

**IN THE MATTER OF ARBITRATION BETWEEN**

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City of Fridley, Fridley, MN	)	<b>BMS Case No. 09-PA-1127</b>
("City" or "Employer")	)	<b>Issue: Employment Termination</b>
	)	<b>Hearing Site: Fridley, MN</b>
and	)	<b>Hearing Dates: March 30 &amp; 31, 2010; &amp;</b>
	)	<b>Conference Call Date: April 30, 2010</b>
Law Enforcement Labor	)	
Services, Inc., Local No. 119	)	<b>Brief Submission Date: August 23, 2010</b>
("Union" or "LELS")	)	<b>Award Date: October 26, 2010</b>
	)	<b>Mario F. Bognanno, Labor Arbitrator</b>

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**JURISDICTION**

Pursuant to Article 7 of the parties' 2008 & 2009 Collective Bargaining Agreement ("CBA"), the above-captioned matter was heard on March 30 and 31, 2010 in Fridley, Minnesota, with a follow-up conference call on April 30, 2010. Appearing through their designated representatives, the parties waived the 30-day decisional timeline provision in Article 7.5(b) of the CBA, and they stipulated that the issue in dispute was properly before the Arbitrator for a final and binding determination. Moreover, it was agreed that herein the Grievant would be referenced by initials.

Each party was afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination and exhibits were introduced into the record. At the close of the hearing, the record was held open pending receipt of subpoenaed documents (Employer Exhibits A, B & C), and post-hearing Depositions from Mr. Lawrence Farber and Ms. Jennifer Markham,

and receipt of an Affidavit from Dr. Gary L. Fischler. Depositions were taken on July 8, 2010, and transcripts of same along with the referenced Affidavit were received into the record on July 21, 2010. On or about August 23, 2010, post-hearing briefs were exchanged and thereafter the matter was taken under advisement.

**APPEARANCES**

**For the Employer:**

Frank J. Madden	Attorney-at-Law
Donovan W. Abbott	Director, Public Safety (a/k/a "Chief")
Deb Dahl	Director, Human Resources
Benjamin Uzlik	Minnesota State Trooper
Marshall Weems	Former Fridley, MN Resident & Witness
Jeffrey A. Guest	Sergeant, Fridley Police Department
Greggory Olson	Police Officer, Fridley Police Department
Kevin Titus	Police Officer, Fridley Police Department
Brian Weierke	Captain, Fridley Police Department
Robert Rewitzer	Captain, Fridley Police Department
Greg Salo	Former Sergeant, Fridley Police Department; Presently Conservation Officer, of Natural Resources
Department	Police Officer, Forest Lake
Kurt Kowarsch	Detective, Fridley Police Department (by Deposition)
Jennifer Markham	Psychologist (by Affidavit)
Dr. Gary L Fischler	

**For the Union:**

Brooke Bass	Attorney-at-Law
A. K.	Grievant & Former Police Officer, Fridley Police Department
Timothy Sullivan	Alcoholics Anonymous Sponsor
Timothy Tougas	Alcoholics Anonymous Sponsor
Lawrence Farber	Retired Police Officer, Fridley Police Department (by Deposition); Presently Sherburne County Commissioner

I. **RELEVANT 2008-2009 CBA LANGUAGE; FRIDLEY DRUG & ALCOHOL POLICIES & PROCEDURES; FRIDLEY POLICE GENERAL ORDERS; AND FRIDLEY POLICE OFFICER JOB DESCRIPTION**

A. **CBA Language**

**Article 5 Employer Authority**

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

**Article 10 Discipline**

10.1 The Employer will discipline Employees for just cause only.

(Joint Exhibit 1)

B. **Policy and Procedures on Drug and Alcohol Use and Testing**

**City Manager, William W. Burns, Memorandum to Employees (April 23, 1993)**

\* \* \*

The purpose of this policy is to provide an alcohol and drug free work place, to promote health and safety of employees of the City of Fridley and the people they serve, and to comply with the federal Drug-free Workplace Act of 1988 and Minnesota Statutes, Chapter 181.950 through 181.957. This is not a new rule; the Safety Manual contains a prohibition of drug and alcohol use in the workplace. This Policy has been drawn up to comply more fully with recent legislation.

I would like to highlight a number of general points.

1. There will be no drug or alcohol testing without informed written consent.

2. Unless an employee has committed other misconduct, no employee will be fired or otherwise disciplined solely as a consequence of the employee's first positive test result on a confirmatory test or retest. Instead, if a positive test result is established for the first time, the employee will be given the opportunity to participate in a drug or alcohol counseling or rehabilitation program. If the employee refused to take part in such a program or fails to complete such a program successfully within a reasonable period of time, the employee will be subject to discipline which may include termination.

\* \* \*

(Union Exhibit 4)

C. Fridley Police General Order 317 - Professional Conduct of Peace Officers

\* \* \*

III. Procedure

... Unless otherwise noted, this policy also applies to off duty conduct...

A. Principle One

Peace officers shall conduct themselves, whether on or off duty, in accordance with...all applicable laws, ordinances and rules enacted or established pursuant to legal authority.

\* \* \*

2. Rules

\* \* \*

d. Police officers, whether on or off duty, shall not knowingly commit any criminal offense under any laws of the United States or any state or local jurisdiction

\* \* \*

D. Principle Four

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

1. Rationale

A peace officer's ability to perform his or her duties is dependent upon the respect and confidence communities have for the officer and law enforcement officers in general. Peace officers must conduct themselves in a manner consistent with the integrity and trustworthiness expected of them by the public.

(Joint Exhibit 13)

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D. Job Description, Police Officer, City of Fridley, Minnesota (September 29, 2008)

\* \* \*

POSITION OBJECTIVE: "...this position is responsible for maintenance and order; enforcement of laws and ordinances; and protection of life and property..."

ESSENTIAL JOB FUNCTIONS

\* \* \*

12. Provides credible testimony and/or evidence at trials, hearings, and before grand juries as required.

\* \* \*

14. Maintains strong code of ethics and conducts him/herself with the highest standard of conduct while on and off duty.

\* \* \*

(Joint Exhibit 14)

II. FACTS AND BACKGROUND

The City of Fridley, Fridley, MN and the Law Enforcement Labor Services, Inc., Local No. 119, are parties to a 2008-2009 CBA that covers all personnel in the "Police Officers" classification. (Joint Exhibit 1) A. K., the Grievant in this case, was hired as a police officer on January 18, 2000. (Joint Exhibit 15) On January 19, 2000, he signed the City of Fridley's Drug and Alcohol Policy. (Union Exhibit 4) On January 24, 2000, the Grievant participated in a swearing-in ceremony at which he signed an oath to "support and comply" with the U.S. Constitution; the charter, laws and ordinances of the City of Fridley; rules and regulation of the City of Fridley's Police Department; and the Law Enforcement Code of Ethics. (Union Exhibit 4 & Employer Exhibit 15)

