

**IN THE MATTER OF ARBITRATION  
BETWEEN**

---

**GENERAL DRIVERS, DAIRY EMPLOYEES,  
WAREHOUSEMEN, HELPERS & INSIDE  
EMPLOYEES, TEAMSTERS LOCAL NO. 346**

**Union,**  
**and**

**CITY OF CLOQUET, CLOQUET, MINNESOTA**

**Employer.**

---

**ARBITRATION DECISION  
AND AWARD**

**BMS Case No. 09 PA 0991**

(Discharge)

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	August 26, and September 11, 2009 Cloquet, Minnesota
Date Record Closed:	September 30, 2009
Date of Award:	November 3, 2009

**APPEARANCES**

For the Union:

Patrick J. Kelly, Esq.  
Kevin Beck, Esq.  
Kelly & Lemmons, P.A.  
7300 Hudson Boulevard  
St. Paul, MN 55128

For the Employer:

Christopher M. Hood, Esq.  
Robert T. Scott, Esq.  
Flaherty & Hood, P.A.  
525 Park Street, Suite 470  
St. Paul, MN 55103

**INTRODUCTION**

The General Drivers, Dairy Employees, Warehousemen, Helpers & Inside Employees, Teamsters Local No. 346, (“Local 346” or “Union”) represents non-supervisory employees including the Grievant, who are employed by the City of Cloquet

Police Department (“City” or “Employer”). The Labor Agreement (“Contract”), Joint Exhibit 1, was identified by the parties as the document controlling this matter. The Contract was effective January 1, 2007 through December 31, 2008.

The Employer discharged Jeffrey Palmer (“Grievant”), and a grievance was filed by the Union. The parties were unable to resolve the grievance, and the matter was referred to arbitration. The parties selected the undersigned as the arbitrator from a list provided by the Minnesota Bureau of Mediation Services.

On August 26, and continuing on September 11, 2009, the Arbitrator convened a hearing at the Cloquet City Hall in Cloquet, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file briefs simultaneously on September 30, by e-mail and U.S. mail, and the record closed when the Arbitrator received the briefs on September 30.

### **ISSUE**

Did the Employer act in good faith when it terminated the Grievant’s employment?

### **FACTS**

#### **SUMMARY**

The Grievant was a peace officer who was employed by the City for eight years. During 2006 and 2007 he had some personal problems that affected his job performance to the extent that he was declared unfit for duty for a month in 2006 and for approximately a month in the spring of 2007. He was last reinstated April 23, 2007, and

met with Deputy Chief Terry Hill. They later signed a performance improvement plan based on the April 23 discussion.

In December 2007, the Grievant was in charge of investigating a computer-based child pornography case. During the investigation, he met a woman named Brianna Barnes. She was the girlfriend or ex-girlfriend of the man who was allegedly violating child pornography laws. The circumstances surrounding the Grievant's relationship with Ms. Barnes caused his superiors to believe he had exhibited extraordinarily bad judgment, and violated known rules of conduct by engaging in a relationship with her. Rather than merely taking him off the case, in January of 2008, they demoted him to Patrol Officer, a job where he would have more supervision. His superiors stated that the demotion was not disciplinary, that it was for reasons relating to violation of the earlier performance improvement plan, and asked him to sign an agreement to that effect. The Grievant believed the demotion to which he agreed was in lieu of a disciplinary action for his relationship with Ms. Barnes, and he signed the statement declaring that the demotion was not a disciplinary action. The Grievant's superiors did not discharge him in January of 2008, because the City Attorney advised them to do otherwise while the pornography case was still pending.<sup>1</sup>

The County Attorney's Office chose to go ahead with a criminal case against the alleged pornographer despite its knowledge of the Grievant's personal relationship with a possible witness. It dutifully revealed these awkward facts to the defense attorney as part of the discovery process. Eventually, the pornographer pled guilty. The case was based on the contents of his confiscated computer rather than witness testimony. Then the City

---

<sup>1</sup> Er. Ex. 39, letter from Attorney Frank Yetka dated January 29, 2008 advising that disciplinary action be postponed until the criminal investigation ends, and that Officer Palmer be advised not to have further contact with Ms. Barnes.

began a process that ended in the discharge of Officer Palmer on April 23, 2009. The City discharged him for lying to his supervisor about the personal relationship and for “having an intimate relationship” with a “material witness” in a case for which he was the investigating officer. When discharged in April 2009, the Grievant had been working for over a year as a Patrol Officer, the position to which he had previously been demoted. During that year, his immediate supervisor was pleased with the Grievant’s job performance and believed he met or exceeded standards in most areas.

