

OPINION AND AWARD

OF

DAVID S. PAULL

**In the Matter of the Arbitration Between
Law Enforcement Labor Services, Inc.**

AND

**City of Belle Plaine, Minnesota
(Sgt. Richard D. Olsen, Grievant)**

Issued June 26, 2009
BMS Case No. 09-PA-0638

OPINION

Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Minnesota Bureau of Mediation Services. A two-day hearing was conducted in Belle Plaine, Minnesota, beginning Tuesday, April 14, 2009. Additional testimony was taken by telephone on Thursday, April 23, 2009. The City of Belle Plaine, Minnesota (City) was represented by Robert A. Alsop, attorney at law, St. Paul, Minnesota. Law Enforcement Labor Services, Inc. (Union) was represented by Isaac Kaufman, attorney at law, St. Paul, Minnesota.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. No court reporter was present. The proceedings were tape recorded to supplement personal notes. After the witnesses were heard and the exhibits were presented, the parties submitted simultaneous written closing statements. The closing statements were timely mailed and were received on Tuesday, May 26, 2009. Thereafter, the grievance was deemed submitted and the record closed.

Issue

The parties agreed on the exact statement of the issue to be resolved:

Was the discharge Sgt. Richard D. Olsen on or about January 5, 2009, for just cause and if not, what is the appropriate remedy?

No procedural issue was raised. The City suggests the existence of an additional issue arising from the Grievants arrest on July 26, 2008. The proposed issue, as expressed by the City, is as follows:

Did the Grievant render himself incompetent for the position of sergeant within the Belle Plaine Police Department whereby the City was justified under the collective bargaining agreement and applicable law to terminate his employment?

The existence of the question raised by the City is suggested by the evidence and must be resolved. However, there does not appear to be any reason to treat the matter separately. The general issue agreed on by the parties is adequate to include this additional matter for determination.

Relevant Contractual Provisions

ARTICLE 8. DISCIPLINE

- 8.1 The Employer will discipline for cause only. Discipline will be in one or more of the following forms:
- A. Oral reprimand
 - B. Written reprimand
 - C. Suspension
 - D. Demotion
 - E. Discharge
- 8.2 Notices of suspension, demotions and discharge will be in written form. LELS shall be provided with a copy of each such notice.
- 8.3 Written reprimands, notices of suspension, and notices of discharge which are to become part of an employee's personnel file, shall be read and acknowledged by signature of the employee. The employee will receive a copy of such reprimands and/or notices.
- 8.4 Employees may examine their own individual personnel files at reasonable times under the direct supervision of the Employer.
- 8.5 Grievances relating to this Article may be initiated by LELS in Step 3 of the grievance procedure.

Relevant Employee Policy Provisions

General Order 14 - Conduct

14.2.3 -- Integrity. Carefully avoid any conduct that may compromise the integrity of yourself, or fellow employees, or the police department itself.

14.3.3 -- Unauthorized use of drugs. You shall not be under the influence of alcohol, either when reporting for duty or during duty hours....you shall not consume alcohol, at least 8 hours prior to reporting for work.

14.3.6 -- Abuse of Authority. Do not threaten, use, or try to use any authority of your official capacity, title, or position in the police department. Do not do anything, on or off duty that is disallowed by law or the contents of this manual.

14.3.10.2.1 -- Peace officers shall carry out their duties with integrity, fairness and impartiality.

14.3.10 -- Unbecoming Conduct. When employees commit acts of conduct unbecoming an officer or employee of the police department, either on or off duty. Those not specifically mentioned here, but tending to bring discredit to you or the police department may also be just cause for disciplinary action.

14.3.10.4 -- Peace officers shall not, whether on or off duty, exhibit any conduct which discredits themselves or their department or otherwise impairs their ability or that of other officers or the department to provide law enforcement services to the community.

14.3.10.4.2 -- Peace officers shall not consume alcoholic beverages to the extent the officer would be rendered unfit for the officer's next scheduled shift. A peace officer shall not report for work with the odor of alcoholic beverage on the officer's breath.

14.3.10.4.9 -- Peace officers shall avoid regular personal associations with persons who are known to engage in criminal activity where such associations will undermine the public trust and confidence in the officer or department....

14.3.10.7.1 -- Peace officers shall, unless required by law or policy, refrain from becoming involved in official matters, or influence actions or other peace officers in official matters, impacting the officer's immediate family, relatives, or persons with whom the officer has or has had a significant personal relationship.

Cell Phone Policy

F. Unapproved Uses. Employees receiving a City-owned cell telephone are prohibited from the following:

6. To engage in any type of harassment or discrimination, including but not limited to sexual harassment and harassment or discrimination based upon race, gender, sexual orientation, religion, national origin, marital status, status with respect to public assistance, disability or any other type of harassment or discrimination prohibited by law and City Policy.

11. To advocate any type of unlawful violence, vandalism or illegal activity.

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Pertinent Facts

The City

The City is a community of 6600 residents located approximately fifty miles southwest of the Minneapolis/St. Paul metropolitan area. Currently, the City Police Department (Department) employs 4 officers, including an interim chief. At the time Sgt. Olsen was discharged, the Department consisted of seven officers including five sworn patrol officers, a sergeant and the chief of police. The City also employs several part time officers. At all times pertinent to the issues raised in this dispute, Steven C. Rost served as the chief of Police.

The Grievant

Sgt. Olsen is a career law enforcement officer and an honorably discharged veteran of the U.S. Air Force. Initially, Sgt. Olsen was hired by the Department as a part time patrol officer in 1995. Within a year, Sgt. Olsen was made a full time patrol officer. In 2004, he was promoted by Chief Rost to the position of sergeant. As the Department's only sergeant, Sgt. Olsen worked the day shift primarily. On occasion, he conducted investigative duties in the evenings. Due to the small size of the Department, Sgt. Olsen was also required to perform routine patrol duties on a daily basis.

Sgt. Olsen's Work History

Prior 1999, there is no evidence to indicate that the City ever had occasion to discipline Sgt. Olsen. Sgt. Olsen's work performance was routinely evaluated and appraised for a ten year period beginning with the year 1997. These appraisals appear to portray a very satisfactory employee. Specifically, the scores ranged from satisfactory to outstanding in nearly every category, including public service, personal contacts, judgment and dedication. All of the appraisals were conducted and completed by Chief Rost. He also testified that the performance appraisals were not an accurate assessment of Sgt. Olsen's job performance. Rather, as Chief Rost testified, he inflated the scores in an effort to improve the working relationship between himself and Sgt. Olsen.

Prior to 2007, the only discipline Sgt. Olsen received were two written reprimands issued to him by Chief Rost on December 30, 1999. Both concerned relative minor incidents of misconduct. The first written reprimand concerned a "ride along" passenger who was permitted by then Officer Olsen to become involved in a law enforcement operation. The second concerned a matter of insubordination, specifically with regard to the unauthorized purchase of a bullet proof vest. Neither of these written reprimands was contested by then Officer Olsen. At the hearing, Sgt. Olsen testified that, according to his understanding, these two written reprimands were to be removed from his personnel file if there were no similar incidents over the period of a year. Sgt. Olsen's factual contention was not confirmed by any other witness and no written record of such an agreement was introduced at the hearing.

