacceptable!

- 1.. If I read your report the way it is written you allow a driver that you suspected to be DK drive her car.
- 2.. If you felt that it was a legitimate medical situation you should have called for an ambulance for the passenger. What was the medical outcome for the passenger who suffers from Asthma?
- 3.. No recorded PBT AC [preliminary breath test alcohol content] in the report only that she failed.
- 4.. No observation that leads you to believe she was intoxicated only a smell of alcohol. What was the PC [probable cause] for the arrest? Just because you smell alcohol on ones breath is not in itself PC for a PBT and arrest.
- 5.. No DL [drivers license] in possession or proof of insurance and you allowed her to drive the vehicle. You don't even indicate in the report if she was valid to drive.
- 6.. You indicate she felt "uncomfortable" with her lack of clothing. We do not allow suspected DK drivers to dictate our procedures. You could have called for assistance and at minimum performed the HGN [horizontal gaze nystagmus test] at the office. She can still perform the balance tests dressed as she was. Please amend your report.

* * *

As shown previously, Grievant did amend his report. He also sent the following email to Chief Gormley on Wednesday, September 26, 2007:

* * *

Chief-

I made a few changes to my report on Friday night, and left you a message on your cell after because I was and still am concerned about the issues. I have thought a lot about the whole cluster that was that stop, and can certainly understand you concerns for the whole mess. It was a bad situation from the get-go, and I knew it was just wasn't going to end in a good way.

I was hoping to be able to discuss this all with you also. I will be in on Thursday, so hopefully we can sit down and you can chew my butt for a while about the whole fiasco and let me know what else you would like to see in the report.

* * *

Chief Gormley also viewed a video and audio recording that showed Grievant escorting the suspect from his squad car into the building after arriving at the Corcoran Police Department headquarters. Gormley noticed that she had not been handcuffed. A similar recording from inside the building showed Grievant administering the intoxilyzer test to the suspect. The video shows that Grievant was still wearing his weapon while seated next to the suspect doing his paperwork. His weapon was within reach of the suspect who was not handcuffed. In 2006, at a staff meeting that Grievant attended, Chief Gormley had directed that weapons be secured in a lock box device before removing handcuffed prisoners from the squad car and escorting them into the test room. Gormley had also tasked another officer with taking steps to ensure compliance. The officer had prepared a sign and affixed it to the glass door of the test room. The sign read, in prominent typeface:

SECURE WEAPON BEFORE ENTERING

The recording of the test room also showed another officer, who had some six months service on the force, present to observe the testing. The recording showed that this officer also had not secured his weapon outside the room. The recordings were introduced in evidence.

By letter dated September 25, 2007, the City Attorney declined to prosecute the matter. The following excerpts explain her concerns:

* * *

* * * Unfortunately, I am forced to decline charges at this time as I believe that if the matter were to proceed to trial, I would be unable to prove the charges beyond a reasonable doubt. There are several issues in the arrest that raise concern. Specifically, the fact that the officer observed indicia of intoxication (detected the smell of alcohol) and the suspect admitted to consuming alcohol, at the time of the initial stop, and the officer then permitted the suspect to drive an additional mile to her passenger's residence. If the passenger was having medical difficulties, an ambulance could have been called to the scene to assist the passenger, and the officer could have provided medical assistance until the ambulance could've arrived.

In addition, upon following the suspect to her passenger's house, the officer failed to indicate that he observed any additional indicia of intoxication that would lead him to then request a PBT. For instance, was there additional driving conduct observed that caused him to reassess his initial determination that she was okay to drive. It is my assessment that due to the fact that the officer failed to request a PBT,

or other field sobriety, at the time of the initial stop, the indicia of intoxication he observed were negated by his decision to let her drive. We would need to show additional indicia of intoxication to request the PBT at the residence.

* * *

By letter dated September 27, 2007, Chief Gormley issued a complaint which triggered the internal affairs investigation. The transcript of Grievant's statement is part of the arbitration record along with the investigator's findings.