### BACKGROUND

Officer Palmer has spent his entire career in law enforcement. He began working for the City of New Orleans in 1991. In 1995, he returned to Minnesota, and was hired as a Patrol Officer by the City of Floodwood, where he was sufficiently successful in his work to be promoted in 1998 to the office of Floodwood Chief of Police. He was hired by the City of Cloquet in June 2001, as a detective/school liaison officer. He was successful in his work for the City, developing an interest in and expertise about enforcement of drug laws. Prior to December 11, 2007, the Grievant received many commendations and had a good employment record overall, although he received some supervisory criticism (not disciplinary actions) about tardiness and for personal use of his business cell phone.

During 2006, the Grievant began experiencing personal difficulties that interfered with his work. He had five children from various marriages and relationships and was having difficulty financially and emotionally. Chief of Police Wade Lamarande and Deputy Chief Terry Hill sent him to employee assistance and took an interest in trying to rehabilitate the Grievant because they considered him a valuable employee and a good

detective. During 2006-2007, the Grievant was twice determined to be unfit for duty for approximately one month each time due to depression. His mood disorder undermined his ability to do his work in a timely manner and to deal effectively with difficulties. The City's psychologist declared him fit for duty most recently in April 2007. Deputy Chief Hill worked closely with the Grievant to help him improve his ability to function during this time. Between April 23, 2007 when the Grievant was cleared to return to work and December 11, 2007, when the incidents giving rise to this grievance began, there is no evidence that the Grievant's work performance was outside the normal range.

When the Grievant returned to work in April 2007, Deputy Hill met with the Grievant and told him what his expectations were. The Grievant told Deputy Hill he was willing to do whatever it took to remain in his position as an Investigator.<sup>2</sup> Apparently, this discussion was put into writing later and signed by the two on June 12, 2007. This document, now known as a performance improvement plan, is the basis for demoting the Grievant to Patrol Officer in 2008, according to the City. The document mentions the Grievant's previous problems with "personal relationships", and sets out five requirements for improvement in work-related areas.<sup>3</sup>

#### INCIDENTS LEADING TO DISCHARGE

On December 11, 2007, a series of events began that led to the Grievant's discharge. The Grievant took a call from Justin Barnes, complaining that his sister's ex-boyfriend had child pornography on his computer. The sister, Brianna Barnes, came to the police department and signed a statement to that effect. Her boyfriend was in jail at

---

<sup>2</sup> Er. Ex. 13, "Items discussed with Jeff Palmer on 04/23/2007"

<sup>3</sup> Er. Ex. 13

that time on another charge. Thereafter, the Grievant began a personal relationship with Ms. Barnes, which became a sexual relationship at some point in December or January.

On January 4, 2008, Deputy Chief Hill, having heard “rumors” about the Grievant and Brianna Barnes, called the Grievant to his office to question him. Deputy Hill was concerned for two reasons: First, he believed that the Grievant still had a long-term relationship with another woman, Sarah, and he further believed that the “volatility” of his relationship with Sarah had led to the Grievant’s earlier mental health problems. Chief Deputy Hill did not want a recurrence. Second, Deputy Chief Hill perceived that the Grievant, who was the investigator in the child pornography case, should not have an “intimate” relationship with Ms. Barnes because it would create a conflict of interest in the child pornography case against the ex-boyfriend. At that time, in answer to Deputy Hill’s question, the Grievant denied that he was involved in an “intimate relationship” with Ms. Barnes.

That evening, Deputy Chief Hill went out to dinner with his parents at the Dry Dock restaurant and observed the Grievant going into the bar and sitting next to a blond woman who turned out to be Ms. Barnes. Deputy Chief Hill was upset about this because he felt that the Grievant had lied to him about Ms. Barnes. He called the Grievant in and told him this the next workday. The Grievant responded by explaining that he thought “intimate relationship” meant sexual relationship, and denied he was sleeping with her. Deputy Chief Hill testified at the hearing that he said to the Grievant, “This could be a defense attorney’s dream. It doesn’t sit well with me...I thought it could jeopardize the case.” One of the Grievant’s coworkers, Derek Randall, presented additional evidence

that the Grievant was with Ms. Barnes at a bar the next night, and that he told Deputy Chief Hill about this because he had been directed to do so.