On October 12, 2007, Sgt. Olsen was suspended without pay for two days. According to the moving document, Sgt. Olsen negligently operated his squad car, losing control of the automobile and striking a center median while attempting to respond to an emergency call. As a result, the squad car was written off as a total loss. Private property was also damaged due to the accident. The suspension notice indicated the Department's position in the matter, that "this type of carelessness not only causes damage to City equipment, but also brings criticism from the public . . ." Sgt. Olsen did not deny or contest the discipline and the suspension was served on November 1 and 2, 2007.

On February 13, 2008, Sgt. Olsen filed a complaint of sexual harassment against Chief Rost and Belle Plaine Mayor Tom Meger, allegation that Mayor Meger commented on the lips of a female suspect in a photograph and then stated to the complainant, "You got nice lips too, so get busy," pointing to his crotch area. The complaint alleges that Chief Rost laughed at this comment. The complaint was not sustained. However, City Administrator Murphy warned in his letter of February 21, 2008, that conduct such as alleged "will not be tolerated in the workplace."

The City received reports that Sgt. Olsen was involved in several alleged incidents which, if true, might constitute employee misconduct. On October 24, 2008, the City placed Sgt. Olsen on administrative leave with pay pending the completion of an investigation. The allegations leading up to the administrative leave were listed in a personnel complaint issued by City Manager David Murphy dated November 12, 2008. Shortly thereafter, the City retained Ms. Mary Dobbins, a lawyer with offices in Edina,

Minnesota, to conduct an investigation of these allegations. Specifically, the City asked Ms. Dobbins to investigate the following allegations:

- Sgt. Olsen arranged for the release of a DWI suspect on March 2, 2008, claiming that the suspect was an informant.
- Sgt. Olsen reported for a surveillance detail in the summer/spring of 2008 while under the influence of alcohol.
- Sgt. Olsen used his city-owned cell phone to make threatening phone calls to the residence of his girlfriend's estranged husband.
- Sgt. Olsen discussed an ongoing investigation with a patron of a local bar and shoved a female bar employee while begin escorted from the business.

Mr. Murphy filed a second personnel complaint on December 12, 2008, alleging that Sgt. Olsen permitted a convicted felon to take possession of a firearm registered to him.

The Investigation and Termination

Sgt. Olsen was placed on paid administrative leave by the City on October 26, 2008. On November 24, 2008, Mr. Murphy signed a personnel complaint against Sgt. Olsen listing the several allegations that had been investigated by Ms. Dobbins. These allegations, now presented in additional detail, were that Sgt. Olsen had violated Department policies by (1) arranging for the release of Paula Stier after she had been stopped for suspicion for driving while under the influence of alcohol, (2) attending a

drug task force surveillance detail while intoxicated, (3) making threatening telephone calls to the Jason Stier residence and (4) engaging in an altercation at Johan's bar.

Ms. Dobbins interviewed all of the full-time officers in the Department, as well as Scott County Sheriff's Deputy Nick Adler, Chief Rost and interim chief Robert Malz. No separate investigation was conducted by Ms. Dobbins in cases where a witness was part of an investigation for possible criminal charges or where the relevant police reports or other investigative documents appeared to Ms. Dobbins to provide complete records of witness statements. Sgt. Olsen was interviewed and his statement was transcribed pursuant to Minnesota law.

On or about December 12, 2008, Mr. Murphy notified Sgt. Olsen that a second personal complaint had been lodged alleging that he had provided a firearm to a convicted felon, Phillip M. Steele. Ms. Dobbins was asked to investigate this allegation as well.

Ms. Dobbins delivered a written summary of her investigation and findings on or about December 22, 2008. On January 5, 2009, City Administrator Murphy recommended Sgt. Olsen's termination. Sgt. Olsen provided the City with a written response to the allegations and Mr. Kaufman represented him at a meeting of the City Council. By resolution dated January 5, 2009, the City Council approved the termination recommendation. The resolution was delivered to Sgt. Olsen by letter dated January 9, 2009.

After the termination resolution was adopted by the City Council, Mr. Murphy learned that the charges against Sgt. Olsen in connection with the July arrest had been amended to include counts for Criminal Vehicular Operation, resulting in an automatic

and immediate suspension of his driver's license. The suspension was to begin on January 2, 2009, and end on December 31, 2009. Thereafter, the City decided to consider whether or not the license suspension constituted additional grounds to terminate his employment. Sgt. Olsen was provided an opportunity to respond. On behalf of Sgt. Olsen, Mr. Kaufman did so, stating that Sgt. Olsen's driving privileges would likely be restored in March of 2009 because he expected to be "fully exonerated." On January 20, 2009, the City Council adopted a second resolution adding the license suspension as an additional ground for termination. The resolution noted that a driver's license was a "minimum requirement to perform the duties of Patrol Sergeant" and that Sgt. Olsen's "off-duty actions have rendered [him] incompetent to be a patrol officer with the City for an extended period of time."

The matter was ultimately resolved when the Criminal Vehicular Operation charged was dismissed upon Sgt. Olsen's plea of guilty to the DWI charge. His license was restored thereafter.

Interference with DWI Arrest

The parties do not appear to dispute the basic facts relating to this incident. Early in the morning on March 2, 2008, Officer Bryan M. Pasek stopped a vehicle operated by Paula R. Stier, a resident of the Belle Plaine area, at the intersection of South Meridian and East Main in Belle Plaine. At the time of the stop, Ms. Stier was engaging in a cell phone conversation with Sgt. Olsen. Ms. Stier asked Officer Pasek if he wanted to speak to Sgt. Olsen, but then disconnect the call.

Officer Pasek noted that Ms. Stier displayed several of the typical indicators of an intoxicated person. An odor of alcohol emanated from Ms. Stier and the vehicle. Ms. Stier displayed “red, glassy eyes.” She admitted to drinking three beers. Ms. Stier failed to successfully perform several aspects of the standard field tests used by law enforcement to determine sobriety. A preliminary breath test (PBT) indicated that Ms. Stier’s blood alcohol level was .129, well in excess of the legal limit.

Officer Pasek advised Ms. Stier that she was under arrest for suspicion of driving while under the influence of alcohol and deposited her in the back seat of his squad car. Later, he noted a half full open bottle of beer in the vehicle and discarded it.

Sgt. Olsen arrived at the scene of the arrest at the approximate time Officer Pasek was escorting Ms. Stier to his squad car. Prior to the arrival of Sgt. Olsen, Officer Terry Stier, not a family relative to Paula Stier, arrived in a separate squad car. Officer Pasek advised that Ms. Stier had tested “over the limit.” Sgt. Olsen advised Officer Pasek that he was talking with Ms. Stier at the time of the stop and that she did not sound as if she were intoxicated during their conversation.

Although the standard practice is to transport any persons suspected of driving while under the influence of alcohol to be arrested and transported to the neighboring City of Jordan for forensic processing, Ms. Stier was instead taken to the Belle Plaine police station and was not arrested. Sgt. Olsen testified, as did several other police officers at the hearing, that the decision on whether to arrest is strictly up to the investigating officer.

