
In Re the Arbitration between:

BMS No. 07-PA-0439

City of Jordan, Minnesota,

Employer,

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

and

Law Enforcement Labor Services,

Union.

Pursuant to **Article X** of the Collective Bargaining Agreement effective January 1, 2005 through December 31, 2007, the parties have submitted the above captioned matter to arbitration.

The parties selected James A. Lundberg as their neutral Arbitrator from a list of Arbitrators provided by the Minnesota Bureau of Mediation Services.

The parties raise no issue of arbitrability and agree that the grievance is properly before the Arbitrator for a final and binding determination.

The grievance was submitted on October 26, 2006.

The hearing was conducted on September 15, 2009 and September 16, 2009.

Briefs were posted on October 16, 2009 and the record was closed upon receipt of briefs.

APPEARANCES:

FOR THE EMPLOYER

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Plymouth, MN 55441

FOR THE UNION

Isaac Kaufman
Law Enforcement Labor Services
327 York Avenue
St. Paul, MN 55130

ISSUE:

Whether the Employer had just cause to terminate the employment of grievant, Corey Pudwill? If not, what is the appropriate remedy?

FACTUAL BACKGROUND:

The grievant Corey Pudwill was hired by the City of Jordan, Minnesota as a part time police officer in 2002. He became a full time Patrol Officer in April of 2003. Officer Pudwill received field training and completed a period of probationary service in January 2004.

During his three and one half (3 ½) years of service as a Jordan Patrol Officer, Officer Pudwill was an exceptionally “active officer.” He earned recognition as “Officer of the Year,” he earned a national highway safety award and won the department “Golden Pen” award three times. The Golden Pen award was given to the officer who wrote the greatest number of tickets over a period of one year. Officer Pudwill wrote more than one half of the tickets generated by the five patrol officers in the department. During his tenure he estimated that he made two thousand five hundred stops, he issued approximately one thousand tickets and made approximately one hundred (100) Driving Under the Influence (DUI) arrests. In general, Officer Pudwill’s job performance was highly regarded by his peers and his supervisors.

On August 4, 2004 Officer Pudwill received a three (3) day suspension for misconduct. Officer Pudwill, who had a “volunteer reserve officer” riding along with him, served an arrest warrant that was not “nightcapped,” meaning it could not be served

after ten (10) PM. The arrest was challenged and Officer Pudwill's written account that he served the warrant at 9:59 PM was investigated.

The investigation resulted in a determination that Officer Pudwill's report falsely reported the time of arrest. According to the "volunteer reserve officer" who witnessed the arrest, Brian Vycital¹, "On our way back from jail, I did ask officer Pudwill, if – you know, 'Can't we get in trouble for this?' And he told me not to worry about the arrest." **Tr. 9/16/2009 p. 282.** The testimony of Belle Plaine, Minnesota Officer Vycital established that Officer Pudwill was fully aware of the fact that he had arrested the suspect in violation of Minnesota Law.

Officer Vycital also testified that Officer Pudwill attempted to gain his cooperation in a cover up of his misconduct. Officer Vycital said, "I received a phone call on my cell phone from Officer Pudwill. He had advised me that administration was looking into the incident with the warrant, because on his log he wrote down that we arrested the male at 9:59 [PM]. And he had told me that administration was looking into the incident; we needed to get our stories straight." **TR. 9/16/2009 p. 282, 283.** The following question was then asked and the following answer was given by Officer Vycital:

Q. (Mr. Madden) And did he elaborate on what he meant by "get the stories straight"?

A. He just said that we needed to stick to that we were there before 10 o'clock...

Tr. 9/16/2009 p. 283.

Officer Pudwill was a member of Law Enforcement Labor Services in August of 2004. Union representation was available to him. He did not grieve the three day

¹ Brian Vycital is currently a licensed police officer and works for the City of Belle Plaine.

suspension that he received nor did he grieve any additional sanctions placed upon him as a result of his attempt to cover up his recording of false arrest information. One of the sanctions imposed upon grievant on August 4, 2004 was a requirement that he “Apologize to Reserve Vycital for putting him in a very uncomfortable position. Explain to him that he was right to tell the truth and that it was wrong to try to cover up the matter.”

The discipline imposed on August 4, 2004 was later taken into consideration by management and given significant weight, when it evaluated the circumstances of August 20, 2006, which resulted in the Termination of Officer Pudwill’s employment as a Patrol Officer for the City of Jordan, Minnesota.

The fact that the 2004 discipline was not grieved is significant in this case. The factual representations that formed the basis for the three (3) day suspension are deemed to be true and correct as recorded in the disciplinary documents. The “Notice of Suspension without Pay” included findings that “Officer Pudwill lied about the details of the arrest” and that “Officer Pudwill enticed a Police Reserve member to ‘cover up’ the arrest.” At hearing Officer Pudwill testified that he told Officer Vycital to tell the truth when asked about the arrest that took place after ten o’clock (10:00) PM. When he was asked why Officer Vycital never again rode with him, Officer Pudwill said “It was generally felt that he had used it as to ingrain himself with the administration.” **Tr. 9/16/2009 p.495.** Officer Vycital was one of four witnesses, whose credibility was challenged by the grievant on critical issues. The Arbitrator found Officer Vycital’s testimony to be credible. The Arbitrator did not believe Officer Pudwill’s testimony that

he called Officer Vycital during the investigation over the “non nightcapped” warrant arrest and told him to “Just tell the truth.”

On August 21, 2006 a nineteen year old women appeared at the City of Jordan Police Department, with her mother, and made a complaint against Officer Corey Pudwill. The woman alleged that Officer Pudwill had stopped her at approximately 4:20 AM on August 20, 2006 (Sunday morning). During the course of the traffic stop, the complainant alleged that Officer Pudwill placed his hand on her breast, while she was seated in the back of his patrol car. In response to the allegations, the Police Department initiated an internal disciplinary investigation and arranged for an investigation of possible criminal conduct to be conducted by the Shakopee Police Department. The internal disciplinary investigation focused on conduct other than the alleged wrongful touching and the wrongful touching allegations were addressed in the criminal investigation. The initial complaint was made in an interview between the complainant and Jordan Police Chief Robert Malz. Chief Malz referred the complainant to Sergeant Brett Empey.