The Grievant admitted that he had a social relationship with the Grievant at the time he spoke to Deputy Chief Hill, and that it later developed into a sexual relationship, probably in mid-January. He drew a distinction between a social relationship, an intimate relationship and a sexual relationship, and there is no clear evidence as to the nature of the relationship in early January. At no time in early January did Deputy Chief Hill or Chief Lamirande (who was kept informed of each development by his deputy chief) order Officer Palmer to cease contact with Ms. Barnes.

On January 11, 2008, Deputy Chief Hill reassigned Officer Palmer from detective to patrol officer, effective on or about January 20, 2008. Officer Palmer agreed to the reassignment after discussing it with his Union representative. As a patrol officer, his pay was reduced two pay grades, and he reported to Patrol Sergeant Carey Ferrell rather than Deputy Chief Hill. The Chief and Deputy Chief advised Sergeant Ferrell to make sure that the Grievant met standards involving the issues raised in his earlier performance agreement. According to Sergeant Ferrell, the Grievant met these conditions during the 16 months the Grievant worked on Sergeant Ferrell's patrol shift.

On January 24, 2008, Chief Lamirande and Deputy Chief Hill met with the Cloquet Citizen's Advisory Board, and told them about the Grievant's problematic relationship with Ms. Barnes. According to Deputy Chief Hill, the members were "visibly upset about this relationship and also the past personal relationships that were brought to light that day to them, in regards to Jeff, when working cases and then striking up personal relationships with individuals involved in these cases. The advisory board

strongly recommended that we look into the latest incident with Brianna Barnes to which we advised them we would.”<sup>4</sup> The Advisory Board did not hear the Grievant’s side of the story.

On January 28, the Chief and Deputy Chief met with the City’s legal advisor who recommended that they take action by taking Officer Palmer off the investigation of the pornography case, advising him to stop seeing Ms. Barnes, and that he should be disciplined only after conclusion of the criminal matter.<sup>5</sup> On January 29, the Chief wrote a letter to Officer Palmer ordering him, among other things, not to have any further contact with Ms. Barnes.<sup>6</sup>

At the end of January, the Employer asked the phone company for its records for December 2007 through January 8, 2008, for the Grievant’s Department-issued cell phone. The records show that the grievant made an excessive number of phone calls and sent an extremely large number of text messages to both Ms. Barnes and his girlfriend Sarah during that time. He reimbursed the Department for these costs as he had done previously. He was advised not to bring his personal cell phone to work or to use his business phone for personal matters.

Some three months later, the City finally requested a *Garrity* statement from Officer Palmer. In that statement, Officer Palmer reiterated that he had not lied to Deputy Chief Hill on either January 4 or 7, 2008.<sup>7</sup> Officer Palmer did, however admit that there had been minimal contact between Ms. Barnes and him (*i.e.*, a text message wishing her a “Happy Easter”) after January. Based on that admission, the City issued a

---

<sup>4</sup> Er. Ex. 14 Hill memo to file, no date.

<sup>5</sup> Er. Ex. 39

<sup>6</sup> Er. Ex. 17

<sup>7</sup> At the arbitration hearing, Officer Palmer testified that the Barnes relationship became sexual in mid to late-January, 2008.

first written disciplinary action, on June 6, 2008. At the same time, Officer Palmer received a one-day suspension for bringing his personal cell phone to work in violation of the February 2008 directive.<sup>8</sup> These two formal disciplinary actions are the only ones of record during his employment.

Nearly one year later, on April 1, 2009, Officer Palmer was handed a copy of the Notice of Discharge Recommendation of the Department. The letter informed him of a hearing date at which the Council would consider and decide whether he should be discharged.<sup>9</sup> The letter states that the Chief and Deputy Chief were recommending his discharge on the following grounds:

1. Commencement and pursuit of an unprofessional, unbecoming and immoral intimate relationship with an individual known to you to be a material witness to an investigated matter [sic] for which you were the responsible investigating officer;
2. Untruthfulness in responding to direct inquiries from supervisors;
3. Unauthorized personal use of departmental equipment; and
4. 'Aggravating factors.'<sup>10</sup>

The City Council met on April 21, 2009 in closed session to consider this recommendation. The Council provided an opportunity for the Grievant's attorney to speak on his behalf, but did not listen to testimony from witnesses. Following the closed portion of the meeting, the Council voted 5-0 with 2 abstentions, to discharge Officer Palmer from employment.<sup>11</sup> Officer Palmer filed a timely grievance dated April 22, 2009.