The parties vigorously dispute whether or not Sgt. Olsen interfered with the arrest on behalf of Ms. Stier. Sgt. Olsen denies that he applied any pressure to Officer Pasek.

Sgt. Olsen testified that he merely advised Officer Pasek that Ms. Stier was providing information to him concerning a house that was the subject of a narcotics investigation. Sgt. Olsen confirms that he discussed Ms. Stier's marital problems with Officer Pasek, indicating that her arrest would exacerbate these existing problems. Rather than put pressure on Officer Pasek, according to his recollection, Sgt. Olsen told Officer Pasek that "This [whether to arrest Ms. Stier] is your decision, I don't want this to be a problem at work." Sgt. Olsen confirms that at the police station, he repeated what he had told Officer Pasek previously, that Ms. Stier was providing drug enforcement information to him and that her arrest would likely end her marriage.

Officer Pasek testified, however, that Sgt. Olsen did in fact strongly influence his decision to release Ms. Stier without arresting her. He noted that Sgt. Olsen repeatedly advised him that Ms. Stier was a source of drug information and that her arrest would cause her to be divorced. Officer Pasek testified that the decision to transport Ms. Stier to the Belle Plaine police station, and not to Jordan for processing, was solely that of Sgt. Olsen. Officer Pasek recalls that he strongly objected to what he considered to be Sgt. Olsen's attempt to influence this particular discharge of his duties. His notes, made just a few days after the March 2nd incident, confirm this. "Talked with Rick outside of interview," his notes state, "I've never let anyone go for DWI why start now, my ethics, this, situation it puts me in, etc." These notes also indicate that Officer Pasek told Sgt. Olsen that the decision on whether or not to arrest Ms. Stier was "up to him," since he was the supervisor, and that the decision to transport Ms. Stier to the Belle Plaine police station was that of Sgt. Olsen. When Sgt. Olsen thanked him "for having good discretion," according to these notes, he responded "I don't ever want to hear about it."

Officer Pasek testified that, at the police station, Sgt. Olsen even went so far as to extract from Ms. Stier a promise “never to say anything to anyone about this,” in order to convince him to let her go.

The record establishes that, while Sgt. Olsen had no direct power to discipline Officer Pasek, as an officer of higher rank, he did have the authority to identify deficiencies in Officer Pasek’s performance and report these deficiencies to the Chief. Because of his status, according to Officer Pasek, Sgt. Olsen could considerably affect the tenor of his working life, although he could not formally impose discipline. Officer Pasek testified that, unless he agreed to release Ms. Stier, Sgt. Olsen would find ways to retaliate against him.

Sgt. Olsen admitted that currently that, as of the date of the hearing, he maintains a romantic relationship with Ms. Stier. He testified, however, that as of the date of the incident, March 2, 2008, his relationship with Ms. Stier was purely personal. In his statement to Ms. Dobbins on November 16, 2008, Sgt. Olsen was asked to describe his relationship with Ms. Stier on March 2, 2008. Sgt. Olsen responded in detail, indicating that at that time, he and Ms. Stier were very close and confidential friends:

At that time it would have been both a source of information and a friend. Like I said, I’ve known her for 12 years. Currently my ex-wife is related to her estranged husband. It’s a small town. So the common last name is Stier. I’ve been friends with her, her husband, her daughter has babysat for me. We’ve gone out in groups settings, things of that nature, the whole time I’ve known her . . . she is like one of a few female friends that I could say – that was able to because she knew my wife was married into that family and could relate to a lot of the personal problems I was having. Would typically be somebody I could talk to and more or less bounce stuff off given my situation personally.

Sgt. Olsen testified that, despite their close personal relationship, Ms. Stier's never gave him any additional information after the incident of March 2, 2008. The record reflects that Ms. Stier's information never resulted in the issuance of a search warrant for the premises that, according to Sgt. Olsen, was the subject of their conversation on the evening of March 2, 2008. Sgt. Olsen testified that his relationship with Ms. Stier became a romantic one shortly before the motorcycle accident of July 26, 2008.

During the March 2nd incident, Chief Rost was on vacation. Upon his return, Officer Stier advised him about what took place. Chief Rost questioned Sgt. Olsen about the matter. According to Sgt. Olsen, after he explained his side of the story, Chief Rost advised him that "There's no discipline coming from this because now that I've heard your side of the story I'm fine with it." Chief Rost denies that his interaction with Sgt. Olsen after the March 2nd incident resolved the matter.

Appearing for Duty Under the Influence of Alcohol

Scott County Sheriff's Deputy Nick Adler testified that, in the spring of 2008, he arranged with Sgt. Olsen to assist him by participating in a surveillance detail on the following evening. On his way to the detail, Deputy Adler telephoned Sgt. Olsen to confirm the assignment and to arrange a meeting. Sgt. Olsen, according to Deputy Adler, responded affirmatively.

When Sgt. Olsen arrived at the police station, Deputy Adler immediately smelled alcohol on his breath and observed other signs of intoxication including slurred speech and watery eyes. Deputy Adler advised Sgt. Olsen that he would not permit him to

participate in the surveillance detail in his condition and that he should obtain a ride home.

Sgt. Olsen acknowledges that he had consumed alcohol before meeting Deputy Adler that evening, before he left his home to meet him. He denies that the surveillance detail had been prearranged for that night. More specifically, he testified that Deputy Adler had indicated his intention of conducting surveillance sometime during the week but had not identified a particular day. Sgt. Olsen confirms that he consumed “a few drinks” with his dinner. Sgt. Olsen testified at the hearing that he was not too intoxicated to participate in the surveillance detail and was able to drive himself home without incident.

Operating a Motorcycle While Under the Influence of Alcohol

On July 26, 2008, Sgt. Olsen was involved in a motorcycle accident. Ms. Stier was a passenger on the motorcycle. She required medical attention as a result of the accident. Sgt. Olsen was charged with three counts of criminal vehicular operation and two counts of 4th degree DWI. Pursuant to law, the Minnesota Department of Public Safety suspended Sgt. Olsen’s driving privileges pending the result of the criminal operation counts. The first suspension extended for a period of two weeks. A second suspension was imposed for the period beginning January 2, 2009, ending on December 31, 2009. Sgt. Olsen’s driver’s license remained suspended only until April 8, 2009, after he pleaded guilty to misdemeanor DWI.

Sgt. Olsen did not advise the City of the arrest. Rather, the City became aware of the incident through an independent source. The City conferred with Sgt. Olsen

concerning the subject of how the suspension of his driver's license would impact his ability to discharge the duties of a police officer. It was determined to grant Sgt. Olsen a temporary leave from his position during the initial period of the two-week license suspension. The parties agreed to defer action on the matter until the criminal charges were settled.