Between January 18, 2000 and September 25, 2008, A. K. had amassed a solid work record, void of documented disciplinary incidences.<sup>1</sup> The Grievant's 2004 ~ 2007 performance evaluations demonstrate that the quality of his on-the-job police work steadily improved, increasing from "Marginal" to "Acceptable," then to "Exceeds Standards" on most of the factors that were evaluated. (Union Exhibits 5 ~ 14 & 14A) Further, commencing in 2001, A. K. began receiving letters of appreciation from members of the public; letters of commendation from the Fridley Police Department; and no fewer than seven other public safety jurisdictions wrote letters commending A. K.'s police work. (Union Exhibit 15) Still further, the record shows that annually the Grievant would volunteer to work as a Safety Camp Officer and as a Neighborhood Resource Officer. Also, the Grievant was recognized by the Fridley Police Department for his enforcement of traffic

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<sup>1</sup> However, signs of prospective off-duty trouble began to surface well before September 25, 2008. First, in October or November 2005, the then leader of the Fridley Police Department's Field Training Officers ("FTO") Program, Sergeant Greg Salo, testified that he rejected A. K.'s request to participate as a FTO because he was troubled by the Grievant's "...off-duty drinking at bars around town." Second, Captain Brian Weierke, Fridley Police Department, testified that on July 5, 2007, the Grievant's ex-wife telephoned to report that A. K. was an alcoholic; drinking 5 to 6 times a week, possibly a fifth of vodka each time; and that he needed treatment. The Captain next stated that on July 6, 2007, A. K.'s ex-wife left him a voice-mail message, reporting that she had brought A. K. to Riverside Hospital for treatment, but her effort was unsuccessful because admission into treatment required A. K.'s voluntary consent. (Employer Exhibit 6) In the meantime, Captain Weierke testified that he discussed the substance of these communications with Deb Dahl, H. R. Director for the City. In reply to a question from Ms. Dahl, Captain Weierke stated that he told her that A. K. was not having on-duty performance problems. And, in response, Ms. Dahl told him that A. K. had privacy rights that limited the City's legal right to either intervene into a possible ex-wife/ex-husband issue or to order A. K. to undergo a "fitness for duty" assessment. Ms. Dahl corroborated the substance of this testimony. Continuing, Captain Weierke testified that he met with A. K. on July 5, 2007, at which time the Grievant reported that he was having off-duty drinking problems and that he was scheduled to go to an AA meeting the following Monday. Captain Weierke next stated that he juggled the following Monday's shift hours so that the Grievant could make it to the AA meeting; gave the Grievant certain FMLA and EAP materials; and he informed A. K. to call him if he needed any further assistance. On July 5, 2007, Captain Weierke reported the foregoing developments to Captain Robert Rewitzer, then head of the Fridley Police Department's Patrol Division. Subsequently Captain Rewitzer met with A. K. and, in so many words, reminded him that he should avoid off- duty conduct that would embarrass the Department. (Joint Exhibit 8)

laws. And, finally, he was a Firearms Instructor and a member of the Drug Abuse Response Team, to identify most of his other positions. (Testimony of A. K.; Joint Exhibit 9)

**A. K.'s DUI Events of September 25, 2008**

On September 25, 2008—nearly eight years after A. K.'s hire date—the Grievant's shift ended at 7:00 p.m. At that time, he proceeded to drive his white SUV to his residence where, at about 8:15 p.m., he began to drink. By approximately 10:15 p.m., after consuming approximately ½ liter of vodka mixed with Crystal Light, A. K. left his residence en route to the Pickle Park tavern and restaurant in Fridley, MN, to meet friends. (Employer Exhibit 12) The planned meeting with friends did not happen.

As the Grievant was driving west on Osborne Road, Marshall Weems, a former resident of Fridley, MN, observed the Grievant driving south on Central Avenue in a reckless manner and running the red stop light at the Central Avenue and Osborne Road intersection, as he was taking a sharp westward turn onto Osborne Road in Fridley, MN. Mr. Weems testified that if he not taken evasive action, the Grievant's SUV might well have "T-boned" his truck, seriously injuring his wife and son, who were passengers, as well as himself. He further stated that he called 911, to report that the Grievant's vehicle was swerving, striking the curb on the right side of the road and then striking the median on the left side of the road; and while traveling west on Osborne Road, he reported seeing the Grievant run two more stop signs before sideswiping another car in front of Unity Hospital. After temporarily losing sight of the SUV, Mr. Weems testified that he drove to the

intersection of Osborne Road and University Avenue where, upon seeing flashing emergency lights, he immediately assumed that A. K. had been involved in an accident. When he learned otherwise, Mr. Weems reversed course and while traveling east on Osborne Road he spotted A. K.'s white SUV rolled over, lying on its side. He parked and walked to accident scene. Subsequently, he testified, that as he was giving police his statement he learned that A. K. was a police officer. Said knowledge made him "angry," since the police are supposed "... to protect the public, not endanger the public." (Testimony of Weems; Joint Exhibit 8; and Employer Exhibits 1 & 12)

Next, the uncontroverted record is that the Grievant sideswiped the right rear end of a minivan on Osborne Road that was in the process of turning left onto Madison Street en route to Unity Hospital. This mishap acutely injured the minivan's driver, Ms. Omolayo Taiwo, and damaged her vehicle. Without stopping, A. K. left the scene of this accident. (Employer Exhibits 4 & 12)

Driving at a high rate of speed, the Grievant continued westward on Osborne Road, heading toward the intersection of Osborne Road and University Avenue, which is the intersection that one would normally cross en route to the Pickle Park. Then, where Osborne Road curves, approximately 750 feet from the upcoming Osborne Road and University Avenue intersection—a point from which the above-referenced flashing emergency lights of a squad car would have been visible—A. K. turned sharply left onto southbound 5<sup>th</sup> Street, where he lost control

of his vehicle.<sup>2</sup> (Employer Exhibit 3B) A. K.'s vehicle jumped the curb and sped across the front yards of two residents before it tipped over, driver's side down. The SUV ended up at 340 Osborne Road, Fridley, MN—the front yard of a third residence. (Employer Exhibits 1, 2, 5 & 12)

### **Investigating the Events of September 25, 2008**

At around 10:30 p.m. Officer Kevin Titus, Fridley Police Department, was dispatched to 300 block of Osborne Road to "...find the vehicle and secure the accident scene." (Officer Titus' dispatch was probably in response to 911-call placed by Mr. Weems.) He testified that upon arriving at the scene, smoke was coming from the SUV and, fearing fire, he immediately approached the vehicle to check on the driver's welfare. When Officer Titus asked the driver if he was O.K., and he replied, "I don't know." Continuing, Officer Titus stated that the Grievant's eyes were "blood shot;" his movement was "labored;" and that smoke masked the of smell alcohol on the Grievant's breath. Nevertheless, he recognized his fellow officer and suspected that he had been drinking, observations that he communicated to Jeffrey Guest, Sergeant, Fridley Police Department. Because A. K. was a fellow officer, Sergeant Guest, acting out of concerns about conflicting interests, called the Minnesota Highway Patrol, requesting that they investigate the matter. Thus, Officer Titus and A. K. did not speak at length, but the latter did