---

<sup>8</sup> Er. Ex. 24.

<sup>9</sup> At the time, it is undisputed that the City Council had sole authority to discharge.

<sup>10</sup> Employer Exhibit ("Er. Ex.") 11.

<sup>11</sup>Er. Ex. 28.

## CONTRACT PROVISIONS

The Parties agree that the Labor Agreement (“Contract”) effective January 1, 2007 through December 31, 2008 was in effect at the time Mr. Palmer was discharged on April 21, 2009. That Contract contains the following relevant provisions:

### ARTICLE 3

DISMISSAL: The Commission agrees that it will act in good faith in the dismissal of any Employee. Should the Union present a grievance in connection with the dismissal of any Employee within 10 days of such dismissal to the Commission, the dismissal shall be reviewed under the terms of the Grievance Procedures as specified in Article 4.

### ARTICLE 4

#### Article 4.4 PROCEDURE.

...

Step 1. An EMPLOYEE claiming a violation concerning the interpretation or application of this AGREEMENT shall, within twenty-one (21) calendar days after such alleged violation has occurred, present such grievance to the Assistant Police Chief...

## POSITIONS OF THE PARTIES

### EMPLOYER POSITION

The Employer argues that the Union’s grievance is “procedurally inarbitrable” because the Union began the Grievance process in violation of Article 4.4 which requires that the Grievant shall present his grievance to the Assistant Police Chief at Step 1. The City further contends that it acted “in good faith” when it discharged the grievant and that “good faith” is the standard for discharge negotiated by the parties. It argues that good faith is not synonymous with just cause.

Even if “just cause” were the standard for discharge, the City argues that the Grievant committed misconduct and discharge was a reasonable consequence. The City claims that Grievant’s conduct violated clear and appropriate Department policies of

which the Grievant was aware; that he was afforded due process at every step of the disciplinary proceedings; that the Grievant's discharge was not double jeopardy; that the City acted appropriately in delaying disciplinary action; and that termination was the appropriate penalty under the circumstances. Additionally, the City claims that if the grievance is sustained and the Grievant is reinstated, no back pay should be awarded.

#### UNION POSITION

The Union claims that the grievance is properly before the Arbitrator because Officer Palmer submitted his grievance through his business agent to City Administrator Fritsinger, who agreed to waive the earlier steps in the process as they had done on previous occasions, and this constitutes a binding past practice. The Union argues that a letter signed by Mr. Fritsinger and sent several days later does not revoke the earlier agreement to waive grievance steps. The Union claims that the Contract requires just cause for discharge, including due process safeguards and progressive discipline.

The Union contends that the City did not meet its burden of specificity of charges. Because the demotion was disciplinary, discharge 16 months later for the same series of incidents is double jeopardy, a denial of due process. The Union points to other mitigating circumstances, and claims that when the City did not discipline other employees who engaged in similar behavior, it engaged in unfair disparate treatment, which fatally undermines its arguments. The Union argues that the City's discharge was neither timely nor did it prove the allegations constituted a good reason for discharge.

The Union asks that the Grievant be reinstated as a Patrol Officer and be granted salary benefits and seniority for the period of time during his discharge.

## DISCUSSION AND DECISION

### A. JURISDICTION

The City claims that the Union did not comply with the Contract, and the grievance should be denied for procedural irregularity. Procedural irregularities caused problems for both parties. Under Article 4, the City's Civil Service Commission is the entity with authority to discharge Department employees. The Commission could not and did not discharge the Grievant because it did not exist at the time of discharge. It had been abolished, for better or for worse, by the City Council on October 2, 2007.<sup>12</sup> To date, the City Council has not established a new process or commission to discharge employees. Nor have the parties negotiated a new Contract provision to clarify the process for discharge.<sup>13</sup> The City takes this to mean that it need not follow the process outlined in the Contract, and instead, the City Council as a whole is to discharge Department employees.<sup>14</sup> The question of whether this part of the process is appropriate is not before me for decision. On this record, however, the City does not have clean hands when it claims that the Union did not follow the Contract's express provisions.