Misuse of Department Cell Phone

According to an investigative report prepared by the Scott County Sheriff's Office, Jason Stier, the estranged husband of Paula Stier, received a threatening phone call at his residence from Sgt. Olsen on October 8, 2008. The alleged threat was not heard by Jason Stier. Rather, the conversation was noted by his daughter Kayla, whose mother is Paula Stier. The caller, according to the police report, had initially refused to identify him or herself. Jason Stier terminated the call, but his daughter was listening on another extension. According to Kayla Stier, after her father hung up the receiver, the caller said "I am going to kill you guys." Sgt. Olsen's Department cell phone number was identified as the point of origination. Indeed, Sgt. Olsen's own cell phone records indicated that he had called the Stier residence at 11:36 p.m. that evening. The telephone records also confirm that Sgt. Olsen placed a second call to the Stier residence a few minutes later, at 12:10, in the early morning of October 9, 2008. No specific threat was associated with this second call, however. The report indicates that Sgt. Olsen merely said "well" in an impatient manner.

Jason Stier contacted the Scott County Sheriff and filed a complaint. He also called his estranged wife, Paula Stier, to advise her of what their daughter had alleged. The telephone records indicated that, beginning at 11:53 p.m. until 7:51 the next

morning, Sgt. Olsen made 98 telephone calls from his cell phone to the cell phone of Paula Stier. Sgt. Olsen testified that Ms. Stier was upset about the allegations and that he wanted to explain. However, Ms. Stier did not answer the calls placed by Sgt. Olsen.

Early the morning of October 10, 2008, two Scott County investigators arrived at Sgt. Olsen's house and asked him questions about the allegation made by Jason Stier. Sgt. Olsen denied making any threatening statement. The investigators noted a strong odor of alcohol coming from Sgt. Olsen during this interview. They further noted that his speech was slurred and labored.

Sgt. Olsen denied making the alleged threatening statement and testified that he must have dialed the residence of Jason Stier by accident while attempting to contact Paula Stier. In the past, Sgt. Olsen testified, Kayla Stier had served as a babysitter for his children, explaining why the number was still on his cell phone.

Both Sgt. Olsen and Paula Stier testified at the hearing that at the time Kayla made the allegations, she was very upset over her parents' separation and blamed Sgt. Olsen for breaking up the family. Paula Stier testified that she believed that her daughter's allegations were untrue. Kayla Stier did not appear as a witness for either party.

Incident at Johan's Bar

Within a week of being questioned about the alleged threatening phone call, on October 17, 2008, Sgt. Olsen was involved in an altercation at Johan's Bar in Belle Plaine. The City relied on a police report indicating that Sgt. Olsen was present at the bar

for an extended period of time and, after getting into a brief argument with another patron, was escorted from the establishment by an employee.

The report referred to the statement of Amy Berger. Ms. Berger, according to the report, stated that Sgt. Olsen's speech was "very slurred" and that while he was not "stumbling drunk . . . "she could easily tell he was intoxicated and well over the legal limit." According to the report, as Sgt. Olsen neared the door, he saw another patron, Cory Ince, and began to "yell" at him. The report further indicates that Sgt. Olsen unintentionally grabbed Ms. Berger as he drew nearer to the exit and pushed her into the wall.

Ms. Berger was called as a witness at the hearing. Her testimony challenged the contents of the police report as inaccurate.

Providing a Firearm to a Felon

On December 9, 2008, Phillip M. Steele was arrested by the Burnsville Police Department for smoking marijuana. His truck was searched. In it, police found a handgun registered to Sgt. Olsen. Mr. Steele is a convicted felon. He was arrested and charged with illegally possessing a firearm. Based on Ms. Dobbins' investigation, the City concluded that Sgt. Olsen had been associated with Mr. Steele and that he had either intentionally or recklessly provided Mr. Steele with access to his firearm.

According to Sgt. Olsen, he met Mr. Steele during the summer of 2008, when Mr. Steele was dating a relative of Paula Stier. Sgt. Olsen testified that his relationship with Mr. Steele was that of a mentor and that Mr. Steele aspired to be a police officer.

Together, they visited a shooting range on several occasions and Mr. Steele had used Sgt. Olsen's weapons without incident.

Sgt. Olsen testified that he did not know, and had no reason to know that Mr. Steele had been convicted of a felony and was on probation. Sgt. Olsen testified that the firearm was taken by Mr. Steele on December 7, 2008, when Mr. Steele was at Sgt. Olsen's house to do his laundry. It is not entirely clear where Sgt. Olsen obtained this information. It is possible that Mr. Steele himself told Sgt. Olsen how he came into possession of the weapon after Sgt. Olsen was contacted by the Burnsville police. It appears that Mr. Steele had reason to know where Sgt. Olsen kept his firearms. Sgt. Olsen further admitted to storing several of Mr. Steele's firearms because Mr. Steele was in the process of moving.

Mr. Steele was not called to testify at the hearing.

Positions of the Parties

The City

The City begins its statement of position by referring to the burden of proof. It cites authority for the proposition that the question of what acts constitute “cause” for discharge are left to the arbitrator under state law and may include the violation of such duties as “honesty, punctuality [and] sobriety.” Additional authority is cited to support the proposition that the just cause test “mandates that the punishment assessed be reasonable in light of all the circumstances” and “may include breach of duty.” Misconduct, asserts the City, may include the failure to adhere to significant department rules and regulations that render the officer unfit to perform. “Based on the record presented at the arbitration hearing in connection with this matter, the City has offered sufficient proof to establish the multiple acts of misconduct,” the City contends. “Based on the nature of the alleged misconduct as well as Sgt. Olsen’s failure to acknowledge any wrongdoing, termination of his employment is reasonable discipline in order to maintain the integrity and efficient of the City’s Police Department.”

The City also addresses what evidence should be credited. The City notes that Sgt. Olsen “denies or discounts each and every allegation of misconduct.” However, the City believes that the witnesses it presented are more credible. “The sheer number of objective witnesses offering contradictory testimony,” the City maintains, “significantly taints the credibility of Olsen’s entire testimony.”

Turning to the alleged incidents of misconduct, the City first addresses Sgt. Olsen’s conduct relating to the arrest of Paula Stier. There is substantial credible

evidence to conclude that Sgt. Olsen improperly used his position as a superior officer to interfere with the arrest of Ms. Stier, the City asserts, in violation of General Order 14, paragraphs 14.2.3, 14.3.6, 14.3.10.2.1 and 14.3.10.7.1. In this regard, the City argues that:

- “Sgt. Olsen inappropriately put Officer Pasek in the position of making an arrest decision without fully understanding the value or extent of Ms. Stier’s drug information or the fact that Sgt. Olsen had both a personal and family relationship with Ms. Stier.”
- Sgt. Olsen’s had sufficient supervisory power over Officer Pasek to pressure him without imposing formal discipline and did so.
- Advised Officer Pasek of Ms. Stier’s value as an informant yet failed to obtain a search warrant or any other information from her after the arrest, while at the same time advancing his personal relationship with her.

In support of the allegation that Sgt. Olsen appeared for duty under the influence of alcohol in a Drug Task Force activity, the City refers to the testimony of Deputy Adler, who testified that he had specifically arranged for Sgt. Olsen to participate in a surveillance detail the day before it was scheduled. Sgt. Olsen’s contention, that he was unaware of the exact day, is not credible, the City asserts. “The record is void of any

conceivable reason for Deputy Adler to lie about the prearranged surveillance detail,” argues the City, and Deputy Adler’s testimony was substantiated by other witnesses. Even if Sgt. Olsen was unaware of the precise day, the City maintains, he should not have appeared for the assignment after drinking.