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<sup>2</sup> The squad car was operated by Officers Gregory Olson and Lawrence Farber, Fridley Police Department. Officer Olson testified that the two were investigating a personal injury accident when he heard screeching tires in the vicinity of Osborne Road and 5<sup>th</sup> Street, and looking up he saw the Grievant's SUV shooting eastbound, across oncoming traffic, on Osborne Road, and going into the front yard of a private residence near the 300 block of Osborne Road. Continuing, he stated that he then lost sight of the SUV, but that he heard a loud crash and saw smoke coming from the area of a house. Officer Olson testified that the Grievant was traveling at 45 – 55 mph when he attempted to negotiate the turn onto 5<sup>th</sup> Street. (Employer Exhibit 5)

tell him that he had "made a mistake." Officer Titus also spoke with Mr. Weems. (Employer Exhibits 5 & 12)

At approximately 10:45 p.m. Sergeant Guest arrived on the scene. He had already called the Minnesota Highway Patrol. Upon his arrival, in addition to Officer Titus, he testified that Fridley Officers Tom Roddy and Gregory Olson were already there, maintaining traffic control.<sup>3</sup> (Employer Exhibits 5 & 12)

Sergeant Guest's accident narrative states in part that Kevin Swanson, a City of Fridley firefighter, advised him that A. K. was "alert" and that A. K. admitted to drinking. (Employer Exhibit 5) At the hearing, Sergeant Guest testified that, while waiting for emergency medical personnel to remove A. K. from his buckled-in position on the driver's side of the rolled vehicle, he and the Grievant spoke and, as they did, he could smell alcohol on the A. K.'s breath, as A. K. remorsefully uttered something like, "I really fucked up or screwed up."<sup>4</sup>

In response to Sergeant Guest's request, Trooper Benjamin Uzlik, of the Minnesota Highway Patrol, was dispatched to the scene of A. K.'s rolled over SUV, arriving at approximately 11:00 p.m. Trooper Uzlik testified that upon his arrival, he observed the presence of several Department squads, an Allina

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<sup>3</sup> Officer Roddy's accident narrative indicates that he interviewed Dorothy Johnson, a property owner in the 300 block of Osborne Road. She stated that her front yard's grass, landscaping and flag pole had been damaged by A. K.'s SUV. Photographs were taken and in addition to the damaged front yard, parts of A. K.'s vehicle were "...scattered through her front yard..." (Employer Exhibit 5) Officer Roddy also interviewed Mr. Weems' wife, Julie Weems, who identified A. K.'s white SUV as the vehicle that her husband had reported during his 911 call. (Employer Exhibit 12)

<sup>4</sup> Sergeant Guest also stated that A. K.'s September 25, 2008 misconduct was an embarrassment to the Department; harmed its law enforcement reputation; and compromised A. K.'s relationship with co-workers. He further speculated that if the Grievant were to appear as a witness in a DUI criminal case the defense attorney would tear into his credibility because of his own DUI and "hit and run" offenses.

ambulance and Fridley Fire Department vehicles. Next, Trooper Uzlik stated that he proceeded to interview the Grievant, who had been removed from his SUV and was already in an ambulance. Immediately, Trooper Uzlik detected the "... strong odor of an alcoholic beverage..." and he discerned that the Grievant's "... speech was slurred and his response[s] to [my] questions came very slowly." Later, while at Unity Hospital, Trooper Uzlik testified that after reading the Minnesota Implied Consent Advisory to the Grievant, the latter consented to a blood test and proceeded to say, "I'm dead, I'm a fucking alcoholic." (Employer Exhibits 1 & 12) The Grievant's ethyl alcohol concentration was .20 grams per 100 milliliters of blood, 2.5 times the legal limit of .08 grams. (Joint Exhibit 8; and Employer Exhibit 1) While at Unity Hospital, Trooper Uzlik interviewed additional witnesses, including Mr. Weems and Dana Therese Geving—who witnessed the rollover and who spoke with A. K. to ensure that he was O.K. (Employer Exhibits 1 & 12)

Officer Titus, Sergeant Guest and Trooper Uzlik all testified that A. K. was "coherent," and not "blacked out" as he claimed, as the events of September 25, 2008 unfolded. Further, in so many words, Sergeant Guest, Trooper Uzlik and Officer Olson were asked, "Why did A. K., who was driving fast, take the sharp left onto 5<sup>th</sup> Street, rolling his vehicle?" The response of all three officers was the same. Namely, in their opinions, when A. K. saw the flashing emergency lights of a police squad at the intersection of Osborne Road and University Avenue, he turned to avoid the police who, A. K. incorrectly assumed, were waiting to stop him because of his hit and run collision with Ms. Taiwo's vehicle. They punctuated this opinion by pointing out, as Sergeant Guest put it, "To get to the Pickle Park

you wouldn't take a left turn onto 5<sup>th</sup> Street." Still further, the witnesses posited this scenario as a basis for concluding that the Grievant was "coherent" and knew what he was doing. (Employer Exhibits 5 & 12)

The testimonies of Fridley Officers Olson and (now retired) Lawrence Farber, as well as those of Sergeant Salo, Sergeant Guest, and Captain Weierke mutually corroborated the claim that in November 2004, when Donovan Abbott was elevated to Chief of the Fridley Police Department, he inaugurated a new and ongoing off-duty conduct regime—one that promised disciplinary consequences for off-duty misconduct.<sup>5</sup>

#### **Aftermath of the Events of September 25, 2008**

Ultimately, a criminal complaint was filed by the Anoka County Prosecutor in Anoka District Court, charging A. K. with two counts of 3<sup>rd</sup> degree DUI offenses and two counts of Criminal Vehicular Operation offenses, all gross misdemeanor offenses. (Joint Exhibit 8) At a pre-trial hearing on February 19, 2009, A. K. pled guilty to the reduced misdemeanor charges of a 4<sup>th</sup> degree DUI (blood alcohol

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<sup>5</sup> Officer Salo testified that Chief Abbott advised that "...off-duty misconduct would not be treated as leniently as in the past." He further stated that there was no confusion in the minds of the rank-and-file officer that there would be "...repercussions for off-duty screw-ups." Officer Olson testified that the Chief made it clear that "...we would pay for our off-duty mistakes" and, continuing, he stated that "...we [police officers] are under a microscope, we are always on duty." Officer Farber testified that "Chief Abbott made it clear that off-duty activity is reflected upon (sic) your job, and he took that seriously." He, like Officer Olson, stated that he was "mad" and "disgusted" at the sight of a fellow officer sitting in an overturned vehicle. Although, Officer Farber believes that everybody deserves a "second chance." (Deposition by Farber) Sergeant Guest testified that in 2004, Chief Abbott shared his expectations with officers, telling them to exhibit "...exemplary conduct on- and off-duty and that he would not tolerate any form of off-duty misconduct." Finally, Captain Weierke testified that Chief Abbott has told all of the Department's executive officers and all officers promoted to the rank of sergeant about his expectations as regard off-duty conduct. He also stated that at every roll call on which he was Patrol Division Captain, he reminds officers of the off-duty standard and of the disciplinary consequence that would follow the standard's violation.