The irregularity the City claims is that Officer Palmer did not present the grievance to the Assistant Police Chief in the first instance as Article 4.4 requires. Instead, Colin Hayes, the Union Business Agent, sent it to City Administrator Brian Fritsinger. On April 27, 2008, Hayes called Fritsinger. At the hearing, Mr. Fritsinger admitted he agreed to waive the first steps of the grievance process and proceed directly to arbitration as he and Colin Hayes had done before in discharge cases. Shortly

---

<sup>12</sup> Er. Ex. 38 Minutes of the City Council Meeting, October 2, 2007.

<sup>13</sup> The Public Employment Labor Relations Act ("PELRA", Minn. Stat. ch. 179A) provides that for public employees, a contract continues in effect after its expiration date. Minn. Stat. Sec. 179A.20 Subd. 6

<sup>14</sup> Testimony, Brian Fritsinger, City Administrator.

thereafter, the City's attorneys drafted a letter sent to the Union over Mr. Fritsinger's signature, which attempted to negate that agreement.<sup>15</sup> The letter claimed that the decision to discharge cannot be grieved because it is a "management right"<sup>16</sup>, that the grievance was not arbitrable, and that it was "procedurally invalid."<sup>17</sup> The City no longer presses some of the arguments it made in this letter, but continues to claim that the grievance should be denied because the Union relied on an oral agreement of the City Administrator to "jump" the first steps in the grievance process.

The City did not deny that this practice existed in discharge cases, but claims that strict compliance is required when the Contract language is clear. Nonetheless, where a Grievant's job is at stake, and all of the players are aware of the facts, the practice of agreeing to waive the first steps of the grievance is reasonable, and will be upheld even when one party attempted to change its position later. Where the City is itself not in strict compliance with the Contract, and the Union's procedural irregularity is *de minimus*, the Grievance should not be denied without examining the merits of the case.

#### B. LEGAL STANDARD FOR DISCHARGE

The standard for review is whether the Grievant was discharged for "just cause". The Contract does not use this terminology, and the Employer claims that the standard should be "good faith" instead, because the Contract provides: "The Commission agrees that it will act in good faith in the dismissal of any Employee..." But this language does not supplant or contradict the just cause standard. Even if the "Commission" had existed at the time of discharge, it would act in "good faith" only if it dismissed an employee for "just cause".

---

<sup>15</sup> Testimony, Fritsinger

<sup>16</sup> Er. Ex. 2, Letter from Fritsinger to Hayes, April 30, 2009.

<sup>17</sup> *Id.*

Just cause is the workplace standard for discipline and discharge. It has been given meaning by academic and industrial relations experts as well as by the courts.

Norman Brand, editor-in-chief of the frequently quoted labor law text, *Discipline and Discharge in Arbitration*, 35 (1<sup>st</sup> ed. 1999) states the general theory:

The central concept permeating discipline and discharge arbitration is “just cause.” Most collective bargaining agreements explicitly prohibit the employer from disciplining or discharging employees without just cause. Even in the absence of specific contract language, just cause is the touchstone by which arbitrators judge employer actions. If the arbitrator concludes that the employer lacked just cause to discipline or discharge an employee, the action will be overturned. If there is just cause, the action will be upheld. *Discipline and Discharge at 29.*

Mr. Brand continues by explaining that arbitrators look at two principles central to just cause, the concepts of industrial due process and progressive discipline. *Id.*

The Minnesota Supreme Court has had occasion to consider the meaning of just cause and has affirmed this standard in recent years:

The term “cause” generally means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice. That is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances would regard as a good and sufficient basis for terminating the services of an employee...

*Hilligoss v. Cargill*, 649 N.W. 2d 142 (Minn. 2002).

That the Contract specifies the Commission should act in good faith means it is bound to consider whether a discharge is fair and reasonable, or in other words, whether it is for just cause. The City must meet that standard in order for the discharge to stand.