The City contends that the evidence of Sgt. Olsen’s cell phone abuse is evidence of his “increasingly bad judgment.” Sgt. Olsen’s license to drive was suspended for two weeks after he was involved in an alcohol related motorcycle accident, injuring Ms. Stier who was a passenger. According to a complaint made by Ms. Stier’s now ex-husband, Sgt. Olsen threatened him on two occasions using his cell phone, an act that is prohibited by the City’s cell phone policy. In support of this contention, the City points to the recollections of Kayla Stier, Ms. Stier’s daughter, and Sgt. Olsen’s “apparent intoxication” during the incident.

The City takes the position that Sgt. Olsen’s conduct at Johan’s Bar violated City conduct policies despite the fact that Ms. Berger “essentially recanted her entire statement.” The City refers to Sgt. Empey’s police report and maintains that “it seems inconceivable that her statements . . . were either not made by her or were inaccurately recorded by the investigating officer.”

The City argues that Sgt. Olsen’s association with Mr. Steele, a convicted felon, is indisputable evidence that General Order 14 was violated. Sgt. Olson “either intentionally or recklessly provided [Steele] access to his firearm,” the City contends. Sgt. Olsen’s position that he did not know of Mr. Steele’s felony record or directly provided him with a firearm is “questionable,” the City asserts, “in light of the unique relationship that Sgt. Olsen admittedly developed with Mr. Steele in 2008.” The City

points to evidence it contends indicates a close relationship, including mutual friends, a mutual interest in guns and Sgt. Olsen's characterization of his relationship as a that of a "mentor" to Mr. Steele. The City refers to a police report indicating that "Steele identified Olsen as a buddy who he hung out with three times a week and who advised him to fully cooperate with the investigation." As a police officer, the City asserts, Sgt. Olsen had an affirmative duty not to associate with persons engaged in criminal activity. "Sgt. Olsen should have known to conduct additional inquiry into Mr. Steele's background and ongoing activities." Instead, the City argues, he provided Mr. Steele easy access to his firearm.

Finally, the City argues that the suspension of Sgt. Olsen's driver's license constitutes additional grounds to terminate his employment with the City. The City notes that Sgt. Olsen's driver's license was suspended for the period beginning January 2, 2009, and ending December 31, 2009, based on an amended charge of Criminal Vehicular Homicide or Operation filed against him in connection with his motorcycle accident on July 26, 2008. "The suspension of Olsen's driver's license rendered him incompetent to perform the essential functions of his job," the City maintains, and "relieved the City of its obligation to continue his employment either under the Labor Agreement or applicable law." Although Sgt. Olsen sought a speedy trial, argues the City, he would still have been incapable of performing his duties for at least three months and possibly longer if his trial was delayed or if he were found guilty.

The City contends the discharge decision was reasonable and proper, as the evidence presented establishes a "dramatic change in Sgt. Olsen's overall performance as a police officer in late 2007 and 2008 resulting in multiple acts of misconduct . . .

significantly impacting his continued effectiveness.” Further, according to the City, his off-duty and on-duty misconduct has “diminished his ability to be an effective supervisory officer . . . circumventing his working relationship with outside law enforcement and the public.” Additionally, the City argues that Sgt. Olsen’s actions have “tarnished” its reputation and given fellow employees reason to question his integrity.

Further, the City argues that Sgt. Olsen’s conduct indicates evidence of his “increasing propensity to make bad decisions which put other officers at risk and could result in unnecessary liability for the City . . . The City cannot afford to assume the risk of future policy violations by Sgt. Olsen particularly when he fails to acknowledge his past misconduct or take any steps to improve his overall performance as an officer.”

The Union

The Union begins its statement of position by referring to the definition of the term “just cause.” The seven-element test for “just cause” as presented in *Enterprise Wire*, 46 LA 359 (Daugherty, 1966) should be applied, the Union urges.

On the merits, the Union first argues that Sgt. Olsen was not given adequate notice of the possible consequences of his actions. Sgt. Olsen spoke with Chief Rost shortly after the Stier traffic stop and Drug Task Force incidents, but was not told that he had violated policy or would be subject to discipline, the Union asserts. Chief Rost disputes the point, but the Union contends the Sgt. Olsen’s testimony is more credible. Chief Rost, the Union contends, testified that his memory was unreliable. “He openly

admitted to falsifying government document,” the Union suggests, referring to Sgt. Olsen’s performance evaluations.

The Union also contends that the length of time that elapsed between these incidents and the initiation of the investigation must be considered. The investigation did not begin until after November 24, 2008, the Union points out, more than eight and a half months after the complaint was issued. This delay is largely unexplained, the Union asserts.

The Union criticizes the investigation conducted by Ms. Dobbins as being so “superficial and utterly incomplete that it did not amount to a legitimate effort on the part of the City to determine whether Olsen had in fact violated any policies.” More specifically, the Union argues:

- In the Stier matter, the report determined that Sgt. Olsen was not a credible witness. However, Ms. Stier was not interviewed and testified that she had provided such information for years. Ms. Dobbins found that no search warrant had been sought, a fact that Sgt. Olsen disputes.
- The report determined that Sgt. Olsen made two harassing and threatening phone calls to the Jason Stier residence, but did not interview the investigators, the complainant and the complaint’s daughter. The report found that Sgt. Olsen was intoxicated when the investigators arrived at his house, which was denied by Sgt. Olsen, yet the investigation did not review a tape recording made of the interview.
- The report determined that Sgt. Olsen became “argumentative when intoxicated” at Johan’s bar and that he struck a female employee, but did not interview the employee who provided contrary information.

- The report determined that Mr. Steele was in possession of Sgt. Olsen's firearm with his implied permission, but did not consider the Sgt. Olsen denied this and did not know that Mr. Steele was a suspect in a jewelry theft.
- The report did not consider the suspension of Sgt. Olsen's driver's license due to the July 26 traffic incident, but the City attempted to add the suspension to the reasons for his termination. Sgt. Olsen was not provided a written complaint and was not given an opportunity to make a formal statement, as required by *M.S. 626.89, subd. 4 and 5*. Additionally, Ms. Stier, who was a passenger, was not interviewed.

The Union also contends that the City's total investigation was neither fair nor objective. "In addition to being woefully incomplete," the Union maintains, "Dobbins' investigation was also skewed toward sustaining the charges against Olsen." In support of this contention, the Union argues that the failure to interview certain witnesses, including Ms. Stier, Ms. Berger and Mr. Steele, necessarily failed to contain their favorable statements. The Union submits that this information was deliberately omitted and Sgt. Olsen was prevented from having information that might "weaken the argument for dismissal." The telephone call incident was based "exclusively on the hearsay contained in a police report, "further indication that this was a non-objective, outcome-based investigation. Ms. Dobbins relied on the generalizations of other Department officers about Sgt. Olsen's reputation and behavior the community, without interviewing any direct witnesses. The report contained no interviews of direct witnesses to the Johan's Bar incident.