On August 21, 2006 Chief Malz went to the residence of Officer Pudwill for the purpose of providing him with a notice of paid suspension. Both Chief Malz and Officer Pudwill recall a short conversation at the time the notice of paid suspension was being delivered to the grievant.

On September 16, 2009 Chief Malz was asked the following questions and gave the following answers:

Q. (Mr. Madden) And I think you said that you didn't want to answer any questions or get involved, and Mr. Pudwill offered up some information to you?

A. Yes.

Q. What did he tell you?

A. He admitted to the stop. Like I said earlier, he said that he hadn't logged or dispatched it. And I asked him why there was no log entry. And he said that because he didn't want to get in trouble for an unlicensed driver. But he admitted to letting that person drive without a license.²

We talked a little bit about – I guess he wanted to know what was going to happen. And I told him there was going to be an investigation.

Just general stuff like that.

Q. Now, during the course of that meeting, did you direct him to answer anything?

A. No.

Q. He's the one that initiated the conversation?

A. Well, I initiated by being there. But as far as wanting to talk to me, yes, it was him. **Tr. 9/16/2009 p. 445-446.**

Officer Pudwill challenged the credibility of the testimony by Chief Malz over their conversation on August 21, 2006. He was asked the following questions and made the following answers:

Q. (Mr. Kaufman) You heard Chief Malz's testimony about your conversation with him at your house on August 21st of 2006?

A. Yes, I have.

Q. Who do you recall initiated that conversation?

² Finding of Fact Number 61 made in the criminal trial of Officer Pudwill says in part "When told there was no log of the incident he [Officer Pudwill] said that he didn't make a log entry because he didn't want to get in trouble for letting an unlicensed driver drive away."

A. When he came up and gave me the letter, and told me that I was going to be on administrative leave, I asked him what this was all about, at which point he asked me if I'd pulled over a lady from LeSueur in a red Lumina.

Q. He asked you that question. Did you then answer that question?

A. Yes. I answered that I pulled over a lady from Le Sueur, but I thought it was a Grand Am.

Q. You provided that information in response to a question from Chief Malz?

A. Yes, I did.

Q. He did not give you a Garrity advisory?

A. No, he did not.

Q. And he did not offer to let you have a union representative or an attorney present before he asked you those questions?

A. No, he didn't.

The following information was obtained during the investigation conducted by the Jordan Police Department:

1. Officer Pudwill had stopped the complainant at approximately 4:20 AM on August 20, 2006. He had excellent reasons for stopping the complainant. Her vehicle was traveling South at a speed of 55 miles per hour on Highway 169 in a 65 mile per hour speed zone. The vehicle's right tires were a couple of feet over the right fog line. The muffler on the vehicle had dropped and was hitting the pavement creating sparks. Officer Pudwill believed that the driver was probably intoxicated.

2. Officer Pudwill checked the auto registration and license information through the Department of Motor Vehicle system. He learned the identity of the registered owner and that the registered owner had no outstanding warrants.
3. When the driver pulled over, her vehicle was not parked completely off the roadway. The left side of her vehicle overlapped the fog line.
4. Officer Pudwill approached the vehicle and the driver rolled the window down a couple of inches.
5. The grievant asked the driver for her driver's license and proof of insurance. The driver gave him her Learner's Permit and provided him with no evidence of insurance.
6. The driver was asked to take a breath test to determine whether she had alcohol in her system. The breath test scored zero, meaning the driver had no alcohol in her system.
7. The driver informed the investigator and later testified that Officer Pudwill frisked her.
8. The driver further explained to both the investigator and the Arbitrator that Officer Pudwill asked who was waiting for her at home and informed her that the ticket and tow would be \$450.00.
9. The driver said Officer Pudwill wondered out loud what they could do about the problem.
10. The grievant had her sit in the back of his squad car, where he touched her breast.

11. The driver also informed the investigator and later testified that she pushed Officer Pudwill's hand away and told him to just take her to jail.

12. The driver told the investigator and the Arbitrator that Officer Pudwill said "good answer."

13. Ultimately, Officer Pudwill let the driver return to her car and drive off, despite the fact that she did not have a valid driver's license and was not accompanied by a licensed driver.

14. Officer Pudwill had no reason to believe that the driver was insured, as she had failed to produce evidence of insurance upon Officer Pudwill's request.

Grievant admits that he made the stop on August 20, 2006. He did not contact dispatch regarding the stop. He did not record the stop on his log. He did not tag the unlicensed driver. He did not cause the vehicle to be towed and he allowed the unlicensed driver to continue to drive, despite clear evidence that she was not in full control of her vehicle. The clear evidence that the driver was not in full control over her vehicle is the grievant's observation that she was driving a couple of feet over the fog line when he stopped her.

Officer Pudwill challenges the credibility of the driver. Officer Pudwill informed investigators and later testified that he did not attempt to obtain a sexual favor from the driver in lieu of issuing a tag and having her vehicle towed and he did not improperly touch her.

Criminal charges were brought against Officer Pudwill over the allegations made by the driver he stopped on August 20, 2006 at 4:20 AM. The grievant was found not guilty. It is important to note that the allegations that formed the basis for the criminal

trial (seven counts of criminal wrong doing of which two involved criminal sexual conduct and two involved allegations of assault) are not the allegations which form the basis for the termination of the grievant's employment. The Employer submitted the entire transcript of the criminal trial and the Verdicts and Findings of Fact for the purpose of proving motive, intent and opportunity with regard to the facts that form the basis for the termination of grievant's employment. Whether the grievant improperly touched the young woman who brought the complaint against Officer Pudwill of improper touching to the Jordan Police Depart, is not at issue in this arbitration.

It is impossible to obtain an accurate view of the events that led up to the termination of Officer Pudwill, without knowing the nature of the original complaint made by the 19 year old driver on August 21, 2006.