C. DID THE CITY ACT IN GOOD FAITH WHEN IT TERMINATED THE GRIEVANT’S EMPLOYMENT?

In January 2008, the City had just cause to discipline the Grievant for engaging in a relationship with Ms. Barnes, because the relationship gave rise to an appearance of

impropriety, or a potential for the criminal defendant to claim a conflict of interest. The evidence establishes that the City did discipline the Grievant for that action by demoting him to patrol officer effective January 20, 2009. The City claims this was not a disciplinary action, but an interim change necessary while waiting for the criminal case to be resolved. The weight of the evidence proved otherwise. Upon demotion to patrol officer, the Grievant's pay was reduced two pay grades, and he reported to Patrol Sergeant Carey Ferrell rather than Deputy Chief Hill. The timing of this reassignment points to a causal connection between the demotion and the Barnes incident; they happened consecutively. The City claimed that the demotion was based on the performance improvement document, rather than the Barnes matter. Unfortunately for the City's theory, none of the items listed as requiring improvement were at issue when it demoted the Grievant.<sup>18</sup> The demotion had all the indices of a disciplinary action except the name.

When Deputy Chief Hill reassigned Officer Palmer from detective to patrol officer, he asked the Grievant to sign a document stating he understood that the reassignment was not disciplinary. Although the Grievant signed the document, something about this transaction led him to believe that the reassignment was not a disciplinary action, but in lieu of an official disciplinary action. In Deputy Chief Hill's notes from the end of January 2008, he confirms the Grievant's belief:

[After signing the document]...Jeff Palmer called me and was inquiring why I was calling Brianna and stated something to the affect[sic] about 'I thought all of this was done and none of this was going to be discipline'.

---

<sup>18</sup> Evidence of misuse of his cell phone was not available until after the demotion. It was sent to the Department January 25, and the demotion was effective January 20.

Hill's notes continue that he told Jeff, "the advisory board was not too happy about this inappropriate relationship with a material witness..." and indicated he would be investigating further.<sup>19</sup> The Grievant's Union Business Agent wrote to Chief Lamirande dated February 1, 2008, (Employer's Exhibit 19) stating:

On January 9, 2008, both you and Deputy Chief Terry Hill requested that Jeff Palmer voluntarily agree to a demotion to the patrol division. At that time you gave Mr. Palmer a choice as to either accept the demotion or face further discipline...Based upon your threat of further discipline Palmer agreed to the demotion and considered the matter settled.

*Id.*

Not only was the demotion disciplinary, the City obtained the Grievant's signature to the exculpatory statement by leading him to believe that the demotion was in lieu of discipline. When the City discharged the Grievant in April 2009 from his position as patrol officer, it essentially punished him twice for the same offense, violating the prohibition against double jeopardy.

When the City discharged him, Officer Palmer had been productive and effective in his work assignment as a patrol officer for 16 months according to his supervisor. At the arbitration hearing, the Union called as witnesses peace officers who had worked with the Grievant both inside and outside the Department. They were positive about his patrol work, his effectiveness as a detective, his good ethics, and their trust in him. The Grievant was respected by his peers in many areas of his work. The Carlton County City Attorney testified that the Grievant was a good witness, and that he had never had complaints from assistant county attorneys about Officer Palmer's work product or his ethics. He had not heard any community comments about loss of trust regarding the

---

<sup>19</sup> Er. Ex. 14

Grievant. This testimony undercuts the idea that the April 23, 2009 discharge was for just cause.

An employee may be terminated for just cause in two types of situations: a single incident of very serious misconduct or the final step in the progressive discipline process.<sup>20</sup> The City did not establish that the facts met either of these criteria. Looking specifically at the four stated reasons for discharge, the City alleges:

1. Commencement and pursuit of an unprofessional, unbecoming and immoral intimate relationship with an individual known to you to be a material witness to an investigated matter [sic] for which you were the responsible investigating officer;
2. Untruthfulness in responding to direct inquiries from supervisors;
3. Unauthorized personal use of departmental equipment; and
4. ‘Aggravating factors.’<sup>21</sup>

The facts underlying the first two charges are that Deputy Chief Hill believed Officer Palmer lied to him when questioned about his relationship with Brianna Barnes. He thought the relationship was sexual at the time Officer Palmer said it was not. The Grievant eventually acknowledged the relationship, but continued to deny that it was sexual when Hill questioned him on January 4 and 7, 2008.

It is evident from the context of the Deputy Chief’s notes and the *Garrity* statement that Hill and Palmer may have used the words “intimate relationship” to mean different things. It may mean a sexual relationship or something less than that. The distinction is important only with regard to the question of whether the Grievant lied to his supervisor. The Grievant may have lied to the Deputy Chief about the nature of the

---

<sup>20</sup> See, *Discipline and Discharge in Arbitration*, Norman Brand, ed., ABA Section of Labor and Employment Law, BNA, 1999, at 68. Citations omitted.