The Union attributes these deficiencies to the “history of the relationship between Sgt. Olsen and Chief Rost.” The Union notes that on February 13, 2008, less than a month before the Paula Stier traffic stop incident, Olsen filed a sexual harassment complaint against Chief Rost and Mayor Meger. Further, the Union contends, Sgt. Olsen was told that Chief Rost intended to make another officer a sergeant in place of Sgt. Olsen. This evidence, the Union contends, indicates a “retaliatory animus on the part of the City.”

The Union takes the position that the City’s allegations were not supported by sufficient proof. In the Stier stop, the Union argues that there was evidence that no policy violation occurred. The testimony of Officer Clawson was submitted in support of the proposition that it is “common practice for investigators to take steps to protect informants who get into legal trouble . . . the type of judgment that Olsen made when he explained Paula Stier’s importance as an informant to Officer Pasek.” Further, the Union argues, Sgt. Olsen never pressured or threatened Officer Pasek or Officer Stier, despite their fear of retaliation. There was no evidence that Sgt. Olsen and Ms. Stier had a “significant relationship,” as the report concludes, since neither a sexual or romantic relationship had begun at that time.

Deputy Adler, the Union points out, acknowledged at the hearing that drug task force members frequently miscommunicate about the scheduling of operations, which is consistent with Sgt. Olsen’s testimony. The city did not adequately consider that Sgt. Olsen had been home having dinner, the Union suggests, when Deputy Adler’s call came in.

Further, the Union suggests that the policies Sgt. Olsen is accused of violating “do not match these facts.” There is no policy against having a few drinks at home during off-duty hours, the Union maintains and the policy does not adequately define the terms “reporting for duty” or “duty hours.”

The Union takes the position that the “evidence is overwhelming that Olsen did not make any threatening telephone calls to the Jason Stier residence.” (emphasis original) Sgt. Olsen explained that the number was still listed under the name of Paula Stier on his cell phone and that he contacted the residence by accident.

The evidence to support the Johan’s Bar incident is insufficient, states the Union, since it was based only on a police report and since Ms. Berger effectively contradicted the report.

The Union takes issue with the City’s contention that Sgt. Olsen violated a policy that requires police officer to avoid personal association with persons who are known to engage in criminal activity. The application of the policy implies that it was violated “simply by associating with Steele,” the Union asserts. Citing to the testimony of City Administrator Murphy, the Union contends that police officer are not required to run criminal background checks on their friends and that Mr. Steele had told him that he was not a convicted felon. The Union contends that Mr. Steele was not a person “known to engage in criminal activity where such associations will undermine the public trust or confidence,” as the policy suggests.

Finally, the Union argues that the City did not apply its policies in an even-handed manner. Specifically, the Union suggests that there is no merit to the City’s contention that the discipline issued to Sgt. Olsen was progressive in nature. “This argument is

flawed,” the Union asserts, “because of two written reprimands that Olsen received in 1999 should have been removed from his file in accordance with the agreement between the Union and Chief Rost. The Union also refers to the testimony of Jason Lilleskov, submitted that Officer Terry Stier instructed him to drive while intoxicated. “It is questionable that Olsen should be disciplined for arriving for a surveillance detail after having had a few drinks during his off-duty hours, when the Department apparently had no qualms about involving Lilleskov in police business after he stated that he was intoxicated.”

The Union seeks Sgt. Olsen’s reinstatement and that he be “made whole.”

Discussion

The result in this case is dependent, in part, on the resolution of several preliminary matters raised by the parties. Both parties make contentions regarding the nature of the “just cause” standard. The CBA at Article 8, Section 8.1 codifies the parties’ agreement relating to discipline. In accordance with this provision, disciplinary action against bargaining unit employees can be imposed only for “just cause.” Section 8.1 suggests a scheme of progressive discipline, containing a list of five possible penalties including reprimands, suspensions, demotions and discharges.

The agreement requiring that all discipline be based on “cause” is indicative of the parties’ commitment to abide by a prescribed method of regulating employee conduct, recognizing and encompassing certain elements of substantive procedure. Arbitrators do not always agree on precisely what constitutes “cause” or “just cause,” or apply their methods in exactly the same way. However, several common themes or rules are universally present.

The Union reasonably suggests that Sgt. Olsen’s conduct be evaluated on the basis of several well-established criteria, as set forth in *Enterprise Wire Co. and Enterprise Independent Union*, 46 LA 359 (Daugherty, 1966). See also, Koven & Smith, *Just Cause: The Seven Tests* (2nd Ed. 1992). These are (1) forewarning or foreknowledge of possible consequences of misconduct, (2) a rule reasonably related to proper business goals and reasonable employee expectations, (3/4) a reasonable effort to discover whether misconduct occurred and if so, a fair and objective investigation of the alleged conduct,

(5) discipline based on a sufficient level of evidence, (6) rules and penalties applied in an even-handed manner and (7) penalties consistent with the offense and the employees past work history.

It is generally recognized that no warnings are required in cases of serious misconduct, such as dishonesty, unprovoked violent behavior or reporting under the influence of intoxicating substances such as alcohol or drugs. Activities of this kind are considered so offensive and so destructive of the employer-employee relationship, that an employee is expected to refrain from engaging in them without need of prior warning. *Martin Co.* 27 LA 768 (Jaffee, 1956).

Both the City and the Union recognize that the final determination in this case must inevitably depend on how the issue of credibility is resolved. The City contends that the approach suggested in Elkouri & Elkouri, *How Arbitration Works*, be utilized. This test considers the witnesses demeanor, self-interest, perception, memory and communication, as well as “whether conflicting statements [ring] true or false.” These guidelines are more fully described in *Safeway Stores Inc.*, 96 LA 304 (Coyle, 1986), in which the following factors are listed:

- The ability of the witness to recall;
- The ability of the witness to testify consistently;
- The existence of a detectable witness bias;
- Whether the ability to respond to questions carefully and accurately is impaired by some emotional condition or stress;
- Whether the witness appears to be forthcoming or evasive;
- The general quality and reasonableness of the testimony, and

- The existence or non-existence of corroborating testimony or documents.

Finally, the manner in which Ms. Dobbins report should be utilized in this award is at issue. Ms. Dobbins' investigative report has been admitted into evidence and appears to be creditable. The Union criticizes the investigation conducted by Ms. Dobbins as, among other things, "superficial" and "incomplete," arguing that her report is insufficient to form the basis for discipline. The conclusions contained in the report constitute proper evidence, worthy of consideration. However, the investigation and report did not reflect the testimony of all the witnesses and cannot be considered complete. In this case, where so many operative facts were disputed by the parties, matters contained in the report cannot serve as the sole basis for a finding of misconduct.

Interference with the Arrest of Ms. Stier

At the hearing, all witnesses, including Sgt. Olsen, consistently testified that the decision to arrest belongs to the investigating officer.

If Officer Pasek's testimony is to be accepted, it must be concluded that Sgt. Olsen interfered with the arrest of Ms. Stier by (1) inappropriately using his supervisory authority to order Officer Pasek to transport Ms. Stier to the Belle Plain police station, rather than the city of Jordan for standard processing, (2) falsely and repeatedly representing to Officer Pasek that her arrest would suppress future information on a pending crime investigation, and (3) repeatedly applying additional personal pressure by advising that the arrest of Ms. Stier would essentially end her marriage.