The complainant appeared at the Jordan Police Department on August 21, 2006, and admitted the following undisputed facts:

- She had been stopped at 4:20 AM on August 20, 2006 because her muffler was sparking and she was driving over the fog line.
- She was not found to have any alcohol in her system.
- She was driving an automobile without a driver's license.
- She was not given a citation.
- Her car was not towed.
- She was allowed to drive from the stop despite being unlicensed.

The information that the complainant provided the Jordan Police on August 21, 2006 was against her interests. She admitted to violating the Minnesota automobile license law.

The complainant's motivation was clearly to obtain some form of redress for Officer Pudwill's alleged improper sexual touching. The complainant did not appear at the Jordan Police Department to report that she had been driving without a driver's license. She certainly did not appear at the Jordan Police Department to request a citation or ask the Jordan Police to impound her vehicle. The complainant never sought monetary damages from the City or Officer Pudwill. Since she was not cited for her illegal act, which should have happened, and she was allowed to go home in her car, which should have been towed, there is no apparent reason that explains why she made a complaint against Officer Pudwill, except that he improperly touched her.

The grievant's employment with the City of Jordan, Minnesota was terminated by letter dated October 19, 2006. The letter of termination said the following:

At its regular meeting on October 16, 2006, the Jordan City Council voted to adopt the City staff recommendation to terminate your employment with the City effective immediately. The termination is based upon the charges raised in the Police Department's Complaint, namely:

1. Permitted violation of state law by allowing an unlicensed driver to operate a motor vehicle. This action was exacerbated by the fact that in your statement you said the vehicle had moved two feet over the fog line and that the driver only had an instructional license. These factors provided evidence that, in addition to being an illegal driver, the driver was also of low skill level at that time.
2. Failed to log the traffic stop in your daily log as required by Jordan Police Department procedures.
3. Failed to videotape the traffic stop with the squad camera as required by Jordan Police Department procedures. Your explanation that the camera malfunctioned is weakened by the fact that the four vehicle stops you made both prior and subsequent to the subject stop were filmed by the video camera.
4. Failed to notify dispatch that you had stopped a vehicle as required by Jordan Police Department procedures. This procedure is necessary for police

safety and proper dispatching of available resources. The videotapes of your other stops that shift reveal you called dispatch on each of those stops undermining your explanation that you "self-dispatch."

5. Prior three-day suspension for lying about details of an arrest and encouraged a Police Reserve Officer to also lie about the arrest. The written document for the suspension reads in pertinent part: "Any future occurrences of conduct exhibited by Officer Pudwill during this incident may, and probably will result in termination of employment." As you recall, during this incident you forged various documents to hide the time of execution of the arrest warrant.

Prior to the arbitration hearing, the City of Jordan withdrew the claim that Officer Pudwill failed to video tape the stop, as required by Jordan Police Department procedures. Evidence regarding the missing video record and the nature of the equipment used by the Police at the time of the traffic stop in question was submitted at hearing. The video camera was working for a period of time before the stop that resulted in the August 21, 2006 complaint against Officer Pudwill. For a period of time before and after the 4:20 AM stop, no recordings were made. For a period of time after the stop that resulted in the August 21, 2006 complaint against Officer Pudwill, video recordings were made. No repair order was submitted to correct problems experienced with the video recorder on August 20, 2006.

Testimony was taken at hearing regarding Officer Pudwill's habits when making a traffic stop. Officer Shane Schultz rode with Officer Pudwill, when he was a trainee. Officer Schultz was asked the following questions and gave the following answers:

Q. (Mr. Madden) Okay. Now, when you were a reserve officer, did you have occasion to observe Corey Pudwill on traffic stops?

A. Yes, I have.

Q. And explain to me, if you would, how that opportunity arose.

A. Before I was a reserve, I was a civilian that rode along with Pudwill.

But as a reserve, every time I rode with him, it was always over the radio; also answered status checks to the book; always written paper warning or a ticket.

And it was always something that I would like to ride with him, just because he was very proactive, and was always out there to stop cars, and, you know, do his job, essentially.

Q. And so the time frame that you were doing this would be what:

A. Primarily evening shifts.

Q. And what years would that be?

A. From about 2005 to about 2006.

Q. Okay. When Pudwill conducted traffic stops, did you notice any particular procedure he seemed to follow?

A. It was always through radio; always documented; very officer-safety conscious. I mean there was always – as a reserve, I was fairly new. So I was kind of just learning as what he did. And I can remember always him documenting it on his log.

Q. So did you ever see a situation where he didn't log?

A. No, I haven't.

Q. Did you ever see Pudwill issue a verbal warning for a non-licensed driver?

A. No.

Q. Did you notice as to whether or not part of his standard procedure, so to speak, that you were describing, would be to contact dispatch when he's making a traffic stop?

A. Yes.

Q. Did you ever see him self-dispatch?

A. I can't say that I have. I guess I really never knew what self – dispatching was as a reserve. But then again, I – always riding with him, it was always through radio. **Tr. 9/15/2009 p. 224- p.225.**

The credibility of Officer Schultz was challenged by the Union. The following questions were asked and the following answers given by Officer Schultz:

Q. (Mr. Kaufman) ... You went from being a reserve officer, to being a full-time officer here in Jordan after Corey was fired, right?

A. Correct.

Q. You moved into the spot that he had vacated basically?

A. Essentially, I mean there was another officer that left – or was in the process of leaving.

Q. Okay.

A. So, yeah, I essentially took –

Q. You'd agree with that then?

A. Yeah.

Q. And, in fact, your mother's on the City Council that voted to fire Corey Pudwill, correct?

A. I guess, yeah. **Tr. 9/15/2009 p. 230 – 231.**

A fundamental safety precaution followed routinely, but not perfectly, by Jordan Patrol Officers is to call traffic stops into dispatch. If a radio call is made to dispatch notifying them of an officer's location and the nature of the stop, dispatch and other

patrol officers will be aware of the location of stop. If a problem arises during the stop, back up support can be made available, if the stop has been called into dispatch. If no call is made to dispatch, the Officer is at risk. If a problem arises, no one will know where he is nor will they be aware that he may require assistance. There is no question that August 20, 2006 Officer Pudwill failed to contact dispatch at any time with regard to the stop that resulted in the complaint that lead to his discharge. There is no question that Office Pudwill did not follow appropriate procedures when he failed to call the 4:20 AM stop into dispatch. Furthermore, there is no evidence that a call by Officer Pudwill at 4:20 AM on August 20, 2006 would have been complicated by the volume of radio transmissions to Dispatch. The evidence supports a finding that it was Officer Pudwill's habit to call in to Dispatch on traffic stops.