By letter dated October 30, 2007, Chief Gormley wrote the following Notice of Unpaid Suspension letter to Grievant to announce the results of the investigation:

* * *

The Internal Investigation has been completed and I have received all documentation and agreed with the findings. This letter is to notify that you are being disciplined as set forth below. The discipline is based upon the following findings of fact related to the internal affairs complaint 07-001 as a result of your action on 9/13/2007.

1. It is *Sustained* that you violated policy 1080.3(A) "**Policing Impartially**" which states:

Officers must be able to articulate specific facts, circumstances, and conclusions that support reasonable suspicion or probable cause for investigative detentions, pedestrian and vehicle stops, arrest, nonconsensual searches, and property seizures.

1. Your report does not reflect the probable cause needed to make the arrest this was founded both in the investigation and city attorney's letter.

2. It is *Sustained* that you violated policy 2000.2 "**Performance of Duties**" which states: **Members of the department shall be held responsible for the proper performance of any and all duties assigned to them, and for the strict adherence to the regulations adopted from time to time for the administration of the department. Actions or omissions, contrary to regulations, will not be excused because a member followed the advice of another member or a person outside the department, except when an employee of higher rank may take the responsibility of issuing orders.**

1. You indicated in your statement that you were aware of the sign on the Intoxilyzer door indicating "secure weapons before entering" but failed to do so.

3. It is *Sustained* that you violated policy 2000.3 “**Breach of Policy, Order or Procedure**” which states: **Members shall not act nor fail to act in such a fashion that constitutes a breach of any policy, order, or procedure outlined in other sections of the manual. They are responsible for knowing the contents of the policy manual issued to them, and for filing in their manual all materials issued by the department for inclusion.**

1. You indicated in your statement that you were unaware of the policy regarding the transporting of female prisoners.

4. It is *Sustained* that you violated policy 2000.58 “**Disregard for Safety**” which states: **Members of the department shall not, by specific action or omission, create a situation of unnecessary risk of injury to themselves, other members of the department, or to any other person.**

1. By failing to handcuff you put yourself and other at risk.

2. By not securing your weapon you put yourself, the suspect and fellow officer at unnecessary risk.

5. It is *Sustained* that you violated policy 2090.1 “**General Policy**” which states: **It is the policy of the department that field interrogations will be conducted in a manner that not only promotes the public safety and safeguards law enforcement officers from harm, but also holds invasions of personal rights and privacy to a minimum.**

1. You failed to get the required information for your report on the passenger in the vehicle. This is the same passenger who was a victim in a medical situation. No name data was ever collected; no outcome to the medical was documented.

6. It is *Sustained* that you violated policy 2150.3 “**Procedures**” which states: **To maximize the safety of officers, the following procedures will be utilized in transporting persons in custody:**

All persons in custody will be searched prior to being placed in a police vehicle. In all cases, persons placed under physical arrest will be handcuffed prior to being transported.

1. You failed to handcuff the prisoner as required by policy and admitted to knowing the policy.

7. It is *Sustained* that you violated policy 4060.3 “**Report Content**” which states: **Language should be understandable, accurate, and concise.**

All names, addresses, phone numbers (private or businesses) must be complete, when possible.

Reports must accurately reflect situations investigated by the officer(s) on the scene.

1. The date on the report is incorrect.

2. The suspect driver of the vehicle was not the registered owner of the vehicle.
3. Failed to articulate your reasons for arrest.
4. Your report does not reflect the probable cause needed for the charges.

I am taking formal discipline and issuing the following directives:

1. 4 hour suspension with loss of pay. (to be determined by management)
2. Must attend a 3 day Standardized Field Sobriety school as soon as practical.
3. You are required to know and follow all department policies, orders and procedures.
4. You are not to engage in any type of retaliation or reprisal either directly or at your direction or suggestion against other employees or other individuals whom you believe may have reported the allegations against you.

From an operational standpoint you will no longer:

1. Work as an FTO (Field Training Officer)
2. No longer assume the role of Defensive Tactics Instructor or Range Officer.
3. No longer assume the role as Department Training Officer.