content of .08 or more) and for leaving the scene of a property damage accident. (Employer Exhibit 12) In the plea, A. K. admitted to knowing that DUI and leaving the scene of a hit and run accident violates the law. With regard to sentencing, the Court stated, in part:

I'm going to sentence you to 90 days in jail and a \$1,000 fine. I'm going to stay all 90 days. I'll stay \$700 of the fine for a period of two years on the following conditions. Number one, that you complete community AA per corrections. Number two, you complete phase II of the current relapse prevention program and follow all recommendations. You apparently have already completed phase one. Next, that you attend a MADD Panel as directed by corrections. *Next, that you have no use of alcohol and or drugs other than drugs prescribed by a doctor and then take them only as prescribed...*

(Employer Exhibit 12; emphasis added)

On September 26, 2008, Captain Weierke telephoned the Grievant to see how he was feeling. Based on this conversation, Captain Weierke testified that A. K. characterized the events of September 25, 2008, as nothing more than a "routine DUI" and opined that his job was not in jeopardy. However, as reports about the events of September 25, 2008 began to flow in, Captain Weierke testified that it became clear to him that the nature of the Grievant's conduct was very serious. Ultimately, for a number of reasons, Captain Weierke recommended to Chief Abbott that the Grievant's employment be terminated. First, the Grievant did not appreciate the severity of his misconduct and his *Laudermill* hearing apology seemed to lack sincere remorse. Second, he, as well as other officers, had concluded that the Grievant could no longer be "trusted." Third, the Grievant had lost credibility with area attorneys and judges. Fourth, at the June 5, 2009 *Laudermill* hearing, the Grievant admitted to violating the court's February 19,

2009 probationary condition that he not use alcohol for a two year period. Finally, the Grievant, like other officers, regardless of rank, knew that stern discipline would follow serious off-duty misconduct.

Chief Donovan Abbott testified that because the events of September 25, 2008 involved a City police officer, Sergeant Guest rightly asked the Minnesota Highway Patrol to independently investigate the events of that evening. Trooper Uzlik conducted this investigation and on September 26, 2008, he filed accident and DUI arrest reports. (Employer Exhibit 1) He also testified that on September 29, 2008, the Grievant was placed on administrative leave, with full pay and benefits.<sup>6</sup> (Employer Exhibits 11 & 12)

Continuing, Chief Abbott testified that: (1) on or about October 31, 2008, Troy McCormack, Sergeant, Minnesota State Patrol, filed the accidents' "probable cause" complaint; (2) based on this complaint, Michael J. Scott, Special Prosecutor for the City of Anoka, authorized prosecution of the matter and summoned the Grievant to court on two counts of 3<sup>rd</sup> degree Driving While Impaired and two counts of Criminal Vehicular Operation—all gross misdemeanors under controlling Minnesota Statutes; (3) An Anoka County Attorney prosecuted the criminal complaint brought against A. K.; (4) on February 19, 2009, before the 10<sup>th</sup> Judicial Court for Anoka County, the Grievant entered into a pre-trial plea agreement and was sentenced as discussed above; and (5) on February 26, 2009, Trent MacDonald, Sergeant of Investigations, Police Department, Maple Grove, MN, was designated to conduct an independent

internal investigation of allegations brought against the Grievant. Sergeant MacDonald delivered his internal investigation on May 4, 2009. On June 1, 2009, Chief Abbott filed his concurrence with Sergeant MacDonald's "Findings of Fact." Chief Abbott testified that the above information served as the basis for concluding that the Grievant's misconduct was in violation of the Fridley Police General Order 317 – Professional Conduct of Police Officer. (Employer Exhibit 12)

Further, with the above-referenced information in hand, Chief Abbott testified that a *Laudermill* hearing was held on June 4, 2009, to elicit the Grievant's perspective of the charges and findings of fact in the record. The Grievant stated that since September 25, 2008, he has been living under a "gray cloud;" that he was ashamed and humiliated by his past conduct; and that he wanted his job back, to "serve." Further, the Grievant explained that he has been under tremendous mental and physical stress caused by family tragedies (i.e., by the 2007 deaths of his beloved mother and grandmother, by one of his daughter's battle with cancer, and by his recent divorce), and by his own health problem (i.e., on January 10, 2006, the Grievant underwent gastrointestinal surgery). Further, A. K. stated that since the summer of 2007, he has attended a variety of chemical dependency programs, has been involved with AA, and was seeing Dr. Lance Becker, Ph.D., twice a month. Still further, he admitted to consuming alcohol in May 2009, after having begun treatment and in violation of his court-ordered plea agreement.

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<sup>6</sup> As of January 12, 2010, the Grievant's termination date, he collected \$129,399.35 in pay and benefits, excluding insurance benefits. (Testimony by Ms. Dahl; and Employer Exhibit 11)

Chief Abbott also testified that while the events of September 25, 2008 were deplorable, amounting to dangerous, deceptive and irresponsible conduct, he was particularly struck by the fact that the threat inherent in violating a Court-ordered probation was not sufficient to deter the Grievant from continuing to consume alcohol. In addition, Chief Abbott testified that he dismissed the Grievant's "blacked out" defense because several experienced investigating officers concluded otherwise. In this same vein, Chief Abbott also noted that the Grievant was "conscious enough" to make two fateful decisions that belie the "blacked out" defense. First, he chose to flee the scene of a personal injury/property damage accident that he caused, while drinking. Second, in Chief Abbott's opinion, the Grievant chose to attempt the dangerous left turn onto 5<sup>th</sup> Street, rolling his SUV across the front yards of several residences because he wanted to evade the police at the intersection of Osborne Road and University Avenue in the advent of his "hit and run"—a turn that was not en route to the Pickle Park.

In sum, Chief Abbott's testimony about his reasons for recommending that Grievant's employment be terminated is that the events of September 25, 2008 were in violation of the Grievant's sworn duty to obey the law; in violation of Fridley Police Department rules; resulted in the loss of public, judicial and co-worker "trust;" and because the Grievant violated his February 12, 2009 plea agreement on May 14, 2009.

On June 9, 2009, Chief Abbott informed A. K. of City's intent to discharge him for his September 25, 2008 misconduct.

Specifically, on or about September 25, 2008 you violated Fridley Police Department General Order 317, Professional Conduct of a Police Officer and of Minnesota law by driving, operating, or controlling a motor vehicle while under the influence of alcohol with an alcohol concentration of approximately .20. You also left the scene of a motor vehicle accident without stopping to fulfill your obligations after being involved in an accident. Your plead [sic] guilty in Anoka County Court to the offenses of DUI - 4<sup>th</sup> Degree and leaving the scene of a property damage accident, both misdemeanors.

(Joint Exhibit 2)

Subsequent to receiving the City's "intent to discharge" notice and to the above-referenced May 14, 2009 drinking episode, the undisputed record evidence is that the Grievant consumed alcohol on at least two additional occasions—June 2009 and August 17, 2009. With regard to this post-discharge evidence and notwithstanding post-discharge evidence bearing on the Grievant's post-September 25, 2008 rehabilitation activities, Chief Abbott testified that he was more confident than ever that the decision to terminate the Grievant's employment was the only decision the City could have responsibly reached. After all, Chief Abbott remarked, "Police Officers are armed, they are not accountants."