At the time that Officer Pudwill was discharged from the Jordan Police Department, it was the practice of all officers to prepare a daily log of their activities. Officer Pudwill learned during his field training that preparation of a daily log was required by the Chief of Police and that the log served to inform officers coming to work of what had transpired on the prior shift. The log was also used to account for any officer's activities during his/her shift. There is no evidence that Officers were given discretion over whether they would log traffic stops. Testimony clearly establishes that Officers were expected to log all traffic stops. Testimony also establishes that some activities were not logged by some officers. It was the habit of Officer Pudwill to log all traffic stops.

It is undisputed that Officer Pudwill stopped an unlicensed driver traveling South on Highway 169 at approximately 4:20 AM on August 20, 2006 and later allowed the

unlicensed driver to continue on her way in her vehicle without giving her a traffic citation. There is no question that the unlicensed driver was a poor driver, was driving in violation of the law and was a serious safety hazard to herself and others, when Officer Pudwill released her from the traffic stop and allowed her to continue to drive the remaining twenty miles³ to her home.

Officer Pudwill explained why he did not cite the unlicensed driver on August 20, 2006 at the arbitration hearing. He was asked the following questions and gave the following answers:

Q. (Mr. Kaufman) Now getting back to the narrative of the morning of August 20th. I think you testified a moment ago that you ran a PBT, and it came back zero, zero, zero, is that right?

A. Yes.

Q. Did that result change your thinking about how you were going to handle this traffic stop from that point forward?

A. Yes, it did.

Q. Can you explain how?

A. That time of the morning is very significant time for DWI drivers. Her driving conduct, while indicative of a DWI, or possibly impaired, is also indicative of somebody being overly cautious.

When I saw that she was alone with a permit, she's aware of the laws; she recently took the permit test. She's just being very cautious in her driving due to inexperience, I assumed. There's no impairment.

³ Approximate distance.

She told me she had two small children waiting for her at home. I asked her if anybody could pick up the vehicle for her. She said, no, her little brother was watching the children and he was 15.

There was two car seats in the car. I believed her story. I didn't feel there was an interest in justice in having to cite and tow this vehicle. She was from Le Sueur. Even retrieving the car from a tow would have cost – I mean inconvenience, to say the least.

Q. Speaking of which, had you decided not to let her go, can you explain what procedure you would have had to follow?

A. I would have had to call for Absolute Towing – which I'm not sure who they use now; that was the towing company used at the time – which entitled (sic.) waking up a tow truck driver.

He would have had to come and remove the vehicle. The vehicle was a hazard. I did not move people's vehicles.

Then I would have had to transport her to – well. I would have had to transport her to either SA or Holiday on 41, because I had dropped too many people off at the Belle Plaine one, and they were asking that I stop.

Q. Okay. So between having the car towed, and driving [the driver] to another location, how long might that have taken?

A. If I happened to catch one of the Absolute drivers awake, it could have taken me 40, 45 minutes. In all likelihood, one hour to one-and –a half hours is more likely.

Q. Can you explain, under the particular circumstances that night, why you didn't follow that procedure with respect to Ms. Gonzalez and her car?

A. Well, by this time, it's 4:20 in the morning. I still have an active hit-and-run suspect out there somewhere. And I'm also dealing with the prime time for DWIs.

So me transporting this under-licensed driver, and towing her vehicle takes me off the road when potentially I could be taking a DWI off the road. **Tr. 9/16/2009 p. 516-519.**

The Union timely grieved the discharge of Officer Corey Pudwill and the question of whether the Employer had just cause to discharge was brought to Arbitration for a final and binding decision.

SUMMARY OF EMPLOYER'S POSITION:

The Employer afforded the grievant all of the necessary procedural components of due process as required by *Cleveland Board of Education v. Loudermill*, **470 U.S. 532 (1985)**. It is required that he be given "oral or written notice of the charges against him, an explanation of the Employer's evidence, and an opportunity to present his side of the story before the proposed action is taken." Introduction of the grievant's motive, opportunity and intent at the arbitration hearing does not violate the grievant's right to due process. Mr. Pudwill knew what charges the Employer had made against him and the basis for the discharge. The fact that the Employer contends that the misconduct for which Mr. Pudwill was discharged was motivated by a desire to cover up his improper action during the stop on August 20, 2006 does not violate any right to due process. Mr. Pudwill was charged with and tried for criminal sexual misconduct, assault, disorderly

conduct and misconduct of a public officer. He had actual knowledge of the allegations made against him and the evidence that supported those allegations.

The Employer references the findings of Judge Robert King, who presided over Mr. Pudwill's trial. Judge King determined Mr. Pudwill was not guilty of criminality under the "reasonable doubt" standard. However, the Judge made findings of fact wherein he said it is likely the grievant engaged in improper sexual touching of the complainant.

The Employer followed the procedures set forth in the **Peace Officer Discipline Procedures Act, Minn. Stat. §626.89** in the course of obtaining a recorded statement to be used as evidence in a disciplinary proceeding against the officer. The Act does not require the Employer to inquire into an Officer's motive as part of a formal statement.

The grievant was given a *Garrity Warning* pursuant to *Garrity v. New Jersey*, **385 U.S. 493 (1973)** prior to taking his formal statement. The grievant was not questioned about the criminal allegations as part of his formal statement. The public employer is not obligated to question an employee regarding his motive as part of a *Garrity* statement nor is an inquiry as to motive an essential part of an internal affairs investigation or an essential element of a disciplinary notice.

The Employer contends that failure to hear material evidence regarding the grievant's motive, opportunity and intent to cover up the facts of the traffic stop at 4:20 AM on August 20, 2006 would be a basis for vacation of an award under **Minn. Stat. §572.19 subd. 1(4)**.