Please understand the seriousness of this matter. Your attention is directed to the expectations and directives contained in this letter. You must take what ever steps are necessary to meet the expectations and comply with the directives. Any failure to comply with the spirit and the letter of the expectations and directions contained in this letter may result in disciplinary action against you, up to and including the termination of your employment.

If you have any questions or need clarification as to the content of this letter, you must contact me immediately. If you do not do so, I will assume that you fully understand the expectations and directives related to your future employment. A copy of the letter will be placed in your personnel file. I am willing and available to assist you in improving your performance. If you have any questions, please contact me.

* * *

In addition to the foregoing, the parties presented evidence about the Agreement provisions, training, methods, and practices associated with the several aspects of the dispute.

OPINION AND FINDINGS

At issue in this dispute is the propriety of the Employer's actions in suspending Grievant without pay for four hours and removing him from additional work assignments. The disciplinary suspension presents a straightforward traditional just cause issue and calls for an item by item analysis of the seven charges listed in Chief Gormley's October 30, 2007 Notice of Unpaid Suspension letter. The propriety of the removal action requires a different analytical approach. First, the character of the removal action must be determined: Was it actually additional discipline or was it non-disciplinary administrative action? This is a question of fact to be determined upon due consideration of all of the relevant circumstances. If it is determined to be additional discipline, then the question becomes whether it was supported by just cause. If it is determined to be non-disciplinary administrative action, the question becomes whether it violated the parties' Agreement in any respect? Finally, the analysis of remedy issues, if any, must await the outcome of those substantive issues.

This analysis will deal with the just cause aspect of the dispute first because it clearly must be determined in connection with the four-hour suspension and because it may also become critical to the analysis of the removal issues. The analysis follows the order of the charges listed in Chief Gormley's October 30, 2007 Notice of Unpaid Suspension. The first charge reads as follows:

1. It is *Sustained* that you violated policy 1080.3(A) "**Policing Impartially**" which states:

Officers must be able to articulate specific facts, circumstances, and conclusions that support reasonable suspicion or probable cause for investigative detentions, pedestrian and vehicle stops, arrest, nonconsensual searches, and property seizures.

1. Your report does not reflect the probable cause needed to make the arrest this was founded both in the investigation and city attorney's letter.

The foregoing policy excerpt as well as the weight of the evidence in this dispute establishes that a peace officer must have a proper factual basis for reasonable suspicion or probable cause to suspect that the law has been violated before the officer may subject a vehicle driver to a preliminary breath test (PBT). This is because alcohol may be consumed legally and, although driving after drinking is not recommended, a person may legally drive after drinking if driving skills are not impaired by the consumption and the alcohol concentration in the body does not exceed the legal

limit. Therefore, an important distinction must be carefully drawn between evidence of mere consumption, or use, and evidence of impairment, intoxication, or being under the influence of alcohol. The weight of the evidence establishes that indicia of mere use, no matter how numerous they may be, are not sufficient to establish the requisite probable cause to subject a person to a PBT.

Given the fact that Grievant did subject the driver to a PBT, which led to her arrest, he was required to include sufficient factual information in his report to demonstrate that he had probable cause to suspect that she was impaired. The report fails to do so.

At the initial stop, Grievant smelled the odor of alcohol and the driver also admitted to having consumed alcohol that night. For whatever reason, Grievant did not administer any field sobriety tests to investigate whether the driver was actually impaired. He had options available to do so. Because he determined there was no medical emergency, he could have taken the driver to headquarters to administer tests without regard to the weather. He could also have administered the HGN test in his squad car at the scene of the stop. This would have countered any weather and modesty concerns. Instead, Grievant permitted the driver to continue her trip to the passenger's residence. As a result, the smell of alcohol and the driver's admission of previous consumption must be seen merely as indicia of use and not indicia of impairment.

Grievant's report does not note that he observed any indicia of impairment while following the driver to the passenger's residence. Indeed, Grievant replied, "No," when asked during the internal affairs investigation whether he had observed any erratic driving or any unusual behavior.