<sup>21</sup> Employer Exhibit (“Er. Ex.”) 11.

relationship, and the Deputy Chief believed he did so, but the weight of the evidence does not support that belief. The Grievant's statements about the nature of the relationship were not contradicted by other direct evidence. Thus, the City proved only that Palmer had a relationship that might appear to cause a conflict of interest, but not that the Grievant lied about the nature of the relationship to his supervisor.

Another reason given for discharge, Paragraph 3, refers to the Grievant's personal use of his business cell phone. Phone company records show that Officer Palmer probably set an all-time record for text messaging from December 11, 2007 through January 10, 2008. He repeatedly called and messaged both Sarah and Brianna. However, a discharge cannot be based on this misuse of property because the Grievant had used his business phone for personal calls before, and prior to January 2008, the City did not discipline him or warn him that the next time it occurred he would be subject to discharge. Instead, it allowed him to repay the Department the costs of his personal phone usage.<sup>22</sup> Due process and progressive discipline require the City to notify employees in advance when they will be subject to discipline rather than being allowed to reimburse the Employer for misuse of cell phones. After Chief Lamirande's order of January 29, 2008, concerning cell phone usage and not seeing Ms. Barnes, there is no further evidence that the Grievant misused a business cell phone.

Paragraph 4 gives as a reason for discharge, "aggravating factors." These factors are unrelated to the Brianna Barnes incident and are not evidence of progressive discipline. They include conduct for which the City did not discipline the Grievant at the time (accidentally discharging his firearm in the office, December 20, 2004; "tardiness, unauthorized absences, unreliability and unproductivity", dates unspecified; a history of

---

<sup>22</sup> Testimony, Chief Deputy Hill

traffic accidents involving CPD vehicles, dates unspecified; and an interrupted traffic stop by a Minnesota State Patrol officer for which no ticket was issued). Because none of these “aggravating factors” was the subject of timely discipline, the City cannot gather them up later and use them to magnify the Grievant’s wrongdoing.

The City established that the Grievant engaged in conduct that created at least the appearance of impropriety and that may have violated the rules of conduct. But it has not demonstrated a course of progressive discipline. The only disciplinary actions of record are the written warning and the one-day suspension imposed on June 6, 2008. The one-day suspension was for bringing his personal cell phone to work and the written warning was for texting Ms. Barnes, in violation of the Chief’s order of January 29, 2008. This discipline accomplished the goal of changing Officer Palmer’s conduct. After June 2008, there were no further disciplinary actions regarding these forbidden activities.

The seriousness of the offense was undermined by other mitigating factors. Departmental policies are not specific about when, if ever, it is appropriate to develop a relationship with someone an Officer meets while investigating a case. The Grievant may not have been the only officer who engaged in the conduct for which he was disciplined. From the testimony, it appears likely that more than one Officer engaged in similar activities and was not subjected to adverse employment consequences.<sup>23</sup> Due process requires clear notice of the conduct that could result in discharge and prohibits disparate treatment of similarly situated employees.

---

<sup>23</sup> Testimony. Detective Randall admitted an intimate relationship with two women whom he met through investigations, one of whom he may have dated while a case against her husband was pending. Second, in Employer’s Exhibit 14, Deputy Chief Hill’s notes of conversation with Grievant in January 2008, Hill writes that the Grievant, when accused of wrongdoing, stated, “Yeah, but what about Tom Hallfrisch when he met Rhonda. I told him we were not talking about Tom we’re talking about you.”

## **CONCLUSION**

A career ending discharge is too extreme a remedy for the misconduct established. The remedy was assessed too late, after the Grievant was demoted and had spent an uneventful 16 months working effectively as a patrol officer. The evidence demonstrates that the City punished Officer Palmer twice for the same offense. Industrial due process prohibits this as double jeopardy. Based on all the foregoing, the City did not establish just cause for discharge.

## **AWARD**

The Grievance is sustained. Officer Palmer should be immediately reinstated as a patrol officer. He should be reimbursed for loss of salary, benefits and seniority from the date of his discharge to the date of reinstatement offset by any interim earnings.

Dated: November 3, 2009

---

Andrea Mitau Kircher  
Arbitrator