In this case the grievant admits that he did not log the August 20, 2006 traffic stop. He admits that he did not contact dispatch regarding the August 20, 2006 traffic

stop. He admits that he let an unlicensed driver, whose vehicle was in need of repair and whose vehicle was not completely under control, leave the traffic stop. He explains his conduct by saying that she was just being overly cautious and had recently taken the test needed to obtain a learners permit. The Employer argues that grievant's conduct was motivated by the need to cover up improper sexual touching that Judge King found likely took place and to cover up the fact that he let an unlicensed driver continue driving home. Moreover, the motivation for releasing the unlicensed driver without citation and allowing the unlicensed driver to continue to drive on August 20, 2006 was to cover up the improper sexual touching.

The City of Jordan had a good and sufficient basis for terminating the services of the grievant. Minnesota arbitrators have rejected the argument that acquittal in a criminal trial is dispositive of just cause in a labor arbitration case. In *Wholesale Produce Supply, 101 La 1101, 1104* (Bognanno, 1993), the arbitrator said:

The issue before the undersigned is not whether the Grievant violated criminal statutes nor whether the elements of a criminal violation are present. Rather, the issues before the undersigned are whether the Grievant engaged in the alleged wrongdoing and whether the proven conduct, if any, warrants the Grievant's discharge from employment.

The Employer cites other arbitration awards that make essentially the same point. If the grievant engaged in the misconduct for which he was discharged and the wrongdoing warrants discharge, the discharge should be upheld.

The City goes on to argue that the standard of beyond a reasonable doubt is not applicable in the context of this discharge. The City contends that the preponderance of

evidence of motive weighs heavily against the grievant and that grievant admitted that he engaged in the specific misconduct for which he was discharged.

The grievant had knowledge of the City's expectations regarding his conduct. He learned during his field training experience that he was required to log traffic stops and report traffic stops to Dispatch. He also learned how he was expected to treat an unlicensed driver. The Police Department's Policy and Procedure Manual requires Officers to be in continuous contact with Dispatch. It sets forth specific requirements to contact Dispatch when arriving at a call, when completing a call and when checking on suspicious vehicles or persons.

The Union emphasized that the City did not have a written policy requiring Officers to log traffic stops. However, there is no doubt that Jordan Police Officers are required to log their traffic stops in their daily logs. Sergeant Empey, Sergeant Stolee and Officers Schultz, Stolt and Vycital all testified that logging traffic stops was a requirement for Jordan Police Officers. Union witness, Officer Dale Larson, acknowledged the importance of the daily log and its usefulness in passing on information to other shifts, how it contributes to Officer safety and documentation of productivity.

Mr. Pudwill had previously been disciplined for a cover up and received a written warning informing him that he would be subject to termination, if he engaged in similar conduct in the future. The August 4, 2004 three day suspension for attempting to conceal the facts of serious misconduct was accompanied by a written warning which said "any future occurrences of similar conduct may, and probably will result in termination of his employment."

The grievant contends that some of the restrictions that were placed on his conduct following the August 4, 2004 discipline had been lifted by the Chief of Police in an e-mail, which was not recovered for this hearing. However, both the grievant and Union Steward Wamsley acknowledged that the grievant was still required to comply with the normal obligations and expectations of all other Jordan Police Officers.

At arbitration the grievant claimed for the first time that he did not ask Officer Vycital to lie for him as part of the incident that led to the three day suspension in 2004. Grievant's testimony was counter to that of Officer Vycital, who had no reason to deceive the arbitrator. Furthermore, the suspension was not grieved and the Arbitrator should deem the failure to grieve the discipline as acceptance that the discipline was proper in all respects.

The expectations of the Employer are reasonable. In fact, the Union made no argument that expecting Patrol Officers to call traffic stops in to Dispatch, expecting Patrol Officers to log traffic stops or expecting Patrol Officers to cite unlicensed drivers was unreasonable. Union witnesses gave testimony that confirmed the importance of daily logs. No witness disputed the contention that calling in traffic stops to Dispatch is an important safety practice that Officers should follow. Finally, the correct procedure to follow when stopping an unlicensed driver is to cite the driver, assist the unlicensed driver in finding a ride and to either allow the driver's vehicle to remain parked for four hours, if it does not represent a hazard or have the car towed, if it represents a hazard. The only witness who suggested that there might be some reason, a medical emergency, for allowing an unlicensed driver to continue driving, was Officer Tapley, who agreed

that the unlicensed driver might not have the requisite skills to drive and could cause an accident.

The investigation was thorough and fair. The grievant's log from the shift in question was examined. The squad video from August 20, 2006 was reviewed and, after some question was raised over whether the video camera had malfunctioned, the Employer withdrew the allegation that grievant had failed to video tape the August 20, 2006 traffic stop. The grievant admitted that he allowed an unlicensed driver continue to drive after being pulled over. He admitted that he did not log the traffic stop and he admitted that he did not call the stop into Dispatch.

On two separate occasions prior to the termination, the grievant was invited to speak to the City Council or its subcommittee. He did not attend either meeting.

The City proved the misconduct. In fact, the grievant admitted all of the elements of misconduct alleged by the City. In this instance, the misconduct is so serious that it warrants discharge. Mr. Pudwill made a series of calculated intentional acts for the purpose of concealing his misconduct on August 20, 2006. It was the habit of the grievant to be meticulous in maintaining his traffic log. Yet, on the one instance which resulted in a serious complaint of sexual misconduct, the grievant failed to log the traffic stop. The grievant also uncharacteristically failed to contact Dispatch with regard to the stop and most uncharacteristically allowed an unlicensed driver to continue to drive. The City argues that Mr. Pudwill's explanation that he allowed the unlicensed driver to continue to drive because he wanted to go after a hit and run driver who could be intoxicated makes no sense. Mr. Pudwill let an unlicensed driver continue to drive, despite the fact that he stopped her because she was driving over the fog line and had a sparking muffler. Corey

Pudwill was the most proactive Patrol Officer in the Jordan Police. He wrote more traffic tickets than the rest of the department. It was completely out of character for him to allow an unlicensed driver to continue to drive home. The motive for not citing the driver and having her car towed was to cover up his improper sexual touching.