Upon arriving at the passenger's residence, his report does not reflect that he observed any indicia of impairment before asking the driver to take the PBT. The sequence of events portrayed in his report shows that he asked for the PBT before there was any discussion about use of Binaca or cigarette smoking.

Although Grievant's testimony at arbitration was to the effect that he reported the order of events incorrectly, this characterization must be discounted. Not only did he report the order of events as he did in his original report, he did not correct the sequence after being asked to amend his report. In directing Grievant to amend the report, Chief Gormley's email actually pointed out the probable cause deficiencies. Nonetheless, Grievant did not amend the sequence. During the internal affairs investigation, Grievant provided the same order of events that he put in his original and

amended reports. The transcript shows that he requested the PBT before there was any discussion about spraying Binaca and cigarette smoking. Finally, during his arbitration testimony, Grievant's testimony again showed he requested the PBT before there was any discussion about Binaca or cigarette smoking. It was only after he was specifically asked about the order of events shown in his report that he claimed the order was incorrect.

But even if the reported order in his report, both original and amended, as well as the order described in his testimony, both during the internal affairs investigation and at arbitration, are changed, it means only that Grievant observed cigarette smoking and use of Binaca. Grievant testified that these are common tactics used by persons trying to mask the odor of alcohol on the breath. But Grievant had already detected the smell of alcohol and the driver had already admitted previous consumption during the initial stop. As the City Attorney's letter noted, by permitting her to drive, Grievant had already negated them as probable cause indicia.

At this point, however, it is again important to note the distinction between indicia of use and indicia of impairment. Cigarette smoking and/or Binaca spraying, despite being common masking tactics, are both legal activities. According to the weight of the evidence, while they may constitute indicia of use, they do not, standing by themselves, constitute indicia of impairment.

Given the foregoing discussion, the finding is, as it must be, that the first charge in Chief Gormley's Notice of Unpaid Suspension has been proven by the weight of the evidence.

The second charge reads as follows:

2. It is *Sustained* that you violated policy 2000.2 "**Performance of Duties**" which states: **Members of the department shall be held responsible for the proper performance of any and all duties assigned to them, and for the strict adherence to the regulations adopted from time to time for the administration of the department. Actions or omissions, contrary to regulations, will not be excused because a member followed the advice of another member or a person outside the department, except when an employee of higher rank may take the responsibility of issuing orders.**

1. You indicated in your statement that you were aware of the sign on the Intoxilyzer door indicating "secure weapons before entering" but failed to do so.

The evidence adduced at arbitration established certain undisputed facts. First, Chief Gormley held a staff meeting in mid-2006 wherein he directed that weapons must be secured in the

provided lock-box before entering the intoxilyzer testing room. Second, Grievant attended that meeting. Third, there was also a sign on the door that read, "SECURE WEAPONS BEFORE ENTERING." Fourth, Grievant was aware of the sign. Finally, Grievant did not secure his weapon on the night in question.

In defense, several contentions were advanced: There is no policy in the policy manual that requires securing of weapons; the text of the door sign is not in the policy manual; Grievant was adhering to the Hand Gun Visibility policy that is in the manual and required him to display his sidearm while in uniform; it was not the practice of other officers to do so; Grievant's weapon was held in a Level 3 holster that deterred its removal by a prisoner; and, finally, Grievant was entitled to exercise his discretion as he did in determining that the driver was not a threat.

On the basis of the undisputed facts, it is clear that the second charge has been proven by the evidence. The remaining question is whether the other factors advanced provided Grievant with an excuse for his failure to secure his weapon. In this regard, it is undisputed that Chief Gormley had the authority to issue the directive he did by virtue of his position. Policy 2000.2 specifically requires officers to adhere to "... regulations adopted from time to time for the administration of the department." There is no evidence to establish that officers are only required to comply with written policies contained in the policy manual. Thus, it must be concluded that Chief Gormley's directive had the force and effect of an adopted regulation. The same policy 2000.2 does not excuse violations of Chief Gormley's directives because other officers also fail to comply. Similarly, whether the driver constituted a threat is a factor that is essentially irrelevant to the need to comply with regulations. Moreover, the directive did not carve out any exceptions based on the type of holster used by an officer.