Pursuant to the CBA, the Union submitted a Step 2 grievance on June 17, 2009, which was denied by the City on June 18, 2009. (Joint Exhibits 3 & 4, respectively), Next, on August 6, 2009, pursuant to the Minnesota Veteran's Preference Act, the Grievant, an honorably discharged veteran, sought a hearing before a tripartite panel whose decision was issued on January 4, 2010. (Joint Exhibit 7) The panel decided to uphold the City's intent to discharge the Grievant. In relevant part, the panel concluded as follows

\* \* \*

2. The veteran engaged in conduct that constituted misconduct sufficient to warrant his removal from office. Specifically this misconduct was knowingly driving his personal vehicle while legally intoxicated on the evening of September 25, 2008, driving erratically, hitting another vehicle and leaving the scene of that accident, rolling his vehicle over within the City of Fridley and violating the terms of Court ordered probation on at least three separate occasions by drinking alcohol. This conduct was a serious violation of Department Policy and the oath of office and the expectations of a police officer in the City of Fridley.

3. The veteran has not shown by a preponderance of evidence that he has recovered enough from his alcoholism to warrant reinstatement to office at this time.

(Joint Exhibit 9) The Grievant was effectively terminated on January 12, 2010. (Testimony by Ms. Dahl; Union Exhibit 3; and Employer Exhibit 11) A. K. appealed this decision to arbitration before the undersigned.

Concurrent with many of the above-discussed events, the Grievant was an AA and alcohol-related treatment program participant. He joined AA during the summer of 2007. Since that time, both of his AA sponsors, James Sullivan and Tim Tougas, testified to having seen A. K. two to three times weekly and speaking with him on the telephone on nearly a daily basis. Both witnesses reviewed the Grievant's personal plights, off-duty drinking problem, attempts at dependency treatment, some of which failed, and his struggle to admit that he was an "alcoholic." On a positive note both witnesses observed that since August 18, 2009, the Grievant's so called "sobriety date," he has not had a drink, and "experience" suggests to them that A. K. is now in genuine "recovery."<sup>7</sup> Of course, each admits that no one can guarantee the future sobriety of an alcoholic.

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<sup>7</sup> On May 14, 2009, A. K.'s ex-wife called the Forest Lake Police Department reporting domestic problems at her ex-husband's house. In response, two officers were dispatched to the house, arriving at about 5:00 p.m., where they found A. K. hunched over a computer desk, with the

Further, Mr. Sullivan noted that the Grievant's life was back on-track; he and his ex-wife are getting along; they again share custody of their children; and the Grievant is employed. Mr. Tougas noted that the Grievant told him that he "blacked out" on September 25, 2008 but, nevertheless, was genuinely sorry for the events of that day and that he is remorseful about his relapses. (See also Joint Exhibit 8; and Employer Exhibit 17)

The record shows that on November 14, 2008, R. Lance Becker, Ph. D. and Clinical Psychologist, Lakes Area Human Services, Inc., who first saw the Grievant on August 17, 2006, wrote, in part:

\* \* \*

...While he was consuming he was careful not to drive impaired or consume while parenting his children. [A. K.] was also adamant that alcohol would never interfere with his work. [A. K.] sought help for this problem and honestly worked to maintain his sobriety. Up until this accident he had been sober for eight months. I believe that Mr. Knutson accepts full responsibility for his actions, he has been open and honest about his actions that evening, he understands that he can never use alcohol again, and he will do everything needed to maintain his sobriety.

...I hope...that his actions that evening will not interfere with ... his position in law enforcement...<sup>8</sup>

(Union Exhibit 17)

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"strong odor of alcoholic beverage "on his breath. Stumbling around, eyes watery and bloodshot, the Grievant refusing to take a breathalyzer test, but did admit to having taken a few drinks. Apparently, the Grievant picked up his young daughters after school at approximately 3:30 p.m. One of his children, Kaitlin, subsequently sent her mother, who was at work at the time, a text message and photo of her father hunched over a computer desk, as if passed out. Concerned for her children's welfare, A. K.'s ex-wife called police and drove to his house. Officer Kurt Kowarsch testified that that Kaitlin told him that when the Grievant picked the girls up, he was "not acting normally." Subsequently, A. K.'s lost his shared child custody privileges. (Employer's Exhibit 22)

<sup>8</sup> See footnote 7 and also note that the Grievant acknowledged that he consumed alcohol on May 14, 2009, in June 2009, and on August 17, 2009.

The record also shows that on November 19, 2008, he was admitted to the University of Minnesota Medical Center's Fairview, Minnesota Behavioral Services Center, where he completed Phases I and II, but not Phase III, of the program, with an April 14, 2009 discharge date. (Union Exhibit 16) On April 21, 2009, the University's Cynthia Bosma wrote that A. K.

... has demonstrated motivation and growth toward recovery through his participation and insightful feedback to others. He demonstrates a positive attitude and provides insight to how he is making healthier lifestyle choices. He has been a good role model for others through his honesty and sincerity to his commitment to sobriety and the healthy choices he is making to maintain sobriety. Mr. Knutson has been an example of openness, willingness to change and positive attitude.

\* \* \*

To date, there is no indication that he is using alcohol.<sup>9</sup>

(Union Exhibit 16)

In preparation for his Veteran's Preference hearing, the Grievant was interviewed by Dr. Gordon Dodge, Ph.D. and Consulting Psychologist, on October 14 and 20, 2009, to determine the former's "fitness for duty." Based on these interviews and other informational sources that were made available to Dr. Dodge led him to conclude, in part, that

...to a reasonable degree of psychological certitude, that [A. K.] can successfully return to work as a law enforcement officer, and likely will also continue in his recovery program and maintain sobriety for the reasonable future.

(Union Exhibit 3)

With respect to his post-discharge efforts, in mid-January 2010, the Grievant, in pursuit of a First Responder's Certificate, was admitted into the

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<sup>9</sup> Id.

state's Health Professional Services Programs ("HPSP"); and, specifically, into its rigorous, sobriety monitoring program. A. K. testified that, *inter alia*, this program requires daily call-ins (except on Sunday), and that once every ten days he is randomly selected for substance abuse testing. (Testimony by A. K.; and Union Exhibits 18 & 20) In addition, among other things, the Grievant's medical records show that on March 10, 2010, he saw Dr. John T. Northwood, Fairview Health Services, whose medical record notes include the observations, "Andy was clean and was adequately groomed. His emotional presentation was cooperative and frank/open..." (Employer Exhibit B)

On March 25, 2010 and March 29, 2010, the Grievant's ex-wife and his current employer, respectively, wrote letters attesting to the Grievant's present-day reliability. The ex-wife wrote that because he has maintained sobriety since December 24, 2009, he has been given unsupervised visitations with their children, including overnights. (Union Exhibit 19) A. K.'s current employer describes his performance as being "exceptional," "reliable" and "professional." (Union Exhibit 21)

### **III. STATEMENT OF THE ISSUE**

The parties stipulated to the following statement of the issue.

"Was A. K. discharged from employment for just cause? If not, what should the remedy be?"