SUMMARY OF UNION'S POSITION:

The Union argues that grievant was not discharged for just cause. It is the Union's position that the Employer discharged grievant because of unproven allegations of improper sexual touching. The Employer never placed the grievant on notice that the allegations of improper sexual touching were a basis for his discharge. The allegations of improper sexual touching were never a part of the internal affairs investigation and grievant never received any due process with regard to the allegations. The allegations of improper sexual touching are completely false and unsubstantiated. Aside from the false allegations of improper sexual touching, the conduct upon which the City based the grievant's discharge is not sufficient to establish just cause for discharge.

The investigation into the grievant's conduct never included a statement that the allegations regarding improper sexual touching had any bearing on the decision to discharge the grievant. The Employer failed to give notice as required by the **Police Officers Discipline Procedures Act Minn. Stat. §626.89, Subd. 3, 5**. There is no record of the grievant being given any notice that the allegations regarding improper sexual touching were part of the internal affairs investigation. Furthermore, grievant was not given notice that meets the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Grievant was entitled to a pre-termination hearing with notice of the charges made against him because he had a property interest in his job.

While grievant was invited to address the City Council on October 16, 2006 and the hearing was in the nature of a *Loudermill* hearing, he was not given notice of the actual reasons why he was being terminated from his position.

The alleged improper sexual touching did not take place. The grievant was tried and acquitted of the charges. In the Arbitration hearing, the Arbitrator must consider the allegation *de novo* and is not bound by Judge King's assessment of the credibility of witnesses or his comment that it is likely that grievant engaged in the improper sexual touching. The alleged improper touching as described by the driver could not have occurred. Grievant gave the following explanation in his testimony on September 16, 2009:

- A. [Corey Pudwill] Per her [testimony], I held a flashlight in her eyes with my left arm, while she was seated in the rear seat of the squad, with both her feet in front of her. Without ducking down or bending, I unzipped her sweatshirt with my right hand, moved up her shirt, and fondled the upper left portion of her chest. I've gone back up to the squad car to make sure about it. I would be eating the squad car to try to reach in for somebody seated in that squad. I would either have to bend down and bend in, or stretch my arms. Tr. 530-31.

The grievant's testimony was completely un rebutted. There is no evidence in the record to explain how Officer Pudwill, a man of small stature, could have reached into the back of the squad car, unzipped the driver's sweatshirt and touched her left breast with his right hand, all while standing outside the vehicle. The Employer can not show by a preponderance of the evidence that the incident occurred.

The fact that the grievant ran two separate DVS database searches in the course of the stop that resulted in his discipline is completely inconsistent with the City's theory that he deliberately tried to avoid detection. The DVS system is accessed using a unique personal identification code, which can be traced back to the user. The grievant logged into the system and a search could be performed to determine what searches he made during a given time frame.

The Employer viewed the manner in which Officer Pudwill handled the traffic stop on August 20, 2006 to be an anomaly that could be explained only by the fact that grievant engaged in improper touching of the driver he had stopped. Both Officer Pudwill and Officer Wamsley testified that Officer Pudwill sometimes makes traffic stops without calling them in to Dispatch. Sergeant Empey in the criminal trial testified that he occasionally would fail to call traffic stops in to Dispatch. The same information was given regarding the occasional failure by officers to log information on their daily log. The City failed to prove that the grievant engaged in a cover up. To the contrary the grievant's conduct was normal on August 20, 2006. As happens from time to time he failed to call the stop in to Dispatch and, as he testified, he simply failed to record the stop in his daily log as he was preoccupied with a hit and run incident.

The actual violations alleged by the City are that Officer Pudwill:

1. Failed to enter a stop on his log.
2. Failed to call Dispatch when he initiated a stop.
3. He allowed the person he stopped to leave the scene.

The grievant admits the conduct but the conduct was not so serious that it should result in a discharge.

One of the factors considered by the City when it discharged Officer Pudwill was that he deliberately failed to video tape the traffic stop. The Employer admitted that it could not prove the allegation and withdrew it before the Arbitration hearing. However, the allegation of deliberately failing to video the traffic stop was one of the factors presented to the City Council and used by the City Council, when it terminated the grievant's employment. The discharge was based, in part, upon the allegation of deliberately failing to video the stop, which the Employer admits it can not prove.

Prior to November 2008, more than two years after the grievant was discharged, the Jordan Police Department did not have a written policy requiring Officers to enter all public contacts on their daily log. At the time the grievant was disciplined, he had been relieved of the specific disciplinary logging that had been part of the August 2004 disciplinary notice. The grievant testified that Chief Malz had relieved him of the special requirements in his disciplinary notice by e-mail and Chief Malz did not dispute the testimony. In the absence of a written policy regarding logging traffic stops, the Employer can not claim that grievant had proper notice of the policy.

The conduct that the grievant admits he engaged in on August 20, 2006 was neither flagrant nor repetitious. The Employer did not establish that grievant attempted to cover up his actions. The Employer was unable to demonstrate that the grievant was dishonest. The grievant honestly admitted that he did not enter the stop in his daily log, he honestly admitted that he did not call the stop into Dispatch and he honestly admitted that he let the driver he stopped go that morning without giving her a citation. Officer Pudwill merely exercised discretion when he released the driver. Patrol Officers routinely exercise discretion in the course of their daily activities.

The City was not likely to be subjected to civil liability as a result of the grievant allowing the driver to continue home. The common law doctrine of official immunity protects public officials and employers from liability who are charged by law with duties that call for the exercise of judgment or discretion.

The penalty imposed on the grievant was disproportionate when viewed in light of the grievant's superior record of service with the Jordan Police Department. The grievant earned commendations for outstanding service, he received an Achievement Award from the National Highway Traffic Safety Administration, he was named Jordan's 2006 Officer of the Year. His performance evaluation ranged from good to excellent and Chief Malz wrote in his evaluation in 2005 that grievant "set the bar by which others are judged."