It remains for consideration whether the Hand Gun Visibility policy excused Grievant's conduct. According to the internal affairs investigation, this defense was not a factor in Grievant's failure to secure his weapon. While he did provide other reasons, he did not reference the Hand Gun Visibility policy as even a partial explanation for his conduct. Given that Grievant also served in several instructional capacities and provided field training to new officers, if there was confusion in his mind, one would have expected him to affirmatively address the subject with Chief Gormley to resolve any perceived conflicts between the Chief's directive and the Hand Gun Visibility policy.

There is no evidence that Grievant ever did. It appears, therefore, that resort to the Hand Gun Visibility policy as a defense for his conduct was essentially an afterthought raised for the first time for arbitration. The finding, therefore, is that the second charge was proven by the weight of the evidence.

The third charge reads as follows:

3. It is ***Sustained*** that you violated policy 2000.3 “**Breach of Policy, Order or Procedure**” which states: **Members shall not act nor fail to act in such a fashion that constitutes a breach of any policy, order, or procedure outlined in other sections of the manual. They are responsible for knowing the contents of the policy manual issued to them, and for filing in their manual all materials issued by the department for inclusion.**

1. You indicated in your statement that you were unaware of the policy regarding the transporting of female prisoners.

The evidence establishes certain facts beyond dispute. First, the policy manual did contain a policy for the transportation of prisoners of the opposite sex. The policy strives to protect officers from claims of inappropriate behavior with prisoners and to ensure that prisoners are transported expeditiously. Second, Grievant admitted during the internal affairs investigation that he was not aware of the policy. Finally, despite not knowing of its existence in the policy manual, Grievant precisely complied with the requirements of the policy when he transported the driver to the intoxilyzer test and to her home afterward.

Policy 2000.3, by its terms, requires that officers know the contents “... of the policy manual ...” and not just the contents of any given policy. Accordingly, Grievant’s lack of awareness constituted a technical violation of the stated policy. The finding, therefore, is that third charge was proven by the weight of the evidence.

The fourth charge reads as follows:

4. It is ***Sustained*** that you violated policy 2000.58 “**Disregard for Safety**” which states: **Members of the department shall not, by specific action or omission, create a situation of unnecessary risk of injury to themselves, other members of the department, or to any other person.**

1. By failing to handcuff you put yourself and other at risk.

2. By not securing your weapon you put yourself, the suspect and fellow officer at unnecessary risk.

It is undisputed that Grievant did not handcuff the driver at any time despite the requirements

of Department Policy 2150.3 which states, “In all cases, persons placed under physical arrest will be handcuffed prior to being transported.” According to the testimony of Chief Gormley, no matter how docile a prisoner may appear, the prisoner may have a change of heart and become resistant at any time. The handcuffing policy exists for the protection of the arresting officer and others who may be present. Grievant admits knowing the policy requirement. Indeed, as training instructor, he wrote the curriculum and final exam for the Use of Force Training Program he taught. The program taught the handcuffing policy as written. Moreover, the test question he put on the exam reflected the cuffing requirement nearly word-for-word.

Similarly, the requirement to secure weapons removes another temptation from the reach of a prisoner. However unlikely the threat may be, if the weapon is secured as directed, the risk to the officer that a prisoner may try to take his weapon is eliminated.

The finding on this charge, therefore, is that it was proven by the weight of the evidence.

The fifth charge reads as follows:

5. It is *Sustained* that you violated policy 2090.1 “**General Policy**” which states: **It is the policy of the department that field interrogations will be conducted in a manner that not only promotes the public safety and safeguards law enforcement officers from harm, but also holds invasions of personal rights and privacy to a minimum.**

1. You failed to get the required information for your report on the passenger in the vehicle. This is the same passenger who was a victim in a medical situation. No name data was ever collected; no outcome to the medical was documented.