### **IV. CITY'S POSITION**

The City begins by arguing that the Grievant admitted to the events of September 25, 2008 and that it proved that A. K. violated: (1) Fridley Police Department Order 317; (2) the Police Officer's oath; and (3) Minnesota law by

driving recklessly, while under the influence of alcohol with a concentration level of .20, fleeing the scene of a property damage/personal injury vehicular accident, and rolling his vehicle. With respect to point (3), the City points out that although initially charged with two counts of 3<sup>rd</sup> degree DUI and two counts of Criminal Vehicular Operation, the Grievant was allowed to plead guilty to a 4<sup>th</sup> degree DUI misdemeanor and to leaving the scene of a property damage accident. Nevertheless, the City maintains, these are “real” violations, clearly behaviors unbecoming a Police Officer, and clearly behaviors that form a just basis for terminating the Grievant’s employment.

Further, the City argues that the Grievant knew the Employer’s expectations concerning off-duty misconduct and the potential for discipline for same. General Order 317 requires that police officers conduct themselves in accordance with all laws, not exhibit any conduct which discredits themselves and the Department, and that they conduct themselves with integrity, “whether on or off-duty.” General Order 317, the peace officers’ oath to uphold the law, and the principle that police officers are held to a “higher standard of conduct” combined to form the basis of Chief Abbott’s admonition that “off duty conduct matters.” (Testimony by Abbott; and Joint Exhibit 8) As he, Captain Weierke, Sergeants Salo and Guest, and Officers Olson and Farber testified, with the advent of Chief Abbott’s administration in November 2004, off-duty misconduct would carry consequences, and the whole Department knew it, including the Grievant. (Joint Exhibit 8) Still further, the City avers that the investigation of the September 25,

2008 events was fair, proved the alleged misconduct, and that the Grievant admitted to having violated General Order 317. (Joint Exhibit 8)

Next, the City urges that for several reasons, the penalty of discharge is appropriate. First, General Order 317 and Chief Abbott's notice off-duty misconduct have been consistently enforced since November 2004, and that the Grievant's misconduct is the most egregious to have occurred in the Fridley Police Department.

Second, the Union's charge of disparate treatment involving alcohol use by two other Fridley officers is groundless for two reasons: first, both incidents occurred prior to Mr. Abbott's elevation to Chief and his expressed intent to administer discipline for off-duty misconduct; and second, while both of the referenced officers were cited for DUI, neither were driving recklessly, involved in a personal injury hit and run, faced gross misdemeanor criminal charges, and there is no evidence that either officer violated the terms of a court-imposed probation. Further, the City observes at the Veteran's Preference hearing the Grievant admitted that his case "was different." (Joint Exhibit 8)

Third, there are no mitigating factors precluding termination of the Grievant's employment. The Grievant's use of post-discharge evidence, such as, Dr. Dodge's 2009 assessment and the information about the Grievant's 2010 enrollment in the HPSP monitoring program is immaterial. That is, it flies in the face of the "after-acquired" doctrine, which holds that just cause disciplinary decisions should be analyzed using the evidence upon which the discharge decision was based and not upon post-discharge evidence, even if relevant to

underlying cause of discharge. This doctrine applies equally to employers and employees and, by definition: the City did not have this information (i.e., the Grievant's latest round of consultative and/or rehabilitative information) when the Grievant was told that the Employer intended to discharge him.

As far back as 2005, the City knew that the Grievant was drinking off-duty; and, in 2007, both Captains Weierke and Rewitzer gave him employee assistance information and the former offered to otherwise help out. However, because the Grievant was not manifesting alcohol-related on-duty performance problems, the City was legally precluded from going any further, such as ordering that the Grievant undergo a "fitness for duty" evaluation. Since he pled guilty to two gross misdemeanors on February 19, 2009, the Grievant has consumed alcohol on at least three occasions, violating the terms of his plea agreement; and neither his psychologists nor his AA sponsors could "guarantee" that he will not drink again.

Fourth, terminating the Grievant's employment is just in this case because police officers are held to a higher standard of conduct than is the ordinary employee, both on-duty and off-duty. The public entrusts their safety and security to the police and their uniform, badge and arms symbolize that trust. To maintain this trust, police must be role models, the "image of integrity" and their conduct "exemplary," as provided in their sworn oath, code of conduct and/or directives. Police enforce the law, including the law against hit and run vehicular accidents. Citing precedent, the City urges that good performance notwithstanding, police officers are held accountable for horrific off-duty misconduct.

For the reasons discussed above, the City requests that the termination of A. K.'s employment be affirmed.

**V. UNION'S POSITION**

The Union initially argues that the Grievant was not given sufficient notice that off-duty alcohol-related conduct could result in his immediate loss of employment. Indeed, the Union points to two unit officers who previously had been convicted of DUI misdemeanors and neither was disciplined. In addition, although these incidents preceded Mr. Abbott's ascent to Chief in 2004, the latter's off-duty misconduct utterances to police officers were not specific to alcohol-related offenses and their consequences. Moreover, his utterances did not indicate that prospective DUIs would be met with anything other than a disciplinary waiver, as was received by the two other officers involved in the prior DUI arrests. In this vein, LELS also maintains that Employer-termination decisions in Fridley, Minnesota ultimately rest with its City Manager, William W. Burns, and it was he who discharged the Grievant but not the police officers involved in the earlier DUI incidents. Rhetorically, the Union questions: What is the off-duty misconduct rule? Is not this a case of disparate treatment?

Next, LELS argues that to have violated a criminal statute is not proof that Fridley General Order 317 was also violated. In this regard, the Union claims that the City's investigation focused on whether the Grievant violated criminal statutes and not whether he actually violated Fridley Police General Order 317. For example, the Union points out that the City did not ask the Grievant (1) about his knowledge/understanding of General Order 317; (2) whether he was present

when Chief Abbott announced his off-duty conduct policy; and (3) whether the Grievant in fact violated this policy. In addition, the Union contends that there is not a scintilla of evidence that the Grievant's left turn onto 5<sup>th</sup> Street was taken to avoid the police at the intersection of Osborne Road and University Avenue because of his earlier accident involving Ms. Taiwo. The Grievant testified that he had no recollection of the events of September 25, 2008, which is to say that he was not being purposefully evasive. In addition, the Union points out that the City, did not see fit to test its evasiveness theory by asking the Grievant why he made the turn in question.

Additionally, the Union contends that the Grievant's summary discharge was neither in accord with the Employer's Drug and Alcohol Testing Policy nor with the intent of Minnesota Statute §181.950 through §181.957 (the Minnesota Drug and Alcohol Testing in the Workplace Act). First, the policy and the statutes in question encourage corrective discipline. Second, with respect to a memorandum from City Manager Burns to employees, the Union argues that, generally, both the policy and the statutes provides that an employee may not be fired

... as a consequence of the employee's first positive test result on a confirmatory test or retest. Instead, ... , the employee will be given the opportunity to participate in a drug or alcohol counseling or rehabilitation program...