The grievant was not treated with progressive discipline. He was punished for minor rule infractions or procedural errors that were simply uncharacteristic of his otherwise exemplary work. The collective bargaining agreement does not specifically call for progressive discipline. However, in this instance, it is clear that some lesser form of corrective discipline would have been appropriate. The only prior discipline in the grievant's file was a three day suspension. The oversights made by Officer Pudwill on August 20, 2006 do not justify the leap from a three day suspension to discharge.

The grievant was discharged without just cause. The Union asks that he be reinstated and made whole.

OPINION:

The grievant received adequate notice of the allegations of misconduct that were made against him in the internal affairs investigation that resulted in his discharge from the Jordan Police Department. He was informed that the following factors formed the basis of the decision to terminate his employment:

1. Permitted violation of state law by allowing an unlicensed driver to operate a motor vehicle. This action was exacerbated by the fact that in your statement you said the vehicle had moved two feet over the fog line and that the driver only had an instructional license. These factors provided evidence that, in addition to being an illegal driver, the driver was also of low skill level at that time.

2. Failed to log the traffic stop in your daily log as required by Jordan Police Department procedures.

3. Failed to videotape the traffic stop with the squad camera as required by Jordan Police Department procedures. Your explanation that the camera malfunctioned is weakened by the fact that the four vehicle stops you made both prior and subsequent to the subject stop were filmed by the video camera.

4. Failed to notify dispatch that you had stopped a vehicle as required by Jordan Police Department procedures. This procedure is necessary for police safety and proper dispatching of available resources. The videotapes of your other stops that shift reveal you called dispatch on each of those stops undermining your explanation that you "self-dispatch."

5. Prior three-day suspension for lying about details of an arrest and encouraged a Police Reserve Officer to also lie about the arrest. The written document for the suspension reads in pertinent part: "Any future occurrences of conduct exhibited by Officer Pudwill during this incident may, and probably will result in termination of employment." As you recall, during this incident you forged various documents to hide the time of execution of the arrest warrant.

The grievant had two opportunities to appear in front of the City Council before he was discharged. The grievant did not appear at the meetings, which were designed to inform him of the allegations made against him and provide a response, as required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The correspondence

between the City and grievant and his legal and union representatives confirm that grievant knowingly waived his right to a *Loudermill* hearing. There is no instance where the grievant requested Union or legal representation and was denied representation. There is no indication that the grievant was questioned without first being given any required notice of his rights and informed of the nature of the inquiry.

The Arbitrator found Chief Malz's recollection of regarding the short conversation he had with the grievant on August 21, 2006 to be more credible than the grievant's recollection of the conversation. Specifically, the Arbitrator believed the testimony of Chief Malz, wherein he recalled the grievant explaining that he had not logged the stop, because he did not want to get into trouble for letting an unlicensed driver continue to drive, after being stopped. The Arbitrator finds that the statement was a voluntary statement made by the grievant. A formal statement was not being sought by Chief Malz. On this specific issue the Arbitrator makes the same finding of fact as Judge King at Number 61 of his Findings of Fact in the Criminal Trial "*When told there was no log of the incident he [the grievant] said that he didn't make a log entry because he didn't want to get in trouble for letting an unlicensed driver drive away.*" The Chief's testimony on this point is credible. He enthusiastically supported Officer Pudwill in his pursuit of traffic offenses. He recommended Officer Pudwill for the National Traffic Safety Award. He awarded Officer Pudwill the Golden Pen three years in a row and he acknowledged that he voted for Officer Pudwill in 2006 as Officer of the Year. There is absolutely no evidence of negative animus directed toward Officer Pudwill by Chief Malz. Chief Malz had no reason to misrepresent any statement made by Officer Pudwill.

The statement made by grievant to Chief Malz is an admission that he covered up his conduct and an explanation of why he covered up his conduct.

At no time did the Employer represent that the grievant was discharged for improperly touching the woman he stopped on August 20, 2006. The Employer did make a credible argument that the grievant wished to conceal/cover up his conduct on August 20, 2006. Grievant acted in a manner that was completely opposite of his normal/habitual conduct. The Employer argued that the need to conceal or cover up the improper touching alleged by the young woman who grievant stopped on August 20, 2006 was motive for his failure to contact Dispatch, his failure to log the incident and the fact that he allowed an unlicensed driver to continue on her way on August 20, 2006. While the explanation of grievant's conduct offered by the Employer is credible, the determination of whether the Employer had just cause to discharge the grievant does not turn on whether the grievant engaged in wrongful sexual touching.

The grievant at approximately 4:20 AM on August 20, 2006 stopped a young woman who was driving about two (2) feet over the fog line South on Highway 169. Her muffler was dragging and sparking. The grievant, who was a very vigilant enforcer of Drunk Driving laws, believed that the driver might be intoxicated. The belief that the driver might be intoxicated was based upon the fact that she did not appear to be in control of her vehicle. The grievant failed to contact Dispatch to advise Dispatch that he was stopping the driver. His failure to contact Dispatch was a serious safety violation and a violation of routine Jordan Police Department Police procedures. Furthermore, it was the grievant's habit to contact Dispatch when making a traffic stop. The Employer acted reasonably and fairly in disciplining grievant for his failure to contact Dispatch regarding

the 4:20 AM stop on August 20, 2006. In isolation the grievant's failure to contact Dispatch was not a form of misconduct that should have resulted in his discharge.