It was undisputed that the passenger broke no law and was not under any obligation to provide information for Grievant’s report. Under the circumstances, while it may have been good information to have in the report, the weight of the evidence does not establish that there was a requirement to interrogate the passenger and obtain his identity information. Moreover, when Grievant amended his original report as directed, he did include information describing how the passenger was feeling better after obtaining his inhaler. It is also noted that in the upcoming seventh charge, policy 4060.3, which deals with the content of the report as it pertains to completeness of names and other information, Grievant is not charged with failing to obtain the passenger’s identity information.

Given the foregoing considerations, the finding is that this charge was not proven by the weight of the evidence.

The sixth charge reads as follows:

6. It is ***Sustained*** that you violated policy 2150.3 “**Procedures**” which states: **To maximize the safety of officers, the following procedures will be utilized in transporting persons in custody:**

All persons in custody will be searched prior to being placed in a police vehicle. In all cases, persons placed under physical arrest will be handcuffed prior to being transported.

1. You failed to handcuff the prisoner as required by policy and admitted to knowing the policy.

The thrust of the policy, quoted in the charge, is self-evident. It is undisputed that Grievant knew of the handcuffing requirement and did not comply with it. Grievant’s contention that cuffing the driver would have made it difficult for her to prevent her night shirt from riding up is not persuasive. The video recording shows that the driver’s night shirt extended to mid-thigh. While seated in the intoxilyzer room, she crossed her legs, left over right, uncrossed them, and then re-crossed them, right over left, without tugging down the hem of her night shirt. While standing and walking about the room, she displayed no apparent need to keep the hem from riding up. She also brushed her hair with her raised hand without apparent concern for exposure. Finally, it was undisputed that Grievant could have applied the handcuffs with her hands in front of her body. This would have complied with the policy and still allowed her hands to keep the hem of her night shirt from riding up.

The finding is that the sixth charge was proven by the weight of the evidence.

The seventh and final charge reads as follows:

7. It is ***Sustained*** that you violated policy 4060.3 “**Report Content**” which states: **Language should be understandable, accurate, and concise.**

All names, addresses, phone numbers (private or businesses) must be complete, when possible.

Reports must accurately reflect situations investigated by the officer(s) on the scene.

1. The date on the report is incorrect.
2. The suspect driver of the vehicle was not the registered owner of the vehicle.
3. Failed to articulate your reasons for arrest.
4. Your report does not reflect the probable cause needed for the charges.

Points 3 and 4 were previously discussed in connection with the first charge and were found to have been proven by the weight of the evidence. That finding is affirmed here.

With respect to point 2, it is undisputed that the driver was not the registered owner of the vehicle. The evidence surrounding this point is bothersome. Grievant's computer log entries on the night in question shows that he inquired into the vehicle's registration and obtained the name of the registered owner in Perham, Minnesota, which was approximately 100 miles away. The name did not match with that of the driver. The driver did not have a driver license nor did she have proof of insurance. There was no medical emergency in progress, yet Grievant made no inquiry into the ownership circumstances or whether the suspect had a valid license. While he did insert the plate letters and numbers into his report, he did not provide any of the ownership information.

When Grievant was cross-examined about this ownership information at arbitration, he testified that he "ran the registration" upon his returned to the police station after making the arrest. He said the driver told him the registered owner was her mother. However, Grievant's computer log from that evening shows that he ran the registration before he returned to the station while he was still at the passenger's residence. In addition, during the internal affairs investigation, when asked if the driver was the registered owner of the vehicle, Grievant stated, "Yes." According to his testimony at arbitration, Grievant explained his mistake because he had not reviewed the records before his statement. Because the information was not in his report, one must wonder if he would have been able to refresh his recollection about the circumstances of ownership.

It is said that the devil is in the details. The conflicts described in the previous paragraph provide a convenient illustration of why it is important for police reports to be complete and accurate. If a defense attorney can trip up an officer on some details at trial, it creates the ability to argue that the officer may also be mistaken about facts more important to the prosecution.

The finding on point 2 is that it was proven by the weight of the evidence.