(See Union Exhibit 4) Clearly, the Union urges, the City's disciplinary action in this case was neither corrective in nature nor was the Grievant offered rehabilitation. Further, after the Grievant had rolled his SUV, the City had probable cause to require that he undergo testing, yet it did not require testing. Said failure, the

Union claims, violates both the City's policy and the referenced Minnesota Statutes, and is evidence of the unfair and incomplete nature of the City's investigation.

Finally, the Union maintains that discharging the Grievant for an off-duty first-offense is not reasonably related to his record of service to the City and to his rehabilitation efforts. To date, the Union continues, the Grievant has been sober for approximately one year and his life is now in order. He enjoys the support of his ex-wife and his present employer, both key predictors that Grievant is well along the road to achieving long-term recovery. In addition, the Union argues that the Grievant is truly contrite for the events of September 25, 2008. Further, the Grievant's on-going AA activities and his sponsors' encouraging accounts of his progress, plus the fact that to date he has been in strict compliance with the rigors of the HPSP, are mitigations that deserve considerable weight.

For the above reasons, the Union requests that the grievance be sustained.

## **VI. DISCUSSION**

The underlying facts of this case are not in dispute. The record evidence shows that on September 25, 2008, while legally intoxicated, the Grievant was driving in a reckless manner. The Grievant nearly T-boned Mr. Weems' car, ran three stop lights, sideswiped Ms. Taiwo vehicle, causing damage to her car and, more poignantly, seriously injuring her, and rather than stopping, the Grievant fled the scene of this accident. Next, while traveling at 45 to 55 mph, the Grievant failed in his attempt to make the 90 degree left turn, as he crossed Osborne Road

in front of oncoming traffic, drove through the front yards of two residences, causing property damage, and ultimately rolled his SUV as it came to rest near a third resident's house.

This account of events was taken from the uncontroverted testimony of witnesses at the hearing, and from a kindred account of events found in Sergeant MacDonald's unimpeachable internal investigation report, which includes transcriptions of his interview with the Grievant and nine other witnesses, as well as related documentation. (Employer Exhibit 12) Chief Abbott relied on Sergeant MacDonald's report when he and his management team decided to recommend termination of the Grievant's employment. Moreover, Sergeant McCormack's "probable cause" complaint, and the subsequent specification of criminal counts and court summons were also based on then-available information about the events of September 25, 2008. Clearly, the City based its discharge decision on these fact-based events which, in turn, fall under the ambit of off-duty misconduct, as contemplated by General Order 317.

A reasonable person—particularly a police officer—would know that it is illegal to drive while DUI; to recklessly endanger the lives of passengers whose vehicle might have been T-boned; to run traffic signals; to sideswipe a car and then flee the scene of the resulting personal injury/property damage accident; and to roll a car after it soared across the front yards of neighborhood residences. Further, a reasonable person—particularly a police officer—would know that this misconduct would reflect poorly on the driver in question, and, if the driver happened to be a police officer, then by association, that this misconduct would

reflect poorly on his or her Department and amounts to misconduct unbecoming an officer. Last, a reasonable person—particularly a police officer—would know that the referenced misconduct would tend to compromise the public’s trust in the police and its special powers. (Joint Exhibit 13)

While the specific facts of this case are not recited in General Order 317, a reasonable person—particularly a police officer—would know that they define a type of conduct that is prohibited by General Order 317. Other types of off-duty conduct prohibited by General Order 317 include arrests for off-duty possession and/or use of cocaine, off-duty sexual assault or off-duty domestic violence, to mention a few examples. Based on this same reasoning, there is no currency in the Union’s claim that the Grievant was not adequately notified that his specific type of misconduct would result in discipline. That Chief Abbott did not expressly tie General Order 317 to the specific facts underlying the Grievant’s misconduct is not a persuasive argument. Similarly, the arguments that the General Order 317 is “vague” and that the City failed to prove that the Grievant’s conduct violated General Order 317 are wanting.

The Union also contends that the Grievant’s dismissal lacked “just cause” because he did not “knowingly” undergo the referenced misconduct and, therefore, he did not “knowingly” violate General Order 317.<sup>10</sup> The Grievant maintains that he was “blacked out” on the evening in question and that he does not remember striking Ms. Taiwo’s car or rolling his SUV. There is a particularly interesting defense because the Grievant was such a compelling witness.

Generally, his testimony "rang true," he was known for his good police work and he has spent his entire adulthood in law enforcement work. In fact, while in the U. S. Marine Corps, the Grievant was in the Military Police.

Nevertheless, two considerations tend to devalue the Grievant's "blacked out" defense. First, it is self-serving for the Grievant to claim unawareness. Yet, to be fair, it is possible that even though the Grievant may have been coherent on the day in question, on the following day, after regaining sobriety, he genuinely could not recall the details of his accidents. This conjecture leads to our next consideration. Second, Sergeant Guest, Officer Titus and Trooper Uzlik all testified that the Grievant was "coherent," and, in addition, Firefighter Swanson allegedly told Sergeant Guest, that the Grievant was "alert." The former three police officers all spoke with the Grievant, who, as their undisputed testimonies suggest, had reached rational conclusions like "[I] made a mistake," "I really fucked up" and that "I'm a fucking alcoholic." In addition, when Officer Tutus asked A. K. if he was "O.K.," he responded, "I don't know." Moreover, the record

suggests that Sergeant Guest and Trooper Uzlik are experienced DUI/crash scene investigators. In fact, Trooper Uzlik testified to having investigated 300 to 400 DUI's and another 300 to 400 crash scenes.

In addition, the testimony of these officers is supported by two theories that the Union did not expressly debunk at the hearing. First, because the Grievant

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<sup>10</sup> A preponderance of the record evidence establishes that the Grievant "knew" about Chief

was DUI, he consciously decided to flee his "hit and run" scene; and second, because the Grievant feared that the flashing emergency lights at the Osborne Road and University Avenue intersection signaled that the police were waiting for him, he consciously veered off the route to Pickle Park to evade them, and in doing so rolled and crashed his SUV. As the Union correctly argues, these theories are based on opinion. However, in this instance, the opinion is informed and it is mutually shared opinion. Moreover, it cannot be denied that these theories do explain proven fact scenarios and, for this reason, they are of value to the Arbitrator, as Fact Finder, because they add to the body of evidence that leads to the conclusion that the Grievant was in fact aware of what he was doing on the night of September 25, 2008.

The Union raises two additional reasons for concluding that the Grievant's discharge lacked just cause. First, the Union claims disparate treatment, an argument that, if proven, would be material grounds for undoing the City's discharge. The Union identified two other Fridley Police Department police officers who were arrested for off-duty DUIs and, apparently, neither was disciplined. In rebuttal, the City argues that the A. K.'s case is differentiated from these prior cases, in two critical respects. First, although the referenced officers were involved in DUI arrests, they were "routine DUIs." That is, to illustrate, neither officer was involved in any reckless vehicular accidents, one of which resulted in a "hit and run" personal injury, and the other of which involved the dangerous rolling of a vehicle in a residential neighborhood. In addition, neither of

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Abbott's new "off-duty" policy.

the two officers was involved in the violation of court-ordered probationary terms. Thus, the City urged, the severe nature of the Grievant's misconduct is distinguishing, and so is the fact that A.K's superiors and some of his peers have lost "trust" in him. Second, the City points out that neither of the prior DUI incidents occurred under Chief Abbott's administration and, thus, neither occurred after Chief Abbott's notice that, unlike the previous administration, he would not tolerate off-duty misconduct.