The failure to cite the unlicensed driver and have her car towed was an extremely serious act of misconduct by the grievant. The grievant stopped the driver because he observed a driver who had such little control over her vehicle that he believed she was intoxicated! Nothing in the grievant's account of the incident begins to explain how he later came to believe that she was competent to safely drive approximately twenty miles down Highway 169. Nothing in the grievant's account of the incident explains why he did not carry out his duty as a police officer to protect the safety of the unlicensed driver and all other drivers on the road on August 20, 2006 by preventing the unlicensed driver from continuing her illegal conduct of driving without a license. The grievant observed an unskilled driver and learned, during the stop, that she was unlicensed. Having a Learner's Permit in the State of Minnesota does not grant anyone the privilege to drive an automobile on public roadways without being accompanied by a licensed driver. The idea that the grievant, who stopped an unlicensed driver after observing that the driver was not in control of her vehicle, had discretion to release that driver back onto a public highway is absurd. The grievant's explanation that he let the unlicensed driver go because he preferred spending his time looking for a possible drunk driver who earlier had been in a hit and run accident is an admission of incredibly irresponsible conduct and simply lacks credibility. The grievant unequivocally placed the unlicensed and unskilled driver at risk of serious injury or even death by not preventing her from continuing to drive. He placed every other driver on the road with the unlicensed driver at serious risk of injury or death by letting the unlicensed driver continue to drive. He also placed

property, both public and private, at risk. His release of the unlicensed driver on August 20, 2006 was no less hazardous and as irresponsible as the release of an intoxicated driver would have been in the same situation. The conduct was incompetent, irresponsible and dangerous to the public, including the unlicensed driver. Allowing the unlicensed driver to continue to drive on August 20, 2006 was not a minor rule infraction. The misconduct regardless of motive was egregious!

The Employer did not cite the fact that the grievant let an uninsured driver continue down the road on August 20, 2006 as a reason for discharging the grievant. However, the fact that the unlicensed driver was also uninsured was established at hearing. The contention that grievant's act of allowing the unlicensed driver to continue driving on August 20, 2006 was a minor lapse of judgment is refuted by the grievant's direct observation of the driver's poor driving skills. It is impossible to accept an argument that grievant's conduct met the expectation of his role as a police officer, when considering the fact that he asked the unlicensed driver for proof of insurance but did not receive proof of insurance from the driver and subsequently let the unlicensed and uninsured driver continue on her way. The grievant's own description of the stop on August 20, 2006 is a description of flagrant misconduct.

On August 21, 2006 the grievant was notified that he was being suspended with pay pending an investigation into allegations made by the young woman he stopped on August 20, 2006 at 4:20 AM. The notification was delivered to him by hand by Chief Malz. Chief Malz testified that grievant said he did not log the stop because he did not want to get in trouble for an unlicensed driver release. The Chief's testimony is credible

and consistent with the evidence regarding the grievant's August 20, 2006 stop of an unlicensed driver at 4:20 AM.

The grievant explained that following the stop of the unlicensed driver he started to log the hit and run incident but was interrupted because he had to pursue a speeding driver. Upon completing the stop of the speeding driver grievant finished logging the hit and run and commenced logging the stop of the speeding driver. **Tr. 9/16/2009 P. 526, 527.** Grievant admits that he did not log the stop of the unlicensed driver. His reason for not logging the stop was given in testimony on September 16, 2009, when he was asked the following questions and gave the following answers:

Q. (Mr. Kaufman) And at the time that you observed that speeding driver and pursued him, had you completed catching up on your log entries at that point?

A. No, I hadn't. As a matter of fact, I had to throw my – one of my notebooks over, because I had it up on the dashboard as I was looking for more information on one of the witnesses, so –

Q. And to the best of your recollection, is that why the [name] stop never made it into your log?

A. Yes. After I made contact with the driver of DRK16, I went back, finished the last couple lines of my accident hit-and run, and put the driver, whose card I had right in my hand, in as my traffic stop.

Grievant seems to be suggesting that he just temporarily forgot the stop he made of the unlicensed driver between the hit-and run and the speeding driver. He is claiming the failure to log the incident was inadvertent. However, he later gave testimony that made it

clear that he never intended to log the stop of the unlicensed driver. On September 16, 2009 he was asked the following questions and gave the following answers:

Q. [Mr. Madden] And you told the driver, did you not, [name omitted] that when you were going to let her drive home, you told her not to tell anybody; to act like this didn't happen"

A. No, I said that "as far as I was concerned, the stop didn't happen."

Q. As far as you were concerned, the stop did not happen.

A. Yes. **Tr. 9/16/2009 P. 556.**

The grievant's testimony that he told the unlicensed driver that "as far as I was concerned, the stop didn't happen" is completely inconsistent with his representation that he inadvertently failed to log the stop. The Arbitrator takes grievant's testimony wherein he corrected opposing counsel statement and asserted "as far as I was concerned, the stop never happened" to be an admission that he had no intention of logging the stop.

The admission by the grievant that "as far as I was concerned, the stop didn't happen" is sufficient to confirm that grievant had no intention of creating a record of the August 20, 2006 4:20 AM stop with Dispatch.

The Employer proved by a preponderance of the credible evidence the following:

- The grievant failed to contact Dispatch regarding the stop of an unlicensed driver on August 20, 2006 at approximately 4:20 AM. The failure to contact Dispatch was intentional.
- The grievant observed that the unlicensed driver had poor driving skills prior to the stop and believed that the poor skills he observed indicated she may have been

intoxicated and it was doubtful that the driver had control over the vehicle she was driving.

- The grievant allowed an unlicensed driver with poor driving skills to return to her vehicle and drive away from the traffic stop on August 20, 2006.
- The grievant intentionally failed to record the stop in his daily log because “as far as he was concerned, the stop never happened.”
- The grievant intentionally concealed or covered up the fact that he allowed an unlicensed driver with poor driving skills to return to her vehicle and drive away from the traffic stop on August 20, 2006.

The grievant received due process throughout the grievance process. He was notified of the allegations of misconduct made against him. He was afforded representation. He was given an opportunity to be heard. He was given *Garrity* and *Tennessee Warnings* before being asked to make a formal statement. Throughout the grievance procedure he received union and legal representation and was never denied access to Union and legal representation.

The Employer established by a preponderance of the credible evidence that it had just cause to discharge the grievant. The grievant attempted to conceal or cover up a flagrant breach of his duties to the public and to his Employer. He had previously been disciplined for covering up misconduct and warned that a future violation would probably result in discharge. The grievance should be denied and the decision to terminate the employment of Corey Pudwill should be upheld.

AWARD:

- *The Employer had just cause to discharge the grievance.*
- *The grievance is hereby denied.*
- *The termination of the employment of Corey Pudwill from the City of Jordan, Minnesota is upheld.*

Dated: November 16, 2009.

James A. Lundberg, Arbitrator