Sgt. Olsen confirms that he told Officer Pasek that he had previously obtained information from Ms. Stier relating to a drug investigation. He confirms that he discussed her personal marital status with Officer Pasek. However, he denies placing any pressure on Officer Pasek, maintaining that he never interfered with the decision to place Ms. Stier under arrest.

On the basis of this record, the testimony of Officer Pasek is persuasive and must be credited. Officer Pasek's testimony is corroborated by his notes, drafted shortly after the incident. These notes indicate that Sgt. Olsen ordered him to take Ms. Stier to the Belle Plaine police station and pressured him into making a decision he did not want to make. The notes show evidence of his resentment and frustration, two emotions that are consistent with his testimony and the circumstances as they existed on that evening. Officer Pasek's testimony is also confirmed by the testimony of Officer Stier. Efforts to discredit the testimony of Officer Stier did not seem to be convincing, especially when compared with the entire record. Sgt. Olsen's assertion that Ms. Stier was a current informant supplying important information on a pending drug investigation is countered and undermined by his admission that Ms. Stier provided him no new information after the incident.

As the parties suggest, the nature of Sgt. Olsen's relationship with Ms. Stier at this time is a pertinent factor. Both Sgt. Olsen and Ms. Stier testified that, at the time of the DWI stop, they were not involved in a romantic relationship. Rather, they testified that the romantic aspect of their relationship did not begin for several months after the stop, in June or July of 2008. The Union suggests that the lack of a romantic relationship between Sgt. Olsen and Ms. Stier supports the credibility of his testimony.

However, on this record, the lack of a romantic relationship with Ms. Stier is not helpful in deciding credibility. The record is clear that, prior to the commencement of their romantic relationship, Sgt. Olsen and Ms. Stier had been longstanding friends. At the time of the DWI stop, Sgt. Olsen had known Ms. Stier for at least 12 years. His ex-wife is related to her ex-husband. Her daughter, Kayla, performed babysitting duties for him. They have participated in group settings on social occasions.

Significantly, their particular friendship appeared to be not only close, but confidential in nature. In the statement taken by Ms. Dobbins, Sgt. Olsen said, “[S]he is like one of a few female friends that I . . . could relate to a lot of the personal problems I was having,” Sgt. Olsen stated. He described her as someone who would “typically be somebody I could talk to and more or less bounce stuff off of given my situation personally.”

In the context of the nature of Sgt. Olsen’s friendship with Ms. Stier, the claim that no romantic relationship existed in March of 2008, does not end the analysis. As Ms. Stier’s close friend, Sgt. Olsen should not have attempted to intercede in the arrest process. Sgt. Olsen violated General Order 14.3.10.7.1 by attempting to “influence” a matter that impacted “the officer’s immediate family, relatives, or person with whom the officer has or has had a *significant personal relationship*.” (emphasis supplied) General Orders 14.2.3, 14.3.6 and 14.3.10.2.1 were also violated because Sgt. Olsen’s conduct compromised the integrity of the police department and was not a proper use of police officer authority. Even Sgt. Olsen’s statement to Officer Pasek, to the effect that the arrest of Ms. Stiers would stop the flow of information, does not appear to be consistent with the extensive friendship existing with Ms. Stier.

Sgt. Olsen's actions on March 2, 2008, were in clear violation of General Order 14.

Appearing for Duty Under the Influence of Alcohol

General Order 14.3.10.4.2 provides that a "peace officer shall not report for work with the odor of alcoholic beverage on the officer's breath." There is sufficient evidence to establish that, on an evening in the spring of 2008, Sgt. Olsen left his home after consuming a few drinks to attend a surveillance detail organized and operated by Deputy Adler. Sgt. Olsen admits to this. Deputy Adler indicated that upon his arrival, Sgt. Olsen smelled of alcohol, displayed slurred his speech and had watery eyes. Deputy Adler did not permit Sgt. Olsen to participate in the surveillance detail on that evening.

The Union contends that Deputy Adler did not communicate the date of the surveillance operation with sufficient clarity and, as a result, Sgt. Olsen did not know or could not anticipate the call to return to duty. The Union contends that it is not "fair or reasonable" to hold Sgt. Olsen responsible for these actions. However, even assuming this to be true, the circumstances do not excuse Sgt. Olsen leaving his home and driving to this assignment in an inappropriate condition. When Sgt. Olsen left his home and drove to the meeting spot, he did so in violation of General Order 14.

Abuse of Cell Phone Policy –Incident at Johan's Bar

The only evidence that misconduct occurred in these two instances are the conclusions of Ms. Dobbins in her report and the police reports. The only person to actually hear what Sgt. Olsen said during this phone call was Kayla Stier. However, she

was not called as a witness. The key witness regarding the events at Johan's Bar was Ms. Berger. At the hearing, her testimony differed greatly from the police report relied upon by the City.

The evidence offered in support of these allegations were not sufficient to justify discipline.

Access to Firearm

Two parts of General Order 14 relate to this allegation, sections 14.3.10.4.9 and 14.2.3. Taken together, these sections require an officer to avoid association with criminals in situations where the public trust would be undermined and requires the avoidance of any conduct that could compromise the integrity of the department. The City determined, based only on Ms. Dobbins' investigation, that Sgt. Olsen had associated with a felon and either intentionally or recklessly provided him access to his firearm.

The City's charge was based on Ms. Dobbins' conclusion that Sgt. Olsen had knowledge that Mr. Steele had been in legal trouble as a juvenile and that he had told Mr. Steele to cooperate with an investigation conducted by the Farmington police. Sgt. Olsen admitted that Mr. Steele told him that he had been in trouble as a juvenile. However, there does not appear to be any evidence to indicate that Sgt. Olsen knew he was a suspect in the Farmington investigation. For his part, Sgt. Olsen denies having any detailed knowledge of Mr. Steele's juvenile record.

City Administrator Murphy testified that General Order 14 does not require City police officer to run criminal background checks on their associates. Mr. Steele was not

called by either party as a witness. There does not appear to be sufficient evidence to sustain this allegation of misconduct.

Failure to Warn

The Union contends that Sgt. Olsen was not forewarned of the consequences of his actions. However, there is no dispute that General Order 14 was in the general knowledge of all Belle Plaine police officers. There was no evidence that Sgt. Olsen was unaware of the contents of General Order 14.

Sgt. Olsen did testify that Chief Rost did not indicate that his conduct would require discipline when he spoke to him a few days after the incident. However, this testimony is disputed by Chief Rost. Regardless, the interference with the arrest and surveillance detail incident is sufficiently serious so as not to require a warning.

The Union also takes the position that the delay between the misconduct and the commencement of the investigation “undermines the credibility of the City’s assertion that these incidents were termination-level offenses.” However, this record indicates that Sgt. Olsen contributed to the delay. Sgt. Olsen did not immediately advise the City that he had been in an accident with his motorcycle and that he had been charged with driving while under the influence of alcohol. He had an obligation to do so. The City made this discovery from an independent source.