Turning to point 1, it is undisputed that Grievant inserted the incorrect date of 9/12/2007 into the box on the report form corresponding with Date Reported. Grievant did not correct this error when he amended his report. While the narrative portion of his report has the correct date of 9/13/2007, the discrepancy cannot be treated as a mere typographical error as the Union and Grievant contend. Similar to the discussion of point 2, above, an internal inconsistency in an official report provides fodder for a defense attorney to contend, "If the report is wrong about this, might it also be wrong about that?" Accordingly, the finding on point 1 is that it was proven by the weight of the

evidence.

In light of the foregoing discussion, the evidence shows that Grievant violated the Employer's policies and regulations in significant respects. This provided the Employer with just cause to assess discipline. Given the nature of Grievant's conduct and his prior disciplinary record, the suspension for four hours loss of pay is not found to be unreasonable. Therefore, it is determined that the disciplinary suspension was for just cause and may stand as a matter of record.

The issues surrounding Grievant's removal from the various training assignments remain for analysis. The threshold question is whether the removal was actually additional discipline in the guise of an administrative action. Several considerations bear on this question. Chief Gormley's letter of October 30, 2007 begins with the line: "RE: Notice of Unpaid Suspension." This suggests that the discipline consists only of the four-hour unpaid suspension. The final page of the letter contains a separate section that begins with this sentence:

I am taking formal discipline and issuing the following directives:

This sentence is followed by a numbered listing of four entries. The first entry listed is the "4 hour suspension with loss of pay." By their terms, the final three entries appear to be directives and not discipline. Grievant was directed to attend a Standardized Field Sobriety school. He was required to know and follow all department policies, orders, and procedures. Finally, he was warned against engaging in any type of retaliation or reprisal against other persons. Moreover, it was not contended at arbitration that entries 2 through 4 constituted additional discipline.

Then the Chief's letter began a new section that started with this sentence:

From an operational standpoint you will no longer:

A new numbered listing of three points follows the sentence. The three entries describe Grievant's removal from the previous training assignments he had been performing.

The final consideration is the Agreement provision that lists permissible forms of discipline.

Article 9.1 mandates that discipline will take one of more of the following forms:

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

Article 2.1 of the Agreement recognizes two ranks within the bargaining unit: Police Officer and Corporal. There is no evidence that Grievant held the rank of Corporal at any time during the relevant time frame. It follows, therefore, that Grievant was not demoted by the removal of temporarily assigned duties.

Given the foregoing considerations, the finding is that the removal of the training duties did not constitute additional discipline within the meaning of the Agreement.

It remains for determination whether the removal of the training duties violated the Agreement in any manner. While Article 31.3 of the Agreement provides for a \$1.50 per hour pay override while performing Field Training Officer duties, it goes on to provide that the duties are "... as assigned by the Chief." No provision of the Agreement has been cited to the arbitrator, and none has been found in his own examination of the Agreement, that limits the Chief of Police from deciding who will be selected to serve, from time to time, as Field Training Officer, Range Officer, Department Training Officer, or Defensive Tactics Instructor. In addition, undisputed testimony in the record establishes that officers who are selected to perform these training duties continue to do so "... at the pleasure of the Chief of Police."

Article 6.1 of the Agreement defines a grievance as follows:

- 6.1 A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

Because of the absence of any Agreement limitation upon the selection and/or retention of officers for the performance of the training assignments in question, it would appear that Articles 4.1 and 4.2 of the Agreement are controlling. They read in full as follows:

- 4.1 The Employer retains the full and unrestricted right to operate and manage all

manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this Agreement.

- 4.2 Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate.

Upon careful review of the foregoing discussion and considerations, the finding is that the Employer's removal of Grievant from further performance of duties as Field Training Officer, Range Officer, Defensive Tactics Instructor, and Department Training Officer was a permissible exercise of the Employer's inherent managerial authority within its sole discretion.

AWARD

1. The Employer did not violate the agreement when it disciplined the Grievant by suspending him for four hours without pay.
2. The Employer did not violate the agreement when it removed Grievant from service as Field Training Officer, Defensive Tactics Instructor, Range Officer, and Department Training Officer.
3. The grievance is denied.

Gerald E. Wallin, Esq.
Arbitrator

August 20, 2008