Regarding the City's second point, the Union observes that City Manager Burns is the ultimate authority over disciplinary matters in the City of Fridley. Moreover, the Union continued, Mr. Burns was the City Manager who decided not to discipline the two officers involved in the prior DUI arrests and he was also the City Manager who decided to discharge the Grievant—Proof of disparate treatment? The problem the Arbitrator has with this defense is that there is no evidence that Mr. Burns ever changed or refused to enforce Chief Abbott's new off-duty misconduct policy, and there is no evidence that Chief Abbott's role as Public Safety Director was that of "figurehead." This conclusion does not comport with the reality that, as Public Safety Director, Chief Abbott is ultimately responsible for Police Department operations. Simply put, the Arbitrator is not persuaded that Chief Abbott's role in the administration of disciplinary policy in the Fridley Police Department is more "ministerial" than "hands on." Overall, the evidence supports the Arbitrator's conclusion that this is not a case of disparate treatment. The fact patterns of the instant case *vis a vis* the former cases are as

dissimilar as “apples and oranges,” which explains the dissimilar level of discipline that was meted out in the Grievant’s case *vis a vis* the prior cases.

The Union next argues that the City’s Drug and Alcohol Testing Policy and the Minnesota Drug and Alcohol Testing in the Workplace Act (i. e., Minnesota Statutes 181.950 through 181.957) permitted the “reasonable suspicion” testing of the Grievant at the point in time when he rolled his SUV; requires that the Employer attempt to correct the Grievant’s alcohol dependency; and, because the Grievant’s work history was exemplary, the policy and the Act requires the Employer to offer the Grievant—a first time offender—the opportunity to participate in alcohol rehabilitation. The Union contends that the City wrongly failed to exercise any of these measures. These specific aspects of the referenced policy and the statutes are correct, as stated. But, nevertheless, they are misplaced because both the policy and the statutes apply to on-duty conduct, not off-duty conduct.

At this point in our analysis, the Arbitrator can endorse below-quoted conclusion of the Veteran’s Preference panel, except for its first sentence. The quote is:

The veteran engaged in conduct that constituted misconduct sufficient to warrant his removal from office. Specifically this misconduct was knowingly driving his personal vehicle while legally intoxicated on the evening of September 25, 2008, driving erratically, hitting another vehicle and leaving the scene of that accident, rolling his vehicle over within the City of Fridley and violating the terms of Court ordered probation on at least three separate occasions by drinking alcohol. This conduct was a serious violation of Department Policy and the oath of office and the expectations of a police officer in the City of Fridley.

(Joint Exhibit 9) The evidence amassed to prove that the Grievant is guilty of serious misconduct is overwhelming and, at this point, it may be concluded that his misconduct warrants discipline. To be answered, however, is the question "Is there sufficient evidence to warrant the Grievant's removal from office?" The answer to this question lies in our evaluation of the post-discharge (or more correctly post-intended discharge) evidence that is in the case record.

The Union maintains that to discharge a long-term employee, with a good work record who is guilty of first occurrence, off-duty misconduct is too severe a penalty and, particularly so, in light of evidence bearing on the Grievant's post-discharge rehabilitation activities, participation in AA, the expert opinion of Dr. Dodge, the opinions of his AA sponsors, and the letters written by the Grievant's ex-wife and current employer that praise his rehabilitated state of being and his professionalism at work, respectively. The Union calls attention to the fact that the Grievant has not consumed alcohol since August 17, 2009, approximately one year from the date the parties exchanged post-hearing briefs; that he is contrite; and that he is "job ready."

The City demurs, noting that the Grievant seriously violated Police Department's General Order 317, his oath of office and off-duty misconduct expectations. Further, the City concludes, the Grievant's egregious misconduct has irreparably damaged supervisory confidence that the Grievant will, prospectively, comport himself in accord with the high standard of conduct that defines the job of a police officer, and that his post-discharge relapses in violation of his court-ordered probationary terms, has served to further erode their

confidence. Still further, in the view of the City, the Grievant has suffered the "distrust" of some peers, and his proven off-duty misconduct has violated the public's trust in him, as a police officer.

Generally, as the City argues, "just cause" considerations of an employee's discharge are determined at the time of the discharge. Nevertheless, there are exceptions to the "after-acquired" doctrine. For example, the City used evidence showing that the Grievant consumed alcohol on two occasions following his *Loudermill* hearing. This evidence relates to the original misconduct that gave rise to his discharge, and the City used it to reinforce its initial grounds for discharging him. Similarly, the Union proffered evidence about the Grievant's post-discharge rehabilitation activities and lengthy period of sobriety. While this evidence does not absolve the Grievant from his initial wrongdoings, the Union argues that it serves as a credible basis for modifying the discharge decision. For reasons like these, post-discharge evidence is often accepted into the arbitration record and is deemed relevant, as it was in this case.

Thus, notwithstanding the "after-acquired" doctrine, the Arbitrator seriously evaluated both the City's and the Union's post-discharge evidence and, ultimately, he concludes that the City's decision to terminate the Grievant's employment does not warrant modification. The Arbitrator is not persuaded that when personal misfortune strikes again, as it most assuredly will, the Grievant is resolute enough not to relapse into drinking. As before, another relapse could result in misconduct that may be as bad as or worse than that which affected the lives of Marshall and Julie Weems, Omolayo Taiwo, Dorothy Johnson and Theresa Geving as well as

other members of the public who witnessed the SUV crash scene, not to mention the ambulance, fire and police personnel from Fridley, the police personnel from surrounding suburbs and the highway patrol troopers who witnessed aspects of the misconduct perpetrated by "one of their own." Given this array of witnesses, the Arbitrator can appreciate the City desire to protect the integrity of the Police Department from the adverse effects that could flow from the disapproving eyes of those who actually know how serious the Grievant's misconduct and crimes were.

Further, the Arbitrator was not reassured by the fact that the Grievant's most recent psychological consultant and his two AA sponsors admitted that they could not "guarantee" his future on- or off-duty sobriety. Still further, the Arbitrator is cognizant of the fact that the Grievant consumed alcohol on at least three separate occasions subsequent to February 19, 2009, and that his earlier psychological consultants were proven wrong in their prior assessments of his "fitness for duty."

In the end, the Arbitrator resolves not to modify the City's discharge decision because the Union's post-discharge evidence does not go far enough to discount Chief Abbott's conclusions that the Grievant is not trustworthy and that the citizens of the City of Fridley deserve better. Moreover, said evidence does not overcome the Arbitrator's uncertainty about whether the Grievant is far enough along the road to recovery to be trusted with police powers and arms.

## **VII. AWARD**

A. K. was discharged for just cause. The grievance is denied.

Issued and ordered from Tucson,  
Arizona on this the 26<sup>th</sup> day of  
October, 2010

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Mario F. Bognanno, Labor Arbitrator