Here, the investigation was begun a short time after a formal complaint was received. The record indicates that the timing of the investigation was not unreasonably related to the City’s knowledge of Sgt. Olsen’s misconduct. Additionally, it does not

seem appropriate to question the City's credibility or intentions on the basis of a delay, when Sgt. Olsen was less than forthcoming with regard to his accident and DWI charge.

DWI Conviction

The parties do not dispute that on April 8, 2009, Sgt. Olsen pleaded guilty to the charge of driving while under the influence of alcohol, stemming from his arrest on July 26, 2008, while he was operating a motorcycle. The matter now appears to be fully resolved.

Sgt. Olsen was not on duty at the time of his arrest. A question therefore arises relating to whether the off-duty conduct is subject to the City's disciplinary authority and whether it can be considered as a factor in this just cause analysis. Generally, when not related to work, an employee's off-duty conduct is exempt from employer scrutiny. Attempts to discipline employees on the basis of non-work related off-duty conduct have been consistently set aside in arbitration proceedings. *W.E. Caldwell Co.* 28 LA 434 (Kesselman, 1957); *International Paper Co.*, 51 LA 1226 (Jenkins, 1969).

But where an employee's off-the-job conduct is reasonably discernable, and where the off-duty behavior is clearly work related, an employer's right to base discipline on the off-duty events is well established. Off-duty conduct has been determined to be pertinent when the employee's behavior harms the employer's reputation, renders the employee unable to perform his duties or leads to the refusal or reluctance of other employees to work with him or her. *Polk County and AFSCME LU 1868*, 80 LA 639, 642 (Madden, 1983); *St. Clair County and Michigan Council 25*, 80 LA 516, 519, (Roumell, 1983); *Baltimore Transit Company*, 47 LA 62 (Duff, 1966).

When an employee is involved in law enforcement activities, the off-duty conduct becomes particularly important. This is especially applicable in this case, where Sgt. Olsen's actions constituted a violation of Minnesota law, as well as General Order 14, an order that contains specific provisions regulating off-duty behavior. Sgt. Olsen's plea of guilty to the charge of driving while under the influence of alcohol establishes that he engaged in misconduct that reflects adversely on the integrity of the Department and its ability to promote and maintain the respect of the community. Such conduct tends to bring discredit upon the Department and the entire City government.

The Union contends that Sgt. Olsen's plea of guilty to the charge of driving his motorcycle while under the influence of alcohol cannot be used to justify the City's personal action. The plea of guilty did not occur until after the decision to discharge Sgt. Olsen was made, the Union notes, and Sgt. Olsen was not given an opportunity to respond with a formal statement as required by law.

The Union's position has merit. As a general rule, just cause for discharge must depend on information that is available prior to the time of discipline. Additionally, the Minnesota Peace Office Discipline Procedures Act, at *M.S. 626.89*, does require that the "formal statement" of the officer be taken in the context of an investigation.

However, neither of these contentions can be sustained in this case. While Sgt. Olsen's plea of guilty occurred after the City had made the decision to terminate his employment, the off-duty conduct occurred while he was still employed. The City reserved its intention to revisit the incident, specifically deferring the matter until the charges were resolved. Further, the City did not need to conduct any additional

investigation to establish the misconduct. The plea of guilty rendered the conduct reasonably discernable and is a matter of public record.

Propriety of the Discipline

General Order 14 mandates that the conduct of Belle Plaine police officers be measured against a high standard. Section 14.2.3 requires police officers to conduct themselves in a manner that promotes the integrity of the department. Section 14.3.3 prohibits a police officer from reporting to work if he or she has consumed alcohol within the preceding eight hours. Other parts of General Order 14 require police officers to carry out their duties with integrity, fairness and impartiality and to refrain from conduct that tends to bring discredit on the department. Significantly, Section 14.3.10.7.1 prohibits police officers from attempting to influence other peace officers in situations involving the officer's "immediate family, relatives, or person with whom the officer *has or has had a significant personal relationship.*" (emphasis supplied)

Although the standards for Belle Plaine police officer are set high, they are both reasonable and proper. It is appropriate and reasonable for the City to require and expect its police officers to conduct themselves in a manner that promotes the public's confidence and trust in the integrity of its police department. It is appropriate and reasonable to expect police officers to function and work with other employees in a courteous, respectful, productive and efficient manner, regardless of such personal issues as may exist. The failure of an employee to conduct himself or herself in this way is a

matter of great concern. The City's primary interest must be to preserve the honor, reliability and productivity of operations through appropriate police officer conduct.

In this case, the evidence establishes that Sgt. Olsen violated General Order 14 on several occasions. He interfered in the legitimate DWI arrest on behalf of a close and confidential personal friend for reasons which must be regarded as questionable. He adversely affected police officer and employee relationships and the proper operation of the police department. He reported for a surveillance assignment in an unreliable condition, operating his vehicle both to and from the police department.

The City has responded to this conduct and other conduct by terminating Sgt. Olsen. The general factors considered in evaluating the penalty for misconduct include the (1) nature of the conduct, (2) the length of service, (3) work performance and (4) disciplinary history. Factors more specific to employee relationship issues include (1) whether the misconduct was a single occurrence or a series of deliberate acts, (2) the effect of the conduct on worker productivity and (3) the presence of mitigating factors such as employer bad faith or provocation. After carefully considering these factors on this record, it appears that Sgt. Olsen's termination is supported by just cause.

An evaluation of this case discloses two factors that work very much in Sgt. Olsen's favor. At the time of his termination, he had served in the Belle Plaine Police Department in excess of 12 years, a significant tenure. Moreover, it appears that his work during that period of time was largely satisfactory. This is well established by Sgt. Olsen's employment evaluations, despite Chief Rost's testimony that he inflated the performance results as an incentive.

Sgt. Olsen's work history prior to 2007 also works in his favor. In the 11 years prior to 2007, Sgt. Olsen was only disciplined on two occasions, both for matters of relatively negligible importance. However, Sgt. Olsen's squad car accident in the fall of 2007, a more serious event, resulted in a two-day suspension. The penalty was not contested and the incident places Sgt. Olsen's work record in a less favorable light.

Significantly, Sgt. Olsen's 2008 conduct related directly to the City's ability to detect and punish crime, negatively affecting the public's trust and confidence in its police department. At the end of the day, Sgt. Olsen's conduct in these incidents was incompatible with his duties as a sworn police officer and the proper functioning of a police department.

Conclusion

Having carefully considered the testimony and exhibits received into evidence, as well as the written arguments of the parties, it is the opinion of the Arbitrator that the City terminated the employment of Sgt. Richard D. Olsen for just cause.

For the foregoing reasons, the grievance is DENIED.

A W A R D

1. **IT IS THE OPINION AND AWARD** of the Arbitrator that the city of Belle Plaine, Minnesota terminated the employment of Sgt. Richard D. Olsen on or about January 5, 2009, for just cause and the grievance is therefore denied.
2. **IT IS THE ORDER** of the Arbitrator that the grievance be dismissed.

June 26, 2009
St. Paul, Minnesota

David S. Paull, Arbitrator